# Table of Contents

## FEATURES

- **Does Sackett bring clarity to “waters of the United States”?** .................................................... 1  
  Robin Kundis Craig

- **Countries adopt insufficient global conservation targets for 2030** ........................................... 5  
  Zak Smith

- **Biodiversity under the spotlight: The growing wave of shareholder scrutiny and stewardship pressure** ................................................................................................................................. 8  
  David M. Silk, Sebastian V. Niles, and Carmen X. W. Lu

- **Stepbrothers: Can we reconcile the growing demand for offshore wind energy with marine conservation?** ................................................................................................................................. 11  
  David E. Jennings

- **Making critical minerals supply chains sustainable and responsible** ........................................... 14  
  K.C. Michaels

- **Rights of Rivers swell in Colorado** ............................................................................................. 17  
  Kevin J. Lynch

- **The constitutional right to a clean environment: Human rights violations as an emerging legal foundation and vehicle for a clean environment** ......................................................... 20  
  Monica McCann

- **Product liability and intentionally—versus unintentionally—added PFAS** ................................. 23  
  Caron Koll and Jack Sheldon

## SECTION NEWS

- **Environmental Bankruptcy Law: A Practice Guide (Alan S. Tenenbaum and Jeanne T. Cohn, ABA 2023)** ................................................................................................................................. 26  
  Norman A. Dupont

- **Views from the Chair** ................................................................................................................ 28  
  Jonathan Kahn
People on the Move ....................................................................................................................30
James R. Arnold

The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of either the American Bar Association or the Section of Environment, Energy, and Resources unless adopted pursuant to the bylaws of the Association.
Does *Sackett* bring clarity to “waters of the United States”?  
Robin Kundis Craig

Robin Kundis Craig is the Robert C. Packard Trustee Chair in Law at the University of Southern California Gould School of Law in Los Angeles, California. She may be reached at rcraig@law.usc.edu.

When the U.S. Supreme Court issued its decision in *Sackett v. Environmental Protection Agency* on May 25, 2023, one thing many Court watchers were hoping for, regardless of which side of the “waters of the United States” debate they fall on, was clarity. The majority opinion does bring some clarity to this long-running environmental law fight, but how *Sackett* will dovetail with the Court’s April 2020 decision in *County of Maui v. Hawaii Wildlife Fund* remains to be seen.

The Federal Water Pollution Control Act, better known as the Clean Water Act (CWA), prohibits the addition of a pollutant to jurisdictional waters from a point source by a person without a permit (33 U.S.C. §§ 1311(a), 1362(12), 1342, 1344). Jurisdictional waters include the ocean, the contiguous zone, and the “navigable waters,” which the CWA defines to be “the waters of the United States, including the territorial seas” (id. § 1362(7)). The debate regarding the proper scope of “waters of the United States” first arose between the two federal agencies that implement the CWA, the U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps). They reached a consensus definition in the 1980s, which the U.S. Supreme Court deferred to in *United States v. Riverside Bayview Homes* (1985), upholding the CWA’s application to wetlands adjacent to traditional navigable waters.

Fast forward 16 years to a changed Court. In 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), the Court decided (5-4, on constitutional avoidance and federalism grounds) that “waters of the United States” do not include isolated submerged sand and gravel pits simply because migratory birds use them. However, it was the 2006 decision in *Rapanos v. United States* that fractured the Court, leaving the agencies and regulated communities with three approaches to “waters of the United States.” Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, confined “waters of the United States to “only relatively permanent, standing or flowing bodies of water” (547 U.S. 715, 732–39 (2006)), including “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right” (id. at 742). In contrast, Justice Kennedy in concurrence required a “significant nexus” between wetlands (and other smaller waters) and traditional navigable waters (id. at 767, 779–81 (Kennedy J., concurring)). Dissenting Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, would have adopted a less stringent test but, under the circumstances, concluded that CWA jurisdiction exists when a water meets either Justice Scalia’s or Justice Kennedy’s test (id. at 809–10 (Stevens, J., dissenting)).

In *Sackett*, the Court also fractured—but Justice Alito authored a majority opinion, joined by
Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett. Justice Thomas also separately wrote a concurring opinion in which Justice Gorsuch joined, while Justices Kagan (joined by Justices Sotomayor and Jackson) and Kavanaugh (joined by Justices Kagan, Sotomayor, and Jackson) each wrote separate concurrences, joining in the judgment only. The case revolved around property near Priest Lake, Idaho, that Michael and Chantell Sackett purchased in 2004, and more specifically the legality of their decision to fill the wetlands on the property without a permit so that they could build a home. On the Sacketts’ first trip to the Supreme Court in 2012, the Court decided unanimously that they were allowed to immediately challenge the EPA’s jurisdictional determination, without waiting for further administrative proceedings. The current decision is the end point of that challenge.

The first important result in Sackett is that the Justices decided unanimously that the EPA and the Corps lacked jurisdiction over the Sacketts’ (former) wetlands. Second, all nine Justices further agreed that Justice Kennedy’s test from Rapanos was not the correct interpretation of either “adjacent wetlands” or “waters of the United States.” This decision will require all federal Courts of Appeals that have applied Rapanos to adjust their approaches to “waters of the United States.”

Beyond those two points of agreement, however, the four opinions offer notably different perspectives on the CWA and adjacent wetlands. For Justice Alito’s majority, “[t]he CWA is a potent weapon” that imposes “crushing consequences” on even “inadvertent violations” (Alito Slip Op. at 3). The majority emphasized the EPA’s “convoluted” logic in concluding that the Sackets’ wetlands are jurisdictional (id. at 5–6), as well as the burdens, procedural and substantive, that section 404 imposes on landowners (id. at 12–14). Applying what it considered a plain-meaning reading of “waters of the United States,” the majority explicitly adopted Justice Scalia’s plurality test from Rapanos, focusing, as Justice Scalia did, on Congress’s use of “waters” (id. at 14–15) but adding new emphasis to “navigable.” “At a minimum, . . . the use of ‘navigable’ signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans” (id. at 15), and “[t]he CWA repeatedly uses ‘waters’ in contexts that confirm the term refers to bodies of open water” (id. at 16).

Nevertheless, the majority acknowledged that “statutory context shows some wetlands qualify as ‘waters of the United States,’” focusing on the 1977 amendments that added section 1344(g) (id. at 18–19). However, to be included, “wetlands must qualify as ‘waters of the United States in their own right,” meaning that “they must be indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA” (id. at 19). As a result, “[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby” (id. at 20). Because the Sacketts’ wetlands “are distinguishable from any possibly covered waters,” Clean Water Act jurisdiction did not exist (id. at 27–28).

Moreover, the majority wrote that, as in SWANCC, the states’ “primary roles” in regulating land and water use undercut expansive federal jurisdiction (id. at 17–18). Notably, the majority flatly refused to defer to the EPA’s and the Corps’ new 2023 regulations, in part because the EPA was seeking to alter the balance of power between the federal governments and the states (id. at 23). Moreover, “the EPA’s interpretation gives rise to serious vagueness concerns in light of the
CWA’s criminal penalties” (id. at 24). Thus, a follow-on consequence of Sackett is that the 2023 “waters of the United States” regulations are almost certainly invalid, especially because they rely on the significant nexus test.

Justice Thomas, joined by Justice Gorsuch, authored the first concurring opinion. These two Justices argued that “navigable” and “of the United States” also limit the scope of “waters of the United States” (Thomas Slip Op. at 1). They would limit federal authority over water to that expressed in the Commerce Clause’s “channels of commerce” jurisprudence, meaning that Congress could regulate only traditionally navigable waters and only for the purposes of protecting interstate and international commerce (id. at 8). Under Justice Thomas’s interpretation, not even Priest Lake—a wholly intrastate lake—is subject to the federal government’s authority, let alone any wetlands (id. at 24–25). Moreover, because of his alleged adherence to the original understanding of the Commerce Clause, Justice Thomas believes that all federal environmental law rests on shaky constitutional grounds (id. at 26).

In contrast, Justice Kagan, joined by Justices Sotomayor and Jackson, concurred in the judgment but argued that the majority’s view of “adjacent” wetlands was too narrow (Kagan Slip Op. at 1). These Justices would have still included as jurisdictional wetlands that are “‘separated from a covered water only by a manmade dike or barrier, natural river berm, beach dune, or the like”’ (id. (quoting the consensus regulations)). Notably, Justice Kagan’s opinion celebrates the CWA and its accomplishments and acknowledges that a broader scope was necessary to achieve Congress’s clear goals (id. at 2–3).

Justice Kavanaugh’s concurrence—which Justices Sotomayor, Kagan, and Jackson joined—explained that these Justices agree that the Court was correct to reject the “significant nexus” test. These Justices also agree “with the Court’s bottom-line judgment that the wetlands on the Sackets’ property are not covered by the Act and are therefore not subject to permitting requirements” (id. at 1–2). The implication—although they do not say so explicitly—is that they also concur in the majority’s adoption of Justice Scalia’s test for “waters of the United States.” However, like Justice Kagan, Justice Kavanaugh disagreed with what he characterized as the majority’s new “‘continuous surface connection’” test for wetlands, emphasizing that “adjacent wetlands” (the term the CWA uses) and “adjoining wetlands” (the test the majority adopts) are different, with adjoining wetlands being a subset of adjacent wetlands (id. at 2–6).

Notably, Justice Kavanaugh relied on “longstanding agency practice” as one reason for keeping the broader definition of adjacent wetlands, emphasizing that this dual-agency definition had persisted through eight presidential administrations that have otherwise sometimes held vastly different views on environmental regulation (id. at 6–8). As such, Justice Kavanaugh seemed willing to continue to defer to long-standing agency definitions, acknowledging that their very survival adds clarity and certainty to the CWA’s meaning. Justice Kavanaugh also strongly resisted the majority’s characterization of the EPA as overreaching its authority, noting that the interpretation of “adjacent wetland” had been settled in 1977 and that “waters of the United States” is an operative rather than obscure provision of the act (id. at 11); in other words, there is no hint of a “major question” in this case. Finally, while “[t]he Court suggests that ambiguities or
vagueness in federal statutes should be construed in favor of the property owner, particularly
given that States have traditionally regulated private property rights,” Justice Kavanaugh stressed
that “the Federal Government has long regulated the waters of the United States, including
adjacent wetlands,” and that the majority was creating rather than recognizing ambiguity in the
statute (id.).

Justice Kavanaugh, relying on the United States’ brief, also indicated that the “continuous
surface connection test” is not as clear as the majority suggested it is (id. at 13–14). While his
questions focused on adjacent wetlands, questions also remain regarding the test’s applicability
to other smaller waters, such as non-navigable tributaries. While the most immediate non-
navigable tributaries should be deemed to have a continuous surface connection to traditional
navigable waters, it remains to be seen how far upstream courts will be willing to acknowledge
that a continuous surface connection extends.

It is at precisely this point that the 2020 County of Maui decision will likely become increasingly
important. Construing “from a point source” in the context of Section 402 of the CWA, the
County of Maui Court created the functional equivalent test (142 S. Ct. 1462, 1476 (2020)).
Under this test, CWA jurisdiction exists either “when a point source directly deposits pollutants
into navigable waters, or when the discharge reaches the same result through roughly similar
means” (id.)—in the case itself, by flowing through groundwater to the ocean over roughly 87 to
110 days. County of Maui thus indicates that the legal status of intermediate waters is largely
irrelevant when pollutants that a point source releases reach relatively close traditional navigable
waters in recognizable form relatively quickly. Thus, filling wetlands that are not immediately
adjacent “waters of the United States” under Sackett could still be a “discharge of fill material”
requiring a section 404 permit—that is, an addition of fill material to a jurisdictional water from
a point source (the equipment that did the filling)—if some of the fill material travels
downstream to a larger navigable water.

Nevertheless, by both adopting and refashioning Justice Scalia’s Rapanos test, Sackett has
narrowed the scope of not only “adjacent wetlands” but also of “waters of the United States.”
Justices Kagan and Kavanaugh confined their protests to the meaning of “adjacent,” but the
Court has now limited all covered waters to relatively permanent, large, continuously flowing or
standing waterbodies. Although the Court was not clear whether these waterbodies must also be
natural (notably, the Corps has long had jurisdiction over waters artificially made navigable), the
retraction of the Clean Water Act’s coverage—as many amicus briefs detailed—is likely to be
severe, particularly in the West and on tribal lands. The states whose interests the majority
sought to protect might extend state law coverage (although such extensions have been an issue
since SWANCC and many states now have laws that limit their water quality laws to the federal
CWA’s scope), but they cannot protect the Tribes within their borders. One last consequence of
Sackett, therefore, may be that Tribes increasingly use their own Clean Water Act authorities to
protect wetlands and smaller waters on tribal lands from polluting activities.
Countries adopt insufficient global conservation targets for 2030

Zak Smith

Zak Smith is a senior attorney and director, Global Biodiversity Conservation, at the Natural Resources Defense Council.

Late last year, leaders from around the world gathered in Montreal to finalize a global conservation plan from now to 2030. The meeting took place against the backdrop of a biodiversity crisis that threatens a million species with extinction and the foundational building blocks of human society. While some Parties pushed for a plan that would compel the kind of transformative change necessary to disrupt the drivers of biodiversity loss, the final, consensus-driven agreement made it more difficult for countries and communities to address the biodiversity crisis. By accepting insufficient targets for action between now and 2030, the agreement allows countries to continue business as usual, posing an existential threat to human well-being.

The Parties to the United Nations Convention on Biological Diversity (CBD or the Convention) started negotiating conservation goals and targets in 2019. Their work included numerous negotiating sessions over the course of three years, as well as meetings of high-level delegates and Ministers at the fifteenth UN Biodiversity Conference that took place in October 2021 in Kunming, China, and December 2022 in Montreal, Canada. The resulting Kunming-Montreal Global Biodiversity Framework (KM-GBF) provides a conservation roadmap for the 196 Parties to the Convention. The framework identifies four long-term goals centered on the Convention’s 2050 vision for biodiversity, when Parties are supposed to be “living in harmony with nature,” and 23 “global targets for urgent action over the decade to 2030.”

No transformational change in Montreal

At the opening of the meeting in Montreal, UN Secretary-General António Guterres laid out the challenge. He was characteristically blunt, noting that “[m]ultinational corporations are filling their bank accounts while emptying our world of its natural gifts” and that “[e]cosystems have become playthings of profit.” As a result of “our bottomless appetite for unchecked and unequal economic growth, humanity has become a weapon of mass extinction. We are treating nature like a toilet. And ultimately, we are committing suicide by proxy.” The secretary-general was not exaggerating. In a “60 Minutes” story on the biodiversity crisis, Dr. Paul Ehrlich sounded the alarm that countries are not doing enough to avert “the end of the kind of civilization we’re used to.”

Unfortunately, the KM-GBF may prove Ehrlich right, at least in the context of global multilateral environmental agreements. In Montreal, Parties consistently refused to agree on targets that would compel transformative change—a fundamental, system-wide reorganization across technological, economic, and social factors, including paradigms, goals, and values—and disrupt the negative trends in nature.
Disappointing funding commitments

According to a 2020 report from the Paulson Institute, to halt and reverse declines in biodiversity we need to increase global spending on protection and restoration by an average of $711 billion each year this decade. During negotiations, many Parties from the Global South were clear that they cannot meet the KM-GBF targets without additional resources. These Parties even walked out of one negotiation session when wealthy countries signaled their refusal to compensate for the environmental degradation and destruction they cause. Nonetheless, the Parties declined to set a target that would close the financing gap. Instead, KM-GBF Target 19 would “[s]ubstantially and progressively increase the level of financial resources” to “at least 200 billion United States dollars” by 2030. The result was well short of what is necessary and is hardly transformative.

Weak protections for biodiversity areas

Similarly, the Parties rejected ambitious language for the targets addressing the two biggest drivers of biodiversity loss: changes in land/ocean use and direct exploitation of species. Target 3 was designed to address the former—the conversion of wild areas to other uses like agriculture or grazing. Protecting more of the world is desperately needed, as we’ve already severely altered around 75 percent of the terrestrial environment and destroyed more than 85 percent of the wetlands that were present in 1700.

Scientists have confirmed that we need to ascribe a high-quality of protection to at least 30 percent of the global ocean and 30 percent of land areas and inland waters by 2030 (30x30). The final Target 3 language is nominally good but lacks the kind of qualitative language that would set us on a new course for protected areas. It commits Parties to “ensure and enable that by 2030 at least 30 per cent of terrestrial, inland water, and of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved. . . .” Ambitious countries sought to qualify the level of protection taking place within an area that is “effectively conserved” by including language such as “prohibits environmentally damaging activities.” But the Parties removed such language from the final draft.

Target 5, designed to address the other leading driver of biodiversity loss—direct exploitation of plants and animals like overfishing and wildlife trade—fared no better. While ambitious countries in the Global South sought language to eliminate exploitation that was ecologically unsustainable, illegal, or posed a risk of pathogen spillover, the Parties adopted language that mirrors current international commitments: “Ensure that the use, harvesting, and trade of wild species is sustainable, safe and legal . . . reducing the risk of pathogen spill-over. . . .” Countries are already supposed to ensure that the use, harvesting and trade of wild species is sustainable and legal. However, around a third of global fish stocks are harvested at unsustainable levels, and around 10 to 15 percent of global timber supplies are sourced from illegal forestry.
Status quo prevails

Negotiators on the global stage maintained the status quo by drafting an agreement that would not threaten business as usual. However, ambitious parties can do more to embrace transformative change as they make their contributions to meet these global commitments. Thus, the fight continues if we want to secure life as we know it for future generations.
Biodiversity under the spotlight: The growing wave of shareholder scrutiny and stewardship pressure
David M. Silk, Sebastian V. Niles, and Carmen X. W. Lu

David M. Silk is of counsel in Wachtell, Lipton, Rosen & Katz’s Corporate Department. His practice focuses on hostile and negotiated merger and acquisition transactions, private equity transactions, corporate governance including sustainability and ESG matters, proxy contests, restructurings, joint ventures, and securities laws.

Sebastian V. Niles is a partner at Wachtell, Lipton, Rosen & Katz where he focuses on rapid response shareholder and stakeholder activism, proxy fights and preparedness, takeover defense, and corporate governance; risk oversight, including as to ESG, cybersecurity, and crisis situations; U.S. and cross-border mergers, acquisitions, buyouts, investments, divestitures, and strategic partnerships; and other corporate and securities law matters and special situations.

Carmen X. W. Lu is counsel in Wachtell, Lipton, Rosen & Katz’s Corporate Department where she advises public and private companies and boards of directors across industries on ESG and corporate governance matters and evolving market trends, expectations, and practices.

With biodiversity loss expected to cost the global economy $2.7 trillion annually by 2030, governments and investors are increasingly heeding the calls to action of intergovernmental organizations and nonprofit advocacy groups. The Kunming-Montreal Global Biodiversity Framework adopted at last year’s United Nations Global Biodiversity Conference (COP15) established new global commitments to halt and reverse biodiversity loss by 2030. These commitments include phasing out or reforming subsidies that harm biodiversity and requiring companies and financial institutions to monitor, assess, and disclose risks and impacts on biodiversity through their operations, portfolios, and supply and value chains. The European Sustainability Reporting Standards (ESRS) that will apply to companies reporting under the EU’s Corporate Sustainability Reporting Directive (CSRD) includes proposed disclosures on biodiversity and ecosystem impacts and dependencies, risks, and responsive actions.

New disclosure standards and coalitions

Recognizing that biodiversity and climate change are intrinsically linked, investors have sought to establish new disclosure standards and coalitions focused on addressing biodiversity and nature loss:

- The Science Based Targets Network (SBTN), a coalition of nongovernmental organizations and business associations including Ceres, the World Economic Forum, and the UN Global Compact, has released guidance for companies on assessing, identifying, measuring, disclosing, and setting targets covering nature and biodiversity impacts that are material to their business.

- The Finance for Biodiversity Pledge, a coalition of 126 financial institutions with approximately $20 trillion in assets under management has committed to sharing
knowledge, engaging with companies, assessing impacts, and setting targets to protect and restore biodiversity through their finance activities and investments.

- The Taskforce on Nature-related Financial Disclosures (TNFD) recently released a final draft of its disclosure framework that is expected to be finalized in 2023. TNFD will require companies to assess, measure, report, and act on nature-related risks. TNFD is also launching a pilot program with member companies that will cover three systems: energy, land use (including food, agriculture, and forestry) and the built environment—the value chains for which account for about 90 percent of the pressure on biodiversity.

- The Global Reporting Initiative (GRI) recently released its exposure draft on new biodiversity standards, which seeks increased disclosure on supply chain and location-specific impacts on biodiversity and introduces new disclosures on the direct drivers of biodiversity loss and the impact of companies and their suppliers on ecosystems and local communities and management responses.

- The International Sustainability Standards Board recently committed to considering the recommendations of TNFD in scoping its forthcoming climate-related disclosures.

Increasing shareholder engagement and activism

Shareholder activism also continues to grow. At the COP15 summit last year, a coalition of investors led by AXA Investment Managers, BNP Paribas Asset Management, Christian Brothers Investment Services, and Columbia Threadneedle Investments, among others, partnered with Ceres, the Institutional Investors Group on Climate Change (IIGC), and the Finance for Biodiversity Foundation to launch Nature Action 100. That new initiative will seek engagement with companies in sectors deemed to be important to reversing nature loss and identify corporate actions that need to be undertaken to protect and restore nature. The initiative parallels Climate Action 100+, another investor-led initiative that has resulted in significant investor engagement and monitoring of companies’ greenhouse gas emissions in recent years.

The launch of Nation Action 100 follows a landmark campaign launched last year by Ceres and a coalition of investors with $10 trillion under management. The campaign sought to push the biggest corporate water users and polluters to treat water scarcity as a financial risk, including pressing for increased board-level oversight on water issues and the development of time-bound, science-based targets and policies to address adverse impacts on water.

International Corporate Governance Network statement

The International Corporate Governance Network (ICGN), an investor-led corporate governance and stewardship coalition with $70 trillion in assets under management, also issued a statement last year recommending that investors and companies prioritize certain considerations, including the following:
• Publicly commit to adopting science-based targets on how investment portfolios/businesses can support the stabilization of biodiversity loss by 2030 and contribute to ecosystems restoration by 2050;

• Begin the process of understanding biodiversity and natural capital dependencies and impacts, making use of the tools now available and being deployed by leading investment institutions and companies;

• Integrate financial, natural, and human capital considerations into stewardship activities across asset classes, investment decision-making, company monitoring, engagement, and voting;

• Ensure that contractual terms in mandates between asset owners and asset managers incorporate stewardship obligations associated with sustainable value creation consistent with biological diversity protection and ecosystem restoration, as described in the ICGN Model Mandate and the Global Investors for Sustainable Development Alliance; and

• Ensure robust governance procedures and board competence in overseeing how management identifies, monitors, measures, and manages biodiversity dependencies, impacts, risks, and opportunities aligned with company purpose and long-term strategy.

As further evidence of growing shareholder scrutiny in this area, Institutional Shareholder Services (ISS) last year launched a biodiversity impact tool for investors to leverage bottom-up assessments of corporate activities and supply chains in order to measure their portfolios’ biodiversity impacts and comply with evolving nature-related disclosure requirements.

Biodiversity loss is closely intertwined with climate change and has wide-reaching impacts on the economy. Indeed, such loss directly and/or indirectly touches companies across every sector, with impacts most acutely felt by companies with significant reliance on natural resources in their primary businesses as well as those with high dependence on nature in their operations and supply chains. Looking ahead, companies will be well-advised to assess their potential risk profile and prepare to engage with investors and stakeholders on nature and biodiversity-related matters.
Stepbrothers: Can we reconcile the growing demand for offshore wind energy with marine conservation?
David E. Jennings

David E. Jennings is an associate with the law firm Cain & Skarnulis PLLC. His practice includes a range of environmental, natural resources, and water law areas.

An urgent need for clean energy

Experts predict that global warming is likely to reach 1.5°C above pre-industrial levels between 2030 and 2052 if it continues unimpeded at current rates. Climate-related risks for natural and human systems will follow suit as a result. In light of predicted changes in climate and their associated risks, the Biden administration has been pressing for rapid increases in the development and utilization of renewable energy, particularly offshore wind (OSW). This includes the goal of harnessing 30 gigawatts of OSW power by 2030, as part of the administration’s commitment of reaching 100 percent clean electricity by 2035 and a net-zero-emissions economy by 2050.

At the time of this writing, there are only two operational OSW installations in the United States, comprising a mere seven turbines. These installations generate only 42 megawatts, meaning that 700 times this output will be required by the end of the decade to meet the Biden administration’s ambitious goals. Reaching this goal raises the important question of whether this massive increase in OSW development can be sufficiently harmonized with marine conservation under existing regulatory processes.

Wind versus whales?

Recent media attention has frequently framed the issue of massively increasing OSW development as a question of “wind versus whales,” which, unfortunately, is a vast oversimplification. To be sure, many taxa—including marine mammals—are affected, one way or another, by OSW development; but the affected species also include fish, benthic invertebrates, birds, and bats. While the fact remains that some 29 whales (among them endangered North Atlantic right whales) recently washed ashore on the east coast of the United States, a detailed discussion of these deaths is beyond the scope of this article. But notably, while the National Marine Fisheries Service (NMFS) declared that there is no link between the whale mortality and OSW development, findings from a recent Biological Opinion seem unlikely to assuage most concerns. Either way, there is no doubt that many of the mechanisms through which OSW turbines are installed (e.g., pile-driving) and subsequently operate (e.g., turbine blades turning) will affect marine mammals and other wildlife.

Risks of OSW development to marine taxa

Turbine installation generally poses the greatest hazard for marine taxa in OSW development.
For example, the noise and vibrations from pile-driving, as well as the noise from construction and other vessel traffic, and the risk of vessel strikes, may adversely affect marine mammals. Turbine blades themselves, when operational, present a risk to birds, including seabirds and other migratory species. Migratory bats may also be adversely impacted by OSW turbine blades. While the number of bird deaths may be relatively “small” now, the Biden administration’s goal is for the United States to generate 700 times more energy from OSW than it currently does, which would require the installation of thousands more OSW turbines.

**Benefits of OSW development to marine taxa**

The effects of OSW development on species and associated habitats are not all negative. For example, OSW turbines can provide valuable habitat for sessile marine species. Fisheries exclusion zones around the turbines will likely have a positive effect on some species. Moreover, in the absence of climate change mitigation, the diversity and abundance of fish species in those areas is likely to change anyway. Therefore, given the uncertainty that remains regarding the magnitude and direction of the effects of OSW development on marine taxa, any revised regulations will need to be adaptable to accommodate rapid expansion of the OSW industry.

**Current regulatory framework**

OSW development currently implicates a patchwork of federal environmental statutes, such as the Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), Migratory Bird Treaty Act, National Environmental Policy Act, Coastal Zone Management Act, and the National Historic Preservation Act. Various federal agencies are involved in applying these regulations to OSW development, such as the Bureau of Ocean Energy Management (BOEM), National Oceanic and Atmospheric Administration, NMFS, and U.S. Coast Guard. For instance, the ESA requires BOEM to consult with NMFS for species under NMFS’ jurisdiction, which includes several whale, turtle, and fish species. Meanwhile, the MMPA provides a general moratorium on the take of marine mammals but allows for various exceptions; most exceptions involving OSW typically implicate the underwater noise associated with turbine installation.

Acknowledging the need to update its regulations governing OSW for the first time since 2009, BOEM published the proposed Renewable Energy Modernization Rule on January 30, 2023. If enacted in substantially similar form as proposed, this rule would represent an important step toward streamlining the regulation of OSW development, without disregarding the potential risks to marine taxa. Significantly, proposed changes to 30 C.F.R. section 585.103, which governs when BOEM may prescribe or approve departures from the regulations, would add flexibility for when BOEM determines the regulations “[a]re impractical or unduly burdensome and the departure is necessary to achieve the intended objectives of the renewable energy program,” while maintaining existing flexibility for protecting the environment, wildlife, natural resources, and archaeologically or historically important sites.
Implementing an adaptive and coordinated management framework for OSW

A recurring theme throughout scientific literature is that many effects of OSW development on marine taxa simply remain unknown at this time. Therefore, an adaptive management framework is surely a necessary component of regulatory decisions going forward. Moreover, the patchwork of existing federal environmental statutes applicable to OSW development yet again highlights the need for a more unified governance framework for the oceans. The perceived conflict between OSW development and marine conservation is unnecessary and should largely be avoidable if more adaptive and robust regulations are put in place. BOEM’s proposed rule is a fine start. An adaptive and coordinated management framework should help facilitate the transition to greater reliance on OSW without sacrificing other environmental interests in marine conservation.
Making critical minerals supply chains sustainable and responsible
K.C. Michaels

K.C. Michaels specializes in administrative law, regulation, and public international law in the field of energy. Michaels studied at the New York University School of Law and worked at the U.S. Department of Energy before moving to the legal team at the International Energy Agency (IEA) in Paris. The views expressed in this article are the author’s alone and do not represent those of the IEA or its members.

Clean energy technologies generally require more scarce minerals and metals than their fossil fuel–based counterparts. Electric vehicle batteries require nickel, lithium, and graphite; wind turbines and solar cells require copper and a host of minerals. Demand for these minerals is set to skyrocket as deployment of these technologies ramps up in line with global climate goals.

To meet growing demand, production must scale up. Recycled materials will surely play a role, but currently, there are not enough minerals in circulation to meet future demand. More mining will be needed. Domestic policies could expand production of critical minerals, along the lines of incentives found in the Inflation Reduction Act (IRA) and the Infrastructure and Jobs Act, while strengthening environmental and reclamation standards. But no single country can meet demand on its own.

Given the global nature of mineral markets, international policy is needed to address the complete supply chain. Moreover, despite company policies to avoid minerals sourced from conflict zones, and the IRA requiring mineral sourcing from U.S. trade allies, it will be increasingly necessary to engage in risky supply chains.

Addressing environmental and social impacts of mining

International policy must meaningfully address the environmental and social impacts associated with mining. There is a moral imperative to do so. If “high risk” countries are shut out of the supply chain, they may miss this opportunity to support durable economic growth and alleviate poverty through their natural resources. Worse, if less scrupulous buyers continue to purchase their output, pervasive governance and human rights issues are not likely to improve. Downstream companies in the United States and elsewhere should remain engaged in these supply chains and seek improved environmental and social standards.

A concerted effort to reduce environmental and social impacts will also help ensure that progress does not slow on decarbonization and that U.S. industries remain competitive. This is because environmental and social harms have the potential to disrupt supply, creating uncertainty for investors and increasing the cost of deploying clean energy technologies.

For instance, if companies cannot demonstrate to local communities that they can operate mines safely and without harm to the environment, it will be difficult to maintain a social license to operate. In turn, local conflict can slow or stop production. Meanwhile, in many contexts, the mining sector has been a hotbed for corruption and revenues can be co-opted to...
fund armed conflict. Projects failing to address these issues may struggle to find willing investors; Angola, Democratic Republic of Congo, Mozambique, South Africa, South Sudan, Tanzania, Zambia, and Zimbabwe rank near the bottom in terms of attractiveness for mining investment. Taken together, these obstacles could result in shortages of minerals needed for electric vehicles and renewable projects.

Expanding domestic production subject to strict environmental and labour standards may partially fill this gap. But if meeting these standards increases costs, it may be difficult to compete with materials produced under less robust regulatory regimes.

**A classic case of market failures**

In economics terms, the environmental and social harms from mining are not fully reflected in the market price for processed metals or the end-consumer products. Instead, local communities absorb the costs from environmental degradation or corrupt practices. Many of these harms go unnoticed, absent negative press or through the rare lawsuit.

However, this may be changing. Increasingly, companies are being asked—or required—to investigate the harms and risks that may be prevalent in their supply chains (so-called supply chain due diligence). This practice stands in contrast to the place-based restrictions placed on tax credit eligibility in the IRA, although both schemes require traceability advances. U.S. companies are already required to investigate risks associated with high-risk and conflict-affected areas for tin, tantalum, tungsten, and gold. The European Union is preparing to significantly expand this requirement through its sustainable batteries regulation, which would require due diligence for batteries sold into that market.

Alongside these legal requirements, investors and consumers are also beginning to demand supply chain attention. Ford and Umicore, for instance, have voluntarily adopted a due diligence policy for cobalt.

**Leveling the playing field**

Due diligence requirements can encourage upstream producers to address environmental and social concerns. But a critical role remains for regulatory standards applied to mining operations by local authorities. According to a recent analysis from the International Energy Agency, most countries have some form of environmental standards for mining. These can take the form of environmental impact assessments, rehabilitation and reclamation requirements, or pollution standards.

That said, simply having laws on the books does not guarantee rigorous or consistent application and enforcement. The U.S. government has several initiatives to provide technical assistance and support to regulators around the world, such as the Energy Resource Governance Initiative (ERGI). Meanwhile, several industry groups, including the International Council on Mining and Metals (ICMM) and the Mining Association of Canada (MAC), have established standards and best practices to increase environmental and social performance at mine sites around the world. These efforts seek to raise standards across the board and create a more level playing field.
Coordination is needed

To be sure, the problems associated with mining are complex and multifaceted. However, failing to make progress on these issues could ultimately endanger efforts to meet global climate goals. Companies and policy makers will need to redouble efforts to improve environmental and social standards and should strengthen international coordination to ensure policies are well-aligned with key trading partners.
Rights of Rivers swell in Colorado
Kevin J. Lynch

Kevin J. Lynch is an associate professor at the University of Denver Sturm College of Law, where he teaches the Environmental Law Clinic as well as courses on civil procedure and Administrative Law.

The Rights of Rivers are gaining traction in Colorado. Local leaders in Nederland, Ridgeway, and Grand Lake have all taken steps to promote the Rights of Rivers in their communities. These communities have joined the growing Rights of Nature movement, which is having a resurgence both here in the United States as well as abroad. The Rights of Nature movement is part of a push for eco-centric approaches to law, sometimes called Earth Law. These movements represent a sharp break from a worldview that suggests that nature has value only through its utility to humans, and instead forcefully argue for the intrinsic value of nature. Of course, these ideas have been around for a long time, since before European settlers imposed colonial property rights systems, notably among Indigenous communities.

Importance of Rights of Rivers

Rivers in the western United States have been dammed and diverted until they become mere shadows of their former selves. These activities reflect the misguided approach of prior generations. Diversion of river water for agriculture or industry was prioritized with no thought to environmental concerns or the river itself. Thus, as one stark example illustrates, the Colorado River regularly fails to reach its end in the Gulf of California. Along the river, the result has been polluted and salinated water, low flows, warming water, and a dramatic decline in wildlife and ecosystems that depend on the river, including several endangered species of river fish.

Rights of Rivers can help alleviate this grim situation, but what rights should rivers hold? One view has been put forth in the form of the Universal Declaration of the Rights of Rivers, which includes a river’s rights to:

- flow,
- perform essential functions within its ecosystem,
- be free from pollution,
- feed and be fed by sustainable aquifers,
- preservation of native biodiversity, and
- regeneration and restoration.

Upholding and giving meaningful effect to these rights in our legal system would help to restore our rivers and all those who depend on them, including humans.

Resistance from the old guard

Water law in many Western states, including Colorado, was developed to promote settlement by those of European descent in the arid west, principally by supporting mining and agriculture.
While these activities are still important to our modern society, there are many other competing uses for water. Simply focusing on ways that humans can put water to use is problematic and has caused the exclusion of nature’s interests to the detriment of healthy river ecosystems.

Water buffalos—i.e., the old guard of water lawyers in Colorado—have been rallying for a last gasp of new dams and diversions of water, trying to get their projects grandfathered in before cuts to water use on the Colorado River are forced by climate change and the federal government. These powerful interests find support in state government officials who fight back against any suggestion that rivers themselves have rights, or even that the public has interests in rivers, through aggressive litigation tactics. These same forces will be expected to oppose Rights of Rivers work in local communities across the state, as well. However, the old system has led us to this crisis, and we can no longer afford to ignore environmental concerns or the needs of 21st-century populations that depend on our rivers to survive. Water law must adapt and change, whether the old guard likes it or not. Rights of Nature provide one key avenue for making the necessary changes.

**Rights of Rivers in action**

So what would Rights of Rivers mean in action? How would transitioning to an eco-centric approach to rivers transform water law in Colorado and other states? Here are a few concrete ways that water law could be improved by incorporating principles from the Rights of Nature movement.

1. **Expansion of the definition of “beneficial use.”** In many states, property rights in water require that the water be put to a beneficial use, which typically means diversion and consumption of water by agriculture, mining, or other industries. These laws can be updated to clarify that keeping water in a river to ensure its health and the functioning of river ecosystems would also fit the definition of beneficial use, perhaps as extensions of existing instream flow programs.

2. **Appointment of legal guardians for rivers.** The common objection that nature cannot speak for itself can be overcome by the appointment of legal guardians for rivers. River guardians could then advocate on rivers’ behalf in administrative proceedings, permitting, or litigation, including litigation in water courts that are established specifically to adjudicate disputes over water rights. Such advocacy might mean that if a river has a right to flow, it requires something like a minimum lifeline flow that is necessary for rivers to achieve their basic functions. River guardians might be governmental or quasi-governmental entities, or they might be nonprofits appointed by the relevant authorities.

3. **Standing for rivers in legal actions.** The doctrine of standing as applied to environmental law has become a joke; tracking down individuals with plans to use a specified forest or stretch of river is a huge waste of time. Reforming standing to allow river guardians or even the general public to engage in litigation on behalf of rivers that are clearly threatened with harm would free us from the farce of thinking that those groups will diligently pursue litigation only if they have a member with a current rafting trip on the
books. We can then focus on the merits of legal disputes and not the sideshow of fights over standing.

The Rights of Rivers provide a powerful rhetorical and organizing tool, one that pushes back against the prevailing legal system that prioritizes exploitation of natural resources. As we collectively stare into the abyss of looming climate and other environmental disasters, Rights of Rivers can provide a beacon of hope that can lead us to a more sustainable future.
The constitutional right to a clean environment: Human rights violations as an emerging legal foundation and vehicle for a clean environment

Monica McCann

Monica McCann is a recent graduate from Georgia State University College of Law in Atlanta where she served as Philanthropy and Outreach Chair for Environmental Law Society, president of the Animal Legal Defense Fund, and legal extern at The Coca-Cola Company in the Environmental, Safety and Sustainability Division. She is an aspiring environmental and natural resources attorney, and hopes to combine her legal education, science background, and love of nature in furtherance of environmental sustainability, conservation, and advocacy.

In July 2022, the United Nations (UN) General Assembly declared access to a “clean, healthy and sustainable environment” a human right, which created a revolutionary new pathway for international cases seeking environmental protection and responsibility for contributions to climate change. Historically, successful international cases pursuing state responsibility for environmental harms eluded litigants due standing issues, reliance on state responsibility for action and enforcement, lack of treaty enforcement, and lack of dependable legal foundation for environmental harms allegations. Combined with the increasing prevalence of constitutional provisions providing the right to a clean environment, however, the UN’s declaration could usher in a new era of redress for state environmental harms.

Ineffective environmental protection through treaties alone

Within international law, treaties have acted as a vehicle adhering countries to unified duties and goals. In 2015, all countries party to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) signed the Paris Agreement (PA), adopted to address climate change and its adverse effects to limit the earth's temperature increase. The UNFCCC unambiguously describes the PA as a “legally binding international treaty on climate change,” but the treaty itself has few legal repercussions. The PA allows for voluntary participation and nationally determined targets, politically encouraged rather than legally bound. It does not impose penalties for parties that violate its terms, and countries are left responsible for their own monitoring and enforcement. The PA exhibits how international treaties can lack real “legal teeth.” Strict treaty enforcement surrounding environmental harms and climate change responsibility remains abstract under the PA standing alone.

Despite early setbacks, hope remains for successful prosecution of environmental harms as human rights violations. As the following examples demonstrate, emboldened by new rights and precedents, litigants are writing a new playbook with human rights violations as the predicate for environmental claims.

Constitutional rights as a legal foundation in Brazil

The Amazon Rainforest spans the entire Amazon River Basin through a total of 1.4 billion acres of forestland—approximately 40 percent of South America. Brazil encompasses 60 percent of
the Amazon rainforest—around 1.2 million square miles. About 30 percent of all Amazon deforestation occurs in Brazil alone, and as such, Brazil ranks first in Amazon deforestation and is the fifth-largest greenhouse gas producer in the world. Brazil is currently projected to miss all of its environmental commitments and goals under the PA for 2030.

Amended in 2017, article 255 of Brazil’s constitution provides “everyone has the right to an ecologically balanced environment, which is a public good for the people’s use and is essential for a healthy life. The government and the community have a duty to defend and to preserve the environment for present and future generations.” Although providing the right to a clean environment, the provision failed to meaningfully impact legal liability or accountability on environmental matters in domestic forums. On the international stage, however, recent developments recognizing and upholding the constitutional rights to a clean environment, where they exist, has helped provide a foundation for environmental protection for the Amazon.

Specifically, in 2020, The Institute of Amazonian Studies (IAS) filed a civil case against Brazil (IAS v. Brazil) for illegal Amazon deforestation, failure to comply with climate mitigation in violation of Brazil’s Climate Change National Policy Act, and the human right to a stable climate “for current and future generations,” as stated in Brazil’s constitution. Although the case is currently pending, the fact that the case has made it this far has already validated Brazil’s constitutional human right to a clean environment helped develop the movement of climate constitutionalism.

Brazil’s constitution also provides land rights for Indigenous peoples based on their traditional range, which has dependably acted as a legal foundation and vehicle for protecting the Amazon. In 2020, seven government organizations and NGOs filed a civil action against Brazil (Partido Socialista Brasileiro (PSB) v. Brazil, ADPF 760), alleging the violation of constitutional land rights of Indigenous peoples through failure to implement the nation’s deforestation regulations. The plaintiffs specifically demanded an 80 percent decrease in deforestation, with the potential for a moratorium if not achieved. One of the ministers considering the case recognized in her decision “unconstitutional aspects regarding illegal deforestation in the Amazon Rainforest and the failure of the Brazilian state concerning the role of protecting an ecologically balanced environment.” However, due to procedural issues, a remedy in this case has so far been forestalled.

Other small movements toward a more reliable and steadfast foundation for environmental cases in Brazil have been making their way through the courts. For example, in PSB v. Brazil, (ADPF 708), a landmark decision following the UN’s declaration, the Brazilian Supreme Court recognized the PA as a human rights treaty, and held that Brazil breached its constitutional right to protect the environment “for current and future generations” due to excessive Amazon deforestation. As a result, Brazil’s government must resume funding for climate change mitigation and monitoring to reduce emissions. The outcome represents a pioneering shift to international alignment of human rights with environmental protection through treaties.
Common law human rights as a foundation in Columbia

Even without reference to constitutional amendments and international declarations, the idea that human rights include rights to a healthy environment appears to have found more general acceptance recently. For example, in Columbia in April 2018, 25 young people persuaded the Columbian Supreme Court to order the government to protect a portion of the Amazon from deforestation and preserve its value for present and future generations. The Columbian court’s ruling recognized a right to the Amazon for current and future generations, creating a revolutionary legal pathway for environmental protection through court-ruled common law rather than constitutional backing, as seen in Brazil’s cases. Combined with the UN’s recent declaration of the basic right to a clean environment, successful cases like Columbia’s could provide guidance for climate change hearings in the International Court of Justice (ICJ) and countries that have not expressly married human rights and environmental sustainability.

International litigation seeking environmental protection and responsibility for climate change contributions faces many challenges. But these cases may stand a chance when framed as environmentally motivated human rights violations. Many countries have seen a progressive movement toward heightened environmental awareness and protections driven by constitutional rights to a clean environment. Along with new international doctrines, these rights have created a new lens for viewing environmental claims and have paved the way for citizens to seek redress of environmental harms associated with climate change.
Product liability and intentionally—versus unintentionally—added PFAS
Caron Koll and Jack Sheldon

Caron Koll leads Antea Group's PFAS service offerings with nearly 40 years of experience in the environmental business serving private and public clients globally. She is a subject matter expert on contaminant fate and transport PFAS and co-contaminants.

Jack Sheldon, a senior remediation specialist for Antea Group, has over 41 years of experience in environmental consulting. He leads Antea Group's Site Assessment & Remediation service line and provides expertise in PFAS risk management, investigation, and remediation.

Identifying per- and polyfluoroalkyl substances (PFAS) in products sold in commerce is a challenge. When they are found, however, product liability lawsuits often follow and result in substantial settlements. Three chemical manufacturing companies, Chemours, DuPont, and Corteva, announced on June 2 that they will settle at $1.185 billion that "forever chemicals" were used in manufacturing and then contaminated U.S. public water systems serving a "vast majority" of the country's population. This may only be the beginning, as lawsuits targeting chemical manufacturers and suppliers are expected to increase when perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), and potentially seven other PFAS are classified as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

A limited number of manufacturers have voluntarily reported PFAS in their products. Rigorous testing by researchers around the world, including the Organization for Economic Co-operation and Development (OECD) have identified PFAS in many products. However, manufacturers may discover in some instances that PFAS were added unintentionally to their products at some point during their manufacturing, packaging, or storage. Below we will showcase examples of both intentionally and unintentionally added PFAS and the ensuing product liability lawsuits.

First, some examples of intentional addition of PFAS. Major sources of PFAS have become well-studied and well-known over the past five years. The list of potential sources is significant even when we focus strictly on the originating primary sources (manufacturers of PFAS raw materials) and secondary sources (use of PFAS raw material for application or addition into a commercial product). North American Industry Classification System (NAICS) codes can be used to identify industries that commonly use PFAS and have a higher potential for use of PFAS products. Those NAICS codes that are commonly associated with PFAS are provided by the Association of State Drinking Water Administration (ASDWA) in their PFAS Source Water Protection Guidance Project Technical Appendix. Examples of industries that commonly use PFAS include, but are not limited to:

- textiles and leather;
- paper products;
- metal plating and etching;
Unintentional addition of PFAS to products is also quite common. There are many well-known unintentional sources of PFAS (e.g., worker clothing, gloves, and greases/lubricants used in manufacturing equipment), and recently, a new unintentional source of PFAS has become known. Case studies of two common unintentional PFAS sources and one recently identified PFAS source and the associated product liability are presented below.

Well-known unintentional PFAS sources are introduced as a processing aid or are an unintended residual. For example, during the production of plastic parts like thermoplastics, polypropylene, epoxy resins, and polyurethane elastomer, the molten plastic is poured into a mold casting. PFAS are used to aid in mold release. PFAS in the mold release agents become coated onto the final product and then are potentially leachable from that product, even though they were never intentionally added to it. In 2021, the Toy Association advocated that the EPA exempt importers and small businesses from a proposed rule impacting all manufacturers using or processing PFAS in plastic polymers that are used for molded plastic parts or as additives to other resins, “which may be incidentally found in some toys and toy packaging.”

Another well-known source of PFAS is Aqueous Film Forming Foam (AFFF), commonly used in fire suppression systems. However, in this case the unintentional source of the PFAS is the residual AFFF. Military, airports, and industry are beginning to switch fire suppression systems to safer, non-fluorine foams (NFF). What is not well known at this point is whether unintentional PFAS will remain in the infrastructure and released over decades when the fire suppression infrastructure is re-used without sufficient cleaning/treatment to remove the old AFFF. Studies have shown that triple water flushing removes only 5 to 10 percent of the PFAS. A growing number of lawsuits from firefighters’ attorneys cite concerns that PFAS-containing firefighting foam increases the risk of cancer, liver damage, and a host of other illnesses. In short, owners of said fire suppression systems are not out of the woods, even after they switch to an alternative, NFF, at least not without either:

- completely replacing the fire suppression system infrastructure, or
- sufficiently cleaning and confirming that the existing fire suppression system is free of residual PFAS.

One newer, discovered unintentional source of PFAS arises from the treatment of high-density plastic polyethylene containers (e.g., bottles, drums, totes) with fluorine gas. Fluorination occurs as a separate step during the manufacturing of polyethylene bottles via blow molding using dilute
fluorine gas. Fluorination surface treatment improves the resistance of polyethylene to many organic chemicals. This fluorination process creates bioavailable PFAS. Rinsate samples of fluorinated high-density polyethylene were found to contain bioavailable PFAS. In August 2021 and March 2022, the U.S. Food and Drug Administration (FDA) and U.S. EPA (EPA) issued notice letters to manufacturers, processors, distributors, users, and those that dispose of fluorinated polyethylene containers that when these containers come in contact with consumer products such as food, they can transfer PFAS to the contained product. Additionally, disposal of said fluorinated polyethylene containers could trigger reporting under Toxic Release Inventory regulations.

On December 19, 2022, the EPA filed suit against Inhance Technologies USA of Houston, Texas, under the Toxic Substance Control Act (TSCA). The EPA suit followed nearly two years of discussions between the agency and the company, during which time Inhance continued to produce PFAS in the HDPE fluorine gas process in violation of TSCA. A number of U.S. states have banned certain uses of product with intentionally added PFAS, including but not limited to Maine, New York, Washington, California, and Colorado. Although each of these state bans has its own, similar definition of “intentionally added PFAS,” it can be argued in a civil suit that the discovery of PFAS in a product is no longer unintentional, at least once the manufacturer has knowledge of the unintentional source of PFAS in the product, such as fluorine gas-treated HDPE and processing aids such as metal plating mist suppression and mold release agents.

In conclusion, our understanding of both intentional and unintentional PFAS sources is evolving, and new sources of PFAS in products may find themselves subject to product liability lawsuits. The number of lawsuits is expected to grow with the likely designation of select PFAS as hazardous substances under CERCLA. These lawsuits may broaden into personal injury and environmental claims as well. The legal community must become well-informed about PFAS and be prepared for active times ahead.
Environmental Bankruptcy Law: A Practice Guide (Alan S. Tenenbaum and Jeanne T. Cohn, ABA 2023)

Norman A. Dupont

Norman A. Dupont is a partner at Ring Bender LLP, where he practices primarily in environmental law. Norm is the current chair of SEER’s Publications Service Group. As a law student, he helped advise then Congressman Robert F. Drinan, who was involved in hearings on what became the 1978 Bankruptcy Reform Act, an act which started the modern era of bankruptcy law.

The next book you buy should be Environmental Bankruptcy Law. This invaluable guide discusses two disparate statutory schemes. Bankruptcy is a cash-preservation and reorganization program designed to prevent immediate depletion of a debtor’s assets and provide interim stay relief and a time to reorganize. Environmental law, particularly the Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA) is a cash-collection scheme designed to reach into the pockets of even the humblest “potentially responsible party” in order to reimburse a plaintiff’s prior environmental expenditures. Many other environmental statutes provide for governmental suits to impose and collect civil penalties for violations of the specific environmental statute, sometimes with very hefty daily penalty amounts. As this book’s introduction summarizes it, bankruptcy and environmental law are “two complex bodies of law that were created for starkly different purposes and that directly conflict with each other in key respects.” Beyond recounting differing statutory policies and provisions that are seemingly irreconcilable, the authors have created a remarkably readable book on how to practically navigate through this dense legal Serbonian Bog.

It is said that you can “tell a book by its cover.” In this case, however, one can judge this book by its co-authors. Alan S. Tenenbaum is a 35-year veteran who has long labored in the bankruptcy issues arising from environmental statutes in the Environment and Natural Resources Division (ENRD) of the Justice Department, where he is currently the Division’s National Bankruptcy Coordinator. Jeanne T. Cohn is a Trial Attorney and Bankruptcy Coordinator at ENRD. Prior to joining ENRD, Jeanne was a partner at Kirkland & Ellis LLP with a focus on environmental matters, including environmentally related bankruptcy cases.

These two experienced practicing lawyers begin with an account of the Bankruptcy Code, its purposes, its legislative development, and an overview of the Code’s chapters. The “bankruptcy for dummies” first chapter of the book will take even the novice environmental law through the basics of the statute, from its initial goals through the requirement of a filing “in good faith” through the automatic stay provisions and orderly collection and then distribution of assets.

This book is designed for both the beginning and the advanced environmental attorney. As a forty-year environmental-law veteran, I opened to the table of contents and found a specific reference to potential recovery of civil penalties in the environmental context and the implications of such collection with the automatic stay provisions of the Bankruptcy Code. I was then able to prepare a summary for my co-counsel involved in a state court environmental
hearing with a bankruptcy petition newly filed by one of the parties. That was done within an hour thanks to the excellent organization of this book and the many citations in it.

Some law books are academically oriented and contain studious legal commentary on expansive subjects such as civil procedure or torts. This book is distinctly different. *Environmental Bankruptcy Law* is designed to be a practical and immediate guide to those lawyers enmeshed in this area who have clients who want a “quick answer.” In this lawyer’s experience, the request for a quick answer is made by virtually all our private and public clients. For such clients and for one’s own knowledge you should get this book.
Views from the Chair: Where has the year gone?
Jonathan Kahn

Jonathan Kahn is a partner with the firm Blake, Cassels & Graydon LLP in Toronto and is chair of his firm’s national environmental group. He is the chair of the Section of Environment, Energy, and Resources.

As I write this, my last Views from the Chair, I am astonished at how quickly the year has passed by. I am honoured to have been the first foreign lawyer to be entrusted with leading the Section. I leave pleased with the outstanding service we provided to our members in this first “post-pandemic” year, and I am excited about the many ongoing initiatives we still have underway and optimistic about the future. I leave with confidence that you, our valued Section members, will be served even better by the very talented and enthusiastic leaders to follow.

I want to start by expressing my personal gratitude, and appreciation, on behalf of our entire Section, to our section director Dana Jonusaitis. I simply could not have done this job without Dana’s support. I am deeply grateful for the experience, knowledge, and judgment she brings to our Section daily. This was not an easy year for Dana, who spent most of this ABA year short two key staff members. The demands on Dana, as well as Kevin Gordon, our membership specialist, and Valentia Sundell, our program associate, were enormous, and they all performed with amazing skill, dedication, and good cheer. We are so pleased that associate director Rachel Rojas-Brennan and editorial associate Mason Gregg have joined our team, providing incoming chair Jeff Dennis with a full and highly talented team.

I want to thank Jeff as well as our vice chair Jonathan Nwagbaraocha. Both have consistently brought creative thinking and outstanding judgment to the table, and I have no doubt the Section will thrive under their leadership. Susan Floyd has done a wonderful job as budget officer and I am so excited to see her transition to the vice chair position, further exemplifying the promising future of the Section.

I also want to thank our immediate past chair Michelle Diffenderfer and house of delegate representatives Pam Barker and Seth Davis. I have relied constantly on their experience, wisdom, and judgment over the past year. To the other members of the leadership—our three service officers, secretary Peter Gioello, board of governors representative Sheila Hollis, and to our 15 wonderful council members—I extend my thanks for your good hard work, support, and camaraderie throughout this year.

Our publications group, led by Norm Dupont, has had a prolific and successful year. I want to especially recognize Randy Hill, who had retired as editor of the Book Board and graciously returned when needed. Under his leadership the Book Board published four outstanding books this year. Thanks also to Andrea Rimer for her leadership on NR&E, Matthew Sanders for his leadership on Trends, and Erin Potter Sullenger and Megan Wagner for their leadership on The 2022 Year in Review. Also, thanks to all the editors, board members, and writers who keep the prolific publishing record of this Section going.

Published in Trends July/August 2023, Volume 54, Number 6, ©2023 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.
Christine Jochim, our education officer, oversaw a wonderful year of programming. I want to thank her as well as Kyle Landis-Marinello and Manisha Patel, who chaired our very successful Fall and Spring Conferences, respectively, and the chairs of our three one-day program planning committees—Lena Golze Desmond, Maxine Keefe, Maggie Peloso, and Carolyn McIntosh.

Maxine and Lena co-chaired one of our most successful one-day conferences ever, the Energy Transition Conference, held both at Howard University School of Law and on Zoom. It was our first ever hybrid conference, and we had near-record one-day conference attendance. The Howard location also provided us with a first-rate opportunity to address environmental justice (EJ) issues associated with the energy transition. This Section’s focus on EJ issues is unwavering, and I would like to thank Jimmy May as well as ABA EJ Task force chairs Gwen Keyes Fleming and Quentin Pair for their leadership in this initiative.

It will not come as a surprise that international engagement was an important priority for me this year. Thanks to Maggie Peloso for almost singlehandedly organizing our very successful Environmental Summit of the Americas, which received glowing reviews and reached maximum capacity. I also want to acknowledge the significant contributions of Lee DeHihns, Amy L. Edwards, Tracy Hester, and many others for their leadership in dealing with international outreach and ABA climate change initiatives.

Marisa Blackshire has been a tremendous membership and diversity officer, overseeing so many important programs and committees. I want to note the renaissance in our Membership Diversity Enhancement Program under the leadership of Joshua Ash and Maram Salaheldin, and the rapid growth of our Environmental Law Society Network led by Achinthi Vithanage and Gabriela Mickel. I also want to thank Lawrence Pittman for overseeing one of the most memorable public service projects (at Spring Conference in Denver) that we have had in recent years.

Thank you to all our committee chairs and vice chairs for your invaluable contributions. Our 27 substantive committees are the critical lifeblood of the Section; the programming, articles, community conversations, networking functions, and online content that you created are a large part of what we do.

Above all, I would like to express my gratitude to our Section members for your membership and participation. There are many players in the environment, energy, and resources law space. You choose to be a SEER member and I happen to think that we are the best, but we could not be the best without the contributions of the hundreds of you who enrich the member experience by writing, speaking, posting, participating, and networking with us. Thank you all.

We accomplished much this year. I am immensely proud of our entire team for making this year not only successful and gratifying but also, and most importantly, enjoyable and fun.
People on the Move
James R. Arnold

Jim Arnold is the principal in the Arnold Law Practice in San Francisco. Jim has served as Section secretary, Council member, Sponsorships Committee chair, In-House Counsel Committee chair, Superfund and Hazardous Waste Committee chair, Annual RCRA/CERCLA Update co-chair, and Section Fall Meeting (1999) co-chair, and is currently a contributing editor to Trends. Information about Section members’ moves and activities can be sent to Jim’s attention, care of mason.gregg@americanbar.org.

Jill Yung has joined Calpine Corporation as managing counsel in the company’s western division in Walnut Creek, California. She formerly was a partner at Paul Hastings LLP, in the firm’s San Francisco, California, office. Yung has significant experience with siting and permitting utility-scale energy projects on public, private, and tribal lands. She has developed strategies for compliance with environmental review, land use, and resource protection laws. She has also litigated these matters in federal and state courts and in California PUC proceedings. Yung serves as an advisor to the executive committee of the Environmental Law Section of the California Lawyers Association. She is on the editorial board of Trends.