# Trends November/December 2014
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## Section News

# The Supreme Court's Homer Decision: A gift to EPA or a Trojan horse?

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In the U.S. Supreme Court's EPA v. EME Homer Generation decision of April 2014, six Justices went out of their way to reverse the U.S. Court of Appeals for the D.C. Circuit and uphold critical elements of U.S. Environmental Protection Agency's (EPA's) far-reaching Cross-State Air Pollution Rule (CSAPR) for electric power plants. Despite troubling statutory language on which the D.C. Circuit had based its decision, in the view of the Supreme Court majority (including conservative Justices John Roberts and Anthony Kennedy), EPA's approach made "good sense." 134 S. Ct. 1584, 1607 (2014).

In the near term, *Homer* won't have much impact on the environment or the electric utility industry because even though the decision was widely touted in the media as a complete win for EPA, *Homer* left critical issues for the D.C. Circuit to decide on remand. Resolving these issues could result in invalidation of CSAPR, in whole or in part, in some or in all affected states. It also appears that more rulemaking will be necessary before any form of CSAPR is put into actual effect. *Homer*'s long-term impacts, however, could be quite significant.

## CSAPR's tangled past

Issued in July 2011, CSAPR was aimed at reducing the interstate transport of sulfur dioxide (SO2) and nitrogen oxides (NOx) from electric power plants in 27 states and the District of Columbia. CSAPR is based on a short clause in the federal Clean Air Act (CAA), commonly called the "good neighbor" provision, requiring State Implementation Plans (SIPs) to prohibit "any source . . . within the State from emitting any air pollutant in an amount which will . . . contribute significantly to nonattainment in . . . any other State." 42 U.S.C. § 7410(a)(2)(D)(i). For example, if Chicago's air pollution is significantly contributing to air quality problems in Wisconsin, Illinois is required to eliminate that pollution. Otherwise, Illinois is not being a good neighbor.

EPA issued CSAPR to correct "fundamental flaws" the D.C. Circuit had found in an earlier CAA "good neighbor" rule known as the Clean Air Interstate Rule (CAIR). The D.C. Circuit remanded CAIR to EPA in its 2008 *North Carolina v. EPA* decision, 531 F.3d 896 (D.C. Cir. 2008), but the court allowed CAIR to stay in effect while EPA sought to remedy CAIR's flaws.

Generally, the 2011 CSAPR created sulfur dioxide (SO2) and nitrogen oxide (NOx) allowance budgets for each state and then allowed interstate trading of those allowances. CSAPR was set to begin in 2012 and then ratchet down the number of allowances available in 2014. That was EPA's plan until over 50 parties challenged the rule in the D.C. Circuit and obtained a stay, stopping CSAPR's implementation in its tracks.

After briefing on the merits, the D.C. Circuit ruled 2–1 that CSAPR's approaches (described below) for (1) calculating state budgets and (2) imposing site-specific "FIP-first" controls both violated the CAA. Because it found CSAPR so fundamentally flawed, the D.C. Circuit vacated the rule in its entirety, leaving CAIR in place.

**The Supreme Court's decision**

In their majority decision, the six Justices clearly sympathized with EPA's plight, as the CAA directs the agency to slash air pollution blowing among the states without giving EPA much guidance on how to do it. The CAA merely provides that states must reduce the "amounts" of their pollution that "contribute significantly" to air quality problems in other states. Moreover, as the majority recognized, EPA has spent over a decade trying to implement the "good neighbor" provision and still hasn't been able to get a rule through the courts.

Industry and many states argued that, under the clear statutory language in the CAA, EPA can only require a state to reduce amounts of pollution sent across its borders to a level necessary (but not more than necessary) to address air quality problems in downwind states. But, instead of following such an "air quality only" approach, CSAPR forces affected states to reduce power plant emissions by requiring cost-effective controls across the board. The result is that CSAPR causes some lesser polluting states to do more than their fair share, while under-regulating some of the more polluting states.

Under the plain words of the CAA, we believe (as did the D.C. Circuit) that the challengers had the better legal argument: the good neighbor provision only requires states to reduce the "amounts" of interstate pollution that "contribute significantly" to downwind air quality problems; it says nothing about cost or requiring cost-effective controls. Yet the Court sided with EPA's cost-effectiveness approach. Why?

Because the majority decided that EPA's approach is an "efficient and equitable solution" to the intractable cross-state air pollution problem:

Efficient because EPA can achieve the levels of attainment, i.e., of emission reductions . . . at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated states, EPA's rule subjects to stricter regulations those States that have done relatively less in the past to control their pollution.

134 S. Ct. at 1590, Syllabus. The majority also sided with EPA on the "FIP first" issue. In issuing CSAPR, EPA in one fell swoop issued (1) new federally mandated targets ("budgets") for each state along with (2) FIPs for each state mandating facility-specific allowance allocations to meet those budgets. During

the comment period on the rule, many parties vigorously objected to this approach. They argued that the terms of the statute, longstanding practice, and the "cooperative federalism" principles embedded in the statute required that EPA first set the budgets and then give states the opportunity to develop SIPs with allowance allocations for each affected facility. The D.C. Circuit agreed with the challengers on this point, but the Supreme Court did not.

As a legal matter, EPA defended its FIP-first approach as based on the CAA's "plain language." As a policy matter, EPA defended the approach based on language from the D.C. Circuit's 2005 *North Carolina* decision admonishing EPA not to tarry in fixing the problems the Court found with CAIR.

EPA based its "plain language" argument on section 110, which explicitly requires EPA to issue a FIP within two years after EPA finds a SIP inadequate. EPA had issued a few state SIP good neighbor disapprovals over the past few years, and, in the final CSAPR rulemaking, EPA summarily issued a "mass" SIP disapproval for 22 states. EPA maintained that these SIP disapprovals set up its authority under section 110 to issue good-neighbor FIPs in those states. For the 22 states subject to the "mass" disapproval, EPA claimed authority under section 110(k)(6), which generally authorizes EPA to "correct" previous EPA SIP actions it later finds to be "in error."

In reversing the D.C. Circuit, the Supreme Court acknowledged that "co-operative federalism" may be a CAA policy goal, yet the Court agreed with EPA that the terms of the statute permitted EPA to issue a good neighbor FIP for any state without first setting budgets for each state—*but only so long as EPA had taken action validly to disapprove a SIP for such state.*

**Key issues unresolved**

On both issues it addressed, the Supreme Court punted on important questions that must now go back—along with other important questions—to the D.C. Circuit for resolution. First, while the Court ruled that EPA's cost-effectiveness approach is generally lawful, the Court left open the possibility of specific states making "as applied" challenges to the rule:

If EPA requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which it is linked, the Agency will have overstepped its authority, under the Good Neighbor Provision, to eliminate those 'amounts [that] contribute . . . to nonattainment.' Nor can EPA demand reductions that would drive an upwind State's contribution to every downwind State to which it is linked below [the level that EPA has determined to be significant].

134 S. Ct. at 1608. The Supreme Court held that there wasn't enough evidence in the record to conclude that either of these "overcontrol" possibilities occurred for any states. But the Court said that particular states could challenge the rule as applied to them, if they can demonstrate that they are being overregulated.

Second, as to "FIP first," the Supreme Court did not reach the critical issue of whether EPA's process of disapproving the SIPs was proper and resulted in valid SIP disapprovals—particularly the 22-state "mass" disapproval EPA claimed was authorized by the CAA section 110(k)(6) "correction" authority. The Supreme Court stated it would now be up to the D.C. Circuit to consider that issue on remand.

Finally, there are a number of issues that the D.C. Circuit never resolved in the first decision, which it will have to decide now. Many of these issues could lead to partial or complete *vacatur* of the rule . . . again.

### *Homer* as precedent

Thus, while EPA secured a victory of sorts in *Homer,* the overall fate of CSAPR is still subject to major uncertainties. These uncertainties derive from two basic sources: (1) several issues before the D.C. Circuit on remand could result in portions of the rule being reversed nationally or on a state-by-state basis, thus setting up the potential for further Supreme Court review, and (2) EPA issued CSAPR in 2011 with two compliance phases to commence in 2012 and 2014—so regardless of what happens in the D.C. Circuit, additional rulemaking will be necessary for there to be a workable program. And any such rulemaking, of course, carries with it new opportunities for judicial review.

Perhaps most importantly, the electric utility industry has drastically changed since EPA first released CSAPR in 2011. Natural gas prices have plummeted, due in large part to the hydraulic fracturing boom, leading utilities to use more cleaner-burning natural gas and less coal when generating electricity. The resulting precipitous drop in SO2 and NOx emissions has made the original CSAPR budgets essentially meaningless for many states that already have emissions below their CSAPR state budget amounts. In the near term, even if CSAPR makes it out of the D.C. Circuit intact, the currently crafted rule will therefore not likely lead to any significant emission reductions.

If nothing else, however, *Homer* finally gives EPA a blueprint for regulating cross-state air pollution based on across-the-board, cost-effective controls. And regardless of what happens to this version of CSAPR in the D.C. Circuit, we expect to see another, more-stringent version in the future based on that blueprint.

# Waters, waters everywhere: Does the proposed definition of waters of the United States expand the Clean Water Act's reach?

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In April 2014, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (EPA and the Corps, collectively, the Agencies) jointly released the long-awaited proposed rule defining "waters of the United States" (WOTUS) under the Clean Water Act (Act). 79 Fed. Reg. 22,188 (Apr. 21, 2014) (Notice). This article identifies key features of the proposed rule and discusses some points of contention that the Agencies and courts will be addressing.

**Background and rationale for the proposal**

According to the Agencies, the proposed rule does not change current practice or expand coverage of the Act. WATERSHED ACADEMY, EPA, WATERS OF THE U.S. PROPOSED RULE 26 (2014) (EPA PowerPoint). Some stakeholders warn, however, that application of new or revised definitions of key terms may unreasonably expand the government's jurisdiction beyond the scope of the Act and that the proposed rule will increase land restrictions and permitting and mitigation. Advocates of the proposed rule support the broad inclusion of waters within the jurisdiction of the Act.

Describing their rationale for the proposed rule, the Agencies suggest that it protects water quality and, therefore, protects human health, reduces confusion over how the term "WOTUS" is defined, is based on Supreme Court precedent, is based on scientific evidence establishing the connectivity of upland and downstream waters, and that its benefits to the public outweigh its expected costs. Throughout the Notice, the Agencies maintain that the proposed rule will protect the nation's waters. They describe the current difficulties in determining the scope of the Act's jurisdiction and explain how those difficulties have hampered enforcement actions. The Agencies also explain that the methodology for defining WOTUS after *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*) caused confusion and often required agencies to evaluate the jurisdiction of particular water bodies on a case-by-case basis.

In *Rapanos*, Justice Kennedy explained that a "significant nexus" exists if wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of navigable waters. 547 U.S. at 780. Although the *Rapanos* plurality opinion disagreed with Justice Kennedy's application of the significant nexus analysis to adjacent wetlands, the proposed rule applies the significant nexus approach beyond adjacent wetlands to *adjacent and other* waters. The Agencies relied on scientific studies evaluating evidence of impacts on the chemical, physical, and biological characteristics of traditional navigable waters and EPA's "Connectivity Report" that synthesized peer-reviewed scientific literature and research on the impacts that upland streams and wetlands have on downstream waters.

For anyone familiar with the concept of "we all live downstream," the Connectivity Report's primary conclusions are not surprising: "streams, individually or cumulatively, exert a strong influence on the character and functioning of downstream waters" and "[w]etlands and open-waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers . . . are physically, chemically, and biologically connected with rivers." 79 Fed. Reg. at 22,222–223. The Agencies rely on these conclusions to justify identifying broad categories of waters as jurisdictional waters.

**Bright-line categories: The devil is in the definitions**

The proposed rule establishes six so-called "bright-line" categories of jurisdictional waters:

- traditional navigable waters,
- interstate waters,
- territorial seas,
- impoundments of these waters,
- tributaries of these waters, and
- all waters adjacent to these waters.

The proposal includes a "case-by-case" seventh category that looks to the existence of a significant nexus to WOTUS. The first three categories are relatively noncontroversial. The other four categories are more so, due in part to new and revised definitions of key terms, including "adjacent," "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus."

The proposal defines a "tributary" as a natural or man-made connector "which contributes flow, either directly or through another water, to" some other jurisdictional water. In addition, the proposal revises "adjacent" to include "neighboring" waters ("located within the riparian area or floodplain"). Relying on the Connectivity Report, the Agencies determined that tributaries and adjacent waters *always* significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas, and therefore a significant nexus exists. Because of that significant nexus, the tributaries and adjacent waters are jurisdictional WOTUS. In addition, *other waters* may be WOTUS if they, either alone or with other similarly situated waters, have a significant nexus to WOTUS. Under the proposed rule's definitions, then, the Act's jurisdiction extends to any area where water is found at any time so long as that water flows on the surface or below the surface to an otherwise recognized WOTUS.

**Exceptions from Clean Water Act jurisdiction**

The proposed rule identifies excluded waters that cannot be considered WOTUS under the "other waters" analysis even if they have a significant nexus to categorical waters:

- waste treatment systems
- prior converted cropland
- ditches that are constructed in uplands, that drain only uplands, and that do not have perennial flow
- ditches that do not flow, either directly or through another water, into a traditional navigable water
- artificially irrigated areas that would revert to upland without irrigation
- artificial structures (e.g., ponds and lakes) constructed in dry uplands
- groundwater
- gullies, rills, and non-wetland swales

These excluded waters could, however, serve as the hydrologic connection for the purposes of determining the adjacency or significant nexus of another water to a jurisdictional water.

The proposed rule clearly states that it does not affect the Act's express exemptions for specified activities such as farming, silviculture, and ranching. The agricultural community expressed concerns about the proposed rule, and despite assurances by the Agencies that these exemptions remain in place, the jurisdictional breadth of the proposed rule continues to be a source of hot debate.

**Sources of controversy and uncertainty with the proposed rule**

Numerous outside commentators disagree with the Agencies' statements that the proposed rule does not expand WOTUS beyond application of the current law. Detractors argue that the proposed definitions unreasonably expand the Act's jurisdiction. Others complain about increased land restrictions and permitting and mitigation costs accompanying a classification as WOTUS. Common areas of concern include the exclusion of ditches and the potential jurisdictional reach of tributaries and "adjacent" waters.

Application of the newly defined terms may be difficult when applied in different regions of the country. For example, the proposed rule generally excludes ditches and excludes upland ditches with "less than perennial flow" but does not extend to ditches that contribute flow "either directly or through another water" to a WOTUS. Because the proposed rule does not define "upland" or "contribute flow," any application is uncertain. The widely different physiographic and climatic conditions across the country add further uncertainty. For example, how can these terms be applied consistently across very different circumstances such as are found in "wet" states that receive 50 or more inches of precipitation annually compared to "dry" states that may receive less than 15 inches?

Some stakeholders are concerned that virtually any ditch that carries water that ends up in a navigable water will be considered a WOTUS, including county-owned ditches along roads and the green infrastructure components of municipal separate storm sewer systems (MS4s). Others argue that because farm ponds tend to be built in low spots, the dry upland exclusion for ponds is a dead letter. Still other groups warn that because the definition of "neighboring" includes "floodplains" and because floodplains can extend for miles from traditional navigable waters, the proposed rule could greatly expand the Act's jurisdiction.

The scope of WOTUS under the proposed rule also affects the cost-benefit analysis. EPA estimates that the public would benefit by up to $514 million by "reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater." EPA PowerPoint at 58. EPA estimates the proposed rule's cost to be $279 million, based on increases in the number of permits that entities must file, the costs of mitigating impacts to streams and wetlands, and the costs to reduce pollution to waterways. Based on these numbers, EPA concludes that the benefits outweigh the costs. Dr. David Sunding, a professor of economics at the University of California, Berkeley, however, argues that EPA underestimated the costs because it relied on a flawed methodology to determine the extent

of acreage that the proposed rule will regulate and did not accurately consider the costs and increased number of required permitting actions. D. Sunding, The Waters Advocacy Coalition, *Review of 2014 EPA Economic Analysis of Proposed Definition of Waters of the United States* (May 15, 2014).

Others believe that the proposed rule appropriately defines WOTUS or even suggest that the Agencies have not gone far enough. In 2011, Jon Devine of the Natural Resources Defense Council and others decried the Agencies' failures to push the Act's jurisdictional limits to the full extent that Congress intended. *See, e.g.*, J. Devine et al., *The Intended Scope of Clean Water Act Jurisdiction*, 41 ENVTL. L. REP. NEWS & ANALYSIS 11,118 (2011). In response to the critique by the Farm Bureau Federation of the proposed rule and the Stoner Blog, Mr. Devine countered each criticism, point-by-point.

Although much of the initial concern expressed about the proposed rule has been about understanding or predicting the scope of WOTUS for purposes of section 404 dredge and fill operations, the Agencies' cost-benefit analysis of sections 303, 311, 401, 402, and 404 shows that the Agencies do not consider this proposed rule solely a dredge and fill-related issue. EPA PowerPoint at 57–60. The rule's impact on these other aspects of the Act raises many questions. For example:

- How will consideration of certain ditches, other waters, neighboring waters, and tributaries affect the determination of designated uses and related water quality criteria under section 303?
- Do existing designated uses and water quality criteria reflect the diverse physical, biological, and chemical realities of jurisdictional WOTUS under the proposed rule? For example, is the same designated use for the protection of propagation of fish and wildlife (and its water quality criteria) that is appropriate for a perennial stream also appropriate for a tributary to that stream when the tributary is ephemeral and is connected by a shallow subsurface hydrologic connection?
- Under section 402 permitting, at what point along the water body will an effluent limit be evaluated as protecting the designated use?

Perhaps even more important than the text of proposed rule are the legal questions regarding statutory construction of the Act and the permissible scope of regulation under the Commerce Clause. In *United States v. Riverside Bayview Homes,* the Supreme Court focused on statutory and regulatory construction but in doing so observed that Congress had intended to exercise its powers under the Commerce Clause. 474 U.S. 121, 126, 133 (1985). In *SWANCC*, the Court recognized the potential constitutional questions but chose to interpret the statute to avoid those issues and expressly declined to address the Commerce Clause. Finally, in *Rapanos*, the plurality opinion recited concerns about Congress's commerce power and the Corps' intent to push the limits of that power and stated: "Even if the term [WOTUS] were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." 547 U.S. 738. Justice Kennedy acknowledged that the Commerce Clause was not limitless and observed: "To be sure, the significant-nexus require-

ment may not align perfectly with the traditional extent of federal authority." *Id.* at 782. Justice Kennedy's statement could well be the opening line of many an argument about the scope of the proposed rule.

Despite the controversies, Congress has not helped resolve the jurisdictional reach of the Clean Water Act. The Agencies expect that the proposed rule will protect the water quality by defining WOTUS with broad and inclusive language that encompasses waters with a significant nexus to traditional WOTUS. The final rule, regardless of its form, will be appealed and the Supreme Court will again be asked to rule on the scope of WOTUS.

## EPA's latest final 316(b) rule: The continuing saga of fish, facilities, and keeping the lights on

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Section 316(b) of the Clean Water Act is short on words but long on controversy. Regulating cooling water intake structures, primarily at power plants and large manufacturing facilities, the statutory provision requires that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." While section 316(b) is silent as to exactly what those environmental impacts are, the potential impact of pumping several hundred million gallons of water per day from a river or estuary is not difficult to imagine. As water is drawn into a power plant or industrial facility, aquatic organisms—primarily fish—are drawn in with it and may suffer one of two fates—impingement or entrainment.

Impingement occurs when a fish cannot escape the velocity of the water pumped into the facility and gets trapped against a screen or grate installed at the intake pipe. Entrainment occurs when fish and other organisms, too small to be impinged, pass into the cooling system. Although the Clean Water Act does not mention impingement or entrainment, minimizing mortality from both—primarily from power plants—has been the focus of the U.S. Environmental Protection Agency's (EPA's) 316(b) rulemaking efforts.

Like many environmental programs, the journey from codification to implementation has been a tumultuous one. Born of legislation, section 316(b) has been reared by litigation. On May 19, 2014, EPA released a 559-page prepublication version of its final rule *National Pollutant Discharge Elimination Sys-*

*tem—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities*. The final rule was published in the *Federal Register* on August 15, 2014 and went into effect on October 14, 2014. The rule is the culmination of nearly 40 years of litigation beginning in 1977 with an industry challenge to EPA's original set of regulations promulgated in April 1976. *Appalachian Power Co. v. Train*, 566 F.2d 451 (4th Cir. 1977). Perhaps best described as an administrative faux pas, EPA's first 316(b) rule required consideration of a development document when assessing the best technology available (BTA) for minimizing adverse environmental impact. The U.S. Fourth Circuit Court of Appeals found EPA's reliance on the development document fatal and remanded the rule to EPA noting that it did not fault EPA for its "point source by point source" application of the rule. EPA's site-specific approach to determining BTA was formalized in its 1977 draft guidance document and served as the framework for 316(b) assessments until another wave of litigation was initiated in 1993.

In January 1993, a citizen suit was filed alleging EPA had violated the Clean Water Act by failing to promulgate regulations to implement section 316(b). EPA resolved the initial litigation by consent decree in 1995 committing to three phases of rule development. Phase I addressed new facilities. Phase II established regulations for existing facilities. Phase III addressed existing facilities not captured within the scope of the Phase II existing-facilities rule, e.g., lower-flow electrical facilities, new offshore facilities. Each rule addressing each phase was challenged in federal court. EPA's May 2014 final rule responds primarily to the remand of the Phase II existing-facilities rule.

Many electrical generating facilities that use large volumes of cooling water on a daily basis were constructed years before section 316(b) was enacted. Cooling water is essential for the operation of these facilities and maintaining electrical service to millions of residential and commercial end users. How to minimize impingement mortality and entrainment at existing facilities has been a point of contention between utility operators, who must operate to ensure consistent delivery of electric power, and environmental interests concerned that cooling water intake systems are yet another line of assault on aquatic systems already burdened by multiple environmental stressors. EPA's efforts to strike an accord between the two camps have not been easy and it remains to be seen just how final EPA's final rule will be. Petitions filed by more than a dozen environmental organizations and several industry groups in six circuit courts of appeal ultimately resulted in the U.S. Judicial Panel on Multidistrict Litigation selecting the Fourth Circuit court of appeals for consolidation of the pending challenges. EPA's continued reliance on a site-by-site approach to 316(b) assessments, a policy EPA has embraced since 1977, is likely to be the key issue in the latest round of legal challenges nearly 40 years later.

Environmental interests preach a simple sermon—use less water and kill fewer fish and aquatic organisms. How to put an industrial facility built in the 1950s or 1960s on a water diet is the point of contention. Cooling systems vary as to efficiency with the least efficient being once – through cooling systems, which take in large volumes of water, run it through the plant, and discharge the water back into the source water lake, stream, or estuary. Closed-cycle recirculating systems reuse the water drawn into the plant by parking the warmed water in a cooling pond and reusing the water, only adding new water to make up for the volume lost (primarily) to evaporation. Dry cooling systems use very little

water, relying on air drafts for cooling. Dry systems are technically feasible but generally not considered a practical industry alternative to once-through or closed-cycle systems, especially in humid climates.

Boiled down to its essence, the issue becomes one of which cooling system should existing facilities employ. Should EPA perpetuate the legacy of high-volume once through cooling or force industry to convert to closed-cycle systems? For existing facilities the answer is not a simple one and may come down to a matter of real estate: Where would new cooling towers or cooling ponds go on a site first cleared in the fifties or sixties and now surrounded by industrial, commercial, and, very often, residential development? Construction of facilities on a new site might be costly, but trying to retrofit an existing site may be cost prohibitive or physically impossible. There lies the dilemma and industry's insistence that a site-by-site approach to 316(b) assessment is essential. Equally essential, environmental advocates would argue, is finally ending the perpetual use of billions of gallons of water and the death of untold fish and aquatic organisms. So does EPA's rule do it—reduce water consumption and protect fish and aquatic life yet provide existing facilities with the flexibility needed to address site limitations and avoid economic waste? It depends on who you ask.

EPA certainly believes so, stating in a two-page fact sheet that by "[s]etting flexible technology standards, EPA's common-sense regulations will greatly reduce damage to ecosystems while accommodating site-specific circumstances and providing cost-effective options." But it is that flexibility and cost consciousness that has vexed the environmental community since EPA first promulgated a rule covering existing facilities in 2004. 69 Fed. Reg. 41,576 (July 9, 2004). Tracing its roots to EPA's 1977 guidance, which drew substance from the ill-fated development document, the underlying theme of EPA's 2004 Phase II existing-facilities rule was flexibility, prescribing a suite of five compliance options for meeting defined impingement and entrainment performance standards. Cost-benefit was squarely addressed in the 2004 rule, allowing a demonstration that cost of compliance would be significantly greater than anticipated by EPA for a similar facility compared to the benefit of meeting the applicable performance standard. Analogizing the section 316(b) BTA standard to the "best available technology" (BAT) standard applied in the context of technology-based effluent limitations, the U.S. Second Circuit Court of Appeals struck down the bulk of the 2004 Phase II rule based on EPA's explicit reliance upon cost consideration and other grounds. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007). Appealed by industry, the U.S. Supreme Court held section 316(b) does not preclude a cost-benefit analysis. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

EPA's 2004 rule did not impose closed-cycle cooling as BTA and provided the suite of five compliance options. Fast-forward 10 years to EPA's 2014 final rule which not only does not mandate closed-cycle cooling as BTA but provides a suite of seven compliance options to address impingement and leaves BTA for entrainment up to the applicable permitting authority. Where the 2004 rule applied to facilities that withdraw 50 million gallons per day, EPA's 2014 rule captures facilities that withdraw a minimum of two million gallons per day. To trigger either rule, old or new, a minimum of 25 percent of the water withdrawn must be used for cooling purposes. The facility owner or operator may choose from the seven options to meet BTA requirements for reducing impingement. As mentioned, steps necessary to meet BTA for entrainment must be determined by the permitting authority facility by facility.

The seven options include three preapproved measures to meet BTA, three streamlined approaches for reducing impingement, and a seventh more detailed demonstration that the facility meets an impingement mortality performance standard. The first of the seven options is to employ a closed-cycle recirculating system, the approach environmental interests believe should be the very definition of BTA. The remaining preapproved measures include a design through-screen velocity of 0.5 feet per second or, for offshore facilities, employing a velocity cap. Streamlined options include a demonstration that existing impingement reduction measures approximate a closed-cycle recirculating system, ensuring an actual through-screen velocity of 0.5 feet per second or employing traveling screens with a fish return system. A final option is a detailed demonstration that the system of technologies employed meet a set of impingement mortality standards repurposed from the failed 2004 rule.

While each option has its own complications and associated costs, the seven-option approach is far afield from the environmental community's vision to adopt option one—closed-cycle recirculating systems as BTA. Exactly how much flexibility each option affords industry remains to be seen. EPA's final rule is rife with process, required studies, detailed monitoring, extensive reporting, and even a peer-review process requiring certain submittals to be scrutinized as if for publication in a refereed journal. In stark contrast to EPA's 2004 rule—which critics argued allowed a site to be scraped clean and rebuilt yet considered an existing facility—new units at existing facilities under the 2014 rule trigger the more stringent requirements of EPA's 2001 Phase I new-facilities rule. The 2014 rule is multifaceted, complicated, and too new to gauge the impact on the regulated community or benefit to the ecological systems it is designed to protect.

So after nearly 40 years of rulemaking and litigation only one thing remains certain—uncertainty. Several appeals of EPA's final rule are pending, which, if past history is any indication, could result in yet another federal appellate court dissecting EPA's efforts and sending all or part of the 2014 rule back to EPA for another do-over. Still, facility owners and operators have no choice but to gear up for compliance, start studies, and prepare to implement the new rule notwithstanding an uncertain future. Environmental advocates and facility owners and operators must certainly wonder—is this EPA's final 316(b) rule or just one more chapter in the continuing saga of fish, facilities, and keeping the lights on?

# Evolving global chemical management programs and why they matter

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Chemicals play a central role in our personal and professional lives. As consumers, we focus keenly on the chemicals in the products we use and with which we come into contact. Globalization and the emergence worldwide of sophisticated chemical management programs invite complex legal, commercial, and scientific challenges. These challenges extend far beyond compliance questions that, by comparison, seem now nostalgically straightforward. Understanding these programs and their evolution can only help inform our judgment as lawyers, consultants, and educated consumers.

**The challenge**

Product formulation is a delicate balancing of performance, cost, and safety considerations. As part of this balancing, the following questions all must be addressed:

- Are the preferred chemical ingredients believed to be hormone disruptors, carcinogens, persistent, bioaccumulative, and/or toxic (PBT)?
- If so, are there efficacious alternatives to the preferred chemicals available?
- Will the presence of a nanomaterial ingredient compel product labeling or disclosure under a European Member State nano inventory?
- Will substitute ingredients perform "well enough" and are they cost competitive?

A confluence of legal trends, social phenomena, and scientific developments has contributed to this new complex calculus.

One of the social phenomena in play is the public's insatiable pursuit of its right to know product composition and impacts. This has resulted in far greater transparency in government oversight and management of environmental health and safety risk from regulated industries, especially the chemical industry. Disclosure is a core tenet in many companies' implicit and explicit compacts with their customers, and failures can breach contractual agreements as well as erode the customer's and public's trust.

Hyper-connectivity and advances in information technology translate into global instant messaging of information about products, both sanctioned and unsanctioned by the product manufacturers. Search engines optimize the availability of huge chunks of data (reliable or otherwise), which enables the production of "arm-chair" product risk assessments in record time. Domestically, the E-Enterprise Leadership Council is a case in point. This organization is marketed as a group of federal and state officials working to improve "service to the regulated community and the public by maximizing the use of advanced monitoring and information technologies, optimizing operations, and increasing transparency." E-Enterprise asserts that it is designed to leverage new technologies and data management. This is code for empowering all stakeholders—regulators, nongovernment organizations, and citizens—to develop new tools to access and evaluate data and draw conclusions from those data, regardless of the stakeholders' qualifications to do so. These evaluations and conclusions can have dramatic implications for product manufacturers—not all of them positive.

Finally, globalization has greatly complicated the manufacture and marketing of products, especially those with a chemical component. The legal practitioner's familiarity with global and regional differences in law, policy, and regulation; consumer perception; and cultural norms is essential to making one's way through the wiles of the commercial jungle this space has become over the years. For example, assume a Restriction of Hazardous Substances (RoHS) exemption has expired after having been in place for several years. A U.S. company manufactures a chemical that is now banned under RoHS because the exemption has expired. The company sells the chemical to downstream customers in the European Union (EU), and the chemical is then included in manufactured articles offered for sale in Europe. The U.S. chemical manufacturer, the EU product manufacturer, and entities offering the articles for sale could all be liable for stiff penalties, the article could be banned from further sales, and the offending entities, including the U.S. chemical manufacturer, could be subject to significant commercial tort liability.

**The solution**

Whether you are a legal practitioner with a need to know, or an inquiring consumer asserting your right to know more about how chemicals are managed globally, a new ABA Section of Environment, Energy, and Resources book, *Global Chemical Control Handbook: A Guide to Chemical Management Programs,* can help. Organized by country and as outlined below, this Handbook helps familiarize readers with the key global chemical control programs and enables them to anticipate associated issues that may arise in legal and commercial settings by providing essential background information as well as observations and commentary by experts who routinely work with these programs. The Handbook also identifies trends in each emerging program and suggests resources for additional information.

**United States—TSCA/FIFRA**—The Toxic Substances Control Act (TSCA) establishes the United States' comprehensive structure to protect human health and the environment from chemicals. The Handbook provides an in-depth discussion of TSCA's key provisions, how they work, and recent efforts on Capitol Hill to update and modernize TSCA.

TSCA exempts chemical substances regulated under other federal laws. Key among these substances are pesticides, which are regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The key FIFRA provisions include pesticide registration, data compensation, risk control options available to the U.S. Environmental Protection Agency (EPA), export and import requirements, and confidential business information and trade secrets.

**State Laws from the United States**—The two states with the most comprehensive chemical programs are California and Massachusetts. California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) in many respects was the spark that ignited the chemical disclosure revolution. Under Proposition 65, California maintains and publishes a list of chemicals determined by the state to cause cancer or reproductive toxicity, and businesses have a corresponding obligation to warn of hazards and label products. A bold new program, California's Safer Consumer Products Regulations (SCPR), goes even further and requires manufacturers to evaluate the availability of safer alternative ingredients for products containing "candidate chemicals."

Massachusetts enacted the Toxics Use Reduction Act (TURA), which requires businesses using large quantities of listed chemicals annually (defined as 25,000 pounds for manufactured/ processed chemicals and 10,000 pounds for chemicals "otherwise used") to report on chemical use and pay toxics use fees. TURA also requires large quantity toxics users either to prepare a Toxics Use Reduction plan that examines their use of the chemicals and sets forth a plan to reduce toxics use or to demonstrate how an environmental management system might be implemented in lieu of a Toxics Use Reduction plan. Users must file a summary of the plan every other even-numbered year thereafter.

**Canada—CEPA 1999**—Those with a working knowledge of TSCA will find many familiar concepts in the Canadian Environmental Protection Act, 1999 (CEPA 1999). Becoming conversant with one statute and its implementing regulations gives an environmental professional a leg up in mastering the other. Similar to the U.S. TSCA Inventory, Canada maintains a Domestic Substances List, and new chemicals are subject to notification requirements. Those who are familiar with the EU's approach will notice that some elements found in CEPA 1999 also appear in the EU's subsequently adopted Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH) regulation. Similar to the EU, the precautionary principle of protecting human health and the environment guides the Canadian government's actions.

**Europe**—The EU's REACH regulation is three decades younger than TSCA and arguably significantly more ambitious by virtue of its multinational coverage, extending to—and harmonizing chemical regulation in—all countries in the EU and the European Economic Area. Mastering the application of REACH can be a daunting task because of its broad scope, its relative newness, and the fact that it is still a work in progress. All chemical substances manufactured in, or imported into, the EU at a volume exceeding one metric ton per annum must be registered pursuant to REACH, but the deadline for registration is not until May 31, 2018. The Handbook illuminates features of REACH that may not be immediately apparent based on expectations formed through experience with TSCA, or that are otherwise novel or potentially confusing.

Other relevant EU legislation complementary to, or contrasting with, REACH includes (1) RoHS, aimed at restricting the use of hazardous substances in electrical and electronic equipment and (2) WEEE, aimed at reducing waste from electric and electronic equipment through collection and recycling, as well as more stringent controls on cross-border trading in such wastes. Differences in application of these rules among Member States mean that before placing electrical or electronic equipment or components on the EU market, it is worthwhile to become familiar with each Member State's legislation adopting RoHS and WEEE.

Another key piece of EU legislation expected to become increasingly significant is the Biocidal Products Regulation (BPR). This regulation became effective in 2013, superseding, building upon, and expanding an earlier Biocidal Products Directive. The BPR's objective is to harmonize the regulation of active substances and biocidal products on an EU-wide basis, rather than solely at the Member State level, and to control articles treated with biocidal products more stringently.

**Mexico, Central America, and South America**—The chemical management regulations of Mexico, Central America, and South America are not harmonized. To practice in these jurisdictions, there is no substitute for acquiring a basic familiarity with the regulatory regime in the country of interest, and it is unwise to go forward based simply on assumptions that regulatory approaches are similar. With significant U.S. investment in South America's domestic chemical production capacity, particularly in Brazil, several South American countries are coming up to speed quickly and significantly modernizing their chemical management governance systems.

**Asia**—As a cost-effective locale for the manufacture of chemical substances, Asia is a draw for multinational companies and others seeking to import chemicals from abroad. Multinational corporations accustomed to Western regulatory systems typically anticipate a detailed regulatory framework characterized by rigid rules, with compliance driven by the imposition or threat of penalties. In Asian nations, the regulatory framework often is markedly different from that in the West, as is the case with business in general. The Asian regulatory implementation schemes rely on gray areas—what is not articulated—to provide flexibility in interpretation, as circumstances may warrant.

For example, two Chinese government decrees are key to chemical management. The Ministry of Environmental Protection's (MEP) Decree No. 7, implemented largely through the MEP's Chemical Registration Center (CRC), addresses notification and registration of chemical substances, data submission and testing requirements, the compilation of an inventory of existing chemical substances, use restrictions, and related functions. The management of chemicals considered to be hazardous, including safe transportation, safe handling, accident prevention, and the maintenance of a standardized hazardous chemicals inventory, is implemented under the State Council's Decree No. 591. Decree No. 591 also is the primary vehicle in China for implementing the Globally Harmonized System of Classification and Labeling of Chemicals (GHS).

Two South Korean regulations that address chemicals include the Toxic Chemicals Control Act (TCCA) and the Act on Registration and Evaluation, etc. of Chemical Substance (the official name), commonly known as Korea REACH or K-REACH, enacted in 2013 and scheduled to take effect January 1, 2015. TCCA focuses on managing industrial chemicals. K-REACH is intended to be a broad regulatory measure, setting up a process for the registration, evaluation, and assessment of the risks and effects of chemical substances and products containing hazardous chemicals. When K-REACH takes effect in 2015, it will not replace TCCA but will strengthen registration activities for both new and existing substances.

Each of the focused chapters in the Handbook, in addition to the commentary and listed resources, help to ground environmental professionals and readers-at-large in the diverse regulatory structures that they may encounter in hands-on interactions with chemical management regulations in the United States or abroad. Knowing what to expect and how to prepare for it are essential steps in successfully navigating these systems.

# A match made in heaven? Co-development on the Outer Continental Shelf off the coast of New York

**Benjamin Nussdorf**

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The renewable and nonrenewable energy industries in the United States have an opportunity to create a unique project in the coming years, provided that differing regulatory agencies can work together to ensure success. Liberty Natural Gas LLC has proposed a project known as Port Ambrose, a deep-water liquefied natural gas (LNG) terminal, which would import natural gas to serve the greater New York City market. Port Ambrose would reduce pricing spikes in this market and would satisfy demand that is currently outpacing the existing infrastructure. The proposed Port Ambrose site is roughly 19 miles off the coast of Long Island and about 29 miles from New Jersey. The proposed terminal would link up with an existing offshore gas pipeline located about 22 miles away. Port Ambrose's regulators include the Maritime Administration at the U.S. Department of Transportation, the U.S. Coast Guard, and the U.S. Department of Energy.

What makes Port Ambrose unique is that its proposed location lies within a renewable energy corridor identified by the Bureau of Ocean Energy Management (BOEM) at the Department of the Interior—known as the North Atlantic Planning Area. Specifically, both projects plan to occupy or utilize portions of Outer Continental Shelf (OCS) blocks 6708, 6709, 6758, and 6657. The National Renewable Energy Laboratory has determined the average wind speed in the call area to be approximately 9 meters per second, meaning that this area has the potential to be a significant producer of offshore wind energy. Because of the renewable energy designation and wind speed in the area, the New York Power Authority, the Long Island Power Authority, and Consolidated Edison ("Collaborative") proposed a 700-megawatt wind farm project in this same area. The proposed wind farm would cover 81,500 acres in between two established shipping lanes. BOEM is currently analyzing the environmental impacts of the proposed wind farm project and engaging in public interest determinations for issuing the lease. Consequently, allocating the site for exclusive use by Liberty Natural Gas LLC for the LNG terminal could potentially impair or inhibit the development of a significant wind energy resource that is important to both the states of New York and New Jersey. Alternatively, issuing a lease to the Collaborative could potentially impair the siting and development of the Port Ambrose LNG terminal.

**Mutually exclusive?**

It is currently unclear whether the development of the Port Ambrose LNG terminal and the Collaborative wind farm project are mutually exclusive. What is clear is that the same stretch of sea and the projects in question need approvals for siting, development, licensing, and National Environmental Policy Act approvals from at least four cabinet-level agencies (the Departments of Energy, Transportation, Homeland Security, and the Interior). Other agencies have regulatory requirements for both projects, but the four agencies mentioned would have principal authority necessary to approve the projects. The projects have competing interests and arguably very little overlap in terms of their goals and requirements. Both projects provide an opportunity for agency collaboration and cooperation and could serve the people of New York and New Jersey with both renewable and nonrenewable energy, produce energy from multiple sources, and, consequently, ensure stability and reliability.

In order to accommodate both projects, the federal agencies with regulatory authority should ensure that the leases associated with the Collaborative wind farm project and the Port Ambrose LNG terminal include conditions to ensure that one project will not impair the siting and development of the other. Both projects should work to use the same transmission corridor to deliver their products to markets while reducing burdens and potential interference with the established shipping lanes entering the Port of New York. Federal officials should consider appointing a working group to ensure that the two project development proposals do not hinder or cause problems with each other. Only through dedicated resources and a focus on co-development can both projects come to fruition.

President Obama believes the United States needs an "all of the above" energy strategy. Working to ensure the development of both the Port Ambrose LNG terminal and the Collaborative wind farm project would be consistent with such a policy and would reduce potential wasted resources on the outer continental shelf. With effective cooperation, collaboration, and stipulations within the leases for both projects, the development of the Outer Continental Shelf off the coast of New York can be a model example of "all of the above" energy development to increase renewable and nonrenewable energy reserves.

# Florida's (truly) original action and why it's unlikely to advance the ACF interstate water rights dispute

**Lewis B. Jones and John L. Fortuna**

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Editor's note: *Trends* published an article discussing Florida's perspective on the "water wars" litigation in the last issue. This article provides a counterpoint position.

As Matt Leopold, general counsel for the Florida Department of Environmental Protection, described in the September/October 2014 issue of *Trends*, Florida has petitioned the U.S. Supreme Court for leave to file an equitable apportionment action against Georgia to divide the waters of the Apalachicola-Chattahoochee-Flint (ACF) River Basin. If accepted, the case will open a new front in this long-running controversy. The basin has been mired in litigation for decades, but all previous litigation has focused on reservoir operations by the U.S. Army Corps of Engineers (Corps).

Florida's proposed complaint against Georgia requests a decree restricting Georgia's use of the waters of the ACF basin to 1992 levels. According to Florida, this restriction is necessary because Georgia's use of water from the basin has harmed endangered species in the Apalachicola River, and because Georgia's use of water from the basin has increased salinities in Apalachicola Bay, which in turn has caused the bay's oyster fishery to collapse. Florida has not sued to protect any human use of water because communities in the Florida Panhandle are amply supplied by groundwater from the Floridan Aquifer. Indeed, Florida has dedicated the entire flow of the river—including "the magnitude, duration, and frequency of observed flows"—to the protection of the fish and wildlife of the rivers, floodplains, and Apalachicola Bay. *See* Rule 40A-2.223, FLA. ADMIN. CODE.

This case is interesting because it is novel. If allowed to proceed, it would be just the second equitable apportionment among Eastern states, the only other example being the 1931 and 1954 decrees in *New Jersey v. New York* that led to the creation of the Delaware River Basin Commission. 283 U.S. 336 (1931), 347 U.S. 995 (1954). (South Carolina sued North Carolina in 2007, but that case settled in the very early stages.) It would also be the first equitable apportionment case in the modern environmental era and the first to present strictly environmental claims as opposed to claims based on the traditional economic uses of water.

Notwithstanding its interest to Court-watchers and water lawyers, however, it is difficult to envision a scenario in which the Court would grant the relief that Florida has requested based on the specific injuries that Florida has alleged.

**The big picture**

The ACF river basin is comprised of the Chattahoochee, Flint, and Apalachicola Rivers. The Chattahoochee River originates in the Blue Ridge Mountains of North Georgia. The Chattahoochee River flows southwest past Atlanta to form Georgia's border with Alabama. At the Florida state line, the Chattahoochee River joins the Flint River—which originates below Atlanta and flows south through the agricultural belt of Southwest Georgia—to form the Apalachicola River, which flows south through Florida's panhandle into the Apalachicola Bay.

The controversy to date has generally focused on metropolitan Atlanta and on the Corps' operation of Lake Lanier, which is located approximately 350 river miles north of the Georgia-Florida state line. Because groundwater is very limited in North Georgia, the Chattahoochee River is the main source of

municipal and industrial water supply for the Atlanta area, which relies on Lake Lanier to regulate the flow of the river to provide a reliable supply. As a result of both geography and conservation, water consumption in metropolitan Atlanta has minimal impact on Florida, which is 350 miles downstream.

Geographically, metropolitan Atlanta is situated at the very top of the ACF basin, and Lake Lanier controls runoff from just 5.6 percent of the basin's land area. Therefore, most of the water enters *downstream of Atlanta* and is not affected by consumption in Atlanta at all. The result is that water consumption in the Atlanta area reduces the annual average flow of the ACF basin at the Florida state line by only 1 to 2 percent—never more than 3 percent, even in a drought.

In addition to attenuating the impact of Atlanta-area consumption, the basin's geography also provides Georgia with a strong, internal motivation to conserve. Because Atlanta is at the top of the watershed, it is served by a relatively small headwaters stream. Thus, quite apart from any impacts to Florida, the Atlanta region and Georgia are highly motivated to conserve water to achieve their own long-term objectives, as shown by the conservation programs the state and region have adopted.

Importantly, the Georgia General Assembly created the Metropolitan North Georgia Water Planning District in 2000 and directed it to create long-term water supply and conservation plans for the region. The result is one of the most aggressive and comprehensive conservation programs in the East. The Atlanta area has also spent billions constructing some of the most advanced water reclamation facilities in the nation to reduce consumptive uses and to increase the amount of water that is reclaimed and returned the river basin.

Georgia has done its part, too, completing a comprehensive, statewide water plan in 2008 and establishing regional planning councils throughout the state to continue this work. The state has also enacted model legislation requiring water audits, reducing water loss, encouraging conservation, and facilitating and funding smart infrastructure projects.

These programs are working. Per-capita use in the Atlanta area is now far lower than comparable cities such as Birmingham, Alabama and Orlando, Florida. Metropolitan Atlanta's conservation programs are on par with some of the best-performing cities in the country. In fact, overall water use in the Atlanta area has decreased since 2000, even as the area has added more than 1 million new residents. Statewide, Georgia consumes less than 5 percent of the flow at the Florida state line on average—which means that Florida typically gets more than 95 percent of the original, unimpaired flow—despite the fact that 74 percent of the land-area of the ACF basin exists within Georgia and 99 percent of the economic activity of the basin occurs in Georgia.

### Clearing the "clear and convincing evidence" hurdle

Given these facts, we think Georgia would likely fare very well in any traditional equitable apportionment: Georgia is using its water resources wisely and conservatively, as it entitled to do, and the existing precedents tilt heavily in Georgia's favor by establishing a strong preference for domestic uses and for established economies, *see e.g., Connecticut v. Massachusetts*, 282 U.S. 660 (1931), while paying little attention to environmental claims. And, while it is certainly possible that a modern Court will give

more weight to environmental interests than past precedent would suggest, Florida's case would seem to be an especially poor vehicle for the Court to use to make new law, due to the difficulty of proving causation.

If the Court allows Florida's case to proceed, Florida will have to prove by "clear and convincing evidence" that Georgia's use causes "real or substantial injury or damage" to endangered species and/or to the oyster fishery in Apalachicola Bay. Florida will confront three major challenges in clearing this hurdle.

The first is to prove by clear and convincing evidence that Georgia's use of water is the root cause of any harm to the river or bay. This will be exceedingly difficult because the reduction in flow due to Georgia's consumption is modest and also because ecological conditions in the Apalachicola River and Bay have been affected by many other factors or equal or greater significance. The flow of the river is controlled by five major dams operated by the Corps, and its bed has been severely degraded by the construction and operation of those reservoirs, as well as by dredging and other navigation projects. Local sources, including one that is currently the subject of a major citizen suit, have also polluted the river.

Causation will be even harder to prove when it comes to the allegation that Georgia's water use has altered salinity in the bay. As indicated above, Georgia consumes only a small fraction of the total flow of the basin. Even after 20 years of controversy, the authors are not aware of any evidence produced by any party suggesting water withdrawals on the scale that actually occur in Georgia can have a material impact on salinity in the bay. Moreover, any purported impact on salinities that Georgia's use might have must be considered in light of the huge daily variations in salinity that occur naturally as a result of the complex interactions of winds and tides.

If Florida could succeed in proving by clear and convincing evidence that Georgia has caused some injury, Florida's next challenge would be to persuade the Court that the nature and magnitude of the injury are sufficient to justify the exercise of the Court's "extraordinary" equitable apportionment power. With respect to endangered species, Florida would have to explain why any threatened or endangered species are not already fully protected by the Endangered Species Act. (It would also have to explain why the Court should intervene when the U.S. Fish and Wildlife Service has previously determined on three separate occasions that the Apalachicola species are not in jeopardy.) And for other types of injuries that are not protected by any federal statute, such as Florida's concern about the general well-being of fish and wildlife in the river floodplain, Florida would have to persuade the Court that these types of injuries rank as high as other more traditional interests, such as the severe harm an injunction would inflict on the established economic uses in Georgia.

Florida's third major challenge will be to counter evidence suggesting that Florida's own mismanagement caused the Apalachicola Bay oyster fishery to collapse. Georgia will argue that overharvesting was a primary cause of the catastrophe. Oyster landing data show that the harvest soared to record levels in the years immediately preceding the collapse. In part, this was the result of a panic that set in after the BP oil spill, when it was thought the fishery would be ruined and a "use it or lose it" mentality took hold. As reported by the Tallahassee Democrat in 2011, the spill threw the industry "into a frenzy with

the idea that oil could ruin their bay and their livelihood." *Outlook Improving for Apalachicola Oystermen*, TALLAHASSEE DEMOCRAT (Apr. 20, 2011). To placate the oystermen, Florida opened the winter oyster bars three months early—an "unprecedented decision" that "many believe led to overharvesting." One fisherman observed: "They were telling people who made claims that they needed to go out and catch as many oysters as they can. A lot came out and caught everything." And even while waiting for a decision from the Supreme Court, Florida officials continue to debate possible "fixes" for this "self-inflicted over-harvest by oystermen worried that oil from the Deepwater Horizon spill endangered the remaining shellfish." *Apalachicola Oyster Decline Sparks Fear About Fixes*, TALLAHASSEE DEMOCRAT (Oct. 5, 2014).

# In Brief

**Theodore L. Garrett**

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### CERCLA

A divided Ninth Circuit panel reversed the approval of a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) de minimis consent decree, finding that the district court gave undue deference to the Arizona Department of Environmental Quality and did not independently scrutinize the terms of the consent decree. State of Arizona v. Raytheon Co., No. 12-15691, 2014 WL 3765569 (9th Cir. Aug. 1, 2014). The state accepted less than 1 percent of cleanup costs estimated at $75 million from 22 settling parties, but the Ninth Circuit agreed with the non-settling intervenors that the district court had a responsibility to independently determine that the settlements were fair, reasonable, and consistent with CERCLA's objectives by, among other things, comparing the proportion of total projected costs to be paid by the settling parties with the proportion of liability attributable to them. The dissent expressed concern that the majority view would greatly expand judicial scrutiny and hinder the ability of states and federal entities to enter into such settlements.

A consent decree with the United States requiring the settling party to "conduct a wide range of [remedial] activities" triggered CERCLA's three-year statute of limitations for contribution actions, a district court held. *ASARCO v. Atl. Richfield Co.*, No. 6:12-cv-00053, __F. Supp.__ (D. Mont. Aug. 26, 2014). ASARCO and the U.S. Environmental Protection Agency (EPA) entered into a 1998 consent decree that resolved EPA's claims for violations of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act as to the East Helena, Montana site. A separate June 2009 consent decree with EPA resolved ASARCO's environmental liabilities to the federal and state governments at several Superfund sites, including East Helena, and required ASARCO to pay $99 million to a trust for that site. ASARCO

sought CERCLA contribution against Atlantic Richfield for the $99 million it paid under the 2009 decree. The court granted summary judgment in favor of Atlantic Richfield, holding that the 1998 consent decree triggered the statute of limitations even though it was not a CERCLA decree and did not expressly cover CERCLA claims. The district court held that the 2009 decree did not create any specific or new obligations as to the East Helena site that were not covered in the 1998 decree, but simply required the $99 million payment to fund pre-existing obligations under the 1998 decree.

**Air quality**

The Ninth Circuit vacated EPA's decision to issue a Prevention of Significant Deterioration permit, which would have allowed Avenal Power Center LLC to build and operate a 600-megawatt natural gas-fired power plant. Sierra Club v. EPA, No. 11-73342, 2014 WL 3906509 (9th Cir. Aug. 12, 2014). Although EPA had a statutory duty under the Clean Air Act to either grant or deny the permit application within one year, 42 U.S.C. § 7475(c), it failed to do so. After the deadline passed but before taking any final action, EPA tightened the applicable air quality standards. EPA granted Avenal Power the permit without regard to the new regulations, which by then had gone into effect, stating that under certain circumstances it has the authority to grandfather permit applications and that its decision is entitled to deference. The court of appeals held that the Clean Air Act unambiguously requires Avenal Power to demonstrate that the particular power plant complies with the regulations in effect at the time the permit is issued and thus EPA's waiver was invalid.

**Water quality**

The U.S. Court of Appeals for the Ninth Circuit held that a district court erred in concluding that the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (General Permit) shielded the defendants from liability under the Clean Water Act for their non-stormwater discharges from a coal loading facility. *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, No. 13-35709, 2014 WL 4339239 (9th Cir. Sept. 3, 2014). Although the defendants, owners and operators of a conveyor system designed to transfer coal from rails into waiting cargo ships, argued that the incidental discharge of some coal was covered by the General Permit, the court of appeals disagreed. The Ninth Circuit held that "The plain terms of the General Permit prohibit defendants' non-stormwater discharge of coal" from the coal conveyor system that allegedly caused the discharge of some coal into Resurrection Bay.

A jurisdictional determination (JD) by the U.S. Army Corps of Engineers (Corps) was held not renewable as a final agency action. *Belle Co. v. US Army Corps of Eng'rs*, No. 13-30262, 2014 WL 3746464 (5th Cir. July 30, 20140). The Corps issued a JD stating that the plaintiff's property contains wetlands subject to regulation under the Clean Water Act, and plaintiffs sued, alleging that the JD is unlawful. The Fifth Circuit affirmed the district court's dismissal for lack of subject-matter jurisdiction, concluding that the JD is not "final agency action" and therefore is not reviewable under the Administrative Procedure Act. The court applied the U.S. Supreme Court's decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and held that although the JD was the "consummation of the Corps's decisionmaking process," the JD was "not an action by which rights or obligations have been determined, or from which legal consequences flow."

The Eighth Circuit upheld an EPA veto of Arkansas' site-specific water quality criteria for tributaries near a chemical manufacturing plant. *El Dorado Chemical Co. v. EPA*, No. 13-1936, 2014 WL 3971461 (8th Cir. Aug. 15, 2014). EPA rejected the criteria because increased dissolved mineral levels would adversely affect downstream water bodies. The court of appeals concluded that "EPA did not act arbitrarily or capriciously by denying Arkansas' revised water quality standards based, in part, on possible downstream effects."

In the Phase Two "Deepwater Horizon" trial, the district court held that BP Exploration & Production, Inc. (BP) is subject to enhanced civil penalties under the Clean Water Act, 33 U.S.C. § 1321(b)(7)(D), as the discharge of oil was the result of BP's gross negligence and BP's willful misconduct. In re Oil Spill by the Oil Rig "Deepwater Horizon," 2014 WL 4375933 (Sept. 4, 2014). The court found that BP's conduct was reckless and Transocean's and Halliburton's conduct was negligent. The trial judge apportioned fault to BP: 67 percent, Transocean: 30 percent, and Halliburton: 3 percent. The court also found that Transocean's and Halliburton's indemnity and release clauses in their respective contracts with BP are valid and enforceable against BP.

**Endangered species**

The Fifth Circuit reversed an injunction prohibiting the Texas Commission on Environmental Quality from issuing new permits to withdraw water from rivers feeding an estuary where whooping cranes make their winter home.*The Aransas Project v. Shaw*, 756 F.3d 801 (5th Cir. June 30, 2014). The court of appeals held that the district court misapplied its proximate cause analysis and that liability under the Endangered Species Act "may be based neither on the 'butterfly effect' nor on remote actors in a vast and complex ecosystem." The court found that a number of contingencies affected the "long chain" of causation between water withdrawal permits to the deaths of whooping cranes, including contingencies which are "all outside the state's control and often outside human control."

**RCRA**

A stormwater permit incorporating a voluntary remediation plan was found to shield a defendant from RCRA liability. *Sherrill v. Mayor of Baltimore*, No. RDB-13-2768, 2014 WL 3555956 (D. Md. July 16, 2014). The RCRA suit challenged the siting and construction of the Horseshoe Casino in Baltimore, Maryland. The district court held that because the cleanup plan under the state's Voluntary Remediation Program was incorporated into the site's National Pollutant Discharge Elimination System (NPDES) permit, RCRA's anti-duplication provision, 42 U.S.C. § 6905, barred any further liability to plaintiffs. The court concluded that "further remedial requirements imposed under RCRA would be inconsistent with the remedial activities already deemed appropriate for the Site as part of the obligations imposed by the Maryland Department of the Environment in connection to sediment control and stormwater management regulations."

A court of appeals rejected a claim by environmental plaintiffs that air emissions from diesel locomotives at rail yards should be regulated under RCRA because the particulate exhaust emissions contain hazardous substances that fall on to the ground nearby. *Center for Community Action v. BNSF Railway*, No. 12-56086, 2014 WL 4085860 (9th Cir. Aug. 20, 2014). The court concluded that emitting diesel particulate matter into the air does not constitute "disposal" under RCRA, which includes "only conduct

that results in the placement of solid waste 'into or on any land or water.'" The opinion concludes that "'disposal' occurs where the solid waste is first placed 'into or on any land or water' and is thereafter 'emitted into the air.'" The court also found persuasive the statutory and legislative histories, which "make clear that RCRA, in light of its purpose to reduce the volume of waste that ends up in our nation's landfills, governs 'land disposal,'" whereas the "Clean Air Act, by contrast, governs air pollutants."

# Views from the Chair: Confirming our value to our members

**Steven T. Miano**

*Steven T. Miano is chair of the Environmental Practice Group at Hangley Aronchick Segal Pudlin & Schiller in Philadelphia and is chair of the ABA's Section of Environment, Energy, and Resources.*

The Section of Environment, Energy, and Resources is here to serve our members. We serve in many ways. Our periodicals and our peer-reviewed books are first-rate. Our membership services include mentoring and programming for young lawyers and law students as they begin their legal careers. Initiatives to attract and retain a diverse membership help provide a range of viewpoints. And leadership development training supports the Section's future leaders. Last but not least, our educational activities—from our major conferences to our remote learning programs—offer cutting-edge information and insights.

The 22nd Fall Conference, which took place in Miami in early October, was a prime example of how we continue to confirm our value to our members by providing the best in environmental, energy, and resources programming. John Jacus, our Fall Conference planning chair, and his planning committee worked tirelessly to bring together the best speakers, panels, and opportunities to network. Their efforts were reflected in the quality of the program and they are to be thanked and heartily congratulated.

While many of our members have always understood the value in our programs, I believe that our recent Fall Conference proved beyond a doubt to everyone in the environmental, energy, and resources bar that the Section's programs are must-attend events. The diversity of our members' interests was reflected in the plenary and break-out sessions. The panels addressed the gamut of issues our members care about, including enforcement, climate change, brownfields and Superfund, Clean Water Act jurisdiction, endangered species, energy project siting, electric power, and fracking. In addition, to further

our outreach efforts, we worked with colleagues from several countries to present a panel on international issues. A sequel to our popular and instructive "Titans" litigation panel was also part of the program. Finally, five of our sponsors led roundtable discussions of significant technical issues.

What was particularly gratifying, and telling, is that the highest levels of government also recognized the value of our programs and the sophistication of our attendees. For example, EPA Administrator Gina McCarthy's staff requested the opportunity for her to address our members at the Fall Conference. Solicitor Hilary Tompkins of the Department of the Interior did the same! In addition, John Cruden, president of the Environmental Law Institute and President Obama's nominee for assistant attorney general for environment and natural resources, and Cynthia Giles, Assistant Administrator of EPA's **Office of Enforcement and Compliance Assurance, both** spoke to this year's Fall Conference attendees. The participation of such high-level government representatives and nominees highlights our programs' breadth, reach, and importance.

Beyond the substance of the conference, we held a very productive Leadership Day, where senior Section leaders provided training and opportunities for collaboration to substantive committee chairs and vice chairs. And as always, there were numerous opportunities for networking and collegiality, including receptions, area-of-interest dinners, and the conference social event.

The Section's mission statement reads as follows:

The Section of Environment, Energy and Resources ("SEER" or the "Section") strives to be the premier forum for environmental, energy, and resources lawyers; a meeting place where they can find the most current and sophisticated analyses of the complicated environmental, energy and resource problems facing the United States and the world and where they can learn, teach and contribute to solving those problems while serving the public interest.

This year's Fall Conference encompassed every aspect of our mission statement. In short, we confirmed through this program that the Section is indeed the "premier forum." In case you were unable to attend, there will be many more opportunities to take advantage of your valuable Section benefits. Please be sure to check our Section website regularly for details.

# People on the Move

**James R. Arnold**

*Jim Arnold is the principal in The Arnold Law Practice in San Francisco and is a contributing editor to Trends. Information about Section members' moves and activities can be sent to his attention. To reach Jim, click on the hyperlink, which will take you to his profile that includes his contact information*

**Brandon Barnes** has jointed Bloomberg Intelligence as a Senior Litigation Analyst – Energy Sector in Washington, D.C. Barnes is currently co-chair of the Section's Energy and Natural Resources Committee. He has previously served as Section liaison to the ABA Young Lawyers Division, vice chair of the Pesticides, Chemical Regulation and Right to Know Committee, and vice chair of the Energy and Natural Resources Litigation Committee.

**Patrick R. Jacobi** has joined the U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, as a trial attorney in Washington, D.C. Jacobi formerly was an associate at Beveridge & Diamond, P.C. in Washington, D.C. He is a co-chair of the Section's Environmental Litigation and Toxic Torts Committee in a personal capacity.

**Zachary A. (Zak) Kearns** has joined Marten Law PLLC in its Portland, Oregon office. Kearns' practice focuses on environmental and natural resources litigation, energy, and environmental permitting and compliance. He works on cases arising under the Clean Air Act, the Clean Water Act, CERCLA, and other federal and state environmental laws.

**Steve McKinney** has been elected to the Board of Regents of the American College of Environmental Law. McKinney is a member of Balch and Bingham LLP, Birmingham, Alabama. His practice includes the regular representation of private companies and coalitions in environmental permitting, environmental aspects of corporate projects and transactions, and environmental compliance. McKinney represents clients in complex environmental litigation matters under the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and Superfund. He is a former chair of the Section (2010–2011) and served for many years in leadership, particularly in the Publications Service Group.

**Leslie Wong** recently joined Environmental Resources Management, Inc. as an Air Quality and Climate Change partner in Houston. Wong was most recently the Oil and Gas Regulatory and Sustainability director of Golder Associates, Inc., also in Houston. She is a member of the *Trends* editorial board.