

# Trends September/October 2019

## Table of Contents

### Features

**EPA’s new approach to power plant GHG regulation: An “ACE” in the hole, or EPA out-Foxed?** .....2  
Amanda Shafer Berman

**Plague, pestilence, plastic? Maybe not.**.....4  
Mary Ellen Ternes

**Climate change, population demographics, and wildfire planning in the West** .....8  
Philip Higuera, Hillary M. Hoffmann, Stephen R. Miller, and Shelley Ross Saxer

**The second wave of climate change public nuisance litigation** .....10  
Albert C. Lin

**The future of agency deference after *Kisor v. Wilkie*** .....12  
Erin Murphy

**The new progressive federalism: States’ rights to clean air and climate protection** .....15  
Melissa Hoffer

**In Brief** .....18  
John R. Jacus

### Section News

**Views from the Chair**.....27  
Karen A. Mignone

**People on the Move** .....28  
James R. Arnold

Published in Trends September/October 2019, Volume 51, Number 1, ©2019 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

## EPA's new approach to power plant GHG regulation: An "ACE" in the hole, or EPA out-Foxed?

Amanda Shafer Berman

*Amanda Shafer Berman practices environmental law at Crowell & Moring, LLP. She previously served as a senior attorney at the U.S. Department of Justice, where she briefed and argued over a dozen U.S. Environmental Protection Agency rule defense cases in the federal courts of appeal.*

The Trump administration fulfilled a promise this summer when the U.S. Environmental Protection Agency (EPA) promulgated the final [Affordable Clean Energy \(ACE\) Rule](#), repealing the Obama administration's Clean Power Plan (CPP) and replacing it with new regulations addressing greenhouse gas (GHG) emissions from coal-fired power plants. In the ACE Rule, EPA disavowed many aspects of the CPP as beyond EPA's authority under the Clean Air Act (CAA). For example, EPA concluded that the plain language of the CAA limits the "best system of emission reduction" (BSER) to measures that can be implemented on-site at a power plant—namely, certain heat rate improvement measures—and does not include generation-shifting (e.g., using the interconnected power grid to shift generation on a fleet-wide basis from coal to natural gas or renewables), which was at the core of the CPP's approach. Another major difference is that, in the CPP, EPA itself set state-specific emission rates and goals, whereas in the ACE Rule EPA only determined the BSER, and gave states wide latitude to set performance standards based on the BSER.

The ACE Rule will have profound implications for power plant GHG regulation as well as EPA's regulation of other sources and pollutants—if it is upheld. But EPA's change of direction implicates several fundamental administrative law doctrines, which may put the agency on a collision course with the U.S. Circuit Court of Appeals for the D.C. Circuit, if not the U.S. Supreme Court.

### The ACE Rule and *Chevron* deference

[Chevron U.S.A. Inc. v. NRDC, Inc.](#), identifies the familiar two-step process for reviewing an agency's interpretation of a statute. Under Step One, if the statutory text is clear, the analysis ends; an agency interpretation that differs from the plain meaning of the text fails, whereas one consistent with it will be upheld. But if the text is ambiguous, under Step Two the agency need only interpret the statute reasonably for judicial deference to be warranted.

In the ACE Rule, EPA concludes that the CAA unambiguously prohibits EPA, as a *Chevron* Step One matter, from including in the BSER any measures that cannot be applied directly at a power plant. EPA bases this conclusion on Congress's use of the terms "application" and "achievable" in CAA section 111, arguing that they reflect Congress' clear intent that emission reduction measures must apply not only to, but on the physical grounds of, a specific coal-fired

power plant. But during argument on the CPP, a majority of the D.C. Circuit sitting *en banc* appeared ready to accept EPA's prior argument that, in light of the interconnected nature of the electric grid, generation-shifting can reasonably form part of the BSER. The ideological balance of that court has not shifted measurably, and so EPA's change of position may be greeted skeptically.

Indeed, by cabining its analysis to *Chevron* Step One, EPA may have made its job harder. To win, it must persuade the D.C. Circuit that, contrary to what EPA said in 2016, CAA section 111 not only *allows* the agency to limit emissions reduction measures to those that apply "inside the fence line," but *unambiguously requires* that outcome. If the D.C. Circuit disagrees with EPA on this issue, it would likely remand the rule to EPA to conduct a Step Two analysis.

So why didn't EPA conduct a Step Two analysis in the ACE Rule, at least in the alternative? The answer may be that if EPA were able to convince the D.C. Circuit—or the Supreme Court—that the CAA's text *flatly prohibits* the agency from requiring more comprehensive measures to reduce GHG emissions, that holding would bind the hands of future administrations. And EPA may be right to think that the Supreme Court, even if not the D.C. Circuit, could be open to such an argument and not particularly concerned about *Chevron*. That Court previously rejected, as atextual and beyond EPA's authority, EPA's attempt to read another CAA provision to allow it to more comprehensively regulate GHG emissions. See [Utility Air Regulatory Group v. EPA](#). And a majority of the Court has expressed doubts about *Chevron*, which the Court now often sidesteps. But to get EPA's new position before the Supreme Court would not only require that the D.C. Circuit issue a decision that the Court is sufficiently tempted to take up on *certiorari*, but also that the Trump administration remain in power beyond 2020 so that the litigation can reach that stage.

### **ACE through the lens of *State Farm* and *Fox***

If the ACE Rule survives a *Chevron* analysis, it must next run the gauntlet of [Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.](#) and [FCC v. Fox Television Stations, Inc.](#) Under *State Farm*, the agency's analysis must be well-explained and its conclusions supported by the record; otherwise it is "arbitrary and capricious." And under *Fox*, while EPA does not have to show that a new rule is "better" than the old, it does have to show that the change is well-reasoned and supported by all the information before the agency. That could pose challenges, particularly regarding EPA's impacts analysis, which critics argue improperly proceeds from a "no CPP" baseline, rather than comparing the impacts of the ACE Rule with the projected impacts of the rule it is replacing.

In short, the administration's road to victory on power plant GHG regulation runs through at least two doctrinal gauntlets: the *Chevron* statutory interpretation analysis and the *State Farm/Fox* standard for determining when agency action is well-reasoned and well-supported.

Both will put EPA's arguments to the test, and only time will tell whether the D.C. Circuit—or the Supreme Court—will permit EPA's change of direction.

## Plague, pestilence, plastic? Maybe not.

Mary Ellen Ternes

*Mary Ellen Ternes is a partner at Earth & Water Law, LLC, in its Oklahoma City location, practicing environmental law and litigation with significant focus on chemical risk management. She is a member of the Natural Resources & Environment (NR&E) editorial board and a regular contributor to NR&E Insights.*

As environmental practitioners, we know that there really is no such thing as throwing something “away.” We can change its form, separate it into elements, or otherwise manage it, but material does not magically “go away.” Except for loss of helium and other light elements to outer space, we essentially live in a closed system that continues to contain what we discard, whether or not we can see it. While carbon dioxide's invisibility might be part of the reason climate change deniers maintain a foothold, plastic is mostly visible, so we can usually see it. But unlike other wastes that we are better at regulating, because they are plainly acutely toxic, reactive, ignitable or corrosive, the same properties of plastic that make it so useful for consumer products also cause us to become complacent about plastic hazards in the environment. Plastic is a synthetic substance not of our natural world with an almost perpetual life. It has no natural place in our environment. So, it ends up doing harm in the stomachs of whales, dolphins, and albatross chicks, as well as filter feeders like larvaceans that eat microplastics, which are then eaten by organisms from tuna to turtles, including us. *See e.g.,* Maria Temming, [Tiny Plastic Debris Is Accumulating Far Beneath the Ocean Surface](#), Science News (June 2019).

It appears that the world has finally had enough. Much like the scope of our U.S. Resource Conservation and Recovery Act (RCRA), the [Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal](#), governs “hazardous and other wastes,” including presumptively hazardous listed wastes (Annex I) and those that are characteristically explosive, flammable, reactive, toxic, infectious, or corrosive (*see* Annex III for more specifically defined characteristics). [The United States has never ratified the Basel Convention](#) and is not a Party, though the United States is a Member of the Organization for Economic Cooperation and Development (OECD), which imposes conditions on U.S. transboundary movement of hazardous wastes as defined by RCRA, [see 40 C.F.R. 261.3 and Part 262, Subpart H](#). On May 10, 2019, at the 14th meeting of the Basel Convention Conference of the Parties, participating nations agreed to add “plastic waste” to the list of “other wastes,” effective January 1, 2021. Specifically, the [draft Amendments](#) include: Annex II, Y 48, listing “plastic wastes” as a category requiring special consideration, exempted only where they are “destined for recycling in an environmentally sound manner. . .”; Annex VIII, A3210, listing for the first time A3210, “plastic waste” as potentially hazardous; Annex IX, replacing B3010,

Published in Trends September/October 2019, Volume 51, Number 1, ©2019 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

defining exempt plastic waste, with B3011. With these Amendments, the Basel Convention Conference of the Parties recognizes that, while plastic has been manufactured for only the past 60 years, [the world has produced more plastic in the past 10 years than during the last 100](#). Moreover, while plastic waste is only about 10 percent of the total waste generated, it comprises about 90 percent of the trash floating in the ocean. And due to the near impossibility of cleaning all the world's oceans, plastic waste must be addressed at its source.

The addition of “plastic waste” to the Basel Convention means that the global trade in plastic waste will be regulated subject to the Convention's protections requiring legitimate recycling, and a new Partnership in Plastic Waste will begin work on solutions. Even though the United States has never ratified the Basel Convention, the United States is directly impacted, as countries are now turning away U.S. shipments of plastic waste and sending them back. *See, e.g.,* Rozanna Latiff, [Malaysia to Send 3,000 Tonnes of Plastic Waste Back to Countries of Origin](#), Reuters (May 28, 2019).

So, [while on July 3, 2019, the Environmental Protection Agency asked the OECD to not adopt these Basel Amendments](#), it does look like the United States may as a practical matter finally need to get serious about managing plastic waste, which raises many questions. First, why is there so much of it? Largely for the same reason plastic is so valuable: it's cheap and easy to make, watertight, strong, yet light, and lasts “forever.” Plastic was first invented in 1869 by treating cellulose with camphor, as a substitute for ivory. With Bakelite in 1907, plastic became fully synthetic, and with World War II, its production in the United States increased by 300 percent in the United States alone, just in time for *The Graduate*. *See* Science History Institute, [The History and Future of Plastics](#). Innovations in chemical manufacturing and plastic's valuable characteristics have made it an easy option for ubiquitous single uses. At the same time, due to the absence of RCRA listing or characteristics, plastic is not regulated as “hazardous waste.” Yet while regulated as “solid waste,” plastic waste often does not find its way to a landfill or recycling facility.

Can't we just use biodegradable plastic? Not really, because it won't degrade before a whale eats it. Biodegradable plastic is supposed to degrade fully within three to six months, but has been found to be largely intact after three years. *See, e.g.,* Brigit Katz, [Do Biodegradable Plastic Bags Actually Degrade?](#), Smithsonian.com (May 1, 2019). And for however long it remains in the environment, plastic—consisting of long chain hydrocarbons—releases smaller molecules of hydrocarbons that are greenhouse gases. *See* University of Hawaii at Manoa, [Degrading Plastics Revealed as Source of Greenhouse Gases](#) (Aug. 1, 2018). And in case anyone wonders why marine animals eat plastic, it both looks and smells like food. Both plastic and dead things release methane and ethylene. (For plastic, *see*: Sarah-Jeanne Royer et al., [Production of methane and ethylene from plastic in the environment](#) (Aug. 1, 2018); for dead things, *see*: Daniel J. Repeta et al., [Marine methane paradox explained by bacterial degradation of dissolved organic matter](#), Nature Geoscience (Nov. 14, 2016).) And when algae grow on plastic, it's apparently irresistible. *See* Matthew S. Savoca et al., [Odors from Marine Plastic Debris Induce](#)

[\*Food Search Behaviors in a Forage Fish\*](#), Proceedings of the Royal Society B (Aug. 16, 2017) and, in layman's terms, [\*Bait and Switch: Anchovies Eat Plastic because It Smells Like Prey\*](#).

What about just recycling it? Theoretically we can, and do, to a degree. But capturing the entire recyclable market is unrealistic without a mandate or incentives that might drive sufficient market demand. In our historical plastic economy without post-use accountability, plastic is so cheap to manufacture that there is little incentive for purchasers of post-use plastic feedstock to pay any additional costs of collecting, sorting, cleaning, and recycling, leaving little market for potentially more expensive and possibly lower-quality recycled plastic. Even if we could overcome collection problems, we would still have to clean it and sort it all, because we can't just melt it all together. Why? Well, the different symbols on our plastic containers mean they are made from different materials (you know this!): (1) "PET" is polyethylene terephthalate (clear, strong, and lightweight, used in water bottles and polyester fabric); (2) "HDPE" is high-density polyethylene (more durable with high strength to density ratio, used in plastic bottles, piping, and geomembranes); (3) "PVC" is polyvinyl chloride (a thermoplastic polymer, white and brittle before addition of plasticizers); (4) "LDPE" is low-density polyethylene (used in food packaging film and shopping bags); (5) "PP" is polypropylene (from a combination of propylene monomers; a thermoplastic polymer combined with other materials to make them more flexible and less brittle); (6) "PS" is polystyrene (a naturally transparent thermoplastic); and (7) "other" including synthetic polymer fabrics such as acrylic polymers (acrylic) and polyamides (nylon). See, e.g., [Blogs by Tony Rogers, Creative Mechanisms](#).

These different chemical molecules were invented for their different material properties, which make them suitable for different uses. Thus, merely melting these different materials, to change their physical phase from solid to liquid, does not change them into different materials. Melting them all together just creates a layered mess of different materials that is unsuitable for any specific use.

In any case, we are terrible at sorting all these different plastics, or cleaning properly before we recycle it, so that it is ready for recycling. To be fair, unregulated manufacturing has resulted in an explosion of disparate items across the material and use spectrum, from single uses to more durable uses, making identification and separation of different types of plastic a real challenge. See, e.g., Wesley Stephenson, [Why Plastic Recycling Is So Confusing](#), BBC Science & Environment (Dec. 18, 2018).

What will work? It looks like a cradle-to-cradle approach imposing post-use accountability is in our future. In 2018, the European Union (EU) adopted its "European Strategy for Plastics in a Circular Economy." See EPEA Part of Drees & Sommer, [European Strategy for Plastics in a Circular Economy: Cradle to Cradle as a Solution](#) (Feb. 1, 2018). The EU's approach is intended to ensure that plastic remains valuable by: changing production and design to make plastic easier to recycle, which could enable higher plastics recycling rates; expanding and improving collection, sorting, and recycling capacity; and bringing together the chemical and

recycling industries to better integrate the plastics value chain and create viable markets for recycled and renewable plastics. On the heels of the EU action, the American Chemistry Council's Plastics Division, representing 19 of the leading plastics resin producers, adopted their own circular plastics economy goals for plastic packaging. *See* American Chemistry Council, [U.S. Plastics Resin Producers Set Circular Economy Goals to Recycle or Recover 100% of Plastic Packaging by 2040](#) (May 9, 2018). Many of the Plastics Division members are also participating in the [Alliance to End Plastic Waste](#), announced January 2019, which has pledged \$1.5 billion over the next five years to help end plastics waste in the environment. The Alliance, in turn, includes members that are also core partners of the [Ellen McArthur Foundation's New Plastics Economy Global Initiative](#), launched in October 2018, bringing together over 250 businesses, governments, and other entities to set 2025 targets for a circular plastics economy in which "plastics never become waste."

Now with serious Basel Convention teeth arming these global efforts, the flow of new plastic into commerce will be affected, impacting manufacturers and consumers alike. Taking inventory of domestic consumer plastic use each day—from the milk container to the coffee pod, shampoo bottle, toothbrush handle, microbeads, alarm keypad, automobile parts, credit card, computer keys, shopping bags, pens and highlighters, file tabs, and on and on, it appears that more products contain plastic than do not. The global effort to adapt to a cradle-to-cradle plastic economy necessarily contemplates collective engagement by government, manufacturers, consumers and recyclers alike in order to fundamentally reform the global commerce of plastic, from historically contemplated abandonment to continuing use. And then, of course, we still will have 60 years of plastic waste inventory to address—plastic that is either in, or on its way to, the ocean.

Implications from this Basel listing reach far beyond the consumer plastic industry. For example, plastic is made of chemical reaction products derived from ethylene, industry's basic building block, produced from ethane or other petroleum fractions from oil and natural gas production. Ethane and other petroleum feedstock availability has increased dramatically with fracking technology (though biomass can also be a good source), such that making ethylene, and thus plastic, cheaper than ever, allowing the plastic industry to become an important alternative hydrocarbon market when fuel demand decreases. *See, e.g.,* [Essential Chemical Industry](#). However, as plastic demand declines, ethylene demand may also decline, impacting hydrocarbon markets and ultimately oil and gas production and investment. Practitioners here in the United States should be prepared for future plastic regulation at the international, state, and local levels, for the time being. Supply chain impacts may ripple through our economy, creating contract disputes in some markets, and asset management issues in others, where ethane, ethylene, and other hydrocarbon production may find less demand for their nonfuel products. Shareholders will likely emphasize plastic sustainability in their ongoing shareholder initiative issues. Stay tuned as this societal issue evolves.

## Climate change, population demographics, and wildfire planning in the West

Philip Higuera, Hillary M. Hoffmann, Stephen R. Miller, and Shelley Ross Saxer

*Philip Higuera is an associate professor of Fire Ecology in the Department of Ecosystem and Conservation Sciences at the University of Montana. [Hillary M. Hoffmann](#) is a professor of law at Vermont Law School. [Stephen R. Miller](#) is the associate dean for Faculty Development and professor of law, at the University of Idaho College of Law. [Shelley Ross Saxer](#) is the Laure Sudreau endowed chair and professor of law, at Pepperdine University Law School.*

*This article contains summaries of presentations from a May 2019 conference exploring the nexus of climate, population, and wildfire planning in the western United States at the University of Montana's Alexander J. Blewett III School of Law.*

Wildfire activity has increased substantially in the United States over the past several decades, with record-breaking fire seasons becoming increasingly common. The 2017 fire season was one of the most extensive and expensive, and, in 2018, California alone experienced its largest (Ranch Fire—186,000 hectares) and deadliest (Camp Fire—85 lives lost) wildfires in state history. While past land-management practices, including decades of fire suppression, have altered the amount of dead vegetation in many ecosystems, fire scientists have also established clear links between increased fire activity and increasingly warm, dry summer conditions, which stem in part from anthropogenic climate change. These increasingly warm, dry conditions make dead vegetation particularly susceptible to ignition and rapid fire spread, and ongoing climate change is expected to exacerbate these conditions in upcoming decades. Despite this understanding, predicting the timing and behavior of individual wildfires, planning to avoid loss of property and human life, and mitigating resultant damages from wildfires (both social and ecological) remain complex endeavors. An additional complicating factor is the changing population demographics of the modern West, with increasing development in the wildland-urban interface placing more homes and structures in fire-susceptible environments, which lead to more human-caused fires during and outside of the historical fire season. Montana alone has seen a doubling of the number of homes in wildfire-prone areas in the last 26 years.

As we shall discuss, these data and trends impact two areas of the law in particular: land-use planning and litigation surrounding management of fires.

### Planning for wildfire in the wildland-urban interface

Wildfires in the wildland-urban interface are receiving significant attention now because they are expensive, dangerous to suppress, and development patterns have caused the size of the wildland-urban interface area to increase rapidly. In most Western states, over 40 percent of the population lives in the wildland-urban interface.



Addressing wildland-urban interface wildfires presents a number of legal challenges. Suppression costs reside with the federal government. As a result, neither the insurance industry nor local governments, which permit new developments, have significant liability for new housing that is placed in high-risk wildfire locations likely to need suppression.

Efforts to address this disconnect have sought to build a unified regulatory approach, but results are mixed. Chief among these efforts is a policy document, known as the Cohesive Strategy, published in 2014 and authorized by the Federal Land Assistance, Management, and Enhancement Act of 2009 (FLAME Act). The Cohesive Strategy adopts a framework for intergovernmental cooperation but has not had significant impact on development patterns. The most common on-the-ground tool is the Community Wildfire Protection Plan. Community Wildfire Protection Plans, authorized by the Healthy Forests Restoration Act of 2003, are voluntary, National Environmental Policy Act–exempt planning documents that primarily identify wildfire risk and offer a community the chance to create a voluntary framework through which federal, state, and local governments can address that risk.

Still, permitting of development in the wildland-urban interface remains primarily the province of local governments. Much work has gone into codes, such as the International Wildland-Urban Interface Code, and voluntary frameworks, such as Firewise, that can guide local decision making. A consensus has emerged that good wildfire planning requires community, neighborhood, individual site, and building-specific regulations. Enforcement of regulations, however, is difficult—few fire departments want to be “tree cops”—and even complying with best practices does not ensure a wildfire will not burn a structure. Wildfire regulations are nascent, though, and likely to become more nuanced, and perhaps more powerful, as wildfire risk grows.

### **Wildfire and state damagings claims**

Wildfire litigation continues to grow as we seek to determine who will pay for the damages caused by these increasingly frequent disasters. Litigants are turning to state constitutions and statutes for inverse condemnation and “damagings” claims (claims based on state constitutional clauses that prohibit the “damaging” of property for public use without just compensation, also known as state inverse condemnation claims) to address government or private actions that benefit the public, but also damage individual landowners. When government action (and possibly inaction) causes property damage, tort claims will likely be unsuccessful, as sovereign immunity shields the government from liability. The federal government relies on the Federal Tort Claims Act for immunity and similar state legislation shields state and local governments. However, those states that have damagings clauses attached to their takings clauses may provide for greater government and private entity (such as a utility company) liability. Such inverse condemnation claims have allegedly driven privately owned utilities into bankruptcy, increased insurance costs, and discouraged investment in these utilities.

If we, as a society, value using political and legal means to fairly distribute the benefits and burdens of our community life, we must consider which mechanisms will be appropriate to account for the “takings” and “givings” that occur with government regulation, action, and inaction, and climate change. The costs of providing public and private services that benefit the public will be great and we need to develop a better understanding of how to pay for these costs. Tort liability; insurance; utility rates; personal responsibility; taxation at the federal, state, and local level; and just compensation for eminent domain or inverse condemnation are some of the remedies we have used in the past to spread the costs of providing public benefits. Unfortunately, these remedies may not be sufficient to manage and pay for future disasters, including today’s wildfires.

## The second wave of climate change public nuisance litigation

Albert C. Lin

*Albert C. Lin is a professor of law and Muir Institute Fellow at the UC Davis School of Law.*

When the U.S. Supreme Court held in *AEP v. Connecticut* (*AEP*) that the Clean Air Act displaced federal common law public nuisance claims against power companies responsible for emitting carbon dioxide, it left open the issue of whether a state public nuisance claim was available. Nearly a decade later, state and local governments (as well as a fishing industry trade group) are bringing a second wave of climate change public nuisance cases—this time based on state law.

Defined as an unreasonable interference with a public right, public nuisance is at the core of these complaints, although some also assert other causes of action. Yet the cases in this second wave differ from the earlier cases in potentially significant ways. Whether these factual differences will make a difference in legal outcomes remains to be seen.

### Based on state law

First, the current cases, which have been filed mostly in state court, rely almost exclusively on state law. Defendants have removed several of these cases to federal court, and district courts have issued conflicting rulings on whether to remand the cases to state court. Those courts that have granted plaintiffs’ motions to remand—the district court in *County of San Mateo v. Chevron* and the district court in *Mayor and City Council of Baltimore v. BP*—have largely accepted plaintiffs’ characterization of their claims as state law claims. Those ruling for the defendants—the district court in *City of New York v. BP* and the district court in *City of Oakland v. BP*—have essentially held that federal common law governs the claims—and then concluded that such claims are displaced under *AEP*.

Each of these rulings is on appeal, but even if plaintiffs are allowed to proceed with their state law claims, they likely will have to demonstrate that Congress has not preempted those claims. Notably, preemption is more difficult to establish than displacement. Whereas displacement simply asks whether a statute “speaks directly to the question at issue,” preemption requires [“clear and manifest”](#) evidence that Congress intended to preempt state law. Moreover, federalism principles support a general presumption against preemption, particularly with respect to a state’s traditional police powers. No analogous presumption exists for displacement.

### **Fossil fuel company defendants**

Second, defendants in the current cases are fossil fuel companies, not power companies. Although producing and distributing fuels does generate greenhouse gases (GHGs), the fossil fuel companies do not directly emit most of the GHGs associated with their products; their customers do. This fact might cut in different directions. Unlike the defendants in *AEP*, the fossil fuel companies lack permits governing fossil fuel combustion, undermining potential arguments that federal regulation displaces or preempts the public nuisance claims. On the other hand, defendants [are already disclaiming liability on the ground that the bulk of GHG emissions occur when the fuels are no longer within their control](#). Notably, some jurisdictions (including California) do not require control of the instrumentality as an element of public nuisance.

### **Evidence of harm and causation**

Third, if courts reach the merits of the state public nuisance claims, they will be presented with stronger evidence of harm and causation than existed when the earlier cases were filed. Scientific consensus on the phenomenon of climate change is now [bolstered by lived experiences of sea level rise, extreme heat, unprecedented flooding, and other climate catastrophes](#). [Detailed estimates](#) of the cumulative GHG emissions from individual companies are also available. Indeed, at the [climate change tutorial](#) held by the judge presiding over the Oakland and San Francisco public nuisance cases, the defendants disputed neither the existence of climate change nor the contribution of fossil fuel emissions to the problem. Rather, the defendants questioned their responsibility for those emissions under public nuisance law. Challenging defendants’ assertions of innocence, the plaintiffs note that the defendant companies have long promoted fossil fuel consumption despite their knowledge of the resulting climate harms. In other words, proximate causation, rather than causation in fact, is likely to be a central issue.

### **Remedy**

Fourth, the current plaintiffs are primarily seeking the creation of an abatement fund to pay for climate adaptation projects. In contrast, the *AEP* plaintiffs sought specific emissions caps, subject to annual reductions—a form of relief that would have required courts to function as environmental regulators on an ongoing basis. Whether a less intrusive request for relief would ease courts’ reluctance to adjudicate climate change public nuisance cases is uncertain. In the

wake of *AEP*, the U.S. Court of Appeals for the Ninth Circuit concluded in *Kivalina* that the Clean Air Act displaced plaintiffs' federal public nuisance action for damages, notwithstanding the statute's lack of a damages remedy. But the matter might come out differently under a preemption analysis, especially as Congress generally left damages to state law when it enacted the federal environmental statutes.

## Implications

The second wave of public nuisance climate change litigation raises novel questions that may take years to resolve. These suits could result in sizeable judgments against the defendants, but are significant for other reasons as well. These cases highlight the fossil fuel industry's role not only in causing climate change but also in blocking efforts to address the issue. Furthermore, the litigation could influence public and political understandings of climate change and put pressure on fossil fuel companies to support a legislative response, such as a carbon tax combined with immunity from public nuisance liability.

## The future of agency deference after *Kisor v. Wilkie*

Erin Murphy

*Erin Murphy is a partner at Kirkland & Ellis LLP. Her practice focuses on U.S. Supreme Court and constitutional litigation. She has litigated several significant environmental and energy law cases before the Supreme Court and the Courts of Appeals.*

In recent years, the U.S. Supreme Court has expressed considerable concern over the vast expansion of the administrative state, as have many of President Trump's appointments to the lower courts. Yet when the Court had a chance to do away with one of the doctrines through which it defers to the views of agencies this Term in *Kisor v. Wilkie*, a majority of the Court declined to do so. That result has many questions about what, if anything, it signals for the future of agency deference in the federal courts.

### The growing skepticism of agency deference

Over the past 15 years, we have seen a growing skepticism from the Roberts Court of the seemingly ever-expanding administrative state. That concern has manifested itself both in decisions for the Court rejecting agency interpretations of the law (including decisions involving environmental regulation, *see, e.g., Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014)) and in separate writings from several Justices.

For example, the Chief Justice has warned that "the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013)

Published in Trends September/October 2019, Volume 51, Number 1, ©2019 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

(Roberts, C.J., concurring). And while on the U.S. Court of Appeals for the Tenth Circuit, then-Judge Gorsuch lamented that judicial deference to agencies is “permit[ting] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.” *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

One of the most persistent targets of the Justices’ ire has been the doctrine of so-called “*Auer* deference.” *Auer* deference (also sometimes known as *Seminole Rock* deference) is the doctrine under which courts will defer to an agency’s reasonable interpretation of its own regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). While *Auer* deference has existed in some form or another for several decades, it has been a subject of considerable criticism in recent years. In fact, no fewer than four Justices have suggested that the Court consider doing away with it entirely.

### ***Kisor v. Wilkie***

The Court had just such an opportunity this Term in *Kisor v. Wilkie*, a case arising out of the U.S. Court of Appeals for the Federal Circuit involving a regulation of the U.S. Department of Veterans Affairs. The Court granted certiorari in *Kisor* on one, and only one, question: whether to overrule *Auer* and *Seminole Rock*. And given the heavy criticism the doctrine had received in recent years, many expected the outcome to be a foregone conclusion.

As expected, four Justices would indeed have done away with *Auer* deference. *See Kisor v. Wilkie*, slip op. 1 (Gorsuch, J., concurring in the judgment, joined by Justice Thomas, and joined in part by Justices Alito and Kavanaugh). But the Chief Justice—one of the same Justices who had suggested that “[i]t may be appropriate to reconsider [*Auer*] in an appropriate case,” *Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 615-16 (2013) (Roberts, C.J., concurring)—ultimately joined the Court’s other four members in salvaging the doctrine.

What are we to make of this seeming retreat from the Chief Justice’s past critiques of excessive judicial deference to administrative agencies? According to the Chief Justice’s concurring opinion, perhaps not very much.

### ***Auer* deference on life support**

For one thing, the Chief Justice voted to preserve *Auer* deference only after the majority articulated considerable constraints on when the doctrine may be invoked.

First, the Court reiterated that “the possibility of deference can arise only if a regulation is genuinely ambiguous”—emphasis on the “genuinely.” Slip op. 11. Second, even “[i]f genuine ambiguity remains,” the agency’s interpretation “must still be ‘reasonable,’” meaning “it must

come within the zone of ambiguity the court has identified after employing all its interpretive tools.” *Id.* at 14.

Finally, even if there is genuine ambiguity, and even if the agency’s interpretation is genuinely reasonable, a court still must ask “whether the character and context of the agency interpretation entitles it to controlling weight.”—i.e., whether it is an “official” interpretation that “implicate[s]” the agency’s “substantive expertise” and “reflect[s] ‘fair and considered judgment.’” *Id.* at 15–17. Only so constrained—or, as Justice Gorsuch put it, “maimed and enfeebled”—did the doctrine survive.

### Looking ahead

Time will tell whether *Kisor* does in fact enfeeble *Auer* to the extent that the Chief Justice seemed to envision in his concurring opinion. But two additional factors caution against reading the Chief Justice’s controlling fifth vote in *Kisor* as signaling any broader retreat from the skepticism of excessive judicial deference to agencies that he typically shares with the four Justices who did not join any part of the Court’s *Kisor* opinion.

First, the Chief Justice voted to preserve *Auer* deference on one, and only one, ground: *stare decisis*. He notably declined to join either of the two parts of Justice Kagan’s opinion that defended the doctrine on its merits. The Chief Justice’s vote thus appears to have far more to do with his views on overruling cases than with any affection for *Auer* deference. Second, the Chief Justice went out of his way to note that he views the issues surrounding *Auer* deference as “distinct” from the issues surrounding *Chevron* deference, and that he did “not regard the Court’s decision today to touch upon the latter question.” Slip op. 2 (Roberts, C.J. concurring). Exactly what that forebodes for *Chevron* may be unclear, but at a minimum, that caveat certainly means what it says.

Taken together, all of that suggests that *Auer* deference may have survived only at the expense of setting forth considerable constraints that we are likely to see resurface when the Court returns to the project of reining in *Chevron* deference. Indeed, perhaps the most important aspect of *Kisor* is not the fate of *Auer* itself, but the fact that every member of the Court has now signed onto the proposition that “ambiguous” means “*genuinely* ambiguous”—a proposition that ought to have at least as much import for the future of *Chevron* deference as it does for the future (or lack thereof) of *Auer* deference.

## The new progressive federalism: States' rights to clean air and climate protection

Melissa Hoffer

*Melissa Hoffer is Chief, Energy and Environment Bureau, Massachusetts Attorney General's Office.*

Today, as we face a climate emergency, our thinking about energy and environment is, of necessity, more integrated than ever. State programs—market-based and otherwise—to promote clean energy and reduce power sector greenhouse gas emissions have been very successful. Yet federal regulatory actions aimed at weakening greenhouse gas regulation and recent efforts to advance wholesale energy market changes that would favor carbon intensive fuel sources jeopardize states' rights to build on the success of their climate protection and clean energy policies.

The March 2017 Presidential Executive Order on Promoting Energy Independence and Economic Growth constituted a significant reset of U.S. energy and environmental policy. Section 2 ordered the immediate review of all “existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.” The Order was the first step in an aggressive deregulatory agenda that the current administration has often framed as an effort to reduce federal overreach and promote states' control over environmental policy.

But we have been down this road before. Many Americans recall the days before the federal Clean Air and Clean Water Acts were passed, before there was a Superfund law that required polluters to pay for the cost of cleaning up their pollution. Federal law was necessary to curb the pollution that threatened public health, ecosystems, and local economies. Pollution recognizes no state border; no matter how diligent a downstream or downwind state may be in controlling pollution from in-state sources, without a federal standard, there is not too much that can be done about out-of-state pollution. In our system of cooperative federalism, state and federal governments share power—often with the federal government setting minimum standards and the states taking a lead role in enforcement and implementation.

States, of course, are central to energy and environmental policy innovation, and truly are functioning as “laboratories of democracy,” in the words of former U.S. Supreme Court Justice Brandeis. For example, in the absence of federal action on greenhouse gas emissions, Northeast and Mid-Atlantic states put in place the first regulated power sector cap and trade program, the Regional Greenhouse Gas Initiative, or RGGI. Now, those states are planning to tackle transportation sector emissions through the regional Transportation and Climate Initiative. As well, under statutory and regulatory mandates, Massachusetts has added or is in the process of adding approximately 26,000,000 megawatt-hours per year of renewable and clean energy

Published in Trends September/October 2019, Volume 51, Number 1, ©2019 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

projects for its electricity customers, which is equivalent to more than 50 percent of the Commonwealth's annual electric load.

### **Curbing mercury pollution**

But while individual states, and even groups of states, can make substantial contributions, strong federal leadership is crucial to securing uniform policy implementation. The role of the federal government is to set minimum national standards to protect the interests of all Americans—clean drinking water, healthy air, a safe climate. Indeed, states find themselves not infrequently in the position of arguing that a federal standard is necessary. Prior to the federal Mercury and Air Toxics Standards (MATS), several states had their own mercury air pollution reduction mandates and Clean Water Act Total Maximum Daily Loads (TMDLs) to reduce mercury pollution in waterbodies. But state requirements alone could not, and did not, address the problem of hazardous air pollution crossing state borders, and mercury pollution remained a problem nationwide. Indeed, as of 2011, all 50 states had fishing advisories in place, particularly to protect young children and pregnant or nursing mothers, due to persistent mercury contamination.

The Northeast Regional Mercury TMDL (2007) concluded that a significant portion of the mercury in the region's rivers, lakes, and streams was due to atmospheric deposition from out-of-region sources that would not be controlled absent a federal standard. And Michigan—the lead plaintiff in *Michigan v. EPA*, challenging MATS on the ground that the U.S. Environmental Protection Agency (EPA) had failed to consider costs for purposes of its appropriate and necessary determination—had a strict state power plant mercury pollution standard set to sunset upon passage of a federal rule. These state rules demonstrated to the *White Stallion* and *Michigan* courts that, as a practical matter, mercury emissions could be controlled cost effectively by existing technology, since states were already doing it.

It was nearly 20 years ago, at the end of 2000, that EPA first determined that it was “appropriate and necessary” to regulate coal- and oil-fired power plants under section 112(n)(1)(A) of the Clean Air Act—a provision established as part of the 1990 Clean Air Act Amendments. EPA affirmed that determination in 2012, and again in 2016 when it issued its Supplemental Finding that, taking costs into account as instructed by the Supreme Court in *Michigan v. EPA*, it remained appropriate and necessary for EPA to regulate power-plant hazardous air pollution. MATS has been in effect since 2015, delivering public health benefits by reducing power plant mercury and other hazardous air pollutant emissions, and, as an unavoidable collateral benefit of the technologies used to remove hazardous air pollution, reducing particulate matter pollution, which poses a substantial health hazard. MATS has imposed no undue costs to ratepayers and no adverse impacts on electric system reliability. Yet, despite many states' long call for action on mercury pollution to protect the health of children, in particular, EPA has now proposed to reverse the appropriate and necessary finding, while leaving the standards in place—a move that



would render MATS vulnerable to legal challenge or administrative rescission, and one that has been opposed nearly unanimously by members of the regulated industry and trade groups.

Critically, and at the very least, federal policy should not undermine states' efforts or usurp state authority to protect their residents and natural resources from pollution and grow their clean energy economies.

### **Encouraging clean energy development and restoring climate stability**

For example, the administration repealed the Clean Power Plan, informed by the principle, subscribed to by then-Oklahoma Attorney General Pruitt, that states should take the lead in addressing power plant carbon dioxide emissions, and not be commandeered by the federal government to comply with a coercive national program that might be inconsistent with their own energy goals. An August 2018 National Public Radio headline captures well this theme in the federal government's messaging when the proposed Affordable Clean Energy rule came out: *Trump Moves to Let States Regulate Coal Plant Emissions*.

Set aside for a moment the fact that, under Clean Air Act section 111(d), states are already in the driver's seat and must develop their own plans establishing a standard of performance for existing sources in accordance with the federal emissions guideline. But the administration's stated goal of respecting states' rights to pursue their own energy policies would seem to have been contradicted by the administration's positions with respect to other key policy proposals.

The U.S. Department of Energy's Grid Reliability and Resilience Notice of Proposed Rulemaking (NOPR) provides a case in point. The NOPR, had it not been summarily rejected by the Federal Energy Regulatory Commission, would have provided cost-recovery (effectively a subsidy) to so-called "fuel secure" plants, like coal plants, providing a market advantage to the most polluting, uneconomic resources and creating an unlevel playing field for cleaner resources—the very resources many states have actively encouraged as a means to combat climate change. In contrast to the administration's stated goal of limiting federal interference in state environmental and energy policymaking, the NOPR would have thwarted state clean energy policy.

A similar dynamic can be seen in the fight over the clean car standards currently underway. Since 1970, California has had authority to set its own more stringent vehicle emissions standards under section 209 of the Clean Air Act, and other states may adopt those identical standards under section 177 or apply the national standard.

The administration's proposal would freeze the Obama-era standards at 2021 levels, and revoke California's authority—again, imposing a lower federal standard on California and more than a dozen section 177 states, and undermining their public health and clean transportation goals, despite rhetoric about the primacy of state leadership.

This significant tension in the administration's position on state authority in the realm of energy and environment is revealing: the administration's allegiance to federalism does not appear to be a bedrock principle, but rather is hostile to many states' energy and environmental policies, under the guise of championing states' rights. States now find themselves on the frontlines of climate disruption, and many are building for resilience while mitigating emissions and doing their part to advance the clean energy transition. States' rights and authority under our federal system ensure that states can continue to lead.

## 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.*

### Atomic Energy Act, Preemption

#### *[Virginia Uranium, Inc. v. Warren](#), 139 S. Ct. 1894 (2019).*

The U.S. Supreme Court has upheld Virginia's long-standing ban on uranium mining in a split decision, affirming the U.S. Court of Appeals for the Fourth Circuit's 2017 opinion that the Atomic Energy Act (AEA) doesn't give the U.S. Nuclear Regulatory Commission (NRC) authority over a uranium mining operation that isn't located on federal land. Writing for a six-justice majority, Justice Gorsuch noted the AEA does not contain any provision preempting state law, and grants express authority to the NRC over all parts of the life cycle of nuclear fuel except mining. The Court also noted that Congress later amended the AEA to add a provision that provides that states remain free to regulate activities not directly under NRC jurisdiction as long as the purpose of that regulation is not nuclear safety, which is exclusively regulated by the NRC. Petitioner Virginia Uranium argued that such provision preempts any state law enacted in order to protect the public against "radiation hazards," citing the Court's 1983 decision in *Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*. In *Pacific Gas & Electric*, the high court held that states must have a non-safety rationale in order to regulate activities within the NRC's authority. The Court disagreed, noting *Pacific Gas & Electric* dealt with a state law governing construction of nuclear power plants, something clearly within the NRC's exclusive jurisdiction.

In a concurring opinion, Justice Ginsburg agreed with the majority opinion that Virginia's ban is not preempted by the AEA but rejected its expressed concern with divining state legislative motives or with the viability of conflict preemption doctrine as exceeding the confines of the case.

Published in Trends September/October 2019, Volume 51, Number 1, ©2019 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Justice Roberts' dissenting opinion said the majority failed to fully address the issue that successfully recovering uranium requires milling to extract the uranium from mined ore, a processing activity exclusively regulated by the NRC, and that Virginia had acknowledged that its ban was enacted due to radiological safety concerns about uranium milling.

## Clean Air Act

### *Sierra Club v. Env'tl. Prot. Agency*, 925 F.3d 490 (D.C. Cir. 2019).

The U.S. Court of Appeals for the D.C. Circuit rejected a challenge to procedural changes made in 2016 by the U.S. Environmental Protection Agency (EPA) concerning data quality assurance and other procedural requirements for certain air monitoring activities, plans, and reporting thereon. The challenged rule requires states to make their air monitoring plans available for public inspection for 30 days, and to accept public comments on those plans and address them as needed in their EPA submissions. The rule also limited procedures for states to change their annual monitoring plans and allowed for less frequent air sampling. The court said it lacked jurisdiction because the challenged new rule didn't deviate much from prior EPA regulations, and that petitioner Sierra Club hadn't shown its members would be harmed by changes in the frequency of air sampling.

Sierra Club had argued that the Clean Air Act requires EPA to approve monitoring plans through the notice-and-comment rulemaking, the same as for state implementation plans sent to EPA. The court disagreed, noting that EPA put annual monitoring plans outside the State Implementation Plan process back in 2006, and therefore the time to challenge that policy had passed. Sierra Club also argued that EPA overlooked concerns it raised in comments on the proposed rule regarding the quality assurance revisions and whether new or modified pollution sources will contribute to significant deteriorations in air quality as a result. The court again disagreed, stating that EPA had "plainly addressed the factors that the comment had said must be considered."

## Clean Water Act

### *Black Warrior Riverkeeper Inc. v. Drummond Co.*, No. 2:16-cv-01443, 2019 WL 2011396, 2019 U.S. Dist. LEXIS 76858 (N.D. Ala. May 7, 2019).

The U.S. District Court for the Northern District of Alabama has held that a pile of mining waste constitutes a point source under the Clean Water Act (CWA or Act), and therefore requires a National Pollutant Discharge Elimination System (NPDES) discharge permit under section 402 of the Act. Alabama By-Products Corporation (ABC) operated the Maxine Mine in Alabama from 1953 to 1983. The surface mining portion was adjacent to the Locust Fork, a navigable-in-fact tributary of the Black Warrior River. Mining operations generated a large pile of geologic

overburden that discharged acidic water into the Locust Fork. ABC worked for decades to reclaim the pile, capping and revegetating the exposed material and constructing ditches to divert contaminated effluent. Ultimately, the Alabama Surface Mining Commission determined that ABC substantially completed reclamation activities. ABC eventually merged with Drummond Company, which reinitiated mining. The Alabama Department of Environmental Management then issued Drummond a NPDES permit for one outfall of the pile, but the permit lapsed in 1993. Black Warrior Riverkeeper sued Drummond under the CWA for unpermitted discharges. On a motion for summary judgment, the court addressed whether Drummond violated section 402 of the CWA by failing to obtain a permit for effluent discharge from the pile. The court paid special attention to whether the concentrated waste material constituted a point source. Observing that the U.S. Circuit Court of Appeals for the Eleventh Circuit broadly construes “point source,” the court found that the pile fell within the definition. The court analogized to *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2014), where the U.S. Court of Appeals for the Eleventh Circuit held that industrial debris piles were point sources because they gathered stormwater and discharged it to a water of the United States (WOTUS) via gullies formed by erosion. Similarly, the Maxine Mine pile collects storm water during precipitation events that then flows into the Locust Fork via man-made channels and natural gullies. Accordingly, the court granted Black Warrior Riverkeeper’s motion for partial summary judgment on the question of whether Drummond violated section 402 of the CWA; however, the court found a genuine issue of material fact as to whether an intermittent tributary of the Locust Fork was a WOTUS. The court stayed the case—instead of proceeding to trial—pending the U.S. Supreme Court’s upcoming decision in *Hawai’i Wildlife Fund v. Cnty. of Maui, Hawai’i*, 886 F.3d 737, 749 (9th Cir. 2018), *cert. granted* 139 S. Ct. 1164 (2019) (previously analyzed in *Trends*, 50 *Trends* No. 5 (May/June 2019)).

### Climate change litigation

#### ***Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 2436848, 2019 U.S. Dist. LEXIS 97438 (D. Md. June 10, 2019).**

The U.S. District Court for the District of Maryland has remanded back to state court the City of Baltimore’s climate change suit against BP PLC and other major oil companies alleging they caused climate change–related damage to the city’s infrastructure. Baltimore brought claims in state court under state law ranging from nuisance to negligence for infrastructure-related costs to the city caused by global warming. Defendant Chevron removed the case to federal court in July 2018 based on multiple arguments, including that federal issues preempted state claims and that the case belonged in federal court because it impacted the country’s foreign policy and a range of federal regulations.

After removal, the defendant oil companies argued that federal issues predominated, warranting federal court retention of the case. The Court disagreed, stating the complaint pleads state-based claims, and citing the well-pled complaint rule as focusing the Court’s attention on the content of

the complaint itself, rather than the federal implications of the case, especially in the absence of controlling authority. The ruling widens a split among federal district courts concerning whether such climate change claims brought under state law belong in federal court, and, once there, if they can be heard at all. The Court also stayed its remand order for 30 days, allowing the defendant oil companies time to file an appeal.

### **Eminent domain, oil and gas**

#### ***Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829 (Iowa 2019).**

The Iowa Supreme Court has held that increased safety of oil transport via the Dakota Access Pipeline and the associated reduced prices for petroleum products benefiting Iowa's citizens satisfied the public use requirement of Iowa statute, affirming the private pipeline developer's authorization to condemn easements for its construction and operation. In January 2015, Dakota Access, LLC petitioned the Iowa Utilities Board to approve construction of the Dakota Access Pipeline and permit condemnation of easements along the pipeline route. An extensive hearing process followed in November and December 2015. In March 2016, the Iowa Utilities Board issued its final decision. The board determined that the increased safety associated with pipeline transport of crude oil and the economic benefits from construction and operation satisfied the requirements for authorizing condemnation by a pipeline company. John Puntenney, a landowner, objected. He requested the pipeline be rerouted because he wanted to install wind turbines on his property near the proposed route. The board concluded that Puntenney lacked a firm plan and that the pipeline would not necessarily interfere with a future wind installation. After a state district court consolidated and denied petitions for judicial review in February 2017, Puntenney, Sierra Club, and other landowners appealed. The court ruled on several issues including standing and mootness; however, its discussion of the constitutional authority for the exercise of eminent domain is most notable. The petitioners argued that condemnation of easements by a private pipeline developer did not constitute "public use" within the meaning of article I, section 18, of the Iowa Constitution or the Fifth Amendment of the U.S. Constitution. In particular, they contended that indirect economic benefits derived from an infrastructure project cannot be considered in evaluating public use. Disagreeing with the petitioners, the court first looked to Justice O'Connor's dissent in *Kelo v. City of New London*, 545 U.S. 469 (2005). Justice O'Connor acknowledged a legitimate public use where a "sovereign [transfers] private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium." After reviewing supreme court cases from Illinois, Ohio, and other states, the court mused that "[i]f economic development alone were a valid public use, then instead of building a pipeline, Dakota Access could constitutionally condemn Iowa farmland to build a palatial mansion, which could be defended as a valid public use so long as 3,100 workers were needed to build it." Nevertheless, the court ultimately upheld Dakota Access' ability to condemn easements. The court emphasized that Dakota Access Pipeline would "provide[] public benefits in the form of cheaper and safer transportation of oil, which in a competitive marketplace results in lower prices for petroleum

products.” Lamenting the externalities associated with facilitating crude production, the court also recommended policy makers impose a carbon tax so developers bear the true costs of their fossil fuel development activities.

## FERC

[\*Sw. Airlines Co. v. Fed. Energy Regulatory Comm’n\*](#), 926 F.3d 851 (D.C. Cir. 2019).

The U.S. Court of Appeals for the D.C. Circuit has held that the Federal Energy Regulatory Commission (FERC or Commission) arbitrarily and capriciously changed its methodology regarding the types of data used in pipeline rate change proceedings. The case concerns an indexing method that FERC uses to streamline the process of verifying the reasonableness of increases in oil pipeline service rates charged to producer/shippers. The Commission calculates an index based on inflation in the Producer Price Index for Finished Goods for the previous two calendar years. A pipeline may enter an expedited process to raise its rate based on the index, rather than individual cost-of-service calculations. A pipeline’s customers may then object to the raised rate through either a protest or complaint. The protest process proceeds quickly. Thus, the Commission uses a simple “percentage comparison test” to evaluate a pipeline’s two-year change in total cost of service. FERC opens an investigation if the percentage change in the rate exceeds the change in costs by more than 10 percent. The complaint process, in contrast, has an extended time frame allowing the Commission to apply a more rigorous test. Namely, a complainant “must show (1) that the pipeline is substantially over-recovering its cost of service and (2) that the indexed based [rate] increase so exceeds the actual increase in the pipeline’s cost that the resulting rate . . . would substantially exacerbate that over-recovery.” In this case, several shippers filed complaints against rate increases of pipeline owner SFPP, L.P. They filed within the two-year statutory window but long after the rate increases occurred. In dismissing the complaints, FERC relied on facts about SFPP’s cost and revenue changes available at the time of the complaint instead of data from the relevant two-year periods. The Commission explained that the shippers waited so long to file their complaints that new, relevant data became available to inform dismissal. The change in methodology prompted the shippers to challenge FERC’s decision. Observing that the Commission exclusively relied on the two-year-period data for previous decisions, the court criticized FERC for failing to justify its marked change in methodology. The Commission’s argument that “it would be inefficient and inequitable to ignore evidence that was available at the time” did not suffice to justify such a sweeping change in the data to be considered for rate changes.

## FERC, NEPA, oil and gas

[\*Birckhead v. Fed. Energy Regulatory Comm’n\*](#), 925 F.3d 510 (D.C. Cir. 2019).

The U.S. Court of Appeals for the D.C. Circuit has refused to review a certificate of public convenience and necessity for certain gas compression facilities on grounds of administrative

exhaustion, but signaled its future scrutiny of FERC's analysis of downstream environmental impacts. In 2015, Tennessee Gas Pipeline Co. applied to FERC for a certificate of public convenience and necessity to construct gas compression facilities in Kentucky, Tennessee, and West Virginia. The Commission completed an environmental assessment for the project in March 2016. FERC then issued the certificate. A group of concerned citizens (Concerned Citizens) petitioned for rehearing on the ground that FERC violated the National Environmental Policy Act (NEPA). The petitioners argued that the Commission failed to address reasonably foreseeable indirect environmental effects resulting from increased upstream gas production and downstream gas combustion. As to upstream effects, Concerned Citizens identified no evidence in the administrative record that would help the Commission predict the number and location of new wells that would be drilled due to increased demand from the compression stations. And because the petitioners never alleged the Commission's failure to obtain evidence violated NEPA, the court had no basis for concluding that the Commission acted arbitrarily and capriciously. As to downstream impacts, the court criticized FERC but ultimately reached the same result. The Commission argued it was impossible to assess potential emission increases or offsets because the destination and end users of the gas were unknown. Discussing the 2017 decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), the court explained that downstream emissions may be reasonably foreseeable even though the newly developed gas displaces indeterminate existing supplies or higher-emission fuels. Moreover, the Commission's lack of jurisdiction over entities other than the pipeline applicant does not excuse it from seeking information needed to consider downstream environmental impacts.

## NEPA, oil and gas

### *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019).

The U.S. Court of Appeals for the Tenth Circuit has held that the Bureau of Land Management (BLM or Bureau) violated NEPA when it failed to analyze the cumulative impacts of horizontal drilling for oil and gas on water resources in New Mexico. In 2000, BLM began revising the Resource Management Plan for the Mancos Shale formation in the San Juan Basin of northeastern New Mexico. The Bureau developed a reasonably foreseeable development scenario that contemplated 9,970 new oil and gas wells in the Mancos Shale. In 2003, BLM issued the Proposed Resource Management Plan and Final EIS, which analyzed the cumulative air quality impacts of nearly all the foreseeable wells. The Bureau began receiving applications for permits to drill in 2010 and undertook the required Environmental Assessments associated with each. Based on development rates thereafter, BLM updated its reasonably foreseeable development scenario, estimating that full development of the formation would only produce 3,960 new wells. However, the wells would likely be established exclusively by horizontal drilling and multistage hydraulic fracturing; the 2003 EIS failed to address horizontal drilling due to the economic infeasibility of the technique at the time. Environmental advocacy groups (Environmental Groups), including Diné Citizens Against Ruining Our Environment, filed suit, alleging violations of NEPA. Namely, the Environmental Groups argued "the environmental

impacts of the horizontal Mancos Shale wells [were] both (1) different in kind from and (2) greater in magnitude than those considered in the 2003 EIS.” The court first confirmed that the Environmental Groups had standing because BLM’s alleged failure to adhere to NEPA created an increased risk of environmental harm which injured the Environmental Groups’ geographic nexus to the land. The court then concluded that once BLM updated its reasonably foreseeable development scenarios, the 3,960 horizontally drilled wells became reasonably foreseeable and hence subject to updated compliance with NEPA’s cumulative impact analysis requirement. Because BLM assumed the 2003 EIS sufficed, the Bureau completely failed to evaluate the likely impacts of horizontal drilling on water resources. The court remanded to the district court to vacate the applications for permits to drill and remanded the Environmental Assessments to BLM to conduct proper NEPA analyses.

## Oil and gas

### *Andrews v. Antero Res. Corp.*, No. 17-0126, 2019 WL 2494598 (W. Va. June 10, 2019).

The West Virginia Supreme Court of Appeals has affirmed a lower court’s ruling that the impacts of horizontal drilling for natural gas by defendants Antero Resources Corp. and Hall Drilling LLC on complainant landowners were within the companies’ implied rights under their mineral leases to use the surface of lands within their lease boundaries for mineral development activities.

The court held that the landowners hadn’t provided sufficient evidence to support their argument that defendants’ activities substantially burdened their right to use and enjoy their land. The court specifically noted that the drilling didn’t take place on their properties and that they hadn’t asserted any specific damage to their surface estates. The court also found that plaintiff landowners had “failed to present evidence that the activities of which they complain are not reasonably necessary for Antero and Hall to develop the Marcellus shale,” or “to present evidence that they are being substantially burdened by these activities.”

The landowners also alleged the drilling and gas development activities constituted a nuisance, but since the lower court based its decision on contract and property law without ruling on the plaintiffs’ nuisance claims, the Supreme Court of Appeals could not address the claim.

A dissenting opinion decried the majority’s failure to analyze landowner and driller rights to achieve a balance of competing interests in the context of the new reality of hydraulic fracturing and unconventional gas well development in the Marcellus and Utica Shales of West Virginia.

## RCRA

### *Ctr. for Biological Diversity v. United States Forest Serv.*, 925 F.3d 1041 (9th Cir. 2019).

Published in Trends September/October 2019, Volume 51, Number 1, ©2019 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



The U.S. Court of Appeals for the Ninth Circuit has reversed a lower court's dismissal of a lawsuit by environmental groups against the [U.S. Forest Service](#) over lead ammunition that's allowed to be used in Arizona's Kaibab National Forest. The District of Arizona federal court dismissed the suit on grounds that it lacked the authority to issue the requested remedy. On appeal, the Ninth Circuit disagreed, saying the Resource Conservation and Recovery Act expressly authorizes suits like plaintiffs' lawsuit, and also spells out guidelines for judges handling them.

In their 2012 complaint, the groups asked the court to enjoin the Forest Service from "contributing to the creation of an imminent and substantial endangerment to human health or the environment" in the forest. Some hunters use lead ammunition, and sometimes their kills are left behind. In that circumstance, if the ammunition used contains lead, that can poison scavenger animals and other animals in the food chain. The use of lead ammunition is not regulated by the Forest Service.

The Ninth Circuit said the lower court was incorrect in finding that the lawsuit could only result in an "advisory opinion," or one with no real power to force the Forest Service to act. The lower court could, in fact, impose a remedy that would require the Forest Service to take some action about the ammunition, whether through cleaning it up, or banning it, or some other action. The Ninth Circuit remanded the case to the district court for further proceedings.

## TSCA, CERCLA

### ***Haber Land Company, Ltd. v. American Steel City Industrial Leasing, Inc., No. 1:18-cv-04091-JMS-MJD, 2019 WL 1981648 (S.D. Ind. May 3, 2019).***

The U.S. District Court for the Southern District of Indiana has dismissed a Toxic Substances Control Act (TSCA) citizen suit claim for injunctive relief regarding polychlorinated biphenyl contamination of soils on the ground that such suit may not be brought for wholly past violations. Related Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claims of the agricultural landowner survived the defendants' motions to dismiss. Plaintiff Haber Land Company, Ltd. (Haber) bought land for agricultural use that was contaminated with polychlorinated biphenyls and other waste from prior industrial activities. After performing cleanup pursuant to state administrative order, Haber sued the prior owners and operators for cost recovery and contribution under CERCLA and sought injunctive relief under TSCA's citizen suit provision. Defendants moved for dismissal.

The court granted defendants' motion to dismiss the TSCA claim since citizen suits under TSCA are authorized only for ongoing violations, and held that the continued presence of soil contamination from previous industrial activity does not constitute an ongoing TSCA violation, since the U.S. Circuit Court of Appeals for the Seventh Circuit has previously held that, unlike

other federal environmental statutes, “TSCA authorizes only prohibitory injunctions to stop ongoing violations.” *Liebhart v. SPX Corp.*, 917 F.3d 952, 961 (7th Cir. 2019).

The court held that Haber’s CERCLA claim survived the motions to dismiss, noting that a standard of “plausibility” was all that was required at this early stage of litigation, and that Haber had easily met that standard. More specifically, Haber’s allegation that it had “performed remediation at the direction of [state regulator] IDEM” was sufficient to allege that it had incurred costs that were “consistent with the national contingency plan,” and a more detailed account of expenses and cleanup activities was not necessary at this point.

## Water resources

### ***Sylte v. Idaho Dep’t of Water Res.*, No. 46062, 2019 WL 2479799, 2019 Ida. LEXIS 105 (Idaho June 14, 2019).**

The Supreme Court of Idaho has denied the request of Sylte Ranch, the holder of an 1875 direct flow right, for a declaratory judgment that natural lake storage volumes of water must be made available to it in order to satisfy its direct flow surface water rights. The Twin Lakes-Rathdrum Creek drainage in Idaho underwent a general adjudication of surface water rights that was completed in 1989. Under the decree, only two rights holders were explicitly entitled to use stored water in Twin Lakes. The decree also stated that “direct flow water rights can be utilized to divert from Twin Lakes only if the diversions do not injure the storage water rights in Twin Lakes.” In September 2016, the Idaho Department of Water Resources (IDWR) issued a letter to the local watermaster, explaining that he could only release the total weekly natural tributary inflow to Twin Lakes to satisfy downstream direct flow rights—and only if the inflows exceeded seepage and evaporative loss. Sylte Ranch sought a declaratory ruling challenging IDWR’s interpretation. Whereas the decree established no right to use the natural storage volume because “it provides a base for the overlying storage rights,” Sylte argued it should receive Twin Lakes’ natural, pre-dam outflow. Conceptualizing Twin Lakes like a bathtub, Sylte suggested that pre-dam outflows would include some portion of the natural storage volume underlying the capacity added by the dam. The court disagreed, holding that the language of the decree unambiguously barred use of stored water by direct flow rights holders. More interestingly, the restriction on flow volume to Sylte would expose the ranch to higher rates of non-delivery under futile call procedures. The court acknowledged this reality but held that the procedures complied with the decree and Idaho water law given the decree’s limitation on use of the stored waters. Thus, the outcome was a one-two punch for Sylte, affirming the unavailability of natural lake storage volume to satisfy its historical flow right and refusing to let the watermaster borrow against natural storage to prevent a futile call.

## Views from the Chair

**Karen A. Mignone**

*[Karen A. Mignone](#) is the chair of the Section of Environment, Energy, and Resources.*

Thank you for allowing me to serve as your chair of the Section of Environment, Energy, and Resources. I hope to build on the success of my predecessors, especially that of Amy Edwards, immediate past chair. Our Section is an amazing organization; fueled by volunteers and containing a varied membership with a wide variety of experiences and perspectives, it provides all of us with limitless opportunities to expand our horizons and our networks, and perhaps even to have some fun.

The appointments process that every incoming chair completes highlights how much the success of the Section depends on the willingness of our members to volunteer. Recognizing that everyone has a number of demands on their time, it is truly incredible that so many people are willing to commit and to work hard to ensure our success. From committee chairs and vice chairs, to special committee and planning committee members, to those who work on creating world-class publications, I am in awe of all those who volunteer time and effort to maintain our standing as the premier forum for environmental, energy, and resources law, and am grateful to each one of you.

Our world is changing; experiencing these changes with a diverse and divergent membership will contribute to our ability to process and adapt. Our members range from people with more than 40 years in the Section to our law students, and represents private practice, in-house counsel, government agencies, and nongovernmental organizations. We will continue our efforts to increase our diversity to increase our strength and relevance. The mix of our senior members, working alongside those who are relatively new to the practice of law or are still in school, helps us provide services relevant to everyone at every stage of their career. For those who are active in leadership, I know it isn't always easy. The work of the Section takes time away from our primary jobs and time with our families and friends. And yet active participation by members is essential to maintaining a viable organization that allows for the free exchange of ideas and the opportunity to learn from others.

Our Section should be a place where people with a variety of beliefs and ideologies can get together, both in person and virtually, to exchange ideas in a thoughtful and respectful manner. We all have different backgrounds and experiences that got us to this place. Consider the fact that many of our members were not even born at the time of the creation of EPA (1970), when the Cuyahoga River burned (1969), or the discovery of Love Canal (1978). Our membership represents such a huge range of memories, experience, and perspectives that we can't help but learn by listening to others.

There are all kinds of benefits, both tangible and intangible, that flow from being active in an organization such as ours. It isn't just the opportunity to engage with people with different views, but it is the opportunity to understand and appreciate our differences. Our success as a Section is based both on the high level of contributions from our members and the ability to engage in respectful and vigorous discourse.

As I embark on my year as chair of the Section of Environment, Energy, and Resources, I want you to know that I am grateful for the opportunity to serve, and even more grateful for your willingness to contribute to our success. I look forward to a year of interesting conversations, vibrant programs, informative publications, and to the opportunities all these benefits create for each of us.

## People on the Move

### James R. Arnold

*[Jim Arnold](#) is the principal in The Arnold Law Practice in San Francisco. He is a past Section secretary, Council member, and chair of the Sponsorships Committee, the Superfund and Hazardous Waste Committee, co-chair of the 1999 Section Fall Meeting, and chair of the Hard Minerals Committee, and is a contributing editor to Trends. Information about Section members' moves and activities can be sent to Jim's attention, care of [ellen.rothstein@americanbar.org](mailto:ellen.rothstein@americanbar.org).*

[John C. Cruden](#) has become president of the Foundation of the American College of Environmental Lawyers (ACEL). Cruden is past president of the ACEL. He is a principal at Beveridge & Diamond, where he counsels clients on strategic high-stakes litigation, civil and criminal enforcement, and compliance matters. Cruden has decades of experience as one of the nation's top government environmental and natural resource lawyers and as a leader of several major environmental bar organizations. He served as an assistant attorney general of the Environment and Natural Resources Division of the U.S. Department of Justice from 2014 to 2017. He was the president of the Environmental Law Institute from 2011 to 2014, after having served with the Justice Department from 1991 to 2011. Cruden was chair of the Section of Environment, Energy, and Resources in 2009–2010.

[Jad Davis](#) has joined Shook Hardy & Bacon as a partner in the firm's Irvine, California (Orange County), office. Davis was formerly with Kutak Rock LLP, also in Irvine. He focuses on the design, construction, and energy industries in the areas of environmental and regulatory counseling, and mass toxic tort and exposure litigation. On behalf of clients, he has appeared in state and federal courts nationwide, as well as administrative agencies—federal, state, regional, or local. Notably, Davis has represented clients before the U.S. Environmental Protection Agency (EPA), and the agencies of the California EPA. In court, he typically represents clients

in litigation involving soils, soil vapor, water, or air contamination. Davis has served in the Section as co-chair of the Science and Technology Committee (2016–2018), and a vice chair of the Environmental Transactions and Brownfields and Air Quality Committees.

**Joshua P. Fershee** has been appointed dean of the Creighton University School of Law in Omaha, Nebraska. Fershee will also continue his professorial career at Creighton. He was with the West Virginia University College of Law in Morgantown, West Virginia, from 2012 to 2019, where he served in various roles, including associate dean for faculty research and development, professor of law, and director of LL.M. programs in energy and sustainable development. Fershee writes and speaks extensively and has actively participated in Section leadership. He has served as vice chair of the Energy Infrastructure and Siting Committee, vice chair of the Constitutional Law Committee, and vice chair of the Restructuring of the Electric Industry Committee.

**Emily Masalski** has cofounded and become CEO of Hunter Masalski LLC in Chicago. Masalski was previously a partner at Rooney Rippie & Ratnaswamy LLP, also in Chicago. She represents clients in environmental, health, and safety (EHS) law matters, emphasizing compliance and defense in U.S. EPA and OSHA areas. Masalski presently focuses on EHS issues in the medical cannabis industry. She was a Star of the Quarter, ABA Young Lawyers Division (2010) and is a SEER Leadership Development Program alumna. More recently, Masalski served as chair of the Environmental Law Section of the Illinois State Bar (2016–2017). She currently serves as an Illinois delegate to the ABA House of Delegates and is a member of the 2020 SEER Spring Conference Planning Committee.

**Mark Walters** has joined the Environment and Natural Resources Division of the U.S. Department of Justice, Washington, D.C., as a trial attorney in the Environmental Defense Section. The Section defends the environmental rules and orders of federal agencies and environmental claims against federal facilities and land management agencies. It also prosecutes Clean Water Act violations, and represents the United States in CERCLA contribution and nonfederal cost recovery litigation. Walters was previously special counsel with Jackson Walker LLP in Austin, Texas, and served as a Texas assistant attorney general representing state agencies in environmental and energy litigation.

**Peter C. Wright** has been confirmed as assistant administrator, Office of Land and Emergency Management, of the U.S. EPA. The office, formerly known as the Office of Solid Waste and Emergency Response, manages EPA's programs for brownfields, emergency management and response, cleanups of federal and nonfederal facilities, the federal Superfund program, underground storage tanks, renewable energy on contaminated lands, landfills and mine sites, sustainable materials management, and solid and hazardous wastes. Wright joined EPA in 2018 as special counsel to the administrator. He was previously Dow Chemical Company's managing counsel for environmental health and safety matters, including remediation of hazardous waste sites, and similar environmental regulatory matters. Wright also provided legal counsel to the

company on merger, acquisition, and real estate transactions. Wright has written and spoken on a wide range of environmental law topics. He has served in leadership with the Section for many years, in such roles as chair, Corporate Counsel Committee (2001–2002); chair, Special Committee on Newsletter Coordination (2004–2005); chair, Section Fall Meeting (2007); member of Council (2006–2009); chair, Book Publishing Board (2009–2010); Section education officer (2012–2014); and chair, Communications and External Relations Committee (2014–2016).