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Incremental climate policy via the Clean Air Act

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Regulators implement climate policy based on the law Congress enacts, not the law they may wish Congress would enact. For the Obama administration, that law is the existing Clean Air Act.

Indirect climate policy through the Mercury Rule

The 2011 Utility Mercury and Air Toxics Standards (MATS) is perhaps the most significant regulatory action affecting near-term greenhouse gas emissions from the electric power sector. Section 112 of the Clean Air Act, aimed at hazardous air pollutants rather than climate change, specifies how the Environmental Protection Agency (EPA) must set the technology standard (average emissions performance of the sector's top 12 percent of existing sources) and the timeline for meeting the standard (at most four years).

Although the rapid pace of coal-fired power plant retirements is primarily the result of sustained low natural gas prices, the MATS timeline forced plant operators and state utility commissioners to decide quickly whether to retrofit or retire facilities that did not meet the standard. The U.S. Energy Information Agency projects that at least 60 gigawatts of coal-fired generating capacity will retire by 2020. Uncertainty regarding future climate policy and the prospect of additional regulations were also important factors.

Because plant closure decisions are generally irreversible, the Supreme Court's recent *Michigan v. EPA* decision, which held that EPA must reconsider the threshold determination that regulating mercury emissions from the power sector is "necessary and appropriate," will have little impact.

The Clean Power Plan

In contrast to the inflexible MATS rule, the EPA's Clean Power Plan (CPP) takes full advantage of the broad flexibility embedded in section 111 of the Clean Air Act. Section 111 directs EPA to create performance standards for new sources, modified sources, and, in limited circumstances, existing sources, but grants EPA broad discretion when setting the standards. The rule, which covers the nation's existing fleet of natural gas- and coal-fired power plants,

aims to influence the trajectory of the electricity sector. The CPP identifies the "best system of emission reduction" using three building blocks: (1) increasing efficiency (i.e., heat rate improvements) at coal-fired power plants, (2) shifting generation from coal-fired steam units to natural gas combined cycle units, and (3) shifting generation to clean energy renewables. EPA used these building blocks to calculate performance rates for coal and natural gas plants, then translated the rates into state goals measured by pounds per megawatt hour (i.e., a rate-based standard focusing on improved efficiency at power plants) and tons of carbon dioxide emitted (i.e., a mass-based standard focusing on reducing overall emission from the electric power sector).

Clean Power Plan implementation choices

States continue to have broad latitude when developing their state plans to meet the CPP standards. As a threshold matter, state officials may choose whether to pursue a mass-based or a rate-based standard. They may also choose whether to assign compliance responsibility solely to existing natural gas- and coal-fired plants, whether to incorporate additional state policies in the state plan, and whether to allow emissions trading.

EPA streamlined the CPP's market-based options, identifying "trading ready" pathways. Under this approach, if multiple states incorporate similar provisions regarding tracking systems and tradable instruments—tons of carbon dioxide for a mass-based approach and "emission rate credits" for a rate-based approach—then power plant operators within those states could buy or sell emission credits across state borders. To help facilitate interstate emission trading, EPA proposed mass-based and rate-based trading-ready model rules and plans to finalize one or both options by summer 2016.

States face a wide range of additional considerations, including how to address the potential for emissions leakage—shifting generation from existing facilities covered by the rule to new sources that are not directly subject to the rule.

The CPP already faces numerous legal challenges, and it seems inevitable that the Supreme Court will likely deliver the final word on the status of the rule.

Performance standards for oil and gas wells

EPA is also on track to limit emissions of methane—a potent greenhouse gas—and volatile organic compounds from new and modified oil and gas wells. The proposed New Source Performance Standard would require owners and operators of hydraulically fractured wells to capture natural gas emitted while preparing a well for production, find and repair leaks, and limit emissions from pumps that use gas pressure. Additionally, the proposal would expand coverage to emissions from certain natural gas transmission equipment. EPA also plans to expand requirements for existing wells in certain areas and has issued draft guidelines for

reducing emissions from existing equipment. The agency separately proposed to expand the Natural Gas STAR Program to create robust commitments for voluntary methane emission reductions.

Looking ahead

More Clean Air Act-based climate policy is on its way. In October 2015, the White House announced forthcoming regulations limiting emissions of climate-forcing hydrofluorocarbons, and the CPP potentially sets the stage for carbon dioxide limits for existing facilities in other sectors. Step-by-step, EPA is developing a broad strategy to reduce the nation's greenhouse gas emissions using its existing statutory authority.

An environmental court for Hawai'i—will other states follow?

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On July 1, 2015, Hawai'i became the second state in the United States, after Vermont in 1990, to create an environmental court. This specialized court will have broad jurisdiction over civil and criminal cases affecting the environment and represents a bold experiment in environmental law by a state often viewed as an environmental paradise.

A brief history of environmental courts

As every environmental lawyer knows, environmental law took hold in the United States in the 1970s with the passage of a number of groundbreaking environmental statutes, including the Clean Water Act and the Clean Air Act. Courts have since struggled with the technical aspects of cases arising under these media-specific statutes. At the time Judge Leventhal explained, in the context of an early Clean Air Act case, that the court was approaching the issues presented with "the utmost diffidence" because "the legal issues are intermeshed with technical matters, and as yet judges have no scientific aides." *Int'l Harvester Co. v. Ruckelshaus,* 478 F.2d 615, 641 (D.C. Cir. 1973).

Given concerns about the scientific and technical complexity associated with this new field of law it is perhaps not surprising that section 9 of the Federal Water Pollution Control Act of 1972 directed the President, through the Attorney General, to study the feasibility of an environmental court system. Pub. L. No. 92-500, 86 Stat. 816 (1972). The Attorney General

assigned a task force, composed primarily of attorneys from the U.S. Department of Justice Land and Natural Resources Division (now known as the "Environment and Natural Resources Division") to perform the study. On October 11, 1973, then Attorney General Eliot Richardson submitted a report to Congress recommending against the creation of an environmental court or court system. *Report of the President, Acting Through the Attorney General, On the Feasibility of Establishing an Environmental Court System* (1973). Among the reasons offered by the Attorney General to oppose the court's creation were the low numbers of environmental cases, the need for generalist courts to answer the many forthcoming "big" questions in environmental law and logistical issues, including the need to try criminal matters locally, which would make it difficult to combine civil and criminal cases. *Id*. at VII. Congress was apparently satisfied with this conclusion and, hence, at present there is no federal environmental court or court system.

But what of the states? Justice Brandeis famously wrote that "a state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). States have experimented with a range of specialized courts including drug courts, mental health courts, domestic violence courts, and "reentry" courts, which focus on easing individuals' transition from prison to responsible citizenship. Then, in 1990, the Vermont state legislature created the Vermont Superior Court, Environmental Division. Vermont's Environmental Division is a trial court with statewide jurisdiction. It hears appeals from state land use permit decisions, from state environmental permits and other decisions of the Agency of Natural Resources, and from municipal land use zoning and planning decisions. The court also hears municipal land use enforcement cases and enforcement actions brought by the Agency of Natural Resources and Natural Resources Board. Since then, no other state had followed Vermont's lead until Hawai'i in 2015.

The Hawai'i Environmental Court

The environmental court enacted by the Hawai'i legislature differs significantly from Vermont's court. The Hawai'i Environmental Court operates within the existing structure of the state judicial system. Environmental court judges are designated in the district and circuit courts statewide. The courts will have jurisdiction over civil and criminal matters involving issues related to water, forests, streams, beaches, air, and mountains, along with terrestrial and marine life. The legislature excluded from the new Environmental Court's jurisdiction matters of law addressed to the State Land Use Commission and shoreline setbacks. Twenty-two judges have been designated statewide by circuit. Each circuit has scheduled their environmental calendars for specific days of the month. When judges do not have environmental cases, they will hear other types of cases. Initial appearances for Environmental Court criminal cases will be placed on the regular arraignment and plea calendars in their respective districts. After the initial appearance in court, subsequent proceedings are placed appropriately on the Environmental Court calendar in their respective district and circuit courts. Ultimately, parties may appeal

rulings from the respective district or circuit courts in accordance with the Hawai`i Rules of Appellate Procedure, through the Hawai`i Intermediate Court of Appeals, and finally to the Hawai`i Supreme Court.

The goal of the Environmental Court, as described by Hawai'i Supreme Court Justice Mark E. Recktenwald, "is to ensure the fair, consistent, and effective resolution of cases involving the environment." The new Environmental Court, as presently structured by the Hawai'i legislature, seems to avoid many of the problems associated with a federal environmental court system as identified in the 1973 Attorney General's Report. By employing the existing court structure, "big" questions of environmental law are still reviewed by generalist judges and the generalist Supreme Court. Criminal environmental matters are still prosecuted through the existing localized structure, albeit before designated environmental judges. And, let's not forget, environmental cases are no longer a rarity anywhere.

What the future holds

Notably, there are currently 350 environmental courts operating in 41 countries worldwide. Chief among them is India's National Green Tribunal, long considered the world's leading environmental court since it was established in 2010. Initiatives such as the creation of a new Environmental Court in Hawai'i are worthy of study. Final resolution of complex environmental problems may well benefit from such innovations. U.S. Supreme Court Justice Stephen Breyer, at the conclusion of his recent book, *The Court and the World: American Law and the New Global Realities* (Knopf 2015), tells us that to address problems like environmental degradation we must understand and consider legal efforts being undertaken throughout the world. Environmental attorneys might begin by looking at the ongoing efforts of America's 50th state to better incorporate environmental law into their judicial system through their new Environmental Court. Excellent materials about the Hawai'i Environmental Courts and environmental courts worldwide are maintained by the Environmental Law Program at the University of Hawai'i, William S. Richardson School of Law.

Methane in the midstream

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The U.S. Environmental Protection Agency's (EPA) September 18, 2015, proposal to tighten New Source Performance Standards (NSPS) applicable the oil and gas industry is primarily

recognized for its first-ever direct regulation of methane emissions and for its expansion of the existing NSPS (Subpart OOOO) from natural gas wells to both natural gas and oil wells. While the agency's proposal is most closely associated with these "upstream" sources, it also represents, not only the first effort to regulate methane emissions from oil and gas transmission equipment, but the first regulation of air emissions from equipment and facilities in the midstream sector. "Midstream" operations link "upstream" to "downstream" refining and marketing. Midstream activities are focused on transportation (particularly pipeline transportation), but also encompass processing and storage facilities.

Background

The proposed rule builds on a regulatory paradigm developed in 2012 when EPA first exercised its authority under section 111(b) of the Clean Air Act (CAA) to establish NSPS to control emissions of volatile organic compounds (VOCs) from new and modified natural gas wells, gathering infrastructure, and processing plants. The 2012 NSPS imposed work practice and monitoring requirements to identify and control fugitive emissions from specific categories of equipment such as compressors and pneumatic controllers. While the category of pollutants targeted by the 2012 NSPS were VOCs, methane capture was identified as a "co-benefit" of the rule because the potential sources of, and controls for, VOC emissions are the same as those for methane emissions.

Proposed regulations

The midstream components of the proposed new NSPS (Subpart OOOOa) comprise existing control requirements for equipment subject to the 2012 NSPS that are also used in the midstream sector. Covered equipment includes compressors, pneumatic controllers, and pneumatic pumps. As with VOC emissions, EPA is proposing to control methane emissions from this equipment through work practices, routine maintenance requirements, and equipment substitution.

EPA is also proposing to adopt in the midstream sector (and for oil and gas wells and boosting and gathering infrastructure) a new leak mitigation requirement previously only mandated for use at natural gas processing facilities. Under proposed Subpart OOOOa, operators of new and modified compressor stations will be required to survey for methane leaks using optical gas imaging cameras, through which invisible methane and VOC emissions can be observed, or through EPA's Method 21, which identifies methane leaks by placing a handheld probe around potential sources of fugitive emissions such as fittings and valves.

These surveys must be done within 30 days of a compressor station's initial startup or within 30 days of a modification. A compressor station is "modified" when one or more compressors is added after the effective date of the final rule or when a physical change is made to an existing compressor that increases the capacity or compression capability of that unit. With limited

exceptions, repairs of leaks discovered during surveys must be made within 15 days of detecting a leak and a confirmatory leak detection survey must follow within 15 days of the repair. Subsequent leak detection surveys would follow annually or semiannually depending on the percentage of components where leaks are detected.

Why methane?

Methane is the second-most prevalent greenhouse gas emitted in the United States, but according to EPA, methane has a global warming potential more than 25 times greater than that of carbon dioxide. Given methane's prevalence and potency, its control is essential to President Obama's well-publicized commitment to cut greenhouse gas emissions in the United States 26 to 28 percent below 2005 levels by 2025. According to the administration, meeting the overall greenhouse gas target requires the United States to reduce its methane emissions by 40–45 percent between now and 2025. And, because EPA views natural gas and petroleum systems as the industry sector with the highest potential to achieve methane emissions reductions, the oil and gas industry is the primary focus of the agency's regulatory strategy for methane.

The oil and gas industry, however, views methane quite differently. Methane is the primary component of the natural gas that companies spend a great deal of money to develop, transport, and sell. According to industry stakeholders, methane reductions need not be accomplished through federal regulation—methane's value as an energy source incentivizes its capture. In industry's view, this imbedded incentive is reflected in the nearly 80 percent reduction in methane emissions from hydraulically fractured natural gas wells since 2005 and the 11 percent reduction in total emissions from natural gas systems over the same time period. This occurred during a time period when total U.S. gas production increased 44 percent. None of these declines were the result of the direct regulation of methane emissions. The majority of these declines, moreover, occurred before methane capture was regulated as a co-benefit of the 2012 Subpart OOOO VOC controls.

What next?

Given the role of methane reductions in the president's ambitious commitment to reduce domestic greenhouse gas emissions, EPA likely views as one of its top priorities for 2016 the finalization of this rule in substantially the same form as it was proposed. The rule's prospects following finalization are decidedly more difficult to predict. Both proponents and opponents of the proposal have been quick to identify a wide range of practical concerns and legal vulnerabilities. Whether these concerns and potential legal vulnerabilities find their way into a petition for review of the rule will depend on how the key stakeholders view the impacts or infirmities of this rule relative to a significant number of rules slated to be finalized in the final year of this administration. It will also depend on stakeholders' views of the 2016 presidential election and the prospect of having the next administration decide how much methane regulation is enough.

The raisins of wrath: The Court finds a Fifth Amendment taking, but does it imply something more?

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The Supreme Court's holding in *Horne v. Department of Agriculture*, ___U.S.____, 135 S. Ct. 2419 (2015) (*Horne II*) appears to be a narrow opinion applicable only to a relic of the FDR era, the Agricultural Marketing Agreement Act of 1937 (1937 Act), with its antiquated reliance upon the suspect concept of economic "central planning." But, as with many of the Court's opinions, the *reasoning* suggests a possibly more significant impact. *Horne II* may not signal anything more than a rejection of its limited (and now outdated) marketing program, but it could presage an expanded role of Fifth Amendment takings claims in future contests over governmental restrictions on water rights and, possibly, Clean Air Act cases.

The raisin farmers win an initial jurisdictional battle

The California raisin farmer plaintiffs in this case, Marvin and Laura Horne, are among the rare litigants in recent Supreme Court history who made it to the Court not once but twice with two separate decisions in their favor.

In the first round, the Hornes contested an administrative penalty proceeding brought in 2004 by the U.S. Department of Agriculture for failure to surrender a portion of their raisin crop as ordered by the Department's "Raisin Administrative Committee." The Raisin Administrative Committee, a government-appointed group of raisin growers and others in the business, had the power under the 1937 Act to order all growers to turn over percentages of their crops to the federal government. *Horne II*, 135 S. Ct. at 2424. After an administrative law judge imposed over $600,000 in fines and penalties, the Hornes argued in district court that this mandatory appropriation of a portion of their crop constituted a Fifth Amendment taking.

The Ninth Circuit held that jurisdiction lay in the Federal Court of Federal Claims, but the Supreme Court reversed, holding that the Hornes could seek federal district court review of their takings defense. *Horne v. Department of Agriculture*, ___ U.S.___, 133 S. Ct. 2053 (2013).

Round two—the merits of their takings claim

The Hornes returned to the Ninth Circuit to try their claim that the action of the Department of Agriculture, through its appointed Raisin Administrative Committee, was a taking of part of their annual crop. They argued that the requirement that a raisin grower or handler set aside a predefined percentage of its annual crop and give the raisins directly to the government

constituted a taking without just compensation.

The Ninth Circuit was again not convinced and rejected their claims on the merits. Once again, the Supreme Court granted certiorari and reversed the Ninth Circuit. The majority, in an opinion authored by Chief Justice Roberts, held that the physical act of taking raisins out of a farmer's hands and placing them at the government's disposal was a *per se* taking. To paraphrase Shakespeare, for the majority, "a taking by any other name is still a violation of the Fifth Amendment." As the Chief Justice explained: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." 135 S. Ct. at 2426. The application of this general principal to the specific case was easy: "The reserve [of raisins] requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government." 135 S. Ct. at 2428.

The majority brushed aside the government's principal defense—that regulating the sale of a commodity in interstate markets is a valid regulatory function. In support, the government had cited a well-known environmental case testing the scope of the Federal Insecticide, Fungicide, and Rodenticide Act and its regulation requiring that pesticide manufacturers disclose information including proprietary trade secrets—*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The Chief Justice found, however, that *Monsanto* was distinguishable: "Raisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point." 135 S. Ct. at 2431. Justice Sotomayor, the sole dissenter, questioned this effort to distinguish *Monsanto*, noting that "nothing in *Monsanto* . . . turned on the dangerousness of the commodity at issue." 135 S. Ct. at 2441, n.2 (Sotomayor, J., dissenting).

Does the second *Horne* opinion raise takings questions about other environmental regulations?

Although the raisin marketing laws may be "outdated, and by some lights downright silly," 135 S. Ct. at 2438, the question remains whether *Horne* suggests a possibly heightened judicial level of scrutiny for other governmental regulations, particularly those in the environmental field.

The first area in which this is likely to play out is in regulation of water and water rights. In at least two cases, courts have entertained the notion that a governmental mandate restricting water usage rights could constitute a physical taking. *See* *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340 (Fed. Cir. 2013) (finding water district had Fifth Amendment interest in water diverted by use of fish ladders, but claim was not ripe for prosecution); *Tulare Lake Irrigation Dist. v. United States*, 49 Fed. Cl. 313 (2001) (takings claim upheld based on restrictions on water deliveries imposed pursuant to Endangered Species Act). A detailed discussion of the possible complications of new takings cases (written before the second *Horne* decision) is found in Professor John Echeverria's excellent article for the ABA 2014 Water Law Conference. The Court's second opinion in *Horne* may also breathe new constitutional

life into challenges to EPA's Clean Power Plan. The Peabody Energy Corporation and a noted constitutional scholar, Professor Laurence Tribe, submitted comments opposing the then-proposed regulation as a Fifth Amendment taking of "settled expectations" based upon decades of prior pro-coal policies in the United States. *See* Comments of Laurence H. Tribe and Peabody Energy Corp to EPA re: Carbon Pollution Emission Guidelines for Existing Stationary Sources (Dec. 1, 2014). Unlike pesticides, it is not immediately obvious that marketing coal is a trade involving a "hazardous substance," and the *Horne* court's effort to distinguish regulations of pesticides in the *Monsanto* case may open the door for a new round of takings claims.

Only time will tell whether *Horne II* was intended as nothing more than a decision about an outmoded regulatory scheme or whether it portends a Court willing to reclassify more regulations as *per se* takings. Current challenges to recent regulatory initiatives under the Clean Water and Clean Air Acts may yield some clues.

Promoting regional "consistency"? EPA's proposed Clean Air Act rulemaking in the wake of *Summit Petroleum v. EPA*

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The U.S. Environmental Protection Agency (EPA) has proposed revised Clean Air Act (CAA) rules intended to ensure "regional consistency" in how it implements the CAA. The proposed rule, however, raises more questions than it answers on whether *such "consistency" will be achieved.*

New consistency regulations proposed

In August 2015, EPA proposed revisions to longstanding CAA regional consistency regulations in 40 C.F.R. Part 56. 80 Fed. Reg. 50,250 (Aug. 19, 2015). EPA adopted those regulations in 1980 under CAA section 301(a)(2), which directs EPA to issue regulations establishing general procedures and policies designed, among other things, "to assure fairness and uniformity in the criteria, procedures, and policies applied by the various [EPA] regions in implementing and enforcing" the CAA. EPA is organized into ten regions and a headquarters office, with nationally applicable policy emanating from headquarters and the regions driving region-specific policies where applicable.

Content of the new regulations

EPA's original regulations seek to ensure "fair and consistent application of rules, regulations and policy throughout the country by assuring that the action of each individual EPA Regional Office is consistent with one another and national policy." 45 Fed. Reg. 85,400 (1980). The regulations provide mechanisms for such fair and uniform application by headquarters and Regional Office employees, and Regional Offices must ensure that actions taken under their authority are "carried out fairly" and are "as consistent as reasonably possible with the activities of other Regional Offices." 40 C.F.R. § 56.5. They must also seek concurrence from the appropriate EPA Headquarters Office on any interpretation of the statute, rule, regulation, or program directive if that interpretation might result in inconsistent application among Regional Offices.

Purpose of the regulations

EPA's proposed revisions to the regional consistency regulations would clarify that only decisions of the U.S. Supreme Court or the D.C. Circuit that arise from challenges to nationally applicable regulations or EPA actions will apply uniformly. Thus, a decision of a federal court arising from a challenge to a "locally or regionally applicable" action would not apply uniformly nationwide. EPA also proposed to add a provision clarifying that EPA Headquarters offices' employees need not revise existing mechanisms for fairness and uniformity (or issue new mechanisms) to address decisions arising from challenges to locally or regionally applicable actions. Finally, EPA proposed to add language to 40 C.F.R. § 56.5(b) clarifying that EPA Regional Offices' employees need not seek concurrence from Headquarters to act inconsistently with national policy if inconsistent action is required to comply with a federal court decision.

Cases that triggered the regulations

EPA's rulemaking springs from the D.C. Circuit's decision last year in *National Environmental Development Association's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014) (*NEDA*), and the Sixth Circuit's 2012 decision in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). In *Summit*, the Sixth Circuit disagreed with EPA's approach to determining when certain sources could be "aggregated" for purposes of triggering new source review and prevention-of-significant-deterioration requirements. In response, EPA issued a memorandum (*Summit* Directive) announcing that it would follow the Sixth Circuit's decision in states within that court's jurisdiction, but it would continue to apply its preferred approach to aggregation elsewhere.

The D.C. Circuit invalidated the *Summit* Directive shortly thereafter in *NEDA*. The *NEDA* court held that EPA's regional consistency regulations express a "firm commitment to national uniformity in the applications of its permitting rules," without any exception for judicial decisions that the agency disagrees with. The court then offered EPA three options

for addressing an adverse judicial decision: (1) revise its underlying regulations, (2) revise its regional consistency regulations, or (3) appeal to the Supreme Court. EPA is currently pursuing both options (1) and (3) in response to *NEDA* and *Summit*.

Questions raised

EPA's regional consistency rulemaking raises several interesting questions. First, like the *Summit* Directive, the proposed rule espouses the doctrine of inter-circuit non-acquiescence–a practice whereby EPA only considers a federal court decision binding in those geographical areas subject to the jurisdiction of the ruling court. That doctrine, however, may conflict with CAA section 301(a)(2)'s call for national uniformity. The *NEDA* court sidestepped that issue, but the D.C. Circuit may be asked to resolve it should EPA finalize the rule as proposed.

Second, EPA's proposal could lead to inconsistent application of CAA regulations and policies by Regional Offices. That inconsistency impacts regulatory certainty and could create competitive advantages or disadvantages.

Third, the proposal leaves EPA wide discretion over whether to follow an adverse judicial decision addressing locally—or regionally—applicable actions only in the particular geographic areas within that particular circuit court's jurisdiction or whether to follow that decision nationwide. EPA's preamble does not shed any light on how EPA would exercise that discretion, and stakeholders are perhaps rightfully concerned that such decision making would be opaque.

The comment period for the proposed regional consistency regulations closed in October 2015. A final rule is expected before the end of the Obama administration.

International Maritime Organization adopts Polar Code

Stephanie Altman

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In May 2015, after nearly five years of work and negotiation, the International Maritime Organization (IMO) adopted the environmental provisions of the International Code for Ships Operating in Polar Waters (hereinafter Polar Code), the first binding bipolar IMO instrument. The Polar Code will replace existing nonmandatory guidelines for ships operating in Arctic and Antarctic waters and establish safety of navigation and pollution prevention requirements for polar shipping. Prompted by the increasing volume of ship traffic in the Arctic and the need

to provide protection to ships, their crew, and the fragile Arctic and Antarctic environments, the Polar Code addresses all aspects of polar shipping, including ship design, construction, equipment, crew training, search and rescue, and environmental protection matters.

Structure of the Polar Code

Structurally, the Polar Code consists of four main parts:

- Part I-A: a mandatory safety part that includes 12 safety-related chapters;
- Part I-B: a recommendatory safety part that includes additional information and guidance to implement Part I-A;
- Part II-A: a mandatory environmental protection part that includes five pollution-prevention chapters; and
- Part II-B: a recommendatory environmental protection part that includes additional information and guidance to implement Part II-A.

The Polar Code is not a stand-alone document; rather it is intended to supplement and expand upon existing requirements that are provided in other IMO conventions currently in force, namely, the Safety of Life at Sea Convention (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL), and the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW). In fact, under the IMO's tacit amendment process, the Polar Code will enter into effect on January 1, 2017, through amendments to SOLAS, MARPOL, and STCW.

New pollution-prevention provisions included in the Polar Code

Notably, the five pollution-prevention chapters included in Part II-A of the Polar Code address the types of operational discharges from ships—oil, noxious liquid substances, sewage, and garbage—regulated under the first five annexes of MARPOL. These chapters provide enhanced protections to the polar marine ecosystem from the impacts of international shipping. Chief among the new provisions are:

- A ban on the discharge of oil and oily mixtures and noxious liquid substances from ships;
- A provision requiring certain ships operating in certain ice conditions to separate their oil fuel tanks from the outer hull of the ship;
- Enhanced regulations requiring ships to discharge sewage and garbage at a minimum distance away from any ice shelf or fast ice;
- A prohibition on the discharge of food wastes onto ice; and
- A prohibition on the discharge of cargo residues classified as harmful to the marine environment.

At the conclusion of the negotiations to develop the Polar Code, the newly adopted pollution-prevention provisions were viewed as a good start to address environmental concerns arising from the presence of international shipping in the magnetic poles. That said, throughout the negotiations, environmental organizations pressed to include additional environmental protection measures not presently regulated under MARPOL, including the regulation of black carbon (a climate-forcing agent) and grey water discharges. Furthermore, environmental groups also sought to extend an existing ban on the use and carriage of heavy fuel oil currently in place in the Antarctic to the Arctic region.

Safety provisions included in the Polar Code also benefit the polar environment

Ships operating in the inhospitable and remote polar environments face many adverse conditions that may endanger ships, including prevalent ice, harsh weather, and lack of surveyed areas. The safety provisions of the Polar Code, while intended primarily to reduce the probability of an incident or accident, will also enhance protection of the environment. Notable safety provisions in the Polar Code include: enhanced planning; increased crew training; technical requirements for the design, testing, and carriage of equipment to protect it against low temperatures and ice accretions typically associated with the poles; installation of additional navigational equipment to display ice conditions in the area of operation and detect ice in darkness; and enhanced voyage planning criteria that require a ship's master to consider key ecological areas important for marine mammals and the location of nationally and internationally designated protected areas when planning a route.

Implementation of the Polar Code and a potential phase II

Given the fast-approaching January 1, 2017, effective date for the Polar Code, the IMO, its member States, industry, and environmental groups are focused on implementation of the Polar Code. At the same time, some entities, including environmental groups, have also started questioning whether states should commence a second phase of Polar Code negotiations that would focus on expanding the applicability of the code's safety provisions to ships not generally regulated under SOLAS, such as fishing vessels and ships on domestic voyages. In the meantime, as traffic continues to increase in the magnetic poles, the IMO and its member states are hopeful that the Polar Code will provide an adequate level of maritime safety and pollution prevention to mitigate the risks associated with operating in Arctic and Antarctic waters.

International air emissions impact states' ability to achieve Clean Air Act visibility goals

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When most environmental practitioners think of international environmental issues, they think of climate change or ocean resources or other complex issues that require a global response. However, international environmental issues arise right here at home and have a very real impact on domestic regulatory decisions and obligations. A prime example is the regional haze program, first enacted in 1977 when Congress amended the Clean Air Act to address visibility in Class I areas (i.e., national parks and wilderness areas). The 1977 amendments "declare[d] as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas [resulting] from manmade air pollution." 42 U.S.C. § 7491(a)(1). Following additional revisions by Congress to the regional haze program in 1990, the U.S. Environmental Protection Agency (EPA) promulgated its regional haze rule in 1999, establishing 2064 as the target date for achieving "natural" visibility conditions at all Class I areas. EPA further revised the rule in 2005 to allow certain aspects to be satisfied by participation in the Clean Air Interstate Rule and subsequently the Cross-State Air Pollution Rule.

States comply with the regional haze program by promulgating State Implementation Plan (SIP) revisions that EPA reviews for compliance with the Clean Air Act. There are three main components of a regional haze SIP: (1) reasonable progress goals, which are visibility goals for a Class I area, (2) a long-term strategy, which is the state's plan for meeting the reasonable progress goals, and (3) implementation of the best available retrofit technology at certain large stationary sources. These SIPs are submitted on a phased schedule, with each revision covering a 10-year period and establishing interims goals for that period.

International considerations

A central tenet of the regional haze program is the idea that visibility impairment is caused by a wide variety of activities and sources across large geographic areas. EPA's regulations specifically define regional haze as "visibility impairment that is caused by the emission of air pollutants from numerous sources located over a wide geographic area." 40 C.F.R. § 51.301. Thus, for states on international boundaries like those abutting Canada and Mexico and even states on coastlines, visibility impairment within their borders can be heavily influenced by foreign activities and events. For instance, electric generating units and other industrial facilities in Mexico have a drastic impact on visibility at Big Bend National Park in Texas. And visibility

at this Class I area is further impacted by wildfires, dust storms, and agricultural burning originating in Mexico.

But does EPA's domestic regional haze program fairly account for these international sources of visibility impairment? The preamble to the 1999 regional haze rule sets forth principles to guide EPA in evaluating a regional haze SIP. As a general matter, EPA "does not expect States to restrict emissions from domestic sources to offset the impacts of international transport of pollution." 64 Fed. Reg. 35,714, 35,736 (July 1, 1999). Instead, states "should evaluate the impacts of current and projected emissions from international sources in their regional haze programs," and "EPA will work with the governments of Canada and Mexico to seek cooperative solutions on transboundary pollution problems." *Id.* For example, in Washington State, EPA noted that additional controls were not needed on Washington sources "due to the significant contribution from emissions from natural fire, the Pacific offshore, Canada, and outside the modeling domain." 77 Fed. Reg. 76,174, 76,204 (Dec. 26, 2012). Similarly, in Idaho, EPA found that sources "outside the modeling domain contribute from 45 to 51% of the [ambient] SO_2 emissions, and from 25 to 37% of the NO_X emissions that impact visibility in Class I areas in Idaho." 77 Fed. Reg. 30,248, 30,256 (May 22, 2012). EPA noted that "[t]hese sources are not under the jurisdiction of Idaho nor surrounding States" and will not be controlled in the first planning period. *Id.*

Not requiring additional controls due to the influence of international emissions makes sense, but EPA has recently indicated that it may be abandoning this traditional approach. For example, in 2009, Texas determined in its regional haze SIP submission that "52 percent of the impairment at Big Bend . . . is from Mexico and further south." Tex. Comm'n on Envtl. Quality, Revisions to the State Implementation Plan (SIP) Concerning Regional Haze at 10-10 (Feb. 25, 2009). Texas specifically requested that EPA "initiate and pursue federal efforts to reduce impacts from international transport." 79 Fed. Reg. 74,818, 74,844 (Dec. 16, 2014). Although EPA acknowledges these international emissions, its proposed regional haze rule for Texas—currently pending—does not account for such emissions. *Id.* at 74,842–44. Ultimately, EPA has not pursued federal efforts with Mexico and has instead proposed that Texas rectify an international issue it cannot control by requiring the installation of emission controls on selected facilities.

Concluding thoughts

Although domestic in nature, the regional haze program invokes international emissions issues that EPA must address. Disregarding international emissions at the expense of domestic sources runs counter to EPA's longstanding commitment to working cooperatively with Canada and Mexico. EPA should both actively engage with the international community on reducing these impacts and work with states to develop methodologies to account for these emissions in state regional haze plans in a way that does not unfairly burden domestic activities and sources.

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.

Air quality

***US v. Luminant Generating Co.*, No. 3:13-CV-3236-K, 2015 WL 5009378 (N.D. Tex. Aug. 21, 2015).**
A federal district court dismissed five of six claims of prevention of significant deterioration (PSD) violation against Luminant, operator of a Texas power plant, for modifying generating units between 2005 and 2008 without the required permits and without installing best available control technology (BACT) pollution controls. The court rejected the government's argument that violations of preconstruction requirements are ongoing, and held that the "violations were complete when modification [of the plant] began." Because the five claims for construction that began between 2005 and 2008 accrued more than five years before the suit was filed in 2013, the court held that these claims were barred by the statute of limitations. The court also denied the government's request for injunctive relief, holding that because the government's legal claims are barred by the statute of limitations, "its claims for equitable relief are also barred under the concurrent remedies doctrine." The court also dismissed two Title V claims for allegedly failing to secure amendments to its permit and to submit an accurate and complete application because it does not include PSD requirements. The court held that: "[f]ailure to amend a Title V permit or the submission of an incomplete permit application is not actionable in an enforcement suit under the Clean Air Act."

***National Parks Conservation Association v. EPA*, 803 F.3d 151 (3d Cir. 2015).**
A court of appeals vacated EPA's approval of Pennsylvania's state implementation plan (SIP), which concluded that no additional pollution controls were required to regulate potential emissions impacting visibility in national parks and wilderness areas given the low visibility impact of the sources and the high cost of implementing the controls. The court found that EPA failed to satisfactorily explain why Pennsylvania rejected upgrades to existing control technologies to satisfy best available retrofit technology (BART), or why the state failed to determine whether a 0.1 lb/MMBtu emission limit represents BART for 13 power plants, or why EPA ignored the state's evaluation of cost controls on a dollar-per-deciview metric rather than the dollars-per-ton metric required by EPA guidelines. The court also rejected EPA's "harmless error" argument, noting that EPA admitted in the final rule that the SIP is "so lacking that it is difficult to assess the visibility impact calculations Pennsylvania did conduct."

Water quality

***Foster v. EPA*, No. 2:14-cv-16744, 2015 WL 5786771 (S.D. W.Va. Sept. 30, 2015).**
EPA issued a compliance order alleging that in the course of developing their property, plaintiffs discharged dredge and fill material into several intermittent and ephemeral streams without a permit. EPA's order required plaintiffs to restore the property to pre-disturbance grade and conditions. Plaintiffs then sought declaratory and injunctive relief to void the EPA order. The district court denied in part EPA's motion to dismiss plaintiffs' claim that the EPA order was unconstitutional. The opinion concludes that plaintiffs demonstrated a substantial property interest of which they have been deprived, namely the ability to physically alter or sell their land. The court rejected EPA's argument that procedural due process protections may be limited to post-deprivation judicial review under the Administrative Procedure Act, stating: "When the penalties from disobeying a law are ruinous, but compliance undermines judicial review, the effect is a deprivation of due process because judicial review becomes unavailable as a practical matter." However, the district court rejected plaintiffs' substantive due process claim, stating that the complaint contains no allegations of enforcement actions that "shock the conscience."

***North Dakota v. EPA*, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015).**
***In re: EPA*, Nos. 15-3799, 15-3822, 15-3853 and 15-3887, 2015 WL 5893814 (6th Cir. Oct. 9, 2015).**
A district court granted a motion by 12 states and the New Mexico Environment Department to enjoin EPA and the Army Corps of Engineers from implementing the April 2015 rule revising the definition of "Waters of the United States" that establishes Clean Water Act jurisdiction. The court held that judicial review lies in the district court and not the court of appeals because the rule imposes no effluent limitation nor does it issue or deny a permit. The opinion concludes that the definition of a tributary, which allows for regulation of any area that has a trace amount of water so long as physical indicators of a bed and banks and an ordinary high water mark exist, includes "vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term." The district court also concluded that the rule is likely arbitrary and capricious because no evidence points to how "intermittent and remote wetlands have any nexus to a navigable-in-fact water," and because the rule establishes a 4,000 foot distance from a navigable water subject to regulation without showing a connection to relevant scientific data. Finally, the opinion concludes that the definition of the term "neighboring" in the rule was promulgated in violation of the Administrative Procedure Act because nothing in the call for comments gave notice that EPA would substitute ecological and hydrological concepts with a rule based on geographical distances.

Subsequently, the Sixth Circuit also granted a nationwide stay of the "waters of the United States" regulation pending a decision whether the court of appeals has jurisdiction over four actions by 18 states that were consolidated in the Sixth Circuit by the multi-district litigation panel. The majority opinion states that petitioners demonstrated a substantial likelihood of

success on the merits, noting that the public did not have notice that distance-based limitations were being considered and the absence of scientific support for the standards that were selected. The dissent states that it is not prudent to issue a stay before the court determines it has jurisdiction.

***Sierra Club v. Virginia Electric and Power Co.*, No. 2:15-cv-112, 2015 WL 6830301 (E.D. Va. Nov. 6, 2015).**
Plaintiff challenged the alleged contamination of groundwater and surface waters surrounding a power plant in Chesapeake, Virginia. The complaint alleged that defendant's Virginia National Pollutant Discharge Elimination System permit does not authorize defendant to introduce alleged coal ash contaminants into jurisdictional waters of the United States via hydrologically-connected groundwater. On April 9, 2015, Defendant moved to dismiss, arguing, *inter alia*, that groundwater that is hydrologically-connected to surface water is not covered under the Clean Water Act. The court rejected this contention and denied the motion to dismiss, citing *Village of Oconomowoc Lake v. Dayton Hudson Corp.* 24 F.3d 962 (7th Cir. 1994), *D.E. Rice v. Harken Exploration Co.,* 250 F.3d 264, 269 (5th Cir. 2001), and *United States v. Johnson,* 437 F.3d 157, 161 (1st Cir. 2006).

CERCLA

***Elite Operations Inc. v. Union Pacific Railroad Co.*, No. H–13–3461, 2015 WL 5474434 (S.D. Tex. Sept. 21, 2015).**
Union Pacific Railroad Co. was held not liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for costs of response on property in Texas because plaintiff did not incur recoverable costs. Plaintiff Elite Operations gave buyer a "soil excavation credit" of $400,000 toward the purchase price of the property when an environmental report revealed the presence of hazardous substances. Elite sued Union Pacific to recover the soil credit costs, claiming that the contamination was caused by the use of the property as a rail yard. The court ruled that Elite could not recover these costs under CERCLA because Elite failed to present evidence showing that the costs were incurred to address a release that threatened the public health or the environment. The opinion also notes that the levels of hazardous substances did not exceed limits for commercial or industrial exposure, and that any needed soil excavation will be performed by the new buyer rather than Elite.

***Center for Biological Diversity v. BP America.*, No. MDL No. 2179, 2015 WL 5363039 (E.D. La. Sept. 14, 2015).**
A district court rejected the an environmental group's claim that British Petroleum America was required to report the release of hazardous substances from the Deepwater Horizon explosion under the Emergency Planning and Community Right-to-Know Act (EPCRA). The district court held that EPCRA's reporting requirements are derived from the CERCLA's definition of "hazardous substance," which excludes petroleum including crude oil or any fraction thereof

not specifically listed as a hazardous substance. The court rejected plaintiff's argument that the spill was reportable because benzene, toluene, and xylene are specifically listed fractions, stating that such an interpretation "would subject every oil spill to CERCLA coverage, rendering the petroleum exclusion meaningless." The court also rejected plaintiffs' argument that the addition of spacer fluid and drilling mud to stop the flow of oil rendered the exemption inapplicable, noting that they are not hazardous substances under CERCLA and the "addition of drilling fluids to petroleum has no effect on the applicability of the petroleum exemption."

FIFRA

***Pollinator Stewardship Council v. EPA*, -- F.3d --, 2015 WL 7003600 (9th Cir. Nov. 12, 2015).**
The Ninth Circuit vacated EPA's unconditional registration of sulfoxaflor, an insecticide. Commercial bee keepers and organizations challenged EPA's approval of insecticides containing sulfoxaflor, which was classified as "extremely toxic" to honey bees. EPA concluded that additional studies were required when semi-field studies were found by EPA to be "inconclusive" as to brood development and long-term colony health. Subsequently, EPA decided to unconditionally register the pesticide even though the requested additional studies were not completed. The court held that EPA's decision was not supported by substantial evidence, stating that "[w]ithout sufficient data, the EPA has no real idea whether sufloxaflor will cause unreasonable adverse effects on bees, as prohibited by FIFRA."

Energy

***State of Wyoming v. U.S. Department of the Interior*, No. 2:15–CV–043–SWS, 2015 WL 5845145 (D. Wyo. Sept. 30, 2015).**
A district court entered a nationwide preliminary injunction barring the U.S. Bureau of Land Management (BLM) from enforcing its final 2015 rule relating to hydraulic fracturing on federal and Indian lands. The district court noted that the Energy Policy Act of 2005 removes hydraulic fracturing operations from EPA regulation under the Safe Drinking Water Act's underground injection program, and held that it "defies common sense" to interpret the BLM's general statutory authority as providing authority to regulate fracking when Congress directly spoke to the issue in the Energy Policy Act. The opinion also concludes that the rule is arbitrary and capricious because the BLM neither substantiated the existence of a problem the rule is meant to address, identified a gap in existing regulations, nor described how the final rule will achieve its objectives. In short, the court states, "the Fracking Rule seems a remedy in search of harm."

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.

To say that the world in which we live is constantly changing is an understatement. The world in which the Section of Environment, Energy, and Resources strives to serve its members—and provide the content and information you want—is now changing more than ever before. I want to share with you some changes that are in progress. We hope that they will provide substantial new benefits in the areas of Section publications, programs, and communications.

In the Section we often speak of the "silos" in which we live and operate, and that many of those silos need to be broken down. For example, one committee working in its silo comes up with a great idea for a program and proceeds to develop it. Independently, another committee, in its own silo, comes up with a similar idea. They then both work to bring the idea to fruition, probably duplicating efforts, and possibly leading to similar products. It would therefore be helpful if there were a formal mechanism in place for coordination. Or, more broadly, let's imagine one of our publications identifies a hot topic for an article and at the same time a conference planning committee decides to have a session on the same topic. This is precisely an opportunity for coordination. And the magical mechanism to coordinate these types of efforts is called "content convergence."

Many of our substantive committees are already working together and doing an excellent job of coordinating and co-sponsoring joint committee newsletters, committee calls, and webinars. That's content convergence—keep up the good work! Going forward, we all need to more proactively think about content convergence and how it should be facilitated. I have appointed a Special Committee on Content Convergence, co-chaired by Seth Davis and John Milner, who will be the next two Section chairs. All substantive officers of the Section are involved. The committee is developing a process for serving as the "clearinghouse" for new content—receiving new ideas from the Section entities that generate it—and disseminating and coordinating those ideas among those entities. It won't happen overnight, but we will be moving—as quickly as we can—to a mode of operation that will better produce, develop, and distribute content in a coherent, coordinated way for the benefit of our members.

Greater coordination is a central theme of content convergence. Here's a sample of how it will work. Substantive committees will help determine topics that are important and timely to our members. Those topics will be considered by the Special Committee on Content Convergence who will use the information to prioritize themes for the Section that year. The committee will also help determine the best way to get the related content to our members. Should a topic be addressed in a series of articles that vary in scope or timeframe? Should it be developed into a

Spring Conference or Fall Conference session? A webinar or a series of webinars? A committee call? Can it be turned it into a podcast? Who else is working on the topic and how can we help these groups coordinate?

While we have been developing the concept of content convergence, we have also been giving serious and concerted thought to the future of our publications and programs. Last year John Milner and our Publications Service Group conducted a comprehensive study of our publications, concluding that while the publications we want are the ones we have, there are some improvements that can be made. Specifically, we can make our publications more flexible, more accessible through our website, more interactive, and more available in different forms. One of our primary goals in publications is to make shorter pieces—individual book chapters, specific *NR&E* or *Trends* articles—more easily available.

In addition, our Education officer, Amy Edwards, and our Education Service Group have taken a "fresh look" at our programming. One of their recommendations is to develop a library of free podcasts, another example of content convergence. The ESG also recommended that the cost of webinars for Section members be reduced and that more discounts be offered for in-person conferences. These proposals would help make Section content more available to our members. Some of these recommendations have already been implemented and we will continue to work on implementing the others in 2015–2016.

We are firmly committed to moving forward with content convergence for the benefit of our members. Absolutely essential to these activities will be the active involvement of our substantive committees and their chairs and vice chairs. We will be looking increasingly to committees to identify key issues and generate new ideas—the content around which our efforts will converge. Those action plans that seem such a nuisance are now more important than ever. The committees will in return receive a better set of themes on which to work, more guidance and assistance in collaboration, and a more coordinated and comprehensive method of producing and distributing content. As I wrote in the last issue, collaboration is essential for us. Content convergence will make it easier for all of us to collaborate within the Section and with other entities. For now, we just ask for your patience and your thoughtful cooperation. Because when we get out of those silos we think you're really going to like the view!

Time to meet face-to-face: The face value of attending the 45th Spring Conference

Susan Floyd King

Susan Floyd King is special counsel in Jones Walker LLP's Real Estate Practice Group as a member of the environmental team. She is the planning chair of the 45th Spring Conference.

Imagine landing at the airport in Austin, Texas—the venue for the Section of Environment, Energy, and Resources' 45th Spring Conference, March 30–April 1, 2016—and stepping off the plane you see a fellow Section member that you haven't been in contact with for ages. The encounter energizes you.

You glance out the cab window as you approach the Hyatt Regency in downtown Austin, noting that the serene Lady Bird Lake and the field of bluebonnets are within walking distance of the conference hotel. The scenery energizes you.

You check into your room and head to the conference registration table where you run into familiar faces of colleagues and friends that you have failed to keep up with over the last few months . . . years. The smiles and warm welcome energize you.

You glance at the conference materials and program, realizing that at least three or more of the topics directly relate to specific issues you are currently addressing with your clients. The program content and the caliber of the speakers energize you.

You reflect for a moment that you made the right decision to attend this conference because the program, the speakers, the public service project, and the events will energize you and your practice. This is the face value of attending the 45th Spring Conference.

Highlights of the 45th Spring Conference include:

- A public service project of shore cleanup and habitat restoration at nearby Lady Bird Lake
- A keynote address by EPA Administrator Gina McCarthy (invited) and Assistant Attorney General John Cruden
- A general counsel roundtable

Wide-ranging sessions will address:

- Hot topics in enforcement
- Air, water, and waste—immediate issues affecting the law practice of environmental,

energy, and resource attorneys
- Practice series guide for attorneys practicing in Region 6
- Supreme Court round-up
- Due diligence in complex transaction from an in-house counsel perspective
- Obama's legacy on climate change
- Production, transportation, and export of oil and gas
- Ethics in today's law practice

And there will be opportunities to visit with friends old and new:

- Section dinner on Thursday, followed by an after-hours social at The Ginger Man in Austin's Warehouse District,
- Taste of SEER dine-around event on Friday evening
- Networking breaks between sessions

Join us in Austin on Wednesday, March 30 through Friday, April 1 for the 45th Spring Conference and get energized!

Don't miss the 2016 Water Law Conference in Austin!

Susan M. Ryan

Susan M. Ryan of Ryley Carlock & Applewhite in Denver is the planning chair of the 34th Annual Water Law Conference.

From innovative ways to allocate scarce water resources to U.S. Supreme Court case law updates, the 34th Annual Water Law Conference will have something for everyone. On March 29–30, 2016, the Section of Environment, Energy, and Resources will hold the Water Law Conference at the Hyatt Regency in Austin, Texas. Located in the heart of Austin, the conference features unique networking opportunities with top water law practitioners and academics from across the country as well as senior-level U.S. Environmental Protection Agency and U.S. Department of Justice officials.

Cutting-edge topics and engaging speakers

Tuesday and Wednesday's CLE sessions will cover the latest developments in water law that are relevant to lawyers in all types of practice settings, from government to NGOs to private

practice in firms of all sizes. Topics include:

- Issues related to the effective management and allocation of scarce water resources;
- How water conservation impacts water utilities and providers;
- Developments under the Clean Water Act, including water quality challenges in Indian Country and the application of the Waters of the U.S. Rule;
- Emerging developments in the management and allocation of groundwater resources between states;
- Examples of effective outreach and communication in water disputes and transactions; and
- Discussion of how to manage ethical conflicts, including the difference between business and ethical conflicts and how to work with outside counsel to resolve both.

The conference also highlights two keynote speakers—Carlos Rubinstein and John Cruden. As the former chair of the Texas Water Development Board and former commissioner of the Texas Commission on Environmental Quality, Mr. Rubinstein will provide insight into local water resource and quality issues. On Wednesday, the Assistant Attorney General of the Environment and Natural Resources Division at the U.S. Department of Justice, John Cruden, will discuss key water disputes in the U.S. Supreme Court and explain the practical impacts of the Court's decisions.

Meet water law experts from across the country

The Water Law Conference provides great opportunities to meet and network with water law practitioners in all sectors with diverse perspectives on water resources. The conference features:

- A pre-conference dine-around event at local restaurants on Monday night;
- A networking reception on Tuesday night;
- Networking coffee breaks throughout the conference; and
- An opportunity to meet Spring Conference attendees at the joint public service on Wednesday afternoon.

Keep Austin beautiful!

Following the conference, please join the Water Law Conference and Spring Conference attendees on Wednesday afternoon for a public service project along the shores of Lady Bird Lake. Participants will walk out the hotel's back door and have the option to conduct clean up along the shore or jump into a kayak and grab trash and other items from the lake! There will

also be an opportunity to conduct restoration work near the confluence of Shoal Creek and Lady Bird Lake.

Stay for the Spring Conference

The 45th Spring Conference will take place at the Hyatt Regency in Austin on March 30–April 1, 2016, after the Water Law Conference. The Spring Conference will inform you about recent developments in air, water, waste, and government enforcement and "hot topics" in environmental, energy, and resource law. Discounted rates for registering for both the Water Law and Spring Conference are available, so take advantage of this unique opportunity!

Kickoff webinars and a conference discount

To kick off the Water Law Conference, the Section is hosting three webinars and offering a $95 discount off the registration fee for the Water Law Conference for anyone who registers for any of the following three webinars.

Look But Don't Touch: How Water Quality Regulation Affects Water Availability. On January 26, 2016, we will hear from a panel of experts about how federal laws and programs are impacting the availability of water. The panelists will focus on Clean Water Act regulatory programs as well as laws that protect threatened species and habitat.

Food Grows Where Water Flows—State Laws and Growers Adapt to Water Scarcity. In early February 2016, a panel of experts will offer three perspectives on changing legal regimes that affect the availability of water for agriculture. The webinar will address the legal frameworks used in California, Arizona, and Nebraska to deal with water shortages for agriculture.

Using Private/Public Partnerships for Water Development. In late February 2016, a panel of speakers will provide focused information about the concepts and alternative solutions of private/public partnerships in the water supply and wastewater sector, with several case studies of recent successful projects in both the western and eastern United States.

See you in Austin!

We hope to see you in Austin for learning, networking, music, and good food. Up-to-the minute conference and registration information can be found at http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=202302853.

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.

Pamela E. Barker has joined Lewis Rice LLC as a member in the firm's St. Louis office. Barker's practice focuses on assisting clients with the environmental aspects of real estate and corporate transactions and with regulatory compliance. She most recently served as chief environmental and regulatory counsel at Appvion, Inc., a specialty paper manufacturer headquartered in Appleton, Wisconsin. Prior to that, Barker practiced for more than 25 years at Godfrey & Kahn, S.C. in Milwaukee. She is the chair of the ABA Section of Environment, Energy, and Resources.

Joshua Bloom has joined Meyers Nave as a principal in the Environmental Law Practice Group in its Oakland, California office. Bloom's practice includes over two decades of litigation, transactional, and counseling experience to public and private entity clients on all state and federal environmental and natural resources laws. His specialty scope of expertise includes negotiating real estate, risk allocation, and regulatory agreements, including guiding clients in navigating protected species and wetlands issues, with respect to brownfields redevelopment and risk-based cleanup, as well as negotiating environmental insurance policies and claims disputes. Bloom also maintains a significant Proposition 65, green chemistry, and other environmentally-related consumer products practice.

Joel P. Johnston has joined Hall Estill as an associate in the firm's Tulsa, Oklahoma office. Johnston's practice is primarily focused on environmental, energy, and natural resources matters. He graduated from the University of Tulsa College of Law where he was a Notes & Comments editor of the *Energy Law Journal*, a staff member for the Section's *The Year in Review* publication, and a Chesapeake Energy Corporation Scholar. Prior to attending law school,. Johnston worked as an environmental consultant and as an adjunct professor of geology at a Colorado community college. During law school, he continued consulting for a national environmental consulting and engineering firm, first managing its environmental consulting practice in its Tulsa, Oklahoma office, and later as the firm's national oil and gas client manager. Johnston has experience with projects in every North American oil shale play, across all segments of the industry, as well as with RCRA, NEPA, CAA, and CWA related matters. He is a licensed geologist in Arizona, Missouri, Nebraska, and Wyoming and teaches and advises as to hydraulic fracturing law and geology.

Angela Morrison has joined Berger Singerman as a partner with the firm's Government and Regulatory Team in its Tallahassee, Florida office. Morrison has more than 25 years of experience in environmental and administrative law, with an emphasis on air quality, climate

change, and energy issues. She represents a broad spectrum of clients on permitting and compliance strategies through counseling, administrative litigation and ongoing relationships with regulatory agencies. Morrison was a partner with Hopping Green & Sams for 24 years. Morrison is the immediate past editor in chief of *Trends*, a member of the Section's Council, and a Council mentor to the Renewable, Alternative, and Distributed Energy Resources Committee and the Waste and Resource Recovery Committee.

Kathleen C. Schroder has joined Davis Graham & Stubbs as a partner in the firm's Natural Resources Department. Schroder's practice focuses on energy development on federal lands and issues arising from the Endangered Species Act. She was formerly with Bjork Lindley Little PC in Denver. Schroder is a vice chair of the Section's Public Land and Resources Committee.