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Divided court rejects EPA regulation limiting hazardous emissions from power plants

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In *Michigan v. EPA*, 135 S. Ct. 2699 (June 29, 2015), the Supreme Court concluded that the Environmental Protection Agency (EPA) interpreted the Clean Air Act unreasonably when it deemed cost irrelevant to its threshold decision to regulate toxic emissions from power plants under the statute's hazardous air pollutant provision. Although the statute explicitly requires EPA to consider cost when setting control standards for specific emitters of hazardous air pollutants, the majority faulted EPA for not factoring cost into its *initial* determination that power plants should be regulated at all. In essence, the issue came down to timing, which might seem trivial but for the decision's potential implications for the *Chevron* deference doctrine.

National Emission Standards for Hazardous Air Pollutants (NESHAPs)

Clean Air Act section 112 directs EPA to set standards to reduce hazardous pollutant emissions from stationary sources (i.e., nonmobile facilities such as power plants and refineries) that meet the statute's triggering criteria. In most cases, the quantity of a facility's emissions determines whether it is subject to these controls: a stationary source producing 10 tons per year of a single pollutant or 25 tons per year of hazardous air pollutants in combination is deemed a "major" source subject to regulation.

Fossil-fuel-fired power plants are assessed differently. Congress anticipated that power plant compliance with regulations mandated by other sections of the act (such as for acid rain) could significantly reduce their hazardous air pollutant emissions. Congress therefore required EPA to evaluate the residual risk from power plant emissions before deciding to regulate power plants directly under section 112. Accordingly, section 112(n)(1)(A) directs EPA to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions" from power plants after imposition of other Clean Air Act regulations.

EPA rulemakings

The statute commands that EPA regulate power plants under section 112 "if the Administrator finds such regulation is appropriate and necessary after considering the results of the study . . . ." In 2000, EPA found the regulation of coal- and oil-fired power plants to be "appropriate and

necessary" based on the statutorily mandated study of public health hazards.

This initial finding, which did not incorporate cost considerations, triggered EPA's duty under section 112(d)(2) to promulgate standards that are achievable "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements . . . ." In the process of subsequently developing these standards, EPA specifically analyzed the standards' costs. In 2012, EPA issued its Mercury and Air Toxics Standards (MATS) for power plants and reaffirmed its earlier "appropriate and necessary" finding. EPA found that health and environmental risks and the availability of hazardous emission control measures rendered regulation "appropriate." Because other Clean Air Act programs did not eliminate the risks from these emissions, EPA also found regulation under section 112 to be "necessary."

Justice Scalia's *Chevron* analysis

After the D.C. Circuit upheld the standards in *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (2014), the Supreme Court reviewed EPA's interpretation of "appropriate and necessary" under the standard established in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *Chevron* directs courts to accept an agency's reasonable interpretation of ambiguous language within a statute it administers. Writing for the majority, Justice Scalia found that EPA unreasonably concluded that that its appropriate and necessary finding need not include consideration of cost. The majority referred to the word "appropriate" as "all-encompassing," treating it as an unambiguous command to consider cost. The majority dismissed EPA's comparison with cost-blind regulatory triggers for other sources, contending that unique power plant provisions rendered other cost-blind triggers irrelevant.

The decision clashes noticeably with Scalia's majority opinion in *Whitman v. American Trucking Associations*, 121 S. Ct. 903 (2000). That case rejected challengers' claim that EPA could consider cost in setting National Ambient Air Quality Standards under Clean Air Act section 109, stating: "We have . . . refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." As the Court explained in *Whitman*: "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."

The dissent

Justice Kagan's dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, argued that EPA need not "explicitly analyze costs" to find regulation "appropriate." The dissent reasoned that the act's other requirement—that costs be considered in standard-setting under section 112—would ensure cost-effective regulation, as would similar mandates in long-standing executive orders. The dissent also highlighted the practical difficulty of assessing costs abstractly before EPA had

developed any specific control requirements.

Implications for the future

The practical effect on emission controls may prove less important than the decision's ramifications for administrative law doctrine. Although EPA must now revisit its initial "appropriate and necessary" finding, the Court did not vacate the MATS rule. Rather, it remanded to the D.C. Circuit, which will likely merely remand to EPA. Revised findings are likely to rely on analysis developed since 2000. Given that many plants have already begun complying, the MATS rule has an air of inevitability about it.

The decision's impact on administrative law doctrine may be greater. Although *Chevron* requires judicial deference to reasonable agency interpretations of ambiguous statutory language, Justice Scalia's *Michigan* opinion was anything but deferential, despite purporting to apply *Chevron*. The opinion glossed over the directive in Clean Air Act section 12(n)(1)(A) to base the "appropriate and necessary" determination on the study "required by this subparagraph," which is solely a study of health hazards.

Other aspects of the decision contribute to the uncertainty. While not binding, ambiguous dicta describing costs as "any disadvantage" and narrowly construing benefits suggests hostility towards agency regulatory discretion. Justice Thomas' concurrence broadly questioned the legality of the *Chevron* doctrine under constitutional separation-of-powers principles. While his outlier view lacks sufficient support to signal imminent reversal, it does suggest that Supreme Court decisions will not soon clarify the proper application of *Chevron*.

The Third Circuit interprets "Total" Maximum Daily Loads

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In a unanimous decision, the Third Circuit Court of Appeals recently confirmed what many had taken for granted: that a Total Maximum Daily Load (TMDL) is not limited to simply the overall loading capacity, but can include what are known as wasteload and load allocations. The court further found that consideration of target dates and reasonable assurance in setting allocations was consistent with the Clean Water Act (CWA). *Am. Farm Bureau Fed'n. v. EPA*, 792 F.3d 281 (3d Cir. 2015). *AFBF v. EPA*, which originated in the Middle District of

Pennsylvania (*Am. Farm Bureau Fed'n v. EPA*, 984 F. Supp. 2d 289 (M.D. Pa. 2013)) is the latest in a line of cases determining what TMDLs are and what they can contain.

TMDLs' embattled history

Section 303(d) of the CWA requires a TMDL for each waterbody for which point source controls for any given pollutant (e.g., nutrients) are inadequate to meet water quality standards (e.g., drinking water, fish spawning, and migration). That statutory requirement was largely ignored, however, until the constructive submission lawsuits in the 1980s and 1990s (*see, e.g.*, *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984) and its progeny).

Once states were establishing TMDLs somewhat regularly, litigation moved on to the substance and effect of TMDLs, such as whether they were enforceable, whether they could be written for waters impaired only by nonpoint sources, and whether allocations had to be set in "daily" terms. In all of that litigation, the basic concept set out in the federal regulations (40 C.F.R. § 130.2)—that a TMDL is more than just the total loading capacity for the waterbody, but rather the sum of the wasteload allocations to point sources, such as wastewater treatment plants, and load allocations to nonpoint sources, such as agriculture—was never questioned. Until now.

Doing the *Chevron* two-step

Reaching the merits of the case after *sua sponte* analyzing jurisdiction and ripeness, the court conducted a thorough *Chevron* analysis. The court asked first whether Congress had spoken to the precise question at hand and, if not, whether the agency's interpretation of the statute was arbitrary, capricious, or manifestly contrary to the statute.

Step one

Under the first prong of the analysis, the court found that the word "total" in "TMDL" was ambiguous based on the structure of the CWA and the fact that appellants' argument would render the word "total" redundant, violating the principle of statutory construction that words should not be read to be meaningless. The court also found that the act was silent as to whether target dates and reasonable assurance could be considered when establishing a TMDL.

No exceptions

Before leaving step one, the court considered two "avoidance" canons of statutory interpretation: federalism (avoid interpreting a statute in a way that gives a federal agency authority to regulate something traditionally regulated by the states) and constitutionalism (avoid interpreting a statute in a way that pushes a constitutional boundary). On federalism, the court found that setting individual point source allocations and sector wide nonpoint source allocations did not intrude on states' land-use or zoning powers because the allocations are an

informational tool only and "the TMDL's provisions that could be read to affect land use are either explicitly allowed by federal law or too generalized to supplant state zoning powers in any extraordinary way." 792 F.3d at 302. On constitutionalism, the court found no concern because the Chesapeake Bay is plainly a channel of interstate commerce, as distinguished from the waterbodies at issue in *Rapanos v. United States*, 547 U.S. 715 (2006) and *Solid Waste Agency of N. Cook County. v. Army Corps of Engineers*, 531 U.S. 159 (2001).

Step two

Under the second prong of the *Chevron* analysis, the court conducted a lengthy analysis of the legislative history of the CWA and found that "Congress not only agreed to [the EPA's] definition of TMDL as the sum of load and waste load allocations, but also affirmatively incorporated the EPA's rule in an addition to the statute," *id.* at 308, and that EPA "has reasonably carried out Congress's directives in administering the TMDL section of the Clean Water Act," *id.* at 308. The court concluded that EPA's interpretation of "TMDL" to include wasteload and load allocations, and to consider target dates and reasonable assurance when setting those allocations, is "reasonable and reflects a legitimate policy choice by the agency in administering a less-than-clear statute" *Id.* at 309.

Implications

This decision has important implications for federal and state TMDL programs, both at the establishment and implementation stages.

Most significantly, the decision confirms that TMDLs can include wasteload and load allocations for, at least, the individual level for point sources and the source sector level for nonpoint sources. If the decision had limited TMDLs to the single overall loading capacity, it would have called into question thousands of existing TMDLs. It also would have made the job of a state employee trying to implement a TMDL extremely difficult. How would that overall loading capacity be parsed out so that it could be incorporated into an NPDES permit or an agricultural nutrient management plan?

The decision also confirms that a reasonable assurance analysis is critical to determining that water quality standards will be achieved, which is the purpose of a TMDL. Indeed, it implies that establishing a TMDL without reasonable assurance might be arbitrary and capricious.

Finally, the decision recognizes the cooperative federalism structure underlying the CWA and TMDLs, which gives joint responsibility to state and federal governments to restore and maintain the quality of the nation's waters.

Editor's Note: On September 18, 2015, the American Farm Bureau and other applicants in *American Farm Bureau Federation v. U.S. Environmental Protection Agency* sought an extension

of time from the U.S. Supreme Court to file a petition for a writ of certiorari.

Economic impacts in ESA critical habitat designations

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On July 7, 2015, the Ninth Circuit issued a published decision in *Building Industry Association of the Bay Area v. U.S. Department of Commerce*. The decision upholds the designation of more than 13,000 square miles (8.6 million acres) of critical habitat for the federally threatened green sturgeon. The decision holds that, under section 4(b)(2) of the Endangered Species Act (ESA), the National Marine Fisheries Service (NMFS) has discretion about how it considers the economic impacts of designating critical habitat. The court also ruled that subsequent NMFS decisions not to carve out certain areas from previous designations are unreviewable. Finally, the court confirmed the long-standing rule that environmental review is not required for critical habitat designations under the National Environmental Policy Act (NEPA). The decision will give federal agencies more leeway in making critical habitat decisions.

The green sturgeon

The green sturgeon, an anadromous, prehistoric-looking fish, is found in bays, estuaries, and coastal rivers along the western coast of North America. The fish can weigh up to 350 pounds and live as long as 70 years. The population that lives in the Sacramento Bay Delta in northern California is called the Southern distinct population segment. It has suffered significant declines due to dams, habitat loss, poaching and bycatch, runoff from farms, and invasive clams. As a result, in 2006, NMFS listed the Southern population segment as threatened under the ESA.

NMFS's critical habitat designation

In 2009, in the action underlying this case, NMFS designated 11,421 square miles of marine habitat, 897 square miles of estuary habitat, and hundreds of miles of riverine habitat in Washington, Oregon, and California as critical habitat for the Southern distinct population segment. "Critical habitat" includes those areas that are "essential" for the species' conservation. 16 U.S.C. § 1532(5).

The Building Industry Association of the Bay Area and the Bay Planning Coalition, represented by the Pacific Legal Foundation, sued. They argued that, in designating critical habitat for the green sturgeon, NMFS failed to use the right methodology for considering economic impacts, ignored economic impacts for certain conservation areas, and failed to conduct NEPA review.

"Taking into consideration the economic impact"

Section 4(b)(2) of the ESA requires that NMFS (and its sister agency, the Fish & Wildlife Service) "designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). NMFS "may exclude any area from critical habitat if [it] determines that the benefits of exclusion outweigh the benefits of specifying such area as part of critical habitat," unless doing so will cause the species to go extinct. *Id.*

The relationship between these two sentences formed the core of this case. The industry plaintiffs argued that the first sentence modified the second, such that NMFS had to evaluate whether the economic benefits of excluding an area from critical habitat designation outweighed the conservation benefits of including it. The district court and the Ninth Circuit disagreed, concluding instead that section 4(b)(2)'s two sentences were essentially separate mandates. That is, NMFS *had to* consider economic impacts when designating critical habitat (and had discretion about how to do that), "after" which NMFS *could* decide to exclude an area from designation so long as it concluded that the benefits of exclusion outweighed the benefits of inclusion. The Ninth Circuit held that "there is no specific methodology that an agency must employ when considering whether to exclude an area from critical habitat designation."

No judicial review, no NEPA review

Giving NMFS even more discretion, the Ninth Circuit also held that NMFS's decisions not to exclude areas from critical habitat designation under the "outweighing" provision of Section 4(b)(2) were unreviewable. The Administrative Procedure Act, the court explained, precludes judicial review of an agency action "committed to discretion by law." A decision regarding whether to exclude otherwise essential habitat, the court concluded, is a "discretionary process" with no standards for review. To fully understand this portion of the Ninth Circuit's decision, it is best to read a prior on-point decision by the same panel: *Bear Valley Mutual Water Company v. Jewell*.

The Ninth Circuit's final holding—that NEPA does not apply to critical habitat designations—builds on a long line of circuit precedent reasoning that the ESA displaced NEPA for such designations; no NEPA review is required for actions that do not alter the physical environment; and critical habitat designations protect the environment from harm.

The bottom line

Read most broadly, the Ninth Circuit's decision requires NMFS to consider economic impacts when deciding which areas constitute a species' critical habitat. However, taking economic impacts into consideration does not require that NMFS evaluate whether the environmental benefits of a critical habitat designation outweigh the economic impacts. And then, at some later point, NMFS may exclude certain areas based on a discretionary balancing test. In reality, NMFS is likely to consider economic impacts throughout its decisionmaking process, and courts in the Ninth Circuit will now give substantial deference to the agency's decisions about how to do that.

Moreover, when *Building Industry Association* and *Bear Valley* are read together, we see that specific decisions to exclude otherwise essential (and thus "critical") habitat may or may not be reviewable in court. While a (likely environmental) plaintiff may challenge NMFS's decision to exclude areas from critical habitat, a (likely industry) plaintiff may not challenge NMFS's decision *not to* exclude areas from critical habitat. Instead, industry plaintiffs are left with more general "arbitrary and capricious" challenges to NMFS's critical habitat designations.

BP agrees to settlement with the federal and state governments

Jesse Reiblich

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On July 2, 2015, British Petroleum (BP) announced that it had agreed in principle to settle the civil claims arising out of the Deepwater Horizon Gulf Oil Spill disaster. If the U.S. District Court for the Eastern District of Louisiana approves this settlement agreement, it will be the largest environmental settlement in U.S. history, as well as the largest settlement between the U.S. government and a single entity.

Background: The Deepwater Horizon Gulf Oil Spill

On April 20, 2010, an explosion aboard the Deepwater Horizon drilling rig in the Gulf of Mexico initiated what would become the largest accidental marine oil spill ever and one of the worst environmental disasters the world has ever seen. The explosion killed 11 people and injured 16 more. Between 2.5 and 4.9 million barrels (1 barrel = 42 U.S. gallons) of oil spilled

into the Gulf. In November 2012, BP pleaded guilty to criminal charges stemming from the event, including 11 counts of manslaughter, one count of felony obstruction of Congress, and violations of the Clean Water and Migratory Bird Treaty Acts.

The settlement

The historic settlement in principle between BP and federal and state governments is valued at over $18.7 billion. This total includes a $5.5 billion Clean Water Act penalty, $8.1 billion for natural resource damages, $5.9 billion to settle claims by state and local governments for economic damages, and $600 million for other claims. While a huge number, the settlement represents significant savings for BP. Before the parties finalized their agreement in principle, a U.S. district court found BP liable for gross negligence and willful misconduct. It also determined that, for the purposes of calculating civil fines under the Clean Water Act, BP was liable for 3.19 million barrels of oil that had been released into the Gulf. Each barrel of oil spilled carried a fine of up to $4,300—an elevated fine due to BP's gross negligence. By these figures, BP faced a total maximum fine of $13.7 billion just for its Clean Water Act violations. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's findings that BP was automatically liable for violations of the Clean Water Act as owner of the Deepwater Horizon oil rig. The U.S. Supreme Court denied BP's petition for writ of certiorari just days before the parties settled.

Past oil spills: Lawsuits and settlements

The size and extent of the Deepwater Horizon oil spill and the settlement in principle invites comparison to the Exxon Valdez oil spill 26 years ago, and others. In 1979, for example, a blowout occurred at the Ixtoc I Oil Well in the Gulf of Mexico's Bay of Campeche. The resulting spill gushed an estimated 3.5 million barrels of oil into the Gulf. Businesses, the U.S. government, and the state of Texas filed lawsuits for more than $360 million against Mexican companies Permargo and Pemex as well as the American company Sedco for their roles in the spill. Because of the spill's location and the actors involved, jurisdiction was a major hurdle to holding the Mexican companies liable. Furthermore, Permargo and Pemex largely avoided paying damages by raising sovereign immunity defenses under the Foreign Sovereign Immunities Act. However, Pemex spent an estimated $100 million cleaning up the spill. Sedco limited its liability under application of the Shipowners Limitation of Liability Act of 1851. The eventual settlements from these lawsuits only netted $4.14 million, around 1 percent of the damages claimed in the suits.

Ten years after the Ixtoc spill, on March 24, 1989, the Exxon Valdez oil tanker ran aground on Bligh Reef in Prince William Sound, Alaska. The tanker spilled approximately 11 million gallons of oil into the sound. Exxon settled civil claims related to this spill for $900 million, paid over ten years. The settlement included a reopener clause, which allowed the government to bring additional claims for further environmental damage after a ten-year period. A lawsuit

brought by fishermen who sustained economic damages because of the spill languished in court for many years. These lawsuits finally concluded in 2008 when the U.S. Supreme Court reduced the $2.5 billion punitive damages award to $507.5 million. The Ninth Circuit Court of Appeals ordered Exxon to pay an additional $470 million in interest in 2009.

The BP settlement in principle: The good and the bad

The good news is that the BP settlement provides funding to restore the Gulf. The settlement is also preferable to past failures to collect from companies liable for causing oil spills. For instance, the BP settlement contrasts with the U.S. government's inability to recover from the foreign companies responsible for the Ixtoc spill. Furthermore, while the BP settlement does not include a reopener clause like the Exxon Valdez settlement did, it does include a $232 million reserve to cover any further natural resource damages that are presently unknown. On the one hand, this reserve money is preferable to a reopener clause because it sets aside money for future environmental damage from the spill (the federal and state governments that filed a claim for $92 million under the Exxon Valdez reopener clause are still waiting for Exxon to pay). On the other hand, the lack of a reopener clause could result in BP avoiding financial liability for unforeseen costs to restore the Gulf.

For BP, the settlement represents a discount against what might have been a much higher price tag. BP had claimed that paying a hefty civil fine would lead to its financial ruin. But commentators note that the settlement lifts a proverbial weight off of BP's shoulders. Bolstering this claim is the fact that BP's stock went up several percentage points after news of the settlement broke. The settlement eliminates what had been a looming uncertainty about how much money BP will spend to clean up the spill.

Commentators have already pointed out that the structure of the settlement will likely work in BP's favor. For instance, BP would have 18 years to pay off the settlement amount. Furthermore, BP would pay lower than market interest rates while it pays for the settlement. These factors mean that by the time it finishes paying off the settlement, BP would most likely end up paying less than the 2015 value of $18.7 billion. Inflation will likely outstrip the interest rate. Finally, BP might be able to write off its payments toward the settlement—less the money it pays toward the Clean Water Act fines—in the form of tax breaks and other write-offs. Taken together, these tax breaks and other reductions could cause the settlement to have less of a deterrent effect on potential bad actors than the high price tag would otherwise suggest.

Conclusions and remaining questions

The efficacy of the settlement remains to be seen, but its record-setting amount represents a large step toward restoring the Gulf. One remaining issue is exactly how much of the settlement money will actually go to restoring the Gulf. Congress enacted the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act

(RESTORE Act) to ensure that 80 percent of the monies collected under the settlement go into a trust fund to restore and protect the Gulf region. Only time will tell whether the monies paid by BP under the settlement and funneled to Gulf restoration by the RESTORE Act will be sufficient to repair the damage caused by the oil spill, or whether the governments that were parties to the settlement will wish they had included a reopener clause or held out for more money.

Will a new approach fly? The FWS considers implementing an incidental take program under the Migratory Bird Treaty Act

Christopher Brooks

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On May 26, 2015, the Fish and Wildlife Service (FWS) announced that it will consider implementing a permit program to allow for the incidental take of bird species protected under the Migratory Bird Treaty Act (MBTA). In particular, FWS issued a Notice of Intent (NOI) to conduct a Programmatic Environmental Impact Statement (PEIS) to consider the impacts of a number of approaches to address the issue of incidental takes under the MBTA. An incidental take permitting program would impact a variety of industry sectors that currently face legal uncertainty under the act.

MBTA background

Almost 200 years ago, the United States negotiated a treaty with Great Britain (acting on behalf of Canada) for the protection of migratory birds. The United States passed the MBTA in 1918 to implement the treaty and later entered into three more migratory bird treaties with Mexico, Japan, and the USSR, each of which the United States implemented through MBTA amendments.

During the late 19th and early 20th centuries the predominant threat to migratory birds was unrestrained hunting and poaching. To address this issue, the MBTA imposes misdemeanor and felony criminal penalties for the unauthorized killing of protected species. Today the act protects over 1,000 bird species, from rare birds also protected under the Endangered Species Act (ESA) to common and abundant species such as crows and bluebirds.

The expanding scope of MBTA regulation

Prior to 1970, FWS enforcement of the MBTA focused on prosecuting those entities who specifically targeted migratory birds. Although the government originally applied the statute to

conduct directed at birds, such as hunting, there is no explicit limitation within the MBTA that limits liability only to intentional takes. Beginning in the 1970s, FWS expanded the scope of the act by enforcing against incidental takes of migratory birds (killings that occur incidentally to otherwise lawful activities).

Although FWS has prosecuted companies for incidental takes associated with industrial activities, the agency and the courts have declined to hold federal agencies liable for activities that modify habitat and may result in migratory bird deaths. The MBTA does not define the term "take," but FWS regulations implementing the act define "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt" to do any of those actions. Notably, and unlike the definition of the term "take" in the ESA, the definition does not include harm to habitat. As a result, and despite President Clinton's reference in a 2001 Executive Order to the need to protect migratory bird "habitats," courts have rejected claims that habitat modification or destruction can result in liability under the MBTA.

Federal circuits split on issue of incidental takes

The overall expansion of liability under the MBTA to include incidental takes resulting from industrial activity has resulted in a problematic and ongoing circuit split as to whether the MBTA imposes strict liability for incidental takes. Due in part to the fact that the misdemeanor provision does not include a *mens rea* element, some circuits now hold that the MBTA imposes strict liability for all misdemeanor violations. Thus, an energy company can be held strictly liable for a misdemeanor if a migratory bird is killed by the operation of an electricity generating facility.

Strict liability for incidental takes is limited only by a necessary finding of proximate cause to avoid "absurd" results such as being held liable for a bird flying into a car windshield. This proximate cause requirement rests on concepts of notice and foreseeability. In *United States v. Apollo Energies Inc.*, 611 F.3d 679 (10th Cir. 2010), FWS first warned the operator of an oil field that its facility could kill migratory birds before eventually prosecuting that defendant for failing to take steps to address the issue. The Tenth Circuit reasoned that because the defendant was on notice that its operations could result in MBTA violations, the defendant could be held liable for incidental takes.

Other circuits, however, do not follow *Apollo*. They have held instead that the misdemeanor provision applies only to intentional and direct takes of migratory birds. Most recently, on September 4 the Fifth Circuit reversed an MBTA conviction, noting that if the statute holds strictly liable all foreseeable acts or omissions that directly kill birds, "then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA." *United States. v. CITGO Petroleum Corp.*, -- F.3d --, No. 14–40128, 2015 WL 5201185, *14 (Sept. 4, 2015).

This latest decision only widens a problematic circuit split. The Second and Tenth Circuits read the text of the MBTA broadly to impose strict liability, while the Fifth, Eighth, and Ninth Circuits hold that liability only applies to deliberate acts specifically directed towards migratory birds. This split creates substantial confusion and legal uncertainty for FWS, regulated industries, and federal district courts.

Existing mechanisms to address incidental takes

Currently, FWS addresses the issue of incidental takes under the MBTA through a combination of enforcement discretion, voluntary guidelines for industries, and very narrow permitting categories that allow for incidental takes.

It has been longstanding practice for FWS to use its own discretion in determining when to enforce against industrial activities that violate the MBTA. As in *Apollo*, FWS typically notifies companies of potential violations and then allows a "grace period" to address the issue before choosing to prosecute. Companies that cooperate with the agency and take steps to mitigate against bird deaths may receive assurances from FWS that they will not be prosecuted. Nevertheless, such assurances do not provide complete certainty, as agency policies and administrations change over time. Moreover, enforcement discretion does nothing to further bird conservation efforts.

FWS also utilizes voluntary guidance documents to help potentially liable industries avoid impacting migratory birds. FWS does consider the extent to which a company adheres to these guidelines in deciding to exercise its enforcement discretion, but it does not completely absolve companies from liability. The current guidelines may help advance conservation efforts, but it remains unclear what exactly constitutes adherence to the guidelines. Ultimately, nothing prevents FWS from taking action against a company for incidental takings, even if the company attempts to follow the guidelines.

Finally, the MBTA allows for some purposeful taking of migratory birds through narrow categories of special use permits—principally for scientific, noncommercial activities. Congress has also authorized an incidental take program under the MBTA for military readiness exercises that could result in migratory bird deaths. These programs can help bird conservation efforts but are extremely limited in scope and fail to address the larger issue of incidental takes from industrial activities.

Considering a new approach to incidental takes

The existing mechanisms have proven ineffective at preventing bird deaths and provide very little legal certainty for industries. Currently, there is no clear mechanism for industry to ensure compliance with the MBTA. It is now apparent that the status quo does not adequately serve the regulated community or protect migratory birds.

In response, FWS is now considering implementation of a broader incidental take permitting program under the MBTA. The statute gives FWS, acting for the Secretary of the Interior, the authority to allow incidental takes without the need for congressional action. Section 704(a) states that "the Secretary . . . is authorized and directed, from time to time . . . to determine when, to what extent, if at all . . . it is compatible with the terms of the conventions to allow . . . taking . . . and to adopt suitable regulations permitting and governing the same." 16 U.S.C § 704(a).

The May 26 NOI represents the first step in a long process of implementing such a program. The PEIS will evaluate four different approaches to regulating incidental takes. Each one would require FWS to promulgate new regulations. FWS's decision to complete a PEIS may be evidence that the agency intends to combine some or all of the four approaches to regulate incidental takes by addressing a variety of circumstances.

The first approach would be to implement general conditional take authorizations for particular industry sectors, including oil, gas, and wastewater disposal pits; methane or other gas burner pipes; communication towers; and electric transmission and distribution lines. FWS will also consider expanding these categories to include take authorizations for wind energy generating facilities. Notably, the NOI makes no mention of the solar electricity generation sector.

The second proposed approach would establish individual permits for select projects and activities not covered by a general conditional take authorization. FWS acknowledges that for this approach to be effective, the agency needs to explore "ways to minimize the administrative burden of obtaining individual incidental take permits . . . such as combining environmental reviews for those permits with reviews being conducted for other Federal permits or authorizations." 80 Fed. Reg. 30,032, 30,035 (May 26, 2015).

A third approach would require an expansion of FWS agreements with other federal agencies and authorizing incidental takes by agencies that sign Memorandums of Understanding (MOUs) with FWS. President Clinton's 2001 Executive Order provides support for this approach. FWS negotiated some MOUs with other federal agencies in the past, although those existing MOUs do not authorize incidental takes.

A final approach would be to expand the current voluntary guidelines for industries that seek to identify best management practices to avoid migratory bird mortality. Under this approach, FWS would continue to exercise enforcement discretion vis-à-vis cooperative companies.

Ramifications of a new program

A new incidental take permitting program could provide greater legal certainty for industries, while compensatory mitigation standards associated with the permitting program could advance migratory bird conservation efforts. Additionally, a new program could help to resolve

the ongoing issues related to enforcement discretion and judicial review under the MBTA.

FWS will likely address the remaining unanswered questions when it develops a draft rule after completing a final PEIS. In public meetings across the country, agency officials stressed that any future rule would not result in a radical change in the landscape. FWS aims to restrict the permitting program to a reasonable scope and there are currently no plans to ramp up law enforcement efforts, agency officials said.

FWS also assures interested parties that the agency is not currently considering application of an incidental take program to the transportation or building sectors. The NOI makes clear that FWS would not expect that individuals who might incidentally take a migratory bird to obtain a permit. In other words, it would not be necessary to acquire an incidental take permit to protect against liability for hitting a bird on the highway or a bird flying into a glass window of a tall building.

It is unclear exactly how a new program might impact other federal agencies, beyond the potential need to commit to an MOU with FWS. For example, would federal agencies engaged in permitting activities that result in habitat modification need to acquire incidental take permits? As of now, agency officials are unsure what the scope of enforcement discretion would be for the MOUs between FWS and other federal agencies. As noted above, courts have rejected prior claims that habitat modification or destruction can result in liability, but that could change under a new incidental take program.

Of course, if FWS proceeds with any of the approaches to regulating incidental takes, there is the potential for litigation. Even if FWS declined to bring enforcement actions against other federal agencies, those agencies could be vulnerable to citizen suit claims under the Administrative Procedure Act that seek to enjoin agency actions that violate the take prohibition of the MBTA.

Any new program would also have to comport with the terms of the various treaties the MBTA implements. Three of the four treaties specifically allow takes for "other specific purposes," which are limited to "scientific, educational [and] propagative" purposes. Some commentators speculate that a court could reasonably find that an incidental take program for large industries does not directly support any of those "other specific purposes."

But, ultimately, it seems unlikely that anything in the four treaties, the MBTA, 2001 Executive Order, the existing MOUs, or agency guidance documents precludes FWS from creating an incidental take program. Congress did not clearly address the issue of incidental takes in the text of the MBTA. If FWS proceeds with an administrative rulemaking creating a new permitting program, it is likely to survive judicial review, as a court would apply *Chevron* deference to the agency's interpretation of the statute.

Despite any uncertainties that exist at this stage of the process, environmental groups and industry officials alike seem optimistic about the proposal. The comment period for the PEIS ended July 27, but there will be more opportunities for interested parties to comment on the proposal. Subsequent opportunities for comment will likely arise concerning a draft PEIS sometime in 2016, followed by a draft rule and a final promulgated rulemaking.

Numeric nutrient criteria in Florida: The road to cooperative federalism

Mohammad O. Jazil and David W. Childs

Mohammad O. Jazil and David W. Childs practice law with Hopping, Green & Sams in Tallahassee, Florida. They previously authored an article on numeric nutrient criteria in Florida that appeared in the November/December 2011 issue of Trends.

Since 2008, the U.S. Environmental Protection Agency (EPA), the state of Florida, conservancy groups, and Florida's regulated community have waged a battle over nutrient water quality standards. An opinion issued by the U.S. Court of Appeals for the Eleventh Circuit on July 7, 2015, was its third in this Clean Water Act (CWA) case. Together with prior opinions, it resolves issues regarding EPA's role in the establishment of water quality standards.

Federal supremacy

In 2008, several conservancy groups sued EPA, alleging that a 1998 national guidance document imposed a nondiscretionary duty to promulgate numeric nutrient criteria for Florida's surface waters under CWA section 303(c)(4)(B). EPA disagreed. But, in a January 2009 letter to the Florida Department of Environmental Protection (FDEP), EPA determined that numeric nutrient criteria were indeed necessary. This necessity determination triggered an obligation for EPA to "promptly prepare and publish proposed regulations setting forth" criteria—precisely what the conservancy groups claimed EPA had committed to doing in 1998. 33 U.S.C. § 1313(c)(4). The conservancy groups and EPA thereafter entered into a settlement agreement, which the district court approved as a consent decree. Appeals followed.

On appeal, the regulated community and one of Florida's water management districts argued that the consent decree usurped the state's primacy in establishing water quality standards and interfered with ongoing restoration efforts. In *Florida Wildlife Federation v. South Florida Water Management District*, 647 F.3d 1296 (11th Cir. 2011), the Eleventh Circuit dismissed this appeal for lack of standing, 2–1. The court held that EPA's 2009 necessity determination was the source of alleged harm; the consent decree itself provided only a schedule for EPA to propose

and finalize rules setting numeric criteria and thus did not affect the regulated community or district.

On remand, the district court seized on the Eleventh Circuit's statement that the regulated community had "an open door to bring a full challenge" to EPA's necessity determination. *Id.* at 1306. So, despite EPA's arguments to the contrary, the district court held that EPA's determination constituted final agency action under the Administrative Procedure Act (APA), which can be challenged in federal court. Florida and its regulated community did just that. They also challenged EPA's finalized federal criteria for Florida's inland waters—its lakes, springs, and streams—which EPA had by that time promulgated pursuant to the consent decree. Conservancy groups filed their own challenge to the criteria, arguing that they were not protective enough.

In *Florida Wildlife Federation v. Jackson*, 853 F. Supp. 2d 1138 (N.D. Fla. 2012), the district court upheld EPA's determination and criteria for lakes and springs, but not EPA's streams criteria. Again, appeals followed; again, the Eleventh Circuit dismissed the appeals. This time it held that there was no appellate jurisdiction to review the order because the district court remanded the streams criteria back to EPA. *Fla. Wildlife Fed'n v. EPA,* 737 F.3d 689 (11th Cir. 2013).

State primacy

Meanwhile, the state of Florida reasserted its primacy. FDEP petitioned EPA to revoke the 2009 necessity determination and criteria. Citing a recent EPA guidance document, Florida argued that it was well ahead of the national benchmarks for setting numeric nutrient criteria and so should not have been the first (and only) state where EPA imposed federal criteria. EPA neither granted nor denied the petition. EPA instead encouraged FDEP to develop state criteria.

FDEP heeded EPA's advice, promulgating numeric criteria for many of its surface waters. While FDEP did not promulgate numeric criteria for its streams—given the scientific uncertainty that doomed EPA's criteria—it did establish a holistic method to assess nutrient concentration in streams. Under FDEP's approach, streams would have numeric thresholds—not criteria—that would be further refined based on site-specific water chemistry and biological data. FDEP successfully defended its rule against a challenge under state law.

The 2012 Florida legislature weighed in as well. It unanimously passed a bill that, among other things, stated that FDEP's rules "shall be effective only if EPA approves these rules in their entirety, concluded rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines . . . that these rules sufficiently address EPA's January . . . 2009 determination." Fla. House Bill 7051 (2012).

Cooperative federalism

FDEP submitted its rules for EPA review and approval. EPA approved Florida's submissions. Because Florida did not promulgate numeric criteria for all of the waters identified in EPA's 2009 necessity determination, EPA also modified its determination to correspondingly limit its scope.

To excuse it from taking final agency action outside the scope of the amended necessity determination, EPA asked the district court to modify the consent decree between it and the conservancy groups. Florida's comprehensive nutrient rules and EPA's amended necessity determination served as the changes in facts and law necessary to modify a decree.

The district court approved the modification over the conservancy groups' objections. Harkening back to its original order approving the consent decree and the Eleventh Circuit's first opinion, the district court noted that the conservancy groups' opposition incorrectly "rest[ed] on the proposition that the consent decree put the state and industry parties in substantially worse position than they occupied before the decree was entered." *Fla. Wildlife Fed'n v. McCarthy*, 2014 U.S. Dist. LEXIS 1343, *28 (N.D. Fla. Jan. 7, 2014). It would mean that "the consent decree affected the state and industry parties' substantial rights, the consent decree should not have been entered, and the appeal from the decree should not have been dismissed." *Id.* The conservancy groups appealed, arguing that they were entitled to an evidentiary hearing to test EPA's amended necessity determination and approval of Florida's rules—both of which were final agency actions. The Eleventh Circuit disagreed and affirmed the district court's order. *Fla. Wildlife Fed'n v. EPA*, 2015 U.S. App. LEXIS 11635 (11th Cir. 2015).

Guideposts

Necessity determinations under CWA section 303(c)(4)(B) are rare. EPA has said that such determinations are "symptomatic of something awry with the basic statutory scheme." 57 Fed. Reg. 60,848, 60,658 (Dec. 22, 1992). Yet one such determination became the focus of years of litigation over the appropriate role of the federal government. To reassert its state primacy, Florida sued EPA, promulgated its own protective standards, passed a law to keep EPA from cherry-picking from the state's standards, and then argued in court to allow EPA to change the terms of the bargain it struck with conservancy groups. Along the way, Florida and its regulated community established—albeit by sometimes losing in the Eleventh Circuit—that necessity determinations are final agency actions, consent decrees cannot be approved or interpreted in a manner that affects the rights of nonconsenting parties, and final agency actions may not be subjected to an evidentiary hearing simply because the actions serve as the basis to modify a consent decree. Hopefully, Florida's journey provides guideposts for others navigating the sometimes long and always winding road to cooperative federalism.

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.

CERCLA

***ASARCO, LLC v. Celanese Chemical Co.*, 792 F.3d 1203 (9th Cir. 2015).**
The Ninth Circuit rejected an argument by ASARCO that the Superfund statute of limitations for contribution claims could be restarted by ASARCO's subsequent bankruptcy settlement. ASARCO's predecessor owned a smelter in California and leased a portion of the property containing a sulfur dioxide plant to CNA Holdings, LLC's predecessor. In 1989, ASARCO settled a cost-recovery lawsuit by a subsequent purchaser who incurred response costs, Wickland Oil Company, and also with the California Lands Commission in its capacity as a former owner of part of the site. Some 19 years later, in 2008, ASARCO agreed to pay $33 million to the state of California as part of a compromise of claims asserted by the State in ASARCO's bankruptcy proceeding. Three years later ASARCO filed a contribution claim pursuant to CERCLA section 113(f), seeking to recover some of its costs for the same site from others including CNA. The Ninth Circuit affirmed the district court's decision dismissing ASARCO's 2011 contribution suit, stating that "ASARCO's new contribution claim via the 2008 Bankruptcy Settlement is for exactly the same liability ASARCO assumed in the 1989 Wickland Agreement, and is therefore time barred." The court noted that if ASARCO could restart the statute of limitations through a bankruptcy settlement, ASARCO "would receive a benefit that it had not paid for in that bankruptcy settlement" and such a ruling "would encourage tardy parties to use bankruptcy to revive their expired claims."

Air quality

***EME Homer City Generation L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).**
The D.C. Circuit remanded the Cross-State Air Pollution Rule (Transport Rule) emissions budgets for 13 states to EPA. The court, however, rejected a number of other challenges to the Transport Rule, upholding the sulfur dioxide and nitrogen oxides emissions trading program. The panel concluded that the 2014 emission budgets for sulfur dioxide are invalid because they require upwind states to reduce emissions more than needed to allow downwind states to meet regulatory standards for ozone, and the emissions budgets for nitrogen oxides were invalid because the downwind states could comply even with no additional emissions limitation imposed on the upwind states. The court rejected EPA's argument that imposing less stringent budgets on upwind states would be contrary to the rationale underlying EPA's uniform cost thresholds, stating that "EPA's uniform cost thresholds have required States to reduce pollutants beyond the point necessary to achieve downwind attainment."

***Sierra Club v. EPA*, 793 F.3d 656 (6th Cir. 2015).**
The Sixth Circuit vacated EPA's decision to approve three state requests to redesignate portions of the Cincinnati-Hamilton area from nonattainment to attainment for fine particulates because the state plans did not include reasonably available control technology (RACT) for industrial sources. The court held that plans to demonstrate attainment of EPA national ambient air quality standards must include RACT "even if those measures are not strictly necessary to demonstrate attainment" of the pollutant standards. However, the court rejected the Sierra Club's argument that states may not use cap-and-trade programs to satisfy the requirement that emissions controls be permanent and enforceable. The opinion states that the "heart of this dispute is really where the sources that reduce their emissions must be located," holding that EPA has discretion to conclude that permanent emissions reductions in a state implementation plan will be achieved from a regional cap-and-trade program in a broader geographic area.

Water quality

***Florida Wildlife Federation, Inc. v. EPA*, No. 14-10987, 2015 WL 4081495 (11th Cir. July 7, 2015) (per curiam) (not for publication).**
The Eleventh Circuit upheld a consent decree regarding Florida's criteria for nutrients in regulated waterways under the Clean Water Act, rejecting environmentalists' claim that the trial court abused its discretion by modifying the terms of a consent decree. Environmentalists initiated a lawsuit in 2008 seeking greater federal oversight of regulated waters and obtained a consent decree requiring EPA to promulgate strict numeric nutrient limits for Florida. After various appellate challenges, the original consent decree was later modified to reflect less stringent rules developed by the state and accepted by EPA. "[I]f the conservationists had wanted to challenge EPA's determination that the regulations do satisfy the CWA, the proper way would have been in a proceeding under the Administrative Procedure Act," the opinion states.

***American Farm Bureau Federation v. EPA*, 792 F.3d 281 (3d Cir. 2015).**
The Third Circuit upheld EPA's multistate Chesapeake Bay cleanup plan, rejecting industry challenges to the total maximum daily load (TMDL) plan that included allocations for permitted point sources and nonpoint pollution from sectors including agricultural and urban stormwater. Rejecting the Farm Bureau's arguments, the court concluded that an interpretation of the Chesapeake Bay TMDL that would prevent EPA from establishing separate TMDL allocations for point and nonpoint sources and requiring "reasonable assurance" that the states will achieve those allocations would frustrate the goals of the Clean Water Act. The court also rejected the Farm Bureau's argument that the TMDL infringes on state land-use policies, stating that TMDLs "exists within a cooperative federalism framework" and the TMDL plan makes "no actual, identifiable, land-use rule." The panel concluded that the Farm Bureau's reading of the act "would shift the burden of meeting water quality standards to point source polluters, but regulating them alone would not result in a clean Bay."

***United States v. Metropolitan Water Reclamation District of Greater Chicago*, 792 F.3d 821 (7th Cir. 2015).**
A district court's approval of a settlement agreement to reduce a city's overflows from a combined sewer and stormwater system over time was upheld on appeal. The Seventh Circuit concluded that the settlement was "reasonable" and that federal water law does not require the elimination of all overflows. Rejecting the claims of environmental groups, the court stated, "The EPA anticipates working out details as time passes and additional reservoir capacity becomes available . . . and if the District does not cooperate the court can afford supplemental relief."

Energy

***Energy and Environment Legal Institute v. Epel*, 793 F.3d 1169 (10th Cir. 2015).**
The Tenth Circuit rejected a dormant Commerce Clause challenge to Colorado's renewable energy standard, which requires utilities to obtain 20 percent of their electricity from renewable sources. Plaintiffs argued that the Colorado renewable energy standard limits out-of-state coal-fired utilities plants from selling electricity because Colorado is tied to an electric grid that covers 11 states. The court concluded that the suit was "a novel lawmaking project" and that the Colorado standard was not unconstitutional because "it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters."

***Energy Future Coalition v. EPA*, 793 F.3d 141 (D.C. Cir. 2015).**
The D.C. Circuit upheld the air regulations that require emission tests for new vehicles utilizing a test fuel that is "commercially available." This rule was challenged by biofuel producers, who want EPA to approve for test usage a fuel containing 30 percent ethanol, even though this fuel is not "commercially available" as required by the regulations. Petitioners argued that the EPA regulations created a catch-22 because they preclude the sale of any fuel that is not "substantially similar" to a test fuel but it is also illegal to use a test fuel unless it first approved for sale, thus effectively precluding use of the new ethanol blend fuel. The court concluded that the statutory scheme adopted by Congress requires that fuels be tested under "actual current driving conditions … including conditions relating to fuel," and it was not arbitrary and capricious "for EPA to fulfill that statutory mandate by requiring that test fuels be 'commercially available.'"

Pesticides and EPA inaction

***In Re Pesticide Action Network North America v. EPA*, No. 14–72794, 2015 WL 4718867 (9th Cir. Aug. 10, 2015).**
The Ninth Circuit issued an order of mandamus requiring EPA to issue a proposed or final revocation of the pesticide cloropyrifos (Dursban) or a final response to the petition filed by environmental groups seeking a ban no later than October 31, 2015. The opinion states that "filibustering…is frowned upon in administrative agencies tasked with protecting human health," and that EPA's delay of nearly nine years "is egregious and warrants mandamus relief."

Views from the Chair

Pamela E. Barker

Pamela E. Barker is a member of the firm Lewis Rice LLC. She is chair of the ABA Section of Environment, Energy, and Resources.

Barely a month into my year as Section Chair I enjoyed a wonderful and totally unexpected thrill. At the ABA's Section Officers Conference meeting in Chicago, sitting at a table with other Section leaders, we were stunned to hear the name of our Section read off as the recipient of the Section Officers Conference's 2015 Outstanding Collaboration Award. It was my honor to accept this award on behalf of the Section, recognizing our 44th Spring Conference in San Francisco, planned and presented in collaboration with the Section of Administrative Law and Regulatory Practice, the Business Law Section, and the Section of Litigation.

Nothing is more central to what I hope to accomplish as chair than cooperation with other entities. And nothing typifies the Section's work better than the cooperation of many people that went into planning that conference. I was able to thank one of them in person, Vice Chair John Milner, who was the first chair of our committee to encourage coordination with other ABA sections, divisions, and forums, instituted under Chair Alex Dunn. The idea of holding a "super conference" originated with Bill Penny during his year as chair. Bill envisioned a conference with programs developed by our Section along with other ABA entities that address environmental, energy, or resource issues. This idea was nurtured by John's committee, later chaired by Steve Humes during Steve Miano's year as chair. Howard Kennison was asked to serve as planning chair for the conference, which required him not only to handle the normal challenges of planning our Spring Conference, but to work with the three cosponsoring sections in developing the nuts and bolts details of the event. Each of them was instrumental in our winning this award, which truly belongs to the entire Section. The award piece was proudly displayed at our recent Fall Conference in Chicago and will also travel to our Spring Conference next March in Austin.

I hope to expand the cooperative spirit of the San Francisco Conference as an ongoing theme of this and coming years. We can cooperate in many more endeavors with fellow ABA sections, divisions, and forums—we have only begun to tap the possibilities. At my meetings with other ABA entity chairs, many have shared their interest in collaboration, cooperation, and identifying common themes. This is a wealth of opportunities for us that we will follow up on.

Reaching out to collaborate with other ABA entities is now a part of our strategic plan. But I want to see our outreach effort go further. We already have contacts with our environmental and energy counterparts in the United Kingdom and Canadian bars and we hope to do more with them. We have a long-standing record of collaboration with the Rocky Mountain Mineral Law Foundation. And we want—and need—to have greater cooperation with state and

local bar associations. Through our outreach this year we have already started to cosponsor events with our counterparts in state bars. For example, in October the Section cosponsored the 2015 Energy Summit, the signature event of the Wisconsin Energy Institute, and will cosponsor a November New York State Bar Association program on brownfields cleanup. Those cosponsorships resulted from contacts made by your chair and chair-elect, but all Section members can make a contact for a collaborative program with their own state or local bar environmental or energy law sections. We are not competitors, but ongoing collaborators in the development and enrichment of our specialties. Go to your state bar meetings, reach out to their officers, and let them know that the Section would love to work with them.

We at the Section will work with you in developing collaborative and cooperative efforts. We can help bring your ideas to fruition. This year I have set up a new outreach committee, chaired by Michelle Diffenderfer, and a specific state and local bar outreach subcommittee led by Ignacia Moreno. They and their teams are there to help you turn outreach from an idea into a reality.

It does not take much to reach out, and through outreach and cooperation we make our Section even stronger and further our commitment to environmental, energy, and resources law.

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.

Andrew C. (Drew) Cooper has joined Hunsucker Goodstein Law PC as a partner in the firm's Washington, D.C. office. Cooper was previously with Dickstein Shapiro in Washington, D.C. He is vice chair, *The Year in Review*, for the Section's Superfund and Natural Resources Litigation Committee. Cooper's practice focuses exclusively on environmental law and his work has spanned transactions, compliance counseling, and litigation.

Kimberly E. (Kim) Diamond has joined Drinker Biddle & Reath LLP's Environment and Energy Group as senior attorney in the firm's New York City office. Diamond is co-chair of the Section's Special Committee on Congressional Relations and is immediate past co-chair of the Section's Renewable, Alternative, and Distributed Energy Resources Committee. She is also chair of the New York/New Jersey chapter of Women of Wind Energy.

Michael B. Gerrard has been named the chair of the faculty of Columbia University's Earth Institute. The Earth Institute comprises more than 30 research centers and some 850 scientists, postdoctoral fellows, staff, and students who focus on the world's most difficult problems, from climate change and environmental degradation to poverty, disease, and the sustainable use of resources. Its academic work is directed by a faculty of 50 professors from multiple disciplines within Columbia University. In addition, Gerrard is the director of the Sabin Center for Climate Change Law and the Andrew Sabin Professor of Professional Practice at Columbia Law School, teaching environmental law, energy regulation, and climate change law and policy. Gerrard is also a senior counsel to Arnold & Porter LLP, where he was previously a partner. He is a former chair of the Section.

Jessica J. O. (Jessie) King has joined Williams Mullen as a partner in the firm's Columbia, South Carolina, office. King focuses her practice on environmental legal issues. A former chief attorney for Environmental Quality Control Division of the South Carolina Department of Health and Environmental Control (SCDHEC), she has substantial experience helping companies and individuals obtain environmental permits, perform due diligence, and negotiate business transactions. Since leaving her position at SCDHEC ten years ago, King has been in private practice representing manufacturers, developers, financial institutions, farmers, and industry.

Allen Keith (Kip) McAlister has joined Williams Mullen as an associate in the firm's Columbia, South Carolina, office. Prior to joining Williams Mullen, he served as an assistant solicitor to the Honorable J. Strom Thurmond, Jr. in the South Carolina Second Judicial Circuit Court in Aiken, South Carolina. He also worked with the McNair Law Firm PA in Columbia, South Carolina.

Irma S. Russell has joined the faculty of the University of Missouri-Kansas City School of Law, as the Edward A. Smith Missouri Chair of Law, the Constitution, and Society. Russell was dean of the University of Montana School of Law from 2009–2014. She is the chair of the Section's Special Committee on Ethics and the Profession and is a former chair of the Section.

Ryan W. Trail has joined Williams Mullen as an associate in the firm's Columbia, South Carolina, office. Trail was previously with the McNair Law Firm PA in Greenville, South Carolina.

Ethan R. Ware has joined Williams Mullen as a partner in the firm's Columbia, South Carolina office. Ware represents businesses and industries in environmental and health and safety legal matters. He has appeared on behalf of businesses in negotiations relating to environmental permits, in defense of environmental and OSHA enforcement actions by state and federal agencies, in defense of toxic tort lawsuits, and on behalf of industry in criminal and civil environmental actions. Ware is past president of the Natural Resources and Environmental Section of the South Carolina Bar.