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The final *Auer*: Midnight approaches for an important deference doctrine

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In *Kisor v. Wilkie*, the Supreme Court stands poised to banish *Auer* deference from the arsenal of tools available to federal agencies in regulatory litigation.

The clock has been ticking

After years of signaling, the U.S. Supreme Court has agreed to reconsider whether agency interpretations of their own ambiguous regulations deserve judicial deference under *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* For Court watchers, it was just a matter of time. In *Perez v. Mortgage Bankers*, the Court unanimously ruled that agencies need not utilize notice-and-comment rulemaking under the Administrative Procedure Act (APA) to reverse prior interpretations of their own regulations. Although *Perez* did not cleanly present the question, some justices took the opportunity to invite would-be petitioners to serve up such a case. Justice Thomas reasoned that “[b]y my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.” Justice Alito observed that there is “an understandable concern about the aggrandizement of the power of administrative agencies” that stems from doctrines of judicial deference, warning that “I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.” Justice Scalia, who, ironically, penned the opinion in *Auer*, stated during oral argument that “[m]aybe we shouldn’t give deference to agency interpretations of [their] own regulations. . . . For me it would be easy.” He then wrote in concurrence that he would “restore the balance originally struck by the [APA] . . . by abandoning *Auer* and applying the [APA] as written.”

The Petitioner in *Kisor* answered the Court’s call. The sole question presented was whether the *Auer* doctrine should be overruled. On December 10, 2018, the Court agreed to hear the case, presumably to provide a definitive answer to that question.
The dawn of *Auer* deference

Judicial deference is a judge-made aid of interpretation, useful when a court must decide whether agency pronouncements and actions fall within the scope of their enabling statutes. In *Chevron USA, Inc. v. Natural Resources Defense Council*, the Supreme Court held that where a statute the agency is charged with administering is ambiguous on “the precise question at issue,” courts should defer to the agency’s interpretation of that ambiguity so long as the interpretation (usually expressed in an implementing regulation) is reasonable. In *Auer v. Robbins*, the Court cemented a similar but even more deferential doctrine for use when considering agency interpretations of their own regulations. Briefly, agency interpretations of their own regulations are entitled to deference unless plainly inconsistent with the regulatory text.

Agencies point to administrative efficiencies that *Auer* deference offers, notably an agency’s ability to implement and enforce policies more flexibly and expeditiously than would be possible if notice-and-comment rulemaking were necessary. They also argue that *Auer* leads to more consistent nationwide application of existing regulations and that doing away with the doctrine could lead to disparate court holdings across the nation about what a regulation means. But many argue that this administrative flexibility in turn incentivizes agencies to draft intentionally ambiguous regulations, with the confidence that changes in policy achieved outside of rulemaking will be upheld by the courts if challenged. Meanwhile, lack of APA procedures deprives regulated parties of a meaningful opportunity to shape agency policy through the notice-and-comment rulemaking process, even while saddling the regulated with the compliance costs resulting from the policy shift. (This is, of course, as with many administrative law principles, a double-edged sword. Deregulatory interpretations can just as easily be given effect through administrative reinterpretations of existing regulations as more stringent interpretations.)

Thus, although *Auer* at first blush appears to be a logical extension of *Chevron*, the criticisms generally applied to *Chevron* deference apply to *Auer* with far greater force. While *Chevron* respects the right of agencies to apply their institutional expertise to fill gaps in the statutory schemes created by Congress, that respect is premised on Congress itself—as the lawmaking body of the United States—having directed the agencies to act through legislation. By that logic, which admittedly has many critics, *Chevron* does not divest courts of their fundamental function of interpreting the laws. Rather, at least in theory, it does no more than instruct the courts to allow agencies to fulfill the role Congress created for them. By contrast, *Auer* permits agencies to draft ambiguous regulations in the first instance and then revisit the meaning of those regulations outside of rulemaking, thus allowing agencies to change their minds long after the notice-and-comment rulemaking period has closed. So while both doctrines have strong critics, *Auer* is the more constitutionally suspect of the two.
Kisor answers the Court’s invitation

Kisor brings the various arguments for and against Auer deference into sharp focus. Petitioner Kisor served in the U.S Marine Corps from 1962 to 1966 and suffered post-traumatic stress disorder (PTSD), but the U.S. Department of Veterans Affairs (VA) denied his claim for benefits, reasoning that he had not been diagnosed with service-related PTSD. Although Kisor qualified for benefits in 2006 with new evidence of his PTSD diagnosis, the VA rejected his request to make his benefits retroactive to 1982 under VA’s interpretation of “relevant” records. The Federal Circuit sided with the VA. While finding that both Kisor and the VA posited reasonable interpretations of the word “relevant,” the court felt bound by Auer to defer to the VA’s.

Interestingly, in its brief opposing certiorari, the United States acknowledged that the time may be ripe for the Court to reconsider Auer deference, but argued that this was not the right case for it to do so because the VA would have prevailed regardless of whether the Court deferred to its interpretation of the word “relevant.” By granting certiorari, at least four justices have indicated they disagree.

Midnight approaches

The demise of Auer seems imminent. As Justice Thomas noted in Garco Construction Inc. v. Speer, Auer deference undermines “the judicial ‘check’ on the political branches by ceding the courts’ authority to independently interpret and apply legal texts.” Indeed, the frequency with which agencies invoke deference is a testament to the immense power that has accrued to agencies under Auer. Frequent commentary from individual justices pillorying Auer all but guarantees that Auer’s hours are running out.

A Green-ish New Deal?

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Political momentum seems to be building for a “Green New Deal.” Although this would add to a debt burden that was exacerbated by the 2017 Tax Cuts and Jobs Act, this is a far more important and better expenditure of federal money. But a Green New Deal should not crowd out simpler,
more effective, or fiscally prudent measures, namely a carbon tax, with some designated use of the carbon tax revenues.

A carbon tax is a unitary tax on actual carbon dioxide emissions. It can be levied upstream, at the point of extraction, refining (of oil), or distribution, or it can be levied downstream, as a surcharge at the gasoline pump or on an electricity or heating bill. Critics of carbon taxation, which include not only opponents of climate policy but many advocates of climate action, focus on the tax itself, without considering what might be accomplished by the tax revenues. That is akin to complaining about local property taxes without thinking about the schools and roads they help fund.

For carbon taxation, revenues can be used to offset the increased energy costs for the economically vulnerable. The simplest way to accomplish this is to return carbon tax revenues—without any governmental interference—to each household on a per capita or lump sum basis. That is the plan of the bipartisan Energy Innovation and Carbon Dividend Act, proposed in the U.S. House of Representatives. The end result would be that such a carbon tax “rebate” or “dividend” would cushion the shock of higher costs of gas, electricity (in some parts), and energy-intensive products like cement, chemicals, and steel. Most people probably could, if they were inclined, just turn around and spend that money continuing their carbon-intensive ways. But the incentive is for them to spend their carbon tax rebate to change their ways, like buying a more fuel-efficient car or truck.

Climate skeptics attack carbon taxation because it would be an effective deterrent to consuming fossil fuels. But some climate advocates are also skeptical about carbon taxation. It is as if some people simply cannot believe that prices change behavior, or that they change it very much. The routineness of market transactions, the millions of decisions that are made daily, render these events mundane and unspectacular, somehow falling short of the heroics needed to save us from climate change. It is also true that economists have trouble explaining how prices ripple through an economy and change behaviors throughout entire supply chains. As Cornell University economist Maureen O’Hara self-deprecatingly quipped, “we know markets work in practice, but we are not sure how they work in theory.” Maureen O’Hara, Making Market Microstructure Matter, Fin. MGMT., Summer 1999, at 83, 83. But that does not mean they don’t work; they have, in measurable ways, for centuries. Markets aren’t fancy, they don’t make for ribbon-cutting moments, and politicians do not get to take credit for them. But they do indeed work. For just about everything, it is safe to say that if the price goes up, consumption will go down. That is true of fossil fuels.

There is one feature, should Green New Deal advocates insist on spending money, that should make its way into any Green New Deal proposal: the institution of prizes for technological breakthroughs. First prominently suggested by Professor Jonathan Adler, prizes are an alternative to the patent system for technological innovation. Jonathan H. Adler, Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization, 35 HARV. ENVTL.
L. REV. 1 (2011). The idea of a prize is to provide a back-end incentive for a specific outcome, like some amount of carbon dioxide capture. This contrasts with patent protection, which protects rights to promising new ideas, regardless of outcome. The U.S. Department of Energy has awarded small prizes for small challenges, like developing affordable hydrogen fueling stations. Sir Richard Branson’s Virgin Earth Challenge is much more ambitious, offering $25 million for a “commercially viable” technology that can remove one billion carbon-dioxide-equivalent tons of greenhouse gases every year for ten years. The utility NRG has offered a $20 million prize for a technology that can convert CO₂ into a useful product, such as a building material.

Apart from what amounts to private philanthropy, prizes are rare for two reasons: upfront money must be made available, and the primary benefit is a public good—freely available new knowledge. This is the exact opposite of what is good and bad about patent protection. Awarding a patent is costless, but as we have seen in the pharmaceutical industry, it enables a patent-holder to “lock up” an idea, preventing others from exploiting that idea unless satisfactory royalties are paid. The price for a dose of insulin in the United States can be as high as $100, while it can be had for less than $10 in other countries with less robust patent protection. Price-gouging is deplorable, but not really the point. The point is that intellectual property for technologies to address climate change must be as free as possible, fertilizing as many other new ideas as possible without price barriers. There is no time for lockups.

Climate change is such a colossal problem that even suboptimal uses of taxpayer money might be better than doing nothing at all. But resources are limited, especially in a world that seems to be politically unstable, so it is still crucial to spend money wisely. What is troubling is that many seem to be pushing ahead with a Green New Deal as a defiant act of unilateralism. Inconveniently, Democrats control neither the White House nor the Senate, so alienating Republicans that are willing to work on climate change would appear to be foolish. Even if such a headstrong effort were successful, there is no time for another unproductive swing of the pendulum. The safer, bipartisan, and ultimately more productive approach is to start with a carbon tax, while adding some carefully crafted spending measures, like climate technology prizes.

The proposed WOTUS rule: How do states regulate nonfederal wetlands?

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The Trump administration announced its proposed replacement rule defining “waters of the United States” in December 2018. The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) (collectively, the “agencies”) note that, in accordance with section 101(b) of the Clean Water Act (CWA), the proposed rule would “recognize and respect the primary responsibilities and rights of States and Tribes to regulate and manage their land and water resources.” (For additional discussion of the agencies’ treatment of CWA section 101(b) in the context of this rule, see Mark A. Ryan’s article “The WOTUS Rule Repeal” in the Fall 2018 issue of Natural Resources & Environment.) In fact sheets accompanying the proposal, the agencies note that “states and tribes have existing regulations and programs that apply to waters within their borders, whether or not they are considered ‘waters of the United States.’”

Setting aside any questions about the legality of the agencies’ proposal for the time being, the number of wetlands that fall outside of federal jurisdiction is expected to increase under the proposed rule. This begs the question: What are states doing to regulate nonfederal waters, especially nonfederal isolated wetlands?

State programs

In Appendix B of the proposed rule’s Resource and Programmatic Assessment, the agencies indicate less than half the states have formal isolated, nonfederal wetlands permitting programs designed to protect isolated wetlands from dredge and fill impacts. Even when these programs exist, they vary widely in scope from state to state. Some states, like Wisconsin and Minnesota, have robust wetlands regulatory programs. Others have none. Here are a few examples.

Wisconsin’s program

Wisconsin may have one of the most robust nonfederal wetlands regulatory programs in the nation. Of the approximately five million acres of wetlands in Wisconsin, an estimated 10 to 30 percent are nonfederal wetlands under current rules. In 2001, under the authority of the public trust doctrine and its broad general police powers, Wisconsin adopted legislation to regulate discharges into nonfederal wetlands after the U.S. Supreme Court’s decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC) decision removed these waters from federal jurisdiction. Wisconsin law requires that a person obtain authorization under a general or individual permit for the discharge of dredged material or fill material into a wetland unless the discharge is exempt.

Primarily over the last decade, changes were made to the law to make Wisconsin’s nonfederal wetland program less restrictive. New laws have mandated that the state’s Department of Natural Resources issue general permits for several types of discharges, including discharges for many
purposes that do not affect more than 10,000 square feet of wetlands. New exemptions from permitting that were created in 2018 include exemptions for nonfederal “artificial wetlands” which did not exist prior to August 1, 1991, for discharges that impact less than one acre of a nonfederal “urban wetland,” and for discharges that impact less than three acres of a nonfederal “nonurban wetland.” The law now prohibits local governments from enacting ordinances with respect to these exemptions or the mitigation requirements. The legislature even created a blanket exemption from wetland permitting for discharges into wetlands in an “electronics and information technology manufacturing zone” (aka the proposed Foxconn campus in southeastern Wisconsin) if the impacts are compensated at a ratio of 2:1. The state also waived water quality certification under CWA section 401. Generally, high quality wetlands are still protected, and mitigation is often required even if the dredge and fill activity is exempt, but the recent trend has been to make it easier to fill a nonfederal wetland in Wisconsin.

Minnesota’s program

What are Wisconsin’s neighbors doing? Minnesota has two major wetland regulatory programs: the Minnesota Wetland Conservation Act of 1991 (WCA) and the Department of Natural Resources (DNR) Public Waters Work Permit Program. Between the two programs, nearly all activities occurring in wetlands in Minnesota are covered by a state or local regulatory authority. The primary requirement of the WCA, primarily implemented by local governmental authorities, is that “[w]etlands must not be drained or filled, wholly or partially, unless replaced by restoring or creating wetland areas of at least equal public value under [an approved] replacement plan.” The Public Waters Work Permit Program regulates activities occurring below the ordinary high-water level in designated public waters. Public waters generally include larger (10 acres or larger in non-municipal areas and 2.5 acres or larger in municipal areas), seasonally flooded to permanently flooded freshwater marsh-type wetlands as well as all lakes and streams. Minnesota DNR regulates these waters through public waters work permits.

Many states have limited programs

Despite Minnesota’s relatively far-reaching regulatory requirements, most states have taken a more laissez-faire approach to wetlands regulation. The majority of states rely primarily on CWA section 401 to provide input into the dredge and fill permitting process, but this only applies to waters of the United States and not to nonfederal waters. For example, Illinois does not have a state wetland program, and most state regulation of wetlands on private land occurs only through the state’s CWA section 401 authority, although the state does regulate state-funded projects and activities that impact state wetlands. Nebraska has a voluntary program for nonfederal waters. Dredge and fill activities in waters of the state, including wetlands, are subject to an anti-degradation clause. So, while the state cannot issue a permit for dredge and fill, it will send a “letter of opinion” to the applicant stating that an activity might violate state water quality standards, and the state will consult with the applicant to avoid violation of these standards.
What’s next?

Given that many states do not robustly regulate nonfederal wetlands, and states with programs seem to be interested in regulating less, any narrowing of the definition of “waters of the United States” could leave more wetlands susceptible to unregulated dredge and fill activities. In a state like Wisconsin, the current regulatory scheme will automatically continue to regulate the newly nonfederal wetlands as state wetlands. However, if the proposed rule becomes final, will more states implement programs to fill the gap?

Environmental litigation in the Trump administration: The first two years
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President Trump came to office promising to remove regulatory burdens that “unnecessarily encumber energy production, constrain economic growth, and prevent job creation.” Two years into his administration, it is difficult to generalize about the success of its deregulatory agenda in court: The administration’s environmental litigation record so far is decidedly mixed, but many of the administration’s key initiatives are not yet final. For these legacy-defining rules, the inevitable litigation has yet to begin.

The big four (power plants, federal waters, fuel efficiency, and ethanol)

Perhaps most important politically, the Affordable Clean Energy (ACE) Rule to regulate greenhouse gas emissions from power plants was proposed by then-U.S. Environmental Protection Agency (EPA) Administrator Pruitt in August 2018. When it is finalized, the new rule will replace the Obama administration’s more stringent Clean Power Plan, which the U.S. Supreme Court stayed before it could go into effect. The ACE Rule is likely to be challenged in court by environmental organizations that oppose EPA’s reversion to a traditional interpretation of the “best system of emission reduction.” The newly proposed standards could be satisfied by making efficiency upgrades within individual power plants, short of the Clean Power Plan’s anticipated shift to less carbon-intensive energy sources.

Another as-yet un-litigated initiative of the Trump administration is its proposed repeal and replacement of a 2015 rule interpreting the phrase “waters of the United States” in the Clean Water Act. The Obama EPA had enlarged its jurisdiction over “navigable waters” to include lands that contain water only when it rains. That interpretation is currently in effect in about half
the states and blocked in the other half, thanks to competing injunctions of the 2015 Obama Rule and a February 2018 Trump Rule suspending it. In December 2018, EPA and the Army Corps of Engineers proposed a new definition—inspired by Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006)—that limits “waters of the United States” to six categories of waters that are “physically and meaningfully connected to traditional navigable waters.” Environmental organizations that stand to lose an important tool for protecting wetlands from development will surely sue when the new rule is finalized.

A third signature deregulatory effort of the Trump administration is its Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, jointly proposed by EPA and the U.S. Department of Transportation in August 2018. The proposed rule’s preferred approach would freeze 2020 fuel economy and greenhouse gas standards in place through model year 2026. When the rule is finalized, California and other states will likely join environmentalists in suing to preserve the Obama administration’s increasingly stringent (and costly) standards and to defend California’s own greenhouse gas standards against the administration’s claim that they are preempted by the Clean Air Act and the Energy Policy and Conservation Act of 1975. California and other states have already petitioned for judicial review of a related Mid-term Evaluation of the old standards, but the D.C. Circuit is unlikely to conclude that report is a reviewable final agency action.

EPA has also committed to act on White House instructions to consider allowing the year-round sale of gasoline containing higher levels of ethanol and increasing transparency in the market for Renewable Identification Numbers (RINs), which fuel producers use to demonstrate compliance with the Renewable Fuel Standard. The forthcoming rule, which has not yet been proposed, is of great interest to ethanol producers, corn growers, and other biofuel feedstock producers who want the chance to compete for a bigger share of the liquid fuel market. But the rule may be opposed by petroleum industry participants, who are reluctant to see any more of their market share go to ethanol.

**Water pollution and food (but really jurisdiction)**

Although the Trump administration’s deregulatory agenda will be judged according to the success of these major environmental rules, some less important agency actions have already been adjudicated.

The administration’s wins against environmental plaintiffs include jurisdictional holdings in cases involving effluent limitations under the Clean Water Act. In *Clean Water Action v. Pruitt*, the District Court for the District of Columbia held that EPA had successfully mooted a challenge to EPA’s indefinite stay of the Obama administration’s 2015 effluent limitations for steam electric power plants. After Clean Water Action filed suit, EPA withdrew the stay and replaced it with a final rule in September 2017 that amended the Obama administration’s 2015 rule, resetting the compliance deadlines. “Because the stay was withdrawn, there is nothing for the Court to vacate, and a declaratory judgment would be an impermissible advisory opinion.”
EPA also prevailed in a subsequent challenge to its September 2017, amendment of the 2015 effluent rule. In *Center for Biological Diversity v. Pruitt*, the District Court for the District of Arizona granted EPA’s motion to dismiss on the ground that the Clean Water Act grants federal appellate courts exclusive jurisdiction over all challenges to effluent limitations.

EPA may snatch yet another jurisdictional win from the jaws of defeat in *League of United Latin American Citizens (LULAC) v. Wheeler*. In that case, the U.S. Court of Appeals for the Ninth Circuit granted a petition for review of EPA’s 2017 order denying a petition to revoke “tolerances” for the pesticide chlorpyrifos in food. Over a dissent, the panel rejected EPA’s argument that the court lacks jurisdiction under the Food, Drug, and Cosmetic Act. On the merits, the court held that EPA’s decision to maintain a tolerance for chlorpyrifos was unjustified, because the agency’s own risk assessment found evidence of neurodevelopmental damage to children, and EPA pointed to no existing evidence to the contrary. EPA petitioned for, and the Ninth Circuit granted, rehearing *en banc* on the jurisdictional question. By the time this article is published, the case will have been heard before an 11-judge panel.

**Endangered species**

The Trump administration lost a few trial court cases involving endangered species.

In *Indigenous Environmental Network v. Department of State*, the District Court for the District of Montana held that the U.S. Department of State’s approval of the Keystone XL Pipeline violated the National Environmental Policy Act and the Endangered Species Act, because the State Department’s Environmental Impact Statement did not adequately consider several factors including greenhouse gas emissions and the potential impact of oil spills on listed species. The court remanded the matter to the State Department. The intervening pipeline builder’s appeal is pending before the Ninth Circuit.

In *NRDC v. Ross*, the environmental plaintiffs persuaded the Court of International Trade to issue a preliminary injunction requiring the government to ban, pursuant to the Marine Mammal Protection Act, the importation of fish from any Mexican fishery that uses an illegal fishing technique known to kill vaquita porpoises.

And in *Crow Indian Tribe v. United States*, the District Court for the District of Montana vacated a U.S. Fish and Wildlife Service (Service) rule delisting the Greater Yellowstone grizzly bear from Environmental Species Act protection. The court held that the Service had arbitrarily and capriciously failed to evaluate the legal impact of the action on other grizzly bears in the continental United States.
Administrative delay

Although few significant merits cases have reached final judgment, the administration racked up several early losses in cases that challenged the administration’s power to delay implementation of Obama-era environmental regulations. These include South Carolina Coastal Conservation League v. Pruitt, which enjoined EPA’s two-year suspension of the 2015 WOTUS rule, Air Alliance Houston v. EPA, vacating EPA’s delay of a Chemical Disaster rule concerning risk mitigation plans for chemical plants, Piñeros y Campesinos Unidos Del Noroeste v. Pruitt, vacating EPA’s delay of a pesticides rule, and Clean Air Council v. Pruitt, vacating EPA’s stay of the methane new source performance standards for the oil and gas industry. Many of these delay cases were litigated before the Trump administration had fully staffed EPA’s Office of the General Counsel and the U.S. Department of Justice’s Environment and Natural Resources Division.

On the other hand, the administration persuaded a district court to delay adjudication of the Obama administration’s methane waste prevention rule while suspending its implementation deadlines in Wyoming v. Department of Interior. The Bureau of Land Management was working on its own proposed revision rule, and the District Court for the District of Wyoming concluded that a stay would “provide certainty and stability for the regulated community and the general public while BLM completes its rulemaking process.”

Looking ahead

The Trump administration’s environmental litigation record so far is mixed, but none of the cases that has been decided in the administration’s first two years will be remembered long. The true test of the administration’s deregulatory agenda will be the success of its signature rules on greenhouse gas controls for power plants, the interpretation of “waters of the United States,” fuel economy and greenhouse gas standards for new vehicles, and market access for higher-ethanol fuel blends. Each of these rules will rise or fall in court based on the quality of EPA’s legal analysis and the thoroughness of its regulatory process.

Cannabis environmental review and litigation

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Regulating and permitting cannabis, a newly legalized but long-established and widespread industry, has raised environmental review obligations of unprecedented scale under “state
National Environmental Policy Act (NEPA)” laws like the California Environmental Quality Act (CEQA). This article looks at emerging environmental legal risks facing both cannabis businesses seeking permits and state and local governments seeking to permit or ban commercial cannabis. This article focuses on California, but the issues occurring there are bound to occur in other states where cannabis cultivation is, or may become, legal.

**Year one of California’s regulatory program for cannabis business**

January 1, 2019, marked the first anniversary of California’s sprawling new regulatory program for commercial cannabis. After releasing three sets of (now-supplanted) “emergency regulations,” the state’s three new cannabis-licensing authorities—CalCannabis, the Bureau of Cannabis Control (BCC), and the Manufactured Cannabis Safety Branch (MCSB)—began issuing licenses. During 2018, CalCannabis issued about 6,700 cultivation licenses; the BCC issued around 1,500 licenses for retail, distribution, and other business activities; and the MCSB issued over 1,200 manufacturing licenses. Many more licenses are likely to be issued as the legal market matures. A February 2018 report by the California Growers Association estimates that CalCannabis has licensed less than 1 percent of cultivators in the state.

Local governments have been busy, too. California’s Proposition 64 reserves to them the power to decide whether and how commercial cannabis businesses may operate within their borders. Exercising this authority, many local governments are working quickly to create their own regulatory and licensing programs for cannabis, and to issue licenses so that the new, state-legal market can function.

**CEQA and cannabis**

CEQA potentially applies to all these regulatory and licensing decisions. CEQA requires public agencies to identify the significant environmental impacts of “projects” and to avoid or mitigate those impacts if feasible. “Projects” include activities undertaken by an agency (like approval of a local ordinance permitting commercial cannabis cultivation) and private activities requiring a public agency’s discretionary approval (like a license to grow cannabis commercially).

CalCannabis took a step toward making environmental review of cannabis cultivation manageable by completing a “Programmatic EIR” (PEIR). While the PEIR provides a foundation for CEQA review of California’s commercial cannabis industry, it anticipates more review in connection with further regulatory and licensing decisions, and such review has raised several potential complications.

Most notably, local governments have varied widely in their approaches to CEQA review of regulatory and licensing programs for commercial cannabis. Indeed, they have used every type of CEQA compliance document in connection with regulating or banning commercial cannabis.
For example, in issuing new cannabis regulations and individual licenses, many local governments relied on CEQA exemptions, which apply to activities found not to have substantial environmental impacts. Other agencies have prepared Negative Declarations (NDs) and Mitigated NDs in issuing cannabis laws. These documents are appropriate where there is no substantial evidence that the project may significantly impact the environment, or if impacts may be made less than significant through mitigation. Still, other local governments have prepared EIRs in creating their regulatory and permitting programs, concluding that the programs would result in significant and unavoidable impacts to environmental resources.

Some of the variety in the types of CEQA documents prepared can be explained by differences between the programs that local governments have proposed and the types of resources present locally. However, the variety in approaches to CEQA compliance also appears to be the product of differing conclusions about the environmental consequences of commercial cannabis activities. Public agencies’ varying conclusions with respect to impacts on air quality, greenhouse gas emissions, and other resources suggest as much.

More fundamentally, there is disagreement about the impacts of legalizing commercial cannabis activities relative to the baseline environmental conditions created by preexisting illegal commercial cannabis activities. Some local governments have found that banning or limiting commercial cannabis activities is not even subject to CEQA, because there is no possibility that the ordinances at issue would physically impact the environment. Such ordinances placing strict limits on commercial cannabis activities are the subjects of two CEQA challenges brought by a medical marijuana nonprofit. Union of Medical Marijuana Patients, Inc. (UMMP) v. City of Upland, 245 Cal. App. 4th 1265, 1272 (2016); UMMP v. City of San Diego, 4 Cal. App. 5th 103 (2016), review granted, 386 P.3d 795 (2017). While the courts of appeal upheld the cities’ determinations that CEQA does not apply to the ordinances, the California Supreme Court unanimously granted review of the Fourth Appellate District’s opinion in the San Diego case. Among other issues the Court may address is whether CEQA applies to San Diego’s ordinance, because it may cause reasonably foreseeable indirect physical changes to the environment.

Tension exists between the view that banning or substantially limiting cannabis business activities would be environmentally superior, on the one hand, and the conclusions underlying CalCannabis’s PEIR and many other CEQA documents prepared by local governments in creating licensing programs, on the other. For example, CalCannabis concluded that regulating and licensing cannabis cultivation would be environmentally beneficial relative to the baseline condition of widespread illegal cannabis cultivation. CalCannabis reasoned that, absent regulation and licensing, “a greater number of unpermitted cultivators would continue to operate . . . result[ing] in impacts due to noncompliance with requirements related to water use, illegal use of pesticides, waste disposal, and illegally obtained energy.”
Emerging CEQA challenges to cannabis

The complexity and scale of environmental review of the newly legalized cannabis industry has also played out in CEQA lawsuits. In addition to the UMMP cases discussed above, examples include:

- **T.C.E.F., Inc. v. Cty. of Kern**, No. F070043, 2016 Cal. App. Unpub. LEXIS 2333 (Mar. 29, 2016) (holding that a ballot measure severely restricting the location of cannabis dispensaries was not exempt from CEQA review under the “common sense” exemption in CEQA Guidelines Section 15061(b)(3) due to dispensaries’ foreseeable environmental effects);

- **SMC Marijuana Moratorium Coalition v. Cty. of San Mateo**, Case No. 18CIV00206 (San Mateo County Super. Ct., filed Jan. 12, 2018) (challenge to an ND for a law allowing for commercial cannabis cultivation that settled, leading to the county repealing the law); and

- **Mendocino Cty. Blacktail Deer Assoc. v. Cty. of Mendocino Bd. of Supervisors**, Case No. SCUKCVPT 16-67623 (Mendocino County Super. Ct., filed June 14, 2016) (challenge to use of a categorical exemption for a law creating a local commercial cannabis permitting program that settled, leading to an injunction on issuance of permits pending additional CEQA review).

Conclusion

Legalization has given rise to complex legal issues under state NEPA laws like CEQA. Notably, even if federal cannabis licensing decisions are not on the horizon, the first NEPA review of cannabis cultivation may be seen before long. For example, NEPA review of commercial cannabis operations on private land could be triggered by related Clean Water Act 404 permits or other federal approvals like rights of way to cross public lands that are needed for the operation of a proposed or existing cultivation operation.

Because NEPA and its state counterparts like CEQA are favorite litigation tools of groups opposed to a project (or an industry) moving forward, it is unsurprising that CEQA has emerged as a new front of cannabis civil litigation. As such, cannabis businesses seeking permits and local governments seeking to regulate cannabis businesses should develop proactive compliance strategies designed to reduce litigation risk.
Leading the way to post-2020: The Peru and Colombia experiences in encouraging REDD+ in light of Paris commitments

Marisa Martin and Alexandra Carranza

Marisa Martin is a senior associate at Baker McKenzie in Chicago and Alexandra Carranza is an associate at Baker McKenzie in Lima, Peru.

At the December 2018 United Nations Climate Change Conference in Katowice, Poland, countries failed to agree on rules for international carbon markets under Article 6 of the Paris Agreement, and work will continue in 2019. In the meantime, many tropical forest countries are implementing national laws to preserve their forests and valuable ecosystem services, with a view to counting these avoided emissions toward their Paris Agreement commitments.

Tropical countries designing climate policy often consider forest policy based on the significant greenhouse gas emissions contributed by land use and land use change activities. As tropical forest countries, such as Peru and Colombia, prepare for participation in carbon markets at a national level, they are paying particular attention to how one program—known as “Reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries” or “REDD+”—will fit within their national goals and their nationally determined contributions, including how to encourage private investment in REDD+. REDD+ is a mechanism for creating financial value for the carbon stored in forests by offering incentives for developing countries to invest in low-carbon sustainable development pathways and reduce emissions from forests. It is recognized by Article 5 of the Paris Agreement.

Two tropical forest countries—Peru and Colombia—are using novel approaches to incentivize sustainable forest management and REDD+ within their borders in line with national priorities and as part of the countries’ commitment to the Paris Agreement. Both countries’ laws are designed to encourage private investment in the sustainable forest management and conservation sector as well as to be flexible enough to address connections to the larger carbon market under Article 6.

Peru’s nesting approach

In April 2018, the Peruvian government enacted Law N. 30754, Climate Change Framework Law. Through this law, promoting public and private investment in climate change management is declared to be of national interest. Considering that Peru has significant potential for REDD+, and that the emissions reductions derived from the implementation of such projects will be counted toward the nationally determined contribution that Peru has agreed to pursue under the Paris Agreement, the country has incentives to promote public and private investment in REDD+.
Peru leads the way on REDD+ nesting\(^1\) pathways for projects, opening the door for sustained and scalable financing for nationally determined contributions. Peru is beginning to align the REDD+ projects inside national protected areas, initially implemented under a voluntary standard (known as the “Verified Carbon Standard” or “VCS”), with the national forest reference emissions level communicated to the United Nations Framework Convention on Climate Change in 2016.\(^2\) This recognition effectively safeguards REDD+ projects against any potential double counting for purposes of Peru’s nationally determined contribution, which is a key requirement for the Article 6 market mechanism and, more broadly, for the tradability of mitigation units in other programs like the Carbon Offsetting and Reduction Scheme for International Aviation. Peru’s efforts to harmonize REDD+ projects with national accounting only addresses certain kinds of credits at this point. However, Peru has launched an additional process to determine how to harmonize nested REDD+ projects on a more long-term basis in preparation for accounting for REDD+ with its Paris Agreement commitments.

**Colombia’s carbon tax**

The government of Colombia has passed several laws and regulations focused on climate change. The Colombian Climate Change Law, Law N. 1931, was enacted in July 2018. As in the case of Peru, this law’s purpose is to set forth general provisions and principles for climate change management.

However, one of the most relevant differences between these two legal frameworks is that Colombia has included in this law the basis for the development of an emission trading program (or “tradable quotas of GHG emissions”). While such program development is still pending, the Colombian Ministry of Environment and Sustainable Development is expected to establish a number of quotas to be traded that are compatible with the national goals of emission trading, and also determine the applicable conditions for trading.

Also, in December 2016, the Colombian government enacted the Colombian Carbon Tax Law, Law N. 1819, which created a carbon tax. This law came into force on January 1, 2017, and applies to the sales and imports of all fossil fuels, including all petroleum derivatives, except for coal. The tax is set taking into consideration the CO\(_2\) emission factor established for each fuel (e.g., natural gas, kerosene and jet fuel, fuel oil, among others) for each energy unit (in terajoules) according to the volume or weight of the fuel.

The tax is currently at US $5 (which is the equivalent of $15,000 Colombian pesos) per ton of carbon dioxide equivalent (tCO\(_2\)e), but this amount will increase annually until it reaches around US $11 per tCO\(_2\)e (or the equivalent of 1 Colombia Tax Unit, which was set to $33,156 Colombian pesos in 2018).

\(^1\) A “nested approach” or “nesting” means an “accounting, management and incentive system established to simultaneously enable REDD+ activities led by various actors working at national and subnational levels.” Forest Trends and Climate Focus, *Nested Projects and REDD+*, at vii.

\(^2\) For more detail, see *Encouraging Private Investment in REDD+ in the Post-2020 Paris Agreement World* by Marisa Martin, Alexandra Carranza, Edit Kiss, and Juan Carlos Gonzalez Aybar.
The Colombian Carbon Tax Law was complemented by its Regulation, approved on June 1, 2017, by Decree N. 926, which establishes an offset program. Under the program, entities covered by the tax can be “carbon neutral” and exempted from the tax if they buy sufficient carbon credits equal to their emissions. Credits must be based on specified methodologies, including those utilized by the Clean Development Mechanism or certain third-party standards (e.g., VCS).

Allowable offsets are those generated after January 1, 2010, and that are the result of a greenhouse gas mitigation initiative implemented inside Colombia, such as REDD+, under the accepted methodologies. The Colombian carbon tax program has encouraged the development of REDD+ projects in the country by providing demand for the credits from such projects. In addition, Colombia is considering how to tie this domestic offset program into its national commitments under the Paris Agreement, with an emphasis on how to avoid double counting.

Test cases for other REDD+ countries

The experiences of Peru and Colombia in implementing these climate laws will be closely watched by other tropical forest countries grappling with how to promote forest conservation and ecosystem protection and encourage private investment while also achieving and increasing the ambition of their nationally determined contributions under the Paris Agreement. Countries that fail to determine how REDD+ projects can continue under national-level accounting risk encountering issues with potential double counting in their nationally determined contributions. Consequently, they may endanger private sector investment in REDD+ projects in the event the projects are not appropriately accounted for at the national level. Private sector involvement and investments will be critical in many forest-rich countries to achieve those countries’ domestic targets and eventually to help raise global ambition to meet the Paris Agreement goals.

In Brief
John R. Jacus

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

CERCLA, RCRA

The U.S. District Court for the District of New Jersey granted summary judgment in favor of the United States in a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA) case brought by the successor to a former wartime chemical plant operator, PPG Industries, Inc. (PPG). PPG argued the United States was liable because it exercised substantial control over the chromium materials manufacturing at the site during World War I and World War II, and, therefore, was partly responsible for the disposal of CERCLA hazardous substance at the site in question during those wars. The court held that the United States could not be held liable under CERCLA based on its general regulation and influence of the industry and the plant during World War I and World War II. In considering CERCLA’s definition of operator and the U.S. Supreme Court’s analysis in *United States v. Bestfoods*, 524 U.S. 51 (1998), the district court concluded that the government’s wartime regulatory control over the chromium chemical facility did not support a finding of operator liability. Although the government controlled the supply and price of chromite ore and the price of finished products, participated in a labor dispute at the facility, and visited the facility, the government never directly managed or conducted the plant’s operations regarding pollution, never entered into a proposed sludge-purchase subsidy, and never seized the plant. The court also found no basis for CERCLA arranger liability of the United States, since even if the government was aware that a certain process would increase the amount of pollution, knowledge alone is insufficient for arranger liability. Finally, because the government was not a CERCLA operator of the site, and never actively managed or disposed of hazardous waste at the site, the court concluded that there was no basis to find liability under RCRA, either.

**Clean Air Act, preemption**


A Minnesota Court of Appeals panel majority has held that Clean Air Act (CAA) claims by the state of Minnesota against Volkswagen for illegally installing emissions-control-defeating software in both new and used vehicles sold to consumers within the state were conflict preempted. The majority held that a conflict-preemption determination was appropriate because EPA has substantial authority to regulate motor vehicle manufacturers’ conduct nationwide, even after the vehicles are sold to the end user. Minnesota had argued that states retain authority under the CAA to regulate motor vehicles in use, while the federal government exclusively regulates new vehicles, but the court disagreed. The dissenting opinion agreed with the state, asserting that state governments retain their authority to regulate used vehicles, including the installation of defeat devices therein, citing the CAA’s preemption and savings clauses.

*In re Anadarko Uintah Midstream, LLC*, NSR Appeal No. 18-01, 17 E.A.D. 656 (Nov. 15, 2018).

The Environmental Appeals Board (EAB) of the U.S. Environmental Protection Agency (EPA) denied a petition by an environmental nongovernmental organization challenging EPA Region
8’s issuance of six synthetic minor, new source review permits to Anadarko Uintah Midstream, LLC (Anadarko). The permits were for six natural gas compression facilities within the boundaries of the Uintah and Ouray Indian Reservation, in Uintah County, Utah. Petitioners argued that EPA had improperly failed to require an air quality impact analysis (AQIA) under applicable regulations. EPA issued the permits pursuant to the Federal Minor New Source Review Program in Indian Country, 40 C.F.R. §§ 49.151–.161. Anadarko requested the permits in order to incorporate the requirements of its 2008 Clean Air Act Consent Decree with EPA into the six federally issued permits, so that the decree may then be terminated as to the facilities in question. Because the facilities were operating pursuant to the 2008 Consent Decree, which effectively limited the facilities’ potential to emit to below major source levels, EPA treated the facilities as existing synthetic minor sources. On appeal, petitioner WildEarth Guardians argued that EPA violated the Tribal Minor New Source Review rules by inappropriately concluding that issuance of the six permits did not constitute permitting actions warranting an AQIA pursuant to 40 C.F.R. § 49.154(d). EPA concluded that the transfer of emissions and operational requirements from the 2008 Consent Decree to minor source permits for the six facilities did not result in any construction or modification, and thus section 49.154(d) was not applicable, and in any event, is permissive, so EPA had discretion to determine that an AQIA was not warranted for these facilities. Thus, because the petitioner did not demonstrate clear error or an abuse of discretion in the EPA’s determination not to require an AQIA for these facilities, the EAB denied the petition.

Climate change litigation


There are several recent decisions regarding this long-pending case awaiting trial before the U.S. District Court for the District of Oregon, the most successful of numerous climate change suits filed by (and on behalf of, children and young adult plaintiffs) Our Children’s Trust against the federal and state governments on various theories, including the public trust doctrine. Based on a 2016 ruling by the U.S. District Court for the District of Oregon denying the federal government’s motions to dismiss filed on the ground that there is no constitutional right to a pollution-free environment, and on political question and foreign policy grounds, this case was pending a trial scheduled for October 29, 2018, until interlocutory appeals were again sought by the federal government. Those appeals included a decision of the U.S. Supreme Court lifting an administrative stay it had issued last October 19, 2018, 10 days before trial was scheduled to begin. *In re United States*, No. 18A410 (U.S. Nov. 2, 2018). The federal government had requested a full stay of the trial proceeding and sought a writ of mandamus directing the federal district court to dismiss the suit. The Supreme Court denied the petition and lifted the administrative stay briefly imposed, noting that the petition for mandamus did not have a fair prospect for success since the relief being sought may still be available from the U.S. Court of...
Appeals for the Ninth Circuit. Although the Ninth Circuit had previously denied the government’s petitions for mandamus, it did so without prejudice.

Two days after the Supreme Court lifted its prior administrative stay of the Juliana case, the Ninth Circuit partially granted another petition by the federal government and issued a stay of the case while it considers a renewed petition for a writ of mandamus directing the Oregon federal district court to dismiss the action, and granting the plaintiffs 15 days to respond to the renewed government petition. The Ninth Circuit panel gave the federal district judge in the case the same time to respond to the petition, if desired. The Ninth Circuit also urged the district judge to promptly resolve pending government motions to reconsider her prior decisions not to certify for interlocutory appeal her denial of the government’s motion to dismiss in 2016, and her October 2018 denial of motions for summary judgment and judgment on the pleadings. On November 21, Judge Aiken issued an order certifying the case for interlocutory appeal to the Ninth Circuit, reconsidering her prior denial of such certification in light of the recent rulings by the Supreme Court and the Ninth Circuit.

**Sinnok v. State, No. 3AN-17-09910 C1 (Alaska Super. Ct. Oct. 30, 2018).**

Minor children plaintiffs filed a petition with the Alaska Department of Environmental Conservation requesting that it issue regulations aimed at creating a stable climate system. The agency denied the petition on September 27, 2017. The plaintiffs then filed suit challenging the denial of their petition for proposed regulations as a violation of Alaska’s Administrative Procedure Act (APA), and seeking injunctive relief ordering the state to prepare an accounting of carbon emissions and create a climate recovery plan, as well as a declaratory ruling that the state’s actions violated the plaintiffs’ fundamental rights to a stable climate system. The state of Alaska moved to dismiss on political question and prudential grounds, relying on the holding in Kanuk v. State Department of Natural Resources, 335 P.2d 1088 (Alaska 2014). Although plaintiffs attempted to distinguish the holding in Kanuk because they were challenging the state’s affirmative energy policy, the court disagreed, noting that the plaintiffs had failed to cite any specific state energy policy that has directly contributed to climate change and did not show how the permitting of oil and gas development and fossil fuel use in general are evidence of any breach of legal duty on the part of the state. Since plaintiffs’ requested injunctive relief would create a policy where none now exists, granting it would violate the separation of powers, so the court dismissed the action as involving nonjusticiable political questions. Also, the court ruled that plaintiffs failed to support their position that individuals have a constitutional right to a stable climate system, noting that neither the Alaska Supreme Court nor the U.S. Supreme Court had issued such a holding, and in the absence of such recognition of the alleged constitutional right, there is not a definite and concrete controversy to be adjudicated. Finally, with respect to the Alaska APA claim, the court held that the agency had timely responded to each point raised by plaintiffs in their petition for rulemaking, and supplied well-reasoned analysis with supporting citations to explain why it could not implement plaintiffs’ proposed regulations. Accordingly, the court granted the state’s motion to dismiss.
A unanimous Colorado Supreme Court reversed a decision of the Colorado Court of Appeals that the Colorado Oil & Gas Conservation Commission (Commission) had improperly denied a petition to adopt new climate change–related regulations. In 2013, minor children filed the petition to adopt regulations that would have precluded issuing permits to drill oil and gas wells unless it could occur in a manner that does not contribute to climate change and does not cumulatively with other actions impair Colorado’s environment and adversely impact human health. Following extensive public comment and a hearing, the Commission unanimously decided not to engage in rulemaking on the petition. The Commission reasoned, among other things, that the proposed rule would be inconsistent with its authority under the Colorado Oil and Gas Conservation Act (the “Act”), that it was already working with the Colorado Department of Public Health and Environment (CDPHE) to address the issues raised, and other Commission priorities took precedence over the proposed rulemaking. The child petitioners appealed the Commission’s action to state district court and the Commission was upheld. The plaintiffs then appealed the district court ruling and a majority of the appellate panel reversed the district court, focusing on particular language in the Act’s legislative purpose, which referred to fostering the development of oil and gas “in a manner consistent with” protecting public health and the environment. Martinez v. Colo. Oil & Gas Conservation Comm’n, 2017 WL 1089556 (Mar. 23, 2017). The Commission appealed to the Colorado Supreme Court, which reversed the appellate court, finding that (1) review of a denial of petition for rulemaking is limited and deferential, (2) the language of the legislative declaration did not override the clear balancing of interests required of the Commission by the Act, including the continued development of oil and gas resources and the protection of public health and the environment, and (3) the Commission’s denial of the petition for rulemaking was based on a proper understanding of its statutory authority and was amply supported by the Commission’s findings, and, therefore, did not constitute an abuse of discretion.

Clean Water Act

Sierra Club v. Con-Strux, L.L.C., 911 F.3d 85 (2d Cir. 2018).
The Sierra Club brought an action under the Clean Water Act (CWA) against a recycler of demolished concrete, asphalt, and other building materials salvaged from demolition debris. Plaintiff alleged that defendant Con-Strux, LLC (Con-Strux) was engaged in industrial activity that is subject to CWA permitting and that defendant had obtained no such permit. The district court granted defendant’s motion to dismiss on the ground that one Standard Industrial Classification (SIC) code not within the scope of industrial activity subject to CWA permitting that applies to Con-Strux predominated over another SIC code that also admittedly applied to Con-Strux and is included within the scope of industrial activity requiring CWA permits. Sierra Club, Inc. v. Con-Strux, L.L.C. 2017 WL 6734184 (E.D.N.Y. Dec. 29, 2017). On appeal, the U.S. Court of Appeals for the Second Circuit reversed the district court, holding that although certain brick, stone, and construction material wholesalers covered by SIC code 5032, which code is not...
included in the scope of “industrial activity” subject to CWA permitting, that noncoverage did not mean that the defendant’s business involving scrap and waste materials and their sorting and wholesale distribution under a separate SIC code 5093 was excused from compliance with CWA permitting requirements. Accordingly, the court of appeals reversed and remanded for further proceedings.


The U.S. District Court for the Central District of Illinois dismissed the claims of an environmental nongovernmental organization alleging that defendant Dynegy Midwest Generation’s (Dynegy) Vermilion Power Station was violating the Clean Water Act (CWA) because pollutants in its fly ash waste disposed in permitted ponds at the facility were seeping into groundwater and from there on to a navigable riverbank. The plaintiff brought a CWA citizen suit against Dynegy relying on conditions in the facility’s CWA discharge permit establishing specific outfalls that did not include the areas of asserted seepage and prohibiting the entry of sludges and other wastes into waters of the state. Dynegy filed a motion to dismiss for lack of subject matter jurisdiction relying on *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994) (*Oconomowoc*), in which the U.S. Court of Appeals for the Seventh Circuit ruled that the CWA does not regulate discharges of pollutants to groundwater. The district court rejected plaintiff’s attempt to distinguish *Oconomowoc*, holding that discharges from artificial ponds into groundwater are not governed by the CWA, even if there is a hydrological connection between the groundwater and navigable waters of the United States. Plaintiff’s further attempt to retain its claim of alleged permit violations was also rejected by the district court, which observed that plaintiff could not “bootstrap a complaint into federal court” for a discharge not within the scope of the CWA simply by alleging that a discharge violates a permit condition.

*Editor’s note:*

The U.S. Supreme Court granted certiorari to review a Ninth Circuit decision holding that discharges to groundwater that was hydrogeologically connected to a navigable water could be regulated by the Clean Water Act. The case is: *County of Maui v. Hawai‘i Wildlife Fund*, No. 18-260, *cert. granted* 2.19.2019. The case will likely be heard in the Court’s October 2019 Term.

**Emergency Planning and Community Right to Know Act**


Plaintiff filed a citizen suit in U.S. District Court for the District of Arizona under the Emergency Planning and Community Right to Know Act (EPCRA) against the defendant Hickman’s Egg Ranch alleging failure to report emissions of ammonia to the environment from poultry waste. Although recent farm legislation eliminated the need for the defendant to report such emissions...
under EPCRA after 2018, it was undisputed that reports were not filed as required for prior years, and were then submitted late. Despite the defendant’s clear liability, and several years of time out of compliance with the reporting requirements for two different facilities, the district court chose not to impose the maximum penalty of $25,000 per facility. Instead, the court imposed $1,500 per facility in penalties, in light of (1) the lack of impact on emergency responders from the failure to report, (2) the defendant’s history of compliance, (3) the absence of economic benefit from failing to report the emissions, (4) the defendant’s much earlier one-time notice to EPA of the emissions, and (5) the defendant’s inability to pay substantial penalties and remain in business, among other factors. Subsequent to this decision, plaintiff filed a motion for reconsideration which was granted in part in an amended decision, resulting in revised findings of fact and conclusions of law, and the entry of judgment in plaintiff’s favor, but leaving the penalty at $3,000 for the two facilities.

**Endangered Species Act**


The U.S. Supreme Court vacated a U.S. Court of Appeals for the Fifth Circuit’s decision involving the U.S. Fish and Wildlife Service’s (FWS) designation of critical habitat for the endangered dusky gopher frog. The Fifth Circuit had affirmed FWS’ decision to protect from development a 1,500-acre area in Louisiana owned by Petitioner Weyerhauser and others by designating it as “critical habitat,” holding that the term “critical habitat” contained no habitability requirement, and that FWS’ decision not to exclude the property in question from the habitat designation was committed to agency discretion and, therefore, unreviewable. The Supreme Court rejected the Fifth Circuit’s ruling on the issue of habitability, holding that only habitat of a species at the time of listing may be subject to such designation by FWS, and remanding to the Fifth Circuit for further consideration of arguments contingent upon the term “habitat,” which is not defined in the Endangered Species Act. The Court then noted the Administrative Procedure Act’s presumption of reviewability and, relying on *Bennett v. Spear*, 520 U.S. 154 (1997), held that the Secretary of the Interior’s ultimate decision to designate or exclude property from critical habitat, which must consider economic and other impacts, is reviewable for an abuse of discretion. The Court therefore remanded the question of whether FWS’ assessment of the costs and benefits was flawed in a way that rendered its decision not to exclude the property at issue arbitrary, capricious, or an abuse of discretion.

**FLPMA, standing, ripeness**

*Southern Utah Wilderness Alliance v. Burke*, 908 F.3d 630 (10th Cir. 2018).

The U.S. Court of Appeals for the Tenth Circuit has held that an appeal by the state of Utah of a federal district court’s approval of a Federal Land Policy and Management Act (FLPMA) settlement between certain environmental nongovernmental organizations (NGOs) and the U.S.
Bureau of Land Management (BLM) was not ripe for review, and dismissed the case for lack of subject matter jurisdiction. At issue was a settlement resulting from the NGOs’ prior challenge of six resource management plans and associated travel management plans adopted by BLM. Utah intervened in the federal district court action and alleged that the settlement between plaintiff NGOs and BLM illegally codified interpretative BLM guidance, impermissibly bound the BLM to a past administration’s policies, infringed on valid property rights on federal lands, and violated a prior BLM settlement, but the district court approved the settlement. Utah appealed to the Tenth Circuit alleging that the settlement conflicts with a prior BLM settlement, currently pending litigation and several federal statutes, including FLPMA and the Administrative Procedure Act. The Tenth Circuit did not address the merits of Utah’s allegations. Instead, the Court held that Utah’s claims were premature because the settlement merely provided criteria for BLM to consider as it develops plans in a complex regulatory scheme that may or may not create de facto wilderness or may impermissibly consider guidance that has been rescinded or ignore future substantive rules. Thus, only when BLM finalizes plans covered by the settlement may a court address the substantive legal arguments raised by Utah.

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 longtime 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.

Let me begin by addressing the 800-pound gorilla in the room. We know that the rollout of the new ABA website has presented a number of challenges. Even I was denied access to my ABA account for more than a month. I have heard stories about your frustrations gaining access to the website or attempting to register for events. I share your frustration and pain. We believe the situation is getting better. The ABA has recently hired outside experts to help troubleshoot what we all hope will be the remaining technical issues. An improved website is one of the keys to the ABA’s successful implementation of its New Membership Model. If you have been hesitant to go back to the website, please do so and try it again. And feel free to contact Zoya Ali on the Section’s staff, the ABA Member Service Center, or me if you continue to experience technical difficulties.
Upcoming conferences

I trust that you have made plans to join us at our two exciting upcoming conferences—our 37th Water Law Conference (March 26–27) and our 48th Spring Conference (March 27–29), both at the Grand Hyatt Denver.

At the Water Law Conference, join us for a Special Masters keynote interview with Deborah E. Greenspan of Blank Rome LLP, a Special Master for the Flint, Michigan, water cases, and Kristin A. Linsley of Gibson Dunn, a Special Master for South Carolina v. North Carolina, Supreme Court Original Jurisdiction No. 138. Other conference highlights include sessions on impacts to freshwater resources from drought and sea level rise; NPDES permits for discharges carried by groundwater; the Walker River/Walker Lake litigation; litigating, negotiating, and implementing tribal water settlements in the United States; and the “Culverts case.”

We have a premier lineup of keynote speakers for the Spring Conference, including the administrator of the U.S. Environmental Protection Agency, Andrew Wheeler; the attorney general for the State of Colorado, Phil Weiser; and the global senior director for Sustainability and Alcohol Policy at Molson Coors Brewing, Kim Marotta. Our substantive panels will cover a variety of timely topics, including regulatory and litigation developments involving emerging contaminants (such as per- and polyfluoroalkyl substances—PFAS), the current state of cooperative federalism on the ground, how the composition of the courts is expected to impact environmental, energy and resources law, streamlined permitting under the National Environmental Policy Act, and the continuing evolution of Clean Water Act jurisdiction. We will have a number of networking events and look forward to seeing you in the Mile High City!

We also want you to mark your calendars for two one-day conferences to be held June 11 and 12 at the Ritz Carlton, Atlanta. The Section will be hosting a Region 4 conference, followed by a one-day Master Class, “Complex Environmental Liability Resolution: State of Art Strategies from Superfund to Brownfields.” The topics will range from regional air, waste, and water issues in the southeast region, to allocation strategies in Superfund cases, to brownfields case studies, and implementation of the EPA Superfund Task Force Reforms. These will be top-notch programs, with high-level speakers, in a very interactive format. We hope that you will plan to join us in Atlanta.

Climate change and the World Justice Project

The Section has elected to propose an update of the ABA policy on climate change (08M 109) that was adopted by the ABA House of Delegates (HOD) in 2008. The updated resolution and report to be presented to the HOD at the 2019 ABA Annual Meeting will acknowledge the need to recognize climate change as a pressing national and international issue and to take action. A special task group is feverishly working on this effort and intends to develop a series of podcasts...
and/or webinars to support the proposed resolution. Let me know if you are interested in working on this effort.

The Section is also continuing its work on the World Justice Project. In April, we will be sending a delegation to The Hague to demonstrate the Section’s continued support for the environmental rule of law initiative (eROLI). We will continue to report back to the Section’s members on the results of these efforts.

The New Membership Model and the SEER Essentials CLE webinar series

In conjunction with the planned rollout of the ABA’s New Membership Model, the Section has launched a SEER Essentials CLE webinar series, starting with programs on environmental due diligence, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 101, Toxic Substances Control Act (TSCA) reform, waters of the United States (WOTUS) 101, and National Pollutant Discharge Elimination System (NPDES) permitting. If you are interested in proposing a SEER Essentials webinar topic, please contact one of our virtual learning co-chairs (Blaine Early, Jesse James, or Holli Feichko).

Increasing membership is the key to our future. The Section will be launching targeted membership drives in the near future. Our membership officer, Jeff Dennis, has designated six regional Membership Team Captains for this effort. Please support this effort in every way that you can.

Concluding thoughts

Finally, I cannot help but note ABA President Bob Carlson’s recent message regarding the importance of civility in the profession. In these challenging times, facing the longest government shutdown in history, and a divided government, this is a very important message to keep in mind. Let’s try to ignore the background noise, keep calm, and carry on.

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.

Tom Bloomfield has joined Kaplan Kirsch & Rockwell as a partner in the firm’s Denver office. Bloomfield was previously an attorney with two other law firms, as well as an assistant regional counsel for Region 9 of the U.S. Environmental Protection Agency. His practice includes...
industrial and public entities; counties, cities, and towns; utilities; the state of California; and several California state agencies. Bloomfield advises clients in complex environmental disputes involving administrative law, public policy, and litigation, and negotiates consent decrees, environmental cleanup documents, and other environmental settlements. In Colorado, he has played a pivotal role in the most significant state air quality and climate change rulemakings. These accomplishments include the first statewide rules to control methane from oil and gas operations, the groundbreaking Clean Air Clean Jobs Act rulemakings, and the state’s adoption of low emission vehicle standards. Bloomfield has been recognized as a leading national expert on financial assurance issues, environmental insurance, fixed-price contractual arrangements, and alternative financing approaches for public projects.

**Ryan J. Carra** has been named a principal of Beveridge & Diamond PC in its District of Columbia office. Carra uses his technical background to counsel clients on environmental regulatory issues in the chemicals, products, and energy sectors. His experience includes advising clients on the Toxic Substances Control Act, including the results of the act’s 2016 reform. Carra focuses on advising product manufacturers, retailers, and other clients on extended producer responsibility, waste classification, chemical hazard classification, advertising and labeling, chemical notification requirements, and product materials restrictions, both domestically and abroad. Carra will speak at the Section’s 48th Spring Conference on the effect of international regulations on product stewardship and the consequences for corporate transactions and integrated supply chains.

**Mark Christiansen** has joined the energy and environmental litigation law firm of Edinger Leonard & Blakley PLLC in Oklahoma City. Christiansen’s legal practice primarily involves the representation of oil and gas producers and purchasers, as well as certain other sectors of the energy industry, in domestic litigation, including the defense of proposed class action lawsuits of every size. He also counsels energy companies concerning select issues in energy law, regulations, and transactions. Christiansen is a former Council member and former chair of two of the Section’s energy committees. He currently serves as the *Year in Review* vice chair for the Section’s Oil and Gas Committee and the Section’s Energy and Natural Resources Litigation Committee.

**Sarah Clark** has become the director of Legislative Affairs for the Pennsylvania Department of Transportation. Clark was formerly the director of Legislative Affairs for the Pennsylvania Department of Environmental Protection. She is the co-chair of the Section’s Special Committee for State Bar Coordination and Engagement, a mentor in the Section’s Leadership Development Program, and a vice chair of the Section’s Fall Conference (2019, Boston).

**John Cossa** has been elected counsel in Beveridge & Diamond PC’s Washington, D.C., office. Cossa focuses his practice on development of energy, infrastructure, and natural resources on federal lands and the Outer Continental Shelf. He counsels oil and gas, mining, pipeline, and renewable energy companies and trade associations on federal regulatory initiatives, and
compliance with operational, environmental, safety, and royalty regulations. Cossa also represents clients in administrative proceedings and judicial appeals of regulations, notices, and orders of the various bureaus of the U.S. Department of the Interior. He currently serves as the co-chair of the Section’s Marine Resources Committee.

**Lena Golze Desmond** has joined Drift Marketplace, Inc., as director of Regulatory Affairs & Advocacy. Golze Desmond will be the point person for regulatory compliance of Drift’s current green products as well as the rollout of new projects, and Drift’s New York lead for building its network within the larger “green” community. Previously, she was an associate with Feller Law Group, PLLC, a Brooklyn-based law firm specializing in retail energy and related transactions. Golze Desmond is the *Year in Review* vice chair for the Section’s Energy Infrastructure, Siting, and Reliability Committee.

**Alexandra Dapolito Dunn** is the new assistant administrator of the Office of Chemical Safety and Pollution Prevention of the U.S. Environmental Protection Agency (USEPA). Dunn previously served as USEPA’s Regional Administrator for Region 1 (Boston). Before joining USEPA in 2018, she was the executive director and general counsel for the Environmental Council of the States and is a former executive director and general counsel for the Association of Clean Water Agencies. Through 2017 Dunn was a member of the executive committee and board of directors of the Environmental Law Institute and of the board of regents of the American College of Environmental Lawyers. She is a fellow of the American Bar Foundation. Dunn has served as an associate adjunct professor of the American University Washington College of Law, a lecturer in Law at the Catholic University of America’s Columbus School of Law, and an adjunct professor at Pace University’s Elisabeth Haub School of Law. She has served with the Section for many years, including as Section chair in 2012–2013 and a past chair of the Section’s World Justice Task Force. Dunn has also been a member of the ABA’s Presidential Task Force on Sustainable Development.

**Rosemary E. Hambright** has left the Public Utility Commission of Texas to become a Drapers Scholar and LL.M. Candidate in Energy and Natural Resources Law at Queen Mary University of London. Hambright has been active in the Section, beginning as a law student at William & Mary Law School.

**Taylor Hoverman** has joined the U.S. Environmental Protection Agency as the policy counsel to the assistant administrator in the Office of Land and Emergency Management. Hoverman was previously the associate counsel at the American Fuel & Petrochemical Manufacturers. She is a co-chair of the Section’s Special Committee for Young Lawyers and a class member mentor for the Section’s Leadership Development Program.

**Peter Hsiao** has joined King & Spalding as the partner heading the firm’s West Coast environmental, health, and safety practice. Hsiao was previously a partner at Morrison & Foerster LLP in Los Angeles. He focuses his practice on litigating cases over a wide range of
environmental issues, including air and water pollution, hazardous waste, natural resources and land use planning, and advising companies on environmental compliance. Hsiao has been lead trial counsel in several multimillion lawsuits, including the $140 million cleanup of San Francisco International Airport and a $100 million settlement against the Los Angeles Department of Water and Power for particulate air pollution from the Owens Dry Lake bed.

**Daniel B. Schulson** has been named a principal of Beveridge & Diamond PC in the firm’s Washington, D.C., office. Schulson represents clients in enforcement proceedings and provides counsel on regulatory compliance, permitting, due diligence, audits, and rulemaking. He also has unique experience with court-appointed monitorships. Schulson has focused primarily on air pollution regulation, for both mobile and stationary sources, and environmental issues in the agricultural sector.

**Stacey Sublett** has become a principal of Beveridge & Diamond PC in the firm’s Washington, D.C., office. Sublett represents and counsels clients in internal investigations, environmental enforcement, product stewardship, right to repair, and transboundary movement of waste. She also counsels clients regarding corporate social responsibility, reporting of sustainability programs and actions, and implementing environmental justice policies. Sublett is the co-chair of the Section’s Membership Diversity Enhancement Program.

**Nicole Weinstein** is now a principal in Beveridge & Diamond PC’s New York office. Weinstein advises and represents clients as to liability in contaminated sites lawsuits and regulatory proceedings. She also focuses on insurance proceeds recovery and related environmental litigation. Weinstein co-chairs the firm’s practice groups for insurance recovery and for Superfund, site remediation, and natural resource damages.

**Graham Zorn** is now a principal at Beveridge & Diamond PC in the firm’s Washington, D.C., office. Zorn’s focus for clients is environmental, toxic tort, and product liability litigation. His experience includes representation and advising on a series of complex products liability and toxic tort cases related to alleged groundwater contamination, and litigation over lead in drinking water. Zorn represents individual businesses, trade associations, and municipalities in litigation as well as in compliance, enforcement, and counseling matters involving the Clean Air Act, the Clean Water Act, CERCLA, and other state and federal environmental statutes.