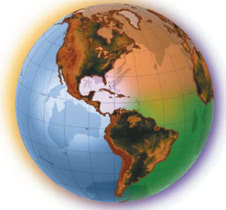
# TRENDS



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# The decline of deference: Is the Supreme Court pruning back the Chevron doctrine?

**Thomas A. Lorenzen and Sharmistha Das**

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*Thomas Lorenzen is a partner at Crowell & Moring, LLP, in Washington, DC. He is a member of the firm's Environmental & Natural Resources, Appellate, Government Affairs, and Administrative Law & Regulatory groups, and focuses on the development and judicial review of EPA's regulations and policies. As an assistant chief at the U.S. Department of Justice from 2004 to 2013, Mr. Lorenzen oversaw the federal government's defense of EPA's regulations for much of the past decade. Sharmistha Das is an associate at Crowell & Moring, LLP, in Washington, DC. She is a member of the Environment & Natural Resources and Government Contracts groups and participates in the firm's Administrative Law & Regulatory Practice working group.*

Judicial deference to agency interpretations of ambiguous statutory terms—a doctrine established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—is one of the fundamental underpinnings of the modern administrative state. It has been particularly critical to the development of environmental regulations. *Chevron* deference has allowed Congress to paint its environmental goals in broad terms, in statutes like the Clean Air Act and the Clean Water Act, while leaving to the U.S. Environmental Protection Agency (EPA) the task of both determining what precisely Congress intended in those statutes and how exactly to achieve what the agency perceives to have been Congress's goals. It has also allowed successive administrations considerable leeway to change course in environmental policy, simply by proffering and rationally explaining new interpretations of ambiguous statutory provisions.

Recent Supreme Court decisions suggest that a number of the Justices are concerned about—and, in the case of Justice Thomas, openly hostile to—*Chevron* deference. These decisions include *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), and most recently *King v. Burwell*,—S. Ct.—(2015), and *Michigan v. EPA*,—S. Ct.—(2015). In each, the opinions of the Court's conservative Justices reflect their concerns over potential agency overreach or over possible violations of the separation-of-powers doctrine. At the same time, in decisions like *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), a differently constituted majority continues "to accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language."

How should one read the tea leaves presented by these cases? As discussed below, Chevron deference is likely to remain a vibrant doctrine for the foreseeable future, giving federal agencies necessary room to fill the interstices inevitably left by Congress when it legislates. At the same time, the Court has begun to prune the doctrine to head off potential overreach and to prevent EPA and other federal agencies from essentially legislating in areas of "deep economic or political significance," as the Chief Justice put it in *King v. Burwell*, absent clear congressional delegation.

### *The origins and evolution of **Chevron** deference*

Judicial deference is a judge-created doctrine used to determine whether agency regulations and interpretive guidance properly follow the federal statutes that authorize them. Under traditional *Chevron* analysis, where the statutory language is clear after applying regular rules of statutory construction, that language governs. There is simply no room for interpretation by the agency. This is known as "Step One" of the *Chevron* analysis. On the other hand, where the statutory language is ambiguous on "the

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precise question at issue," the courts must defer to any reasonable interpretation of the statute offered in a regulation promulgated by the agency charged by Congress with implementing that statute. This is *Chevron* Step Two.

### *Two glosses:* ***Auer*** *deference and* ***Chevron*** *Step Zero*

The courts have created two glosses on *Chevron*. First, in *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court confirmed that deference extends to agency interpretations not just of statutes, but of the agency's own regulations. In such cases, the agency's interpretation is not tested for "reasonableness" as under *Chevron*, but is "controlling unless plainly erroneous or inconsistent with the regulation."

Second, many now agree that there is a *Chevron* Step Zero, and the Court's recent decision in *Burwell* appears to embrace that refinement to *Chevron*. In this step of the analysis—really, the first step of any *Chevron* analysis—the reviewing court asks whether the statute clearly evinces congressional intent to delegate interpretive authority to the agency. If not, as the Court concluded in *Burwell*, or if the agency offering an interpretation is not an expert on the question at issue, the court itself will resolve what the statute means.

### *The pruning of* ***Chevron***

All the Court's recent decisions speak in terms of *Chevron* deference and whether it is appropriate to grant such deference with respect to the statutory language in question. They thus proceed from a common starting point: that *Chevron* is still the governing doctrine and that agencies will receive deference to their reasonable constructions of ambiguous statutory provisions. Yet in each there is, either in the majority opinion or in the concurrences or dissents, a hint of discomfort with the implications of *Chevron* and with the potential for agency overreach if *Chevron* continues to be applied as it has been in the past. Justice Thomas, in contrast to the others on the Court, sees the doctrine as a violation of the separation of powers embodied in the Constitution and would do away with it altogether.

### ***Utility Air Regulatory Group v. EPA*** *(2014)*

The Supreme Court's decision in *UARG*, involving EPA's authority to regulate greenhouse gases under the Clean Air Act, is illustrative. Just seven years earlier, in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the Court had held, citing *Chevron*, that the term "pollutant" unambiguously includes "all airborne compounds of whatever stripe" and that greenhouse gases "are without a doubt" encompassed within that term. The Court thus held that EPA was required to regulate new motor vehicle greenhouse gas emissions if the agency found those emissions posed a threat of endangerment to public health or welfare.

In *UARG*, the Court reached essentially the opposite conclusion, holding that for purposes of the Clean Air Act's prevention-of-significant-deterioration (PSD) and Title V permitting programs, both of which apply to "pollutants" whose emissions are regulated under the Clean Air Act, the term unambiguously *did not* include greenhouse gases. The majority, led by Justice Scalia, first dismissed *Massachusetts' Chevron* Step One holding by reasoning that the word "pollutant" "must be read in [its] context and with a view to [its] place in the overall statutory scheme." The Court then found that, in the specific context of the PSD and Title V provisions, "there is no insuperable barrier" to giving the term a narrower

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meaning that makes it consonant with other aspects of those provisions. Thus, the Court concluded, the term "pollutant" is ambiguous within the context of the Clean Air Act's PSD and Title V provisions even though it remains unambiguous generally.

Once the Court had reasoned that far—placing "pollutant" within the confines of Chevron Step Two analysis—an important *Chevron* Step Two principle came into play: that "[e]ven under Chevron's deferential framework, agencies must operate within the bounds of reasonable interpretations." From that base, the Court determined that EPA's reading of the PSD and Title V provisions as covering greenhouse gases was unreasonable in light of the vast number of sources that would be drawn into the permitting program.

Limiting deference when the agency decision is one of "vast economic importance," as Justice Scalia put it in *UARG*, suggests one possible new limitation on *Chevron*. In fact, Justice Scalia's reasoning forms an important part of the basis for the Court's subsequent decision in *Burwell*, discussed below.

### ***Perez v. Mortgage Bankers*** *(2015)*

Until the Court's issuance of its decisions in *Burwell* and *Michigan*, *Perez* appeared to be the most significant Chevron case of the past term, principally for its concurring opinions by Justices Scalia and Thomas. *Perez* involved the D.C. Circuit's *Paralyzed Veterans* doctrine, which while recognizing *Auer* deference to an agency's interpretation of its own ambiguous regulation, required agencies to undertake notice-and-comment rulemaking before revising an earlier interpretation of a regulation. The majority found this notice-and-comment requirement to be an impermissible encumbrance on an agency's authority to revisit and revise its prior interpretations.

In his concurrence, however, Justice Scalia expressed grave doubts about the wisdom of this holding. According agency interpretations of their own regulations heightened Auer deference, in his view, essentially makes those interpretive rules binding on the public and thus tantamount to laws. Justice Thomas echoed this in his own concurrence, noting that the problems Justice Scalia discussed "call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations." Like Justice Scalia, Justice Thomas viewed Auer deference as creating separation-of-powers problems.

Though framed in terms of doubts about the constitutionality of *Auer* deference, these concurrences have implications for *Chevron* deference as well, because there too the courts are essentially ceding to the executive branch the authority to say definitively what the law means.

### ***King v. Burwell*** *(2015)*

*Burwell* was the Supreme Court's second visit with the Affordable Care Act. This time, the question was whether a health care exchange "established by the State" could include an exchange established by the federal government after a state failed to establish its own. Here, the United States argued that the Internal Revenue Service (IRS) acted permissibly in interpreting that term to include such federally

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established exchanges. Though the majority in *Burwell*, led by Chief Justice Roberts, ultimately concluded that the statute could only reasonably be read as the IRS had read it, it very conspicuously did not defer under *Chevron* to the agency's reading.

The Court acknowledged *Chevron* and noted that, "When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced [there.]" Citing an earlier decision, however, it held that this was an "extraordinary case" in which "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." Reaching back to Justice Scalia's reasoning in *UARG*, the Court held that where the question is one of "deep economic and political significance that is central to [the] statutory scheme," the reviewing court must look for an *express* delegation of interpretive authority from Congress. Having found no such delegatory intent, the Court determined that *it* was the proper entity to interpret the statute.

This principle—that on certain questions of deep economic and political significance the reviewing courts may determine *not* to defer to the agency's interpretation of an ambiguous statutory term—could resonate significantly in future cases, such as in the coming challenges to EPA's carbon dioxide emission standards for existing power plants, through which EPA proposes a major restructuring of the nation's energy markets.

### ***Michigan v. EPA*** *(2015)*

Finally, *Michigan v. EPA* involved review of a Clean Air Act provision commanding EPA to determine whether it is "appropriate and necessary" to regulate certain pollutants before proceeding to regulate them. In the D.C. Circuit, a deeply divided panel had held that the word "appropriate" was ambiguous and did not clearly command that EPA consider the cost of regulation when determining whether to regulate. Thus, under *Chevron* Step Two, EPA's decision not to consider costs at that stage was reasonable and entitled to deference.

The Supreme Court, in another opinion by Justice Scalia, reversed. Though the Court did not apply a Chevron Step 1 analysis in *Michigan*, it nonetheless concluded that EPA acted unreasonably by failing to read the word "appropriate" to require at least some consideration of costs. Looking to the text of the statute, the Court determined that the term "appropriate" is "capacious" and "all-encompassing" and therefore requires "at least some attention to cost." The Court also grounded its conclusion in a foundational precept of administrative law: that an agency engaged in rulemaking may not "entirely fail to consider an important aspect of the problem."

In his concurring opinion, Justice Thomas took further the line of reasoning he espoused in Perez, arguing that *Chevron* deference, like *Auer* deference, must go. Both, in his view, run afoul of the separation-of-powers doctrine, ceding too much authority to the executive branch at the expense of the other two. Notably, no other Justice joined his opinion.

### ***Chevron's*** *future*

*Chevron* remains, and likely will remain, the standard by which agency interpretations of statutes will be judged. In most instances where the text of the statute is ambiguous and the agency has attempted to give it a reasonable meaning, the agency's interpretation will control. The recent cases, however, are

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more notable for the exceptions to *Chevron* that they appear to announce: that deference will not be given on questions of deep economic or political significance absent clear congressional statements of delegatory intent and that—even where *Chevron* applies—the courts will remain the ultimate arbiter of what interpretations are reasonable.

# EPA to modernize self-disclosure process for environmental violations

**Scott Fulton and Daniel B. Schulson**

*Scott Fulton is a principal at Beveridge & Diamond PC, a former general counsel at the U.S. Environmental Protection Agency, and president-elect of the Environmental Law Institute. Daniel B. Schulson is an associate at Beveridge & Diamond PC and was previously an attorney in the U.S. Environmental Protection Agency's Office of General Counsel.*

In June 2015, the U.S. Environmental Protection Agency (EPA) announced plans to launch a web-based system to receive and respond to disclosures made under its existing Audit Policy titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (65 Fed. Reg. 19,618 (Apr. 11, 2000)) and Small Business Compliance Policy (65 Fed. Reg. 19,630 (Apr. 11, 2000)). Under EPA's newly announced program reforms, the agency will create an "eDisclosure" portal that will allow members of the regulated community to disclose violations more easily and EPA to process disclosures more efficiently. EPA intends to launch the web-based portal in fall 2015 and simultaneously publish a Federal Register notice describing the new system.

EPA's Audit Policy, which remains unchanged, provides incentives for regulated entities that self-disclose environmental violations within the terms of the Policy. If all Audit Policy conditions are met, EPA will not refer the matter for criminal prosecution and will waive gravity-based penalties, which are keyed to the seriousness of the violation and represent the punitive component of a civil penalty. The agency retains the discretion to collect any economic benefit that may have been realized because of the noncompliance.

To be eligible for penalty mitigation, an entity must satisfy various Audit Policy conditions. In general, the entity must discover the violation through a voluntary, independent, and systemically conducted audit, disclose the violation within 21 days of discovery, and correct it within 60 days of discovery. In addition, the entity must cooperate with EPA and take measures to prevent the violation from recurring. The Audit Policy excludes violations that have been repeated at the same facility in the past three years or at multiple facilities owned or operated by the same entity in the past five years.

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Once the eDisclosure portal goes live, EPA intends to require regulated entities to use the system to electronically file disclosures. Consultants, attorneys, or other agents may disclose violations through the eDisclosure portal on behalf of a regulated entity. EPA will require those using the portal to (1) register to file with the portal, (2) submit a violation disclosure report, and (3) submit an online compliance report certifying that any noncompliance was timely corrected. The eDisclosure system will not be designed to manage Confidential Business Information (CBI). Thus, any disclosure containing CBI must be sanitized before it is submitted on the portal, and any CBI must be submitted according to EPA procedures and requirements in 40 C.F.R. Part 2.

The eDisclosure system will accept two categories of self-disclosures—so-called "Tier 1" and "Tier 2" disclosures. Tier 1 disclosures will include Emergency Planning and Community Right-to-Know Act (EPCRA) violations that meet all Audit Policy or Small Business Compliance Policy conditions but will not include chemical-release reporting violations under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 103 or EPCRA section 304, or EPCRA violations that resulted in significant economic benefit as defined by EPA. EPA will "spot check" Tier 1 disclosures and most will receive fast-track processing with little to no review from EPA. These disclosures will be immediately resolved with no civil penalties assessed, conditioned upon the accuracy and completeness of disclosure. Tier 1 disclosures will receive especially favorable treatment under this new implementation approach because (1) EPA can easily confirm compliance with EPCRA, (2) EPA has experience providing Notice of Determinations for EPCRA violations, and (3) stakeholders have suggested that EPCRA violations are well-suited for this approach.

The eDisclosure system will also accept Tier 2 disclosures. These will include all non-EPCRA violations, EPCRA violations with respect to which the regulated entity cannot meet the Audit Policy's "systematic discovery" condition but can meet its other conditions, and EPCRA/CERCLA violations excluded from Tier 1. EPA will "screen" Tier 2 disclosures for significant concerns (e.g., criminal conduct or imminent hazards). The eDisclosure system will automatically issue an electronic Acknowledgement Letter confirming that EPA has received the Tier 2 disclosure and stating that EPA will make a determination about penalty mitigation eligibility if and when EPA considers taking an enforcement action for the environmental violation(s) at issue.

The eDisclosure portal is plainly aimed at disclosures that emerge outside of an upfront audit agreement with EPA, as such disclosures have created workload issues for the agency in the past. EPA appears to be willing to continue to negotiate upfront auditing agreements where the agency sees broader value in doing so. Such agreements may offer a greater measure of certainty regarding penalty forgiveness than disclosures under the eDisclosure portal, at least for purposes of Tier 2 violations.

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# BLM regulation of hydraulic fracturing on federal lands

**Hannah J. Wiseman**

*Hannah Wiseman is the Attorneys' Title Professor at the Florida State University College of Law. She received her J.D. from Yale Law School and her A.B., summa cum laude, from Dartmouth College and clerked for Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit.*

On March 26, 2015, the Bureau of Land Management (BLM) issued a final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands" (HF Rule) nearly five years after the agency held its first public forum on the topic. 80 Fed. Reg. 16,128 (Mar. 26, 2015). States and industry groups have sued, with environmental nonprofits intervening as respondents. The U.S. District Court for the District of Wyoming has stayed the effective date of the rule pending the outcome of motions for a preliminary injunction.

### BLM's statutory responsibilities

As early as 1942, the U.S. Geological Survey, which then regulated drilling on federal lands, required approval of well casing programs before wells were drilled. 30 C.F.R. § 221.21 (1942). BLM now regulates oil and gas development on federal and tribal lands under the Federal Land Policy and Management Act (FLPMA), which declares that it is federal policy that "public lands be managed in a manner that will protect the quality of scientific, …ecological, environmental, air and atmospheric, water resource, and archeological values" and requires BLM to issue regulations necessary for the "protection of the public lands." 43 U.S.C. §§ 1701(a)(12), 1733(a). When BLM leases oil and gas it also must follow the Mineral Leasing Act (MLA) of 1920, as amended, which directs BLM to, inter alia, regulate surface disturbance "in the interest of conservation of surface resources" and require bonding to ensure adequate restoration of land and surface waters. 30 U.S.C. § 226(g).

### Scope of the HF Rule

The HF Rule occupies approximately five pages of the *Federal Register* and primarily addresses three aspects of drilling and hydraulic fracturing:

1. well casing and cementing (lining) to conserve oil and gas and prevent pollution of underground and surface water resources,
2. monitoring of the hydraulic fracturing process and disclosure of the chemicals used, and
3. surface storage of fracturing wastes.

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### Data collection and disclosure

The vast majority of the requirements in the HF Rule address data collection and disclosure and update older, similar BLM regulations. Before drilling and fracturing, operators—entities that develop wells—must submit information that helps BLM determine whether drilling and fracturing could potentially pollute underground resources or waste oil and gas through leakage. This data includes the formation to be fractured and its depth, natural formation fractures, depths of usable quality water, and other existing wellbores near the proposed well, among other data points. The operator also must describe the fracturing planned, such as the source of water and methods of storing and disposing of wastes. After fracturing the well, the operator must submit most of this same data describing the actual chemicals used, pressure applied to the well, and other information. The operator may withhold from the public some information about fracturing chemicals after submitting an affidavit claiming trade secret or confidential status. Much of the data may be submitted through the existing chemical disclosure registry "FracFocus" website.

Additional data collection is required to show that the casing for each well—protective steel pipes that are cemented into the well—is adequate. For example, if the casing does not run all the way to the surface, the operator must run a cement evaluation log. Operators also must test well integrity before fracturing, and during fracturing they must continuously monitor pressure in the space between casing pipes (the "annulus").

### New substantive requirements

Beyond these informational requirements, the HF Rule has several substantive narrative standards. For example, operators must take "remedial" or "corrective" action if it appears that cementing is inadequate or too much pressure built up in the annulus during fracturing. Finally, the HF Rule contains several specific, technology-based requirements, the most prominent being that flowback that flows out of the well after fracturing must be stored in closed or covered tanks, with some exceptions.

### Comparison to existing state requirements

Tribal and state regulations also apply to wells on federal lands, and the HF Rule allows BLM to grant a variance from compliance with its rule if state or tribal rules are equally or more protective than BLM rules. (Variances will typically be unnecessary because BLM rules are a floor, and states already may regulate more stringently than the federal rules without needing BLM permission or variances.) This variance provision in the rules has become one of the most controversial issues and was discussed at length during the author's recent testimony before the House Subcommittee on Energy and Mineral Resources.

In some cases, state regulations appear to be at least as environmentally protective as BLM rules. For example, Colorado requires operators to run cement bond logs—a specific type of cement evaluation log—when operators use certain types of casing, and New Mexico requires these logs in certain counties. In an analysis of BLM's 2013 draft rule (some components of which changed in the final rule), researchers from the nonpartisan think tank Resources for the Future concluded that, generally speaking, for states with large public land acreage, "BLM rules do not appear to impose significant require-

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ments beyond existing state regulations." Molly Feiden, Madeline Gottlieb, Alan Krupnick & Nathan Richardson, Hydraulic Fracturing on Federal and Indian Lands: An Analysis of the Bureau of Land Management's Revised Proposed Rule, 29 J. LAND USE & ENVTL. L. 337, 362 (2013–2014).

Other BLM requirements in the final rule are more stringent than those in states. For example, Colorado requires tank storage of wastes only for drilling within a certain number of feet of a public water system, while New Mexico allows pits but requires operators using pits to obtain a permit and to follow specific siting, construction, and operational guidelines.

**Source and scope of BLM authority**

Colorado, North Dakota, Wyoming, and industry actors have argued, inter alia, that the rule is beyond the scope of BLM's authority under FLPMA and the MLA and conflicts with other federal statutes. These arguments do not seem particularly strong. FLPMA grants BLM broad regulatory discretion for environmental protection, and tank storage and casing and cementing programs protect surface waters (in addition to underground water) and prevent oil and gas waste. These subjects all fall under BLM's MLA authority. Further, although the Safe Drinking Water Act (SDWA) exempts hydraulic fracturing from the definition of "injection," the SDWA contains no text indicating that Congress intended to prohibit the regulation of fracturing under other federal acts. The statute expressly indicates that its exemption of fracturing from the definition of injection is "[f]or purposes of this part" only. 42 U.S.C. § 300h(d)(1).

Nonetheless the courts have yet to address these claims beyond the initial stay issued, and, regardless of the outcome, the battle over approximately five pages of text in the Federal Register has only just begun.

Professor Wiseman is grateful to Mary McCormick, Assistant Director for Research, FSU College of Law Research Center, for her valuable help locating sources.

# Ninth Circuit Rulings yield changes to Endangered Species Act rules and policies

**R. Todd Silliman and Stefanie Warren**

*R. Todd Silliman is a partner in the Environment and Natural Resources Practice of Dentons US LLP. His practice includes litigation and regulatory counseling on endangered species, water quality, contaminated property, and other environmental matters. Stefanie Warren is counsel in the Litigation and Dispute Resolution Practice of Dentons US LLP. Her practice covers both environmental and commercial litigation including CERCLA, Proposition 65, TSCA, RCRA, CEQA, and class action defense.*

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Rulings of the U.S. Court of Appeals for the Ninth Circuit have resulted in recent changes to federal Endangered Species Act (ESA) regulations and policy. These changes concern the listing of threatened and endangered species and the conditions under which the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) will authorize incidental take of ESA-listed species.

**Defining "a significant portion of its range"**

The first recent change concerns the ESA's definition of a term impacting FWS's and NMFS's methodology for deciding whether a species should be listed under the ESA. The ESA defines a species as "endangered" or "threatened" according to whether the species is endangered or threatened, respectively, "throughout all or a significant portion of its range."16 U.S.C. § 1532(6), (20). FWS and NMFS finalized their policy last year that seeks to provide greater clarity on how they will define and apply the phrase "significant portion of its range" (SPR). 79 Fed. Reg. 37,578 (July 1, 2014); see also 76 Fed. Reg. 76,987 (Dec. 9, 2011) (draft policy). The policy clarifies that FWS and NMFS will first analyze whether a species is threatened or endangered throughout "all" of its range. If it is not, FWS and NMFS will then consider whether that species is endangered or threatened in an SPR. If it is, then all individuals of the species, not only those found in the SPR, are to be protected. The agencies reasoned that this interpretation is necessary to give independent, "operational meaning" to the words "all" and "significant portion of its range" within the SPR phrase. The policy change grew out of the decision in *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1141 (2001). In *Defenders of Wildlife*, the Ninth Circuit reversed the Secretary of the Interior's decision not to designate a species for failure to consider the species' viability in an SPR.

The policy also revises the definition of "significant" for purposes of determining whether a portion of a species' range qualifies as an SPR. The new test for "significant" is whether, without the members in the given portion of the range, the species is endangered or threatened, *or likely to become in danger of extinction in the foreseeable future*. This is a lower bar than the Department of the Interior Office of the Solicitor had proposed in 2007 in what the agencies label the "clarification interpretation." That interpretation was at issue in Defenders of Wildlife. According to FWS and NMFS, the clarification interpretation rendered the SPR phrase redundant. FWS and NMFS reason that the prior interpretation would consider a portion of a species' range "significant" only if without the individuals in that portion the entire species was imperiled. The agencies maintain that this is merely another way of saying that the species is imperiled throughout its range. FWS and NMFS clarified that they will determine whether a portion of a species' range is significant based on of principles of conservation biology. To determine if a portion of a species' range is significant, FWS or NMFS would ask whether, without that portion, the representation, redundancy, or resiliency of the species—or the four similar metrics used more commonly by NMFS—would be so impaired that the species' vulnerability to threats would be increased to the point that the overall species would be in danger of extinction. If so, the portion is significant. 76 Fed. Reg. at 76,994.

The new policy is years in the making and follows a process through which the agencies received approximately 42,000 comments. Some in the regulated community have voiced concerns about a more expansive policy leading to more listings. No reported federal court decision has yet addressed the new policy.

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**Changes to rules for incidental take statements**

FWS and NMFS also recently published a final rule clarifying in several respects the instances under which the agencies will issue an incidental take statement (ITS) and the conditions that they may impose in an ITS. See 80 Fed. Reg. 26,832 (May 11, 2015). Under the ESA, action agencies such as the U.S. Forest Service or Bureau of Land Management consult formally or informally with FWS or NMFS. In formal consultation, FWS or NMFS issues what is known as a biological opinion analyzing the effects of an agency's action on a listed species. An ITS is an element of a biological opinion. Its purpose is to allow "take" of a listed species where the take is incidental to, and not the purpose of, the federal agency action and will not jeopardize the continued existence of the species or adversely modify its critical habitat. The regulations previously stated that an ITS was appropriate to address situations where take "may occur." The new rule restricts this further to situations where "take is *reasonably certain* to occur."

Under the rule, ITSs will not be issued in conjunction with section 7 consultations of "framework programmatic actions" that themselves will not cause take. An example of a "framework programmatic action" is the U.S. Army Corps of Engineers' issuance of nationwide permits under section 404 of the Clean Water Act. The rule clarifies that the appropriate time for an ITS to be issued is when the agency prepares to undertake a particular action pursuant to the programmatic framework that is reasonably certain to result in take.

This curtailment of ITSs is the result of court rulings, most notably *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001). In *Arizona Cattle Growers*, the Ninth Circuit overturned an ITS that was issued without any finding that the listed species even existed in the area that would be affected by the federal action; thus, there was no basis for concluding that take would occur.

The new rule also clarifies when FWS and NMFS may use "surrogates" in ITSs. A surrogate is a measurable impact to a "similarly-affected species or habitat or ecological conditions" that is used when FWS or NMFS is unable to measure an impact to a specific number of individuals of a listed species. The rule provides that a surrogate may be used only when the ITS articulates: (i) the "causal link" between the surrogate and the take, (ii) why impact to a number of individuals of the listed species cannot be specified or monitored, and (iii) a clear trigger for when the acceptable level of anticipated take has occurred and further consultation is necessary. The new rule on surrogates is the result of another ruling of the Ninth Circuit, *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031 (2007), which invalidated use of a surrogate when there was no finding by the agency that a limit on a specific number of the listed species could not be used and where the trigger for further consultation was vague.

Practitioners would be wise to familiarize themselves with this new policy and rule, which may be at issue in cases within the Ninth Circuit or elsewhere in the coming years.

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# Wetland mitigation banking: An innovative practice grows to a major industry and provides an additional land revenue option

**Eric T. Olsen**

*Eric T. Olsen is a shareholder at Hopping Green & Sams, where he practices in the fields of wetlands regulation, wetlands mitigation banking, and conservation banking. He has worked on establishing and operating many mitigation banks both in and outside Florida including resolving issues related to site protection instruments, financial assurances, credit award and use, and mitigation bank compliance.*

Conducting land development activities resulting in discharges of fill material to wetlands and other surface waters considered "Waters of the United States" requires a section 404 Clean Water Act permit. One requirement to obtain this permit is to provide compensatory mitigation to offset unavoidable impacts. Starting in the mid-1990s, the means of providing required compensatory mitigation evolved. Whereas before the 404 permit applicant would provide mitigation either on-site or in close proximity to the impact, beginning in the mid-1990s the focus changed to allowing third parties to provide the mitigation through an offsite mitigation bank with watershed scale benefits. Mitigation banks are now the preferred form of compensatory mitigation.

### What is a mitigation bank?

A mitigation bank is a site, or suite of sites, where resources are voluntarily restored, established, enhanced, or preserved to provide compensatory mitigation for impacts authorized by 404 permits.

### How are mitigation banks established?

The U.S Army Corps of Engineers (Corps) wetland mitigation rules set forth the process to establish, operate, and use mitigation banks. *See* 33 C.F.R. § 332. The entity proposing the mitigation bank is called a "bank sponsor." The bank sponsor can be a landowner or an entity working with a landowner.

In summary, to establish a mitigation bank, the sponsor develops a mitigation plan, includes that plan in a formal proposal to the Corps called a "prospectus," and then awaits the Corps' determination as to whether the proposed mitigation bank can potentially provide appropriate compensatory mitigation. If the Corps so determines, the sponsor then prepares a mitigation banking instrument and submits it to the Corps. The Corps reviews the mitigation banking instrument with assistance from the U.S. Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service and occasionally the National Marine Fisheries Service and National Resource Conservation Service. If these agencies approve the mitigation banking instrument, they sign it along with the sponsor and the mitigation bank is created.

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### What do they sell?

Like any enterprise, mitigation banks market a product or service and in this case the product is credits and the service is compensatory mitigation and transfer of liability for mitigation compliance. Credits are units of aquatic resource function and, as compensatory mitigation, they replace the units of aquatic resource function authorized to be lost as unavoidable impacts in the 404 permit. Credits are released for use over time according to a credit release schedule contained in the mitigation banking instrument. The instrument also has a ledger to track credit usage and remaining balance.

The geographic marketplace in which the credits can be sold and used is determined by a mitigation service area set forth in the mitigation bank instrument. The mitigation service area size is usually set by reference to the watershed, ecoregion, physiographic province, or U.S. Geologic Survey hydrologic unit code. While the use of the mitigation bank's credits is regulated by the Corps, the price is not. Price is determined solely by the bank sponsor and marketplace.

### What is the size of this industry?

With the rise of the mitigation banking practice, the number of mitigation banks in the United States has grown exponentially. According to EPA, in 1992 there were only 46 authorized mitigation banks. In 2001, the Environmental Law Institute determined that there were 219 authorized mitigation banks. A 2005 Corps Institute for Water Resources inventory estimated 450 approved mitigation banks. An EPA inventory in August 2013 of the Corps Regulatory In-lieu fee and Bank Information Tracking System (RIBITS) database indicated over 1,800 approved mitigation banks with many more in the review process. A review of RIBITS in June 2015 indicates over 2,000 mitigation banks approved or undergoing review.

Sponsors are not required to disclose to the Corps credit sales prices so the Corps does not maintain this data. However, a private ecosystem marketplace entity estimates the total yearly credit sales volume in the United States to be $1.3–2.2 billion.

The mitigation banking industry is substantial enough to organize itself into a national trade association—the National Mitigation Banking Association—which advocates for the acceptance and use of mitigation banks.

### What are the risks?

Mitigation banking comes with risks. For example, there is no guarantee the agencies will approve a mitigation bank instrument. One sponsor, frustrated by a Corps denial of its bank instrument, sued, claiming a taking. The U.S. Court of Appeals for the Federal Circuit, however, ruled that no taking occurred because no Fifth Amendment property right exists in a mitigation bank instrument. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326 (Fed. Cir. 2012) cert. den., 132 S. Ct. 2780, 183 L. Ed. 2d 640, 2012 U.S. LEXIS 4595 (U.S. 2012).

There is also no guarantee credits will sell or sell at the desired price. Credit demand and price depends upon general land development in the mitigation service area, sponsor credit marketing, and competition from other banks or compensatory mitigation opportunities.

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### What are the opportunities?

Even considering the risks, the growth of this industry demonstrates that good prospects exist to establish mitigation banks. Mitigation banks are best suited for land that can be preserved and ecologically enhanced or restored. Mitigation banking can be useful for properties that lack other marketable land use options due to significant wetland presence. Landowners may wish to consider establishing a mitigation bank if their land has the potential for ecological enhancement and the landowner's goal is to preserve land from development while still generating income.

## Ukraine's energy crisis may invite hydraulic fracturing and regulatory uncertainty

**Viktoriia De Las Casas**

*Viktoriia De Las Casas is a fellow at the Center for Biological Diversity in Washington, D.C. She earned her first law degree in Ukraine, where she practiced real estate law, and subsequently obtained her J.D. from the University of Richmond, T.C. Williams School of Law.*

Since 2014, Ukraine has been in turmoil. An ouster of the Ukrainian president, disputes over Ukraine's natural gas payments debt to Russia, and the annexation of Crimea, among other events, have culminated in a severe energy crisis in the country.

Traditionally, Ukraine has been a significant consumer and vital transporter of natural gas produced in Russia. Ukraine provides Russia with access to the European gas markets through an extensive network of Ukrainian pipelines, guaranteeing Ukraine a continuous supply of natural gas at discounted prices. Russian gas satisfies 40 percent of Ukrainian energy demand.

### A domestic energy crisis leads to natural gas reform

Recently, Russian threats to shut off Ukraine's natural gas supply and increase gas prices, combined with a drastic reduction in coal production in Ukraine (production declined 22.4 percent in 2014), has led to energy market instability. Ukraine has been forced to supplement its natural gas supply with product purchased from Europe. To satisfy domestic energy needs, Ukraine has begun taking major steps to reform its energy sector by reducing its energy dependence on Russian gas and seeking alternative energy sources.

In 2011, Ukraine pledged to reform its energy laws and officially joined the Energy Community, an international policy organization that works to extend the European Union's energy market to South Eastern Europe and the Black Sea region. As one element in this strategy, in April 2015 Ukraine

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adopted its Natural Gas Market Law. This statute is designed to conform Ukraine's natural gas pipeline infrastructure to the Energy Community standards. (Author's note: The Natural Gas Market Law is currently available only in Ukrainian.)

The main purpose of the Natural Gas Market Law is to create a more efficient and competitive environment in the natural gas market. For example, it provides for nondiscriminatory access to gas infrastructure, in conformity with Ukraine's commitments as a member of the Energy Community. Under the law, customers will be able to independently choose a gas supplier. Currently, a state-owned company known as "Naftogaz" extracts Ukrainian natural gas and through its subsidiaries also controls natural gas transmission and distribution. The new law separates Naftogaz's production and distribution activities from the transmission of natural gas. Specifically, the law provides two models for unbundling the exclusive control that Naftogaz enjoys: the Ownership Unbundling model (control of transmission is separated from distribution and production) and the Independent System Operator model (independent operators manage a transmission network owned by other companies). Ukraine has to select which model it will follow by the end of 2015. Additionally, Ukraine is working to approve a new "Energy Strategy" designed to expand alternative energy sources and increase environmental protection.

### Shale gas potential and hydraulic fracturing

Against this backdrop, industry is showing a strong interest in Ukrainian shale gas. According to the U.S. Energy Information Administration, Ukraine has Europe's third-largest shale gas reserves at 128 trillion cubic feet. Since 2011, approximately 22 domestic and foreign-owned companies have been engaged in hydraulic fracturing in Ukraine.

But this growing industrial presence is bedeviled by a host of obstacles. At least one company has backed out of a deal to extract shale gas in Eastern Ukraine due to the threat of military action in that area. Yet setting aside this currently unstable climate, there are many other challenges to hydraulic fracturing in Ukraine.

### Challenges to hydraulic fracturing

First, Ukraine lacks a regulatory regime for hydraulic fracturing, and it is hard to predict its official position on the issue. Certain EU countries oppose hydraulic fracturing; for example, France has banned the practice. As Ukraine changes its laws to meet the Energy Community standards, it may decide to adopt the antipathy toward hydraulic fracturing that is prevalent in the European Union.

Importantly, regulation of natural resources in Ukraine differs significantly from the approach used in the United States. In Ukraine, natural resources belong to the people with the government acting as a trustee. To extract natural gas, a private investor must execute a production-sharing agreement with the government. But no investor is entitled to 100 percent of its production. The investor is allocated only a share of it and the state receives the rest.

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Another challenge to hydraulic fracturing in Ukraine is uncertainty about the extent of public objections. Preoccupation with the military activity in the eastern regions of the country could minimize citizen opposition to hydraulic fracturing. That said, more people in Ukraine than in the United States live in proximity to well locations. They are thus more susceptible to potential negative effects of hydraulic fracturing and to opposing the practice.

Finally, there is no guarantee that hydraulic fracturing will result in less expensive prices for natural gas than those that currently prevail on the market. Studies have shown that shale gas reserves in Poland that are similarly situated to Ukrainian reserves—which are located much deeper in the ground than those occurring in the United States—are more expensive to extract than their American counterparts.

**Doing business in Ukraine**

Before consulting clients seeking to engage in the natural gas sector in Ukraine, one must thoroughly understand the complexities of Ukraine's longstanding bureaucracy, unfamiliar legal system, and unstable political climate. Reforms designed to achieve greater energy independence are underway and promise to offer a measure of regulatory stability. However, the process of fully implementing these changes will take time.

# 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.*

### Supreme Court

***Michigan v. EPA, 135 S. Ct. 2699 (2015).***

The Clean Air Act requires EPA to determine whether regulation of hazardous air pollutants from power plants was "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). EPA found power plant regulation "appropriate" because the plants' emissions pose risks to public health and the environment and because controls capable of reducing these emissions were available. It found regulation "necessary" because the imposition of other Clean Air Act requirements did not eliminate those risks. EPA declined to consider cost when it issued the rule regulating the emission of mercury at power generating plants. It estimated, however, that the cost of its regulation would be $9.6 billion a year but the benefits would be $4 to $6 million a year. Petitioners (including 23 states) sought review of EPA's rule in the D.C. Circuit, which upheld the regulations. The Supreme Court reversed. The Court held that EPA unreasonably interpreted the Clean Air Act when it set limits on such emissions from power plants without first considering the costs to industry. Justice Scalia's opinion for the Court concludes that the phrase "appropri-

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ate and necessary" plainly encompasses cost and that EPA must consider cost, including cost of compliance, before deciding whether regulation is appropriate and necessary. Justice Kagan's dissent opines that EPA reasonably decided to trigger the regulatory process given that costs were taken into account in multiple ways when setting the emission limits.

***Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2015).**
The Supreme Court held that the Fifth Amendment's takings clause requires the government to pay compensation for takings of personal property. It ruled in favor of raisin producers who challenged a government program requiring a percentage of each grower's crop to be physically set aside in certain years free of charge "for the account of" the government. The government makes use of those raisins by selling them in noncompetitive markets or disposing of them, with any net profits distributed back to the raisin growers. The government fined the Horne family for its refusal to set aside any raisins for the government and the Hornes challenged the government's actions in federal court, arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment. "The government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home," Chief Justice Roberts wrote for the majority. The principle goes back to the Magna Carta, which protected agricultural crops from uncompensated takings, the opinion for the Court states. The fact that the growers are entitled to the net proceeds of the raisin sales does not mean that there has been no physical taking. On remand, the just compensation due is the market value of the property at the time of the taking and the Hornes should be relieved of the obligation to pay the fine.

### Constitutional law

***Charles Hill v. Sec. and Exch. Comm'n*, 15-cv-1801, 2015 U.S. Dist. LEXIS 74822 (N.D. Ga. June 8, 2015).**
A federal district judge granted a preliminary injunction in an insider trading case based on its finding that the U.S. Securities and Exchange Commission's (SEC's) use of an administrative judge to hear the case is likely unconstitutional. The Dodd-Frank Act allows the SEC to seek penalties in certain cases before one of its administrative judges, rather than in a civil case in federal district court where individuals can invoke their right to a jury trial. The district court found that an administrative judge is likely an "officer" of the federal government under the Appointments Clause of Article II, Section 2 of the Constitution and therefore must be appointed by the president or the head of the department or a federal court. Because the SEC administrative law judge in the instant case was not appointed by the president, the SEC commissioners or the judiciary, the court found that his appointment was likely unconstitutional. This decision has implication beyond the SEC. If EPA administrative law judges qualify as "officers" under the Constitution, then the same question posed in the *Hill* case is presented.

### Air quality

***Westar Energy Inc. v. EPA*, Nos. 11-1333, 12-1019, 2015 WL 4067382 (D.C. Cir. May 26, 2015) (not designated for publication in Federal Reporter).**
The D.C. Circuit dismissed a suit challenging EPA's rejection of the Kansas "good neighbor" state implementation plan (SIP) to curb interstate air pollution that the agency replaced with its Cross-State Air Pollution Rule (CSAPR). The court's decision concluded that "EPA acted well within the bounds of its delegated authority when it disapproved of Kansas's proposed SIP" in 2011 and then immediately

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imposed its CSAPR air trading program on Kansas and 27 other states. The court rejected Kansas's argument that its analysis of interstate emissions to justify its SIP was due deference, noting that EPA provided guidance for states on how to craft good neighbor SIPs prior to creating CSAPR and that the "discussion of interstate transport in Kansas's SIP was only one page long and failed to provide any analysis at all of the downwind effect of its in-state emissions."

***Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544 (D.C. Cir. 2015).**
The D.C. Circuit rejected industry challenges to EPA's regulation of hazardous air pollutants emitted from polyvinyl chloride (PVC) manufacturing. The court found that EPA reasonably decided not to subcategorize process vents on the basis of emissions control technology used by PVC manufacturers and rejected challenges to the monitoring requirements for pressure relief valves. An industry request for a stay of emission limits for process wastewater treatment systems was denied, even though EPA had agreed to reassess the limits and did not oppose a stay pending reconsideration. The court reasoned that EPA's consent is not alone a sufficient basis to stay or vacate a rule and petitioners failed to show irreparable harm. The court held that other issues raised in the briefs were time barred because they were not raised during the notice-and-comment period but were instead raised in petitions for administrative reconsideration of the final rule that EPA has neither denied nor completed evaluating. The court also found that EPA had not unreasonably delayed its reconsideration of its rule during a four-year period, finding that the delay did not constitute a "functional denial" of the petitions for reconsideration.

### Water quality

***Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015).**
The Fifth Circuit vacated and remanded a district court decision ordering EPA to determine whether new water quality standards were necessary to control nitrogen and phosphorus in the Mississippi River and the northern Gulf of Mexico. EPA denied a petition by environmental groups to make such a necessity determination under section 303(c)(4) of the Clean Water Act. The Fifth Circuit relied on the Supreme Court's decision in *Massachusetts v. EPA* that EPA may avoid making a threshold determination "if it provides some reasonable explanation as to why it cannot or will not exercise its discretion." The court thus held that EPA may decline to make a necessity determination under section 303(c)(4) of the Clean Water Act if it provides an adequate explanation grounded in the statute. On remand, the district court must determine whether EPA's explanation was adequate.

***Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34 (D.C. Cir. 2015).**
The D.C. Circuit dismissed a suit by the National Association of Home Builders (Home Builders) challenging a preliminary, internal determination by EPA and the Army Corps of Engineers that two stretches of the Santa Cruz River in southern Arizona are traditional navigable waters. The Home Builders contended that the agencies' navigability determination has caused harm by making it more likely that they will need Clean Water Act permits to discharge on their land. The D.C. Circuit had addressed the basic controversy in *National Association of Home Builders v. EPA*, 667 F.3d 6 (D.C. Cir. 2011) (*Home Builders I*), which held that there is no standing until a jurisdictional determination is applied to particular property. Based on collateral estoppel or issue preclusion, the D.C. Circuit concluded that it is bound by the conclusion in *Home Builders I* that plaintiffs lack standing. Two members of the panel, however, filed a concurring opinion to express the conclusion that Home Builders I was

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incorrectly decided and "is so much out of step with our case law it should not have continuing jurisprudential significance." The law is rather clear, states the concurrence: "any party covered by an agency's regulatory action has standing to challenge a rule when it issues—it certainly need not wait until a government agency seeks to enforce a rule." An affected party should be able to establish standing upon the government's issuance a jurisdictional determination.

***Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015).**
The 10th Circuit rejected claims that the Army Corps of Engineers violated the National Environmental Policy Act (NEPA) by issuing its nationwide permit No. 12 for utility line projects without considering oil spill risks and cumulative effects of pipelines on the environment. TransCanada Corporation had relied on the permit to build a pipeline intended as a segment of the Keystone XL pipeline and the circuit court held that environmental groups did not raise their NEPA concerns during the public comment period for the nationwide permit and thus those claims were waived. Rejecting Clean Water Act claims, the court ruled that environmental groups failed to show that the permit authorizes activities with more than minimal impacts. The concurring opinion, however, expressed concern that the Corps improperly limited its NEPA analysis to impacts within jurisdictional waters resulting from the discharge of dredge and fill material.

**Waters of the United States**
On May 27, 2015, EPA published its final rule defining "waters of the U.S." which is intended to clarify which farming, development, and other practices are subjected to regulation. The regulation is available in its final published form at 80 Fed. Reg. 37,054 (June 29, 2015), attempts to define waters subject to the Clean Water Act as those with a "significant nexus" with "navigable waters." Some representatives in Congress are concerned that the rule could halt virtually all development near water and cover streams with limited flow. The House version of the energy and water spending bill, meanwhile, includes language blocking the rule. Litigation challenging the rule has already commenced.

**Environmental justice**

***El Comite Para el Bienestar De Earlimart v. EPA*, 786 F.3d 688 (9th Cir. 2015).**
The Ninth Circuit upheld EPA's approval of a California Clean Air Act implementation plan to reduce volatile organic compound emissions from the application of pesticides. The plaintiffs alleged that EPA failed to obtain necessary assurances from California that the plan would not violate Title VI of the Civil Rights Act by disproportionately exposing Latino schoolchildren to pesticides. What "assurances" are "necessary" to comply with Title VI is left to EPA's discretion, the opinion states. EPA acted reasonably in concluding that the plan was in compliance with the Civil Rights Act, the court held, noting that EPA had conducted its own investigation and California had submitted proof of its compliance with an earlier settlement. The court also rejected claims that EPA failed to adopt enforceable regulations for reducing emissions.

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### RCRA

***Carbon Sequestration Council v. EPA, 787 F.3d 1129 (D.C. Cir. 2015).***
Under the Underground Injection Control program, Class VI wells are designated to receive carbon dioxide (CO2) streams generated as part of a climate change mitigation program known as "carbon capture and storage" (CCS). In 2014, EPA issued a final rule concluding that supercritical CO2 injected into Class VI underground wells for purposes of geologic sequestration is "solid waste" within the meaning of Resource Conservation and Recovery Act (RCRA) and constitutes "discarded material" even though they could, theoretically, be extracted and reused in the future. The regulation allows companies injecting CO2 injection into a permitted Class VI well to obtain a waiver from complying with RCRA Subtitle C waste management requirements. The Carbon Sequestration Council, the Southern Company, and the American Petroleum Institute sought review of EPA's solid waste determination. The D.C. Circuit held that the petitioners lacked standing to challenge these rules and thus did not decide the merits of EPA's determination that CO2 injected for CCS activities is a "solid waste" under RCRA. The court noted that the petitioners are not yet using Class VI wells for sequestration and concluded that the companies can only show "speculative concerns" over the rule's potential impact. Concern that EPA's 2014 rule will cause the industry to change its business practices in anticipation of likely future regulation over enhanced oil recovery is not enough, the court held, to demonstrate injury sufficient to meet the standing requirements of Article III of the Constitution.

# Views from the Chair

**Pamela E. Barker**

*Pamela E. Barker of Milwaukee is chair of the ABA Section of Environment, Energy, and Resources.*

I am very excited to be assuming the chairmanship of the Section of Environment, Energy, and Resources. The Section has been an important part of my life for many years, and I look forward to working with many long-time friends and—I hope—many new ones in what should be a very interesting 12 months. I have talked to all outgoing and incoming committee chairs during the appointment process, and everyone is looking forward to the 2015–2016 ABA year.

### Focus on outreach

A major initiative that I am enthusiastic about continuing is the outreach program begun by Steve Miano during his year as chair. I am a state bar person—a former State Bar of Wisconsin president—and I want the Section to focus even more on reaching out to state and local bars. I also want to collaborate with colleges, universities, law schools, environmental groups—any organization that shares our interest in and commitment to environment, energy, and resources law. Working towards the same goals, we can do better things together. The outreach efforts should go beyond our borders as well. We will con-

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tinue to strengthen our ties with the National Environmental, Energy, and Resources Law Section in Canada and with the United Kingdom Environmental Law Association and support the World Justice Project.

I will need your help with these outreach efforts. I plan to hold a series of informal discussions with Section leaders to identify what special contacts we already have and which organizations might become new partners with us. Please consider how we can collaborate with other groups in which you are active and share those ideas with me or any other Section officer.

**New ideas**

I want all of us throughout the Section to work together to generate ideas. I hope to make our Council meetings forums for exchanging ideas and brainstorming rather than encouraging mere recitations of reports. (Of course, committee chairs will still have to write those reports and Council members will still have to read them.) When the Council meets we should use our time to share ideas on making our Section even better and discuss how to meet the challenges our Section might encounter this year. The same holds true for the meetings and conference calls of our committees and publication boards.

**Content and communications**

Much is going to be unfolding in the coming months in the areas of content and communications. Last year we undertook an in-depth study of what we want the future of our Section publications to be. Now we will start implementing the study's recommendations, while at the same time adapting to a new business climate in publishing.

Also, many of you have heard of ABA's content convergence initiative, to which we are firmly committed. We will be engaging a strategy where the topics themselves are the focus—not the means by which the related content is distributed. Concentrating on the major themes affecting our practice area, we will build relevant, cutting-edge content and then disseminate the content through conference sessions, articles, books, webinars, podcasts, or the like.

The ways in which we communicate are continually changing, as are the ways in which we receive and exchange information. We have to keep up with the times and use all media—new and old, print and electronic—as well as we possibly can. This means that we have to systematically and continually reexamine how these communications responsibilities are structured and assigned, both within substantive committees and throughout the Section. The growing importance of social media creates a host of opportunities for younger lawyers—who actually know how to use it—to take on leadership roles.

**Insightful programming**

It's going to be an exciting year for programming. Our 23rd Fall Conference will be held in Chicago in late October with an excellent schedule of speakers and great social events planned. Our 45th Spring Conference and 34th Water Law Conference will be collocated in Austin, Texas, at the end of March. Austin was such a popular site for our 20th Fall Conference that we decided to return next spring with two of our premier programs.

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Of course, the Section will continue to offer teleconferences and webinars throughout the year on the most current hot topics. And the substantive committees will also provide opportunities to keep up-to-date in your areas of interest through committee calls.

**Get involved!**

Like any organization, the more you put into the Section the more you will get out of it. Whether it's referrals, identifying an expert, meeting with different agency folks, or simply enjoying friendships and conversations, the more you come to our conferences, participate in our committees, or write for our publications, the more you will take away. We can do much more as a group than we can individually. The new ABA year is just starting, and it's a perfect time to get involved! I want to develop new friendships this year so please call or e-mail me—I've got a place for you!

# My kind of town, Chicago is….The 23rd Fall Conference

**Scott J. Sachs**

*Scott J. Sachs is a senior counsel in Atkinson, Andelson, Loya, Ruud and Romo's Cerritos, California, office. He is the program chair of ABA's Section of Environment, Energy, and Resources' 23rd Fall Conference.*

If your work is concerned with policy, transactions, or trials you will want to join your colleagues for the Section of Environment, Energy and Resources' 23rd Fall Conference, October 28–31, 2015, at the Swissotel Chicago. For the first time, the Windy City will be our venue for the Fall Conference—home to the Cubs and Sox, the Art Institute, and the Magnificent Mile! Whether you are attending the entire conference—or just one day—you will not want to miss the practical learning and networking experiences featuring several senior-level U.S. Department of the Interior, U.S. Environmental Protection Agency, and U.S. Department of Justice officials, as well as top transactional and trial lawyers.

**Conference kickoff**

The conference kicks off on Wednesday morning with an enriching public service project at a local elementary school that will include a Q&A session on environmental issues with the students. Plan to arrive early to participate!

That afternoon, programming begins with "Getting Your Foot in the Door: How to Get Hired by In-House Counsel," featuring an engaging panel sharing insights on what in-house counsel look for in their lawyers. Consultants and in-house and outside counsel will cover the do's and don'ts of marketing to

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potential clients, as well as strategies for keeping clients once you have won their business. The panel will highlight their points with a role-play by lawyers making pitches for new business to counsel from a hypothetical corporation.

### CLE and more!

Thursday's and Friday's plenary sessions will focus on legislative priorities for the next few years and emerging issues for what may become tomorrow's Supreme Court cases. Breakout session topics include:

- Developments under the primary environmental statutes: the Clean Air and Clean Water Acts, CERCLA, and RCRA;
- Issues involving our nation's water resources that are affected through runoff;
- What lawyers need to know when advising multinational corporations;
- Our nation's largest freshwater system on Earth and the challenges of protecting and governing one-fifth of the world's water supply;
- Trends in regulatory and citizen suits for agricultural operations; and
- Environmental risk transfers in M&A and issues affecting the oil, gas, and transportation sectors.

A conference highlight will be a live litigation deconstruction as lawyers argue before a judge for the U.S. District Court for the Northern District of Illinois, the Honorable Virginia M. Kendall. If you have enjoyed the "Titans" sessions at past Fall Conferences, you won't want to miss this one!

The conference would not be complete without a session on today's ethical issues facing lawyers on the move. A panel will discuss potential ethical snares when moving between firms or between the public and private sectors and how to navigate around them.

In addition to the above CLE sessions, there will be further opportunities to learn at Friday's Technical Roundtables. Over lunch, roundtable presentations will be offered on air monitoring, ESA compliance, underground injection, and the new CCR Rule.

### Get to know your colleagues—and Chicago

We hope that you will join your colleagues at:

- Thursday night's social event at the Museum of Science and Industry, featuring 35,000 artifacts and many hands-on exhibits to remind us that science surrounds us. The evening will provide fun, food, and informal networking. It will also serve as our Halloween celebration, so pack your costume!
- Taste of SEER dutch-treat dinners at local restaurants on Friday night; and
- Receptions on Wednesday, Friday, and Saturday evenings.

You will also have networking opportunities throughout the conference, including

- A Speed Networking session, and
- Coffee breaks between CLE sessions.

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**Plan to attend!**
The Fall Conference is the premier forum for keeping abreast of legal developments in environmental, energy, and resource law; networking with your colleagues; and meeting government, industry, and private practice leaders. You won't want to miss this unique opportunity! Up-to-the-minute conference information can be found at www.shopABA.org/environfall. We look forward to seeing you in the Windy City in October.

# 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.*

**Jeffery S. (Jeff) Dennis** has joined Akin Gump Strauss Hauer & Feld LLP as senior counsel in the firm's Washington, D.C., office. Dennis was the former Director, Division of Policy Development at the Federal Energy Commission (FERC). He was also previously a legal advisor to Commissioner John R. Norris and an appellate lawyer at FERC. Dennis is the Section's publications officer and was the Section's budget officer from 2013–2015.

**Randy Hill** has been named the Deputy Assistant Administrator, Office of International and Tribal Affairs at the U.S. Environmental Protection Agency. Hill has 28 years' experience with EPA and was most recently a judge on the EPA's Environmental Appeals Board. He is the chair of the Section's Book Publishing Board.

**Andrew Schatz** recently became the legal advisor to the Ecosystem Finance Division of Conservation International (CI) in Arlington, Virginia. Schatz advises CI on projects and matters relating to international ecosystem preservation and climate change. He was formerly with DLA Piper in its Baltimore office. Schatz is a former co-chair of the Section's International Environmental and Resources Law Committee.

**Floyd R. Self** has recently joined Berger Singerman LLP, in Tallahassee, Florida, as a partner in the firm's Government and Regulatory Team. Self is board certified by the Florida Bar as a State and Federal Government and Administrative Practice Lawyer. He is the president-elect of the Southern Chapter of the Energy Bar Association.

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**Deborah Tellier** is venturing into work as a philanthropic and legal advisor in Lafayette, California. Tellier has retired from private law practice as a partner at Farella, Braun + Martel in San Francisco. She continues to advise clients on formation, operational, grantmaking, and governance issues for non-profit organizations. Tellier is a Section Council member. She is also a member of the board of directors of the Environmental Law Institute.

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