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The Clean (Ground)Water Act?
David Chung and Elizabeth B. Dawson

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The Clean Water Act (CWA or Act) prohibits the discharge of a pollutant from a point source to a water of the United States, unless otherwise permitted under the Act. Under the National Pollution Discharge Elimination System (NPDES), the U.S. Environmental Protection Agency (EPA) or authorized states, tribes, and territories may issue permits for discharges that would otherwise be prohibited. In the decades since the establishment of the NPDES program in 1972, litigants have debated the meaning of “discharge,” “pollutant,” “point source,” and “water of the United States.” And although EPA has taken the position that the CWA leaves groundwater regulation and nonpoint-source pollution control to the states, that has not stopped litigants from arguing that the federal CWA regulates discharges of pollutants to groundwater that ultimately reach waters of the United States. Indeed, EPA has also taken the position that in some circumstances federal permits may be required for such discharges when a direct hydrological connection between subsurface and surface waters is present. Cases involving such claims have considerably increased in recent years. In 2018, the Fourth, Sixth, and Ninth U.S. Circuit Courts of Appeals reached different conclusions on this issue. Not surprisingly, the issue is now the subject of pending petitions for certiorari in the U.S. Supreme Court.

In Hawai‘i Wildlife Fund v. County of Maui, 886 F.3d 737 (9th Cir. 2018), the plaintiffs argued that the county was injecting treated wastewater into wells without an NPDES permit in violation of the CWA. The Ninth Circuit agreed, ruling that discharges of more than de minimis amounts of pollutants that are “fairly traceable from a point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water” require a NPDES permit. Notably, and consistently with several prior statements, EPA filed an amicus brief in that case contending that if a pollutant reaches jurisdictional surface waters through groundwater with a direct hydrological connection to that surface water, a permit would be required.

Around the time of the Ninth Circuit’s Maui decision, EPA expressed some ambivalence about the positions articulated in its amicus brief in Maui and elsewhere, and EPA requested comments on the proposed rule Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126 (Feb. 20, 2018). Specifically, EPA questioned whether including in the NPDES program point-source discharges that reach jurisdictional waters via groundwater with a direct hydrologic connection “is consistent with the text, structure, and purposes of the CWA.” EPA also sought comment “on whether EPA should clarify its previous statements” about these types of discharges, including whether EPA should continue to hold its position and, if so, how to further explain activities or connections that would
suffice to invoke permitting requirements. The comment period closed in May 2018; EPA has not acted further.

Meanwhile, the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), addressed the issue in a slightly different factual context—a prior pipeline spill that was no longer discharging, but where an amount of extant gasoline continued to migrate through groundwater and natural formations into nearby waterways. The Fourth Circuit held that “a plaintiff must allege a direct hydrological connection between ground water and navigable waters” to state a claim under the CWA. This holding tracks the language of EPA’s amicus brief in *Maui*, though EPA did not file a brief in the Fourth Circuit. The court also ruled that as long as the discharge came from a point source (here the pipeline), and “as long as pollutants continue to be added to navigable waters,” a citizen suit may be brought to abate an ongoing violation of the CWA. Moreover, a “discharge need not be channeled by a point source until it reaches navigable waters” to be covered by the CWA.

Together, these decisions could significantly expand the scope of the Act’s NPDES program, potentially encompassing an array of discharges—from all manner of industry and landowners—that historically have not required CWA permits. Power plants, mines, farms, septic tanks, municipal storm and sewer systems, and waste storage facilities, among others, could all be subject to expanded or new liabilities, and the NPDES program could balloon to unworkable proportions. That said, demonstrating the fluid nature of this evolving case law, a different panel in the Fourth Circuit has since narrowed the potential universe of allegedly unlawful discharges by holding that landfills and lagoons that passively collect pollutants are not point sources because they are not “discernable, confined and discrete conveyance[s]” as the CWA requires. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018) (addressing coal ash impoundments).

Most recently, the Sixth Circuit held, contrary to both the Ninth and Fourth Circuits, that the CWA does not regulate discharges via hydrologically connected groundwater. In two cases involving the seepage of contaminants from coal ash ponds into groundwater that ultimately reached jurisdictional waters, the Sixth Circuit held that “[t]he CWA does not impose liability on surface water pollution that comes by way of groundwater.” *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018); accord *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018). The Sixth Circuit explained why, in its view, the text and statutory context of the CWA clearly do not extend to discharges via groundwater, and it pointedly disagreed with the decisions from its sister circuits in *Maui* and *Upstate Forever*. And in footnotes, the court cited approvingly the Fourth Circuit’s holding in *Sierra Club* that coal ash ponds are not point sources.

It comes as no surprise that the issue of whether the CWA regulates discharges via groundwater is now before the Supreme Court in petitions for certiorari in both *Maui* and *Upstate Forever*. On December 3, 2018, the Supreme Court called for the views of the Solicitor General on both
petitions by January 4, 2019. Given EPA’s recent litigation position and request for comment, what exactly the Solicitor General will say is uncertain. One thing is fairly certain, though: unless the Supreme Court takes the case and resolves the issue, litigation is unlikely to abate anytime soon.

Our new pro-liberty justice—and what that means for environmental law

Alice Kaswan

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Of course, only time will give us the final word on Justice Kavanaugh’s Supreme Court jurisprudence. Nonetheless, with 12 years on the U.S. Court of Appeals for the D.C. Circuit, we have quite a few markers of his judicial philosophy and its application to environmental law.

A guiding theme in Justice Kavanaugh’s decisions is his concern for individual liberty, with liberty understood as liberty from government control. The concern for individual liberty has separation-of-powers implications: Justice Kavanaugh keeps a sharp eye out for agency overreach—for agency actions not explicitly authorized by Congress. More broadly, in cases challenging environmental laws and regulations, he appears to keep a watchful eye on agencies’ attempts to control corporate or individual behavior.

In this short essay, I will discuss Justice Kavanaugh’s efforts to constrain agency action to preserve individual liberty in two contexts. The first is the Justice’s tendency to construe statutes strictly and narrowly—and the implications of that approach for deference to agencies. The second context is his tendency, in some tension with his otherwise strict constructionist approach, to inject cost or cost-benefit considerations into statutory schemes.

Strict construction: a couple of examples

Since his nomination, much has been written about Justice Kavanaugh’s strict adherence to statutory language. His opinion in E.M.E. Homer v. EPA, 696 F.3d 7 (D.C. Cir. 2012), is illustrative. Then-Judge Kavanaugh’s opinion struck down the Environmental Protection Agency’s (EPA’s) Cross-State Air Pollution Rule, designed to implement the Clean Air Act’s “good neighbor” provision, which provides that upwind states must not emit pollutants in “amounts which will . . . contribute significantly to nonattainment” in downwind states. He ruled that EPA must apply the language literally to determine upwind state obligations, and that EPA’s complex and policy-driven mechanisms for determining each state’s emission reduction obligations were not authorized by the statute.
Similarly, in *Mexichem Fluor v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), Judge Kavanaugh narrowly construed the Clean Air Act’s provisions on replacing ozone-depleting substances (ODSs) with more environmentally sound alternatives. Early on, EPA had allowed manufacturers to replace ODSs with hydrofluorocarbons (HFCs). Over time, however, the agency recognized that HFCs are potent greenhouse gases and required manufacturers to substitute HFCs with a less harmful ODS replacement. Judge Kavanaugh ruled that the agency cannot replace the replacement. He concluded that the Clean Air Act did not permit EPA to limit the use of HFCs because the statute authorized EPA to replace only ODSs, not their replacements, even if the replacements proved to be harmful.

**Strict construction: implications for “statutory purpose” analysis**

In focusing tightly on explicit language in specific provisions, Justice Kavanaugh pays less attention to the pragmatic challenges agencies face in fulfilling a statute’s overarching purpose. So, in *EME Homer*, adjudicating the Cross-State Air Pollution Rule, he argued that EPA must base its requirements only on each state’s specific contribution to downwind states’ nonattainment, without addressing the practical challenge EPA faced in determining each state’s contribution. Notably, recognizing the practical challenge and the need for flexibility to address interstate air pollution, the Supreme Court reversed Judge Kavanaugh’s decision.

And in *Mexichem Fluor*, Judge Kavanaugh focused only on the plain meaning of the word “replace.” He did not address the purpose of the replacement provisions, which were designed to ensure that replacements for ODSs were not themselves harmful to the environment.

Justice Kavanaugh’s view appears to be that if statutory language does not perfectly match the agency’s regulatory challenge, it is not for the agency to interpret its authority broadly to meet statutory goals. To avoid unauthorized agency overreach that violates the separation of powers and restricts individual liberty, it is up to Congress to revise statutes that fail to adequately address existing challenges.

**Strict construction and deference**

How will Justice Kavanaugh’s approach to statutory construction intersect with principles of deference to agency action—particularly the *Chevron* doctrine? Given his strongly expressed respect for judicial precedent, Justice Kavanaugh is unlikely to overturn *Chevron* directly.

However, given his concern about agency overreach, Justice Kavanaugh is likely to find ways to scrutinize and potentially invalidate agency action notwithstanding the *Chevron* doctrine. Under step one, he could well find that an agency regulation is inconsistent with what he considers to be unambiguous statutory text. Or, if the statute is ambiguous, his suspicion of agency overreach...
could lead him to conclude, under step two of *Chevron*, that the agency’s interpretation is unreasonable.

Lastly, Justice Kavanaugh has articulated a “major rules” doctrine that is a variant on *King v. Burwell*’s “major questions” doctrine. While the major questions doctrine suggests that courts need not defer to agencies concerning matters of considerable economic and political import, Justice Kavanaugh has gone a step further, suggesting not only that courts need not defer, but that, for “major rules,” agencies lack the authority to act absent explicit congressional authorization. Thus, under the major rules doctrine, Justice Kavanaugh would not simply forego deference for major actions predicated on ambiguous language, he would invalidate them.

**Deference and Obama-era actions**

If, and when, Obama-era regulatory initiatives come before the Supreme Court, Justice Kavanaugh is likely to cast a skeptical eye on the agency’s efforts to make our dated environmental statutes fit the reality of current environmental challenges. An initiative such as the Clean Power Plan, which created a complex and far-reaching program for regulating existing power plants under the Clean Air Act, is likely to be considered agency overreach because it innovates beyond the spare words of section 111(d). Similarly, if the Obama-era Clean Water Rule comes before the Court, Justice Kavanaugh is likely to construe the Clean Water Act’s inherently ambiguous jurisdiction narrowly and without considering the statute’s overarching goals.

**Deference and Trump administration actions**

Does this mean that Trump administration initiatives would also face intense and potentially nullifying scrutiny? Justice Kavanaugh would likely remand Trump administration initiatives if the administration ignored required procedures or explicit statutory language. However, assuming compliance with procedure and explicit statutory terms, he is likely to uphold the Trump administration’s environmental initiatives because the administration appears to share his interest in construing statutory authority narrowly, as evidenced in its proposed and anticipated replacements for the Clean Power Plan and Clean Water Rule.

**Not so strict construction: the role of costs in agency decision-making**

Justice Kavanaugh’s concern about the scope of agency power and its impacts on individual liberty—its impacts on the regulated sector—is also evident in his rulings on the role of cost considerations in environmental decision-making. Although Justice Kavanaugh tends to construe agency authority narrowly and strictly when confronted with far-reaching regulatory initiatives, he has found that agencies have a duty to consider costs even in the absence of explicit statutory language.
White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014), addressed the Clean Air Act provision conditioning power plant toxics controls on whether they were “appropriate and necessary.” Although the provision appeared to focus on whether power plants continued to present public health concerns, Judge Kavanaugh’s dissent argued that the term “appropriate” inherently required the agency to consider regulatory costs, a view ultimately validated by the Supreme Court in Michigan v. EPA.

Judge Kavanaugh made a parallel argument in his dissenting opinion in Mingo Logan Coal Co. v. EPA, 829 F.3d 710 (D.C. Cir. 2016). Mingo Logan involved the role of costs in EPA decisions to revoke a stream fill permit for mining waste disposal. The Clean Water Act allows EPA to revoke a permit when EPA identifies an “unacceptable adverse effect” on the environment. Judge Kavanaugh argued that EPA was required to balance environmental benefits with industry costs, even though the statutory language referred only to the permit’s environmental, not its economic, implications. Judge Kavanaugh suggested that reasoned decision-making always requires consideration of costs, following Michigan v. EPA’s affirmation of his argument for considering costs in the Clean Air Act context. He thus appeared to reject, implicitly, the notion that Congress could require agencies to make some decisions turn on environmental impacts alone.

Conclusion

Overall, although Justice Kavanaugh has suggested that he is not “anti-regulatory,”” his concern about individual liberty, and associated concerns about agency overreach and the impacts of government on the regulated sector, suggest that he is likely to keep agencies on a short leash. As a consequence, agency efforts to achieve statutory purposes by making do with ambiguous or outmoded statutory provisions are unlikely to meet with Justice Kavanaugh’s approval.

Fear and loathing of PFAS
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Since the U.S. Environmental Protection Agency’s (EPA’s) release of new lifetime Health Advisory Levels for perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) in 2016, there has been an explosion of interest and new regulation of these and other chemicals, known as per- and polyfluoroalkyl substances (PFAS). PFAS compounds, known for their grease-resistant and water-resistant properties, have been used in a wide variety of commercial and consumer products (including Scotchgard, GORE-TEX, firefighting foam, and Teflon). EPA
has long known about the potential toxicity of some PFAS—leading to the phasing out of PFOS in the United States in 2002 and PFOA in 2015—but there was relatively little regulatory or public interest in the chemicals until recently.

In the past two years, a number of states have rushed to adopt enforceable drinking water, groundwater, and soil standards for PFAS. Interstate Technology Regulatory Council, Standards and Guidance for PFAS. Some states, including Vermont, New Jersey, and New Hampshire have gone further than EPA—proposing new requirements for sampling PFAS or enforceable standards even lower than the non-enforceable, advisory levels proposed by EPA. In May 2018, bipartisan pressure culminated in a National PAS Summit at EPA’s headquarters. At the summit, former EPA Administrator Scott Pruitt committed to further EPA action on PFAS including evaluating national drinking water standards for PFOA and PFOS, and regulating them as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act. Administrator Pruitt also committed to evaluating the toxicity of additional PFAS chemicals, including the alternative PFAS chemicals, GenX and perfluorobutane sulfonate, and agreed to extensive public outreach efforts. United States Environmental Protection Agency, PFAS National Leadership Summit and Engagement. Over the summer, the Agency for Toxic Substances and Disease Registry (ATSDR)—an agency within the Department of Health and Human Services—announced that there may be health impacts from exposures to PFOS and PFOA at levels seven to 10 times lower than the already low standards proposed by EPA. In November, the ATSDR completed its review of the toxicity of GenX and perfluorobutane sulfonate, finding them significantly less toxic than PFOS and PFOA. United States Environmental Protection Agency, Fact Sheet: Draft Toxicity Assessments for GenX Chemicals and PFBS.

As public pressure and litigation against manufacturers and secondary users of PFAS mount, there is a divergence in views regarding the risks that PFAS pose to public health and the environment. Some states and environmental groups have adopted a highly conservative approach to new PFAS regulation and tout evidence of significant human health impacts ranging from elevated cholesterol to reproductive harm, developmental delays, and an increased risk of certain cancers. C8 Panel Study, The Science Panel Website; World Health Organization, International Agency for Research on Cancer, IARC Monographs on the Evaluation of Cancer Risk to Humans. But other states, municipalities, and industry supporters have pushed back on some of the science used to support draconian limits on PFAS. See, e.g., Inside EPA, Industry Raises Legal Warnings Over ATSDR’s Strict Draft PFAS Findings, Aug. 28, 2018; Texas Commission on Environmental Quality, TRRP Protective Concentration Levels. Numerous health studies have shown no link between cancer and PFAS exposure, and other studies indicate that higher limits for PFAS than those being considered by EPA and most states are sufficiently protective of human health. See Australian Government, Department of Health, Summary: Expert Panel for PFAS, July 2018; New York State Department of Health, Cancer Incidence Investigation 1995-2014, Village of Hoosick Falls, New York, May 2017; New Hampshire Department of Health and Human Services, Cancer Incidence Report: Merrimack, NH, Jan.
2018; Minnesota Department of Health, *Cancer Incidence in Dakota and Washington Counties*. As interest has increased and litigation has accelerated—including the recent filing of a national class action against PFAS manufacturers in the U.S. District Court for the Southern District of Ohio—the emerging fight over new state and federal regulatory limits for PFAS features a familiar group of players, including federal and state environmental officials, municipalities, industry groups, environmental nonprofits, and communities impacted by drinking water contamination. Class Action Complaint, *Hardwick v. 3M Company*, No. 2:18-cv-1185 (S.D. Ohio Oct. 4, 2018).

Although there is disagreement regarding what enforceable standards should be set for PFAS, no one has advocated that members of the public should be exposed to contaminants at levels that may result in negative health impacts. But eliminating every last molecule of PFAS from drinking water supplies—as some environmental groups advocate—is likely not a feasible alternative. Nor is a zero tolerance standard for PFAS consistent with the mandate of municipal, state, and federal environmental regulators, who are responsible for setting drinking water risk levels for thousands of chemicals and naturally occurring substances.

While PFAS have garnered a great deal of public attention—and instilled tremendous fear within communities, who are in some cases only learning about their exposure now—it does not pose nearly the same health hazard as many other common drinking water contaminants. And while the tragic contamination of drinking water with lead in Flint, Michigan, remains an important reminder that Americans should not take safe drinking water for granted, or neglect the drinking water infrastructure that is in place, the United States should remain proud of its strong record in delivering safe and clean drinking water to the public. Whatever EPA and the states ultimately decide to do next, the final regulatory decisions for addressing PFAS in drinking water, groundwater, and soil should be based on a transparent process, public participation and debate, and the best available science and reasonable risk assessments.

**Supreme Court punts to Fifth Circuit to decide future of habitat protections under the Endangered Species Act**

*Collette Adkins*

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**The rare frog’s controversial habitat protections**

The dusky gopher frog was once abundant in longleaf pine forests in Alabama, Mississippi, and Louisiana. People have destroyed nearly all the irreplaceable ephemeral ponds required for the
The frog’s breeding; the frog now breeds in just a handful of ponds left in Mississippi. With only about 100 adult frogs remaining, the species faces a high risk of extinction.

In 2001, the U.S. Fish and Wildlife Service (Service) protected the frog under the Endangered Species Act (ESA). In 2012, litigation by the Center for Biological Diversity prompted the Service to designate “critical habitat” for the species. The designation covers 6,477 acres across two states, but the litigation involves just the 1,544 acres in Louisiana known as “Unit 1.”

Although the frogs once lived on Unit 1, no frogs have been seen there, or anywhere else in Louisiana, since 1965. Unit 1 still contains a complex of five, rare ephemeral ponds perfect for frog breeding. But the uplands surrounding the ponds are closed-canopy loblolly pine plantations. The Service found that—with “reasonable effort”—the closed-canopy uplands on Unit 1 could be restored to the open canopies that the frog prefers.

The Endangered Species Act in the spotlight

Owners of Unit 1 challenged the critical habitat designation. The district court and the U.S. Court of Appeals for the Fifth Circuit sided with the Service and the Center for Biological Diversity, which intervened to defend the frog’s habitat protections. In January 2018, the U.S. Supreme Court granted the petition for certiorari filed by the timber giant, Weyerhaeuser Company, which owns a portion of Unit 1 and leases the rest for timber production. The primary question before the Court concerned the requisite qualifications for designation of an area as “critical habitat.”

The parties’ arguments focused on two provisions of the ESA, namely sections 3 and 4. Section 4 requires the Service, “concurrently” with the listing of an endangered species, to “designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A). Weyerhaeuser used this language to argue that “critical habitat” must first qualify as “habitat.” Because Unit 1 lacks open-canopied uplands that the Service identified as an essential “feature”—and the owners refuse to allow any habitat restoration—Weyerhaeuser argues that Unit 1 could not qualify as “habitat.”

Section 3 provides the definition for “critical habitat.” For unoccupied areas, the definition requires that they be “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii). According to the Service and the Center for Biological Diversity, Unit 1 satisfies the definition of unoccupied critical habitat because scientists within and outside the agency found Unit 1 essential for frog conservation. In its merits brief, the Service argued that Unit 1 can qualify as “habitat” because that term should be construed broadly, while the Center for Biological Diversity argued that the statutory definition controls and an area need not also satisfy an undefined requirement to be “habitat.”

The retirement of Justice Kennedy and the delay in Justice Kavanaugh’s confirmation resulted in just eight justices hearing oral argument on the case, which was held on the first day of the fall
term. According to one legal scholar who summarized the argument for SCOTUSblog, “the tenor of the justices’ questions seemed to place them into two predictable camps.” The court’s liberal justices focused on the need to conserve the frog through habitat protection and restoration, while the conservatives expressed concerns about the rights of the property owners and the desire for limits on the Service.

On November 26, 2018, the Supreme Court issued a narrow 8–0 decision, written by Chief Justice John Roberts. The decision maintains the frog’s habitat protections and sends the case back to the Fifth Circuit to decide the key questions raised in the case.

Specifically, the Supreme Court directs the Fifth Circuit to interpret the term “habitat,” as used in the Endangered Species Act, and assess whether the St. Tammany lands qualify as habitat. The Court also remanded the question of “whether the Service’s assessment of the costs and benefits of designation was flawed in a way that rendered the resulting decision not to exclude Unit 1 arbitrary, capricious, or an abuse of discretion.”

The future of habitat protections

As for the case’s potential consequences, it depends on whom you ask. Groups focused on the rights of private property owners, such as the Pacific Legal Foundation, point to this case as an example of how environmental regulations overburden private landowners. They emphasize the possibility of $34 million in lost value if Unit 1 cannot be developed. And they suggest that, unless the court adopts a narrow definition of “habitat,” any land—even if completely unsuitable for wildlife—could be designated as critical habitat, with severe economic losses for private landowners.

In contrast, wildlife advocates point to the critically imperiled status of the dusky gopher frog and the undisputed scientific consensus that the frog—and so many other endangered species—cannot be conserved without protecting key remaining unoccupied areas for habitat restoration and species reintroduction. They point to numerous limits on the Service’s power to designate critical habitat, including the ESA’s mandate that the agency base its decisions on “best available science.”

With only a handful of ESA cases ever reaching the nation’s highest court, environmental practitioners anxiously awaited the Supreme Court decision on the future of habitat protections. But with such a narrow ruling, tensions between environmental regulation and private property rights must continue to play out in the courts.
Florida v. Georgia: The Supreme Court weighs in on the struggle over the Apalachicola-Chattahoochee-Flint river basin
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It seems that the struggle over how to apportion rights to the shared waters of the Apalachicola-Chattahoochee-Flint (ACF) river basin will never end. After 30 years, seven lawsuits, years of unsuccessful negotiation, and a failed interstate compact, the U.S. Supreme Court finally waded into the dispute this past summer. Florida v. Georgia, 585 U.S. ___ (2018). Rather than resolving the matter, though, the Court in a five-to-four decision returned the case to a Special Master for findings and conclusions on five specific issues. Thus, the battle over the waters is likely to continue for some time.

The case

In 2013, Florida sought to invoke the original jurisdiction of the Court to equitably apportion the waters of the ACF basin. Florida, the downstream state, alleged that the upstream state, Georgia, had reduced the water flowing to the Apalachicola River to such an extent that the oyster fishery in Apalachicola Bay and a number of threatened species had been harmed by the resulting low flow conditions. Florida, thus, sought a cap on Georgia’s depletive water uses. The Court assumed jurisdiction and appointed Ralph Lancaster as Special Master.

Following extensive discovery and a month-long hearing, the Special Master recommended that the Court dismiss Florida’s complaint because Florida had not demonstrated “clear and convincing evidence” that its injury could be redressed by capping Georgia’s consumptive use. Report of the Special Master (Feb. 14, 2017).

Description of the ACF river basin

Three interstate rivers flow through the ACF basin.

- The Chattahoochee River originates in the north Georgia mountains and flows for 400 miles, passing by Atlanta and along the Alabama-Georgia state line before emptying into Lake Seminole, which lies immediately north of Florida. Five dams operated by the U.S. Army Corps of Engineers (Corps) are located along its course.
- The Flint River rises just south of Atlanta and flows south for 350 miles joining the Chattahoochee to form Lake Seminole. No Corps dams exist along the Flint. Irrigated agriculture has exploded in the Flint basin over the last 45 years, and the greatest share of the entire basin’s water is consumed by these irrigators.
- Water from Lake Seminole is released through the Corps’ Woodruff Dam to become the Apalachicola River. The Apalachicola runs for 106 miles through the Florida panhandle.

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to the Gulf of Mexico, where it helps sustain one of the nation’s most productive marine estuaries, Apalachicola Bay.

**Note on the parties**

The parties to the case are Florida and Georgia. Alabama chose not to participate, and the United States enjoys sovereign immunity in this instance. Although Georgia moved to dismiss, asserting that the United States was a necessary party that could not be joined, the Special Master ruled that a cap on Georgia’s water consumption could possibly address Florida’s injury without affecting the Corps’ operation of its Chattahoochee dams. Special Master’s Order on Georgia’s Motion to Dismiss (June 19, 2015).

**Report of the Special Master**

The Master wrote that there was “little question” that Florida had suffered harm from reduced flows in the Apalachicola. He also stated that it appeared that agricultural irrigation along the Flint had grown dramatically and that Georgia had done little to restrain this consumptive water use. While the Master appears to have assumed that Georgia’s agricultural water use was unreasonable, he added that it was less clear that Georgia’s water consumption for municipal and industrial purposes was unreasonable.

The Master concluded that while more could be said about Florida’s injury and the reasonableness of Georgia’s consumption, it was not necessary to do so. Regardless of harm or unreasonable use, the Master found that Florida had failed to demonstrate by “clear and convincing evidence” that its injury could be redressed, since the Corps could likely offset any additional flow on the Flint by storing more water in its Chattahoochee reservoirs during dry periods rather than releasing it through the Woodruff Dam into the Apalachicola.

**The Special Master applied the wrong standard**

The Court found that the Master’s redressability test was too strict. While the clear-and-convincing standard has been applied to initial showings of substantial injury, it does not apply to redressability. Instead, the standard is whether the complaining state has demonstrated that “it is likely to prove possible” to craft relief.

**Order**

The Court held that, at this stage and based upon its examination of the record, Florida had met its initial burden on redressability. Remand, however, was required to find additional facts to enable the Court to perform its equitable-balancing inquiry.
Factors to consider on remand

The Court then turned to the Master’s conclusion and addressed (1) whether it was possible for a cap on Georgia’s water consumption to produce additional streamflow in the Apalachicola, and (2) whether that additional flow would significantly redress Florida’s harm without a decree binding the Corps. According to the Court, the record demonstrated that considerable additional water could flow into Lake Seminole from the Flint River as the result of a cap. But will it flow through the Woodruff Dam into the Apalachicola at relevant times? Based on the record, the Corps’ Master Manual, and the amicus brief filed by the United States, the Court found that it was likely that a cap would provide more water to Florida by reducing the number of days, even during dry periods, that the Corps must conduct drought operations at Woodruff, operations during which the Corps would offset additional flows from the Flint. The Court also determined that there was evidence indicating that the additional water would significantly address Florida’s harm.

Without explicit findings, however, the Court was unable to determine how much extra water would be provided or how much Florida would be benefited. Thus, the case was remanded for additional findings on those two issues as well as more findings on Florida’s harm, the reasonableness of Georgia’s consumption, and whether that consumption harmed Florida.

Special Master on remand

The Supreme Court has appointed Paul Kelly, Jr. to serve as Master on remand.

In an order handed down in November 2018, the new Master found that the existing record in the case is adequate to resolve the merits of the issues raised by the Court; thus, the remand is poised to move ahead somewhat more quickly than many observers had anticipated.

In Brief
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Clean Water Act—Supreme Court calls for views of the Solicitor General (CVWG)

On December 3, 2018, the U.S. Supreme Court invited the Solicitor General to file briefs by January 4, 2019, on the government’s position on two pending petitions for certiorari in *County of Maui v. Hawaii Wildlife Fund* and *Kinder Morgan Energy v. Upstate Forever*. In *County of Maui*, the U.S Circuit Court of Appeals for the Ninth Circuit affirmed that Maui County violated the Clean Water Act (CWA) by discharging pollutants from four wastewater disposal wells into groundwater and from there into the coastal waters of the Pacific Ocean, a water of the United States, without a National Pollutant Discharge Elimination System (NPDES) permit. The Ninth Circuit held that the county was liable because pollutants were fairly traceable from the point source (wells) to the navigable water (via groundwater), and that such discharge is the “functional equivalent” of a discharge into the navigable water. In *Kinder Morgan Energy*, the majority of a U.S. Circuit Court of Appeals for the Fourth Circuit panel held that a spill from a ruptured underground gasoline pipeline resulted in CWA liability since the pollutants traveled from the original point of release from the ruptured pipeline through groundwater to reach “navigable waters,” and was therefore properly subject to enforcement under the CWA. Both courts held that groundwater with a “direct hydrological connection” to navigable waters falls within the scope of the CWA. These cases highlight the inter-circuit split of authority on this question with the U.S. Circuit Court of Appeals for the Sixth Circuit in the case of *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018) (summarized in this issue of *Trends*), in which a majority reasoned that the CWA’s text and statutory context would not accommodate the plaintiff’s assertion that groundwater could be deemed a point source, since it is not “discernible, confined or discreet,” and also rejected the plaintiff’s “hydrological connection” assertions, similar to those made in *County of Maui* and *Kinder Morgan Energy*. Given the Supreme Court’s request that the Solicitor General file its brief by early January, it is possible one or both cases might yet be scheduled for oral argument this session, should certiorari be granted.

### Antiquities Act—Extension of coverage to submerged lands


Commercial fishermen’s groups challenged President Obama’s 2016 designation of the Northeast Canyons and Seamounts Marine National Monument in the Atlantic Ocean because the designations will eventually prohibit commercial fishing in the vicinity of the monument’s two noncontiguous areas of over 4,900 square miles. The fishermen argued that the Antiquities Act only authorizes the designation of monuments on “lands” controlled by the federal government, meaning onshore designations within the federal government’s control, and that the amount of land reserved is not the smallest compatible with its management. The U.S. District Court for the District of Columbia rejected these arguments and granted the government’s motion to dismiss. The district court cited prior U.S. Supreme Court decisions holding the Antiquities Act does extend to “submerged lands and the waters associated with them,” *United States v. California*, 436 U.S. 32–33 (1978) and *Alaska v. United States*, 545 U.S. 75 (2005).
(concerning whether Alaska or the federal government had title to the submerged lands in Glacier Bay), noting that one prior Supreme Court decision specifically relied on the monument designation of submerged lands to prove the government had properly reserved the lands in question, citing Alaska. On the issue of control, the Court also disagreed that “complete control” of the submerged lands in the Exclusive Economic Zone (EEZ) some 130 miles off the coast of the mainland was necessary under the Act, since no private person or sovereign entity rivals the federal government’s dominion over the EEZ, among other considerations.

CERCLA

Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565 (9th Cir. 2018).
The U.S. Circuit Court of Appeals for the Ninth Circuit affirmed an award of response costs against Defendant Teck Cominco Metals, Ltd. (Teck) by the U.S. District Court for the Eastern District of Washington. The Confederated Tribes of the Colville Reservation (Colville Tribes) filed a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action concerning the historic pollution of the Upper Columbia River by Teck’s operation of a lead and zinc smelter in Trail, British Columbia, just north of the U.S.-Canadian border. The Ninth Circuit affirmed that investigatory costs are recoverable response costs, even though they both advanced the Colville Tribes’ litigation and acquired data about the nature and extent of contamination. The court also affirmed that attorney’s fees are recoverable by the Colville Tribes as part of enforcement costs by a government entity. Finally, the court rejected Teck’s divisibility defense on the ground that it presented data only about its own hazardous substance contamination, and did not place that in the context of all site contamination, which the lower court held was necessary to demonstrate the harm is capable of apportionment.

The U.S. Circuit Court of Appeals for the Third Circuit has held that the meaning of “all costs” in CERCLA § 107(a) includes remediation costs incurred both before and after land ownership by a potentially responsible party (PRP). The case concerns a CERCLA and state Hazardous Sites Cleanup Act (HSCA) suit by Pennsylvania against a limited liability company and its members to recover response costs incurred prior to their ownership of the property, a site where the third-party prior owners had operated a chemical manufacturing business resulting in its contamination. The lower court granted partial summary judgment to the Pennsylvania Department of Environmental Protection (DEP), finding the current owner (Trainer LLC) liable for costs incurred after it acquired the site, but not before. DEP sought interlocutory appeal of the district court’s limitation on its recovery of only post-acquisition response costs. The court began with consideration of section 107(a)’s creation of liability for “owners” with respect to response costs under CERCLA. Noting that such liability for “all costs of removal or remedial action” is remarkably broad, the court nonetheless gave the term its plain meaning and concluded that “all costs” includes costs incurred before an owner acquires title to a site. The court also took note of
the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (codified at 42 U.S.C. §§ 9601, 9607), which clearly subjects prospective purchasers to broad CERCLA owner liability if they fail to make “all appropriate inquiry” prior to acquisition. The court affirmed in part, reversed in part as to costs incurred before ownership by Trainer LLC, and remanded the case for further proceedings.

**Trinity Indus., Inc. v. Greenlease Holding Co.**, 903 F.3d 333 (3d Cir. 2018).

The U.S. Circuit Court of Appeals for the Third Circuit reversed in part a district court’s allocation of liability between two potentially responsible parties (PRPs), Greenlease and Trinity, as to liability for a former railcar manufacturing site. Trinity brought suit in the U.S. District Court for the Western District of Pennsylvania for CERCLA contribution from Greenlease and its corporate parent with respect to costs Trinity incurred remediating the site previously owned and operated by Greenlease. After trial, the lower court allocated 62 percent of response costs to Greenlease and 38 percent of costs to Trinity. The court of appeals found error in the lower court’s reliance on volume alone in arriving at its allocation percentages, without regard to the costs to remediate each PRP’s particular hazardous substances at the site. The court also rejected the trial court’s grant of equitable deductions to Greenlease based on its intent to shift liability via an indemnification provision and a purported increase in fair market value of the property post-remediation. The Third Circuit observed that Greenlease’s subjective intent was insufficient to warrant an allocation adjustment when the indemnification agreement itself did not evidence a mutual intent to shift liability, but rather contained an explicit “non-assumption of liabilities” clause. The court also rejected the lower court’s granting of an equitable deduction of 10 percent for increased property value as a result of Trinity’s remediation, since the record lacked evidence of such increased value. Finally, the Third Circuit affirmed the district court’s finding that Greenlease’s corporate parent Ampco-Pittsburgh Corporation was not directly liable as a CERCLA arranger under the standard enunciated in **United States v. Bestfoods**, 524 U.S. 51 (1998).


The U.S. District Court for the Southern District of Indiana held that a 1998 RCRA consent decree—which resolved Resource Conservation and Recovery Act (RCRA) liability of the facility owner/operator Refined Metals Corp. (Refined) by imposing final corrective measures obligations—triggered the limitations period for any CERCLA § 113(f) contribution actions. Thus, the district court concluded that a decades-later contribution suit by Refined against former owner NL Industries (NL) was time-barred. The case concerns a lead reclaiming facility operated for many years by NL Industries at a site in Marion County, Indiana. In 1980, NL sold the site to Refined, which operated the facility until 1995 and continues to own the property. In 1998, Refined, the United States, and Indiana entered a consent decree under which Refined agreed to recommend and then perform final corrective measures as required by the Environmental Protection Agency. When Refined brought its CERCLA section 113(f) contribution action in 2017, NL moved to dismiss based upon the statute of limitations. In considering the split of
authority on whether a non-CERCLA consent decree may cause a CERCLA section 113(f) contribution claim to accrue, the court sided with the majority position of the U.S. Circuit Courts of Appeals for the Third and Ninth Circuits that a non-CERCLA consent decree can trigger the accrual of a CERCLA contribution cause of action, as enunciated in *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1119–21 (9th Cir. 2017) and *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 136–38 (3d Cir. 2013). Accordingly, Refined’s 2017 complaint was time-barred, and the court dismissed its CERCLA claims for cost recovery and contribution.

**Clean Air Act**

*United States v. Luminant Generation Co.*, 905 F.3d 874 (5th Cir. 2018).

The U.S. Circuit Court of Appeals for the Fifth Circuit held that while a claim for penalties by the government for the failure of a power plant operator to obtain pre-construction air permits was time-barred, the government’s claim for injunctive relief was not. The case concerned Clean Air Act (CAA) claims by the federal government against Luminant Generation Co. and its subsidiary for significant modification of their Texas plants without obtaining the required preconstruction air permits. While the federal government contended the facilities at issue were liable for a new violation for every day they operated without a proper permit, the Fifth Circuit disagreed, noting that several federal circuits have held that a violation of CAA preconstruction permitting requirements occurs only at some point during the construction period and not during the subsequent operation of the facility. Accordingly, the five-year statute of limitations set forth in 28 U.S.C. § 2462 precluded a claim for penalties. In considering the question of whether the government’s claims for injunctive relief were also time-barred, the majority opinion observed that the “concurrent remedies doctrine” would typically preclude the granting of injunctive relief because “when the jurisdiction of the federal court is concurrent with that of law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations.” However, a majority of the court agreed with the government and plaintiff-intervenor the Sierra Club that there is an exception to the doctrine when the government brings an action “in its sovereign capacity,” noting that “an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it.” Since the government has expressly consented to a statutory time bar only in “the enforcement of any civil fine, penalty or forfeiture,” the court found that the district court had erred in dismissing the government’s equitable relief claims under Rule 12(b)(6) based on the concurrent remedies doctrine.

**Clean Water Act, RCRA**


The U.S. Circuit Court of Appeals for the Sixth Circuit affirmed the lower court’s dismissal of the CWA claim brought by a nongovernmental organization, but reversed the holding of the
lower court that it lacked jurisdiction to hear the plaintiff’s RCRA complaint by virtue of a state environmental agency’s ongoing regulation of defendant Kentucky Utilities Co. (KUC). With respect to the CWA claim premised upon a discharge into groundwater that ultimately made its way to a nearby lake, the Sixth Circuit majority reasoned that the CWA’s text and statutory context would not accommodate the plaintiff’s assertion that groundwater could be deemed a point source, since it is not “discernible, confined or discreet.” The court also rejected the plaintiff’s “hydrological connection” assertion that indirect discharge from the impoundments via groundwater to the lake required a point source permit under the CWA, a theory that has been espoused by the U.S. Circuit Courts of Appeals for the Fourth and Ninth Circuits in recent cases previously summarized by In Brief. See In Brief, 49 Trends No. 6 (July/August 2018).

Finally, with respect to the reversal and remand of the RCRA claim, the Sixth Circuit noted that the “diligent prosecution” bar against RCRA citizen suits was only available to preclude three specific types of actions by the state environmental agency, and that the agency’s ongoing RCRA enforcement against KUC was not such an action.

Endangered Species Act


The U.S. Fish and Wildlife Service (FWS) delisted a population of grizzly bears from the “threatened or endangered” species list of the Endangered Species Act (ESA). The U.S. District Court for the District of Montana reversed the delisting decision after a challenge by plaintiff Indian tribes and environmental and animal rights nongovernmental organizations. The court held that by delisting the Greater Yellowstone grizzly population without analyzing how delisting would affect the remaining members of the lower-48 grizzly designation, FWS failed to consider how reduced protections in the Greater Yellowstone Ecosystem would impact the other grizzly populations. The court also found that FWS’s application of an ESA-required threats analysis was arbitrary and capricious for having illegally negotiated away FWS’s obligation to apply the best available science in order to reach an accommodation with the states of Wyoming, Idaho, and Montana; and that agency’s reliance on two studies to support its determination that the Greater Yellowstone grizzly can remain independent and genetically self-sufficient was illogical, since both studies concluded that the long-term health of the Greater Yellowstone grizzly depends on the introduction of new genetic material. The court therefore vacated FWS’s final rule delisting this portion of the grizzly bear population, effectively restoring the endangered species status to the Greater Yellowstone grizzly.

Federal Power Act, preemption of state energy legislation

Electric Power Supply Ass’n v. Star, 904 F.3d 518 (7th Cir. 2018).
The U.S. Circuit Court of Appeals for the Seventh Circuit sustained an Illinois statute that subsidizes nuclear power plants in Illinois to reduce the risk of their near-term closure. The court found that the state statute did not run afoul of the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act and did not violate the dormant Commerce Clause’s barriers to state discrimination against interstate transactions. The statute in question creates a zero-emission credit (ZEC) program whereby state regulators select certain Illinois nuclear power plants to generate ZECs and then requires utilities to purchase those ZECs for a predetermined purchase price. The Electric Power Supply Association (EPSA) challenged this Illinois program as both preempted under the Federal Power Act and as violating the dormant Commerce Clause of the U.S. Constitution. The Seventh Circuit requested an amicus brief be filed by FERC on the issue of preemption and FERC did so, asserting that the statute in question was not preempted by the Federal Power Act. Not surprisingly, the Seventh Circuit thereafter found no preemption since Illinois’ statute does not depend on Illinois power generators’ participation in an interstate auction, which is forbidden, although it may affect such auctions. As the court noted, to receive a credit under the statute, “a firm must generate power, but how it sells that power is up to it.” Moreover, because states retain authority over power generation in a manner consistent with the Federal Power Act, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law. With respect to the EPSA’s dormant Commerce Clause argument, the Seventh Circuit found it to be circular, noting that if that argument was correct, the powers over generation reserved to states by Congress would effectively be denied to them by the U.S. Constitution, and “[t]hat can’t be right; it would be the end of federalism.”

State regulation of mining on federal lands and preemption

**Bohmker v. Oregon, 903 F.3d 1029 (9th Cir. 2018).**

The U.S. Circuit Court of Appeals for the Ninth Circuit upheld an Oregon statute limiting certain gold mining dredge operations statewide, including on federal public lands, against challenges of federal preemption. In reviewing Oregon Senate Bill 3, which permanently restricted motorized mining operations in sensitive salmonid habitats, the Ninth Circuit panel majority noted that Congress had adopted numerous federal laws since the General Mining Law of 1872, which together “reflect Congress’ intent to foster a productive mining industry but also its intent to protect the environment.” While these laws, including the Federal Land Policy and Management Act of 1976, declare many federal lands “free and open” to exploration, these laws also require miners to comply with state laws, including state environmental laws. After a lengthy review of federal laws affecting mining, the Ninth Circuit held that the Oregon statute was not preempted by those laws. The court noted that the Oregon law did not prohibit mining (it just restricted one method of mining), that it is not part of Oregon’s distinct land use laws and regulations, and it has a clear environmental purpose to which the provisions of the bill are tailored. A dissenting member of the panel urged the adoption of a commercial impracticability test to preserve the miners’ ability to explore for and extract valuable minerals on the federal public lands even if...
environmentally impactful, stating that “[b]ecause the permanent ban on motorized mining in Oregon Senate Bill 3 does not identify an environmental standard to be achieved but instead restricts a particular use of federal land, it must be deemed a land use regulation preempted by federal law.”


The U.S. District Court for the Eastern District of California held that California Senate Bill 50 (SB 50), which restricted federal agencies from disposing of unwanted federal lands within California, ran afoul of the “intergovernmental immunity” provision of the Supremacy Clause and was also preempted. SB 50 expressed California’s state policy to limit transfer of federal lands within the state to third parties, presumably in an effort to preclude developers and industrial entities from then exploiting such lands after transfer. The district court granted the federal government summary judgment, finding that the law as written gave the California State Lands Commission a right of “first refusal” over certain federal land dispositions. Such a right, the court held, was inconsistent with the Supremacy Clause of the U.S. Constitution and was also preempted by federal law which limited California’s right to control disposition of federal lands—federal law principles dating back to California’s admission to the Union. Thus, the court enjoined any further enforcement of SB 50.

For further information on SB 50 and its background, see L. Belenky & K. Delfino, **SB 50: California sets a course to keep public lands public**, 50 Trends No. 2 (Nov/Dec. 2018).

### Views from the Chair

**Amy L. Edwards**

Amy L. Edwards became the Section of Environment, Energy and Resources’ 92nd chair during the Section’s annual business meeting in August 2018. A long-time Section member, Edwards has previously served as education officer, Council member, 21st Fall Conference planning chair, and chair of the Environmental Transactions and Brownfields Committee. She is a partner with Holland & Knight LLP in Washington, D.C.

In my last Views from the Chair column, I concluded that “the times, they are a-changing,” and we need to be changing with them. That is particularly true as we begin 2019, with the Democrats in control of the House of Representatives and possible personnel changes within the Trump administration.

It is still too early to tell what the midterm elections may mean for environmental, energy, and resources practitioners, but it is anticipated that the next two years will be compelling. The House is likely to initiate some investigations and to bring renewed attention to issues such as
climate change and infrastructure. We also know that the courts have reversed some Trump administration rulemakings on the grounds of failure to follow the Administrative Procedure Act. So, the next two years promise to be as turbulent as the past two.

As a Section member, your membership keeps you on top of these fast-paced developments with information provided by our publications, website, and committee and Section-level programming.

In early 2019, watch for the Winter 2019 issue of Natural Resources & Environment on the theme of “Forests” as well as new substantive articles being published on our committee webpages.

Also, the Section will be launching a “SEER Essentials” CLE webinar series geared toward younger lawyers or general practitioners who want or need to know more about fundamental areas of environmental, energy, or resources law such as the Clean Water Act, environmental due diligence, TSCA, pesticides regulation, enforcement, and NPDES permitting. Keep an eye out for notices about these webinars.

And mark your calendar for the 2019 Water Law (March 25–27, 2019) and Spring Conferences (March 27–29, 2019) in Denver. Both conferences will feature thought leaders and decision-makers at the federal, state, and local levels as well as excellent networking opportunities. Plan to attend!

In addition to the Section activities described above, I would like to update you on other important Section and ABA endeavors.

**SEER Connect**

After a number of hiccups, the new ABA website is now up and running, as is SEER Connect, which will be the communications vehicle for our Section going forward. We trust that you have had an opportunity to familiarize yourself with the new website and with SEER Connect. Please let Norm Dupont or Zoya Ali know if you are experiencing any difficulties using these new platforms, because they would be happy to offer additional training or support. We are beginning to see committees use SEER Connect, which is fantastic.

**Outreach**

We continue our Section membership outreach efforts and hope you will help us! Have you spoken with young lawyers and colleagues about the substantially reduced rates and increased membership benefits that will be available to them starting September 2019 under the ABA’s [New Membership Model](#)? Now is the time to begin spreading the word. You are our best salesperson! Let Jeff Dennis, our membership officer, and his team of regional captains know
how they can help you spread the word about the enhanced benefits and reduced rates available under the New Membership Model. Let them know about individuals you know who should become members of our Section. With your help, we can grow the Section’s membership significantly over the next several months. The New Membership Model truly offers substantial benefits, particularly for younger lawyers, lawyers in small firms, government lawyers, academics, foreign lawyers, and nonprofit lawyers.

We also continue our outreach to outside organizations. This past October at the Section’s 26th Fall Conference in San Diego, Alexandria Pike, chair of National Environmental, Energy, and Resources Law Section (NEERLS) of the Canadian Bar Association, gave an insightful presentation on the status of pipeline projects in Canada, while in November, SEER chair-elect Karen Mignone spoke about the Trump administration’s environmental policies at NEERLS’ Department of Justice (DOJ) Day Conference in Ottawa, Canada. These efforts are examples of a well-established relationship between the environmental bar sections of both countries.

Alf Brandt has been reinvigorating the Outreach Committee and is encouraging Section members who would be interested in being a subject matter resource to our Congressional Relations Committee to contact that committee’s co-chairs Martha Marrapese and Emily Fisher.

Guidelines on Section Public Positions

At our Fall 2018 Council meeting, the Council approved “Guidelines on Section Public Positions” (Guidelines). These Guidelines attempt to clarify the process that our Section must follow if it would like to be more vocal on a given issue as a Section. In most instances, there must be a House of Delegates (HOD)-adopted resolution on the issue. After HOD adoption, a Resolution becomes ABA policy.

Currently, there are several HOD resolutions being drafted by ABA entities. For example, our Section intends to propose an update of the ABA policy on climate change (08M 109) that was adopted by the HOD in 2008. We hope to have a resolution adopted at the 2019 ABA Annual Meeting in San Francisco. The ABA Section of Administrative Law is working on a resolution for HOD consideration that addresses the role of science in environmental decision-making. Our Section has expressed interest in supporting this effort. There may be other potential issues for resolutions as we enter the second 50 years of modern environmental law. Section members interested in knowing more about the Guidelines or with an interest in specific issues should contact Roger Martella or Lee Paddock.

As always, please reach out to me with any questions or concerns regarding the Section. Best wishes for 2019!
48th Spring Conference
Rita Bolt Barker

Rita Bolt Barker, a shareholder at Wyche, PA in Greenville, South Carolina, is the planning chair of the 48th Spring Conference.

The Mile High City awaits you! Join your colleagues for the Section of Environment, Energy, and Resources’ 48th Spring Conference in Denver, March 27–29, 2019. Our unbeatable conference venue, the Grand Hyatt Denver, is located in the heart of the city’s entertainment districts. And with the majestic Rocky Mountains in reach, plan to bring your family and hit the slopes after the conference.

The Spring Conference will offer world-class CLE programming and networking opportunities. The planning committee’s cross-disciplinary team has developed a program with something for everyone.

The conference kicks off with a plenary session that will explore Science & Compliance: Trends in Enforcement. Featuring U.S. Department of Justice attorney Bruce Gelber, EPA Region 8 Regional Counsel K.C. Schefski, Wyoming Department of Environmental Quality Director Todd Parfitt, Hudson Riverkeeper President Paul Gallay, and Vinson & Elkins partner Margaret E. Peloso, the panel will provide essential information about federal-state compliance coordination and implementation, the development of new field testing methods and technologies, scientific standards, and enforcement priorities.

The second plenary session, The Next Battlegrounds: How the Composition of the Federal Courts Will Shape the Future of Environmental, Energy, and Resources Law, features a distinguished panel of practitioners and court-watchers, including University of Denver Sturm College of Law professor Justin Pidot, Crowell Moring partner David Chung, and Kirkland & Ellis partner Erin Murphy, highlighting significant cases making their way through the courts. The panel will identify key trends to watch in the courts of appeals and forecast how the U.S. Supreme Court Justices will influence the cases brought and pursued in the federal courts.

The Spring Conference’s breakout sessions will cover a broad range of cutting-edge topics, including:

- PFAS: Impacting Site Remediation and Litigation for Years to Come?
- Grid Resiliency: Ensuring and Valuing the Ability to Stay Plugged In
- What the “Frack” Is Going On: Emerging Issues in Oil and Gas Law
- The Continuing Evolution of Clean Water Act Jurisdiction
- What Happens When Recyclables Become Trash, Wastes Go Astray, or the Status of Naturally Occurring Materials Is Changed?
- Permit Streamlining for Mineral Exploration and Development
• Water 2070: The Future of Drinking Water in the United States, the Nexus between Water Supply and Water Quality
• One Federal Decision and Regulatory Streamlining: Opportunities and Costs for Infrastructure Development
• When Financing Goes Bad: Doing Deals and Litigating Cases When Bankruptcy, Workouts, or Ability to Pay for Environmental Liabilities Is at Issue
• Frenemies: Federal, State, Tribal, and Local Governments and the Inherent Tension of Cooperative Federalism on the Ground
• East Meets West in the Air Quality Arena: Ozone Attainment, Regional Haze, Electric Vehicles, and More
• International Product Stewardship Regulations: Their Effect on Integrated Supply Chains and Corporate Transactions
• The New Cannabis Industry: Will It Cause the Environment to Go to Pot?
• How Prospective Changes to the Endangered Species Act Affect Landowners
• Turning Brownfields into Green Money: Creative Deals to Boost Contaminated Superfund Site Redevelopment and Streamline Cleanups
• Ethics: Tweets, Posts, Snaps, and Chats: Lawyer Ethics and Social Media

The Spring Conference will also offer our popular networking events, including a public service project, a reception in the Grand Hyatt’s Pinnacle Club with stunning views of downtown Denver and the Rocky Mountains, #SEERRunClub!, and the Taste of SEER dine-arounds.

The Spring Conference is a can’t-miss opportunity with unmatched educational and networking opportunities with influential legal leaders in environmental, energy, and resources law. You will leave Denver with new insights to benefit your practice as well as new contacts. See you in the Mile High City in March!

37th Water Law Conference
Roger Sims

Roger Sims is a partner in Holland & Knight’s Orlando, Florida, office. Mr. Sims chairs the firm’s Water Resources Team and practices in the areas of water resources, environmental, and land use law. He deals with many governmental agencies on a regular basis, including the state’s Water Management Districts. He has practiced before water regulators for more than 40 years and has experience with rule development, permitting, and third-party challenges. Mr. Sims is the planning chair for the 37th Water Law Conference.

For 37 years the American Bar Association’s Section of Environment, Energy, and Resources’ annual Water Law Conference has provided unmatched continuing education and networking
opportunities for water law practitioners. Consistently drawing the top government, nonprofit, and private practitioners to speak on hot topics affecting the practice today, the annual Water Law Conference is not to be missed.

The 37th Water Law Conference, which will be held on March 25–27, 2019 in Denver, will take a fresh look at long-standing water law topics, and emerging topics of special concern to practitioners in all stages of their career in an exciting day-and-a half of CLE programming.

Sessions will include:

- **East, West, Colorado, and the Colorado River:** Don’t miss this discussion on the foundations of water law, with insights for both new and experienced practitioners. This session will summarize the basics as well as provide informative updates on topics with potentially broad applicability in the era of increasing water demand and less reliable water supplies. Panelists will consider the law governing the Colorado River and features of Colorado’s unique form of prior appropriation that provides a valuable model on several issues facing all prior appropriation states and states struggling with groundwater and stream water interactions.

- **Impacts to Freshwater Resources from Drought and Sea Level Rise:** This panel will review the scientific issues and discuss the legal implications of dealing with gradual encroachment of saline water into aquifers providing fresh water for potable, agricultural, and other uses vital to the public health, safety, and welfare. This session will address such issues as the scientific concerns surrounding lateral salt water intrusion and the upwelling of deeper water with brackish characteristics, as well as reduction in freshwater recharge due to drought. Legal issues will be explored and planning for alternatives to the traditional sources now at risk will be discussed. (This panel will offer attendees a unique tool for judges and litigants to make sense of groundwater science in litigation—the National Judicial College’s new Adjudicating Groundwater bench book. The Section’s collaboration with the NJC and its Dividing the Waters program allows the Section to offer this resource to conference attendees.)

- **Walker River/Walker Lake Litigation: The Public Trust Doctrine in Nevada:** This panel will explore the severe reduction of surface water area in Walker Lake and the competing theories of cause, as well as legal implications. The Public Trust Doctrine is a key provision in the debate surrounding the lake and the Walker River, even though Nevada is a prior appropriations jurisdiction for most purposes.

- **Litigating, Negotiating, and Implementing Tribal Water Settlements in the United States:** The U.S. Supreme Court’s November 2017 cert denial in *Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians* will have significant implications for both tribes and non-Indian stakeholders in groundwater-dependent basins throughout the United States. In addition to discussing the consequences of this landmark case, the panel will provide an update on ongoing efforts to establish and quantify tribal water rights through litigation and settlement efforts.
**The Culverts Case—Interference with Tribal Fishing Rights by Government Storm Water Diversion and Treatment Systems:** The Stevens Treaties, signed by several Pacific Northwest tribes in the mid-1850s, reserved tribal rights to fish “at all usual and accustomed grounds” in common with settlers. Interpretation of this provision has been subjected to litigation for over a century, including the 1905 Supreme Court case, *United States v. Winans* and the Court’s affirmation of 1974’s Boldt Decision (*United States v. Washington*), which guaranteed tribes up to 50 percent of the region’s fisheries. The “Culverts Case” is the most recent sub-proceeding of *United States v. Washington* to reach the Supreme Court, affirming a federal court injunction requiring the state of Washington to remove or retrofit hundreds of road culverts blocking critical fish runs.

**ETHICS: The Attorney-Client Privilege in the Twitter Era:** Communications have become easier and easier, to the point that a “tweet” (short message) seems ordinary and very informal. However, once in writing, a tweet can become evidence and constitute a disclosure of client-confidential information. This panel will take a close look at this issue and related problems that arise when communication of client information is not carefully managed.

**Interstate Disputes/U.S. Supreme Court Case Update:** While interstate disputes pit one state against another, they take place within a wider context of state and federal regulation and litigation, including state administration and federal water-supply management. This panel will explore that context in connection with three pending Supreme Court cases: *Florida v. Georgia*, an equitable apportionment case over surface water, *Mississippi v. Tennessee*, an equitable apportionment case over groundwater, and *Texas v. New Mexico & Colorado*, a case to enforce the Rio Grande Compact. The panel will also discuss how these cases may result in regulation or further litigation important to all water practitioners.

**NPDES Permits for Discharges Carried by Groundwater: Is That a Thing?:** The Clean Water Act regulates “Waters of the United States” which, by definition, does not include groundwater. In 2018, two federal appeals courts held that discharges through groundwater hydrologically connected to WOTUS are subject to regulation under the CWA. The Ninth Circuit concluded that treated wastewater injected into wells and carried by groundwater to the Pacific Ocean after 84 days was “fairly traceable” to WOTUS. The Fourth Circuit found that a gasoline spill that continued to migrate from a repaired underground pipe break resulted in a “discharge” through soil and groundwater into adjacent wetlands and creeks. Both courts held that CWA groundwater jurisdiction is not limited to discharges of pollutants “directly” from point sources to WOTUS. These cases leave regulation ambiguous and pose substantial technical and regulatory challenges.

As you can see, this year’s Water Law Conference will be substantive and valuable to any water law practitioner. This year’s program will take place at the Grand Hyatt Denver, conveniently located in the heart of Denver with easy access to the city’s best of dining and entertainment. Join us March 25–27, 2019, for unbeatable networking opportunities, to participate in a joint
public service project with attendees of the 48th Spring Conference, and to take advantage of everything the Mile High City offers.

Please make your reservations now and join us in Denver!

People on the Move
James R. Arnold

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

James R. (“Jim”) Arnold, the principal in The Arnold Law Practice, has been elected the chair of the Environmental Law Section of the Bar Association of San Francisco. Arnold’s practice focuses on litigation in environmental and real estate law in courts and agencies, the environmental aspects of real estate and commercial transactions, and regulatory compliance. He appreciates the opportunities he has received in various capacities in Section leadership with the Council, committees, publications, membership, annual meetings, quick teleconferences, and sponsorships.

Keli Beard has joined the State of Utah’s School and Institutional Trust Lands Administration (SITLA) in Salt Lake City. SITLA manages Utah’s 3.4 million acres of trust lands on behalf of the K–12 public schools, state hospitals, state higher education institutions, and other beneficiaries. Previously, Beard spent the majority of the past five years as corporate counsel in the Salt Lake City office of Rio Tinto plc, where she represented Rio Tinto’s mineral exploration group in North and South America. She is co-chair of the Section’s Mining and Mineral Extraction Committee.

Andrew C. (“Drew”) Cooper has joined Van Ness Feldman LLP in Washington, D.C. Cooper was formerly a partner at Hunsucker Goodstein PC’s Washington, D.C., office. He has experience with both environmental litigation and the environmental aspects of real estate and commercial transactions. Cooper represents clients including private equity companies, manufacturers, energy companies, utilities, developers, lenders, commercial banks, distributors, and retailers in matters ranging from real estate transactions to the complex purchase, sale, and financing of major manufacturing companies. His continuing work in environmental litigation includes the consequences of transactions, CERCLA contribution actions, steering committees for large and small Superfund sites, claims for loss of property values due to contamination, agency and court penalty proceedings, and insurance recovery.
**Daniel DePasquale** has joined the U.S. EPA’s Office of General Counsel as an attorney advisor in the Pesticides and Toxic Substances Law Office. Previously, he was an Oak Ridge Institute for Science and Education fellow with U.S. EPA’s Waste and Chemical Enforcement Division, Office of Enforcement.

**Emerson Hilton** has joined the in-house legal department of CMS Energy Corporation and Consumers Energy Company in Jackson, Michigan, where he focuses on renewable energy and utility regulation, including Federal Energy Regulatory Commission matters, rate making, and hydroelectric projects. Hilton previously practiced in the Seattle office of Beveridge & Diamond, P.C.

**Miles Kiger** has joined Troutman Sanders LLP as an energy associate in the firm’s Washington, D.C., office. Formerly, Kiger was an attorney-advisor in the Office of General Counsel-Energy Markets Division at the Federal Energy Regulatory Commission. He offers client-focused regulatory counsel to energy companies seeking advice on mergers and acquisitions, electric grid interconnections, wholesale energy market participation, and general regulatory compliance. Kiger served as co-chair of the Section’s Energy Markets and Finance Committee from 2016 to 2018 and continues to serve as a vice chair. He has also participated in Section programs, serving as organizer and moderator of energy panel discussions, as well as editing and contributing to portions of the 2016 and 2017 *The Year in Review* reports.

**Merissa Moeller** has joined Marten Law as an associate in the firm’s Portland, Oregon, office. Moeller was previously with Davis Wright Tremaine LLP, also in Portland. Her experience in natural resources, water, and land use law is in litigation and regulatory compliance through counseling and permitting. Moeller’s litigation experience involves state and federal disputes over natural resources.

**Angeles Murgier** is a senior attorney with the Beccar Varela law firm in Buenos Aires, Argentina. Murgier has been elected chair of the Environment, Health and Safety Law Committee of the International Bar Association’s Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL). She co-chaired the Biennial Conference of IBA SEERIL in Lisbon, Portugal, in 2018. Murgier provides environmental counseling and representation in Argentina, focusing on U.S. companies doing business there, specializing in environmental and related regulatory compliance, audits, and due diligence.

**Andrew R. Varcoe**, a partner at Boyden Gray & Associates, PLLC, in Washington, D.C., has been named chair of the executive committee for the Federalist Society’s Environmental Law and Property Rights Practice Group. Varcoe’s practice focuses on the intersection of law, strategy, policy, and government affairs; energy, environmental, and natural resources industry matters (including international investment issues); and the life sciences and innovation.