TRENDS

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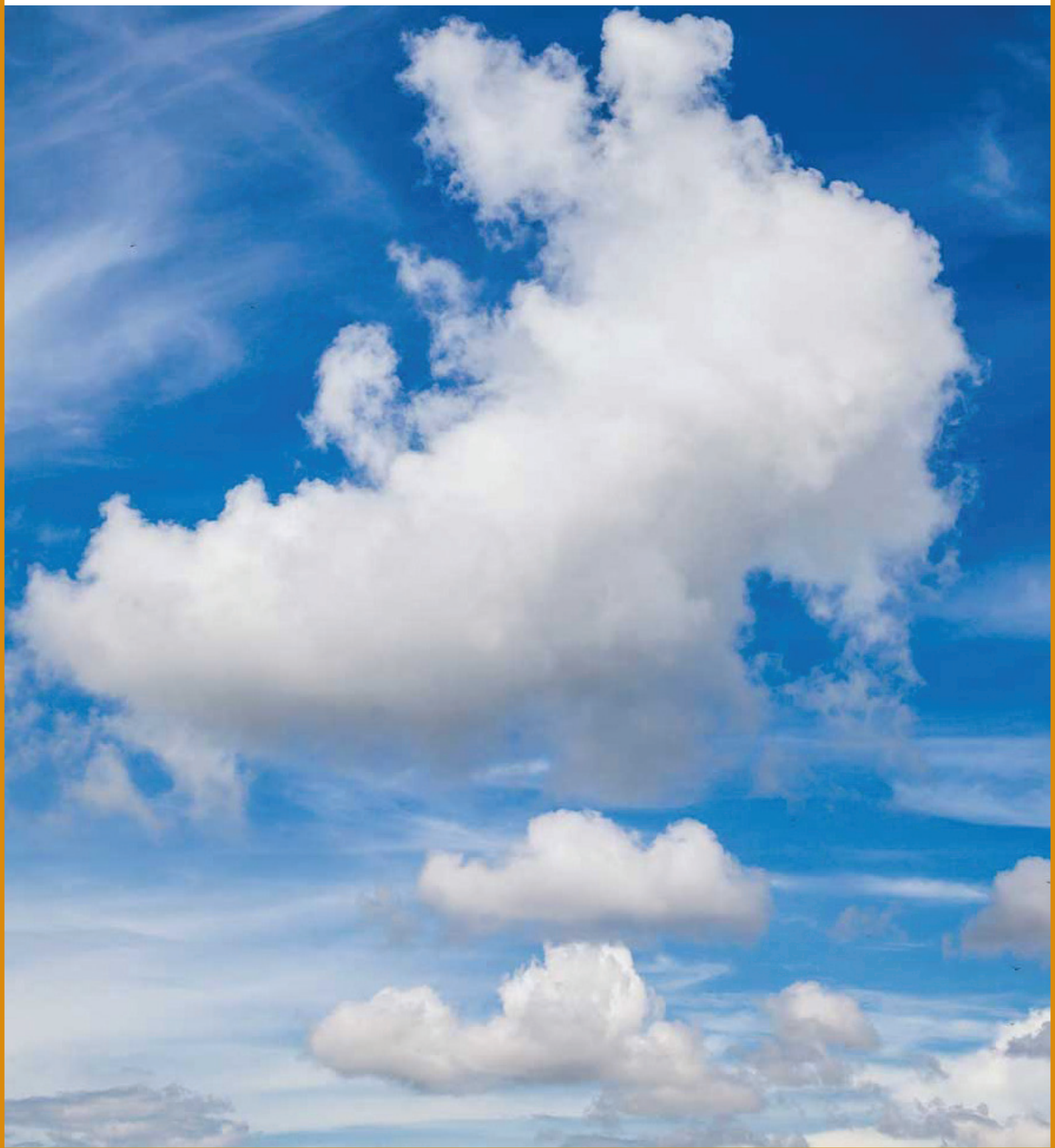

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EPA's coal ash rule relies on unique enforcement framework

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On December 19, 2014, the Environmental Protection Agency (EPA) issued a prepublication version of its much-anticipated final rule for the management and disposal of coal combustion residuals (CCRs). (At the time this article went to press, the final rule had not yet been published in the Federal Register.) EPA's final rule regulates CCRs as non-hazardous solid waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA). The final rule establishes national standards for location restrictions, design and operating criteria, inspections, groundwater monitoring, corrective action, closure, and various reporting and recordkeeping requirements. The final rule also provides regulatory clarity for the beneficial use of CCRs. EPA, however, deferred action on its previous Bevill regulatory determination, leaving open the possibility that CCRs could be regulated as hazardous waste in the future.

Enforcement in final rule compared to proposed rule

EPA made a notable shift from the proposed rule in its discussion of the role of the states and how their role affects enforcement. In 2010, EPA indicated that the disposal standards for CCRs would be "self-implementing," which means that individual facilities would be responsible for implementation of the standards. Enforcement would be primarily through citizen suits and also possible with EPA's imminent and substantial endangerment authority. The preamble to the proposed rule provided little discussion of the role for states under Subtitle D and, in fact, was highly critical of the states' efforts as of that time to regulate CCRs. Of course, at that time, EPA had not provided standards to guide state and private sector implementation, despite having possessed statutory authority to do so for decades.

State implementation

Although the standards in the final rule are self-implementing, the preamble to the final rule clarifies that states may implement the federal standards under their own state-specific solid waste management plans, which EPA must approve:

Specifically, for those states that choose to submit revised state SWMPs that incorporate the federal criteria, EPA intends to rely on the existing processes in 40 CFR Part 256 relating to approval of state solid waste management plans.

Final rule (prepublication version) at 113. Once a state adopts the federal regulations and EPA approves the state's solid waste management plan, the state assumes primary responsibility for enforcement. EPA acknowledges in the preamble to the final rule that "states can also continue to enforce any state regulation under their independent state enforcement authority." Id. at 19.

Citizen suits

Thus, upon adoption and approval of a solid waste management plan, a state agency may enforce state standards that mirror federal requirements. But that does not mean that state enforcement is the only option. Citizen suits remain a possibility; the question is how and under what circumstances. For example, last year a federal district court asserted that "[i]t would be contrary to that intention for Congress to include a citizen-suit provision, but allow states to opt out of it upon adopting their own EPA-approved regulatory programs." *City of Hattiesburg v. Hercules, Inc.*, No. 2:13-208, 2014 WL 1276459, at *4 (S.D. Miss. Mar. 27, 2014).

Diligent prosecution

With this enforcement approach, there are a couple of issues to consider. First, the diligent prosecution bar in section 7002 of RCRA may operate to preclude a citizen suit where the state is already undertaking an enforcement action, in a fashion similar to the citizen suit provisions of the Clean Water Act and other major environmental programs. Like other statutes, RCRA provides that a citizen is barred from filing suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order." 42 U.S.C. § 6972(b)(1)(B). The case law discusses whether this bar applies if the state does not commence an action before the citizen suit is filed; the state has an opportunity to do so by virtue of a requirement to notify the state 60 days prior to filing the citizen action.

State compliance

Second, there is the question of how to address a citizen suit allegation of noncompliance with federal standards when the facility is complying with the state regulations. EPA has taken the position that compliance with an EPA-approved state program will suffice as compliance with the federal criteria. In the preamble, EPA explained that a "facility that operates in accord with an approved [solid waste management plan] will be able to beneficially use that fact in a citizen suit brought to enforce the federal criteria; EPA believes a court will accord substantial weight to the fact that a facility is operating in accord with an EPA-approved [solid waste management plan]." Final rule (prepublication version) at 470.

EPA's role in enforcement

The broad outline of this enforcement scenario bears a strong resemblance to other environmental programs. Citizen suits are possible, as they are under other statutes, and states typically have the lead on program implementation and enforcement, as long as EPA approves. However, RCRA Subtitle D is unique in that EPA lacks the "backstop" enforcement authority typical of other major programs, such as the hazardous waste program under Subtitle C of RCRA. For purposes of the CCR rule, EPA's duties are complete upon promulgating federal standards and approving state solid waste management plans, other than RCRA's provision for an EPA response in the event of an imminent and substantial endangerment to health or the environment.

The big news

Aside from these legal considerations, in the real world, the big news is that the CCR rule will trigger substantial changes to prevent CCRs and their constituents from entering the environment. The rule's preference toward dry handling, liners, groundwater monitoring, and public reporting will provide important information to assess the performance of CCR disposal facilities.

The Keystone XL Pipeline: Fueling the debate over presidential permit authority

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TransCanada's proposed Keystone XL Pipeline has cast a spotlight on the presidential permit process for cross-border oil pipelines, which has otherwise gone largely unnoticed since its inception. The Keystone XL Pipeline would originate in Alberta, Canada, and transport up to 830,000 barrels per day of Canadian oil sands crude and Bakken shale oil to a hub in Steele City, Nebraska. From there, the Keystone Cushing Extension Pipeline (already in service) transports oil to Cushing, Oklahoma; the Gulf Coast Project Pipeline (already in service) delivers the oil from Cushing to Gulf Coast refineries. This article provides a brief overview of the presidential permit authority for cross-border oil pipelines, summarizes the ongoing presidential permit proceeding for the Keystone XL Pipeline, and looks ahead to possible congressional action.

Under a series of Executive Orders, a presidential permit is required to build oil pipeline facilities that cross an international border of the United States. The federal government's siting authority is limited to facilities located at an international border; siting authority otherwise rests with the state(s) where the pipeline will be located. The U.S. Department of State acts as the gatekeeper in a presidential permit proceeding, but other federal agencies and the public are afforded an opportunity to participate. The president retains the ultimate authority to grant or deny the permit.

History of the presidential permit authority

Although presidential authority to approve cross-border infrastructure dates from the late 1800s, the State Department did not receive authority to issue presidential permits for oil pipelines until 1968, when President Lyndon Johnson issued Executive Order 11423. The State Department's authorization was revised in 1994 to include requirements for consulting with other federal agencies. However, its current procedures for reviewing presidential permit applications for oil pipelines are based on Executive Order 13337, issued by President George W. Bush in 2004.

Evaluation criteria
The State Department is directed, upon receipt of an application, to determine whether a proposed project would serve the "national interest." The State Department has substantial discretion in making national interest determinations and often considers impacts on the environment, economy, energy security, and foreign policy.

The State Department evaluates the potential environmental effects of a cross-border oil pipeline by performing a review under the National Environmental Policy Act (NEPA). Under NEPA, the State Department is required to prepare an Environmental Impact Statement (EIS) if a federally authorized project may have a significant impact on the environment. The public may comment on the State Department's draft and final EIS.

Timeframe for issuance
After the NEPA process is complete, the State Department turns to the national interest determination in preparation for issuing or denying a permit. There is no deadline for completing these actions. Certain federal agencies have 15 days to object to the State Department's determination; if none object, the Department's decision to issue or deny the permit is final. If the State Department receives an objection, the president, under no specific timeframe, has ultimate authority to grant or deny the permit.

Legal challenges to presidential permit authority
While not subject to many legal challenges, federal courts have upheld the presidential permit process for cross-border oil pipeline facilities as a legitimate exercise of the executive branch's constitutional powers. In *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F. Supp. 2d 1071, 1081 (D. S.D. 2009), for example, the U.S. District Court for the District of South Dakota determined that because Congress had not acted to exercise legislative authority over the permitting process for oil pipelines, "the President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs." In *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1163 (D. Minn. 2010), the U.S. District Court for the District of Minnesota similarly held that the president's authority over permitting emanates from the president's "constitutional authority over foreign affairs and authority as Commander in Chief."

Keystone XL presidential permit process—developments to date
The presidential permit proceeding for the Keystone XL Pipeline began in the final year of the George W. Bush administration and continues to the present day. During that time, two presidential elections have taken place, the State Department has completed two environmental reviews, and the pipeline route has been revised. In addition, the U.S. Congress and state legislatures have debated and, in some cases, passed laws relating to the project. Meanwhile, production of Canadian oil sands crude and Bakken shale oil continues to increase. More specifically during this time period, the following developments occurred:

- **September 2008:** TransCanada files initial Keystone XL presidential permit application.
- **November 2011:** Nebraska's state legislature enacts new siting requirements in response to environmental concerns regarding the Sand Hills region, causing TransCanada to revise the pipeline's route.

- **November 2011:** Due to the Nebraska rerouting, the State Department announces it needs additional time to evaluate the presidential permit application.
- **December 2011:** Congress enacts the Temporary Payroll Tax Cut Continuation Act of 2011 (P.L. 112-78), requiring the State Department to issue the permit within 60 days unless the president determines it is not in the national interest.
- **January 2012:** The State Department denies the permit, citing insufficient time to meet the deadline imposed by Congress.
- **May 2012:** TransCanada reapplies for a permit for the revised Keystone XL route.
- **January 2014:** The State Department completes environmental review and releases Final Supplemental Environmental Impact Statement (FSEIS).
- **March 2014:** Interagency and public comment period on FSEIS expires.

Current actions

When this article was submitted for publication in February 2015, the State Department had not issued its final national interest determination and the presidential permit application for the Keystone XL Pipeline remained pending. Although not directly related to the presidential permit process, there were also two notable issues pending at the state level. Under opposition from several American Indian tribes, the South Dakota Public Utilities Commission was considering TransCanada's bid for recertification of the project's state construction permit, which expired in June 2014. In addition, following the Nebraska Supreme Court's recent rejection of a constitutional challenge to a 2012 law (LB 1161) that transferred routing authority from the Nebraska Public Services Commission to the governor, two new challenges attempting to overcome the standing deficiencies in the previous suit had been filed in Nebraska state court.

Possible legislative and executive action

The Keystone XL Pipeline has received considerable attention in Congress. On January 29, the Senate passed the Keystone XL Pipeline Act, authorizing TransCanada to build and operate the Keystone XL Pipeline *without* a presidential permit. On February 11, 2015, the House of Representatives passed a bill authorizing construction of the Keystone XL Pipeline. The White House reiterated President Obama's opposition to any legislation that would circumvent the presidential permit requirement, indicating he will veto the bill. Many political commentators have suggested there is insufficient support in Congress to override a veto.

It is clear that a central aspect of the Keystone XL discourse is the tension between the executive and legislative branches regarding permitting authority for cross-border energy facilities. This project has also called into question the appropriate role of federal, state, local, and tribal governments in determining the routing of oil pipelines, both cross-border and domestic. As the congressional debates of recent weeks have shown, these questions are relevant not only for the future of the Keystone XL Pipeline, but for U.S. energy policy more generally.

The Fifth Circuit declines to extend Sackett to jurisdictional determinations

John B. King

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In *Belle Company v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), the Fifth Circuit distinguished a Corps-issued jurisdictional determination (JD) from an EPA-issued compliance order, and declined to extend "final agency action" status to a Corps' JD. In *Sackett v. EPA*, 132 S. Ct. 1367 (2012), the Supreme Court ruled that an EPA-issued compliance order was a final agency action and thus subject to judicial review under the Administrative Procedure Act (APA). Essentially, the *Belle* decision leaves JD recipients with two options to judicially contest the JD. One may go through the expensive and time-consuming permit process and seek review of the JD in a permit review action. Alternatively, one may initiate work at the site, which could lead to civil or criminal penalties.

Corps' JD

The Corps issued a JD to Belle, decreeing that the vast majority of the property on which Belle intended to construct a solid waste landfill was jurisdictional wetlands, effectively killing the project due to mitigation costs and difficulties in obtaining state permit modifications to accommodate that decision. After Belle exhausted its administrative appeals, it sought judicial review in federal district court, claiming that the JD was "final agency action" under the APA. The district court disagreed with Belle.

Test for final agency action

On appeal to the Fifth Circuit, Belle argued that the JD met the familiar two-prong test of *Bennett v. Spear*, 520 U.S. 154 (1997). Not only did the JD mark the consummation of the agency's decision-making process, it determined Belle's rights or obligations and legal consequences flowed from the JD to Belle.

First prong: Consummation of decision- making process

The Fifth Circuit had no trouble finding (as did the district court) that the JD represented the consummation of the Corps' decision-making process. Issuance of the JD concluded an internal process (the administrative appeal process) for parties such as Belle to solicit the Corps' "official position" about the property. Additionally, the Corps asserted its final position on the facts through the JD.

Second prong: Determination of rights or obligations

In assessing the second prong, the panel noted that both prior to and after Sackett, all of the courts that had previously considered the question, including the Fifth Circuit, had held that a JD is not a final agency action because it does not determine rights or obligations or have legal consequences. Indeed, the reasoning of *Sackett* as to the second prong highlights the "determinative distinctions between a JD and an EPA compliance order." *Belle*, 761 F.3d at 391. The Fifth Circuit then examined *four* distinctions it found dispositive.

Obligations. First, the compliance order independently imposed obligations, as it ordered the Sacketts to restore their property and provide access to records. The JD, on the other hand, was merely a notification of the property's classification as wetlands but did not obligate Belle to do or refrain from doing anything on the property. Belle argued that, under state law, the JD required Belle to modify its existing solid waste permit to include information about the status of wetlands on the property and its plans to protect any wetlands that the landfill's construction would impact. However, the Fifth Circuit rebuffed that notion, finding that state-agency action "does not transform nonfinal federal-agency action into final action for APA purposes." Belle, 761 F.3d at 392.

Penalties. Second, the compliance order independently imposed coercive consequences for its violation and exposed the Sacketts to penalties. The JD "erects no penalty scheme," does not itself impose any penalties, and does not require Belle to comply with it. The possible use of the JD against Belle in future penalty calculations was too "speculative" when compared to the actual accrual of penalties against the Sacketts for failure to restore the property.

Permit. Third, the compliance order limited the Sacketts' ability to obtain a permit from the Corps based on explicit statements in Corps regulations. The JD created no such hindrance for Belle.

Violation. Fourth, the compliance order determined that the Sacketts' property contained wetlands and that they had violated the Clean Water Act. The JD, however, does not state that Belle is in violation of the Clean Water Act, does not include an order to comply with the JD, and does not require any steps to alter or restore the property.

Determination

After considering the distinctions between Belle's JD and the Sacketts' compliance order, the Fifth Circuit found that "the JD is not an action by which rights or obligations have been determined, or from which legal consequences will flow." *Belle*, 761 F.3d at 394.

In short, the Fifth Circuit followed its own precedent as to the second Bennett prong. As to *Sackett*, the Fifth Circuit simply found too many distinctions between a JD and a compliance order to determine that *Sackett* mandated a similar result for Belle. For now at least, a JD is not a final agency action and thus not subject to judicial review. The Fifth Circuit's decision in *Belle* indicates that *Sackett's* impact is narrower than some may have anticipated, leaving certain would-be petitioners without immediate judicial recourse.

California adopts sustainable groundwater management

Alf W. Brandt

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Finally! California has joined its sister western states in implementing a statewide groundwater management system. For decades, California and Texas were the only western states without one. Texas approved a groundwater management law in 2008. The next year, California Governor Arnold Schwarzenegger approved the state's first tentative step—a statewide system of local monitoring of groundwater elevations—after vetoing previous groundwater bills. In 2014, after a serious drought, the legislature and governor approved a statewide Sustainable Groundwater Management Act (SGMA), Part 2.74 of Division 6 of the California Water Code.

Historic legislative development

A century ago, the legislature left groundwater out of its state water right permitting system, leaving management to local groundwater users and court adjudications. Southern Californians adjudicated their aquifers in the 1950s. Two decades ago, the legislature created a voluntary legal structure for collaborative management, and courts recognized that county governments could manage groundwater under their police power. However, this led to inconsistencies, including patchwork and limited groundwater management of the state's largest aquifer in the Central Valley and an ever-growing decline in groundwater resources.

2014 drought

By 2014, California's long-standing problem with pumping too much water from the Central Valley aquifer had become acute. The state was suffering one of its most serious droughts. Surface water imports from the California Delta slowed. The Central Valley Project, which the Bureau of Reclamation built to counteract groundwater overdraft 75 years ago, had substantially reduced its deliveries to eastern and western San Joaquin Valley. Wells started running dry. Some small towns came within 60 days of complete loss of their drinking water supply.

Emergency plan

In January 2014, with this dire information streaming in, Governor Jerry Brown declared a drought emergency and issued his "California Water Action Plan" that, among other things, called on the legislature to "ensure" that local agencies had sufficient authority to protect groundwater supplies. The governor's staff convened stakeholders, as well as legislative staff whose members expressed interest in

groundwater management. So began a seven-month collaboration between the governor and the legislature, working closely with stakeholders on both sides of the issue. Passed in the final days of the legislative session and signed on September 16, SGMA took effect on January 1, 2015.

California's groundwater management framework

SGMA came out of three bills: SB 1169 (Pavley), AB 1739 (Dickinson), and SB 1319 (Pavley). Together, these bills establish a statewide framework that relies on local agency leadership to generate "sustainable groundwater management," defined as the management and use of groundwater without an "undesirable result," such as unreasonable reduction of groundwater storage, degradation of quality, seawater intrusion, or land subsidence.

SGMA requires an existing or a newly created local agency, called groundwater sustainability agencies (GSAs), to volunteer to develop and implement a sustainable groundwater management plan for a basin. SGMA then invests these agencies with authority and a mandate to collect information, create a plan, regulate groundwater extraction, and enforce limits on pumping to maintain sustainability.

Prioritization of basins

SGMA also requires the California Department of Water Resources (the Department) to prioritize each groundwater basin, from high to very low priority, based on a range of factors. The Department must analyze the projected effects of groundwater depletion on local habitat and surface stream flow, implicitly reversing California's long-standing legal fiction denying a connection between surface water and groundwater. Any basins designated as high- or medium-priority basins must, in turn, have a GSA that manages groundwater sustainably.

Implementation timelines

As for implementation timelines, SGMA requires the Department to adopt regulations for evaluating GSA groundwater management plans by June 2016 and to establish best groundwater management practices by 2017. Any GSAs in basins subject to "critical conditions of overdraft," one subcategory of high- and medium-priority basins, must adopt a sustainable groundwater management plan consistent with the Department's regulations by 2020. Other high and medium-priority basins have an additional two years, until 2022, to complete their plans.

State Board oversight

Perhaps the most critical legal change that will ensure local agencies manage groundwater is the so-called "backstop" of state management by the State Water Resources Control Board (State Board). SGMA authorizes the State Board to put a basin on "probation" if no local agency assumes GSA responsibility or if a designated groundwater sustainability plan is deficient. To put a basin on probation, Water Code section 10735.2 requires the State Board to make certain determinations regarding the sustainability of the basin's management. Once a basin is on probation, the State Board may adopt its own "interim plan" for the basin.

This state backstop fundamentally changes the default condition if local agencies and groundwater pumpers do nothing in response to SGMA's passage. Before the new law, local failures to adopt groundwater management meant that pumpers could extract groundwater without any limitation. Now local

failures kick authority to the state to step in and regulate. Both pumpers and local agencies prefer local control, making local sustainable groundwater management—and limitations on pumping—an incentivized and achievable objective.

The road ahead

With the law now in effect, it is up to local agencies to implement sustainable groundwater management and decide the fate of the surrounding water supplies. These local agencies may be eligible to get state funding from the recently approved water bond, which included $100 million for groundwater sustainability planning and projects. As local agencies work to assess how much pumping is sustainable, the governor and the legislature may consider how to streamline groundwater adjudications by the courts. Achieving sustainable groundwater management will take a long road, perhaps decades-long. But, at the very least, California can now say it has begun its journey.

Effects of sound on marine mammals: Acoustic permitting of ocean activities

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The oceans are busy, loud places. They are filled with natural and human activities and natural and human sounds. Many marine mammals rely on hearing for multiple reasons, including:

- finding food,
- locating and selecting mates,
- avoiding predators,
- navigation, and
- group structure.

Marine mammals are able to communicate underwater across a variety of distances using sound. Human-created sounds can cause disruption to marine mammals through acute impacts, such as an intense noise event that has adverse physical and behavioral impacts affecting health and fitness of the mammal. Human-created sounds can also cause disruption through chronic impacts, where rising background noises limit the mammals' abilities to communicate and sense their environments. As human uses of the oceans increase and human noise impacts increase, it is becoming increasingly important to

monitor and regulate the impact of human noise on marine mammals. To help practitioners identify pertinent legal authorities, this article will briefly discuss several key federal statutes related to acoustic impacts on marine mammals:

- Marine Mammal Protection Act (MMPA)
- National Environmental Policy Act (NEPA)
- Environmental Species Act (ESA)
- National Marine Sanctuaries Act (NMSA)

Marine Mammal Protection Act

The MMPA recognizes the importance of marine mammals to marine ecosystems and acknowledges that human activities may deplete or extirpate marine mammal species or population stocks. The MMPA's primary objective is to maintain the health and stability of marine mammals and their marine ecosystems. To do this, the MMPA prohibits the "taking" of marine mammals unless the taking is exempted, authorized, or permitted. The MMPA does allow for the incidental taking of marine mammals within a specified geographical area during otherwise lawful activities, provided the Secretary of Commerce finds that the taking

- will have a negligible impact on such species or stock and
- will not have an unmitigatable adverse impact of the availability of species or stock for subsistence uses.

The MMPA requires that permissible methods of taking will have the least practicable impact on species or stock, paying particular attention to rookeries, mating grounds, and areas of similar significance. Activities that have caused incidental takes and that the Secretary of Commerce has deemed permissible under the MMPA include

- oil and gas exploration,
- military training and testing,
- port and highway bridge construction,
- scientific research, and
- offshore alternative energy development.

To better assess the impact of human activities on marine mammals, the National Oceanic and Atmospheric Administration (NOAA), the agency responsible for issuing MMPA permits, is in the process of developing "acoustic guidance for assessing the effects of anthropogenic sound on marine mammal species." The guidance will help "NOAA analysts/managers and other relevant user groups/stakeholders, including other federal agencies[,] to better predict a marine mammal's response to sound exposure in a manner that has the potential to trigger certain requirements under one or more of NOAA's statutes," such as the MMPA, ESA, or NMSA. NOAA's guidance should help the government better understand and monitor chronic impacts of human noise on marine mammals.

National Environmental Policy Act
Issuance of an MMPA permit triggers analysis under several other environmental statutes. For example, NEPA requires that federal agencies must analyze the impacts of their proposed activities and potential alternatives to those activities. The agency must make this analysis, in the form of an environmental assessment or an environmental impact statement, available to the public and to agency decision makers.

Endangered Species Act
A proposed action must also take into consideration the ESA, which requires federal agencies to ensure that their actions do not jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of their critical habitat. The Secretary of Commerce may require the applicant to conduct a biological assessment of the species in question, which may be included as part of the NEPA assessment.

National Marine Sanctuaries Act
Similarly, under the NMSA, federal agencies must provide the Secretary of Commerce with a description of any activity that may cause the loss of, or injury to, any resource located in one of the nation's 13 national marine sanctuaries.

Coastal Zone Management Act
It is important to note that many human activities causing acoustic impacts take place in state waters or have impacts on state coastal resources. Under the consistency provision of the Coastal Zone Management Act (CZMA) (16 U.S.C. § 1456(a)(1)(A)), states have the authority to request that federal activities affecting "any land or water use or natural resource of the coastal zone" be carried out "in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." These state programs can vary widely. Careful practitioners should be familiar with the CZMA and the provisions of approved state coastal management plans (CMPs) and consider whether proposed activities could potentially impact state coastal resources, including marine mammals.

As ocean activities continue to multiply, the protection of marine mammals will become an even greater challenge. Those undertaking such activities should evaluate both acute and chronic impacts. The best available science on acoustic impacts to marine mammals will be critical in evaluating these impacts.

Consent decree negotiations

Charles Wehland

Charles Wehland is a partner with Jones Day in Chicago, representing clients in a variety of environmental matters. He recently concluded the negotiation of a consent decree that was part of

EPA's new source review enforcement initiative against acid manufacturing plants. The negotiation took almost seven years from start to finish.

Negotiating a consent decree to resolve environmental violations is a complex job that takes a long time. Five to ten years can elapse between the time the regulatory agency issues a notice of violation and the court enters a consent decree. What should you do when representing a client snared in this process?

- **Know the facts and law.** You earn credibility with your client and with the people on the other side of the table by demonstrating mastery of the issues. The government has an information advantage in enforcement initiatives because it has access to all of the facts and settlement negotiation results from previous cases. If you represent the target of an enforcement initiative case, spend time getting familiar with previous settlements. (EPA keeps most of them available on its enforcement initiative website.) Counsel for parties that already settled can be a good source of information not only about the relevant facts and law but also about the positions and strategies enforcement staff may use in negotiations.
- **Expect the people to change.** In a negotiation that takes years, the people conducting the negotiation will change over time. This fact has real consequences because the new people need to be educated about what issues have been resolved, how they were resolved, and what issues remain open. New people also bring a fresh perspective to the negotiating table that can overcome previous stumbling blocks. And new people also question the fundamental decision about whether to negotiate or litigate.
- **Prepare to negotiate in fits and starts.** It is not unusual for several months to elapse while one of the parties considers its position or develops information. You need to have a way to remind yourself and your client which issues are on the table when negotiations resume. A detailed issues list that summarizes the parties' negotiating positions can be helpful.
- **Understand your client's objectives.** Does your client want to settle at all costs or is it willing to litigate? Are there timing considerations that affect the client's ability to install control equipment? Does the client have plans to expand or modify the process that is the target of enforcement? Can settlement conditions give your client a competitive advantage by, for example, agreeing to requirements that will be difficult or expensive to meet for competitors facing the same enforcement initiative? Understanding the answer to these and other similar questions will help you negotiate a settlement that serves your client's interests.
- **Build consensus.** Individuals within the client organization will have different views on the importance and relevance of the objectives. Some will want to settle, some will want to litigate, and some will say they want to litigate. Obtaining a clear management consensus and direction on how to proceed is essential, but be prepared for people who question the direction to continue promoting alternative perspectives. The need to work for consensus and clear direction is never over.
- **Develop rapport.** You need to have a good working relationship with the key people on the other side of the table (usually the DOJ attorney, the OECA attorney, and the EPA technical lead). There will inevitably be significant hiccups in negotiations that take years to resolve. Items that were thought to be resolved will unexpectedly have to be negotiated again for some good reason. Those difficult negotiations can be completed only if the negotiators have a reasonable reservoir of good will between them.

- **Remember, the law will change.** Important legal developments that significantly affect your position will occur during the negotiations. Whether it is a new EPA rule that changes the method for calculating emission increases or a new judicial decision on the statute of limitations or the availability of injunctive relief, you will have to be on top of the developments as they occur. You must be prepared to interpret them for the client and evaluate whether negotiating positions should change as a result.

Negotiating a consent decree is a long and sometimes arduous journey. It is filled with unexpected developments that cannot be foreseen with clarity at the outset of the process. Keeping these negotiating tips in mind as the process unfolds may make it easier to navigate some of the shoals.

Is environmental justice still a consideration for the regulated community in 2015?

Susan Floyd King

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EPA's environmental justice initiatives in 2015

The U.S. Environmental Protection Agency (EPA) intends to convene the first community-wide Federal Interagency Working Group on Environmental Justice (EJIWG) meeting in Turkey Creek near Gulfport, Mississippi. This meeting, scheduled for January 2015 and the first among others EPA is scheduling for locations around the country, is part of EPA's initiative to pull together resources from multiple federal agencies to help meet economic, environmental, and other needs of selected communities.

The first meeting will focus on environmental justice (EJ) issues and the goal is to collaborate on efforts by EPA and its community partner in the area, the Turkey Creek Watershed Partnership (Partnership). Members of the Turkey Creek and North Gulfport communities established the Partnership to address their communities' environmental and cultural concerns. The Partnership now includes over 50 individuals representing more than 20 city, county, and state agencies; local and regional nonprofit organizations; citizen groups; churches; and homeowners. The desired outcome of the January 2015 EJIWG

meeting is for other federal agencies, along with EPA, to assist the Partnership and community members with revitalization efforts to make a noticeable difference in an area impacted by potential EJ concerns.

All federal agencies are beginning to incorporate these EJIWG environmental justice initiatives as required under Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (signed by President Bill Clinton on February 11, 1994).

So how should the regulated community prepare for these new, expanded EJ initiatives?

EPA's policies and procedures

Through Executive Order 12898, EJ considerations are now a part of the permanent fabric of EPA's policies and procedures. Hence, it is important that leaders in the regulated community understand and are prepared to address EJ issues that may affect their projects or development activities. It is equally important for community and environmental groups to work cooperatively with the regulated community to address EJ concerns.

"Plan EJ 2014" provides EPA's current position and overarching strategy for advancing environmental justice into its programs, policies, and activities and making EJ an integral part of virtually every type of agency decision, including rulemaking, permitting, compliance, and enforcement.

EPA incorporates EJ considerations into rulemaking by implementing guidance it developed to more effectively protect human health and the environment for overburdened populations. EPA's permitting programs include EJ considerations by facilitating full and meaningful access to the permitting process for members of overburdened communities and by addressing EJ issues in permit actions to the greatest extent practicable under existing environmental laws. Finally, EPA is committed to integrating EJ considerations when it initiates a compliance or enforcement action.

EJ defined

EPA defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies." As related to environmental justice, "fair treatment" means "no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies." To attain the goal of "fair treatment," Plan EJ 2014 seeks to:

- protect the environment and heath in overburdened communities;
- empower communities to take action to improve their health and environment; and
- establish partnerships with local, state, tribal, and federal governments and organizations to develop healthy and sustainable communities.

"Fair treatment" is measured by "meaningful involvement." Thus, it is necessary for the regulated community to understand "meaningful involvement" when attempting to address any EJ issues related to a particular project or development.

Proof of meaningful involvement

Affirmative answers to the following questions provide "proof of meaningful involvement," which is essentially the barometer for determining whether potential EJ issues have been identified and addressed:

1. Have the people potentially affected by the project or development had an opportunity to participate in decisions about activities that may affect their environment and/or health?
2. Did the public's contribution have an opportunity to influence the regulatory agency's decision process?
3. Did the agency consider the public's concerns and contributions in the decision-making process?
4. Did the decision makers seek out and facilitate the involvement of people potentially affected?

Strategies to meet EPA's criteria

What specific tasks can the regulated community employ to form a strategy that effectively meets EPA's EJ criteria (described above)? The following are the core components of a good EJ strategy:

- Become familiar and well-versed with Plan EJ 2014, including supplemental all supplemental materials.
- Become familiar and well-versed with EJ or related initiatives at the state agency level.
- Identify and initiate communications with state and local environmental groups and other relevant local community groups.
- Consider and take into account potential cultural or language barriers that may be present.
- Plan and implement a strategic public engagement process in collaboration with the applicable regional EPA office and/or state agency.
- Demonstrate due diligence in seeking to meet EPA's EJ criteria by actively engaging all stakeholders involved.

Finally, the most important task of all is communicating the strategy and its potential benefits to the community with the community itself.

In Brief

Theodore L. Garrett

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

This term's Supreme Court cases of interest

The U.S. Supreme Court will hear this term the following cases of interest to environmental, energy, and natural resources lawyers. This summary gives the date of oral argument, if known, and indicates if the Court's ruling has already been issued.

Michigan v. Environmental Protection Agency, No. 14-46 (consolidated with related cases, ***Utility Air Regulatory Group v. EPA***, No. 14-47, and ***National Mining Assoc. v. EPA***, No. 14-49).

Issue: Whether the Environmental Protection Agency (EPA) unreasonably refused to consider costs in determining whether it is appropriate to regulate mercury and other hazardous air pollutants emitted by electric utilities.

Dart Cherokee Basin Operating Co., LLC v. Owens, No. 13-719. Decided Dec. 15, 2014.

Issue: Whether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or whether it is enough to allege the required "short and plain statement of the grounds for removal." *Held*: A majority of the Court rejected a Tenth Circuit pleading requirement, and concluded that the statutory requirement allowing removal to federal court need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions.

Kansas v. Nebraska and Colorado, No. 126 Original (argued Oct. 14, 2014).

Issues: Whether Nebraska violated a compact apportioning the waters of the Republican River between Kansas, Nebraska, and Colorado; if so, what relief is appropriate to remedy the violation?

Oneok Inc. v. Learjet, No. 13-271 (argued Jan. 12, 2015).

Issue: Whether the Natural Gas Act, which occupies the field as to matters within its scope, preempts state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions.

Perez v. Mortgage Bankers Ass'n, No. 13-1041 (consolidated with *Nickols v. Mortgage Bankers* Assoc., No. 13-1052) (argued Dec. 1, 2014).

Issue: Whether a federal agency must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

U.S. v. Wong, No. 13-1074 (consolidated for hearing with *U.S. v. June*, No. 13-1075) (argued Dec. 10, 2014).

Issue: Whether the six-month time bar for filing suit in federal court under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), is subject to equitable tolling.

Yates v. U.S., No. 13-7451 (argued Nov. 5, 2014).
Issue: Whether Mr. Yates was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, which makes it a crime for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" with the intent to impede or obstruct an investigation, where the term "tangible object" is ambiguous and undefined in the statute, and unlike the nouns accompanying "tangible object" in section 1519, pos-sesses no record-keeping, documentary, or informational content or purpose.

Recent lower federal court decisions of interest

Constitutional law

People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Services, No. 2:13-cv-00278-DB (D. Utah. Nov. 5, 2014).

A district court struck down Endangered Species Act regulations that forbid, without a permit, any activity on private land that injures, kills, or significantly impairs the habitat of a prairie dog that the government conceded was found only in Utah. The court concluded the Commerce Clause does not authorize regulation of actions that would injure or impair the habitat of Utah prairie dogs on non-federal land because the Utah prairie dog has no substantial effect on interstate commerce. The court rejected the government's argument that the prairie dog has biological value and removing the prairie dog from the ecosystem would have effects on commerce, stating: "If Congress could use the Commerce Clause to regulate anything that might affect the ecosystem (to say nothing about its effect on com-merce), there would be no logical stopping point to congressional power under the Commerce Clause."

Shell Gulf of Mex. v. Ctr. for Biological Div., 771 F.3d 632 (9th Cir. 2014).
The Ninth Circuit held that an energy company's suit seeking a declaratory judgment against environmental groups was not justiciable under Article III of the Constitution. Shell Oil sued various environmental groups who had opposed the government's approval of two oil spill response plans under the Oil Pollution Act. The federal Bureau of Safety and Environmental Enforcement (Bureau) approved Shell's oil spill response plans for leasing and drilling in the Beaufort Sea and the Chukchi Sea. Thereafter, Shell filed a declaratory judgment suit against environmental groups that had submitted comments to the Bureau opposing the oil spill response plan. Shell argued that it was entitled to a determination that the Bureau did not violate the Administrative Procedure Act in approving the contested oil spill response plans and that it needed a speedy determination to provide certainty before proceeding. The Ninth Circuit concluded that Shell was not entitled to seek a determination of who would prevail if the environmental groups asserted a hypothetical claim under the Administrative Procedure Act against the Bureau. The case is not justiciable under Article III, the court held, because Shell was not aggrieved by the Bureau's actions and the Bureau is not a party to the suit and would thus not be bound by any judg-ment.

CERCLA

Arizona v. City of Tucson, 761 F.3d 1005 (9th Cir. 2014).
The Ninth Circuit reversed a trial court's approval of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) consent decrees, holding that the trial court failed to independently evaluate whether the settlements represented the comparative fault of the settling and non-settling parties. The trial court had approved a de minimis settlement over the objection of non-settling parties who argued that the state of Arizona had provided insufficient information for the court to deter-mine whether the settlement was fair and reasonable. The Ninth Circuit reversed, stating that the trial court accorded "undue deference" to the state. In approving a proposed consent decree, a district court must find that the proposal is based on "some acceptable measure of comparative fault" that rationally apportions liability among the settling parties. The Ninth Circuit found the district court's action unsup-portable, stating that "nowhere in the district court's opinion is there an analysis comparing each party's estimated liability with its settlement amount."

United States v. Coeur d'Alenes Co., 767 F.3d 873 (9th Cir. 2014).
The Ninth Circuit affirmed an order granting the United States' motion to enter a CERCLA consent decree for payment of the cleanup costs at a mine in Idaho. The consent decree was based on CERCLA provisions authorizing the government to settle for an amount less than a potentially responsible party's proportionate share of the cleanup cost if the party has a limited ability to pay. The court of appeals rejected intervener Federal Resources Corporation's argument that the district court abused its discre-tion by forgoing a comparative fault analysis that the district court found irrelevant. The Ninth Circuit found ample support in the record for the district court's conclusion that the United States appropri-ately considered the financial health of the Coeur d'Alenes Company when concluding that the proposed settlement represented the maximum amount of money it could contribute to the cleanup costs.

Air quality

WildEarth Guardians, v. McCarthy, 772 F.3d 1179 (9th Cir. 2014).
The Ninth Circuit affirmed the dismissal of a suit by environmental groups seeking to compel EPA to revise the Clean Air Act prevention of significant deterioration (PSD) permit rules for ozone. The plain-tiffs alleged that the 2008 EPA rule revising the national ambient air quality standard (NAAQS) for ozone created a mandatory duty under section 166(a) of the Clean Air Act to revise the PSD regulations for ozone. EPA argued that after 1977, the only nondiscretionary duty is to promulgate PSD regulations after NAAQS are established for a newly regulated pollutant, which does not apply here since EPA had already regulated ozone. The court also found that plaintiffs' broader reading of section 166(a) as encompassing all pollutants was plausible, and thus concluded that the statute is ambiguous. The suit must be dismissed, the court held, because EPA's duty to revise the PSD rules when NAAQS are revised was not clear cut or readily ascertainable from the statute, and therefore was not a mandatory duty which was judicially enforceable.

Water quality

Alaska Community Action on Toxics v. Aurora Energy Services, 765 F.3d 1169 (9th Cir. 2014).

The Ninth Circuit reversed a district court's summary judgment entered in favor defendant companies in a Clean Water Act citizen suit that challenged the lawfulness of defendants' discharges of coal into Resurrection Bay, Alaska. The district court erred in concluding that the "Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity" shielded the defendants from liability under the Clean Water Act for their non-stormwater coal discharges. The Ninth Circuit concluded that the plain terms of the General Permit prohibit the discharges in question because the permit contained a list of the only non-stormwater discharges authorized by the permit and defendants' coal discharges were not on this list.

U.S. v. Am. Commercial Lines, 759 F.3d 420 (5th Cir. 2014).

A company sued by the United States to recover cleanup costs under the Oil Pollution Act (OPA) may not bring a third-party complaint against companies that elected to submit claims to the OPA Trust Fund. American Commercial Lines (ACL), the owner of a barge carrying fuel oil, contracted with two environmental service companies to provide cleanup services for an oil spill from the barge. After ACL failed to pay the full outstanding amounts owed to the cleanup companies, the companies elected to submit a claim for uncompensated costs to the Oil Spill Liability Trust Fund, and the United States in turn sued ACL to recover its payment. ACL sought to join the cleanup companies as third-party defendants or, alternatively, to hold the companies liable to ACL to the extent ACL was found liable to the United States. The court of appeals held that ACL's recourse was a defense against the OPA Trust Fund and that OPA displaces any federal common law and maritime law claims against the cleanup companies.

Views from the Chair: A history of leadership in many forms

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.

Many of us had the pleasure of listening to a keynote address given to Section members at our Fall Conference in Miami by our friend and former Section chair John Cruden. A central thesis of John's was that future leaders in environment, energy, and resources fields can, and should, look to the expertise of past leaders. Indeed, clues to meeting—and hopefully resolving—current and future environmental, energy, and resources challenges can be gleaned from the successes of the past.

Historic perspectives

John Cruden is uniquely qualified to deliver such an address and to provide insights into our practice areas. John has had a remarkable career culminating in his recent confirmation as assistant attorney general for the Environment and Natural Resources Division of the U.S. Department of Justice.

During his most recent stint, as president of the Environmental Law Institute, John interviewed leaders in the early environmental movement in the United States. They included former EPA administrators William K. Reilly and Russell Train and another former Section chair, Kinnan Golemon. Their recollections formed the basis of John's keynote address. If you were unable to join us at the Fall Conference, John recently summarized his address in his column in the January/February 2015 issue of ELI's *The Environmental Forum*. It is well worth reading.

John's address and his column got me thinking. We as Section members are fortunate to have a very rich history with many accomplished leaders, past and present. We should look to our leaders and their wealth of collective knowledge as we tackle some of our most pressing environmental, energy, and resources challenges.

Origins of the Section

John's address also led me to research our Section's early history. What I discovered was extremely interesting, a bit surprising, and even somewhat amusing. Way back in 1926, members of the American Bar Association formed the Section of Mineral Law (which over the years has evolved into the Section of Environment, Energy, and Resources).

The Section was established to study U.S. laws relating to gold, coal, oil, gas, oil shale, and other valuable minerals. The new entity was to study conflicting state laws, marketing issues, and tax laws relating to these commodities. Further, the Section was to study conservation laws and the extension of police power relating to these issues, and to allow lawyers to advocate the uniform construction of laws relating to minerals.

In 1930, the "young" section created the Committee on Conservation of Resources, presumably to study and advance ideas addressing the conservation of these public resources. (Amusingly, in 1920, the ABA created a Special Committee on Air Law—however, this committee's sole focus was on aviation issues, including who owned rights to the air in which aircraft flew!) Also interesting was the ABA's 1947 creation of a special committee to urge Congress to confirm title in the states "to all lands beneath the navigable waters within their boundaries and offshore therefrom.")

Common themes today

What strikes me from this review of our Section's earliest roots is that issues we continue to address are substantially related to the issues that led to the formation of the first ABA "environmental, energy, and resource" section. Oil, gas, mining, coal, and even oil shale, were considered among the most pressing issues in the 1920s. Conflicting state laws, the extension of police powers, and the uniform construction of such laws, were issues then and remain issues today. Moreover, jurisdictional issues over water were also considered a critical issue in the late 1940s. Today, all of these very same issues are among the thorniest issues we as environmental, energy, and resource lawyers continue to address.

To be sure, the issues have expanded and become immensely more complex. However, wouldn't it be interesting to have some of these early ABA and Section leaders in a room to ask them about their experiences addressing these issues? While we don't have access to the earliest Section leaders, we do in fact have an impressive group of leaders from the past several decades and a rich history of thought leadership and scholarship that could provide valuable insights into today's environmental, energy, and resource issues.

Learning from the past

John Cruden's advice about learning from past leaders in the broader environmental, energy and resources community is absolutely on target. John concluded his column with: "The coming years have all the same challenges [as the early years], but our past provides guidance if we are careful to heed it." When considering our Section's past, it is important to remember our Section's roots and our past Section leaders. Today's leadership of the Section, which includes all of you, continues this rich tradition.

2015 Water Law Conference in Denver: Local, regional, and national issues

Robin Kundis Craig

Robin Kundis Craig is the chair of the 33rd Annual Water Law Conference of the ABA Section of Environment, Energy, and Resources. She is the William H. Leary Professor of Law at the University of Utah S.J. Quinney College of Law.

On June 4–5, 2015, the ABA Section of Environment, Energy, and Resources will be holding its 33rd Annual Water Law Conference at the Four Seasons Hotel in Denver. For those with fond memories of past Water Law Conferences in San Diego, this conference continues the Section's strong tradition of

focusing on cutting-edge water law issues with panels that tap into local and regional expertise as well as addressing topics of national significance. Moreover, the conference planners have selected topics and speakers to appeal to a broad range of water law practitioners:

- from seasoned water lawyers to law students and lawyers recently admitted to practice;
- from lawyers whose practices focus almost exclusively on state water allocations to lawyers who deal with water issues in larger legal contexts; and
- for lawyers in all types of practice settings, from government to NGOs to private practice in firms of all sizes.

New trends and developments

This year's conference takes a special look at new developments in water use, with panels examining developing practices in water allocation and reallocation, emerging issues, the intersection of water use and water quality, and national policy issues. Practitioners engaged in cutting-edge water law issues will enjoy panels comparing emerging approaches to particular problems across states and panels focusing on the water issues facing particular sectors. Experts from Texas, California, and Colorado will discuss current issues regarding—and contemporary approaches to—water marketing in their respective states. Another panel will compare new and evolving approaches to groundwater management in Florida, California, and Colorado. Sector-focused discussions will cover cooling water withdrawals and other special water issues stemming from fossil-fuel extraction and combustion, and a wide range of contemporary water issues facing agriculture.

Federal water policy

This year's Water Law Conference includes a session on recent Clean Water Act developments and a session provocatively asking whether it is time for a federal water policy. These sessions will examine federal law and policy's intersection with state water law.

Ethics session on lobbying

The conference's ethics session will look at the potential professional pitfalls for "Lawyers Who Lobby" regarding water issues.

Keynote speakers

Conference attendees will also enjoy personal insights regarding contemporary water issues from the conference's two keynote speakers—Jim Lochhead, CEO and manager of Denver Water, and Justice Gregory J. Hobbs of the Colorado Supreme Court.

Public service project

On Friday afternoon, we invite attendees to participate in the conference's public service project along the South Platte River in Denver. The project gives attendees the opportunity to interact with local schoolchildren regarding their work on river monitoring and to participate in a riverbank clean-up and/or improvement.

Warm-up webinars

New this year, the Water Law Conference planners are producing a series of three "warm-up" webinars in anticipation of the conference itself. To sweeten the deal, people who register for any of these webinars will be entitled to a $95 discount off the registration fee for the Water Law Conference.

Water Reuse. In February, we offered a webinar on "Reusing Wastewater."

Basics of Water Law. In April, we will present "Water Law 101," a basic introduction to and overview of the state-law doctrines that govern the allocation of surface water and groundwater in the United States. This webinar should be particularly useful for practitioners who are new to water law and who want a basic overview of the subject before heading off to the June conference.

Water Supply. Finally, in early May 2015, we return to contemporary issues in water supply with a webinar examining the various issues (including cost) surrounding states' and municipalities' increasing use of desalination in places like Texas, Florida, Arizona, and California.

We hope that you will join us for these webinars and for the Water Law Conference itself. See you in June in Denver!

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 Jim's attention in care of ellen.rothstein@americanbar.org.

Shawna Bligh recently joined Evans & Dixon, LLC in St. Louis. Bligh had previously been with BW Law Group, LLC, in Kansas City, Missouri.

John Cruden was sworn in on January 5, 2015 as the assistant attorney general for the Environment and Natural Resources Division, U.S. Department of Justice. Cruden was most recently president of the Environmental Law Institute and was a long-serving deputy assistant attorney general in the ENR Division while serving as chair of the Section, 2009–2010.

Robyn Hanson, a trial attorney with the Environment and Natural Resources Division, U.S. Department of Justice, recently relocated from Washington, D.C. to the division's regional office in Denver. Hanson is a member of the editorial board of *Trends*, the Section's newsletter.

Ramsey Kropf has been appointed deputy solicitor for Water at the U.S. Department of the Interior, Washington, D.C. Kropf was previously with Patrick, Miller, Kropf & Noto in Aspen, Colorado.

Lisa Jones became the deputy assistant attorney general for the Environment and Natural Resources Division, U.S. Department of Justice (ENRD) in November 2014. Jones was most recently counsel with Sidley Austin LLP. Her earlier career was with the Appellate Section of ENRD, serving as Assistant Chief, Appellate Section, ENRD for six years. Jones serves on the editorial board of *Trends*.

William L. Penny has joined Burr & Forman in Nashville. Penny was formerly with Stites & Harbison in Nashville. Penny is the immediate past Section chair, 2013–2014, and is the current chair of the Section's nominating committee. He has more than 30 years' experience in environmental law. Penny's practice concentrates on environmental law, including NEPA, Endangered Species Act, water quality and stormwater issues, air pollution, RCRA, CERCLA, SMCRA, Brownfields redevelopment, water law, and low level radioactive waste and environmental litigation.

Lauran M. Sturm has become a partner at Waller Landsden Dortch & Davis, LLP, in Nashville. Sturm is a member of the Section's Publications Service Group and chair for committee newsletters. She is also a Programs vice chair of the Air Quality Committee and a vice chair of the Special Committee on Section, Division, and Forum Coordination.