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The decision of the Ninth Circuit in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), dealt another blow to recent attempts to use the federal common law tort system to address

issues relating to greenhouse gas emissions and climate change. The Supreme Court held last year, in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*), that federal common law claims seeking emissions caps against “major” sources of greenhouse gases are displaced by the Clean Air Act (CAA). The Court held that federal common law could not proceed because the CAA sets forth a method to address these issues, through U.S. Environmental Protection Agency (EPA) action, and thereby left no room for a parallel track of regulation through common law litigation. The Ninth Circuit held in *Kivalina* that the same reasoning also precludes federal common law claims seeking monetary damages, rather than injunctive relief. Together, these cases might spell the end of climate change tort litigation in the federal courts.

The litigation and appeal process

The complaint in *Kivalina* was filed in February 2008, by the governing bodies of an Alaskan tribal village. They alleged that their village is being threatened by the effects of climate change—specifically, by the reduction in protective sea ice and an increase in storms and flooding—and asserted that the 24 oil, energy, and utility companies named as defendants should be held liable for the costs of relocating the village, estimated at \$400 million, because they had allegedly contributed to the risks of climate change through their greenhouse gas emissions. The plaintiffs styled their cause of action as a “nuisance” claim under federal common law, although they asserted in the alternative that their claims might also proceed as a matter of state common law.

The defendants raised three principal objections. First, they argued that the plaintiffs lacked standing to bring the claims because they could not show that climate change or its effects were “fairly traceable” to these individual defendants, as required under Article III of the Constitution. Second, they asserted that the claims were not justiciable under the political question doctrine because, in order to determine a “reasonable” level of greenhouse gas emissions for a particular company or industry, a court would need to make decisions regarding national policy with respect to appropriate greenhouse gas levels that are reserved under the Constitution for the legislative and executive branches. Third, the defendants argued that the court lacked authority to recognize the asserted “nuisance” claims as a matter of federal common law—without express congressional authorization—and that such claims would in any event be displaced by the CAA.

The district court dismissed the federal common law claims in October 2009, holding that the plaintiffs lacked standing and, further, that the claims presented non-justiciable political questions. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 879–80 (N.D. Cal. 2009). The court found it unnecessary, in light of these holdings, to address whether the claims could properly be recognized under federal common law or, if so, whether they would be displaced by the CAA. *Id.* at 882–83. The court also did not address whether the claims might be brought under state common law, after declining to exercise jurisdiction over those claims following dismissal of the federal issues. *Id.*

The plaintiffs appealed to the Ninth Circuit. After initial briefing was completed, but before argument was scheduled, the Supreme Court issued its decision in *AEP*, holding that federal common law claims seeking injunctive relief against sources of greenhouse gas emissions were displaced by the CAA. 131 S. Ct. at 2537–38. In supplemental briefs, the defendants argued that *AEP* compelled dismissal of the claims in *Kivalina*, while the plaintiffs asserted that *AEP* was distinguishable because the claims in that case sought injunctive, not monetary, relief. The appeal was argued in November 2011, before Ninth Circuit Judges Sidney Thomas and Richard Clifton and District Judge Phillip Pro of the District of Nevada, sitting by designation.

Ninth Circuit decision

On September 21, 2012, the panel unanimously affirmed the district court's judgment. *Kivalina*, 696 F.3d at 858. It did not, however, rely upon or even address the two issues on which that judgment was based—standing and political question. Rather, the panel's opinion focused exclusively on federal common law and displacement. *Id.*

The panel found, first, that the “climate change” claims asserted by the plaintiffs were potentially “viable under federal common law in the first instance.” *Id.* at 855–56. It acknowledged the principle that federal courts generally cannot develop common law causes of action without express authorization from Congress, *id.* at 855 (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938)), but it said that courts may nevertheless do so when necessary to resolve “federal questions that are not answered by statutes,” *id.* In support, the panel cited the Supreme Court's opinion in *AEP*, which—although it explicitly declined to resolve this particular question—noted at one point that “[w]hen we deal with air and water in the ambient or interstate aspects, there is a federal common law.” 131 S. Ct. at 2535 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972)). For that reason, according to the panel, “federal common law can apply to transboundary pollution suits. . . . [which] often, as in this case, . . . are founded on a theory of public nuisance.” *Kivalina*, 696 F.3d at 855.

However, the panel then concluded that, even if the claims might have been viable at one time, they are now displaced by the CAA. *Id.* at 858. A federal common law claim is displaced by federal statute, the panel explained, when the statute “speaks directly to the question” addressed by the claim. *Id.* at 856 (quoting *AEP*, 131 S. Ct. at 2537). While this analysis may sometimes be “complex” and “fact-specific”—in order to determine “whether Congress has provided a sufficient legislative solution to the particular [issue] to warrant a conclusion that the legislation has occupied the field to the exclusion of federal common law,” *id.* (quoting *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 777 (7th Cir. 2011))—the panel said it was simple in this case, given the Supreme Court's holding in *AEP* that the CAA displaced the climate change claims presented there. *Id.* That holding, the panel concluded, was directly applicable to the plaintiffs' claims. *Id.* at 858.

The panel acknowledged but quickly rejected the plaintiffs' argument that *AEP* was distinguishable because it addressed claims for injunctive relief, rather than monetary damages. *Id.* at 856–58. The panel noted that the Supreme Court had previously “rejected similar attempts to sever remedies from their causes of action,” *id.* at 857 (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008)), and had found federal common law “nuisance” claims based on water pollution to be displaced by the Clean Water Act whether the relief sought was injunctive or monetary in nature, *id.* (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 314, 25 (1981); *Middlesex Cnty. Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 4 (1981)). Finding these decisions controlling, the panel held that the federal common law claims in *Kivalina* were displaced. *Id.* at 858.

Judge Pro issued a separate concurring opinion, to address two separate points. First, he suggested that there was “tension” in the Supreme Court's displacement jurisprudence. *Id.* In particular, he posited that *Exxon Shipping* may represent a “departure” from other displacement cases, insofar as it seemed to suggest (in holding that the Clean Water Act did not displace common law claims for punitive damages linked to an oil spill) that “the right and the remedy may indeed be severed when the particular claim at issue seeks injunctive relief versus damages.” *Id.* at 862–63. Nevertheless, he found that *AEP* and prior “nuisance” decisions of the Supreme Court in the water pollution context were sufficiently clear to

control the outcome and compel displacement in this case. *Id.* at 866. Second, Judge Pro opined that the plaintiffs lacked standing to bring their claims in federal court under Article III of the Constitution, because in his view the alleged link between defendants' greenhouse gas emissions and the effects of climate change was too "attenuated" to support the necessary finding of causation. *Id.* at 867–69. He distinguished *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the Supreme Court upheld a state's standing to challenge EPA's refusal to regulate greenhouse gas emissions, on grounds that *Massachusetts* had been brought by a state pursuant to an express statutory right of action. *Kivalina*, 696 F.3d at 869.

Neither the panel opinion nor Judge Pro's concurrence addressed whether the plaintiffs' claims might proceed as a matter of state law, as that question was not presented on appeal. Nevertheless, the implications of the panel's opinion may suggest that such claims would be preempted by the CAA. Although the standard for preemption of state law is traditionally regarded as more demanding than that for displacement of federal common law, in either circumstance a federal statute that sets forth a "comprehensive" method for regulating in a particular area will generally be deemed to preclude all common law claims in the field, whether under federal or state common law. *See, e.g., Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Insofar as both *AEP* and *Kivalina* imply that the CAA is precisely this type of statute, as applied to issues relating to greenhouse gas emissions and climate change, *see Kivalina*, 696 F.3d at 866, they would seemingly also bar the plaintiffs' claims as a matter of state law (as at least one district court has recently held, *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 868 (S.D. Miss. 2012)). But the opinion does not actually resolve the preemption question, and for that reason, as Judge Pro noted in his concurrence, *Kivalina*, 696 F.3d at 866, it is possible that other plaintiffs may attempt to repackage such claims in state court.

A new hurdle for climate change tort claimants

The decision in *Kivalina*, given its heavy reliance on *AEP*, might be viewed as simply affirming existing law, as opposed to announcing any new legal principle. But the panel's holding, even if pre-ordained, is nevertheless important: it confirms that the displacement analysis of *AEP* applies to all federal common law "climate change" claims, whatever the nature of the relief sought. That holding, assuming it does not categorically bar all such claims, at the least presents another large hurdle to future plaintiffs who would seek to address issues relating to greenhouse gases and climate change through federal common law litigation, rather than the legislative and regulatory process.

Decker v. NEDC: The Supreme Court may not be the end of the (unregulated) forest road **Chris Carr and Shaye Diveley**

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The U.S. Environmental Protection Agency (EPA) estimates that the United States has approximately 751 million acres of forest land, crisscrossed by hundreds of thousands of miles of roads. *See* 77 Fed. Reg. 30,473 (May 23, 2012). Productive, working forests depend on these roads. Typically, foresters have used best management practices to reduce erosion and protect water quality from stormwater discharges associated with road maintenance and use. In California, for example, there are on average 2.43 drainage features routing stormwater off or under each mile of forest road. This means that there are more than 107,000 forest road drainage features in California alone.

For nearly 40 years EPA has formally and consistently maintained that forest roads and their associated drainage features are not point sources of water pollution subject to the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program. However, in *Northwest Environmental Defense Center (NEDC) v. Brown*, 640 F.3d 1063 (9th Cir. 2011), the Ninth Circuit swept aside EPA's established precedent by "interpreting" EPA's long-standing "Silvicultural Rule" (40 C.F.R. §122.27) as not excluding forest roads and their drainage features from NPDES permitting. The court of appeals held that forest roads are point sources of industrial stormwater discharge under the plain language of the Clean Water Act.

The Supreme Court granted certiorari on June 25, 2012. In so doing, the Court rejected the Solicitor General's recommendation against review. While asserting that the Ninth Circuit got it wrong on the merits, the Solicitor General argued against review in part because EPA had proposed to address the Ninth Circuit's error through rulemaking. What the Supreme Court holds and what EPA ultimately does could fundamentally change Clean Water Act regulation for the timber industry.

First attempt: *EPIC v. Pacific Lumber Co.*

In *NEDC v. Brown*, neither the U.S. District Court in Oregon (where the case was filed) nor the Ninth Circuit reached the issue of whether stormwater runoff from forest roads actually met the elements necessary to trigger NPDES permit coverage. Instead, the Supreme Court has before it the Ninth Circuit's decision reversing the trial court's order granting a motion to dismiss based upon the definition of a silvicultural point source under the Silvicultural Rule. An earlier test case, *Environmental Protection Information Center (EPIC) v. Pacific Lumber Co.*, 469 F. Supp. 2d 803 (N.D. Cal. 2007), was the first and only case in which the issue of whether such stormwater runoff meets the Clean Water Act elements was actually litigated. *EPIC* provides a window on what citizen suit litigation under the Clean Water Act targeting forest roads will look like if the Supreme Court affirms the Ninth Circuit's decision.

Filed in 2001 in the U.S. District Court for the Northern District of California, *EPIC* spanned seven years and spawned numerous motions to dismiss, motions and crossmotions for summary judgment, and requests (all filed by Pacific Lumber and denied) for certification of interlocutory appeal. *EPIC* limited its "test" case to Pacific Lumber's Bear Creek watershed, a watershed encompassing some 5,500 acres of redwood forest on steep slopes heavily traversed with roads that are crossed by a network of seasonal watercourses leading downhill to Bear Creek.

Upon filing, Pacific Lumber quickly moved to dismiss the lawsuit as barred by the Silvicultural Rule, which explicitly defines stormwater runoff from forest roads as nonpoint source pollution and, thus, not subject to regulation under the NPDES program. The district court denied all efforts by Pacific Lumber to secure early dismissal of the case, holding that the regulation, lest it be *ultra vires* of the Clean Water Act, must be interpreted to require a NPDES permit for any logging road with a point source. *EPIC v. Pacific Lumber Co.*, No. C. 01-2821 MHP (N.D. Cal. Oct. 14, 2003). As a result, the district court allowed *EPIC* to try to prove that Pacific Lumber's forest roads were, in fact, point sources discharging stormwater to Bear Creek. *EPIC v. Pacific Lumber Co.*, 301 F. Supp. 2d 1102 (N.D. Cal. 2004).

Following years of extensive fact and expert discovery, *EPIC* moved for summary judgment to establish Pacific Lumber's liability. The district court denied the motion (*EPIC v. Pacific Lumber Co.*, 469 F. Supp. 2d 803 (N.D. Cal. 2007)), holding that *EPIC* failed to establish that the hillslope watercourses "significantly affect[ed] the chemical, physical and biological integrity" of Bear Creek, so as to satisfy the

“significant nexus” requirement established by the Supreme Court in *Rapanos v. United States*, 546 U.S. 715 (2006). The court also held that EPIC had failed to establish that culverts, ditches, and other road drainage features channel stormwater into the hillslope watercourses. Nonetheless, the district court pointedly held that drainage features associated with forest roads—such as rolling dips and culverts—can themselves be “point sources,” allowing the case to proceed to trial in which EPIC would have the opportunity to prove its case. These liability issues were never tried because Pacific Lumber Company entered bankruptcy in early 2008.

Try again: *NEDC v. Brown*

In the meantime, the U.S. District Court for Oregon issued a decision in March 2007 dismissing a Clean Water Act citizen suit on the ground that stormwater discharges from forest roads are non-point source pollution, per EPA’s Silvicultural Rule, and thus not subject to NPDES permitting. *NEDC v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007). The Oregon District Court rejected as “wrongly decided” the earlier decision in *EPIC v. Pacific Lumber Co.*, which had denied a similar motion to dismiss and instead “interpreted” EPA’s longstanding Silvicultural Rule not to exclude such stormwater discharges from NPDES permitting. *Id.* at 1197.

Plaintiffs appealed, and the United States submitted a brief as *amicus curiae* asserting that the Silvicultural Rule excluded discharges from forest roads from the NPDES program. The Ninth Circuit heard argument in 2008, but did not issue a decision until 2011. In its opinion, the Ninth Circuit explicitly agreed with the holding of *EPIC v. Pacific Lumber Co.* that forest roads and associated drainage features are point sources of industrial stormwater discharges. It also “interpreted” EPA’s Silvicultural Rule as not excluding stormwater discharges from NPDES permitting despite EPA’s longstanding position that such discharges were not subject to the program. *NEDC*, 640 F.3d at 1079–80.

The State of Oregon and the timber industry unsuccessfully petitioned the Ninth Circuit for rehearing and en banc review. Although the Ninth Circuit issued a modified opinion, it continued to hold that forest roads that drain into ditches and culverts are point sources subject to the NPDES permitting program. Thereafter, the State of Oregon and the timber groups petitioned for certiorari. The Supreme Court issued an order requesting the views of the Solicitor General on whether review should be granted.

In May 2012, the Solicitor General recommended against review of *NEDC v. Brown* because EPA had already proposed to address such discharges through rulemaking. The Solicitor General also asserted that the Ninth Circuit had erred on the merits and should have deferred to EPA’s longstanding interpretation of its Silvicultural Rule.

In June 2012, the Supreme Court granted certiorari. On September 4 (the same day the Solicitor General’s merits brief as *amicus curiae* was filed), EPA issued its proposed rulemaking to specify that stormwater discharges from logging roads are not stormwater discharges “associated with industrial activity.” 77 Fed. Reg. 53,834 (Sept. 4, 2012).

Not the last word?: Oral argument

In light of the Ninth Circuit’s track record before the Supreme Court in environmental cases, and, specifically of late, Clean Water Act cases, many expected the Supreme Court’s grant of review to be the end of the road for the environmental community’s efforts to overturn the Silvicultural Rule. However, EPA threw a wrench into the works by promulgating its final rule on Friday, November 30—right before

oral argument was scheduled on Monday, December 3.

EPA's final rule amended 40 C.F.R. § 122.26(b)(14)(ii) to expressly limit industrial activities subject to the NPDES program to the previously specified "rock crushing, gravel washing, log sorting, or log storage facilities" and exclude "all other types of silviculture facilities." Revisions to Stormwater Regulations to Clarify that NPDES Permit is Not Required for Stormwater Discharges from Logging Roads, 77 Fed. Reg. 72,970 (Dec. 7, 2012).

The Supreme Court did not seem pleased by this late-breaking development. Chief Justice Roberts stopped Petitioners' argument at its very start, stating: "Well, before we get into that, congratulations to your clients . . . [for] getting almost all of the relief they're looking for under the new rule issued on Friday. . . . And thank you for calling it to our attention." The Deputy Solicitor General was pointedly asked why the Court was not informed sooner of the EPA's imminent decision, as the Court might have delayed oral argument had it been so informed. Thereafter, the Justices went on to question all involved parties regarding why EPA's new rule does not simply moot the entire matter.

Interestingly, NEDC strenuously argued against finding that the case is moot, undoubtedly hoping not only to preserve its favorable Ninth Circuit decision, but also its ability to seek attorneys' fees under the Clean Water Act for its decade-long lawsuit. A Supreme Court decision that the EPA's rule moots the case would simply mean the environmental groups would have to start all over again, bringing a petition to review the new rule in the court of appeals or possibly new citizen suits in district court against timber companies. However, this was a possibility that the Court appeared happy to live with.

One more try?: Regulation under section 402(p)(6)

The new rule also did not end the uncertainty with EPA. In the announcement for the proposed rule (77 Fed. Reg. 53,824 (Sept. 4, 2012)), EPA expressed its intention to evaluate other silvicultural discharges "under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches that may be better suited to address the complexity of forest road ownership, management, and use." *Id.* at 53,837. EPA's proposal to regulate forest roads and their associated drainage features under section 402(p)(6) may prove as onerous for the industry as attempting to comply with a general stormwater permit under the NPDES program.

EPA's announcement is troubling, as the very issue before the Supreme Court is whether forest roads and their associated drainage features are non-point sources, as defined by the Silvicultural Rule (40 C.F.R. § 122.27). Indeed, even if EPA merely relies on state regulation of forest roads (as is permitted under the flexibility inherent in section 402(p)(6)), the implication would be that such forest roads and features are, in fact, point sources and the state programs are "in-lieu of" federal regulation. This would not eliminate the specter of citizen suits and it could federalize state forest practices regulations by conditioning Clean Water Act compliance on EPA approval for state regulatory programs.

EPA could also designate a subset of forest roads as point source discharges of stormwater and establish a regulatory program for the targeted roads. But, again, given the quantity of forest road miles and conveyances, even regulating a subset could pose a permitting and enforcement nightmare. As a result, even if the Supreme Court overturns *NEDC* (which seems doubtful in light of the questions posed by several of the Justices during the hearing), the "flexibility" of the 402(p)(6) program provides little certainty to timber companies. There is still a long road ahead.

**Facts can be pesky things: SCOTUS takes up LA County Flood Control District v. NRDC
Virginia S. Albrecht**

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Why the Supreme Court granted certiorari in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 673 F.3d 880 (9th Cir. 2011), is a mystery. The Court declined certiorari on one Clean Water Act (CWA) question presented in the petition, but then granted it on a second, which is unlikely to be resolved without actually reaching at least some of the touchy issues that may have led it to decline certiorari on the first question. Regardless, the case is particularly important for municipal governments that are attempting to address flooding and stormwater management challenges in a regional context. The Court heard oral argument on December 4.

The County of Los Angeles, the Los Angeles County Flood Control District (District), and 84 cities in southern California are co-permittees on a Municipal Separate Storm Sewer System permit (commonly known as an “MS4 permit”) issued under the Clean Water Act National Pollutant Discharge Elimination System (NPDES) program. Generally speaking, an MS4 is a system of conveyances that collects stormwater runoff and discharges it from a collection of outfalls to “navigable waters” within the meaning of the CWA. Conceptually, the MS4 taken as a whole is a point source under the CWA. The regional permit at issue in the case covers a vast area of southern California and includes thousands of miles of storm drains and hundreds of miles of open channels, many portions of which have been engineered (often concrete lined) for stormwater management and flood control purposes. The NPDES permit authorizes the permittees to discharge stormwater runoff from the MS4 into navigable waters, but prohibits discharges that violate specified water quality standards.

The permit also requires the District to monitor and report on pollutant levels of runoff flowing past seven “mass emissions stations” within the MS4. Two of the stations are located in concrete channelized portions of the Los Angeles and San Gabriel Rivers, and data collected at those stations detected pollutants in excess of permit standards. Both rivers were confined long ago by concrete channels to prevent severe storm flows from flooding neighboring urban areas. Indeed, Justice Kennedy described the Los Angeles River as a 50-mile stretch of concrete and steel in his famous concurrence in *Rapanos v. United States*, 547 U.S. 715,769–770 (2006).

The Natural Resources Defense Council (NRDC) sued, claiming that the District and the County of Los Angeles were in violation of the permit based upon exceedences at the mass emissions stations in the concrete portion of the two rivers. The district court granted summary judgment for the defendants. The court held that the mass emissions data “merely reflects water passing by the stations” and that in order for the District to be in violation, it must be discharging pollutants to “navigable waters” from a point source. But the plaintiffs had not provided evidence to establish that the rivers below the stations were distinct bodies of water from the MS4 above the stations. Thus, there was no evidence of a discharge. *NRDC v. County of Los Angeles*, No. CV 08-1467 AHM, at *11 (Mar. 2, 2010).

The Ninth Circuit reversed, holding that, under the CWA, a discharge of a pollutant “from a point source occurred when the still-polluted storm water flowed out of the concrete channels where the monitoring stations are located, through an outfall, and into the navigable waterways. . . . the precise location of each outfall is ultimately irrelevant because there is no dispute that [the] MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.” 673 F.3d at 900.

Further, because the monitoring stations are located in concrete portions of the MS4 controlled by the District, the District “is discharging pollutants from the MS4 to the Los Angeles River and San Gabriel River in violation of the Permit.” *Id.* at 901.

The District sought certiorari on two questions: (1) whether channelized portions of the Los Angeles and San Gabriel Rivers that are part of an MS4 remain “navigable waters” under the CWA, and (2) whether water passing from the engineered portions of the river to the natural sections of the same river constitutes a regulable discharge that requires an NPDES permit under the Clean Water Act, notwithstanding the Court’s holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that transfer of water within a single body of water cannot constitute a “discharge” for purposes of the act. The Court then requested the views of the U.S. Solicitor General, who advised it not to take the case in part because it was too fact intensive.

The Court declined the first question, but took the second. One can imagine that the Justices may have declined the first because their most recent attempt to clarify the meaning of “navigable waters” resulted in a 4–1–4 split that still has people scratching their heads. *Rapanos v. United States*, 547 U.S. 715 (2005). But, in addressing the second question the Court will necessarily intrude into territory it sought to avoid by declining the first. That is because the statute requires an NPDES permit for the “discharge of a pollutant,” defined as the “addition of any pollutant to navigable waters from a point source.” 33 U.S.C. §§ 1311(a) and 1362(12). To be a regulable discharge, the pollutant has to move *from* a point source *to* “navigable waters.” In this case, the alleged pollutant is moving *from* the engineered portions of the natural river *to* the (un-engineered) natural river. So the key legal question that everyone anticipated would be addressed was whether the engineered portion of the Los Angeles River is a “point source” or a “navigable water.”

It now appears that the answer to the second question in the certiorari petition is “No.” Petitioner, the County of Los Angeles, and respondent, the NRDC, agreed that the answer is “no.” The Solicitor General also agreed that this was the proper answer to the narrowly framed question. Thus, oral argument focused on what, if anything, was left of the case. Petitioner argued that the Court should simply reverse the Ninth Circuit and end the case. The NRDC urged that the Court affirm the Ninth Circuit’s decision on a grounds not raised in the certiorari petition (NRDC did not file a cross-petition). The Solicitor General suggested that the Court remand to the Ninth Circuit for further proceedings, whatever those might be.

Editor’s Note: As this article went to publication, the Supreme Court announced its unanimous judgment, reversing the Ninth Circuit and remanding the case back to the Ninth Circuit. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, No. 11-460, 2013 U.S. LEXIS 597 (Jan. 8, 2013). The Court declined the invitation of counsel for the Natural Resources Defense Council to consider affirming the Ninth Circuit’s decision on a grounds not raised in the petition for certiorari.

The truth about mercury TMDLs **Brooks Smith, Max Lee, and John Koogler**

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Total Maximum Daily Loads, or TMDLs, serve a profoundly important function under the federal Clean Water Act. They provide regulators with a systematic and comprehensive mechanism for identifying all sources and causes of water quality impairment, and then calculating the reductions needed to address the impairment in an equitable manner. But for TMDLs to be effective, they must be derived in a legally and technically defensible manner.

Under section 303(d)(1)(C) of the Clean Water Act, TMDLs must be established “at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” TMDLs are typically expressed as the sum of wasteload allocations assigned to point sources (e.g., regulated industrial and municipal facilities), load allocations assigned to nonpoint sources and natural background, and a margin of safety to account for uncertainty.

TMDLs are more than simply an equation. Although the U.S. Environmental Protection Agency (EPA) commonly refers to TMDLs as “planning” or “informational” tools, they have important regulatory consequences. Once a TMDL has been established, National Pollutant Discharge Elimination System (NPDES) permits for existing municipal, industrial, and construction point sources must contain limits that are consistent with the assumptions and requirements of any available wasteload allocation in the TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B). And NPDES permits for *new* sources are prohibited unless: (1) there are sufficient remaining pollutant load allocations to allow for the discharge, and (2) the existing dischargers are subject to compliance schedules designed to bring the receiving water into compliance with applicable water quality standards. 40 C.F.R. § 122.4(i). EPA has determined that “all pollutants, under the proper technical conditions, are suitable for the calculation of TMDLs.” Mercury, however, presents special challenges.

First, the “applicable” water quality standards for mercury are in a state of flux. For TMDL purposes, the applicable standards are those adopted by states and approved by EPA under Clean Water Act section 303(c). Most of the applicable standards are based on water column values (i.e., waterbody concentrations). EPA issued recommended standards based on the amount of mercury in fish tissue as opposed to the water column in 2001. Many states have not formally adopted EPA’s recommendations, yet in a number of recent proceedings states have opted to use *ad hoc* values derived using EPA’s fish tissue approach (often considerably more stringent than the water column-based standards on the books).

Second, in many waterbodies, an important contributor of observed mercury is atmospheric deposition. However, neither the TMDL program in particular, nor the Clean Water Act in general, provides any direct authority over atmospheric deposition sources.

Third, the science is imperfect and evolving, as explained in greater detail below. While it is important to make progress in the face of uncertainty, sometimes the level of uncertainty is too overwhelming to permit good decisions about how to proceed.

Over the past several years, a number of states have attempted to develop mercury TMDLs. Most of these proceedings have been driven by litigation-based deadlines for states to either establish their own TMDLs or cede that authority to EPA. Beginning with Minnesota in 2007, states moved from waterbody-specific TMDLs to more ambitious state-wide or even multi-state TMDLs, in effect compounding the uncertainties and complications associated with mercury. The two most recent states to enter the fray are North Carolina and Florida, each of which initiated a state-wide mercury TMDL proceeding in the spring of 2012. The issues raised in these proceedings are both cautionary and illustrative of the challenges

inherent in developing technically sound and legally defensible TMDLs.

Mercury and the mercury inventory

Mercury is a naturally occurring element with a very complex biological/geological/ chemical cycle. The complexities lie not only in determining sources of mercury but also in the interactions of mercury in air, water, soil, and biota. In spite of these complexities, EPA has approved mercury TMDLs based on assumptions of direct and linear relationships between mercury transport through air, water, and soil and the ultimate bioaccumulation in higher trophic level fish (e.g., largemouth bass). This regulatory approach is overly simplistic given the complexity of a chemical such as mercury.

The first complexity in developing defensible mercury TMDLs is a reliable mercury loading inventory for the TMDL area. States have determined with few exceptions that 95–100 percent of the mercury loading to a waterbody is from the deposition of atmospheric mercury released from anthropogenic and natural sources and the re-emission of previously deposited mercury, *not* from point sources discharging wastewater directly into the waterbody. To account for the remaining 0–5 percent of the loadings, states typically develop an inventory of NPDES-permitted wastewater discharges. Because a number of studies have shown that deposited mercury is predominately from global sources, mercury inventories should also be global.

While research varies on the numbers, mercury emitted from natural sources is estimated at 2000 metric tons per year (Mg/yr). Beginning with the industrial revolution, anthropogenic mercury emissions increased dramatically, although they have recently declined because of modern environmental controls. In addition to natural and anthropogenic mercury emissions, fractions of the natural and anthropogenic mercury that have deposited on land and in water are re-emitted into the atmosphere. Global mercury emissions are estimated at 6000 Mg/yr, approximately equally divided between natural, anthropogenic, and re-emission sources. The United Nations Environment Programme (UNEP) has estimate mercury emissions in the United States at 670 Mg/yr; 19 percent anthropogenic, 48 percent natural, and 33 percent re-emissions.

Biogeochemical cycling of mercury

Assuming one can successfully compile a mercury inventory, the ultimate determination of the TMDL is dependent on how mercury cycles through the environment and the complexity of this analysis remains a fundamental impediment to accurately developing mercury TMDLs. In developing their TMDLs, the States of Florida and North Carolina both undertook extensive scientific efforts to determine the relationships among mercury emissions, deposition, dissolution into waterbodies, and, ultimately, fish tissue concentrations.

Because of the three chemical forms of mercury released into the atmosphere (ionic, particulate-bound, and elemental), mercury can remain in the atmosphere from hours to years before depositing. Modeling undertaken by EPA and UNEP demonstrates that of the mercury deposited in the United States, a minor fraction is from U.S. anthropogenic sources and the remaining is from natural, re-emissions, and other global anthropogenic sources. For example, UNEP modeling shows that a 20 percent reduction in U.S. anthropogenic emissions will result in only a 3.5 percent reduction in mercury deposition in the United States. Modeling by the State of Florida and the State of North Carolina similarly indicates mercury is predominately from sources outside of those states. All modeling shows a high degree of uncertainty and limited correlation to “in the-field” monitoring data. Mercury deposition is not a simple function of

mercury emissions. Once mercury is deposited, field research and aquatic modeling again show, with very few exceptions, no significant correlation to waterbody concentrations or to fish tissue concentrations.

In spite of extensive scientific efforts to develop mercury inventories and scientifically based TMDLs, states have defaulted to a very simple presumptive concept that an X percent mercury emissions reduction will result in an X percent deposition reduction, which then results in an X percent reduction in waterbody concentrations and an X percent reduction in fish tissue concentrations. The reason for this simplified linear assumption is that none of the scientific studies yet supports a more sophisticated or scientifically grounded approach. The fact that EPA continues to approve TMDLs based on this simplified assumption presumably derives from a 2001 EPA report that applied these direct assumed relationships through long-term (100-year), steady-state modeling to demonstrate the direct relation between the deposition of ionic mercury and mercury in fish tissue. This same long-term equilibrium (multiple decades to centuries) is confirmed by other modeling studies.

In cases where a TMDL requires a reduction in mercury loading, some states correctly recognize that only anthropogenic mercury emissions can be controlled. Using the TMDL for Northeast Minnesota as an example, the State of Minnesota determined that a 65 percent mercury load reduction would be required to attain applicable standards, and assumed that anthropogenic emissions contributed 70 percent of the mercury loading. Based on these two factors, the state calculated that anthropogenic mercury had to be reduced by 93 percent. As unrealistic as this may be, and setting aside the fact that the Clean Water Act confers no authority to regulate air emissions sources, this same basic approach has been used in several other mercury TMDLs approved by EPA.

In addition to understanding the overall mercury inventory, regulators must also consider the ratio between anthropogenic and total mercury emissions. Although states like Minnesota have conveniently assumed that anthropogenic mercury constituted 70 percent of total mercury emissions, the available studies suggest that anthropogenic mercury emissions in the United States constitute only 19 percent of total mercury emissions. If applied to the Northeast Minnesota TMDL, this means that anthropogenic mercury would need to be reduced 100 percent, and natural and re-emission sources of mercury would have to be reduced 57 percent. In short, a real-world impossibility.

Legal considerations

Over the past two decades, EPA regions and states have established tens of thousands of TMDLs for a range of different pollutants and waterbodies, from small headwater creeks in Appalachia to the 64,000 square mile Chesapeake Bay watershed, from arroyos in the arid west to the abundant bays and embayments of the Pacific coast, and virtually every kind of lake, river, and stream in between. Even with all of the knowledge and experiences gained through those efforts, much remains to be learned and done. No more so than in the mercury context, where special challenges complicate the development of technically sound and legally defensible TMDLs.

Some states have recently established mercury TMDLs based on *ad hoc* values rather than formally adopted “applicable” standards, and states have also opted to rely on simplified assumptions about mercury cycling in the environment even though these assumptions cannot yet be verified or validated. Last but not least, states have elected to proceed with TMDLs where the predominant source of mercury (e.g., 95–100 percent is atmospheric deposition, leading to TMDL equations that (1) “assume” reductions that are beyond the authority of the Clean Water Act or governments (U.S. or international) and (2) place

point sources in jeopardy of extremely stringent if not unachievable NPDES permit limits, even though point source contributions are de minimis and will have no practical impact on the TMDL outcome.

Some practitioners derisively refer to TMDLs as “too many damn lawyers.” Unlike the wave of lawsuits that breathed life and energy into the Clean Water Act program 20 years ago, there have been remarkably few cases addressing the scope, contents, and effect of TMDLs. Indeed, most of the fundamentals of mercury TMDLs have been established without scientific basis or even confirmation through field studies. So far, practice has begotten precedent, but the question remains: *who’s fooling whom?*

The Cross-State Air Pollution Rule: Will EPA learn from experience?

Mohammad O. Jazil and Joseph A. Brown

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If as Oscar Wilde said “experience is simply the name we give our mistakes,” then the U.S. Environmental Protection Agency (EPA) has had plenty of experience trying to regulate interstate air emissions. The Cross-State Air Pollution Rule (CSAPR) was simply EPA’s most recent attempt. It was short-lived. The D.C. Circuit vacated CSAPR in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) before the rule could even take effect.

Brief history of interstate emissions regulation

Air emissions do not respect political boundaries. Emissions from one state may affect air quality—or National Ambient Air Quality Standards (NAAQS)—in other states. The Clean Air Act addresses the interstate transport of air emissions by requiring states to include provisions in their State Implementation Plans (SIPs) to regulate emissions “which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such [NAAQS].” 42 U.S.C. § 7410(a)(2)(D). This good neighbor provision, as it is called, is one of 20 requirements for SIPs in the Clean Air Act. It is at the heart of the dispute over EPA’s attempts to regulate interstate air emissions.

Congress added the good neighbor provision to the Clean Air Act in 1990. *See* Pub. L. No. 101-549, § 101(b), 104 Stat. 2399, 2404 (1990). After the 1990 amendments, EPA and several states formed the Ozone Transport Assessment Group (OTAG). *See* 63 Fed. Reg. 57,356 (Oct. 27, 1998). As its name implies, OTAG studied the transport of ozone and ozone precursors, and strategies to ameliorate the effects of such transport. OTAG, however, could not reach a consensus on its recommendations. In 1998, EPA nevertheless relied on OTAG’s work to issue a nitrogen oxides (NO_x) SIP call, in which the agency formally informed 22 states and the District of Columbia that their SIPs failed to adequately address NO_x emissions, precursors to ground-level ozone. Litigation followed.

The D.C. Circuit addressed challenges to the 1998 NO_x SIP call in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). The decision was a mixed bag. Notably, in resolving petitions filed by states, industry, and conservancy groups, the court held that EPA could consider cost in determining an upwind state’s emission reduction obligations under the good neighbor provision. Specifically, the court held that EPA could use cost to limit required reductions to “only a subset of each state’s contribution.” But the court also held that EPA erred by including Wisconsin, Missouri, and Georgia in the SIP call, and in defining Electric Generating Units.

In 2005, EPA promulgated a more comprehensive interstate transport rule, which it termed the Clean Air Interstate Rule or CAIR. 70 Fed. Reg. 25,162 (May 12, 2005). EPA's CAIR proposal spanned 85 pages in the *Federal Register* and garnered significant public comment with EPA's response to comments document totaling more than 1,000 pages. Through CAIR, EPA sought to tackle the interstate transport of precursors for both ozone and fine particulate matter, namely NO_x and sulfur dioxide (SO₂) emissions. To do this, EPA defined the good neighbor obligations of 28 states and the District of Columbia, allocated NO_x and SO₂ budgets for each, and created a cap-and-trade program for NO_x and SO₂ emissions. Again, litigation followed.

The D.C. Circuit initially vacated CAIR in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). There, the court explained that the good neighbor provision "gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions." Instead, "[e]ach state must eliminate its own significant contribution to downwind pollution" and EPA "may not require some states to exceed the mark." So, while *Michigan* allowed EPA to use cost to lower an upwind state's obligations, as interpreted by *EME Homer*, *North Carolina* held that EPA may not use cost to increase an upwind state's obligations, which CAIR allowed, in part, with unlimited interstate trading of emission allowances (premised on regional cost considerations) without respect to interstate impacts. The D.C. Circuit thus vacated CAIR. But, upon petitions for rehearing the court later converted its mandate into a remand without vacatur, effectively leaving CAIR in place pending further EPA regulatory action. The court reasoned that leaving CAIR in place temporarily would "preserve the environmental values covered by CAIR." *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

Replacing a "fundamentally flawed" rule

The D.C. Circuit called CAIR "fundamentally flawed." Yet this fundamentally flawed rule has now been in place since 2005 with emission reductions required beginning in 2009. As a result, many facilities have installed new controls at significant cost to curb NO_x and SO₂ emissions and have Title V operating permits that require the operation of these controls. In Florida, for example, the combination of additional controls and Title V requirements under CAIR has contributed to an approximately 64 percent reduction in annual NO_x emissions between 2008 and 2011. See *EPA Air Markets Program Data*. Downwind air quality can only have improved as a result. So, it follows that EPA should have felt no rush to promulgate a replacement for CAIR. It did.

In August 2010, EPA proposed CSAPR. The proposal required 256 pages in the *Federal Register* and was accompanied by voluminous technical material. Three Notices of Data Availability followed with each proposing revisions to CSAPR's underlying models and assumptions. Substantial public comments were submitted with EPA issuing multiple "response to comment" documents, including a 3,009 page "primary" response.

A short 12 months later, EPA issued a final rule that caught many by surprise. Among other things, emissions allocations—or budgets—for the states were significantly different than those in the proposed rule. In fact, the Office of Management and Budget observed that "the sheer magnitude of change to the budgets of all the states results in a significantly different rule than originally proposed." *Summary of Interagency Working Comments on Draft Language under EO 12866 Interagency Review*, Document EPA-HQOAR-2009-0491-4133, at 11 (posted July 11, 2011). Simultaneously with finalization of CSAPR, EPA even issued a proposal expanding the rule's scope to other states. Two proposals correcting errors in CSAPR soon followed.

EPA's haste to implement CSAPR was also evident in the departure from its approach to implementing the 1998 NOx SIP call and CAIR. Unlike the earlier rules, which provided several years to comply, CSAPR imposed a compliance deadline of January 1, 2012—a mere five months from publication of the final rule in the *Federal Register*—and simultaneously imposed Federal Implementation Plans (FIPs). This precluded states from having any initial opportunity to develop SIPs. Naturally, litigation followed.

In *EME Homer*, the D.C. Circuit had before it 45 petitions for review and 18 separate motions asking the court to stay CSAPR pending review. The court stayed CSAPR on the eve of its January 1, 2012 effective date but expedited briefing on the merits of the case. On August 21, 2012, a divided court vacated CSAPR, while leaving CAIR in place, for two independent reasons.

First, the D.C. Circuit held that EPA exceeded the scope of the good neighbor provision by potentially requiring upwind states to reduce emissions in excess of their “significant contribution.” According to the court, EPA could use a numeric threshold to include a state in CSAPR—to determine that a state significantly contributed to downwind air quality problems; however, that threshold then established a floor below which EPA could not require states to reduce emissions. EPA ignored this floor by relying on a cost-based standard to determine a state's emissions reduction target without regard for its contribution determined by the threshold. Thus, while EPA limited interstate trading under CSAPR in response to *North Carolina*, the court reiterated that “EPA may not use cost . . . to force an upwind State to ‘exceed the mark.’” The court also found that EPA erred by failing to account for the relative contribution of emissions from other upwind states to a downwind state and those of the affected downwind state itself.

Second, the D.C. Circuit held in *EME Homer* that EPA erred by simultaneously promulgating FIPs. The court explained that EPA must first quantify a state's good neighbor obligations, if any, before it can require the state to submit a SIP. EPA cannot preemptively find a SIP deficient and then usurp the state's prerogative to comply with the good neighbor obligations as it sees fit.

The proposed CSAPR regulation of Florida illustrates the rule's flaws. EPA included Florida in CSAPR because of modeled links to two air quality monitors near Houston, Texas. Yet EPA's own modeling projected that these monitors would have no air quality exceedences by 2014 without *any* reductions mandated by either CAIR or CSAPR. See *Air Quality Modeling Final Rule Technical Support Document*, Document EPA-HQOAR-2009-0491-4140, at Appendix B-30, B-31 (posted July 11, 2011). Moreover, EPA failed to consider the downwind state's relative contribution to its own air quality problem. It failed to consider, for example, that mobile sources from the Houston-area emitted 153,556 tons of NOx in 2008, which dwarf EPA's 2012 projections of 91,072 tons of NOx emissions from *all* Florida power plants absent CAIR or CSAPR reductions. Compare 2008 National Emissions Inventory Data, with *Emissions Inventory Final Rule Technical Support Document*, Document EPA-HQ-OAR-2009-0491 at 103 (posted July 12, 2011). Also, while EPA linked eight other states to these monitors, it required Florida to bear the lion's share of emission reductions. 76 Fed. Reg. 48,208, 48,246, 48,250-251 (Aug. 8, 2011). Again, it did so without regard for Florida's relative contribution.

Judge Rodgers filed a lengthy dissent in *EME Homer*. Relying on the dissent, on October 5, 2012, EPA and other intervenors filed petitions seeking rehearing *en banc*. That petition is still pending before the court as of this writing.

Replacing a “fundamentally flawed” rule . . . again

Should CSAPR's vacatur withstand further scrutiny by the D.C. Circuit or even the U.S. Supreme Court, EPA must ensure that a replacement is consistent with *Michigan*, *North Carolina*, and now *EME Homer*. EPA could decide to build a new rule from the ground up or it may attempt to salvage portions of CSAPR. EPA's recent actions suggest that it favors the latter approach.

In at least two actions since *EME Homer*, EPA has relied on CSAPR's modeling (linking upwind to downwind states) to conclude that states have satisfied their good neighbor obligations. 77 Fed. Reg. 61,724 (Oct. 11, 2012); 77 Fed. Reg. 63,228 (Oct. 16, 2012). In fact, EPA specifically stated that nothing in the *EME Homer* opinion suggests that this aspect of CSAPR was flawed or invalid. So, according to EPA, while the D.C. Circuit may have invalidated CSAPR's methodology for determining required emission reductions, the methodology linking upwind states to downwind states remains valid.

On remand, this initial rulemaking suggests EPA may seek to continue to rely on this aspect of CSAPR. Prognostications aside, the audience can only wait, watch, and wonder whether EPA has finally learned from experience.

IN BRIEF

Theodore L. Garrett

Theodore L. Garrett is a partner at Covington & Burling LLP in Washington, D.C. He is a former chair of the Section and a contributing editor of Trends.

CERCLA

Two real estate companies sued a church to recover the costs of responding to contaminated groundwater that migrated from the adjacent church property. A district court dismissed the church's counterclaims alleging that the migration from the church's property made plaintiffs' property part of a single Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "facility" and thus plaintiffs were responsible as a current owner. *Alprof Realty LLC v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 2012 WL 4049800 (E.D.N.Y. No. 09-5190, Sept. 13, 2012). The court stated: "The cases cited by the Church do not establish that a CERCLA facility must always be defined to include the entire area of contamination, and they particularly do not stand for the proposition that an unrelated neighboring property onto which contamination spreads becomes part of the CERCLA facility." The court also noted that the Church did not allege that it incurred costs because contamination from plaintiff's property threatened to damage Church property.

A district court denied a request for discovery to show that underlying CERCLA liability was transferred from a company that contributed to contamination at the site to another company that was an indemnitor. *Cyprus Amax Minerals Co. v. CBS Operations*, No. 11-CV-252-GKF-PJC, 2012 WL 4857924 (D. Okla. Oct. 12, 2012). Parties can contractually shift responsibility for their response costs among each other by means of an indemnity, the court held, but the parties may not thereby escape their underlying liability to the government or a third party. On that basis, the court found that discovery to establish the transfer of liability was not relevant.

New Jersey Spill Act

Affirming the dismissal of a Spill Act claim for costs to remediate groundwater that contaminated private

wells, the New Jersey Supreme Court held that the proofs failed to establish a sufficient nexus between the groundwater contamination and defendant's discharges during its operation. *N.J. Dep't of Env'tl. Prot. v. Dimant*, 51 A.3d 816 (N.J. Sept. 26, 2012). The New Jersey Department of Environmental Protection (NJDEP) found that a pipe emerging from defendant's building was dripping perchloroethylene (PCE) on to the asphalt, but did not identify any cracks in the asphalt that might have been a pathway for the PCE to enter the environment. The court's opinion states that "[i]t is not enough to prove that a defendant produced a hazardous substance and that the substance was found at the contaminated site." The Court held that in order to obtain damages under the Spill Act, the NJDEP must demonstrate, by a preponderance of the evidence, a reasonable connection between the discharge, the discharger, and the contamination at the damaged site.

Air quality

The Ninth Circuit affirmed the dismissal of a lawsuit by the City of Kivalina, Alaska, seeking damages against oil, energy, and utility companies based on claims that greenhouse gas emissions have resulted in global warming that eroded the city's land and threaten destruction. *Native Vill. of Kivalina v. ExxonMobil Corp.*, No. 09-17490, 2012 WL 4215921 (9th Cir. Sept. 21, 2012). The court held that federal common law can apply to transboundary pollution suits, but Kivalina's claims are displaced by the Clean Air Act (CAA) and EPA actions authorized by the CAA displaces Kivalina's claims. The Supreme Court in *AEP v. Connecticut*, 131 S. Ct. 2527 (2011) held that Congress has addressed the issue of domestic greenhouse gas emissions and thus displaced any federal common law right to seek abatement of the alleged nuisance. Although Kivalina seeks damages rather than abatement, the Ninth Circuit found that distinction not relevant to the doctrine of displacement. The court concluded that the solution to Kivalina's circumstances rest with the legislative and executive branches, not federal common law.

A district court found that a utility, undertaking a project to change from natural gas to coal, failed to obtain a MACT determination in violation of the CAA. *Wildearth Guardians v. Lamar Utilities Board*, No. 1:09-cv-02974-DME-BNB, 2012 WL 4476649 (D. Colo. Sept. 28, 2012). In 2005 EPA delisted small electric generating units (EGUs) from Section 112 of the CAA, but the delisting rule was overturned by the D.C. Circuit. In 2012 the utility obtained a permit from Colorado limiting emissions to qualify the project as minor. The court concluded that the project violated the CAA from time the D.C. Circuit vacated the delisting rule in 2008 until the synthetic minor permit was issued in 2012. The court also rejected the utility's defense that the § 112(g) requirements apply to preconstruction and thus do not apply because construction was already underway when the D.C. Circuit vacated the delisting rule.

Water quality

The Third Circuit upheld the conviction of a pipe foundry company and four of its managers for illegally pumping contaminated water into storm drains leading to the Delaware River. *United States v. Maury*, No. 09-2305, 2012 WL 4343775 (3d Cir. Sept. 17, 2012). Rejecting defendants' argument that the jury charge was erroneous, the court held that the culpable mental state for a misdemeanor violation of the Clean Water Act (CWA) is simple negligence rather than gross negligence. The court also ruled that the jury's verdict that defendants had knowingly participated in a conspiracy to violate the CWA and also committed a negligent violation of the CAA are not mutually exclusive.

The Eleventh Circuit denied attorney fees to the Miccosukee Tribe in its efforts to compel the South Florida Water District to obtain a NPDES permit for its water transfers. *Friends of the Everglades v. S. Fla. Mgmt. Dist.*, No. 11-150352012 WL 1468484 (11th Cir. 2012). Although the Tribe prevailed in

district court, that ruling was later reversed on appeal and thus the Tribe was not a “prevailing party” entitled to fees.

NEPA/Federal Tort Claims Act

Overturning its earlier decision, the Fifth Circuit held that the U.S. Army Corps of Engineers (Corps) was not liable for damages caused by canal breaches that occurred in New Orleans during Hurricane Katrina. *In re: Katrina Canal Breaches Litig.*, No. 10-30249, 2012 WL 4343775 (5th Cir. Sept. 24, 2012). The opinion states that “At most, the Corps has abused its discretion—an abuse explicitly immunized by” the discretionary-function exception. That exception under the Federal Tort Claims Act bars suit on any claim that is “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a) (2012).

Environmental marketing

The U.S. Federal Trade Commission (FTC) issued revisions to its Green Guides for the Use of Environmental Marketing Claims describing environmental marketing claims that the FTC considers unfair or deceptive under section 5(a) of the Federal Trade Commission Act. The guides caution marketers not to make broad, unqualified claims that a product is “environmentally friendly” or “eco-friendly.” The FTC advises marketers not to make an unqualified degradable claim unless they can prove that the entire product or package will completely break down and return to nature within one year after customary disposal.

42nd Spring Conference: Beyond the Basics: Sustainable Use, Development, and Environmental Challenges

Wendy Bowden Crowther

Wendy Bowden Crowther is a shareholder and member of Parsons Behle & Latimer’s Environmental, Energy and Natural Resources practice group. She is the planning chair of the 42nd Spring Conference.

Once again Salt Lake City will host the Section’s Spring Conference. Wait, Spring Conference? Yes, the Annual Conference on Environmental Law is now known as the Spring Conference. While the name may have changed, the conference remains the premier forum for environmental law practitioners to discuss the leading issues in environmental, energy, and resource law. The 42nd annual conference will take place on March 21–23, 2013. Building on last year’s emphasis on the basics—air, land, and water—this year’s conference will focus on sustainable resource use and development and the related environmental challenges and priorities.

Core environmental topics and cutting-edge issues will be addressed by leading environmental officials, practitioners, and academics. As the conference will take place only months after the election, our opening plenary session will examine the make-up of the administration and of Congress and will consider the election’s impact on environment, energy, and natural resource priorities. Our speakers will provide insight into what you may expect to see in terms of policy and practice over the next four years. To help you stay current in your practice, the conference will also include a plenary session highlighting recent Supreme Court and appellate court decisions.

The conference offers something for all environmental law professionals—from experienced lawyers to young lawyers and law students. Panels focusing on the practice basics will address the status of Superfund and trends in RCRA litigation, and update you regarding NAAQS standards and implementation. Looking forward, break-out sessions will address the cutting-edge issues that are likely to impact the practice of environmental, energy, and natural resource law in the near future. One panel will address the legal challenges and opportunities associated with coastal zone land use and energy development. Another panel will consider the hotbed of environmental, energy, and resource law that is the Arctic. A panel of corporate leaders and counsel will address the lawyer’s role in climate change adaptation—a topic brought to the forefront by Hurricane Sandy.

In other sessions, leading energy law professionals and practitioners will address how sustainability may be defining the future of energy law, the consequences of the explosion in natural gas development, and the legal implications of the developing bans and moratoria on hydraulic fracturing. Those interested in natural resources will want to attend panels addressing stormwater from regulation to resource and the impacts of modern agriculture on the environment. Finally, this year’s ethics panel will focus on the ethical issues raised by the evolving duty to disclose environmental risks.

In addition to expanding your working knowledge, the conference provides a great opportunity to network with your colleagues—both long-time friends and new contacts. Continuing the strong ABA tradition of community, the conference will provide opportunities to interact with Section leaders, speakers, and conference attendees during lunch and networking breaks and, of course, during the conference dinner Thursday evening. The conference will again provide an opportunity to meet with your colleagues while planting trees at Thursday morning’s public service project. Throughout the conference special networking opportunities will be available to young lawyers and law students to make sure they get the most from their conference experience.

An additional conference highlight will be Section’s recognition of its Distinguished Environmental Advocates award recipients on Thursday afternoon.

The Spring Conference will be returning to Salt Lake City’s five-diamond rated Grand America hotel. Salt Lake City is an ideal family vacation spot with several attractions located just minutes from the hotel. Check out Salt Lake Connect pass for more information and discounts. You may also want to consider staying for the weekend to take advantage of the beauty of Utah. Salt Lake City sits at the base of the majestic Wasatch Mountains and late season skiing on the “Greatest Snow on Earth” is available 30 minutes from the conference hotel. Park City, home of the Sundance Film Festival, offers a unique historic mining town destination with world-class restaurants and shopping. If the mountains are not your choice, consider a trip to southern Utah to explore Zion National Park, Canyonlands, or Arches National Park. Whatever your interests, you will find Utah has something to offer.

Make your plans now to meet in March with the nation’s leading environmental professionals at the country’s premier environmental law conference. For more information, visit the Spring Conference webpage—and for updates, download the conference mobile app to your smart phone. I look forward to seeing you in Salt Lake City!

Launching the Special Committee on Public Service**Neil Johnston**

Neil Johnston is a practice group leader at Hand Arendall in Mobile, Alabama, and the chair of the Special Committee on Public Service.

Established during the 2012–2013 year, the Special Committee on Public Service will assist the Section and its committees implement, coordinate, and develop public service programs. The Special Committee will provide a centralized mechanism to collect information about existing public service programs, support Section members' (and others') participation in and development of innovative public service activities, structure, budget, and approval processes. The Special Committee will provide an organized conduit for interaction among all Section committees who are emphasizing public service and those who would like to do more.

DID YOU KNOW:

I. **THAT** there are many established public service programs and materials that can be found the Section's Public Service webpage, including the ABA-EPA Law Office Climate Challenge, which recognizes law offices that adopt one or more of the four component programs: best office paper management practices, EPA's WasteWise Program, EPA's Green Power Partnership Program, and EPA's Energy Star Program. You can find the enrollment forms here.

II. **THAT** over 28 Section members, spouses, friends, law students, and staff participated in the public service project for the 20th Section Fall Meeting on Wednesday, October 10, 2012, at the Ann Richards School for Young Women Leaders (grades 6–12), an innovative institution in Austin, Texas.

[photo]

As you can see, the participants, in cooperation with Keep Austin Beautiful, planted trees and improved the grounds as part of the Section's One Million Trees Project to plant one million trees across the nation by 2014. To date, the Section has planted over 20,000 trees. With the support of the full ABA, one million may not be far from achievement.

III. **THAT** the Waste and Resource Recovery Committee sponsored a Stream Cleanup Public Service Project (kudos to co-chairs Deborah Tellier and Nandra Weeks) on Wednesday, October 10, 2012, in Austin's Palm Park and Waller Creek during the 20th Section Fall Meeting.

IV. **THAT** the Section is now offering meeting attendees the opportunity to offset their carbon, with the funds going to plant trees and to renewable projects on tribal and farm lands. At the most recent Section Fall Meeting, 37 people elected to offset their carbon. At the prior Fall Meeting, in Indianapolis, our offsets went to the Iowa Farms Wind Project, in northern Iowa. This wind energy project will create 92,000 metric tons, verified carbon standard. Our offset partner is Native Energy.

V. **THAT** the Special Committee has also set up (so far) three project-specific subgroups to focus on those public service projects that you can join:

VI. **THAT** the American Bar Association has recently adopted the One Million Trees Public Service Project and is encouraging *all* ABA members to participate.

VII. **THAT** the Air Quality Committee recently held a One Million Trees event on November 3, 2012, at Swan Creek Park in Fitchburg, Wisconsin. For more information contact Phil Bower.

VIII. **THAT YOU** can participate. See the Public Service webpage for the Special Committee of Public Service chair and vice chairs contact information and other information.

Views from the Chair: The globalization of environmental law: Why it matters and what the Section is doing

Alexandra Dapolito Dunn

Alexandra Dapolito Dunn is the executive director and general counsel of the Association of Clean Water Administrators.

Robert Percival, professor and director of the Environmental Law Program at the University of Maryland School of Law, has written extensively on “the globalization of environmental law.” Professor Percival powerfully notes that “as the forces of globalization bind the world more closely together than ever before, environmental law is developing on a global scale in important new ways.” Robert V. Percival, *The Globalization of Environmental Law*, 26 PACE ENVTL. L. REV. 451, 452 (2009).

I understand what Professor Percival, a friend and frequent speaker at Section programs, means when he reflects on the more international nature and scope of our practices as compared to environmental law’s early days. Some of us began our practice with an international or global component, but I, for example, cut my legal teeth on domestic clean air and Superfund law, later moving into U.S. water quality law. My day-to-day practice did not require much knowledge of European Union trends, developments in Asia, or resource extraction in developing nations.

That has changed. The evolution of issues—from water shortages, to climate change, to e-waste, to multinational corporation counsel—means that we are all, in some way, global practitioners. When serving as dean of Environmental Law at Pace Law School, international students in my Human Rights and the Environment course enlightened me with their perspectives on limited transparency and information, limited judicial capacity, and resource exploitation. I have attended colloquia of the International Union for the Conservation of Nature (IUCN) Academy of Environmental Law—a global network of environment, energy, and resource law professors. In some cases, a participating academic is the only environmental law professor in his or her country, revealing how fragile our future could be with insufficient numbers of lawyers trained in our work.

Although my practice has returned to traditional U.S. water quality law, my experiences with global environmental law have permanently changed me. My evolution is well supported by a quotation cited by Professor Svitlana Kravchenko, a pioneering human rights and the environment scholar from the Ukraine, who later worked at the University of Oregon School of Law, and passed away in 2012, much too early. Professor Kravchenko offers the following in the opening to her law school text: “In this life, once you have opened your eyes, you can never close them again.” Nothing can be more accurate and truthful at this juncture for Section members. The Section posthumously honored Professor Kravchenko with the ABA Award for Distinguished Achievement in Environmental Law and Policy at the ABA Annual Meeting in August 2012.

With this reflection on my own pathway toward a more globalized view of our field, I offer some examples of work that the Section has undertaken to advance international issues relevant to our practices. Most dramatic is the Section's work to support the World Justice Project's (WJP) Rule of Law Initiative. Section leaders have participated in all three meetings to date of the World Justice Forum. The forum brings together more than 500 dignitaries, leaders, and innovators from more than 100 nations to discuss essential rule of law issues such as "economic development, technology, women's rights, freedom of expression"—and thanks to the Section's work—the environment. The Section will send a delegation to the upcoming forum in the Netherlands in July 2013, and will report back to the Section's membership on our connections and learning there.

Our work with the WJP, chaired by Howard Kenison, continues with our most ambitious project ever. We will be developing a special report with the WJP on environmental and energy rule of law. Our study will look at five countries in the areas of enforcement, labor, corruption, transparency, criminal and civil liberties, and how these and other "benchmark areas" are perceived by the general population, and also by academic, judicial and regulatory experts in those fields. The WJP has the most objective data going back many years in some of these areas, and allows its rich and objective data to speak for itself on the state of rule of law. This special report must be undertaken with such diligence and care that we are likely two to three years from its release. However, the Section is committed to ensuring that this critical information is incorporated into the WJP's work.

Also impressive is the fact that five of our Section's leaders represented the ABA as a whole at the Rio+20 United Nations Conference on Sustainable Development. Our impressive delegates blogged from the June 2012 conference, and delivered a comprehensive report to the ABA at its conclusion. One of the most poignant blog comments was made by past Section Chair and Rio Delegate Sheila Hollis, when she noted on June 20, "Dear Friends—It is many things here:—Extraordinary experience—Indigenous Peoples well represented. And they are delegates; exceedingly diverse representation and positions on biggest issues. It is humbling to participate; thanks for the support and for allowing us the privilege of carrying the ABA portfolio."

To provide a home for our global law activities, we formed this year the Special Committee on Environmental Rights and Justice, chaired by past Section Chair Claudia Rast. This special committee provides a consolidated and organized way to monitor developments, advance endeavors like the ones described, and to report to the Section's membership on our work. This committee also contains our liaisons to the International Bar Association (past Section Chair Gene Smary) and to the IUCN Academy of Environmental Law (Ann Powers), our domestic environmental justice work (Paula Schauwecker), and our continuing post-Rio+20 activities (past Section Chair Lee DeHihns).

Beyond these larger initiatives, our recognition of the globalization of environmental law is reflected in our current activities. At our CLE programming, we have offered a variety of global law panels. Recent topics include European Union environmental law at the 40th Annual Conference on Environmental Law in 2012, environmental law within and between NAFTA member countries at the 19th Section Fall Meeting in 2011, and counseling multinational corporations on environmental compliance issues at the 18th Section Fall Meeting in 2010. At our upcoming 41st Spring Conference in Salt Lake City, the agenda will offer a panel on Arctic governance. We are supporting law students interested in global environmental law through our support of the Stetson Law International Environmental Moot Court Competition, a world-wide moot court, particularly its North America Regional Round being held in Washington, D.C. in February 2013.

Section publications also cover a myriad of international issues. For example, each year the International Environmental and Resources Law Committee (IERLC), currently cochaired by Brett Grosko and Jennifer Wills, provides a chapter for the *The Year in Review* that highlights the last 12 months' developments. The committee's newsletter is also packed with information. The Section's bi-monthly publication *Trends* has published articles by IERLC members focusing on international environmental law and energy emissions, including international battles over U.S. labeling of tuna in the World Trade Organization and EU efforts to regulate emissions from U.S.-based airline carriers. And a dynamic team of more than 50 Section members is hard at work on a brand new book scheduled for publication in 2013 tentatively called "*International Environmental Law: The Practitioners' Guide to the Laws of the Planet.*" This book, edited by Roger Martella and Brett Grosko, will be like no other, providing the tools environmental practitioners need to approach international environmental law questions, and covering the environmental regimes of more than 35 countries or regions.

Finally, an executive member of the Canadian Bar Association's National Environmental, Energy, and Resources Law Section (NEERLS) sits *ex officio* on our Council and our Section vice chair does the same with NEERLS. We are coordinating with the ABA's Section of International Law through our Special Committee on Section, Division, and Forum Coordination and through the IERLC. We hope this relationship will yield additional productive activities that will serve members of both sections.

I hope that this column has raised your awareness of the Section's global activities, and perhaps intrigued you enough to get more involved—I'm sure you didn't miss that quite a few of our past Section chairs are! If you'd like to, reach out to me at Environ.Chair@americanbar.org. I close with words from sociologist Margaret Mead, which sum up how I feel about our personal roles in the globalization of environmental law—"Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has."

People on the Move

Steven T. Miano

Steven T. Miano is a shareholder at Hanglely Aronchick Segal & Pudlin in Philadelphia. He is a contributing editor to Trends.

Firm moves

Phillip Bower was recently elected as a shareholder of Whyte Hirschboeck Dudek S.C. Bower is located in the firm's Madison, Wisconsin office. He counsels clients on environmental compliance and risk management associated with business operations and transactions, including air permitting, waterway and wetland permitting, and hazardous waste and EPCRA issues, as well as the investigation and remediation of contaminated properties.

Geri Edens recently joined Baker Hostetler as a litigation partner in the firm's Washington, D.C. office. Edens represents chemical, energy, agricultural, and consumer products companies in a variety of regulatory and litigation matters relating to environmental compliance, the law and science of chemical regulation, natural resource law, on clean air and water issues, food additive approvals under the Food Drug and Cosmetic Act, and regulation of genetically modified organisms (GMOs). She has defended the adequacy of environmental analyses for major economic development projects, large-scale energy projects, interstate pipeline right-of-way approvals, and GMO product approvals.

Julia L. Jennison was recently elected as a shareholder of Lewis, Longman & Walker, P.A. in the firm's West Palm Beach, Florida office. Jennison's practice focuses on environmental, land use, water resources, sustainability, administrative, and real estate law. Previously, she was a senior legal research assistant for the South Florida Water Management District for 13 years.

Suedeem Kelly recently joined Akin Gump Strauss Hauer & Field LLP as co-chair of the firm's energy regulatory practice in Washington, D.C., where she will continue to represent clients on FERC matters and other energy-related matters. Kelly served two terms as a Democratic FERC commissioner. Most recently, Kelly was with Patton Boggs LLP. She was also a professor at the University of New Mexico School of Law and chairwoman and commissioner of the New Mexico Public Service Commission.

James P. Moorhead recently announced the formation of the Moorhead Law Group, LLC in Chicago. Moorhead's national practice focuses on commercial real estate, conservation and natural resources law, and sports law. Previously, he was a partner with Thompson Couburn LLP.

This and that

Michelle Diffenderfer, a shareholder at Lewis, Longman & Walker, P.A. in West Palm Beach, Florida, was selected to be featured in *The 2013 Woman's Advantage Shared Wisdom Calendar*. The calendar provides advice for women business owners from influential women leaders across the United States and around the world. Diffenderfer had held various leadership positions within the Section, including education officer and Council member. She currently chairs the Communications and External Relations Committee.