TRENDS

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

MAY/JUNE 2015

Trends May/June 2015
Table of Contents

Features

Section News

Emerging oil and gas greenhouse gas regulations

Leslie Cook Wong

Leslie Cook Wong is a Texas State Bar-licensed attorney and a partner in the Air Quality and Climate Change division of Environmental Resources Management (ERM). She has over 20 years of experience solving complex air emissions management issues for a variety of industries.

White House plan

The emerging greenhouse gas (GHG) regulations for power plants are arguably the most discussed topic in U.S. air regulation. However, GHG regulations are also emerging for the upstream and midstream oil and gas industry (O&G). The White House released an outline of its "Methane Climate Action Plan—Strategy to Cut Methane Emissions" on January 14, 2015, the goal of which is to cut U.S. methane emissions 40 to 45 percent from 2012 levels by 2025. The bulk of the cuts will be focused on the O&G industry pursuant to new regulatory actions. They will primarily originate with the Environmental Protection Agency (EPA), but also from the Bureau of Land Management, Department of Energy, Bureau of Ocean Energy Management, and other federal agencies. While by weight O&G emissions of methane are dwarfed by power generation's emissions of carbon dioxide, the fact that methane's global warming potential (GWP) is 25 times that of carbon dioxide makes methane emissions nevertheless significant.

Current regulations

No current federal regulatory restrictions apply to methane emissions from O&G operations. O&G has significant data collection and disclosure obligations pursuant to the EPA GHG Reporting Program, however. Congress enacted that program under section 114 of the Clean Air Act (CAA), and it is therefore strictly limited to information disclosure. New and modified O&G sources also have significant emissions and operational control obligations pursuant to the O&G New Source Performance Standards, Subpart OOOO, enacted under CAA section 111(b) (known as "Subpart OOOO"). These obligations, however, attach only to the volatile organic compound (VOC) emissions from O&G operations that are typically co-emitted with methane at much lower concentrations, not directly to methane emissions themselves. This scenario is expected to end in the summer of 2015 when EPA proposes an expansion of Subpart OOOO. The expansion is expected not only to extend applicability to more midstream O&G operations, but also to extend the scope of regulated pollutants from VOC emissions to both VOC and methane emissions.

Potential expansion to include methane

The extension of applicability of Subpart OOOO to GHG emissions has the potential to do for O&G operations what it did for power plants: open the door to regulation of existing sources under CAA section 111(d) Emission Guidelines in the form of an Existing Source Performance Standard (ESPS). This ESPS would be implemented at the state level with the potential to reach many, many more facilities than a New Source Performance Standard, including older facilities not scheduled for additional investment. While EPA has stated in the media that it does not support and is not actively planning an ESPS for O&G, the fact remains that CAA section 111(d) would require such regulation at some point in time because methane emissions are not covered by a National Ambient Air Quality Standard, assuming this concept is not overturned by litigation. And, EPA has already included a limited existing source program, applicable to O&G operations in ozone nonattainment areas only, as part of the summer 2015 Subpart OOOO expansion. Under this program, EPA will issue "Control Techniques Guidelines" for use by states to develop O&G methane reduction regulations for use in ozone nonattainment areas. Of

course, by the time EPA finalizes the Subpart OOOO rules, which EPA anticipates will occur by the end of 2016, ozone nonattainment areas will be poised to expand dramatically as the new, lower ozone National Ambient Air Quality Standard is implemented and a new administration is entering the White House.

Expanded reporting requirements

While expansion of Subpart OOOO is the lynchpin for increasing EPA jurisdiction over O&G operations, the march to broader O&G emissions regulation will not begin with the planned summer expansion of Subpart OOOO. It already began last fall with the expansion of EPA's GHG Reporting Program jurisdiction, with relatively little industry engagement, to include O&G gathering and boosting stations, hydraulically fractured oil wells, and gas transmission pipeline blowdowns. Interestingly, these are the very sources slated for addition to Subpart OOOO applicability in the summer of 2015. In essence, EPA is developing a pattern of collecting data under its section 114-based GHG reporting program in preparation for implementation of GHG emissions restrictions the following year. These restrictions for new and modified sources are implemented under section 111(b), followed by expansion to existing sources under section 111(d).

Industry engagement

In light of these developments, the best defense for upstream and midstream O&G operations against what appears to be a multi-year program of rapidly expanding air emissions regulatory requirements is a good offense. In other words, it behooves the prudent O&G facility operator to develop and implement a robust compliance management system with plenty of room for expansion to cover new requirements.

The delta smelt battle: A new model for healthy rivers and water supplies

Kate Poole

Kate Poole is a senior attorney and Litigation Director for the Natural Resources Defense Council's Water Program.

Across the globe, access to clean, fresh water for people and ecosystems is declining. In California, this scarcity came to a head in a series of cases that are reforming management of the state's water system. California's response to this challenge could serve as a model for ensuring sufficient water supplies for people and the environment in a climate-changed future.

Fisheries in decline

Freshwater fishes had the highest extinction rate of all vertebrates worldwide during the twentieth century. The pace of extinction is increasing, with 25 percent of fish extinctions having occurred since 1989. At the same time, fish are an increasingly important source of food to the world's people, with fish consumption growing at a rate double that of population growth over the last half century.

California has not escaped the global phenomenon of fishery declines, despite a rich fishing heritage. The San Francisco Bay Delta, the largest freshwater estuary on the West Coast of the Americas, once supported a thriving ecosystem teeming with native fish as well as a vital fishing economy for communities up and down the West Coast. Today, many of the Bay-Delta's fish populations are on the verge of extinction. The last remaining commercially fishable run of salmon—the fall-run Chinook—has suffered such severe declines that regulators closed the salmon fishing season off the coast of California in 2008, 2009, and for most of 2010 as a drastic measure to allow this population to rebuild.

The Ninth Circuit upholds ESA protections

In 2014, the Ninth Circuit Court of Appeals gave California's fisheries a fighting chance for survival. The court decided two cases challenging Endangered Species Act (ESA) protections intended to ensure the continued existence of several threatened and endangered fish and their critical habitat in the Bay Delta: *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014), cert. denied., 135 S. Ct. 950 (2015) (challenging ESA 2008 provisions for the Delta smelt), and *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971 (9th Cir. 2014) (challenging ESA 2009 provisions regarding Salmonid species). The court upheld the ESA-based protections in each case over the protests of regional water suppliers in the Central Valley and Southern California. The covered fish include winter-run and spring-run Chinook salmon, Central Valley steelhead, North American green sturgeon, orcas, and the delta smelt, as an "indicator species" because its fortune rises and falls with the health of the estuary. The populations of most of these fish have collapsed in recent years due, in large part, to excessive freshwater withdrawals from the state's rivers by California's two massive water projects, the State Water Project and the federal Central Valley Project.

Freshwater withdrawals

Together these two water projects profoundly alter the Bay-Delta's natural hydrology in three fundamental ways:

- by impounding millions of acre-feet of water behind dams upstream of the Bay Delta,
- by diverting millions of acre-feet of water to water users before flows ever reach the Delta, and
- by exporting millions of acre-feet of water from massive pumps in the south Delta for export to agricultural interests and cities in central and southern California (one acre-foot is enough water to cover an acre of land to a depth of one foot—or just under 326,000 gallons).

The protections put in place by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, and affirmed by the Ninth Circuit, reduce freshwater withdrawals to levels designed to provide sufficient water flows and thereby prevent fish extinctions. As the Ninth Circuit succinctly put it, "People need water, but so do fish." 776 F.3d at 980.

The biological opinions

The protections upheld by the court are contained in plans called "biological opinions," in ESA parlance. The biological opinions recognize that continuing to divert half of the Delta's flow, on average, would kill off too many fish. The opinions therefore called for reducing freshwater diversions by the water projects to about 5 million acre-feet annually, which is what the state averaged in the 1980s and 1990s. Several sets of plaintiffs that divert large amounts of water out of the Bay Delta, including two of the largest urban and agricultural water districts in the country, the Metropolitan Water District of Southern California and the Westlands Water District, challenged these biological opinions. Plaintiffs alleged that the agencies inadequately considered the potential impacts to agriculture in central California and water use in southern California. The Natural Resources Defense Council, along with several other conservation, tribal, and fishing groups, intervened in the cases to help defend the biological opinions.

A sustainable water future

The battle to protect the Bay Delta's fisheries has prompted a long-needed paradigm shift in California's approach to water supplies. The litigation and resulting pumping modifications in the Bay Delta have accelerated implementing technologies and policies to more efficiently use and re-use existing water supplies to vastly increase the value that we obtain from each drop of water. This shift away from the old "dam-and-divert" approach will be necessary in a number of states throughout the arid western United States as they reach the limits of their water supplies and is an approach that is helping regions of California that have embraced it to weather the current drought. In California alone, experts estimate that the state can expand existing water supply and reduce water demand by between 7 and 14 million acre-feet annually using a variety of proven, cost-effective techniques such as

- improved water conservation and efficiency,
- increased wastewater reclamation, and
- stormwater capture and reuse.

That's more water than has ever been exported out of the Bay Delta in a year.

A model for the world

We must heed the warning signs provided by declining fisheries and indicator fish such as the delta smelt if we are going to make the needed investments in sustainable water supplies in time to avert a worldwide crisis in freshwater management. The litigation over the Bay Delta ecosystem provides California with the chance to model for the world how it can be done.

Recent developments in "permit shield" law

Thomas Casey and Patrick Runge

Thomas Casey and Patrick Runge both practice in Balch & Bingham's environmental law section in Birmingham, Alabama, representing industrial and commercial clients in a full array of environmental compliance and litigation matters. Balch & Bingham represented the defendants in the Sierra Club v. Energy Future Holdings Corp. case discussed below.

The regulated community relies heavily on federal and state permits as a basis for environmental compliance strategies. Because adherence to the conditions and standards set forth in a validly issued permit should protect a facility from compliance-related liabilities, permits provide the certainty and predictability necessary to operate in a highly regulated environment. In January, the Sixth Circuit's *Sierra Club v. ICG Hazard, LLC* decision made headlines for affirming that a National Pollutant Discharge Elimination System (NPDES) "general" permit protected its holder from Clean Water Act liability associated with selenium discharges that were not explicitly referenced in the permit. No. 13-5086 (6th Cir. Jan. 27, 2015). However, two other 2014 cases, discussed below, could also have notable impacts on this area of law.

Southern Appalachian Mountain Stewards v. A&G Coal Corp

In *Southern Appalachian Mountain Stewards v. A&G Coal Corp.*, 758 F.3d 560 (2014), the Fourth Circuit set limits on the protections offered by NPDES permits. In the underlying action, environmental groups sued A&G for violating the Clean Water Act by discharging selenium from a bituminous coal mine without explicit authorization in the facility's NPDES permit.

Permit shield defense

A&G contended that it was shielded from liability for the discharges under the Fourth Circuit's two-part test because (1) it had disclosed the source of the selenium discharges—bituminous coal mining—to the Virginia Department of Mines, Minerals and Energy during the permit application process and (2) the state permitting agency was "generally aware of elevated selenium levels in the geographic area." Thus, A&G argued that the possibility of selenium discharges from its operation was "within [the state agency's] reasonable contemplation" when it issued the permit. The district court disagreed, holding that a permit shield did not apply.

Disclosure requirement

On appeal, the Fourth Circuit affirmed. The appellate court emphasized that the mine's permit application required A&G to indicate whether selenium was "believed present" or "believed absent." Silence was not adequate. Because A&G did not indicate its belief, the company had not met its disclosure obligations and could not assume implicit authorization for the discharges.

EPA's policy memorandum

The Fourth Circuit also refused to apply a 1995 U.S. Environmental Protection Agency (EPA) policy memorandum, which states that a permit shield applies to pollutants not identified as present in an NPDES application but which are "constituents of wastestreams, operations or processes that were clearly identified in writing during the permit application process and contained in the administrative record." Because the policy was predicated on the permittee's full compliance with all relevant application and notification requirements, it was inapplicable. The court also highlighted A&G's inconsistency

in asserting that it had no reason to believe that it would discharge selenium, while simultaneously asserting that its disclosures to the state permitting agency put selenium discharges within the agency's reasonable contemplation.

Sierra Club v. Energy Future Holdings Corp.

A second significant environmental permitting decision from 2014 is *Sierra Club v. Energy Future Holdings Corp.*, No. W-12-CV-108 (W.D. Tex. 2014). A key issue in this case was whether Luminant could rely on two affirmative defenses in its air operating permit and Texas's State Implementation Plan (SIP) against alleged opacity exceedances due to startup, shutdown, and malfunction-related conditions. In determining the issue, the court held that Luminant could not rely on a permit shield defense because Texas regulations required the shield to be explicitly set forth in the air permit and Luminant's permit did not include the necessary language.

Nevertheless, the court found that the two affirmative defenses were still applicable because (1) the plaintiffs were barred from collaterally attacking the defense provisions because the defenses were incorporated into the permit, and (2) the court should apply the law that applied at the time of the action, not at the time of the alleged violations. Luminant demonstrated that it fulfilled the requirements of those affirmative defenses and won. The case played out very much like a permit shield case, but the basis for the court's decision was distinct.

Collateral attack of valid permit

First, the court held that it lacked jurisdiction to hear claims collaterally attacking a valid Title V permit provision. TCEQ issued the plant's renewed Title V permit in 2008, after a public permitting process. Neither EPA nor the Sierra Club timely objected to the permit's affirmative defense provisions for exceedances related to upsets and unplanned startups and shutdowns (within the Clean Air Act's specified 45-day deadline). Therefore, Title V's "jurisdictional bar" prevented either party from subsequently challenging those provisions.

Current law and retroactive effect

Second, the district court held the two affirmative defense provisions were applicable because they conformed to affirmative defenses that were currently available under Texas's SIP. While the state had issued the permit to Luminant in 2008 with the affirmative defense provisions, EPA did not approve the revision of the Texas SIP that incorporated those defenses until January 10, 2011. Despite this apparent "gap" in coverage, the court ultimately held that the current law, not the law in effect at the time of the alleged violations, was the appropriate standard unless there was an impermissible retroactive effect on the plaintiff (the Sierra Club). The court concluded that applying the current law did not impair any vested rights acquired by the Sierra Club before EPA approved the affirmative defenses as part of the Texas SIP.

At trial, the district court held that the affirmative defenses applied to each opacity event at issue, giving deference to previous TCEQ determinations to that effect. Thus, compliance with the permit's affirmative defense provisions for upsets and startups/shutdowns protected Luminant from liability, even though a permit shield did not.

Advice for permit holders

Together, these recent cases suggest that while courts still recognize the important role environmental permits play in providing reliable guidance and standards for facilities in highly regulated industries, permit holders should be increasingly hesitant to rely on implicit or unstated "authorizations" in a permit unless sufficient disclosures were made in the application.

Transparency and the legal process in the *Deepwater Horizon* NRDA: It's all about balance

Donna Lum and Bradley Ennis

Donna Lum is the public participation director at Neel-Schaffer, Inc. in Jackson, Mississippi. Bradley Ennis is an associate in Balch & Bingham LLP's Environmental and Natural Resources Section in the firm's Gulfport, Mississippi office. Donna and Bradley are both involved in the Natural Resource Damage Assessment for the Deepwater Horizon spill and serve as chairs of the Trustees' Public Affairs Subcommittee and Attorney Subgroup, respectively.

What's the rub?

What happens when a client is in (or is facing) litigation and the disclosure of information, even for the purpose of being open and transparent to the public, could affect the case? This conflict arises when the client's communication specialist is charged with disseminating information to the public while legal counsel must protect that same information from disclosure. That is the rub. Communication specialists and attorneys come from two different perspectives—some might argue from two different planets.

The communicator's perspective

From a communicator's perspective, facilitating the public's understanding of and involvement in plans and actions that impact their lives is a good thing. The communicator's job is to supply easily understood information throughout a project and carefully consider the public's input. A true communicator lives for holding listening sessions and workshops, facilitating roundtable discussions, and supporting the notion that all ideas should be duly heard and considered. They are taught that making all information available can only strengthen collaboration and help the public provide meaningful comment. Communicators want to put all their cards on the table. According to communication specialists, attorneys, while absolutely necessary, tend to hinder transparency efforts.

The attorney's perspective

Attorneys, on the other hand, often seem horrified by public outreach practices when a case is highly publicized and involves copious amounts of confidential information and data, particularly in the environmental law arena. They keep their cards close. Attorneys, as trained, scrutinize every paragraph, sentence, word, and even punctuation marks with a narrowly focused lens. Attorneys seem to have an internal alarm that begins to sound relentlessly when an article, a news statement, a tweet—any release of information—is suggested. That's with good reason because attorneys must protect the case and the client.

Attorneys crave consistency, such as the use of talking points. They urge others to stick to the script and answer only what is asked or, better yet, say nothing at all. In some cases, court orders may prohibit disclosure of information that would otherwise not be protected. In other cases, it may simply be that the release of certain information runs counter to the overall litigation strategy. Of course, information should never be released without the client's approval. Constant vigilance is part of the attorney's duty to preserve attorney–client privilege and to prevent disclosure of attorney work product. Keeping a client's case sound while providing public information is a high-wire act. It's all about balance.

Case in point: *Deepwater Horizon* NRDA

The *Deepwater Horizon* oil spill Natural Resource Damage Assessment (NRDA) and Early Restoration process is an example of a case in which maintaining the balance between public engagement and protecting confidential case information is vitally important. The NRDA of the nation's largest off-shore oil spill is currently underway. A NRDA is the process used by natural resource trustees to develop the public's claim for natural resource damages against the party or parties responsible for the spill. Natural resource trustees are persons and agencies entrusted under the Oil Pollution Act and other applicable statutes and regulations to restore injured natural resources and lost services resulting from an incident involving a discharge or substantial threat of a discharge of oil. The Deepwater Horizon NRDA trustees include representatives from Florida, Alabama, Mississippi, Louisiana, Texas, NOAA, DOI, USDA, EPA, and DOD (to the extent of DOD-owned lands).

In April 2011, one year after the spill occurred, the Deepwater Horizon NRDA trustees entered into an agreement with BP for the provision of $1 billion to begin restoration of natural resources and the public uses they provide through the implementation of early restoration projects. Early restoration takes place before the completion of the NRDA, which, due to the potential for litigation over natural resource damages, requires certain confidential information and communications to be protected and maintained. The agreement between the NRDA trustees and BP specifies that the public shall be engaged in the development of early restoration plans through public review and comment. Such review is also required by the Oil Pollution Act, NRDA regulations, and, where applicable, the National Environmental Policy Act (NEPA).

Because public comment is required on proposed early restoration projects before the NRDA is complete, a balancing of the competing interests of confidentiality and public disclosure and involvement is necessary. Answering questions raised by the public (such as in responses to comments resulting from public notices) requires close collaboration and cooperation between communicators and attorneys.

Striking a balance

Communication and legal experts agree there must be a balance between the dissemination of information and the protection of confidential information. Constant collaboration is the key. While every case is different, here are a few of the more common best practices that can assist both communicators and attorneys in finding that balance:

- Work as a team by sharing information and directives regularly.
- Jointly develop talking points, communication strategies, and public statements.
- Identify and prepare answers for anticipated questions from the media.
- Help communicators understand legal boundaries before information is released.
- Help attorneys understand that short, simply worded statements are best for the media.
- Review, review, review.
- And, by all means, keep your client informed and get approval for final products.

Although communicators and attorneys seem to be from two different planets, they can form a powerful team for the good of the case and the client. It's all about coordination and balance.

A common understanding of "cultural resources"?

Anne Senters

Anne Senters is an attorney-advisor with the Bonneville Power Administration, an agency of the U.S. Department of Energy.

Several years ago, I sat chatting with a group of lawyers, all of whom had been practicing for at least a decade longer than I had, when I mentioned that my practice area had changed to "cultural resources." The room went silent until someone finally admitted, "I'm not sure I know what that means."

What are cultural resources? Places or things or both?

This confession admitting a lack of understanding of what is intended by the term "cultural resources" is not unusual. Interestingly, however, some of our nation's most familiar laws designed to protect cultural resources, such as the National Environmental Policy Act (NEPA), call for the consideration of cultural resources as that term *"is commonly understood."*

It's complicated

After years of working closely with archaeologists—a passionate profession if ever there was one—I know that reaching a "common understanding" of "cultural resources" is a complicated exercise. Moreover, for the federal lawyer working to ensure compliance with federal cultural resource protection laws, the breadth of interests involved and interpretations of what those laws mean can be bewildering.

Fortunately, other laws specifically addressing the scope of cultural resources are more descriptive than just referencing a common understanding. For example, the Archaeological Resources Protection Act of 1979 applies to "*material* remains of past human life." The Native American Graves Protection and Repatriation Act protects burial *sites* and funerary objects.

Applicable to any site or federal lands only?

Some laws, including these last two, apply only to cultural resources found on federal and certain Indian lands. What of private lands or sacred sites and landscapes that are less clearly delineated than archeological resources? Are these also protected? Yes … for the most part.

Cultural resources on private land, as well as publically owned land, that meet certain criteria fall under the umbrella of the National Historic Preservation Act (NHPA) and its implementing regulations. Broader in scope than other laws, the NHPA invokes the criteria of the National Park Service's National Register of Historic Places to define the cultural resources it addresses, known as "historic properties." While the layered National Register criteria require professional interpretation, they generally provide a framework for resources that are 50 years old or older and that are related to significant events or people in history, are likely to reveal important information about history or prehistory, or represent the work of a master or unique style. Despite the discretion allowed for interpretation, some have criticized the National Register's framework as being inappropriately narrow and imposing a bureaucratic approach, particularly with regard to how agencies apply the criteria to sacred sites and traditional cultural properties.

If a culturally significant site or landscape does not neatly fit the National Register criteria or if the engaged parties disagree on a resource's eligibility as an historic property, the overarching purpose of the NHPA may be difficult to meet. The battle of the Wampanoag Tribes to have the Nantucket Sound recognized as a cultural resource eligible for listing on the National Register, and thus affecting the government's approval of a large offshore wind energy project, famously illustrates the issues that arise when regulatory criteria collide with a sacred sense of place. *Pub. Employees for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67 (D.C. Cir. June 11, 2014).

What should be done if a project could affect cultural resources?

If your agency is proposing a project that could affect cultural resources or if your client is seeking federal approval or a permit for a project that could affect cultural resources, it is critical to recognize both the requirements and the limitations of the NHPA, even though other considerations may also guide the path forward.

Consultation—the most critical piece of the puzzle
The NHPA directs federal agencies to consult with various parties to determine whether there are resources present on or near the project site that might be eligible for inclusion on the National Register and, if yes, to determine whether the federal undertaking might adversely affect those resources. These parties include entities with a "demonstrated interest" in the resource and any Indian tribe ascribing religious or cultural significance to the resource. Not consulting with a particular tribe can be both legally problematic and possibly disastrous for the resource if the agency fails to understand the resource's importance before the agency acts.

Ensuring appropriate and sufficient process
Although the law explicitly requires consultation only with *federally recognized* tribes, some agencies consult with unrecognized tribes if they are likely to have a demonstrated interest. How a federal agency ultimately addresses a resource lies beyond the scope of the government lawyer's duties, but the lawyer must be able to defend the agency's consultation process as being sufficient for the agency to make an informed decision about the treatment of a resource.

What else should I consider if a project may affect cultural resources?
Individual federal agencies may have directives for considering resources that might reach beyond the National Register criteria. One immediate consideration is whether the particular federal agency taking action was a party to the Memorandum of Understanding for Interagency Collaboration and Coordination for the Protection of Sacred Sites. Agencies subject to this MOU have put together working groups to evaluate current laws and policies that apply to sacred sites. Their findings are certain to affect perspectives about the meaning of "cultural resources" in the future. State laws may apply and should also be considered.

The lawyer's balancing act
The NHPA requires that the federal agency taking action must also make a determination of eligibility for each affected cultural resource based on information provided by qualified archeologists and input from parties that ascribe significance to a site. More often than not, federal lawyers face situations that aren't squarely addressed in the applicable regulations. A healthy understanding of the overarching principles and unfolding policy directions for cultural resources is essential to ensuring respectful and meaningful compliance with cultural resource laws.

The judicious use of environmental acronyms in briefs

J. Brett Grosko

J. Brett Grosko is a trial attorney at the U.S. Department of Justice Environment and Natural Resources Division. The views expressed herein are his own and do not necessarily reflect the views of the U.S. Department of Justice or any other agency.

State and federal judges often lament environmental law practitioners' proclivity for using acronyms as shorthand for describing the technical issues in their cases. Judges frequently refer to the "alphabet soup" of acronyms that environmental lawyers utilize. They state their preference for ordinary English, reasoning that acronyms obscure meaning and reduce readability. Legal writing expert Bryan Garner has singled out environmental law practitioners as some of the grossest offenders in this regard.

The U.S. Circuit Court of Appeals for the D.C. Circuit issued a public note in 2010 strongly urging parties to limit the use of acronyms. The court observed that "[w]hile acronyms may be used for entities and statutes with widely recognized initials, such as FERC and FOIA, parties should avoid using acronyms that are not widely known." D.C. Circuit Rule 28 further requires all briefs containing uncommonly used abbreviations—including acronyms—to include a glossary defining each such abbreviation on a page immediately following the table of authorities. The D.C. Circuit has also rejected briefs and ordered the offending parties to resubmit them after removing all uncommon acronyms.

Several guidelines will help practitioners improve their briefs' readability.

- First, check the local rules of the court where you are appearing for specific requirements on the use of acronyms. Ask whether the judge before whom you are appearing is familiar with environmental law and then tailor your brief accordingly.
- Second, prioritize uncommon acronyms for attention. Avoid, when possible, using acronyms that are not widely recognized. Mr. Garner's book *The Winning Brief* suggests that practitioners check a good dictionary. For example, *Black's Law Dictionary* includes an entry for "EPA." Finding an acronym in the dictionary suggests that it may be familiar enough to use in a brief.
- Third, replace acronyms with a single word, for example the "Act" or the "Service" when referring to the Clean Water Act and the U.S. Fish and Wildlife Service, in lieu of "CWA" or "FWS."
- Fourth, if you use acronyms in a brief, include a glossary at the front. The court may wish to include its own glossary in its decision. If so, the judge may appreciate having one handy.

Overall, the goal should be to describe the law clearly for generalist judges who are sophisticated but may lack specific knowledge of environmental law.

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.

U.S. Supreme Court

Kansas v. Nebraska, 135 S. Ct. 1042 (2015).
In an original jurisdiction case, the U.S. Supreme Court resolved a dispute between the states of Kansas and Nebraska over implementation of an interstate compact for Republican River Basin water rights. The High Court agreed with the special master that Nebraska had knowingly failed to comply with its obligations under the terms of the existing settlement and upheld the special master's $1.8 million award to Kansas for disgorgement damages. The Supreme Court also adopted the special master's recommendation to amend the Accounting Procedures so that Kansas may no longer charge Nebraska for imported water.

CERCLA

Pakootas v. Teck Cominco Metals, Ltd., 2014 WL 7408399 (E.D. Wash. Dec. 31, 2014).
A trial court held that a Canadian company might be liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the company's air pollutant emissions and river discharges that contaminated a site in the United States. Defendant conceded that its smelter emissions had settled into the Columbia River, but moved to dismiss the air emission claims because CERCLA's definition of "disposal" does not include "emitting." The trial court held that the "CERCLA disposal" alleged by plaintiffs occurred when hazardous substances from Teck's aerial emissions and its river discharges were deposited "into or on any land or water" of the site. Defendant requested reconsideration based on a recent Ninth Circuit decision under RCRA stating that disposal does not extend to emissions of waste directly to the air. *Center for Community Action and Environmental Justice v. BNSF Railway Company*, 764 F.3d 1019 (2014). The trial court distinguished the BNSF case and denied reconsideration. However, because this is a previously undecided issue under CERCLA, the district court certified its order for immediate interlocutory appeal to the Ninth Circuit.

Cyprus Amax Minerals Co. v. TCI Pacific Communications Inc., No. 4:11-cv-00252, 2015 WL 427807 (N.D. Okla. Feb. 2, 2015).
Cyprus Amax Minerals Co. (Cypress) entered into a consent decree with the U.S. Environmental Protection Agency (EPA) and the state of Oklahoma for remediation of a contaminated site. Cyrus filed suit for contribution under CERCLA against New Jersey Zinc (N.J. Zinc) as the parent of Tulsa Fuel and Management Company (Tulsa Fuel) and against TCI Pacific Communications (Pacific) as the successor in interest to N.J. Zinc and Tulsa Fuel. Cyprus alleged that Pacific was liable for environmental harms caused by a Tulsa Fuel smelting operation located near Cyprus' contaminated site. The parties filed cross-motions for summary judgment on the issue of whether Tulsa Fuel was the alter ego of N.J. Zinc and whether Pacific is liable because it directly managed the operations at the site. The court held that Tulsa was the alter ego of N.J. Zinc because N.J. Zinc represented to the Interstate Commerce Commission that it controlled or dominated the operations of Tulsa Fuel and there is evidence that N.J. Zinc treated Tulsa Fuel as a division of N.J. Zinc. Because there is no dispute that Pacific is the successor to N.J. Zinc, the court ruled that Cyprus may recover contribution from Pacific under CERCLA. The court rejected Pacific's argument that Oklahoma law required a showing that N.J. Zinc abused the corporate form to commit fraud against Cyprus as a pre-condition to any piercing of the corporate veil based on a finding of alter ego.

Coppela v. Smith, No. 11-cv-01257-AWI-BAM, 2015 U.S. Dist. LEXIS 5127, 2015 WL 224730 (E.D. Calif. Jan. 15, 2015).
The Coppelas, owners of a dry cleaning business, brought a suit against prior owners of the property, Martin and Martin Properties, seeking contribution for cleanup costs relating to tetrachloroethylene (PCE) contamination of soil and groundwater (commonly associated with dry cleaning operations). Defendant moved for summary judgment, alleging that it had never operated a dry cleaning business on the property and it was an "innocent landowner" because its pre-purchase investigation in 1995 did not identify any PCE contamination or any past operation of a dry cleaning business at the property. The court granted summary judgment for defendant, finding that defendant (1) did not cause a release, (2) exercised due care before purchasing the property, (3) fully cooperated with EPA and the state, and (4) had neither knowledge nor reason to know of any PCE contamination. The court held that defendant's failure to comply with the current requirement to use ATSM standard E 1527-93 as part of a due diligence effort was not fatal because an "appropriate inquiry" is one that complies with the accepted commercial standards applicable when the property in question was purchased (in this case, in 1995).

Air quality

Natural Resources Defense Council v. EPA, 777 F.3d 456 (D.C. Cir. 2014).
A divided D.C. Circuit panel vacated EPA's extension of deadlines for states to comply with the 2008 National Ambient Air Quality Standard (NAAQS) for ozone and EPA's revocation of State Implementation Plan (SIP) requirements for transportation planning. Following a nonattainment designation, the Clean Air Act requires a state to demonstrate that the area will come into compliance with a National Ambient Air Quality Standard (NAAQS) within three years of the designation. EPA's rules for the 2008 ozone standard allowed a state's demonstration to focus on reaching compliance by the end of the third calendar year. The court held that this extension, from three years after designation to the end of the third calendar year after designation, was contrary to the Clean Air Act because it would extend the deadline to ***more than*** three years after the nonattainment designation. EPA explained that the rule allowed states to obtain ozone data for three full summer seasons in order to establish compliance. The majority held that EPA's ozone-season explanation lacks any grounding in the statute, and that: "Even if EPA could adequately justify choosing a trigger date other than the designation date, it has failed to do so here." Judge Randolph's dissent concludes that the "Clean Air Act says nothing about when EPA should start the clock after the agency has issued new, stricter [NAAQS] for ozone," and warns that the majority's ruling could cause "disarray" in the SIP process, in particular for states whose compliance deadlines have passed. On the second issue addressed by EPA's rule, the majority held that EPA had no authority to revoke the ozone standard for SIP transportation conformity planning purposes, which obligates noncompliance areas to assure that new transportation infrastructure projects meet EPA-approved air quality plans.

Water quality

Hall & Assocs. v. EPA, No. 14-808, 2014 U.S. Dist. LEXIS 178571 (D.D.C. Dec. 31, 2014).
A federal district court dismissed a Freedom of Information Act (FOIA) suit requesting documents relating to EPA restrictions on blending partially and fully treated wastewater from wet weather events. Plaintiff sought information from EPA regarding whether EPA would give nationwide application to the

decision in *Iowa League of Cities v. EPA*, 711 F.3d 844, 878 (8th Cir. 2013), which rejected EPA's assertion of authority to ban blending. The district court concluded that the plaintiff failed to exhaust its administrative remedy to contest the completeness of EPA's response, stating that "general complaints about the results of a search do not amount to a cognizable FOIA claim." On the underlying issue, EPA's position is that industry cannot challenge EPA's policy on how it will exercise its veto power and may only sue to challenge EPA's veto of a specific permit.

Sierra Club v. ICG Hazard, LLC, No. 13-5086, 2015 WL 543382 (6th Cir. Jan. 27, 2015).
A divided court of appeals affirmed a grant of summary judgment to a coal mining company that discharged selenium into surface waters in concentrations above state water quality standards. The court concluded that the company disclosed its selenium discharges to the permit authority, that selenium discharges were thus within the reasonable contemplation of the permit authority, that the company operated under a general permit, and, therefore, the permit shield in the Clean Water Act protected the company from liability even though the permit did not specifically limit selenium. The court held that the Sierra Club's claims under the Surface Mining Act were barred because the state water quality standards were incorporated into the surface mining permit and the Clean Water Act regulatory framework controls over inconsistent regulation under the Surface Mining Act.

In re: Charles River Pollution Control Dist., NPDES Appeal No. 14-01, 2015 EPA App. LEXIS 3 (Feb. 4, 2015).
EPA's Environmental Appeals Board (EAB) upheld EPA's authority to require Clean Water Act discharge permits (National Pollutant Discharge Elimination System (NPDES) permits) for "satellite" sanitary sewer systems that collect wastewater from domestic sources owned by one entity and route the wastewater to municipal wastewater treatment plants owned by another. The EPA region explained that its practice is to regulate such regionally integrated POTWs with a co-permitting structure. On appeal, the owners of the satellite collection systems argued that they do not need a permit because they do not own the treatment plant outfall. The Clean Water Act requires NPDES permits for publicly owned wastewater "treatment works" that discharge to waters of the United States. The EAB held that the term "treatment works" includes sewage collection systems, and thus EPA properly included the satellite collection systems as part of a single NPDES permit with the towns operating those collection systems as co-permittees.

RCRA

Community Association for Restoration of the Environment (CARE) v. Cow Palace, LLC, 2015 WL 199345 (E.D. Wash. Jan. 14, 2015).
A federal court held that certain manure management practices of a dairy violated the Resource Conservation and Recovery Act's (RCRA) solid waste requirements. In granting summary judgment, the court held that when groundwater contamination results from manure that is over-applied to crops or stored in poorly designed lagoons that leak, the manure is converted from a potentially beneficial product into a discard that is a solid waste under RCRA. The court further ruled that contamination of nearby groundwater sources presented an imminent and substantial endangerment to public health, thus triggering the corrective action provisions of RCRA.

TSCA

Trumpeter Swan Society v. EPA, 774 F.3d 1037 (D.C. Cir. Dec. 23, 2014).
The D.C. Circuit rejected a suit seeking to compel EPA to regulate lead bullets and shot under the Toxic Substances Control Act (TSCA). The panel held that TSCA "unambiguously exempts" items taxed as ammunition, including shells and cartridges. Plaintiffs attempted to avoid the exemption by arguing that EPA should regulate *spent* bullets and shot. The panel concluded, however, that since "bullets and shot can become 'spent' only if they are first contained in a cartridge or shell and then fired from a weapon, petitioners have identified no way in which EPA could regulate spent bullets and shot without also regulating cartridges and shells," which is precisely what the exemption prohibits.

Energy

Thompson v. Heineman, 289 Neb. 798 (Neb. S. Ct. 2015).
In 2013, the governor of Nebraska approved TransCanada's proposed route for the Keystone Pipeline pursuant to a law enacted by the Nebraska legislature in 2012 that granted the governor authority over pipeline routing decisions. A group of landowners successfully challenged the approval in state trial court, and an appeal to the state Supreme Court followed. Four of the seven justices on the Nebraska Supreme Court concluded that a state statute allowing the governor to exercise the power of eminent domain for building the Keystone Pipeline was inconsistent with the state constitution because the statute transferred the Public Service Commission's powers over common carriers to the governor. Three other justices concluded that plaintiffs lacked standing and declined to address the constitutional issues. Because the Nebraska Constitution requires a super-majority of five judges to hold a legislative act unconstitutional, the legislation must stand by default.

Views from the Chair: Prince Charles, the Magna Carta, and 800 years of sustainability

Steven 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.

Agreed to by King John of England at Runnymede on June 15, 1215, the Magna Carta promised, for the first time, the protection of church rights, protection from illegal imprisonment, access to swift justice, and limitations on feudal payments to the Crown. It had a profound influence on early American colonists and the formation of the American Constitution. The Magna Carta remains an important symbol of liberty 800 years later. As such, the ABA, along with the U.S. Library of Congress, is holding a

number of anniversary celebrations, both in the United States and in the United Kingdom. This collaboration between the ABA and the Library of Congress also resulted in a travelling exhibit on the Magna Carta. Through the intersession of our Section, the exhibit includes important references to the Charter of the Forest.

Charter of the Forest

The Charter of the Forest was a complementary charter to the Magna Carta. It provided, for the first time, significant rights, privileges, and protections for citizens against the abuses of the Crown with respect to natural resources. At the time, the forests belonged to the king. Forests were the most significant source of fuel and food. Before the Charter, it was illegal for citizens to collect firewood, hunt, pasture animals, and perform other important acts to sustain their lives. There were grave consequences for violation. For example, hunting deer was punishable by death. The Charter represented a fundamental shift in rights, away from the monarchy and to the common man. For the first time, forests (including open land areas) became available for use by citizens.

Global empowerment through rule of law

Given the significance of the Charter of the Forest and its fundamental ties to the environment and the rule of law, the Section has been participating in the Magna Carta anniversary celebrations. In March, we took part in the event "Magna Carta 2015: Global Empowerment Through Rule of Law Forum" held at the National Archives in Washington, D.C. The forum was presented by the Presidential Precinct, composed of a group of universities and other institutions including the University of Virginia and the College of William & Mary.

Discussion with Prince Charles

One of the forum's three sessions focused on sustainability and climate change. Twenty-five young leaders from emerging nations and 25 other invited guests attended, including His Royal Highness, The Prince of Wales. I moderated a discussion on sustainability and climate change among a number of young leaders from around the world. Following that discussion, Prince Charles joined us and we had the opportunity to brief him on the discussion. The Section will continue to participate in the dialogue through the forum website and social media posts.

Integration and outreach

As many of you know, one of my goals this year is "integration and outreach." Our renewed focus on *international* environmental, energy, and resources legal issues fits squarely within this goal. The Section's involvement with the 800th anniversary of the Magna Carta is only one example.

Why address global issues?

So why are we devoting our attention and resources to international concerns? A simple reason is that it provides tremendous opportunities to our Section members. Perhaps a more compelling reason is that it is the right thing to do.

No one seriously refutes that the world is becoming a smaller place. From an environmental perspective, what happens in the United States affects the rest of the world and what happens in the rest of the world surely affects the United States. In order for any of us practicing in the areas of environment,

energy, and resources law to provide sound advice to our clients, we need the knowledge of what's happening across the globe. Our Section leadership believes that our international work will pay dividends to Section members for many years to come. Clearly the Section's global efforts have been recognized, from both within and outside ABA. It is exciting for the Section to be at the forefront of these important discussions.

Recent examples

Engaging in the 800th anniversary of the Magna Carta and focusing on the Charter of the Forests, one of the world's first environmental laws, is only one recent example of the Section's international focus. In addition, the Section has been:

- Prominently involved in the World Justice Project's environmental rule of law initiative. This work, led this year by Alex Dunn with the assistance of other Section leaders, was described in a recent *Trends* article.
- In addition, we are, through the efforts of Lee DeHihns, leaders in the ABA Sustainable Development Task Force, which began as a project of ABA President James Silkenat.
- A number of the Section's substantive committees focus on international issues, including the International Environmental and Resources Law Committee and the Climate Change, Sustainable Development, and Ecosystems Committee.
- We have recently published an excellent resource on international issues, *International Environmental Law: The Practitioner's Guide to the Laws of the Planet*, edited by Roger Martella and Brett Grosko.

Through these efforts, we have amassed a significant body of both knowledge and information on global environmental, energy, resources, and sustainability issues. More importantly, the Section is increasingly seen as a leader, both within and beyond the ABA, on these issues.

I invite your ideas, comments, and thoughts on this important work.

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.*

J. Wayne Cropp recently joined Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, in Chattanooga, Tennessee, as counsel and is a member of the firm's corporate mergers and acquisitions group. Cropp is a past chairman of the Environmental Law Section of the Tennessee Bar Association and was president of the National Association of Local Air Pollution Control Officials in the days of Anne Gorsuch at US EPA.

Jane Fedder has been promoted to vice chair of the environmental practice group of Polsinelli, PC, in St. Louis.

Jason Gellman has joined as counsel the natural resources group of Snell & Wilmer, L.L.P., in Phoenix. Gellman's practice is mainly focused on energy and public utilities law and regulation. He is the Social Media vice chair for the Section's Energy Infrastructure and Siting Committee.

Thomas D. Goslin has been promoted to counsel at Weil, Gotshal & Manges LLP, in Washington, D.C. Goslin's practice focuses on a wide range of environmental, energy, and other regulatory concerns in the context of mergers and acquisitions, private equity investments, financing transactions, infrastructure projects, and corporate restructurings. He is the Publications vice chair of the Section's Renewable, Alternative, and Distributed Energy Resources Committee.

Kevin Klesh has joined Consolidated Edison Company of New York, Inc., as associate counsel in the company's environmental law group. Klesh was formerly with Davis Polk & Wardwell LLP. He is the former chair of Section's Environmental Disclosure Committee and continues to serve as the Sustainability vice chair of the committee.

Adena Leibman has become the Plastics Initiative Manager for Ocean Conservancy in Washington, D.C. Leibman most recently was a staff attorney with the Ocean Conservancy in Portland, Oregon. She was chair of the ABA Law Student Division in 2012–2013. Leibman is currently a Committee Newsletters vice chair of the Section's Marine Resources Committee.

Matthew A. ("Matt") Paque has joined McAfee & Taft in Oklahoma City. Paque's practice includes environmental permitting, regulatory compliance, enforcement defense, environmental issues in complex transactional matters, and tort litigation. Before joining McAfee & Taft he was assistant general counsel for Tronox Limited, a publicly traded global mining and manufacturing company.

Sandra L. ("Sandy") Schubert has joined Somach Simons & Dunn in Sacramento, California. Most recently, Schubert was undersecretary of the California Department of Food and Agriculture and served as counsel to the majority leader of the U.S. Senate. As undersecretary, she worked with the undersecretaries of the California Department of Natural Resources and the California EPA to draft the California Water Action Plan.

Edna Sussman of SussmanADR LLC in New York City was recently appointed president of the College of Commercial Arbitrators for 2014–2015. She will also serve another term as vice-chair of the New York International Arbitration Center and as a member of the Executive Committee of the American Arbitration Association.

Gretchen Zmitrovich has joined the Mississippi Department of Environmental Quality as a senior attorney in Jackson, Mississippi. Zmitrovich was formerly with Baker, Donelson, Bearman, Caldwell & Berkowitz in Jackson.