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The Trump administration’s futile efforts to prop up the declining U.S. coal industry
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During his presidential campaign, Donald Trump promised “to bring the coal jobs back” in a speech in Charleston, West Virginia—a commitment he would repeat during the remainder of his campaign. Since taking office, President Trump has pressed the Secretary of Energy, Rick Perry, to develop a strategy for providing financial assistance for the coal industry. These efforts have proven to be unsuccessful, and that outcome is unlikely to be any different in the future. The market forces and contributing factors aligned against the coal industry are simply too strong to surmount with government policies and subsidies. Moreover, the impact of environmental regulations on the demise of the coal industry was exaggerated, so their rollback is not having the hoped-for effect of reviving the domestic coal industry.

Prior failures

In September 2017, Secretary Perry submitted a proposed rule to the Federal Energy Regulatory Commission (FERC) pursuant to section 403 of the Federal Power Act under which nuclear and coal plants with a 90-day fuel supply on-site would be accorded preferential rate treatment as “reliability and resilience resources.” This proposal was unanimously rejected by FERC in an order issued in January 2018; FERC found, among other things, that it improperly excluded other generating resources that may provide similar resilience benefits to the electrical grid. Subsequently, the Department of Energy (DOE) prepared another proposal grounded in national security interests, as described in a draft forty-page memorandum that was leaked to the press in May 2018. This proposal relied on asserted DOE authority under the Defense Production Act of 1950 and section 202(c) of the Federal Power Act to temporarily delay retirements of “fuel-secure” generation resources. This proposal was never formally submitted for consideration, however; media reports in mid-October 2018 cited internal debates at the White House about the statutory authority for the proposal.

The forces aligned against the coal industry

According to the Energy Information Administration, more than 90 percent of coal use in the United States is for generating electricity. Over the past decade, this country has seen a 40 percent decline in coal-fired generation, due primarily to competition from lower- or zero-carbon fuels (natural gas, wind, and solar). Most recently, U.S. monthly electricity generation from renewable sources exceeded coal-fired generation for the first time in April 2019—renewable
sources provided 23 percent of total electricity generation to coal’s 20 percent—reflecting longer term trends of increased renewable generation and decreased coal generation, with three factors representing the primary drivers.

**Electric Industry Decarbonization.** Electric utilities in the United States are on a rapid path to decarbonize, driven by market forces, primarily low-cost and plentiful natural gas and cost-competitive renewables (both wind and utility-scale solar). Recent competitive solicitations and integrated resource plans by utilities across the United States are showing that it is cheaper to build new wind and solar resources, coupled with battery storage, than continuing to operate existing coal plants, resulting in coal plants retiring at a faster pace during the Trump administration than during the Obama years. In the Environmental Protection Agency’s recent adoption of the Affordable Clean Energy rule, it **acknowledged** that greenhouse gas (GHG) emissions will be 35 percent lower from 2005 levels in 2030, irrespective of the rule, due to the impact of market-driven decarbonization in the electric industry. This demonstrates that the rollback in environmental regulations represented by the new rule will have virtually no impact.

**State-Level Initiatives.** As discussed in the November/December 2018 issue of **Trends**, the majority of states have **Renewable Portfolio Standards (RPSs)**, which require electric utilities to procure a prescribed portion of their power supply from renewable resources. Many states are revisiting their RPSs to adopt more aggressive targets, as well as adopting zero-carbon standards and GHG reduction targets that would completely eliminate coal and natural gas from future resource portfolios. The recently enacted Climate Leadership and Community Protection Act in New York, for example, adopts standards of 100 percent carbon-free electricity by 2040 and an 85 percent reduction in GHG emissions by 2050. A few states (New York, Illinois, New Jersey, and Connecticut) are also subsidizing nuclear plants to achieve low-carbon objectives, which has the effect of forcing coal-fired generation “out of the money” in competitive wholesale markets.

**Consumer-Driven Demand.** Dozens of Fortune 500 companies, from “new economy” companies like Apple, Google, and Facebook to traditional “bricks and mortar” companies like Walmart, Procter & Gamble, and General Motors, are choosing to invest billions of dollars in new wind and solar projects to power their operations or offset their conventional energy use. This demand by large energy users has become a major driver of renewable electricity growth in the United States. During 2018, the number of corporations entering into renewable energy deals for the first time doubled, as companies in the United States purchased a record 6.43 gigawatts (GW) of renewable power, an amount more than two times the previous record of 3.22 GW in 2015.

**Global decline in demand for coal**

Apart from the domestic factors driving down coal production in the United States, the long-term prospects for coal exports are similarly dim. Although new coal-fired generation in Asia has increased significantly in recent years, there has been a systemic decline in thermal coal demand globally since 2014. In 2018, more coal plant capacity was retired than approved, and global coal

**Future prospects**

Notwithstanding the efforts of the Trump administration to stem the decline of the coal industry, the future trajectory is very unlikely to reverse. Decarbonization in the United States and globally is largely driven by market forces that make it very challenging for coal to compete with other generating sources based solely on price, irrespective of environmental considerations. As states continue to adopt more aggressive zero-carbon and GHG reduction goals, coal’s formerly dominant role as a fuel for generating electricity can be expected to continue its steady decline.

**As legal challenges loom, impact of new Endangered Species Act rules remains uncertain**

*James Rusk and Daniel Maroon*

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In August 2019, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (together the Services) finalized amendments to the federal regulations implementing the Endangered Species Act (ESA), after receiving more than 200,000 public comments, and more than a year after the Services formally proposed the changes. The final rules include nearly all of the key changes the Services proposed in July 2018, including the elimination of automatic protections for species newly listed as threatened, changes to the standards for designating unoccupied critical habitat, and revisions to the procedures for interagency consultation. But, with environmental advocacy groups already challenging the rules...
in federal court, and significant questions about how the Services will implement the new provisions, the impact of the closely watched rulemakings remains uncertain.

The three final rulemakings—two issued jointly by the Services, and one issued by the USFWS alone—appeared in the Federal Register on August 27, 2019, and became effective on September 26, 2019.

**Rescission of the “blanket 4(d) rule”**

The USFWS finalized, without change, the proposed revisions to its so-called “blanket rule” issued under ESA section 4(d), which by default extended to threatened wildlife species the “take” prohibition and most other protections that apply to endangered species under the ESA. Under the new rule codified at 50 C.F.R. § 17.31, those protections will apply to species the USFWS lists as threatened after the rule’s effective date only to the extent the USFWS makes them applicable through a species-specific “special rule.” The blanket rule will continue to apply to species the USFWS previously listed.

Environmental advocates have said the change will undermine protections for threatened species. But whether that actually occurs will depend on the USFWS’s adoption of special rules. The preamble to the final rule notes that, even with the blanket rule in place, the USFWS has adopted more than two special rules per year over the last decade. It states that, under the new regulations, the USFWS intends to promulgate special rules when listing or reclassifying species as threatened, and that the rules will be tailored to stressors that threaten the species, while facilitating conservation efforts. The preamble notes that the NMFS has long followed a similar approach.

**Amendments to listing and critical habitat rules**

The Services finalized most of the proposed changes to the regulations at 50 C.F.R. Part 424, which govern listing of species and designation of critical habitat under ESA section 4. Key provisions of the final rulemaking include:

- **A new definition of “foreseeable future”**—important for listing decisions because the ESA defines a threatened species as “any species which is likely to become an endangered species within the foreseeable future.” The final rule changes the language but retains the substance of the proposed rule, providing that the foreseeable future “extends only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely.” Commenters have suggested the change will curtail the Services’ reliance on long-range climate change projections to justify the listing of threatened species.
• **New standards for designating unoccupied critical habitat.** The final rule retains the “two-step” approach of the proposed rule, under which the Services will designate unoccupied habitat only after a determination that occupied habitat is inadequate for conservation of the species, and only if there is “reasonable certainty” that the area will contribute to the species’ conservation. The final rule adds a requirement that unoccupied habitat contain at least one of the “physical or biological features essential to the conservation of the species”—responding to the U.S. Supreme Court’s recent holding in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018), that all critical habitat must first be “habitat.” The final rule abandons a provision in the proposed rule that would have allowed designation of unoccupied critical habitat where a designation limited to occupied habitat would result in “less efficient conservation.”

• **A revision allowing (but not requiring) the Services to present information on the economic impacts of listing decisions.** The preamble to the final rule acknowledges that the Services cannot consider economic impacts in making listing decisions, but states that Congress and the public have expressed a “strong and growing interest” in this subject, suggesting that economic-impacts information could be intended to support consideration of future legislative action.

Other provisions in the final rule clarify the standards for delisting species and for finding that designating critical habitat is not prudent. Overall, these changes do not mandate a sea change in the Services’ implementation of the ESA, but they could support a more parsimonious approach to listing and critical habitat designations in certain circumstances, particularly for species that are primarily threatened by loss of habitat due to long-term climate change.

**Technical changes to section 7 consultation regulations**

The Services finalized amendments to the regulations for interagency consultation under ESA section 7. Most of the proposed amendments were technical in nature, or intended to clarify existing practice, such as those that define “effects of the action” and “environmental baseline” for purposes of the Services’ biological opinions, and those dealing with reinitiation of consultation on programmatic federal land management plans. The final rule largely adopts the proposed changes with non-substantive revisions. Notably, the final rule implements a new, 60-day time limit for informal consultation, and adds a provision for expedited consultation on federal actions with minimal or predictable adverse effects on listed species.

**Challengers to the rules are lining up**

Environmental advocacy groups have strongly criticized the amendments since the Services issued the proposed rules, and a group that includes the Center for Biological Diversity, Sierra Club, Defenders of Wildlife, and the NRDC filed suit in federal court in the Northern District of
California in August to block the final rules. Seventeen states, the District of Columbia, and the City of New York filed another suit in the same court in September, also challenging the final rules. The outcome of these challenges, together with the approaches to ESA implementation taken by current and future federal administrations, will determine the impact of the amended regulations.

**Forget what you thought you knew about FOIA Exemption 4**

Stephen Gidiere

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And just like that, everything changed. With a snap of its fingers, a flick of its wand, the U.S. Supreme Court magically erased over four decades of jurisprudence under Exemption 4 of the Freedom of Information Act (FOIA), § 5 U.S.C. § 552, in its recent decision in Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356 (2019).

**FOIA Exemption 4**

The FOIA generally requires that federal agencies make their records available to the public, but Exemption 4 provides that this disclosure obligation “does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential.” § 5 U.S.C. § 552(b)(4). So, Exemption 4 is of great interest to individuals and businesses that provide their own confidential business information to a federal agency—for example, through a license or permit application, contract bid, or other submission.

And for 45 years, FOIA practitioners thought they knew the legal standard that must be met for information to fall within Exemption 4. In 1974, the D.C. Circuit declared that Exemption 4 required a demonstration that the release of the “confidential” information would “cause substantial harm to the competitive position of the person from whom the information was obtained.” Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974). And for 45 years, much ink was spilled implementing this standard. Many courts, including outside the D.C. Circuit, adopted this standard (although some did not). Agencies across the federal government ensconced the “competitive harm” test into their regulations. Scores and scores of lawyers drafted declarations to substantiate their clients’ claims of harm and prevent the release of their confidential information. And I wrote a book for the ABA containing dozens of pages discussing it! Two editions! With helpful tips for meeting the “competitive harm” test!
The *Food Marketing Institute* decision

But guess what. It turns out that the statute doesn’t actually say anything about “competitive harm.” That is what Justice Gorsuch concluded in his opinion for the majority in *Food Marketing Institute*, a case involving a FOIA request to the Department of Agriculture for store-level data from retail stores participating in the national food-stamp program. The majority opinion concluded that the “competitive harm” test is “inconsistent with the terms of statute” and rejected the *National Parks* court’s “casual disregard of the rules of statutory interpretation.” *Food. Mktg. Inst.*, 139 S. Ct. 2356, 2364 (2019).

Instead, apparently based on the “ordinary meaning and structure of the law itself,” *id.*, the majority announced the new Exemption 4 standard: “At least where commercial or financial information is *both* customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of Exemption 4.” *Id.* at 2366 (emphases added). The majority found the information at issue to have met this standard because “uncontested testimony established that the Institute’s retailers customarily do not disclose store-level [food stamp] data” and “the government has long promised them that it will keep their information private.” *Id.* at 2363.

**Unresolved question: Assurance of privacy?**

But why qualify the new test with “at least”? Where does that leave us? Is there some other—less stringent—standard that could be met to satisfy Exemption 4? Is the statute, perhaps, not entirely clear? At the end of the day, the majority expressly did not address whether *both* of its conditions must be met in all cases. The first condition—that the information be treated as private by its owner—“has to be” met, the majority found. But whether the second condition—that the government “assure” the submitter of the data’s privacy—has to be met was an issue the majority found “no need to resolve.” *Id.*

Unfortunately, with 45 years of jurisprudence out the window, there is a burning need to resolve this issue. What will federal agencies require before finding Exemption 4 to be met? What will they write in their new FOIA regulations? In practice, federal agencies very rarely provide submitters of information with an express “assurance of privacy.” Does this mean Exemption 4 is now a matter of agency discretion, to be invoked only when the agency decides to affirmatively provide such an assurance? Should submitters refuse to produce sensitive information to agencies until such an assurance is provided? Stayed tuned. Hopefully, it will not take another 45 years to answer these questions.
Becoming a master of disasters: Environmental issues associated with disaster planning and response

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This article is derived from a paper by the authors that was presented at the June 11, 2019, ABA Section of Environment, Energy, and Resources conference in Atlanta on Key Environmental Issues in U.S. Environmental Protection Agency Region 4. The full paper (available here) includes a more detailed discussion and references to source materials.

Environmental compliance is always a challenge—and even more so when a disaster strikes. Using the recent explosion of overheated chemicals at the flooded plant of Arkema, Inc. as a jumping-off point, this paper identifies the elements of a disaster, describes the role of environmental law in disaster preparation and response, and makes recommendations for minimizing regulatory risks associated with disaster-related releases.

The Arkema incident

The highly volatile organic peroxides that Arkema manufactured at its Crosby, Texas, plant would explode if not kept cool. As Hurricane Harvey bore down on the Houston area in August 2017, Arkema realized that its plant could lose its ability to cool those peroxides because its main power transformers, backup generators, and liquid nitrogen cooling system were likely to flood in the forecasted record rainfall. So Arkema loaded the organic peroxides into refrigerated trailers and scrambled to move them to higher ground. Some trailers did not make it; they lost power and exploded, leading to a weeklong evacuation of over 200 residents and the need for 21 people to seek medical treatment for smoke and chemical exposure. Unsurprisingly, Arkema became the target of civil suits, criminal charges, and federal and state administrative investigations. The lesson of Arkema is simple: worse can come to worst, so be prepared.

Elements of a disaster

There are numerous ways to define a disaster, but common elements include: (1) a sudden or non-sudden, calamitous event (2) that results in (a) a serious disruption of government and community functions, or (b) severe human, economic, or environmental losses that exceed a community’s ability to cope using its own resources, and (3) is caused by (a) nature, (b) technology, or (c) human action. In the case of Arkema, a failure to have and to implement a contingency plan adequate to address a natural disaster resulted in a significant chemical release.
The role of environmental laws

Environmental laws regulate activities impacting the environment or human health. Most pollution programs are prescriptive and regulate not only routine releases into the environment, but also accidental ones. These programs play a role before, during, and after a disaster occurs.

Before

Some federal regulatory programs focus on “before” and impose planning and coordination requirements. Examples include: (1) sections 301–303 of the Emergency Planning and Community Right-to-Know Act (EPCRA), which require certain facilities to communicate with state and local emergency response commissions; (2) section 311 of the Clean Water Act, which requires the preparation of plans to prevent and respond to oil and hazardous substance spills; (3) section 112(r) of the Clean Air Act, which imposes a general duty to prevent accidental releases and which mandates hazard assessments, chemical accident prevention programs, and emergency response plans; (4) section 3004 of the Resource Conservation and Resource Recovery Act, which requires owners and operators of hazardous waste treatment, storage, and disposal facilities to maintain their facilities and develop contingency plans to minimize the possibility of, and to be able to respond to, an emergency; and (5) the Chemical Facility Anti-Terrorism Standards of the Homeland Security Act, which require preparation of vulnerability assessments and security plans. The National Oil and Hazardous Substances Pollution Contingency Plan, mandated by the Clean Water Act and Superfund, establishes a blueprint for coordinating the responses of governments and regulated industries to releases of oil and hazardous substances.

During

Some federal regulatory programs focus on “during” and contain release reporting and response requirements. Examples include: (1) section 304 of EPCRA, which requires notice of environmental releases of extremely hazardous substances, (2) section 103(a) of Superfund, which requires notice of releases of reportable quantities of hazardous substances, (3) section 311(b) of the Clean Water Act, which requires notice of unpermitted releases of oil and hazardous substances, and (4) section 112(r)(1) of the Clean Air Act, which imposes a duty to minimize the consequences from accidental releases of extremely hazardous substances.

After

Recognizing that not all releases are preventable, some environmental statutes provide limited exemptions or defenses for accidental releases. Statutes specify, for instance, exemptions for emergency and public health and for national security and defenses for acts of God, Good Samaritans, and response action contractors. The common law provides a defense for government contractors. These defenses are grounded in policies that encourage the regulated community to respond to disasters using the best means possible.
Recommendations

A business cannot afford to put off thinking about disaster planning until news breaks of an impending hurricane or other calamity. As Ben Franklin purportedly observed, if you fail to prepare, you are preparing to fail.

Regulated industries should identify all regulatory requirements pertinent not only to routine operations, but also to operations before, during, and after a disaster. Below are some specific recommendations:

- Review all pertinent federal and state statutes and regulations, local ordinances, and permits and orders, and identify environmental release requirements associated with routine and nonroutine operations.
- Develop a comprehensive approach for maintaining compliance before, during, and after a disaster strikes, which includes:
  - preparing site-specific plans for disaster preparation and response that identify worst-case contingencies and mitigation measures, including redundancies, and that are periodically reviewed and updated
  - identifying persons responsible, including backups, for each aspect of the plan
  - developing and implementing training for the persons assigned a disaster preparation and response task
  - developing and implementing procedures to ensure required records are kept and timely notices are given to appropriate agencies
  - identifying roles played by federal, state, and local governments in disaster preparedness and response
  - coordinating with local governments and nearby residents
- Keep abreast of regulatory changes and evolving issues, including, for example, those related to climate change and emerging contaminants such as per- and polyfluoroalkyl substances (PFAS).
- Consider retaining a consultant to assist in preparing or updating a comprehensive plan, peer review, training, and/or environmental audits.

Conclusion

The task of environmental compliance is particularly daunting when a natural disaster strikes and pressure to act quickly and decisively mounts. To assure compliance, regulated industries should identify pertinent regulatory requirements and develop and implement plans for compliance, including those related to disaster preparation and response.
U.S. Supreme Court reviews CERCLA preemption of state restoration claims
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The U.S. Supreme Court recently accepted review of a decision from the Supreme Court of Montana that has potentially wide-reaching implications for the interplay between the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and state common law restoration claims. The case, Atlantic Richfield Company v. Gregory A. Christian, involves restoration damage claims brought under state law by residential property owners within a 35-year-old Superfund site, currently under U.S. Environmental Protection Agency (EPA)-directed remediation. The landowners’ claims, if upheld, could require remediation beyond that selected by EPA; conversely, a decision against the landowners could establish the preeminence of CERCLA over state law claims for damages from contaminated properties.

Background

ARCO, the defendant and petitioner, is the successor to the company that operated the Anaconda Smelter, which processed copper ore for approximately 100 years. The Anaconda Smelter site spans a 300-square mile area encompassing residential, commercial, recreational, and agricultural lands in western Montana that has been impacted by heavy metals—particularly arsenic. In 1998, EPA selected a site remedy, which included requiring ARCO to remediate residential yards within the site where arsenic levels in soil exceed 250 parts per million.

In 2008, residential landowners sued ARCO in Montana state court asserting common law claims for compensatory damages including “expenses for and cost of investigation and restoration of real property.” The parties filed cross-motions for summary judgment on the “restoration damages” claim. ARCO argued that CERCLA barred restoration damages claims, while the landowners argued that ARCO’s affirmative preemption defense failed.

After the trial court denied ARCO’s motion and granted the plaintiffs’ motion, the Montana Supreme Court granted review. ARCO argued that CERCLA sections 113(h) and 122(e)(6) preempt plaintiffs’ restoration damages claims where the damages sought are for the sole purpose of remediation beyond EPA’s selected remedy and where the plaintiffs are themselves potentially responsible parties (PRPs).
The Montana Supreme Court decision

In its decision, the Montana Supreme Court rejected ARCO’s arguments over a strong dissent, electing to allow a jury to determine whether the plaintiffs’ restoration claims had merit. The court first analyzed the bar on pre-enforcement review in section 113(h), holding that even if section 113(h) applied in state courts, a state law claim would be an impermissible “challenge” to an EPA remedial action only if it would “actively interfere with EPA’s work, as when the relief sought would stop, delay, or change the work EPA is doing.” That would not necessarily occur here, the court reasoned, because the plaintiffs’ claims were for damages to perform cleanup above and beyond that required by EPA.

The court also analyzed the bar in section 122(e)(6), which states that when an EPA-approved remedial investigation and feasibility study has been initiated, no PRP “may undertake any remedial action at the facility” without EPA’s authorization. The court found ARCO’s assertion that the plaintiffs were themselves PRPs unconvincing because none of the plaintiffs had previously been found liable, no claims had been brought against them, defenses to their liability might exist, the statute of limitations for bringing claims against them had passed, and ultimately, according to the court, “the PRP horse had left the barn.”

ARCO’s certiorari petition

ARCO petitioned for certiorari on three grounds. First, ARCO argued that the Montana Supreme Court incorrectly interpreted what constitutes a section 113(h) “challenge” to a remedial action. While the Montana Supreme Court determined that, “fundamentally, a § 113(h) challenge must actively interfere with EPA’s work, as when the relief sought would stop, delay, or change the work EPA is doing,” ARCO argued that several circuit courts of appeal have interpreted section 113(h) as barring actions “related to the goals of the cleanup,” or ones that “call into question” or “impact” EPA’s ordered cleanup. In this case, ARCO argued, the remedy that the plaintiffs demanded was inconsistent and detrimental to the EPA-selected remedy.

Second, ARCO argued that the Montana Supreme Court incorrectly interpreted the term PRP under section 122(e)(6). ARCO maintained that the term PRP is defined under section 107(a) and that it applies to parties regardless of whether any third party or governmental body ever formally alleges their PRP status or seeks financial contribution from them.

Finally, ARCO argued that the Montana Supreme Court misconstrued CERCLA’s savings clause to save all state common law remedies from preemption, and accordingly did not perform any conflict preemption analysis. ARCO argued that the plaintiffs’ restoration remedy is impossible, directly contradicting EPA’s remedy, and that the plaintiffs’ claim is an “obstacle to the accomplishment and execution” of CERCLA’s purposes.
Landowner response

The landowners argue that their restoration claim seeks damages to remediate their properties after the CERCLA-mandated cleanup is complete. As they argue, even if the section 113(h) bar applies to state law claims, no court has found that this type of claim constitutes a “challenge” under section 113(h). The landowners argue that they “do not challenge any of EPA’s CERCLA determinations” nor do the “requested damages depend on [any] attack on EPA’s remedial orders.” Instead, their damages claim depends on “contentions that additional efforts are required (after EPA has ‘pulled up stakes’) to return their properties to their pre-pollution state.” Accordingly, while section 113(h) “postpones” challenges to EPA remediation, it does “not forever prohibit them.”

With respect to section 122(e)(6), the landowners argue that the term PRP means only “parties possibly subject to CERCLA liability,” not those “who have never been sued or otherwise designated as having potential CERCLA liability, who would be able to invoke CERCLA exemptions from liability, and who would be protected by the statute of limitations.” According to the plaintiffs they “are not ‘potentially responsible’ because they face no prospect of liability.”

Finally, regarding implied conflict preemption, the landowners argued that “no court has held that a state-court damages award that does not conflict with EPA’s remedial orders is otherwise preempted by CERCLA.” The landowners further argued that there is no conflict because “nothing in EPA’s orders precludes ARCO from paying damages so landowners may conduct additional remediation efforts EPA did not order ARCO to take.”

Conclusion

By accepting review of the Montana Supreme Court’s decision, the U.S. Supreme Court is poised to rule on more than simply whether the Montana Supreme Court got the facts of this case correct. It remains to be seen whether and to what degree the Court will elect to opine on the scope of CERCLA’s preemption over state law claims and the meaning of CERCLA’s remedy-bar provisions.
Senate Bill 19-181: Colorado enacts first-of-its-kind oil and gas legislation
Dale Ratliff

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Proposed ballot measures and judicial opinions bring oil and gas regulation to the political forefront in Colorado

Colorado recently adopted legislation that will significantly change how the state regulates oil and gas development. This article explores the recently enacted legislation and its potential effects on the state regulatory system. But to start, a brief summary of how Colorado got here is important.

On May 2, 2016, the Colorado Supreme Court issued corollary opinions in City of Fort Collins v. Colorado Oil & Gas Association and City of Longmont v. Colorado Oil & Gas Association, holding that the Colorado Oil and Gas Conservation Act preempted local bans and moratoria on hydraulic fracturing.

On November 6, 2018, Colorado residents voted to defeat proposed ballot measure Proposition 112. Proposition 112 proposed to amend the Colorado Oil and Gas Conservation Act to create a statutory 2,500-foot setback for oil and gas development from all occupied buildings and “vulnerable areas” and provide local governments with increased authority to adopt more restrictive setbacks than the state requirement.

Then, on January 14, 2019, the Colorado Supreme Court issued a long-awaited opinion in Colorado Oil & Gas Conservation Commission v. Martinez. The court upheld the Colorado Oil and Gas Conservation Commission’s (COGCC’s) determination that a petition for a rule prohibiting oil and gas development unless it could occur in a manner that posed no cumulative environmental or climate-change impacts exceeded its statutory authority under the Oil and Gas Conservation Act. The court held that the Act as drafted did not “allow the Commission to condition one legislative priority (oil and gas development) on another (the protection of public health and the environment).”

The Colorado General Assembly enacts sweeping reforms in Senate Bill 19-181

On November 6, 2018, Coloradans elected Democratic governor Jared Polis, and Democrats swept every major statewide race—providing Democrats with control of both the legislative and executive branch. As a result, the legal and political developments discussed above set the stage for oil and gas regulation to be prioritized by the Democratic General Assembly.
On April 16, 2019, Governor Polis signed into law Senate Bill 19-181. SB-181 is perhaps the most sweeping and progressive oil and gas legislation passed since the boom in hydraulic fracturing throughout the United States.

A shift of priorities and increased authority for local governments

In a direct response the Colorado Supreme Court’s recent Martinez opinion, SB-181 revises the legislative declaration of the Oil and Gas Conservation to Act to shift the “balance” and direct the COGCC to prioritize public health, safety, welfare, and the environment over oil and gas development. Where before, the COGCC was to “foster the responsible, balanced development” of the state’s oil and gas resources, consistent with the protection of public health, welfare, and the environment, the act now directs the COGCC to “regulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources.”

SB-181 also seeks to provide local governments with increased authority to regulate oil and gas development within their jurisdictions. SB-181 revises the Colorado Land Use Control Enabling Act to provide local governments with explicit authority to regulate the location and siting of oil and gas facilities and other environmental components of oil and gas development, including water quality, air quality, and reclamation. And it includes an express provision stating that local government and state agencies share regulatory authority over oil and gas development, and that “a local government’s regulations may be more protective or stricter than state requirements.”

Colorado is currently in the very early stages of navigating the concurrent jurisdiction envisioned by SB-181. Adams County, for instance, recently proposed the first suite of new regulations under SB-181. The county’s proposed adoption of the requirements raises interesting legal questions about local-government authority under SB-181 and about how state and local agencies will navigate the concurrent jurisdiction envisioned by the bill. In response to the proposed regulations, the Colorado Department of Public Health and Environment sent a public notice to local governments and oil and gas operators reminding them of CDPHE jurisdiction over environmental impacts and encouraging local governments and oil and gas operators to continue to work with CDPHE to implement the requirements of SB-181.

A packed schedule

Perhaps the most significant—or at least immediate—consequence of SB-181 is the multitude of rulemakings that will now follow in its wake. SB-181 requires both the COGCC and the Colorado Air Quality Control Commission (AQCC) to engage in a suite of rulemakings to implement the bill’s various mandates.

Pursuant to the various directives in SB-181, the COGCC and AQCC have tentatively scheduled rulemakings through April 2020 to:
• Adopt additional requirements related to storage tank controls, pneumatic controllers, and leak detection and repair (LDAR), among other items;
• Revise COGCC regulations for flowlines and inactive, temporarily abandoned, and shut-in wells;
• Review and revise its rules to ensure they properly implement the priority shift in the COGCC’s mission;
• Adopt rules that allow the COGCC to evaluate and address the potential cumulative impacts of proposed oil and gas development; and
• Adopt an alternative location analysis as part of the permitting process.

These are complicated topics that will add new layers to the COGCC’s comprehensive set of regulations and permitting process. For example, the requirement to conduct an alternative site and cumulative impact analysis for all proposed drilling permits raises questions about the adoption of a mini-NEPA into the state’s permitting procedures. Determining how this should work will be no easy task. And the expedited schedule under which the COGCC has proposed to conduct these rulemakings—concurrently with the AQCC’s mandated rulemaking—raises valid concerns about whether the agency and stakeholders will have the necessary time and resources to dedicate to these important matters.

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.

Clean Water Act, WOTUS Rule

The U.S. District Court for the Southern District of Georgia issued a decision on the merits regarding multiple pending state and private party challenges to the U.S. Environmental Protection Agency’s (EPA) and the U.S. Army Corps of Engineers’ (Corps) Waters of the United States, or WOTUS Rule. The court held that EPA and the Corps exceeded their jurisdiction under the Clean Water Act (CWA) and violated procedures required by the Administrative Procedure Act (APA) through their promulgation of the WOTUS Rule. The court held that under Justice Kennedy’s concurring opinion in Rapanos v. U.S., 547 U.S. 715, 779 (2006), there had to be some nexus to a traditional navigable water, but the Rule’s definition of interstate waters was so broad that it effectively read the term “navigable” out of the statute. Thus, the agencies had exceeded their authority under the CWA by asserting jurisdiction over waters that had no
significant nexus to navigable-in-fact waters. Additionally, the Rule defined “tributary” too broadly by allowing the agencies to designate areas as tributaries based on computer technology, statistics, and historical data that identified the past presence of a streambed, banks, and highwater mark. The court reasoned that the agencies’ sanctioned use of such tools could not guarantee that the streams they purported to regulate would have any actual nexus to a primary water or a tributary thereof. Likewise, the portion of the Rule designating adjacent waters as jurisdictional on the basis of their proximity to waters within the 100-year floodplain of a tributary was impermissibly broad because it did not ensure that adjacent waters would be limited to those with a significant nexus to a traditional navigable water. Finally, the agencies violated the APA because portions of the Rule were arbitrary and capricious, and the final Rule was not the logical outgrowth of the Proposed Rule. For example, the parties could not have anticipated the distance limits for adjacent and case-by-case waters in the final Rule or the final Rule’s exemption for farmland in proximity to adjacent waters.

Clean Air Act

**California Communities Against Toxics v. Envtl. Prot. Agency**, No. 18-1085, 2019 WL 3917540, 2019 U.S. App. LEXIS 24715 (D.C. Cir. Aug. 20, 2019). Petitioners challenged a memorandum issued by a former EPA assistant administrator for the Office of Air and Radiation, William Wehrum, which interprets section 112 of the Clean Air Act (CAA or Act) to allow a source of toxic emissions classified as “major” to be reclassified to a non-major or “area” source following a reduction in its potential to emit below major source thresholds (Wehrum Memo). The U.S. Court of Appeals for the District of Columbia Circuit held that the Wehrum Memo was not a final agency action subject to judicial review and therefore dismissed the petitions for lack of subject matter jurisdiction under the Act. The court majority opinion observed that reviewing courts assessing the nature of an agency action should resist the temptation to define it by comparing it to superficially similar actions examined in case law, noting they should instead be guided by the unique statutes and regulations that govern the action at issue. The court also emphasized that, although all legislative rules are final, not all final rules are legislative. A dissenting opinion asserted that the majority had to ignore the holding in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000), to reach its conclusion, as *Appalachian Power* requires a determination of whether the action at issue is one “by which rights or obligations have been determined, or from which legal consequences will flow,” and if it does, the action is likely final.

permits before the 2015 standard was adopted to comply with the 2008 ozone standard rather than the more stringent 2015 standard. In upholding the primary standard, the court found that EPA had adequately explained why the more stringent revised standard was necessary to protect the public health and rejected arguments that the new standard was not protective enough. Although environmental petitioners argued that the form of the revised standard was not health-protective because it permitted ozone levels to exceed 0.07 ppm on some days, the court found that EPA reasonably explained its decision to retain the form of the standard. The court also upheld EPA’s selection of the 0.07 ppm standard as reasonable and reasonably explained despite the Clean Air Scientific Advisory Committee’s (CASAC’s) attempt to influence EPA’s policy judgment about where the standard should be set within the range of 0.06 to 0.07 ppm recommended by CASAC on the basis of scientific evidence of adverse effects. Regarding the secondary standard, the court rejected a challenge that EPA acted arbitrarily in setting the target level of air quality, but held that EPA failed to justify its decision to use a three-year average benchmark without lowering the level to account for single-year spikes in ozone exposures. The court also held that EPA arbitrarily declined to set a level to protect against adverse welfare effects associated with visible leaf injury to plants. The court also rejected the industry petitioners’ cross-cutting challenges to the NAAQS. The court found no merit in the argument that EPA had to take into account adverse economic, social, and energy impacts when periodically evaluating a NAAQS, citing Whitney v. American Trucking Ass’n, 531 U.S. 457 (2001), for the proposition that the Clean Air Act (Act) “unambiguously bars cost considerations from the NAAQS-setting process.” The court was unpersuaded that EPA failed to take into account background ozone in setting the new NAAQS and held that the text of the Act foreclosed this argument. Finally, the court rejected EPA’s grandfathering of permit applications based on the argument that the Act was ambiguous with respect to the treatment of permit applications pending when a new NAAQS is adopted. The court held that the Act unambiguously precluded EPA’s interpretation.

CERCLA


The U.S. Court of Appeals for the Seventh Circuit affirmed a district court ruling that a former private, state-court action to recover cleanup expenses at a steel mill site did not preclude a subsequent cost recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court also affirmed the district court’s reduction of costs awarded and an allocation of costs to the plaintiff new owner. Defendant Joslyn claimed that the plaintiff’s CERCLA cost recovery action was precluded by the earlier state-court suit and that the case was untimely. The court disagreed, noting that CERCLA cost-recovery actions can be brought only in federal court and that the U.S. Supreme Court has ruled that claims with exclusive federal jurisdiction generally are not precluded by a former state court judgment. The court also rejected Joslyn’s argument that the issue was limited to dicta in Indiana case law, as well as Joslyn’s attempt to distinguish that case law and its assertion that Indiana,
like most states, disapproves of claim splitting. The court observed that statutes of limitation and other mechanisms serve to reduce the potential for claim splitting and even if a claim is not precluded, the underlying facts cannot be relitigated. The court also held that prior cleanup work was removal action and not remedial action, for purposes of determining the proper limitation of actions period under CERCLA. The court agreed with the district court that the CERCLA claim was filed in a timely manner by the plaintiff new owner, despite former removal actions. The court also upheld the district court’s equitable allocation of costs as rational because the district court noted it would be sanctioning “double recovery” for new owner Valbruna if the award was not reduced by $500,000 with a 25 percent allocation of past and future costs to the plaintiff.

CERCLA, financial assurance

The U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review in which nongovernmental environmental organizations challenged EPA’s decision not to impose CERCLA financial responsibility requirements on the hardrock mining industry. The court held that CERCLA § 9608(b) is ambiguous regarding what risks EPA must consider, and the agency made a reasonable choice to focus on financial risks rather than risks to health and the environment. Moreover, EPA’s decision not to promulgate financial responsibility regulations for this industry was not arbitrary or capricious because the agency considered all required financial factors and its consideration of costs and benefits was not unreasonable. The petitioners had claimed that EPA misinterpreted the term “risk” in 42 U.S.C. § 9608(b), and that regardless of the statutory meaning of “risk,” EPA was obligated to promulgate additional financial responsibility requirements for the hardrock mining industry. The court disagreed, applying the classic Chevron two-step test, first determining that the statutory text is ambiguous and then ruling that EPA’s interpretation of the text was reasonable. The court then ruled that EPA’s interpretation of the financial responsibility provision was also reasonable, noting that the overall structure of section 9608 supports EPA’s position that the financial responsibility requirements thereunder relate only to ensuring against financial risks associated with cleanup costs. Therefore, the court deferred to EPA’s interpretation that it should set financial responsibility regulations based on financial risks rather than on risks to health and the environment. The court rejected petitioners’ argument that section 9608(b)’s wording that EPA “shall” promulgate financial responsibility requirements prohibits the agency’s decision not to promulgate financial responsibility requirements for the hardrock mining industry. The court held this statutory provision does not require regulation of any specific facilities or industries, reiterating its earlier decision in In re Idaho Conservation League, 811 F.3d at 514, that EPA retains discretion to decline any rule. The petitioners’ final argument, that EPA’s Final Action was not a “logical outgrowth” of the Proposed Rule, was also rejected. The court observed that both the D.C. Circuit and the U.S. Supreme Court have long held that a logical outgrowth of a proposal includes the decision to refrain from taking the proposed step.
Climate change litigation


The U.S. District Court for the District of Rhode Island remanded back to state court a climate change action brought by the state of Rhode Island against major fossil-fuel companies. Rhode Island brought this suit against fossil-fuel companies it claims are largely responsible for the “climate crisis” by extracting and selling a large percentage of fossil fuels globally for more over 50 years. The state further alleges that although the defendants understood the consequences of their activities decades ago, they worked to cloud the emerging scientific consensus regarding climate change. Rhode Island filed this case in state court, pleading eight state-law causes of action in law and equity for past and future damages associated with the costs of climate change, including sea-level rise. The defendants removed the case to the U.S. District Court for the District of Rhode Island, claiming federal question jurisdiction. The state filed a motion to remand back to state court.

The court observed that under the well-pleaded complaint rule, this case appears to belong in state court, as the complaint on its face contains only state-law causes of action with no federal questions. The defendants’ cited the artful-pleading doctrine to support their argument that the state’s nuisance claims are governed by federal common law, as was held recently by federal district courts in California and New York. However, the court held that the artful-pleading doctrine does not sanction this transformation into federal common law claims, and proceeded to evaluate the complete preemption doctrine, which it said could justify federal jurisdiction over this dispute. But the court observed that environmental federal common law cannot completely preempt the state’s public-nuisance claims without statutory support. The court disagreed with the defendants’ assertion that the Clean Air Act completely preempts the state’s claims, explaining that the Clean Air Act provides nothing like Rhode Island’s nuisance claims, and the statute explicitly preserves rights under other statutes or common law. The defendants also alleged *Grable* jurisdiction, but the court rejected this theory because the defendants identified no right or immunity created by federal law that is an element of the state’s state-law claims. Thus, the court held that Rhode Island’s claims are “thoroughly state-law claims,” for which the rights, duties, and rules to be determined are supplied entirely by state law without reference to federal law. The defendants’ attempt to claim that foreign affairs, federal regulations, or navigable waters of the United States raise federal issues were also rejected as premature defenses that may be raised later in the litigation, but do not confer federal jurisdiction.

Accordingly, the court granted Rhode Island’s motion to remand the case back to state court.
RCRA


The U.S. Court of Appeals for the District of Columbia Circuit denied a petition seeking review of EPA’s Transfer-Based Exclusion rule under the federal Resource Conservation and Recovery Act (RCRA), which allows generators of hazardous secondary materials to avoid regulation of that material as a solid waste when they transfer the material to a third-party reclaimer for legitimate recycling. Although EPA opposed the petition on several grounds, the court held that it was timely filed, it was not precluded by prior litigation concerning a different version of the exclusion rule, and petitioners had standing.

Nongovernmental environmental organizations filed the petition asking the court to vacate the Transfer-Based Exclusion, arguing that when a generator pays a reclaimer to take hazardous material, that material is necessarily discarded and should be subject to RCRA’s regulations on solid waste. The court rejected the argument, finding that EPA had reasonably interpreted the term “discarded” in RCRA to exclude materials that are legitimately recycled. The court first examined whether Congress had directly addressed the issue of whether “discarded material” includes hazardous material that the generator pays to transfer to a reclamation facility and found that its precedent foreclosed the petitioners’ argument that Congress directly resolved this issue, citing American Petroleum Institute v. EPA (API III), 862 F.3d 50 (D.C. Cir. 2017). The court then found EPA’s view that legitimately recycled material is not discarded to be reasonable in light of the legislative history and the court’s precedent under step two of Chevron. The court also found that the factors EPA considers in determining whether a material is eligible for the Transfer-Based Exclusion adequately ensure that the material is legitimately recycled.

The petitioners argued that the Transfer-Based Exclusion was arbitrary and capricious because EPA had not provided a reasoned explanation for treating the same hazardous materials differently or adequately addressed its prior determination that the conditions required for exclusion of hazardous materials were inadequate. The court rejected these arguments, finding that EPA did provide an explanation for why it treats the same materials differently, i.e., that materials that qualify for exclusion “are not part of the waste disposal problem targeted by Subtitle C regulations” because they are recycled. Finally, the court found that EPA adequately addressed its prior determination that the conditions of the exclusion were inadequate by specifically noting changes in the recycling industry that have made recycling safer under the conditions required by the final Transfer-Based Exclusion.

Tribal sovereign immunity

Dine Citizens Against Ruining Our Env’t v. Bureau of Indian Affairs, 932 F.3d 843 (9th Cir. 2019).
The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and APA challenges to a 25-year extension of the operation of the Four Corners Power Plant and an expansion of the coal mine that feeds the plant on tribal sovereign immunity grounds. Environmental groups sued agencies within the U.S. Department of the Interior (DOI), but did not name the Navajo Transitional Energy Co., owner and operator of the plant, in its complaint. The court held that DOI would not adequately represent the Navajo Nation-owned energy company’s interests in the litigation, and therefore the tribally owned energy company was a necessary party and should have been included in the action. The environmental groups argued that tribal sovereign immunity “is not a sufficient basis for dismissing public interest lawsuits against federal agencies for violating NEPA and the ESA,” reasoning that, if that were the case, it would be difficult to enforce federal environmental laws on Native American lands. Notably, the federal government agreed with the environmental groups that the suit should proceed without the tribal energy company, and that the government’s and the tribal energy company’s interests were sufficiently aligned to allow the suit to proceed. The federal government also argued that, because a federal agency issued the permits, the tribe should not be able to nullify the lawsuit through its sovereign immunity. A unanimous panel disagreed, noting there was a long history of court rulings that recognize tribal sovereign immunity protection in cases like this, and that the tribal energy company shares the Navajo Nation’s tribal immunity. Because the tribal energy company must be included in the suit, and because it benefited from tribal sovereign immunity, the panel decided that the lawsuit could not proceed fairly and affirmed the district court’s dismissal on sovereign immunity grounds.

Climate change litigation


The U.S. District Court for the District of Oregon held that U.S. citizens do not have a constitutional right to wilderness. The plaintiffs, an animal rights organization, a Native American environmental group, and six individuals, brought the complaint asserting that federal policies on fossil fuels, agriculture, and forestry that allegedly contributed to climate change violated their right to wilderness. The plaintiffs asserted that the U.S. Constitution guarantees the right to enjoy land in its natural, undeveloped state, and that the federal government’s policies on fossil fuel combustion, deforestation, and animal agriculture have contributed to climate change and harmed the country’s wilderness areas, thereby depriving them of a fundamental right to go into nature and be alone. The federal government responded that such claims went far beyond what the Constitution provides, and therefore that the lawsuit could not proceed, noting the country’s framers never guaranteed anyone a right to wilderness. Noting that the plaintiffs had asked the court for “nothing short of revolutionary thinking” to find that their asserted right to wilderness had been infringed by climate change, the court observed that “[t]he lower courts—bound by rule of law—are not the forum for the ‘revolutionary’ thinking that plaintiffs...
articulately espouse.” The court then held that the plaintiffs did not have standing to sue because the harm they described is not individualized, but rather “a diffuse, global phenomenon that affects every citizen of the world.”

**Tribal court challenge enjoined, exclusive federal jurisdiction**

*Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019).

The U.S. Court of Appeals for the Eighth Circuit affirmed a district court decision enjoining a tribal court from adjudicating tribal members’ suits seeking royalties for the flaring of natural gas from oil wells on reservation lands on the ground those claims arise under federal law. Four members of the Three Affiliated Tribes and tribal court officials appealed the injunction issued by the U.S. District Court for the District of North Dakota, arguing that tribal courts should be able to hear tribal members’ claims that several oil and gas companies owed them royalties for burning gas from wells on the Fort Berthold Indian Reservation that the companies could have captured and sold. In a unanimous opinion, the panel upheld the injunction “because we conclude suits over oil and gas leases on allotted trust lands are governed by federal law, not tribal law, and the tribal court lacks jurisdiction over the nonmember oil and gas companies.” While the U.S. Supreme Court’s decision in *Montana v. U.S.* established two exceptions to a tribe’s general lack of authority over nonmembers on tribal lands, neither of those exceptions applied in this case, according to the court. The tribal defendants had argued that the U.S. Supreme Court’s 2001 ruling in *Nevada v. Hicks*, which held that tribal courts could not exercise jurisdiction over state game wardens who had executed a search warrant on a Nevada tribal reservation for off-reservation conduct, should be read narrowly and did not necessarily block tribal courts from hearing federal causes of action. The panel disagreed, stating that “the better reading of *Hicks* is that, at least where nonmembers are concerned, tribal courts’ adjudicative authority is limited (absent congressional authorization) to cases arising under tribal law,” and that tribal court could not hear the claims because they were based on federal law.

**Views from the Chair**

*Karen A. Mignone*

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

Congratulations to our planning committee, led by Shelly Geppert, our staff, the speakers, and our members for making the Section’s 27th Fall Conference in Boston a rousing success. The committee crafted an amazing array of CLE sessions, where speakers provided a range of perspectives. The success of the formal conference offerings makes me happy, but what makes me even happier was seeing so many people there, forging connections and having fun.
As a Section I don’t think we spend much time thinking about fun, but I believe it is a fundamental reason people are drawn to gather at our conferences. One of the greatest benefits of being a Section member is developing a network of lawyers and consultants from across the country; people who may send you work, or who you might send work to; people who share your interests ranging from views of legal practice to bands, activities, and even sports teams. The best way to develop and strengthen this network is to meet people at our conferences.

For the first time in recent memory at a Fall Conference, we decided to forego a scheduled dinner event on Thursday to allow for as much unstructured time as possible. This gave attendees the option of exploring one of the most amazing cities in the United States (yes, I am biased—it is my hometown), sampling some of its incredible restaurants, catching up with old friends, and making new ones. In short—having fun. The idea of providing people with the opportunity to interact in less formal settings has given rise to the SEER Run Club, to early morning yoga, and to the Friday evening dine arounds focusing on various timely issues and areas of common interest.

We plan to continue these social and networking opportunities at the 49th Spring Conference in Chicago in April 2020. In addition to the subject matter dinners, Section Executive Committee members will host Thursday and Friday dinners, where you can get to know the officers, discuss issues or ask questions, let us know what kind of interesting and fun activities you might be interested in adding to conferences, and express your interest in getting more involved in Section leadership. As we did in Boston, we will do our best to find venues that are affordable and can accommodate large groups. I especially encourage people who are relatively new to the Section to attend one of these events to get to know leadership and to learn more about getting involved.

We as a Section are faced with a number of challenges as our practices evolve and the landscape of environmental, energy, and resources laws change. There is no unified “Section view” of these changes; rather we all have our own perspective and politics, which leads to what may be the most valuable benefit of conference attendance. Conferences offer you the opportunity to hear from people with different views and to gain an understanding of these differences. I truly believe it is much easier to have discussions regarding divergent viewpoints among friends, especially people who are able to share a good time together. It helps all of us develop a balanced perspective and may even help us to understand and serve clients better.

The goal of our conferences is to provide cutting-edge CLE on topics of environmental, energy, and resources law in an atmosphere of collegiality, while also finding ways to have fun. The planning committees strive to incorporate activities into our programming that will help foster camaraderie among members. If you haven’t been to one of our conferences in a few years, I encourage you to make plans to attend the 49th Spring Conference, to be held April 22–24, 2020, in Chicago. I promise thought-provoking substantive sessions, a range of viewpoints, lots of people to meet, all in a venue that has unlimited options for fun and adventure during the unscheduled times. I hope to see you there!
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.

Nadira Clarke has joined Baker Botts LLP as a partner in its Washington, D.C. office. Clarke was formerly with Katten Muchin Rosenman LLP. She is a trial attorney who represents, counsels, and conducts internal investigations for companies and individuals in environmental and other governmental programs. She has extensive experience with the U.S. Justice Department and as an assistant U.S. attorney. Clarke currently serves on two court-appointed teams monitoring compliance after criminal prosecution.

Charles Howland recently completed service as a Fulbright Specialist Fellow at Universitetet i Tromsø, the Arctic University of Norway (or UiT) teaching and helping develop a new joint program with UiT, Uppsala University (Sweden), and the University of Eastern Finland. The three universities are offering a Joint Nordic Master’s Program in Environmental Law (OMPEL) beginning this fall. The curriculum focuses on teaching students about environmental and energy issues of legal governance, with a focus on the Arctic. As part of Howland’s appointment, he gave a lecture entitled “U.S. Climate Policy; U.S. Energy Policy: Neither Exists, And Not Because Of The Current White House,” which summarized the federal and state laws that govern energy generation, transmission, and distribution in the United States. Howland joined Curtis, Mallet-Prevost, Colt & Mosle, LLP in New York City in 2018 as a partner and head of the firm’s environmental practice. He counsels and represents clients in environmental compliance, CERCLA cleanups, brownfields redevelopment, renewable and other energy development issues, risk management and emergency response/release reporting, and sustainability initiatives.

Richard E. Glaze recently joined Barnes & Thornburg LLP as a partner in the firm’s Atlanta office. Glaze was formerly with Balch & Bingham LLP in Atlanta. He served earlier with the U.S. Environmental Protection Agency as enforcement counsel, and as a special assistant U.S. attorney. In private practice, Glaze represents private clients and provides creative, strategic, results-oriented counsel in the enforcement and defense of environmental, administrative, civil, and criminal proceedings. He also serves as the Year in Review vice chair for the Section’s Water Quality and Wetlands Committee.

Emily Mott recently joined Baker Botts L.L.P. in the firm’s Houston office. Mott practices in the firm’s litigation and environmental groups focusing her practice in internal investigations, company compliance matters, major industrial accidents, crisis response, and environmental litigation, both civil and criminal. She also has experience in workplace safety matters, advising
companies with respect to workplace culture, whistleblowers, process safety incidents, and workplace injuries and fatalities. Mott is a member of the 2019–2020 class in the Section’s Leadership Development Program.

Matthew Sanders has returned to his alma mater, Stanford Law School, as a clinical supervising attorney and a lecturer in law, where he supervises students in the Environmental Law Clinic and teaches advanced legal writing. Sanders was most recently a deputy county counsel for San Mateo County, California. He has previously served with the Appellate Section of the U.S. Justice Department’s Environment and Natural Resources Division, in two law firms, and as a clerk for the Honorable Consuelo M. Callahan of the U.S. Court of Appeals for the Ninth Circuit. Sanders is the editor-in-chief of Trends.

Jennifer Wills has founded J Wills Career Coaching, a career coaching firm for environmental and sustainability professionals across the nation. Until recently, Wills practiced environmental law at the U.S. Environmental Protection Agency’s Office of General Counsel and strove to enhance professional development opportunities across the office. She continues to teach environmental law and policy with Virginia Polytechnic and State University’s (Virginia Tech’s) Center for Leadership in Global Sustainability. Her firm helps clients find a career path to satisfy their deep desire for meaning, professional development, and growth. Wills is a vice chair of the Section’s International Environmental and Resources Law Committee and is a member of the Section’s Rebranding Task Force.