**Trends May/June 2020**

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Corporate social responsibility in an era of COVID-19
Roger Martella

Roger Martella is a career environmental and climate change attorney who has worked in government, private practice, and in-house. He is co-editor of the upcoming book, Corporate Social Responsibility—Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century, which will be published in early spring 2020 by Wolters Kluwer. The views expressed herein are strictly the author’s and not any former or current clients and or employers.

For half a century, corporate social responsibility (CSR) has served as the key vehicle for measuring and reporting a company’s broader impacts to the environment and for social accountability to stakeholders, investors, and the public. The year 2019 set the stage for a significant CSR transformation in the environmental realm, to some extent filling the gap resulting from a lack of progress on environmental and climate change law. In turn, 2020 began with momentum to turn 2019’s foundational exercises into action.

Then the COVID-19 pandemic arose. By the end of 2020’s first quarter, the world’s economy rapidly shifted from growing to preserving business. Keeping employees safe, rapidly retooling resources toward the global fight against the pandemic, and preserving core operations appropriately captured the full bandwidth of corporate leaders. These priorities will define 2020.

Yet, despite these challenges, CSR will advance in 2020, even if it takes a different course than anticipated. If 2019 was a year of a renewed focus on CSR, 2020 will be a year of redirecting CSR initiatives, with 2021 and beyond resetting the future of CSR. This article takes readers through that transition.

2019: Renewed commitments to CSR

CSR traces its roots to 1950s and 1960s concepts of assessing the broader impacts of companies on societies. CSR has evolved to encompass more specific concepts relating to Environment, Sustainability, and Governance (ESG); human rights; labor; conflict minerals; supply chain; and other topics. Environmental aspects of CSR and ESG measure, inter alia, a company’s environmental footprint from its rooftops through its supply chain and, increasingly, the end use of products it manufacturers. T. Clare, Environmental, Social, Governance (ESG): Why ESG is the next big thing for environmental lawyers, 30 Envtl. L. & Mgmt. 80, 81 (LawText 2018). Environmental CSR and ESG take into account, for example, the company’s impacts on the land—through the production of pollution and waste—as well as on climate and biodiversity. Metrics that track greenhouse gas emissions, recycling, and water use help investors and other stakeholders weigh a company’s environmental performance. Id.
Historically, CSR concepts have been largely voluntary, with the recourse being public shaming for failing to disclose impacts and metrics. CSR traditionally has focused on companies’ impacts on society and less on the opportunities that companies have to ameliorate society’s challenges more generally. However, 2019 was a key year on the transition from CSR being a “nice to do” to a “should do” and, ultimately, a “must do” philosophy. Three developments represented this heightened momentum.

First, 2019 sought to modernize outdated reporting methodologies. Various groups, such as the Global Reporting Initiative, the Task Force on Climate-related Financial Disclosures, and the Sustainability Accounting Standards Board, advanced sometimes complementary, sometimes competing, methodologies to track issues of growing importance, such as greenhouse gas emissions across product life cycles, conflict minerals, and supply chain metrics. While the outcome is unresolved, momentum is moving toward more relevant and uniform disclosures.

Second, investors elevated the role of CSR for decision-making in C-suites and boards. Investment firms made several announcements regarding the types of companies they would and would not invest in, increasingly centered around CSR considerations. Activist investor groups presented more than 75 climate-related shareholder proposals in 2019, up from 17 in 2013. G. Rubin, Show Us Your Climate Risks, Investors Tell Companies, Wall St. J. (Feb. 28, 2019).

Third, companies themselves advanced the long-standing CSR debate about focusing on opportunities to solve bigger challenges. In August 2019, the Business Roundtable proposed to “Redefine[] the Purpose of a Corporation” to include classic CSR concepts such as “[s]upporting the communities in which we work . . . and protect[ing] the environment by embracing sustainable practices across our businesses.” This focus reflected growing momentum among individual companies to improve the communities in which they operate.

**2020: Redirecting CSR to protect people**

CSR initiatives will continue in 2020 but look different than 2019’s foundation setting in light of the COVID-19 pandemic. In the near term, CSR in 2020 may be even more important in three ways.

First, it’s sometimes easy to take for granted that the true root of CSR—as well as environmental and climate change law—is protecting people and keeping them safe. For companies with global footprints in changing landscapes, this is an all-hands issue. With the emerging pandemic, companies are embracing bold decisions to keep their employees safe, first and foremost, both in the work environment and through policies that promote safe working and leave conditions, bringing this core CSR principle to the front line of focus.

Second, companies are rapidly reinventing to protect their broader communities—another core CSR component. Headlines document heroic efforts to maintain infrastructure in ways that
deliver needed healthcare, medical supplies, groceries, and staples around the world, including to vulnerable populations. Some manufacturers are reconfiguring production to make health care equipment for the first time. This effort builds upon 2019’s CSR movement of companies fulfilling a higher purpose in solving global challenges.

Third, in a roundabout way, the 2020 efforts on preserving and returning companies to “business as usual” are themselves a key CSR success. The relatively short experience so far with COVID-19 has reinforced the foundational role of businesses in maintaining the quality of life for diverse populations and communities. In 2020, businesses will need to focus not only on emerging from the pandemic for shareholders, but also on rebuilding the fabric of jobs and infrastructure upon which society relies. To be clear, this does not mean companies will avoid CSR practices. Most companies will endeavor to pursue a “business as usual path” wherever possible in managing regulatory compliance, protecting people and the environment, and operating their businesses conscious of their impact to populations and the environment. Maintaining these commitments will reinforce the importance of CSR even in the economy’s most turbulent times.

2021+: Resetting the CSR path forward

While the COVID-19 pandemic may have temporarily redirected 2019’s CSR foundations, the lessons learned will inspire greater momentum toward realizing new goals with diverse stakeholders perhaps sooner than otherwise would have happened.

First, the pandemic reinforces the most pressing CSR focus: that we operate in a globally connected world—economically and ecologically—with shared challenges. While we will succeed in fighting COVID-19, other global challenges such as climate change, access to water, creating a circular economy, labor conditions, and human rights will continue at the forefront of global issues in need of coordinated action.

Second, the corporate pandemic response will reinforce the growing CSR trend to focus not only on company impacts to communities, but also on the opportunities that companies have to solve broader problems. Early into addressing the COVID-19 pandemic, companies already demonstrated their willingness and ability to tackle global challenges in the toughest of times. We will learn from these lessons in developing pragmatic solutions to other tenacious global challenges.

Third, while 2020 will bring some pause to efforts to elevate voluntary CSR topics toward mandatory requirements, 2019’s momentum will continue after the pandemic is addressed and business as usual returns. At that point, the business sector can build upon its success in protecting employees, creating solutions to solve the pandemic and protect communities, and strengthening performance to apply those lessons to develop collaborative solutions to meet the global challenges ahead.
Private permitting of “take” of endangered species under section 10 of the Endangered Species Act: The Habitat Conservation Plan
(Advanced Practitioner Series)
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This article is the first in our new Advanced Practitioner Series, which is designed to provide our readers with expert analysis of trends, as well as advanced practice tips, in established practice areas. The series also covers professional and career issues of interest to environmental, energy, and natural resources lawyers.

This article explains the basic requirements for a Habitat Conservation Plan, to be submitted in connection with a party’s application for an individual permit to impact endangered species and habitat in the course of property development.

A brief history of “take”

The federal Endangered Species Act (ESA), passed in 1973, contains a provision prohibiting “take” of any species which has been listed as endangered under the Act. 16 U.S.C. § 1538. What does it mean to “take” a species? The ESA defines “take” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Id. § 1532(19). “Harm” has been defined to include “habitat modification or degradation that actually kills or injures wildlife,” which definition the U.S. Supreme Court upheld in 1995. Babbit v. Sweet Home Chapter of Cmty. For a Great Or., 515 U.S. 687 (1995). Whether the habitat modification “actually kills” wildlife generally turns on issues of foreseeability and must be determined on a case-by-case basis.
When the ESA was passed in 1973, “take” of endangered species was allowed only in the context of federal actions whereby the federal agency taking the action would have to consult with the U.S. Fish & Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS) (depending upon the species involved) to determine whether the action (for example, the U.S. Army Corps of Engineers issuing a permit to fill wetlands) would jeopardize the existence of an endangered species. There existed no provision for allowing private-party “take” of a species during land development.

In 1982 the ESA was amended to allow nonfederal parties to obtain a permit to “take” endangered species in the course of private development so long as the “take” was “incidental to, and not the purpose of, the carrying out of the activity.” ESA § 10, 16 U.S.C. § 1539(a)(1)(B). To obtain a section 10 Incidental Take Permit, the nonfederal party must submit an application to the relevant agency, along with a conservation plan, commonly referred to as a Habitat Conservation Plan (HCP).

**Contents of a Habitat Conservation Plan**

The HCP must cover several items set forth in the statute, specifically (1) the impact that will result from the taking, (2) the steps the applicant will take to minimize and mitigate those impacts, (3) the funding that will be available to do so, (4) what alternative actions the applicant considered and why they were not chosen, and (5) “such other measures” that are deemed necessary or appropriate by the Secretary of the Interior. 16 U.S.C. § 1539(a)(2). Each of these statutorily mandated considerations in a HCP involves extensive analysis and discussion.

For that reason, developing the HCP is by far the most time-consuming and intensive part of obtaining the Incidental Take Permit. Parties (and their consultants) are encouraged to consult with the regulating agency early in the process and to work with the agency to arrive at the appropriate measures to address each of the ESA’s requirements. Depending upon the complexity of the situation, the process can take years. The USFWS and NMFS have published a Habitat Conservation Plan Handbook to which applicants and practitioners can refer during the process. The Handbook itself is hundreds of pages long and describes how the agencies view and fulfill their roles and obligations in processing section 10 permits and assessing HCPs.

**Impact of the take**

Determining the impact that will result from the taking of the species involves reviewing how the amount of take from the specific activity will impact the species’ population—for example, in a certain range or a designated population segment—analyzing context, intensity, and duration of the impact.
Minimizing and mitigating impact

Once the impact of the take is analyzed, the applicant must describe how it will minimize and mitigate for that impact to the “maximum extent practicable.” This step is the primary focus of the HCP.

In determining how it might “minimize,” i.e., reduce, the impacts, the applicant should first consider whether it can avoid the impacts altogether (and obviate the need for a permit). Assuming it cannot, minimization considerations can include timing of activity (e.g., by operating wind turbines only when endangered bat species are not present), use of buffer zones (around nesting areas or other areas crucial to species activity), slowing equipment speed, and the like. Once the impacts are minimized to the maximum extent practicable, the applicant must state how it intends to mitigate for the impacts that will occur again, to the maximum extent practicable.

Mitigation can involve restoring species habitat, translocating species, preserving land of other habitat areas (for example, though conservation banks), and reducing threats on other habitat (say, by taking out non-native encroaching vegetation). Some or all of these measures can offset the impacts of the “take.” What constitutes effective mitigation will be determined by the agency, in view of the biological goals for the endangered species.

If the mitigation that is proposed will fully offset the impacts of the “take” the applicant has met its burden to minimize and mitigate “to the maximum extent practicable.” If the mitigation will not fully compensate for the “take,” the applicant will have to show either that there is simply no other way to fully mitigate or it is economically detrimental to fully mitigate (and in that case, the applicant must show the agency its financial information). The USFWS and NMFS maintain that either of those options should be used only when there are “truly no other options.”

Mitigation funding

The Incidental Take Permit applicant must also describe in its HCP how it will fund the mitigation, including whatever monitoring and adaptive management will be required to ensure the mitigation works over the course of the permit. To ensure the applicant will not be required to comply with additional land use restrictions or to increase its financial commitment in the future based upon changed circumstances which were unforeseen at the time of permit issuance, the agencies adopted a “No Surprises” policy in 1998. 50 C.F.R. §§ 17.22(b)(8), 17.32(b)(8).

Alternative actions

Alternative-action analysis requires the applicant to discuss in the HCP the other possible alternatives to its proposed activity, including a “no action” alternative and why those actions were rejected (e.g., subsurface mining instead of surface mining would be financially devastating
and leave valuable reserves untouched). This analysis can include the proposed mitigation and why it is the best choice for the species.

The above is a skeletal outline of the issues that must be addressed in an HCP that is submitted in support of a section 10 Incidental Take Permit under the ESA. Private parties desiring to develop land with endangered species present would do well to consult the Habitat Conservation Plan Handbook and to engage consultants and counsel early in the process.

**Much ado about CEQ: The uncertain effects of proposed NEPA streamlining regulations**

Carlos Romo

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On January 10, 2020, the White House Council on Environmental Quality (CEQ) proposed the first major regulations to implement the National Environmental Policy Act (NEPA) in the last 40 years. Much anticipated, and much ballyhooed, the proposed regulations seek to streamline agency NEPA reviews. This article analyzes the actual impact the proposed regulations may have on the environment and projects subject to NEPA.

**Background**

Adopted in 1969, NEPA requires that agencies examine the “environmental impact” and “adverse environmental effects” of “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. Since its adoption, courts have interpreted NEPA to require agencies to take a “hard look” at the environmental effects of proposed federal actions. NEPA is a procedural statute; it does not impose substantive requirements.

Current CEQ regulations, last updated in 1986, require NEPA reviews to analyze both the direct and indirect effects of an agency action, and the “cumulative impact” that can “result from individually minor but collectively significant actions taking place over a period of time.”

**Overview of proposed NEPA reforms and comments on proposal**

In addition to relatively minor changes aimed at speeding up NEPA reviews (e.g., time and page limits on NEPA documents and coordination among federal agencies), CEQ proposed three overarching reforms.
1. **Narrowing the scope of major federal actions that trigger NEPA**

CEQ proposes a suite of new measures aimed to “assist agencies in a threshold analysis for determining whether NEPA applies.” In particular, CEQ seeks to revise the definition of “major federal action,” and give more flexibility to agencies to satisfy NEPA through another required document that is the “functional equivalent” of a NEPA document (1507.3). The rule also aims to help agencies expand use of categorical exclusions that exempt projects from NEPA.

Project proponents support CEQ’s efforts to streamline NEPA’s applicability. For instance, wind project proponents noted that small federal actions that are part of bigger projects (e.g., a short river crossing permit for a longer renewable energy transmission line) can often envelop the entire project in an all-encompassing NEPA review. Under the proposed rules, the NEPA review could be limited to the part of the project subject to federal control and responsibility.

Not surprisingly, project proponents support expanded use of categorical exclusions by agencies. CEQ stopped short of creating *per se* categorical exclusions (a topic CEQ invited comment on). But CEQ clarified that one agency can rely on another agency’s categorical exclusion.

Defenders of NEPA’s existing regulations focus on whether the proposed changes to the definition of “major federal action” are consistent with statute and worry that encouraging “functional equivalent” documents will circumvent NEPA by allowing agencies to rely on evaluations less robust than NEPA reviews.

It is undeniable that changes to the definition of “major federal action” may limit which projects are subject to NEPA. However, some of the limitations are likely appropriate, such as minimizing reviews of certain projects that have a *de minimis* federal nexus or minimal federal funding (e.g., a wind project with *de minimis* impacts to federal minerals). Meanwhile court decisions imposing criteria for which documents can be “functionally equivalent” to satisfy NEPA will still apply.

2. **Curtailing the evaluation of cumulative and indirect effects from the proposed action**

CEQ proposes consolidating the definitions of “direct effects,” “indirect effects,” and “cumulative effects” into one definition of “effects,” and clarified that effects must be “reasonably foreseeable” from and have a “reasonably close causal relationship to the proposed action or alternative.”

Defenders of the current regulations (and even some project proponents) criticize these changes to the extent they appear to eliminate consideration of certain “indirect” environmental impacts, such as climate change, from proposed actions.
However, the NEPA statute itself does not mandate that agencies evaluate specific “indirect” or “cumulative effects.” Thus, while it may be true that, under the proposed rules, agencies may no longer evaluate certain tangential and indirect effects of their proposed actions, this revised scope may help focus scarce agency resources on the most significant, reasonably foreseeable environmental impacts.

Many commenters also fear that consolidating indirect and cumulative impacts into a simplified definition of “effects” will eliminate ongoing analyses of “upstream” and “downstream” greenhouse gas (GHG) impacts from proposed actions. But an agency cannot avoid evaluating GHG impacts from a proposed action simply as a result of the proposed rule. Indeed, case law has firmly established that some GHG impacts are a reasonably foreseeable effect of a proposed agency action (e.g., the GHG emissions associated with combustion of coal from a proposed coal mine). Thus, the proposed rule would likely narrow the evaluation of GHG impacts to those that are reasonably foreseeable, not speculative. This approach is consistent with existing law.

3. **Limiting the remedies available when an agency violates NEPA**

The proposed rule clarifies that “CEQ regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm,” and adds a new section entitled “Remedies” that seeks to limit overturning NEPA reviews based on minor procedural irregularities. The rule also adds other exhaustion requirements and encourages litigants challenging NEPA reviews to raise alleged NEPA violations “as soon as practicable.”

It is unlikely that CEQ’s proposed changes will substantially alter the currently available remedies for violations of NEPA. Injunctive relief is already difficult to obtain in any federal court action, and it is especially rare in NEPA cases. In any case, even if the proposed rule intends to codify current judicial presumptions, it is the courts, not CEQ, that will determine whether a litigant meets the standards for injunctive relief in a given case. A more troubling proposed change may be the requirement that challengers raise alleged violations “as soon as practicable.” Such a vague judicial review requirement likely invites only more litigation.

**Conclusion**

Nearly 200,000 individuals and organizations submitted comments on CEQ’s proposed regulations. Not surprisingly, the comments are generally split between project proponents favoring CEQ’s attempt to trim NEPA’s scope and limit its review to the direct effects of projects, and defenders of NEPA arguing that the reforms are either unnecessary or go too far. In the end, many of the proposed regulations seek only to codify existing precedent or are unlikely to change current, judicially created standards.
Scientific uncertainty and the Council on Environmental Quality’s proposed changes to its National Environmental Policy Act regulations
Steph Tai

Steph Tai is a law professor at the University of Wisconsin Law School, whose work focuses on the intersection of risk, regulation, and science. She coauthored the Institute of Medicine Committee report, “Environmental Decisions in the Face of Uncertainty,” cited in this article.

Introduction

On January 10, 2020, the Council on Environmental Quality (CEQ) proposed major changes to its approach toward the National Environmental Policy Act (NEPA), in its Update to the Regulations Implementing the Procedural Provisions of NEPA (hereinafter Update). These proposed changes include changes to key aspects of how federal agencies are to comply with NEPA, including the threshold applicability analysis, categorical exclusions, environmental assessments (EAs), scoping, and environmental impact statements (EISs). To date, no one has addressed what these proposed changes mean for assessing and disclosing scientific uncertainties in the NEPA process.

The Update seeks to ensure that environmental documents prepared under NEPA “serve their purpose of informing decision makers regarding the significant potential environmental effects of proposed major Federal actions and the public of environmental issues in the pending decision-making process.” The evaluation of scientific uncertainties is a necessary part of this process; as the Institute of Medicine Committee report, Environmental Decisions in the Face of Uncertainty (hereinafter IOM Uncertainty Report), observed: “the informed identification and use of the uncertainties inherent in the process is an essential feature of environmental decision making.” This is because “[s]ystematically considering uncertainties and their potential to affect a decision from the onset of the decision-making process will improve the decision, focus uncertainty analyses on the decision at hand, facilitate the identification of uncertainties in factors in addition to health risk estimates, improve the planning of uncertainty analyses, and set the stage for the consideration of uncertainties in decisions.” Three aspects of the Update warrant careful consideration: (1) proposed changes that could affect an agency’s ability to evaluate fully scientific uncertainty, (2) proposed changes that could require additional assessments of scientific uncertainty, and (3) proposed changes that could alter the presentation or evaluation of scientific uncertainty.
 Proposed changes that could affect an action agency’s procedural ability to evaluate scientific uncertainty

The first change that could affect an agency’s procedural ability to evaluate scientific uncertainty is the creation of procedural time limits for the NEPA evaluation process. In particular, the Update proposes “a presumptive time limit for EAs of 1 year and a presumptive time limit for EISs of 2 years.” While these limits can be waived by senior officials, the use of presumptive time limits could limit an agency’s ability to fully evaluate the scientific uncertainties involved with a given proposed action. That said, the IOM Uncertainty Report recognizes that “[in an] ideal world time and resources would not be limiting, and the requisite information and analyses would be available at the time needed, and in the quality and quantity needed, so that decision makers would be able to make decisions consistently using relevant data. In reality, however, decision makers do not have perfect information upon which to base decisions or to predict the impact and consequences of such decisions.”

More significantly, the Update proposes that EISs be required to evaluate the environmental impacts of the “proposed action and reasonable alternatives” rather than “the proposed action and the reasonable alternatives,” reasoning that, “an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum.” The removal of the word “the,” therefore, is intended to allow agencies to consider a more limited range of alternatives than it might have otherwise. To the extent this change might reduce the number of alternatives an agency must analyze, it may impact how much an agency is able to evaluate “deep uncertainty,” defined as the “uncertainty about the fundamental processes or assumptions underlying a risk assessment” involved with a given action. As the IOM Uncertainty Report acknowledged, evaluating or even describing deep uncertainties can be especially challenging when there is “uncertainty or disagreement about what regulatory alternatives are available.” What the report recommends instead is a robust scenario analysis, assessing outcomes using a broad range of possible alternatives. This may be hindered when the range of alternatives to be presented in an EIS is limited.

 Proposed changes that could require additional assessments of scientific uncertainty

The Update proposes changes to 40 C.F.R. § 1501.2(b)(2) and § 1502.15 to clarify that agencies should consider economic and technical analyses with environmental effects. Such a focus could require additional uncertainty analyses. The IOM Uncertainty Report provides a strong recommendation to evaluate economic and technical uncertainties, recognizing that “[a]lthough different estimates of technology availability are sometimes used, the uncertainties that stem from those estimates are not often carried through to the final outputs in a regulatory impact assessment.” In addition, “[u]ncertainties in economic analyses are sometimes conducted, but they are not necessarily presented.” Sufficient follow-through with this Update change, therefore, should implicate Recommendations 2 and 3 of the IOM Uncertainty Report, which state:
RECOMMENDATION 2

[An agency] should develop methods to systematically describe and account for uncertainties in decision relevant factors in addition to estimates of health risks—including technological and economic factors—in its decision-making process. When influential in a decision, those new methods should be subject to peer review.

RECOMMENDATION 3

Analysts and decision makers should describe in decision documents and other public communications uncertainties in cost–benefit analyses that are conducted, even if not required by statute for decision making, and the analyses should be described at levels that are appropriate for technical experts and non-experts.

Proposed changes that could alter the presentation of scientific uncertainty

The Update also proposes several changes to how agencies must produce EAs and EISs that may affect agencies’ ability to fully describe the scientific uncertainties involved in their environmental evaluations. First are the presumptive space limitations for EAs and EISs. The Update proposes a presumptive 75-page limit for EAs (a “new”ish requirement for EAs, although the earlier CEQ Forty Most Asked Questions document states that EAs are generally around 10 to 15 pages), 150 pages for regular EISs, and 300 pages for EISs of “unusual scope or complexity” (the same presumptive limits as the earlier page limits, but with an additional requirement of approval in writing for extending beyond those presumptive limits). While both presumptive limits are available for modification, the limits may impair an agency’s ability to fully describe the scientific uncertainties in its evaluations. As the IOM Uncertainty Report recommended, at least for the Environmental Protection Agency (EPA), “[t]o better inform the public and decision makers, . . . communications to the public should systematically include information on what uncertainties in the health risk assessment are present and which need to be addressed, discuss how the uncertainties affect the decision at hand, and include an explicit statement that uncertainty is inherent in science, including the science that informs EPA decisions.” Such statements can require space in documents.

Finally, the Update proposes the use of other evaluative documents as the functional equivalent of an EIS, allowing such use when “(1) There are substantive and procedural standards that ensure full and adequate consideration of environmental issues; (2) There is public participation before a final alternative is selected; and (3) A purpose of the analysis that the agency is conducting is to examine environmental issues.” To the extent that such functional equivalents can provide replacements for EISs, different norms in addressing scientific uncertainties in the production of other evaluative documents may affect how scientific uncertainties are presented in EISs.
Conclusion

The Update is a major one for federal agency compliance with NEPA. While other effects are also important, evaluation of scientific uncertainties is one area in which the Update will have particularly significant ramifications.

Pipelines, communities, and the environment: The growing complexities of siting
Hannah Wiseman

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Introduction

As U.S. companies continue to produce large quantities of oil and gas from unconventional formations, the need for new pipelines grows. By some estimates, more than 41,000 miles of new oil and gas pipelines will be built in the United States by 2035. ICF Consulting, North American Midstream Infrastructure Through 2035 (2018), https://www.ingaa.org/File.aspx?id=34658. The U.S. pipeline buildout has sparked a vociferous response from communities, environmental groups, and other citizen groups. The U.S. Federal Energy Regulatory Commission (FERC) approves the construction and siting of all interstate natural gas pipelines, and a growing number of legal challenges have borrowed from the full arsenal of environmental and public lands law to attempt to halt or slow down pipeline construction.

Public lands

In what is likely the best-known case due to a grant of certiorari by the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth Circuit in Cowpasture River Preservation Association v. Forest Service, 911 F.3d 150 (4th Cir. 2018) found that the U.S. Forest Service could not use the Mineral Leasing Act to grant a pipeline right of way (ROW) under the Appalachian National Scenic Trail for the Atlantic Coast Pipeline. The court reasoned that the entire Appalachian Trail is part of the National Park System, and the Mineral Leasing Act does not allow for the granting of a pipeline ROW within the National Park System regardless of whether the Forest Service or another agency approves the ROW. The court also found multiple National Environmental Policy Act (NEPA) violations as a result of the Forest Service’s failure to adequately consider erosion and water quality impacts, among other impacts. Oral argument before the Supreme Court was in February.
NEPA: Indirect effects

In another growing set of cases, groups that oppose pipelines have focused on the requirement for considering indirect effects of pipelines under NEPA. One large victory for environmental groups in Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017) suggests that the case outcomes in this area could be mixed. In Sierra Club, the U.S. Court of Appeals for the District of Columbia Circuit found that FERC had to consider the indirect downstream effects of the pipeline—the impact of burning natural gas from the pipeline in power plants—because the agency is a “legally relevant cause” of the downstream effects, in that it could deny a pipeline certificate on the basis of environmental harm. And in this case, FERC knew that the pipeline would provide gas to specific power plants in Florida, thus making the effects reasonably foreseeable. 867 F.3d at 1372.

In a subsequent indirect effects case, FERC argued that it is required to consider downstream effects of a gas pipeline only when they are as clear as they were in Sierra Club—when the agency “actually” knows the specific volume of gas that will flow through the pipeline, and when the entire purpose of the pipeline is to transport gas to “specifically-identified” destinations. Birckhead v. FERC, 925 F.3d 510, 519 (D.C. Cir. 2019). In a per curiam opinion, the court rejected FERC’s proposed test for downstream indirect effects, but it also rejected the appellants’ claim that all “combustion-related emissions are necessarily a reasonably foreseeable indirect effect of a pipeline project.” Rather, the court emphasized that whether a gas pipeline’s downstream effects must be considered will be a case-by-case inquiry. When the agency has or could reasonably acquire information about where and how much gas will be burned, it likely must consider downstream indirect effects.

Arguments for considering upstream indirect effects—when building a pipeline triggers the drilling and hydraulic fracturing of more natural gas wells—have tended to be unsuccessful. For example, in Birckhead, the court ruled that a simple determination of need by FERC does not establish that the pipeline is the only way to transport gas from new wells to consumers, and that the wells would not have been developed absent the pipeline project. But Birckhead also suggests that if plaintiffs are able to muster evidence showing the number and location of new wells that will be drilled as a result of the pipeline project, FERC might also have to consider the upstream indirect effects of the pipeline.

Other NEPA claims

Groups opposing interstate pipelines have also used other portions of NEPA—beyond indirect effects—to argue that FERC acted arbitrarily and capriciously in approving the pipeline because it did not adequately consider NEPA factors. These groups were successful in Cowpasture River Preservation Association because the Forest Service, which was a cooperating agency for FERC’s NEPA review, made a variety of objections to the environmental impact statement.
concerning FERC’s failure to adequately consider off-forest routes, erosion, and other impacts, but then promptly reversed its objections without explanation.

NEPA claims that challenge FERC’s selection of a particular site for a pipeline or associated infrastructure tend to be less successful. For example, when petitioners argued that under NEPA, FERC should have approved a pipeline loop instead of a compressor station in Myersville, Maryland, this claim failed. The court emphasized that NEPA does not require FERC to select what petitioners believe is the environmentally superior alternative. *Myersville Citizens for a Rural Community v. FERC*, 783 F.3d 1301, 1324 (D.C. Cir. 2015).

**Violations of other environmental statutes**

Beyond NEPA, groups opposed to natural gas pipelines increasingly argue that pipeline construction directly violates the provisions of substantive environmental statutes. For example, this year the U.S. District Court for the Western District of Texas considered whether to preliminarily enjoin construction of a Kinder Morgan pipeline on the basis of alleged violations of the Administrative Procedure Act, NEPA, and the Endangered Species Act. The court denied the preliminary injunction but cautioned Kinder Morgan that, given its apparent violation of the biological opinion and incidental take statement under the Endangered Species Act, it could be subject to future civil and criminal liability for any incidental takes of species. The court also warned that the U.S. Fish and Wildlife Service’s allowance of land clearing for the pipeline past the hard deadline for clearing established in the biological opinion would likely be arbitrary. *City of Austin v. Kinder Morgan Texas Pipeline, LLC*, Order, 1:20-CV-138 RP (W.D. Tex. Mar. 19, 2020).

**Conclusion**

As the rush to build new pipelines continues—particularly in relatively populous areas along the Eastern Seaboard—more challenges are certain. But the results of these challenges are far from certain. The courts have largely eschewed categorical rules for or against FERC victories, instead conducting case-by-case review of the particular circumstances and facts on the record.

**Emerging trends in RCRA citizen suits**

**Ame Wellman Lewis and Maureen Mitchell**

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Resource Conservation and Response Act (RCRA) citizen suits have drastically changed the environmental enforcement landscape over the last few years. Plaintiffs increasingly seek to leverage the statute’s broad language to address some of today’s most pressing environmental issues in the wake of decreasing federal enforcement. At the same time, funding for environmental organizations has increased sharply, enhancing their ability to bring more lawsuits to combat perceived gaps in environmental protection under the Trump administration.

As a result of RCRA citizen suits, hundreds of millions of dollars have been committed to address sources of contamination in a variety of industries. Energy companies have agreed to excavate and dispose coal ash off-site, large dairy farms have agreed to line manure ponds, and nuclear waste remediation contractors have agreed to upgrade worker protection to reduce exposure to toxic gases and vapors.1 These settlements have occurred due to broad authority under RCRA’s citizen suit provision, which allows citizen suits to be brought against “any person” who “has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B). If a court finds that an imminent and substantial endangerment to health or the environment exists, it can order injunctive relief and award a successful plaintiff its attorneys’ and expert witness’ fees and costs. This broad grant of authority in matters involving complex environmental problems has raised new questions about the role of the courts in addressing these claims.

**Imminent and substantial endangerment claims under RCRA**

RCRA is a “cradle to grave” statute governing the generation, treatment, storage, and disposal of hazardous and solid waste. The statute provides plaintiffs two primary bases for citizen’s suits: (1) alleged violations of any “permit, standard, regulation, condition, requirement or order” and (2) the past or present “handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . .” 42 U.S.C. § 6972(a)(1)(A), (B) (emphasis added).

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The availability of injunctive relief to prevent ongoing harms makes “imminent and substantial endangerment” citizen suits unique under environmental law. RCRA allows private citizens to force responsible entities to clean up waste causing imminent and substantial endangerment, or to abate the polluting activity. However, RCRA is not a general clean-up statute, and it does not allow plaintiffs to recoup monetary damages or seek recovery for past response costs.

RCRA does not define “imminent and substantial endangerment,” leaving courts to construe the scope of its application. In 1996, the U.S. Supreme Court interpreted “imminent” narrowly, finding that “an endangerment can only be ‘imminent’ if it ‘threatens to occur immediately.’” Meghrig v. KFC Western, Inc., 516 U.S. 479, 485–86 (1996). A threat of future harm can be imminent where the harm may occur in the near-term if the risk of threatened harm exists at the time of the lawsuit. Id. at 486. Since Meghrig, courts have broadened the reach of the imminent and substantial endangerment clause. To establish that an endangerment may be “imminent,” there must be a reasonable prospect of future harm, but courts do not necessarily require evidence that the actual harm will occur. Maine People’s Alliance and Natural Resources Defense Council v. Mallinckrodt, Inc., 471 F.3d 277, 296 (1st Cir. 2006); 307 Campostella, LLC v. Mullane, 143 F. Supp. 3d 407, 414 (E.D. Va. 2015). Courts have allowed lawsuits even where the actual harm might not occur for a long time, as long as the endangerment is ongoing. Burlington Northern and Santa Fe Railroad Co. v. Grant, 505 F.3d 1013, 1020-21 (10th Cir. 2007). Endangerment is “substantial” where the risk is serious and there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances if remedial action is not taken. Id. at 1021; Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1015 (11th Cir. 2004). Finally, the plaintiff must establish that defendant’s conduct is causing or contributing to the harm.

Current trends involving complex environmental threats

Emerging contaminants and complex environmental threats such as climate change and disposition of spent ammunition are presenting cutting-edge questions to the courts. See Tennessee Riverkeeper, Inc. v. 3M Co., 234 F. Supp. 3d 1153 (N.D. Ala. 2017); Conservation Law Found., Inc. v. ExxonMobil Corp., No. CV 16-11950-MLW, 2020 WL 1332949 (D. Mass. Mar. 21, 2020); Ctr. for Biological Diversity v. United States Forest Serv., 925 F.3d 1041 (9th Cir. 2019). These questions go beyond traditional defenses involving statutory elements, such as standing, notice, and whether the government is already prosecuting the alleged violations and threats to the environment. Recent trends show courts grappling with concepts such as primary jurisdiction and the balance of authority between courts and administrative agencies charged with environmental enforcement and other duties. The focus has shifted to some degree away from the plaintiff’s entitlement to relief and toward the court’s discretion to grant it.

A recent decision by the U.S. District Court District of Massachusetts in Conservation Law Foundation, Inc. v. ExxonMobil Corp. noted that the use of RCRA citizen suits to address complex environmental threats such as climate change is different than the “typical” RCRA
citizen suit. Specifically, the court emphasized the complex technical questions it had to consider, such as whether, how, and to what extent climatologists believe weather patterns in Boston are changing, and how prudent industrial engineers would respond to such changes. This undertaking implicates scientific and policy issues absent from a typical citizen suit in which the court compares the level of pollutants discharged to the level of pollutants allowed by the permit. The court concluded that the U.S. Environmental Protection Agency (EPA) had primary jurisdiction to craft a discharge permit that addressed the plaintiffs’ climate change concerns, and that it would be premature to grant injunctive relief before allowing EPA an opportunity use its expertise to “unravel intricate, technical facts.” The practical impacts on litigants have been significant.

**Practical impacts on RCRA citizen suit cases**

Whether a party is on the plaintiff or the defense side, developing a RCRA litigation strategy now requires a bigger toolbox. Recognizing the expansive authority courts have to require complex environmental responses, litigants are increasingly turning to scientific and policy arguments to advocate for why a court should or should not take action. Litigation support in the form of environmental consultants who can testify as to a party’s compliance or noncompliance is not enough. A wider range of consulting and testifying experts should be involved early in a case to advise on the scientific, technical, policy, and financial consequences of using the courts to address complex environmental issues. And if a court deems it necessary to impose some kind of injunctive relief, thorny questions such as the nature, extent, and future oversight of the injunction must be tackled. Rather than leave such decisions in the hands of a judge, in cases where RCRA citizen suit claims survive these threshold issues, strong incentives exist to manage the extensive financial and environmental implications by negotiating a mutually agreed resolution. As a result, the trend is for fewer cases to reach trial on the merits. So long as the RCRA citizen suit provision allows litigation to fill environmental regulatory gaps, courts will continue to face challenging questions of when and how to exercise its expansive authority on complex environmental problems.

**EPA poised to overhaul Lead and Copper Rule for Drinking Water**

Allison A. Torrence

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Following the Flint, Michigan, lead-contaminated water crisis in 2016, the U.S. Environmental Protection Agency (EPA) has faced continuing pressure to improve the way it protects communities from lead in drinking water. In response, on November 13, 2019, EPA published
proposed regulatory revisions to the National Primary Drinking Water Regulation for lead and copper (Lead and Copper Rule) in the Federal Register, 84 Fed. Reg. 61,684.

The draft regulations propose the most significant changes to the Lead and Copper Rule since the rule was promulgated in 1991. The regulations would have the largest impact on Large Community Water Systems (Systems), which are water systems serving more than 10,000 customers. Under the authority of the Safe Drinking Water Act, EPA proposes to task Systems with a host of new and more stringent obligations to protect public health by minimizing lead and copper levels in drinking water. In particular, because the proposed revisions had their genesis in the Flint crisis, where lead entered drinking water primarily through the corrosion of lead-containing water pipes and plumbing materials, the proposed revisions to the Lead and Copper Rule require more proactive measures to identify upgrades needed to reduce the effects of deteriorating infrastructure.

**New lead “trigger level”**

The original Lead and Copper Rule established a maximum contaminant level goal (MCLG) of zero lead in drinking water and an action level of 15 parts per billion (ppb). The proposed revisions maintain the current MCLG and action level but introduce a lead trigger level of 10 ppb. If a System identifies water at the trigger level of 10 ppb, it would be required to, among other potential requirements, (1) either conduct a corrosion control study (if it does not currently treat for corrosion) or re-optimize its existing corrosion treatment system, and (2) work with the state to set an annual goal for replacing lead service lines. Under the existing Lead and Copper Rule, there is no requirement to replace lead service lines unless the System detects lead at the current action level of 15 ppb.

**Requiring a public service line inventory and public outreach**

Systems would also be required to prepare and update a publicly available inventory of lead service lines and “find-and-fix” sources of lead when a sample from a water tap in a home exceeds the action level of 15 ppb. The proposed revisions would further require Systems to notify customers within 24 hours if a sample collected in their home is above the action level and conduct outreach to all customers with lead service lines at least once a year.

**Replacing lead service lines**

The proposed revisions include a number of changes aimed at replacing lead service lines. Systems above the action level of 15 ppb would, at a minimum, be required to fully replace a minimum of 3 percent of the number of known or potential lead service lines annually. As mentioned above, Systems above the trigger level of 10 ppb would additionally have to work with their state to set higher annual goals to replace lead service lines. Partial lead service line replacements would no longer be allowed except in certain emergency repair situations. Instead,
when Systems are required to replace lead lines, they would have to replace the entire lead service line.

**More stringent sampling**

Under the proposed revisions, Systems with lead levels above the trigger level of 10 ppb would also be required to monitor annually or semiannually, and all samples would be required to be taken at homes with lead service lines. In contrast, the current Lead and Copper Rule requires that only 50 percent of samples be taken from lead service lines.

Additionally, Systems would be required to annually conduct lead in drinking water testing at 20 percent of K–12 schools and licensed childcare facilities built before January 1, 2014, in their service areas. Systems would then have to provide the results to each sampled school and childcare facility, as well as to local and state health departments.

**Conclusion**

EPA received over 78,000 comments to digest and address in its final rule revision. While current global events make progress on these regulatory revisions uncertain, EPA will likely move in the near future to finalize these significant proposed changes aimed at continuously reducing lead in public drinking water.

**How and why state and local governments are suing the fossil-fuel industry for the costs of adapting to climate change**

Matthew J. Sanders

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In article after article, in study after study, we learn that climate change and its impacts are much worse than we expect them to be. The United Nations Environment Programme (UNEP) reported in 2019 that greenhouse-gas emissions, far from falling or even stabilizing, have risen by 1.5 percent per year in the last decade and reached a record high in 2018. In another report issued last year, UNEP and five other climate research organizations warned that we are now on track to burn 50 percent more fossil fuels than the amount that would limit global warming to 2°C. The effects will be (and already are) devastating. The New York Times reports that, in 2018, the United Nations Intergovernmental Panel on Climate Change (IPCC) estimated that by 2100 seas will rise between 1.8 and 3.2 feet, leading to frequent and severe erosion and flooding. The U.S. National Oceanic and Atmospheric Administration puts the estimates at 5 and 8.2 feet, with even more dire consequences. In 2019, the IPCC warned that warmer oceans, combined with rising
sea levels, are threatening local and global food supplies and generating unprecedented flooding and storms.

Adaptation is currently the principal defense that communities around the world have against the climate crisis, and it is and will be immensely expensive. Indeed, even if the world completely stopped emitting greenhouse gases today, we would still face the massive costs of adapting to the climate-change–related damage that is already underway. In coastal areas, this will mean assessing risks, retrofitting or moving structures, installing sea walls and monitoring systems, and converting vulnerable land uses to parks and wetlands. The New York Times reports that, in 2012, Hurricane Sandy cost the New York City subway system $5 billion in water damage. In 2017 it was Hurricane Harvey that cost Houston and its surrounding areas $125 billion. According to a 2019 IPCC report, future coastal adaptation across the United States will cost tens to hundreds of billions of dollars a year. These are just the adaptation costs associated with sea-level rise, to say nothing of how much it will cost to live with warmer temperatures, more frequent and destructive wildfires, dwindling drinking water, and the like.

As we start to grasp the scale of these costs, we are forced to ask: who should pay them? So far it has been mostly all of us, through our taxes and insurance, but is that appropriate, or even possible? A growing number of local and state governments think it isn’t. They believe that those who bear substantial responsibility for getting us into this mess should pay for a substantial portion of the costs of living with it. And so, in the last five years, at least 13 city, county, and state governments have filed lawsuits against large fossil-fuel companies, seeking damages for the companies’ outsized contributions to climate change. (The Sabin Center for Climate Change Law at Columbia Law School maintains databases of these and other domestic and international lawsuits.) The suits vary in their particulars but all advance a mix of state common-law theories of liability, including public and private nuisance, trespass, product liability, negligence, and failure to warn. Thus far, most of the suits have been hung up on the issue of whether they belong in federal or state court (i.e., whether federal law preempts or displaces the state-law claims), but at least some of them are likely to be litigated on their merits in state court. At that point, one fight will be about whether it is appropriate to use public-tort litigation to recover the public costs of climate change from private companies.

Specifically, the courts will consider whether the governments may seek damages against fossil-fuel companies under common-law theories of public nuisance, trespass, product liability, negligence, and failure to warn. Though the sheer scale of climate change and its adaptation costs may be unprecedented, these theories are not. To the contrary, they borrow from precedents that have been or are being established in other litigation contexts—lead paint, opioids, MTBE-contaminated drinking water, herbicides, and asbestos, to name a few.

Most controversial (and most promising for the governments) might be the public-nuisance doctrine, which at least eight of the governments assert as a cause of action in their complaints. A public nuisance is an unreasonable interference with rights held in common by the general
public. Restatement (Second) of Torts § 821B (1979). Some states, including California and Oklahoma, have especially broad public-nuisance statutes, and it is no accident that public-nuisance litigation has been most successful in those states. See Cal. Code Civ. Proc. §§ 731, 3479, 3480; Okla. Stat. tit. 50, § 1 et seq. In California, for example, Santa Clara County and other counties and cities reached in 2019 a $305 million settlement with three lead-paint manufacturers to pay for lead-paint abatement in residential housing. The settlement followed an appellate decision ruling the manufacturers’ activities to be a public nuisance. People of California v. ConAgra, 17 Cal. App. 5th 51 (2017); see also Cty. of Santa Clara v. Atl. Richfield Co., 137 Cal. App. 4th 292 (2006). Meanwhile, in Oklahoma v. Purdue Pharma L.P., an Oklahoma trial court found in 2019 that drug maker Johnson & Johnson contributed to the public nuisance of overdose deaths resulting from opioids, and awarded the state $465 million for opioid treatment programs.

Like any tort, public nuisance requires duty, causation, and harm. Each of these elements presents novel issues in the climate-change context (though made somewhat less novel by their treatment in other public-nuisance contexts). But what is not at all novel is the claim by the local governments that oil companies aggressively and deceptively marketed their products—i.e., that they knew the dangers that fossil fuels posed for the climate but sold them anyway. That argument was crucial in the plaintiffs’ success in the lead-paint, opioid, and other public-nuisance litigation. For example, in the lead-paint litigation, the California Court of Appeal found that the defendant lead-paint manufacturers “knew at that time” that they sold lead paints that their paints produced lead dust, and knew that “lead dust was poisonous,” but “marketed,” “advertised,” and “promoted” their lead paints all the same. ConAgra, 17 Cal. App. 5th at 70–73.

Similarly, in the Oklahoma opioid litigation, the trial court found that the defendant drug makers “marketed, promoted and sold opioid drugs” in a “false, deceptive and misleading” way, emphasizing the drugs’ benefits while underplaying their dangers. See Final Judgment After Non-Jury Trial, at 4, 16, Oklahoma v. Purdue Pharma L.P., Dist. Ct. (Cleveland County) No. CJ-2017-816 (filed Nov. 15, 2019). If the local government climate-change suits reach the merits, the defendants’ similar knowledge of the dangers posed by their products, and their decision to advertise and sell them nonetheless, may well be the deciding factor (for the governments) in at least some of those suits.

Skeptical lawyers, judges, and scholars have raised many objections to public-tort suits, especially public-nuisance claims. Many object that it is unfair to hold companies liable for harms associated with selling lawful products. Others object that the remedy for public nuisance traditionally has been, and should be, injunctive relief, not damages. And still others argue that public nuisance is not a tort, but more like a criminal offense. However, state legislatures have arguably addressed these critiques by adopting broad public-nuisance statutes, and these critiques tend to be weaker in cases where the defendants knew of the risks of their products or conduct. These critiques seem to be carrying less weight in recent years; the courts, initially skeptical of
traditional product-liability claims asserted as public nuisances, have been increasingly (though not uniformly) receptive to them.

That still leaves the most common objection to public-nuisance claims: that they are inappropriate tools for remedying social harms, especially harms as complex and widespread as climate change and sea-level rise. Those who raise this objection argue that legislatures and administrative agencies are better equipped than courts to address such “controversial” social harms, at least until a legislature specifically deems them a public nuisance. But tort cases, on the one hand, and legislation and regulation on the other, serve different functions: the former address past wrongful behavior and seek relief for particular injured parties, while the latter set broadly applicable, forward-looking policies. Thus, local governments are not using their lawsuits to tackle climate change; they’re instead trying to recoup some of the staggering losses that result from it. Without a ready source of funds from the federal government, and with no global body empowered to assess and award climate-change-related costs, local governments and the citizens they serve have little other recourse. They literally can no longer afford to wait.

What is the future of the Bidding Rounds in the Mexican hydrocarbon sector?
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Energy reform in Mexico

In 2013, the Mexican Congress approved Mexico’s Energy Reform (Reform), which promised a bright new future for national and foreign investment in the country’s energy sector. For over 80 years, all hydrocarbon exploration and extraction activities had been carried out exclusively by state-owned Petróleos Mexicanos (PEMEX). The Reform’s main purpose was to promote several amendments to the Political Constitution of the United Mexican States that would affect the existing oil participation scheme. Those changes allowed national and foreign companies to carry out hydrocarbon exploration and extraction activities throughout Mexico. Under this new scheme, a newly formed national regulatory body—the National Hydrocarbons Commission (CNH, by its Spanish acronym)—was charged with administering these oil contracts and representing the Mexican State in their execution through a bidding process, commonly referred
to as “Bidding Rounds.” The Bidding Rounds were created to ensure fairness and transparency among competing companies.

During the administration of former President Enrique Peña Nieto, CNH awarded 111 contracts for the exploration, extraction, and production of hydrocarbons. Of these, 106 were awarded through the Bidding Rounds process, while the remaining were awarded through the traditional migration process in which Integral Exploration and Production Contracts or Financed Public Works Contracts were migrated to new Hydrocarbon Exploration and Extraction Contracts before the Ministry of Energy (SENER). By project location, CNH further divides the contracts as: 48 percent for land-based areas, 28 percent for deep-water areas, and 31 percent for shallow-water areas. See CNH’s Relevant Figures at https://rondasmexico.gob.mx/esp/cifras-relevantes/. As a result of contracts awarded through the Reform, CNH estimates that Mexico has collected more than 2.2 billion dollars (US) up to December 2019 and accumulated an investment of more than $4 billion dollars (US) up to January 2020. See https://rondasmexico.gob.mx/esp/cifras-relevantes/.

Cancellation of the bidding rounds

The administration of Andrés Manuel López Obrador (AMLO) felt that the Reform was not the ideal tool to reposition Mexico as a global power in energy self-sufficiency. Instead, it decided to refocus its efforts on strengthening PEMEX by financially rescuing the oil company, fighting corruption, and doing away with the illegal acquisition of hydrocarbons, an activity commonly referred to as “huachicoleo,” which is widely practiced in Mexico.

To that end, AMLO announced two much-touted initiatives: (1) in July 2019 the PEMEX Rescue Plan, which consists of providing the company with much-needed financing to reduce its obligations and tax burdens, as well as assistance in implementing strong anti-corruption policies; and (2) in May 2020 the National Refining Plan, which provides for rehabilitating and maintaining six operating refineries, as well as constructing a new refinery (Dos Bocas Refinery) in the State of Tabasco.

As part of AMLO’s revamped energy policy, the SENER suspended the Bidding Rounds indefinitely. This decision led to much confusion and uncertainty on the part of private investors in the hydrocarbon sector, since it was not known at the time whether the new government would terminate existing contracts. However, SENER’s Secretary, Rocío Nahle, addressed these concerns by stating that the Mexican government would continue to honor contracted obligations. In the interim, Bidding Rounds would remain suspended until the results of the existing contracts are known. That is, until it is verified that the Exploration and Development Plans for the Extraction of Authorized Hydrocarbons have been fulfilled.
Future regulation

Article 96 of the Hydrocarbons Law states that “Exploration and Extraction Activities” shall be considered of social interest and public order, thus afforded preference over any other activity that implies the use of the surface or subsoil of affected lands. Activities involving the hydrocarbon sector have been increasingly afforded greater involvement of federal, state, and municipal authorities to efficiently resolve formal and procedural matters.

On the other hand, in accordance with the provisions for the minimum insurance requirement for oil activities, is the need for participants to obtain insurance that would address any civil liability damages and environmental damages. In practice, obtaining coverage is a difficult task since the Industrial Security and Environmental Protection Agency of the Hydrocarbon Sector rejects most documents prior to securing these coverage policies. Thus, proof of insurance coverage letters represents yet another significant delay, and a compliance risk, to hydrocarbon sector participants.

Opportunities still abound in the Mexican hydrocarbon sector

The only way Mexico can decisively move forward in the development of its hydrocarbon sector is through the resumption of the Bidding Rounds. Reactivating this important initiative would open the Mexican economy to significant investment from national and foreign companies with the corresponding exploration and exploitation of contracted areas to once again produce nationally significant amounts of oil. We note that such development would not take place overnight since the sector, as we have seen in the past, tends to set its sights on long-term solutions and results that may ultimately prove fruitful.

One need not look far to see how effective the use of Bidding Rounds has been in another Latin American jurisdiction. Brazil’s 1997 Energy Reform opened the door to companies besides Petrobras (Brazil’s state-owned oil company) to participate in that nation’s hydrocarbon sector. To date, Brazil has organized approximately 16 Bidding Rounds while Mexico has held only three. Both countries hold large oil reserves, but Brazil appears to have taken the lead by in this sector by continuing to organize these bidding processes. Mexico needs to reactivate its Bidding Rounds and assign those oil fields that SENER considers viable, while encouraging joint ventures between PEMEX and national and/or foreign companies for the successful exploitation of these fields.
In Brief
John R. Jacus

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Administrative Procedure Act

The U.S. District Court for the Southern District of New York granted summary judgment to the Natural Resources Defense Council (NRDC), an environmental nongovernmental organization, regarding its challenge to the Environmental Protection Agency’s (EPA) revised policy that prevents scientists who receive EPA grants from serving on the agency’s advisory committees. NRDC argued that the change in policy was an effort to move scientific advisory panels toward industry views and away from academic priorities. EPA argued that, under the Federal Advisory Committee Act, an agency may appoint members “at the agency's sole discretion,” and no standards for such appointment were available for the court to use in its review. In granting NRDC’s motion and denying EPA’s cross-motion for summary judgment, the court held that the change in policy was arbitrary and capricious because EPA had failed to provide a good explanation for why it departed from its previous policy and “why an outright ban on EPA grant recipients [serving on advisory committees] would improve the existing policies that required demanding and continuous conflict of interest reviews” and other procedural safeguards.

APA, FLPMA, NEPA

The U.S. District Court for the District of Idaho set aside the Bureau of Land Management’s (BLM) 2018 revised instruction memorandum on how oil and gas lease sales should be handled on federal lands within greater sage-grouse management areas. Plaintiff environmental groups argued the BLM revised the memorandum without providing public notice and comment or environmental review in violation of the Administrative Procedure Act (APA), Federal Land Policy and Management Act (FLPMA), and National Environmental Policy Act (NEPA). The BLM asserted the memorandum was a general policy statement that was not final agency action and need not go through APA rulemaking. The court found that the memorandum implemented a required template for oil and gas leasing in greater sage-grouse management areas that was “finally determinative” and established a different framework for the BLM’s administration of leasing decisions. The court also found that legal consequences necessarily flowed from the changes to the memorandum. Additionally, the court found the memorandum to constitute a
substantive rule for which notice-and-comment rulemaking was required, and the BLM’s failure to promulgate the memorandum as a rule under the APA rendered it invalid. Finally, the court found the memorandum’s provisions that reduced public participation in leasing decisions and reduced the opportunity for public comment at the leasing decision stage could not be reconciled with FLPMA’s and NEPA’s broad mandates. The court reinstated the prior memorandum and set aside the 2018 memorandum.

CEQA

*King & Gardiner Farms, LLC v. Cty. of Kern*, 45 Cal. App. 5th 814 (Cal. Ct. App. 2020). The California Court of Appeals set aside an ordinance revision by Kern County intended to streamline the permitting process for new oil and gas wells. Plaintiff environmental and community groups and a local farm argued that the County’s environmental impact report (EIR) did not comply with the requirements of the California Environmental Quality Act. The court found the EIR failed to properly address the impacts of the revised ordinance to water supplies, agricultural land, and noise. It therefore reversed and remanded the case for further proceedings.

CERCLA, cost recovery, NCP consistency

*Rolan v. Atl. Richfield Co.*, No. 1:16-CV-357-HAB-SLC, 2019 WL 6876677, 2019 U.S. Dist. LEXIS 216744 (N.D. Ind. Dec. 16, 2019). The U.S. District Court for the Northern District of Indiana granted summary judgement to defendants E.I. du Pont de Nemours and Company and The Chemours Company in an action by residents of public housing located within the U.S. Smelter and Lead Refinery Superfund Site (Site) in East Chicago, Indiana. Plaintiffs sought to recover costs they allegedly incurred investigating contamination and temporarily relocating their households. Defendants previously entered into a consent decree with EPA to address lead and arsenic contamination through excavation of contaminated soil across the Site. Upon learning of the required remediation of the Site, plaintiffs sued defendants for nuisance and negligence and brought a claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 107 to recover their costs of response. In granting defendants’ summary judgment motions, the court held that plaintiffs failed to establish they incurred any recoverable costs of investigation or response because (1) their attorney represented them on a contingent-fee basis and there was no evidence in the record that the attorney had required plaintiffs to repay fees paid by the attorney for an environmental consultant, (2) the consultant’s work consisted merely of reviewing documentation generated by EPA’s own investigation, which the court found to be duplicative and unrelated to CERCLA’s purposes, and (3) the costs claimed for temporary relocation of plaintiffs’ households were unnecessary and inconsistent with the National Contingency Plan.
CERCLA, appeal of arbitration award


The U.S. District Court for the Western District of Kentucky upheld a challenged arbitration award of CERCLA remediation costs under an agreement to arbitrate environmental liability with respect to the B.F. Goodrich Superfund Site. PolyOne Corp. failed to obtain recovery of significant cleanup costs it incurred at the site from Westlake Vinlys, Inc., in a sealed arbitration award and challenged the award in federal court on several grounds. PolyOne argued the award should be vacated because Westlake polluted at the site and CERCLA’s polluter pays principle was not properly reflected in the award’s assignment of all disputed costs to PolyOne, among other reasons. The court disagreed, holding that the final arbitration award “was well-reasoned based on the evidence presented to the panel” and “does not disregard public policy.” The court further held that PolyOne simply failed to prove the fact and amount of costs to remediate Westlake’s contamination, and was not improperly subject to the burden of proof since it had demanded arbitration.

Clean Air Act, APA


The U.S. Court of Appeals for the District of Columbia Circuit granted a petition to reconsider EPA’s Final Mercury and Air Toxics Standards (MATS) Rule. The MATS rule exempted the startup periods for coal- and oil-fired power plant boilers from numerical limits for Hazardous Air Pollutants (HAP). Petitioner environmental groups challenged the EPA’s denial of their prior petition, asserting that EPA did not analyze which power plants were the “best performers” until the final rule, thereby depriving petitioners of an opportunity to comment. The court agreed, finding the groups were not given the opportunity to comment, propose revisions, or otherwise challenge the EPA’s selection of the “best performing” power plants. Accordingly, the court held that the final rule was not a logical outgrowth of the proposed rule. Petitioners also argued that EPA failed to disclose in the proposed rule that it believed HAP emissions for such boilers are immeasurable until air pollution control devices become operational. The court found that the proposed rule failed to provide sufficient notice that EPA would later conclude that specific emission measurements during startup establish that HAP emissions cannot be measured in a technologically and economically feasible manner. The court held that EPA erred in denying the petition because such a belated conclusion was of central relevance to the final MATS Rule. The court vacated EPA’s denial and remanded the petition to the agency for reconsideration.
ESA, tribal sovereign immunity


The U.S. District Court for the Eastern District of Oklahoma dismissed an Endangered Species Act (ESA) citizen suit brought by an environmental nongovernmental organization against Native American tribal leaders, the U.S. Department of the Interior, and other government officials alleging that Oklahoma City’s plan to redirect water from the Kiamichi River would jeopardize endangered mussel species. Plaintiff argued that a 2016 tribal-government water settlement enabling the water diversion violated the ESA because there was insufficient consultation about the potential impact of the water diversion plan on the endangered mussels. Federal and state government defendants asserted both a lack of standing and ripeness in motions to dismiss the action, noting that it would be years before any water might be diverted under the noted agreement. Tribal leader defendants asserted sovereign immunity from suit under the ESA. The court granted the tribal leaders’ motions to dismiss on sovereign immunity grounds, stating that it “is not persuaded that Congress intended to include Indian tribes as ‘any other entity subject to the jurisdiction of the United States,’ nor is it persuaded that the term ‘any person’ includes tribes,” within the meaning of those terms in the ESA’s citizen suit provision. The court also held that the involved tribes were indispensable parties whose interests were not aligned with any other defendant party. Thus, the dismissal of the action rendered moot the federal and state governments’ motions to dismiss.

FERC, PURPA


The U.S. District Court for the District of New Mexico dismissed a lawsuit that alleged a New Mexico municipal utility’s imposition of unlawful and discriminatory monthly fees on rooftop solar owners. The plaintiff individuals and solar energy advocacy group challenged rooftop solar fees charged by the Farmington Electric Utility Service (Farmington) in federal court on the ground that they violate the Public Utility Regulatory Policies Act’s (PURPA) prohibition on discriminating against qualified small-scale power producers, and, therefore, constitute a failure to implement PURPA regulations crafted by the Federal Energy Regulatory Commission (FERC). Plaintiffs argued that Farmington did not provide enough data to support charging higher rates to customers who generate their own electricity compared to those who do not. The court found that plaintiffs had sufficiently alleged that Farmington was not implementing FERC’s PURPA regulations properly, but, under section 210(g) of PURPA, that issue was reserved exclusively for state courts. The court also rejected the plaintiffs’ argument that any time a municipal utility or state utility regulator acts inconsistently with federal PURPA rules, they could be sued in federal court. The court held that section 210(h) of the statute allows for challenges for failure of a municipal or state utility regulator to implement FERC rules, but the court would not infer that this section also allows for challenges to how the utility regulator complied with the FERC rule. Accordingly, the court dismissed the action for lack of
jurisdiction, but did so without prejudice to allow plaintiffs to refile in state court or in federal court with allegations of sufficient facts.

**Oil and gas, forced pooling, constitutionality**


The U.S. District Court for the District of Colorado dismissed with prejudice multiple constitutional challenges to Colorado’s forced pooling statute, which allows oil and gas lessees to extract their minerals along with some percentage of non-consenting mineral owners’ minerals. A group of mineral property owners argued the statute violated the First Amendment by requiring non-consenting mineral owners to “associate” with oil and gas companies through “compulsory monetary contribution” and by compelling them to subsidize corporate speech. The court disagreed, finding no evidence that any association between the owners and oil and gas operators was in any way expressive, and that the statute was neither aimed at nor funded speech. The court also found the statute did not violate the owners’ substantive due process rights by forcing them to associate with oil and gas operators because there was no evidence that the statute required plaintiffs to associate with oil and gas operators for political purposes. In addition, the court held that the statute was not facially vague because it did not authorize arbitrary enforcement. The court also rejected plaintiffs’ takings claim, finding that although plaintiffs showed the existence of a property interest, they failed to show that the taking of such interest did not serve a public purpose. Finally, the court ruled that the state did not violate the Contract Clause of the U.S. Constitution through exercise of its police powers in authorizing the pooling of oil and gas mineral interests because there was no clear indication of statutory intent to create a contract between lease operators and non-consenting mineral owners.

**Oil and gas, Rule of Capture**


The Pennsylvania Supreme Court reversed a Pennsylvania Superior Court decision in which the lower court held that the common law Rule of Capture was not a defense to claims of subsurface trespass involving the use of hydraulic fracturing to drain oil and gas minerals from an adjacent mineral owner’s property. The Supreme Court rejected the conclusion that the act of artificially stimulating the flow of gas through hydraulic fracturing renders the Rule of Capture inapplicable, noting that all drilling for oil and gas involves the artificial stimulation of flow. Further, the court found that the lower court’s opinion suffered from a “lack of specificity as to the averments on which its holding is rested.” More specifically, the court held that the Rule of Capture applies to hydraulic fracturing operations, and that “developers who use hydraulic fracturing may rely on pressure differentials to drain oil and gas from under another’s property, at least in the absence of a physical invasion.” A dissenting opinion criticized the majority for ignoring specific averments.

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of subsurface trespass in the record of proceedings in the Superior Court. The decision left open the possibility of future claims of subsurface trespass by virtue of hydraulic fracturing in Pennsylvania.

Tribal water rights, state intervention


The U.S. District Court for the District of Columbia held that the State of Utah may intervene in an action by the Ute Indian Tribe of the Uintah and Ouray Reservation (U&O Tribe) against the United States in which the tribe is seeking an accounting of its tribal water rights, a declaratory judgment of their legal status, and an order requiring the federal government to assist the tribe in the development of its water rights. The U&O Tribe had opposed the motion to intervene on grounds that the state has no legally protectable interest in the administration and regulation of tribal water. The court disagreed, noting that the U&O Tribe’s claims, which are based in part on a 1965 water rights deferral agreement, could affect the administration of water rights and threaten Utah’s limited water resources.

Views from the Chair
Karen A. Mignone

_Karen A. Mignone is the director of Sustainability for Qualus. She is the chair of the Section of Environment, Energy, and Resources._

In February, The Elisabeth Haub School of Law at Pace University held its 31st annual Jeffrey G. Miller National Environmental Law Moot Court Competition (NELMCC). The Section of Environment, Energy, and Resources, a major sponsor of the competition, plays a significant role in many aspects beyond financial support. This kind of involvement is important to the Section and its future, so I encourage more people to become active. Through NELMCC we connect directly with students and coaches from more than 50 schools, along with the more than 300 lawyers from the region serving as judges who make the competition possible. At its peak, NELMCC hosted nearly 80 schools, and with our help I believe we can boost the number of competing schools to close to what it once was.

NELMCC is a single-site moot court—the largest in the country. Students begin on Thursday with two preliminary rounds, with a final preliminary round Friday morning. In the afternoon the teams that advanced argue in the quarter finals. Those who move on then participate in the semifinals on Saturday morning, with the finals held Saturday afternoon. The final round is judged by
U.S. federal appellate and district court judges and judges from the EPA environmental appeals board.

This ambitious schedule requires a huge group of judges, and over the years I have convinced a number of our members to participate. Judging takes a little work, as the environmental problem is typically complex, and for many it means travel to White Plains, New York, in the winter. (Of course, travel to White Plains puts you only 40 minutes from New York City via train.) There is a core group of Section members who participate each year both because it is important for the students and because it is an enjoyable experience. (Seriously—ask them!) In addition to our members, lawyers from the tri-state area in private practice, NGO settings, and government agencies also participate. This diverse involvement gives you, the volunteer, as well as the students, the opportunity to meet a wide range of practitioners, including those from state and federal government agencies. You must be a lawyer to judge, but no special training or background is necessary. The Pace Moot Court Board provides a bench brief and suggested questions.

I understand that not everyone can commit to being present at the competition, and world events surrounding COVID-19 may require next year’s competition to adopt a different format. But judging in White Plains is not the only way to contribute. Any lawyer can grade briefs by contacting the coordinator, Lorraine Rubich (lrubich@law.pace.edu) by November 30, and there are other options, too. Law schools face financial issues arising from reduced enrollments, and many have withdrawn financial support for activities beyond those of teaching students, which is why participation in NELMCC dropped by more than 25 schools. Many schools no longer fund coaches, pay entrance fees, or support students’ travel to moot courts such as NELMCC. As a result, students miss a valuable learning experience—but we can change that.

We as a Section are well positioned to assist by providing coaches and adopting teams from schools that fail to provide institutional support for external student moot courts. This is not an insignificant investment, but it is one that has the potential for huge dividends. I meet lawyers across the country who, when they find out my connection to Pace, immediately relate their NELMCC experiences. Many say it was one of the most important events in their law school careers. Helping students to compete and to experience this event will create lasting memories as well as an important connection to the ABA and our Section. Motivated students (and to commit to NELMCC you have to be motivated) often need minimal coaching, but it is a great way to connect to the students and to the school, and to get your attorneys out into the community.

A list of participating schools from the 2020 competition can be found here. Is your local law school missing? Perhaps you can help get a team going and, if the COVID-19 pandemic is no longer an issue, get them to White Plains for the 2021 competition. The process begins early in the fall semester. Students who participate not only get the experience of an intense and enjoyable moot court competition, but they have the opportunity to connect with lawyers and students from around the country, and take a first step in building the network that will become...
the base of a successful practice. Students can speak with lawyers from EPA, DOJ, firms, corporations, and consulting companies. The Section also hosts a panel focused on employment in environmental, energy, and resources law that provides another opportunity for students to explore post-graduation options and to connect with Section members. The panel is always well attended, and our presenters really enjoy hearing about the student commitment to environmental, energy, and resources practice.

There are few of us in this profession who got here without some help along the way. I firmly believe that we owe it to the next generation to be the source of some of that help. Please consider reaching out to your local law school to offer students the opportunity to experience one of the premier environmental moot court events. I have a commitment to NELMCC and hope you will consider it as well, but there are other competitions that may be more convenient for you to support. The important thing is to make the effort, build connections with your local law school, and demonstrate the Section’s commitment to helping students succeed. Doing so has the potential to change their lives, and, if you do it right, it can change your life as well.

In the interest of full disclosure, I received my JD from Pace in 1989, and the Moot Court is named for my husband, Jeff Miller.