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Table of Contents

Features

The Clean Power Plan stay: Are states placing their pencils down? 2
Shannon S. Broome

Environmental law jurisprudence and Associate Justice Antonin Scalia's legacy 4
James R. May

Climate litigation scores successes in the Netherlands and Pakistan 7
Michael B. Gerrard

Fading into the sunset: Solar and wind energy get five more years of tax credits with a phase-down 9
Felix Mormann

Final critical habitat rules and policy may result in substantial impacts to land use without commensurate wildlife benefits 14
Karma B. Brown and Kerry L. McGrath

The environment chapter of the Trans-Pacific Partnership: An environmental agreement within a trade agreement 16
Howard F. Chang

In Brief 19
Theodore L. Garrett

Section News

Views from the Chair 21
Pamela E. Baker

Spotlight on Section programming 23
Amy L. Edwards

People on the Move 25
James A. Arnold

The Clean Power Plan stay: Are states placing their pencils down?

Shannon S. Broome

Shannon S. Broome is the co-chair of the ABA's Climate Change, Sustainable Development, and Ecosystems Committee and is a vice chair of the Air Quality Committee. She practices extensively on air quality and climate change issues for a range of clients.

On February 9, 2016, the U.S. Supreme Court issued a 5–4 order in which it stayed the U.S. Environmental Protection Agency's (EPA's) implementation of the Clean Power Plan (CPP) pending eventual consideration by the Supreme Court. EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule*, 80 Fed. Reg. 64,662 (Oct. 23, 2015). The CPP establishes state-by-state targets for carbon emissions reductions, and EPA states that the rule will reduce national electricity sector emissions by an estimated 32 percent below 2005 levels by 2030. The CPP provides options to cut carbon emissions and determines state emissions reduction targets by estimating the extent to which states can take advantage of each of them. Targets differ from state to state because of each state's unique mix of electricity-generation resources—and also because of technological feasibilities, costs, and emissions reduction potentials, all of which vary across the country. The CPP set a deadline of September 6, 2016, for states to submit final plans on how they will meet their CPP targets or, alternatively, an initial plan with a request for an extension until no later than September 6, 2018.

Does the stay mean the Supreme Court will overturn the CPP?

The first question is whether the Court's decision to grant the stay definitively means that the justices who voted for it considered the CPP to be legally flawed. The stay was issued before Justice Scalia passed away. There are a range of views on this issue. For example, some believe that a majority of the Court may have considered the challengers of the CPP to have demonstrated a reasonable probability that they would succeed on the merits of their challenge to the CPP. The standards that the Court typically applies in reviewing stay applications lend support to this view. Others might argue that given that the Court did not offer *any* substantive explanation for granting the stay, it is possible that at least some justices who voted for the stay were most concerned with preserving the status quo pending judicial review and had not yet made up their minds on the merits. Whatever signal the stay's issuance might have sent regarding the merits of the case, that signal is obscured by Justice Scalia's death.

In short, issuance of a stay was not a positive sign for the CPP, but it is important not to overread the stay's issuance. What the stay means for certain is that five justices at least wanted to preserve the status quo until the courts have had an opportunity to determine the rule's validity. Indeed, the state applicants and the Utility Air Regulatory Group (UARG) invoked section 705 of the Administrative Procedure Act, which authorizes a stay to preserve the status

quo "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705.

The heightened uncertainty from Justice Scalia's passing also creates renewed significance of the decision of the D.C. Circuit regarding the CPP's fate. There is a strong possibility that President Obama's nominee to replace Justice Scalia, D.C. Circuit Chief Judge Merrick Garland, or the next president's nominee, whomever that may be, will not be confirmed before the case is decided. Thus, there could be a 4–4 split in any Supreme Court decision ruling. If that occurs, the lower court ruling (whether favorable or unfavorable to the CPP) would stand. This is because under a longstanding Supreme Court practice, where justices are evenly divided, the lower court's decision is deemed affirmed. *See, e.g.*, *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (*per curiam*). Thus, if the current makeup of the Supreme Court remains, and if the D.C. Circuit affirms the CPP, the four living justices who voted to stay the CPP would not constitute a majority that could overturn the D.C. Circuit's decision. To the extent that the four justices in the liberal wing of the Court who would have denied the stay did so because they believed the rule was a valid exercise of EPA's authority, one of them would have to change his or her view regarding the validity of the rule for it to be invalidated. Adding to the uncertainty is the fact that Justice Kennedy, who voted for the stay, is considered a swing vote, and some argue that he could have supported staying the CPP for reasons other than having reached the conclusion that it is invalid, such as the number of states that applied for the stay (given his pro-states' rights reputation), the desire to preserve the status quo, and EPA's dismissal of the significance of the Court's decision in the *Michigan* case last term, *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The D.C. Circuit hears argument in the case the first week of June and a decision will likely be issued relatively quickly (compared with decisions issued in other cases rather than in absolute terms).

What are states doing in response to the stay?

Given the tight timelines for submitting state plans and compliance dates as early as 2022, states that may need to alter their energy mix to achieve their state targets face a dilemma. Should they stop state plan development altogether until the courts rule on the legality of the CPP, continue full steam ahead, or adopt an "in between" approach? Under D.C. Circuit precedent, it is reasonable to expect that if the CPP is upheld in significant part, the deadlines for state submittals and the compliance dates will be tolled for approximately the same period of time that the stay is in effect, basically pushing all of the deadlines an equivalent period into the future. At the same time, states may view the stay as offering them the gift of time to create a thoughtful plan.

While some commentators have claimed that the stay means "pencils down" and others have characterized states as either suspending, assessing, or continuing planning for compliance with the CPP, the fact is that even in states that say they are "suspending planning," the actual status is more nuanced. Some activities that will be useful to CPP compliance may in fact be

proceeding. States face a tension between being ready for compliance by assessing the best strategies for their mix of power and their CPP targets and the desire not to expend resources on implementing a rule that the courts could ultimately invalidate. Thus, we are seeing many states adopt a "no regrets" strategy under which they appear to be taking actions that would occur whether or not the CPP is upheld. For example, before the stay, Michigan, a litigant against the CPP, also announced that it would be submitting a plan to EPA in September. Following the stay, Michigan suspended the stakeholder process it had initiated, but reportedly has not canceled the contract for its modeling, so it will be ready to make key decisions (e.g., mass-based or rate-based) should the stay be lifted. Similarly, the PJM Interconnection, a regional transmission organization that covers nearly a quarter of a million square miles in eastern states, and which ensures cost-effective delivery of power over the bulk transmission system, is also reported to be continuing to "crunch numbers" and run modeling scenarios, as are other such organizations such as the Midwest Independent System Operator.

Another reason for continued planning by several states is the need to meet renewable portfolio standards or energy efficiency requirements adopted independently from the CPP. These standards, which are aids to CPP compliance, must be met regardless of the CPP's status.

Reading the tea leaves on the CPP's ultimate fate is difficult, especially without knowing whether the Supreme Court will have its full complement of justices when it hears the case, which president will make the appointment, what the D.C. Circuit's decision will be, or the basis for that decision. What can be said is that many states are *not* putting their pencils down.

Environmental law jurisprudence and Associate Justice Antonin Scalia's legacy

James R. May

James R. May is a Distinguished Professor of Law and Director, Global Environmental and Natural Resources Law Institute, Delaware Law School and the Chief Sustainability Officer, Widener University. He is the editor of, and a contributing author to, Principles of Constitutional Environmental Law (J. May, ed. 2011).

Associate Justice Antonin Scalia left a long and indelible jurisprudential shadow on environmental law. Over his nearly 30 years on the bench, the former professor of administrative law shaped—sometimes single-handedly—a multitude of areas that serve as stock-and-trade of environmental, energy, and natural resources lawyering across the nation. This article focuses on standing, takings, and deference to environmental agency rulemaking.

Less likely to find environmental standing

Justice Scalia's most lasting legacy on environmental law is how his jurisprudence makes it more difficult for environmental plaintiffs to demonstrate constitutional standing under Article III of the Constitution. Since at least *Sierra Club v. Morton* (1972), plaintiffs needed to show that they possessed an "injury in fact," which could be commercial, economic, aesthetic, or environmental. Raising the bar, Scalia stated that plaintiffs must demonstrate at an "irreducible minimum": (1) imminent and concrete "injury-in-fact" that is (2) fairly "traceable" to the defendant's actions, and (3) "redressible" by the court. Applying this standard, Scalia found standing lacking in *Lujan v. National Wildlife Federation* (1990), because using land "in the vicinity of" affected federal land wasn't sufficient, and in *Lujan v. Defenders of Wildlife* (1992), due to the absence of what has come to be known as "tickets in hand" to return to the places of alleged injury. Dissenting in *Defenders of Wildlife*, Justice Blackmun, bemoaned Scalia's new requirements as "a slash-and-burn expedition through the law of environmental standing."

After a bit of a corrective, he also dissented in *Friends of the Earth v. Laidlaw Environmental Services v. EPA* (2000), when the majority held that it is injury to the person, and not the environment, that matters in standing analysis. There, he complained that the majority had proceeded "to marry private wrong with public remedy in a union that violates traditional principles of federal standing—thereby permitting law enforcement to be placed in the hands of private individuals. I dissent from all of this."

Justice Scalia was skeptical that the effects of climate change could ever support standing, even for states. Speaking from his dissent in *Massachusetts v. EPA* (2006), Scalia would have found that petitioning states lacked standing to challenge the U.S. Environmental Protection Agency's (EPA's) failure to institute rulemaking to regulate greenhouse gas emissions from stationary sources, thereby rejecting that states are entitled to "special solicitude" in standing analysis.

Justice Scalia was more inclined to find standing when litigants challenged environmentally protective agency action. For example, writing for a plurality, he found that alleged injury to economic interests to water districts and to corporate ranching and agricultural interests was sufficient injury in *Bennett v. Spear* (1997). Moreover, he held that homeowners possessed both standing and a cause of action to challenge an EPA-issued but not enforced administrative compliance order in *Sackett v. EPA* (2014).

More likely to find regulatory takings

Modern takings jurisprudence is also Justice Scalia's handiwork. He, more than any other Justice, was inclined to find government regulation—particularly that which serves environmental ends—"goes too far" as to constitute a regulatory taking, warranting just compensation. In *Lucas v. South Carolina Coastal Council* (1992), he held for the majority that a state law designed to protect barrier islands constituted a compensable taking when it had

the effect of depriving a developer of what he considered to be all economic use. And in *Nollan v. California Coastal Commission* (1987), Justice Scalia—again for the majority—held that a requirement that a shorefront property owner maintain a public pathway to a public beach was "illogical" and constituted a compensable taking.

More likely to invalidate environmental rulemaking

Justice Scalia was consistently skeptical of environmentally protective interpretations by federal agencies, especially those by EPA. In *Rapanos v. EPA* (2006), writing for a plurality of the Supreme Court, he rejected the Army Corps of Engineers' interpretation of the Clean Water Act's term "navigable waters" to include temporally saturated areas, instead insisting on a direct surface water connection to a water that is "navigable in fact." Likewise, he joined the Court's decision in *SWANCC v. Army Corps of Engineers* (2001), holding that Congress did not intend to permit the Corps and EPA to regulate dredging and filling of isolated ponds and wetlands that are not adjacent to otherwise navigable waters, under what was known as the "migratory bird rule." Most recently, in *Michigan v. EPA* (2015), he wrote for the majority to invalidate EPA's mercury and toxics rule, finding it unreasonable "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." And shortly before he died, he joined four other justices to order a stay of EPA's Clean Power Plan.

Yet Scalia was more inclined to defer to EPA interpretations that were less environment-minded. For instance, in *Entergy v. Riverkeeper* (2009), he wrote on behalf of the majority to uphold EPA's use of cost-benefit analysis in assessing "best technology available" for minimizing the adverse environmental effects of cooling water intake structures under section 316(b) of the Clean Water Act. Likewise, he dissented in EPA's favor in *Massachusetts v. EPA*, voting to uphold the agency's decision at that point that greenhouse gases are not "air pollutants" under the Clean Air Act.

Early during his tenure on the bench, however, Justice Scalia seemed more inclined to endorse the edict from *Chevron U.S.A., Inc. v. NRDC* (1984), to defer to "reasonable" statutory interpretations from mission-oriented agencies. For example, in *EDF v. Chicago* (1994), Scalia on behalf of the Court upheld EPA's interpretation under the Resource Conservation and Recovery Act that "solid waste" includes ash from municipal waste incinerators. And then in dissent he decried the result in *U.S. v. Mead Corp.* (2001), where the Court strayed from the *Chevron* standard by granting only "power to persuade" as opposed to "reasonableness" deference to agency interpretations that are not the result of a deliberative process.

Last, *Whitman v. American Trucking* (2001) stands as a bit of an outlier to Scalia's seeming antipathy to EPA's reach, in which and on behalf of the majority, he upheld as an "intelligible principle" under the nondelegation doctrine Congress having EPA establish national ambient air quality standards that are "requisite" to protect human health and the environment.

Conclusion

Justice Scalia's jurisprudence significantly affected environmental law, principally that respecting standing, takings, and deference to agency rulemaking. For further reading on these subjects, please see *Principles of Constitutional Environmental Law* (J. May ed., 2011).

Climate litigation scores successes in the Netherlands and Pakistan

Michael B. Gerrard

Michael B. Gerrard is a professor and director of the Sabin Center for Climate Change Law at Columbia Law School and chair of the Faculty of Columbia's Earth Institute.

Most U.S. climate change litigation falls into one of two categories. The vast majority of cases—which receive the bulk of the attention—are based on the Clean Air Act and other statutes. These include *Massachusetts v. Environmental Protection Agency* (2007) and the current litigation over the U.S. Environmental Protection Agency's (EPA's) Clean Power Plan. The second category, and the focus of this article, comprises cases based on common law and the Constitution.

A flurry of these cases arose a decade ago; most sought money damages or injunctive relief against fossil fuel companies and electric utilities due to their greenhouse gas (GHG) emissions. All were based chiefly on the public nuisance doctrine. That line of litigation was largely shut down by the Supreme Court's ruling in *American Electric Power v. Connecticut* (2011). There, the Court held that the Clean Air Act's grant of authority to EPA to regulate GHGs displaces any federal common law of nuisance as to such emissions. Though that case concerned injunctive relief, the displacement doctrine was extended to money damages cases in the Ninth Circuit's decision in *Native Village of Kivalina v. Exxon Mobil Corporation* (9th Cir. 2012). While the Supreme Court in *American Electric Power* left the door slightly ajar for *state* common law nuisance cases, no one has brought such a suit in the nearly five years since that decision.

Several climate cases have been brought (mostly against states) under the public trust doctrine, which places on the states a duty in trust to protect public resources. Despite some interim victories, however, so far all the cases that have reached judgment have been dismissed. One case currently pending in the U.S. District Court in Oregon seeks to establish a federal constitutional right to a clean environment and the idea of the existence of such rights under state constitutions has gained traction in Pennsylvania.

All in all, though, no plaintiff has won a common law or constitutional case in the United States seeking damages or injunctive relief arising from climate change. In 2015, however, two similar

suits were successfully prosecuted in other countries. That, in turn, has inspired several others. These cases may mark the start of a trend.

Urgenda v. Netherlands

The Urgenda Foundation and 886 Dutch citizens sued the Kingdom of the Netherlands in December 2013 in the district court in The Hague. While the European Union has established a legal framework aiming at achieving a 20 percent reduction in GHGs by 2020, and the Dutch state had pledged a 17 percent reduction, the suit sought an order that the government take measures to reduce emissions in the Netherlands to at least 25 percent below 1990 levels by 2020. On June 24, 2015, the court granted the requested order, concluding that "[d]ue to the severity of the consequences of climate change and the great risk of hazardous climate change occurring—without mitigating measures … the State has a duty of care to take mitigation measures."

In determining what the duty of care requires, the court cited (without directly applying) Article 21 of the Dutch Constitution ("It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment"); the emissions reduction targets of the European Union; principles under the European Convention on Human Rights; the "no harm" principle of international law; the doctrine of hazardous negligence; and the principles of fairness, precaution, and sustainability embodied in the United Nations Framework Convention on Climate Change.

After a detailed examination of various scientific reports, the court concluded that a 25 percent reduction was needed to meet the country's fair contribution toward the UN's temperature goal. The court left it to the government to select the measures that would achieve this reduction.

This was the first decision by any court in the world ordering countries to limit GHGs emissions for reasons other than statutory mandates. It was also the first *attempt* outside the United States to bring these theories before a court in the climate change context.

Some commentators argue that the Dutch court exceeded its authority in ruling on the adequacy of European Union commitments. The government is presently appealing the decision.

Leghari v. Federation of Pakistan

Ashgar Leghari, a farmer from Pakistan, sued the national government for failure to carry out the 2012 National Climate Policy and Framework. The Lahore High Court ruled on September 4, 2015 that "Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system . . . . On a legal and constitutional plane this is a clarion call for the protection of fundamental rights of the citizens of Pakistan."

The court cited the right to life and the right to human dignity, "constitutional principles of democracy, equality, social, economic and political justice..., the international principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity, and public trust doctrine." The court found that "the delay and lethargy of the State in implementing the Framework offend the fundamental rights of the citizens."

The court then created a Climate Change Commission and appointed 21 members from key ministries, nongovernmental organizations, and universities to help ensure implementation of the climate laws.

Pending cases

In addition to these two victories, several suits were recently brought or are in the works. Suits similar to *Urgenda* have been brought in Belgium and New Zealand. Both are in their early stages. A Peruvian farmer has sued RWE, a large German electric power company, in a trial court in Germany seeking money damages for RWE's alleged share of the costs of adapting to glacial melt. Greenpeace has announced it will sue the government of Norway for allowing offshore oil drilling, arguing that such drilling is a violation of the Norwegian Constitution due to its climate impacts. Greenpeace has also petitioned the Philippines Human Rights Commission for a declaration that the world's largest oil, gas, and coal companies have violated human rights by contributing to climate change.

Most nations recognize the right to a healthy environment in their constitutions or statutes, and more of these kinds of claims can be expected as climate change becomes more severe. Whether they might gain a footing in the United States is unclear.

Fading into the sunset: Solar and wind energy get five more years of tax credits with a phase-down

Felix Mormann

Felix Mormann is associate professor at the University of Miami School of Law and faculty fellow at Stanford University's Steyer-Taylor Center for Energy Policy and Finance.

In the closing weeks of 2015, the solar and wind energy industries scored a major policy victory as Congress voted to extend the tax credits that have been a key driver of recent renewable energy deployment in the United States. Legislators reached a rare bipartisan compromise when renewable energy advocates agreed to lift the 40-year old export embargo on U.S. oil in exchange for an extra five years of tax credit support for solar and wind energy. Renewable

energy practitioners can now help their clients take advantage of these incentives for several more years and would be wise to do so sooner rather than later because the Consolidated Appropriations Act of 2016 does more than just extend the production tax credit (PTC) for wind and the investment tax credit (ITC) for solar; it modifies both tax credits in two critical ways. First, the act provides for a gradual phase-down of the values of both credits. Second, it extends the "begin construction" language that determines a wind project's tax credit eligibility to commercial solar projects. While providing much needed policy certainty, Congress also plays favorites and misses an opportunity for reform to enhance the overall efficiency of tax credit support for solar and wind energy.

Between boom and bust—a brief history of tax credit support for solar and wind

First established by the Energy Policy Act of 1992 and codified under 26 U.S.C. § 45, the PTC offers eligible wind power generation facilities tax credits in proportion to their electricity output during the first 10 years of operation. Originally set at $15 per megawatt-hour (MWh) of wind electricity, the inflation-indexed credit currently amounts to $23 per MWh. Historically, federal tax credit support for wind has been anything but stable, with the PTC allowed to expire six times in the past 15 years, most recently at the end of 2014 before being retroactively extended last December. The resulting boom-and-bust cycles underscore the PTC's vital importance for the wind industry with capacity additions dropping precipitously whenever the credit's future is uncertain.

Building on the renewable energy ITCs first created by the Energy Tax Act of 1978, the solar ITC, in its current form, was established by the Energy Policy Act of 2005. Codified under 26 U.S.C. § 48 (investment credit for commercial properties), § 25D (personal credit for residential properties), the solar ITC currently awards tax credit equal to 30 percent of a project's qualifying capital expenditures. While the credit is realized in full the same year that a project begins operation, the § 48 ITC vests over a period of five years. Any transfer of ownership before the end of this period leads to recapture of the unvested portion of the credit. Prior to the Consolidated Appropriations Act of 2016, the solar ITC was slated to drop down to 10 percent for § 48 commercial properties and sunset altogether for § 25D residential properties on January 1, 2017.

Fading into the sunset—five more years with a phase-down

The Consolidated Appropriations Act of 2016 adds an extra five years to the solar ITC and wind PTC, coupled with a gradual phase-down for both. The act retroactively extends the wind PTC, previously expired at the end of 2014, through the end of 2019. Starting January 1, 2017, the PTC will ramp down in 20-percent increments annually before sunsetting altogether at the beginning of 2020. Nominal values remain subject to potential adjustments for inflation by the Internal Revenue Service (IRS). In lieu of the PTC, wind developers may opt to receive an ITC, initially worth 30 percent of qualifying capital expenditures and subject to the same gradual

phase-down as the PTC. Table 1 illustrates the phase-down timeline for both the PTC default and the ITC option for wind projects.

Table 1: Phase-Down Timeline for Wind Tax Credits

Date	through 2016	Jan. 1, 2017	Jan. 1, 2018	Jan. 1, 2019	Jan. 1, 2020
PTC Value*	$23 / MWh	$18.4 / MWh	$13.8 / MWh	$9.2 / MWh	n.a.
ITC Rate**	30%	24%	18%	12%	n.a.

* Nominal value subject to potential inflation adjustments by IRS
** Requires selection by wind developer in lieu of PTC

Adding to the solar ITCs' original runtime through 2016, eligible solar projects now have until the end of 2021 to lock in the ITC. Starting January 1, 2020, the solar ITC will ramp down in annual increments. On January 1, 2022, the § 48 ITC for commercial properties will drop down to 10 percent while the § 25D ITC for residential properties will sunset altogether. Table 2 illustrates the solar ITC's phase-down timeline.

Table 2: Phase-Down Timeline for Solar Tax Credits

Date	through 2019	Jan. 1, 2020	Jan. 1, 2021	Jan. 1, 2022
§ 48 ITC Rate*	30%	26%	22%	10%
§ 25D ITC Rate**	30%	26%	22%	n.a.

* Investment tax credit for commercial properties
** Homeowner's personal tax credit for residential properties

How to lock in tax credit rates—begin of construction vs. placement in service

The scheduled phase-down and eventual sunset of all but the § 48 solar ITC make it more important than ever for solar and wind developers to lock in the tax credit eligibility of their projects as early as possible in order to secure the highest possible rate. Since the American Taxpayer Relief Act of 2012, wind developers can lock in a project's PTC eligibility by beginning construction as opposed to the previous, more restrictive requirement that a project had to be placed in service to secure tax credit eligibility. The Consolidated Appropriations Act of 2016 extends the "begin construction" language to the § 48 solar ITC for commercial properties but leaves the § 25D solar ITC for residential properties subject to the original "place in service" requirement. With lead times of up to two years or more, especially for large-scale projects, the ability to lock in tax credit eligibility and rate at the start of construction, rather than the—often much later —placement in service represents a further, albeit less salient extension of the

§ 48 solar ITC. The placement in service remains a backstop requirement under § 48 insofar as a project that begins construction prior to January 1, 2022 but is not placed in service before January 1, 2024 will only qualify for ITC at the floor rate of 10 percent.

Following the American Taxpayer Relief Act of 2012, the IRS issued Notices 2013-29, 2013-60, 2014-46, and 2015-25 to provide guidance on how to meet the "begin construction" requirement for the § 45 wind PTC. A comprehensive analysis of the Notices is beyond the scope of this article. In a nutshell, practitioners can help their clients meet the requirement in one of two ways. First, they can satisfy the "physical work" test by starting, and continuing, physical work of a significant nature on the project, beginning with acts such as commencing the excavation for the foundation, setting anchor bolts into the ground, or pouring concrete pads for the foundation. Preliminary activities, such as those related to planning, design, financing, or permitting do not satisfy the physical work test. Second, taxpayers can satisfy the "safe harbor" test by paying or incurring 5 percent or more of the total cost of the facility provided they make continuous efforts to advance toward its completion thereafter. Importantly, the relocation of a facility or its transfer to another taxpayer after construction has begun under either test need not affect the lock-in of the PTC assuming continuous efforts. The IRS is expected to issue another Notice in the coming months to reflect the latest PTC extension as well as to provide guidance on how to meet the "begin construction" requirement for the § 48 solar ITC, likely to also rely on the physical work and safe harbor tests outlined above.

Playing favorites—residential solar and other redheaded stepchildren

The Consolidated Appropriations Act of 2016 marks what is likely to be the final extension of federal tax credit support for solar and wind energy. Along the way, the act offers insights into the legislators' valuation of different renewable energy technologies. Federal tax support for renewables in general has oft been criticized for Congress' picking winners and playing favorites between fossil-fueled energy and renewable energy. With its latest, more selective tax credit extension, Congress picks winners and openly discriminates among renewables. A whole suite of renewable power generation technologies, including biomass, geothermal, hydroelectric, landfill gas, and municipal solid waste, among others, did not see their tax credits extended. Similarly, but more subtly, Congress treats residential solar as the redheaded stepchild compared to commercial solar and wind. To be sure, the § 25D solar ITC for residential properties did receive the same 5-year extension and phase-down as the § 48 solar ITC for commercial properties. But the residential credit phases out completely at the end of 2021 while the commercial credit continues indefinitely at 10 percent. Moreover, Congress extended the more lenient "begin construction" standard for locking in tax credit eligibility and rates from wind to commercial solar but continues to hold residential solar to the much more restrictive "placement in service" standard. To illustrate, let's assume a solar project that began continuous construction on December 31, 2021 and was placed into service on December 31, 2023. On commercial property, the project would earn an ITC worth 22 percent of capital expenditures

while the same project, on residential property, would not qualify for any tax credit support at all.

Efficacy is not the same as efficiency—a missed opportunity for reform

Notwithstanding the laudable policy certainty it creates, the recent extension of the solar ITC and wind PTC also represents a missed reform opportunity to enhance the overall efficiency of both tax credits. There can be little doubt as to the efficacy of federal tax credits for solar and wind. With uninterrupted tax credit support in place, solar and wind power have experienced annual growth rates of 53 percent and 31 percent, respectively. Efficacy, however, is not the same as efficiency and, as I've explained in greater detail elsewhere, today's tax credit regime is woefully inefficient.

Renewable energy developers and their projects tend to lack the quintessential requirement to benefit from tax credits—a high enough tax bill to offset with these credits. Many renewable power projects take 10 or more years before they recover their high up-front costs and begin to generate taxable profits. Without tax liability from other sources, project developers could carry forward their tax credits but the lost time value would cost them up to two-thirds the tax credit value. The tax code's prohibition of trading in tax attributes, meanwhile, precludes developers from simply selling off their tax credits.

Enter the "tax equity" investor looking for ways to offset tax liabilities from other sources. Taking a temporary ownership stake, these investors can monetize a renewable project's tax credits right away. But the required financial acumen and hefty tax bills have limited the pool of tax equity investors to two-dozen large banks and highly profitable corporations. Cashing in on their exclusivity, these investors exact returns of up to 15 percent or more for their investments in renewable energy projects, more than twice the going rates for conventional equity and project debt.

Besides driving up the cost of capital, the need to bring in a tax equity investor also imposes considerable transaction costs for complex deal structures that enable renewable project developers to effectively sell off their tax credits without running afoul of the tax code. Structuring these deals often requires millions of dollars in legal fees. In the end, developers realize roughly two-thirds of their tax credits' value—with the remainder going to bankers and lawyers. Diverting billions of tax dollars away from their intended use every year, these inefficiencies are bad news for taxpayers and the renewable energy industry.

There's a better, more efficient way.

Tax credit where credit is due—making the ITC and PTC refundable

Making the ITC and PTC refundable would give developers a choice between using tax credits

to reduce their tax liabilities or, in the absence thereof, receiving cash instead. When the same choice was offered as a stimulus measure under § 1603 of the American Recovery and Reinvestment Act of 2009, developers overwhelmingly chose cash over tax credits, illustrating the renewable energy industry's struggles with the currency of its bread-and-butter subsidy. A refundable ITC and PTC would help free solar and wind from the tether of scarce and costly tax equity while allowing the broader investment community, including retail investors like you and me, to invest in the nation's clean energy future. The tax code has long recognized refundable tax credits such as the Earned Income Tax Credit under 26 U.S.C. § 32 or the Child Tax Credit under 26 U.S.C. § 24.

A refundable ITC and PTC would ensure that the taxpayer dollars behind these subsidies actually go to their intended use—building out the nation's low-carbon, renewable energy infrastructure to help meet our obligations under the Paris climate agreement. Giving tax credit where credit is due, the efficiency gains from a refundable ITC and PTC would allow Congress to accelerate their phase-down, saving taxpayers money while securing the sustained growth of an industry that already employs hundreds of thousands of Americans.

Final critical habitat rules and policy may result in substantial impacts to land use without commensurate wildlife benefits

Karma B. Brown and Kerry L. McGrath

Karma B. Brown is counsel at Hunton & Williams LLP. Her practice focuses on environmental and administrative law, with an emphasis on federal litigation and regulatory compliance with the Endangered Species Act, Clean Water Act, and the National Environmental Policy Act. Kerry L. McGrath is an associate at Hunton & Williams LLP. Her practice focuses on environmental, energy, and administrative law, including counseling and litigation under the Endangered Species Act, Clean Water Act, and other environmental statutes.

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) have promulgated significant changes to the designation of critical habitat under the Endangered Species Act (ESA). In February, the Services issued revised criteria for designation of critical habitat, 81 Fed. Reg. 7414 (Feb. 11, 2016) (Designation Rule). At the same time, the Services issued a revised definition of "destruction or adverse modification" of critical habitat, 81 Fed. Reg. 7214 (Feb. 11, 2016) (Adverse Modification Rule) and adopted a final policy regarding the exclusion of areas from critical habitat designation, 81 Fed. Reg. 7226 (Feb. 11, 2016) (Exclusion Policy). These changes, which became effective on March 14, 2016, could result in significant burdens to land use for property owners.

The rules and policy are likely to significantly reshape the critical habitat process and expand the Services' authority to designate critical habitat. More land may now be designated as critical habitat, which could lead to the restriction of more activities than before.

Background

Once land is designated as critical habitat under the ESA, it is subject to ESA section 7 consultation. Federal agencies are required to consult with the Services to "insure" that any activity funded, carried out or authorized by that agency is not likely to "result in the destruction or adverse modification" of designated critical habitat.

Congress intended to restrict the designation of critical habitat to occupied areas that meet specific qualifications. In particular, the ESA defines "critical habitat" as "the specific areas within the geographical area *occupied* by the species, at the time it is listed …, on which are found those *physical or biological features* (I) *essential to the conservation of the species* and (II) *which may require special considerations or protection*." 16 U.S.C. § 1532(5)(A) (emphasis added). As a further limitation, the statute states that "critical habitat shall not include the entire geographical area which can be occupied" by the species, "[e]xcept in those circumstances determined by" the Services to be appropriate. *Id.* § 1532(5)(C).

The restrictions on designation of *unoccupied* areas as critical habitat are even more stringent. The Services must determine "that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A).

The final rules and policy expand the role and impact of critical habitat
The Services' final rules and policy transform the role and impact of critical habitat in several significant ways. The rules and policy:

- Define "occupied" critical habitat to include areas not *occupied* by the species. The Services' definition allows for designation of habitat as occupied "even if *not used on a regular basis*." *See* 81 Fed. Reg. at 7429 (emphasis added).
- Allow designation based on potential future occurrence of features, *see* 81 Fed. Reg. at 7435, which could result in much broader areas being deemed critical habitat; this arguably conflicts with the ESA's requirement that occupied areas include only areas on which essential physical or biological features "*are found*," instead of *may be* found. *See* 16 U.S.C. § 1532(5)(A)(i) (emphasis added).
- Adopt a requirement to identify "physical and biological features essential to the conservation of the species," which can include "dynamic or ephemeral" habitat features. 81 Fed. Reg. at. 7439.
- Define "adverse modification" as an alteration that "appreciably diminishes" critical habitat value, and "clarify" that the Services interpret "appreciably diminish" to mean

"worthy of consideration" or that the Services "can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat." 81 Fed. Reg. at 7218.

- Allow for adverse modification finding not based only on the current status of the species, but also on "potential for the habitat to provide further support for the conservation of the species." 81 Fed. Reg. at 7220.
- Provide that areas subject to permitted conservation agreements and plans will *generally* be excluded from critical habitat designation, but leave it to the discretion of the Services to exclude or not exclude areas from designation. 81 Fed. Reg. at 7229.

These new provisions may open the door for the Services to make more extensive critical habitat designations. More landowners could have their land designated as critical habitat and the Services could be more likely to find that a proposed activity will result in adverse modification of critical habitat. Because critical habitat designation is often duplicative of the protections already provided by the ESA's jeopardy standard, more expansive designations may come at significant costs to landowners without commensurate wildlife benefits. *See* D. Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141, 145 (2012); 64 Fed. Reg. 31,871, 31,872 (June 14, 1999).

In sum, the Designation Rule establishes broad bases for designating critical habitat. The Exclusion Policy may provide little relief for landowners considering that, even where land is subject to a conservation agreement (e.g., a Habitat Conservation Plan), it is not necessarily excluded from designation. With the revised Adverse Modification Rule, the Services are much more likely to find that a proposed activity or project will result in the destruction or adverse modification of critical habitat. This, in turn, could trigger recommendations by the Services that federal action agencies implement measures to avoid adverse modification and result in significant impacts across all industry sectors.

The environment chapter of the Trans-Pacific Partnership: An environmental agreement within a trade agreement

Howard F. Chang

Howard F. Chang is the Earle Hepburn Professor of Law at the University of Pennsylvania Law School, where he teaches international trade law and international environmental law and writes about the law and economics of trade and the environment.

Starting with the North American Free Trade Agreement (NAFTA), the United States has made striking progress in linking trade liberalization in its trade agreements with obligations

to protect the environment. This trend began in 1993, when the United States negotiated an environmental side agreement to supplement NAFTA before its approval by Congress. Since then, the United States has incorporated additional significant environmental obligations into its free trade agreements. The recent Trans-Pacific Partnership Agreement (TPP) represents the most important manifestation to date of this promising development in international trade law. The TPP currently awaits congressional approval and cannot enter into force without it.

Environmental obligations enforced by trade sanctions

Unlike the environmental obligations in the NAFTA side agreement, which have their own special procedures for enforcement, the TPP environmental obligations appear in an environmental chapter (Chapter 20) included in the TPP itself and are subject to the same enforcement mechanism that the TPP applies to its trade obligations. Thus, the TPP enforces its environmental obligations with the threat of trade sanctions. This equal treatment for environmental obligations and trade obligations continues the practice followed by the environmental chapters included in each of the four bilateral free trade agreements negotiated most recently by the United States: those with Peru, Colombia, Panama, and South Korea.

Incorporating substantive environmental standards

The environmental obligations enforced in the NAFTA side agreement merely require each party to enforce its own environmental standards, without imposing substantive obligations regarding the level of environmental protection. The TPP includes a similar obligation in Article 20.3 but also goes much further, including specific substantive obligations to protect the environment. Thus, the TPP is not only an important trade agreement but also a significant environmental agreement.

The environmental chapter in each of the four most recent bilateral free trade agreements negotiated by the United States incorporated substantive obligations from the same list of seven multilateral environmental agreements (MEAs). Many of these MEAs lack effective enforcement mechanisms, so incorporating their legal obligations into free trade agreements provides much needed "teeth" through the threat of trade sanctions. Each of those four bilateral free trade agreements, however, incorporated these MEA obligations only if both parties to the free trade agreement were also both parties to a listed MEA. The TPP extends this approach to its 12 parties by incorporating or replicating substantive obligations from three of the seven MEAs listed in prior free trade agreements, thereby effectively including obligations from all the listed MEAs that all 12 TPP parties have joined: the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Convention for the Prevention of Pollution from Ships (MARPOL), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Entirely new wildlife protections

More impressive than the incorporation of existing MEA obligations are the entirely new substantive environmental obligations that the TPP would impose an all 12 TPP parties. These obligations go beyond those in any existing agreement and break new ground in the protection of wildlife. For example, the TPP includes commitments in Article 20.17 to "take measures to combat" and to "cooperate to prevent" trade in wild animals and plants taken illegally, whether or not those species are protected under CITES. TPP Article 20.16 includes another especially important commitment in which the TPP parties agree to prohibit subsidies for fishing that "negatively affect" stocks that are overfished or that subsidize "any fishing vessel" listed as engaged in illegal fishing.

Effectively a revision of prior free trade agreements

With the negotiation of the TPP, President Barack Obama has in effect made good on his 2008 campaign pledge to renegotiate NAFTA. The TPP includes all three parties to NAFTA, so the United States would impose new environmental obligations on Mexico and Canada through the TPP in addition to those already imposed by NAFTA. Similarly, the TPP would also impose new environmental commitments on Australia, Chile, Peru, and Singapore beyond those already imposed by the bilateral free trade agreements that those TPP parties have with the United States. In this sense, Congress can augment the environmental commitments in prior free trade agreements by approving the TPP agreement.

A model for a broader free trade area and for future agreements

As made explicit in TPP Article 30.4, the TPP is open to new members. Several countries have already expressed interest in joining and the TPP seems likely to expand. Thus, the TPP would not only establish new environmental obligations for current TPP parties but also provide the basis for extending these obligations to still more of our trading partners.

The recent history of free trade agreements reveals a general trend in which the United States has increased the integration of environmental commitments into its free trade agreements. The environmental chapter of the TPP is significant not only for the environmental obligations it would impose on TPP parties but also as a precedent for the next generation of free trade agreements. The United States can build on the TPP model and seek still deeper and broader environmental commitments in negotiating future free trade agreements.

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

***United States v. Dico, Inc.*, 808 F.3d 342 (8th Cir. 2015).**
A divided Eighth Circuit panel reversed a district court decision holding defendant Dico Inc. liable under Superfund when it sold buildings in Iowa on a site subject to a U.S. Environmental Protection Agency (EPA) cleanup order. The purchaser dismantled the building, and EPA later found polychlorinated biphenyls (PCBs) in soil and steel beams on the property. The district court granted the government's motion for summary judgment that defendant was liable for cleanup costs by "arrang[ing] for disposal" of the PCBs. The court of appeals agreed with Dico's argument that the buildings had some commercial value based on which a fact finder may find that Dico did not intend to dispose of PCBs by selling the buildings. "Overall, unlike cases finding liability at summary judgment, we do not believe the evidence of record demonstrates as a matter of law that Dico was merely trying to get rid of a hazardous substance," the court's opinion states. The court of appeals cited the Supreme Court decision in *Burlington Northern*, which calls for a fact-specific inquiry, particularly when the motives for a sale are not clear, and concluded that Dico's intent should not have been decided on summary judgment. The court affirmed the award of penalties for violating an EPA order concerning the use of the buildings but vacated an award of punitive damages. The dissent viewed the facts as showing that Dico wanted the buildings and their PCB contamination gone and thus intended to dispose of the PCBs.

Air quality

***Group Against Smog and Pollution (GASP) v. Shenango, Inc.*, 810 F.3d 116 (3d Cir. 2016).**
The Third Circuit affirmed a district court order dismissing a Clean Air Act citizen suit against a Pennsylvania coke plant for violating emission standards in the state's implementation plan. In 2012, the state Department of Environmental Protection and Allegheny County filed an action in U.S. district court for violations of the standards. The parties entered into a consent decree to resolve these violations and in 2012 the district court entered final judgment and retained jurisdiction for the purpose of modifying or enforcing the consent decree. In 2014, a citizen group, GASP, filed a lawsuit claiming violations of the same emission standards. The district court granted defendant's motion to dismiss under FRCP Rule 12(b)(1) because Allegheny County was already diligently prosecuting an action to require compliance. The Third Circuit affirmed, stating that dismissal was warranted under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The court rejected plaintiffs' argument that no agency enforcement action was pending when its suit was commenced, stating "the

diligent prosecution bar will prohibit citizen suits during the actual litigation as well as after the litigation has been terminated by a final judgment, consent decree, or consent order and agreement." The court's opinion cites the legislative history of the Clean Water Act stating that citizen suits are "meant to supplement rather than to supplant government action." Declining to "contradict the accepted practice of giving deference to the diligence of the agency's prosecution," the Third Circuit rejected plaintiff's argument that the company continues to violate the state plan, noting that under the consent decree the government is enforcing the same violations alleged in the citizen suit.

Water quality

***Watervale Marine Co., Ltd. v. U.S. Department of Homeland Security,* 807 F.3d 325 (D.C. Cir. 2015).**
The D.C. Circuit affirmed a lower court decision rejecting claims that the Coast Guard imposed unlawful security conditions before granting departure clearance for vessels that the Coast Guard believed were violating the Clean Water Act. After receiving whistleblower complaints alleging that oil record books were falsified, the Coast Guard ordered U.S. Customs to withhold departure clearance. After an investigation, the Coast Guard released the vessels only after the vessel owners posted a bond and executed a security agreement. The vessels' management pled guilty to unlawful discharges of oil but subsequently challenged the Coast Guard's authority to demand, as a condition of departure, security agreements including facilitating the crew's travel to court appearances and helping the government to serve subpoenas on foreign crew members outside the United States. The D.C. Circuit rejected the government's argument that the Coast Guard's discretion is unreviewable, but rejected the plaintiffs' claims. The court concluded that since the Coast Guard can hold a ship until a civil or criminal proceeding is completed, it follows that the Coast Guard can notify Customs to release a ship only upon conditions assuring that a civil or criminal proceeding would not be jeopardized.

***Askins v. Ohio Department of Agriculture,* 809 F.3d 868 (6th Cir. 2016).**
The Sixth Circuit affirmed a district court decision dismissing a lawsuit by citizen plaintiffs challenging Ohio EPA's transfer of part of its National Pollutant Discharge Elimination System (NPDES) permit authority to the Ohio Department of Agriculture (ODA). The plaintiffs challenged specific NPDES permits to animal feeding operations and filed a citizen suit in U.S. district court alleging that the transfer of permit authority to ODA was made without notifying the U.S. EPA or obtaining EPA's approval. The Sixth Circuit agreed with the U.S. EPA and Ohio position that it was for EPA to decide whether or not the appropriate state authority is handling Clean Water Act permits. The court concluded that EPA's oversight power in this arena is discretionary, stating "the Clean Water Act does not require the U.S. EPA to conduct a hearing if a state fails to administer properly a state-NPDES program." The court of appeals also drew a distinction between the statute's requirements for NPDES programs versus NPDES *permits*, stating that only permits are subject to the citizen suit provisions and that "a regulator's failure

to follow procedural regulations is not grounds for a citizen suit."

Natural resources

***State of North Carolina v. Alcoa Power Generating, Inc*., 2015 WL 5703520 (E.D.N.C.) Sept. 28, 2015).**
A district court dismissed a suit brought by the State of North Carolina and held that Alcoa owns a forty-five mile segment of the Yadkin River in North Carolina, on which Alcoa had built four hydropower dams. The state commenced the action in 2013, seven years after it learned Alcoa had asserted ownership of the property. Alcoa produced evidence of record title ownership of most of the segment and adverse possession of the entire segment. The district court noted that the state did not dispute Alcoa's possession of the property and ruled that Alcoa has been in continuous possession of the property since at least 1962. The district court previously ruled that the segment of the river was not a navigable waterway when North Carolina became a state in 1789 and thus the state did not acquire rights upon statehood.

***U.S. v. Estate of E. Wayne Hage*, 810 F.3d 712 (9th Cir. 2016).**
The Ninth Circuit reversed a decision by a Nevada district court which had ruled that a family did not violate trespassing laws by grazing their cattle on federal lands without a permit. The court of appeals rejected the family's argument that family's cattle were not trespassing as they had water rights to nearby lands, and held that the district court's "easement by necessity" theory "plainly contravenes the law." The Ninth Circuit stated that "[w]ater rights are irrelevant" to the basic permit requirement and that "[d]efendants openly trespassed on federal lands." Stating that the trial judge's rulings were marked by "bias and prejudgment," the Ninth Circuit remanded the lawsuit and requested the Chief Judge of the district court to assign a new judge. In its remand order, the Ninth Circuit concluded that the trial judge should enter judgment in favor of the government, impose an injunction, and calculate appropriate damages.

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.

I write this shortly after our co-located Water Law and Spring Conferences in Austin, Texas. This is the first time we have held these two conferences in the same week and at the same location. We were thrilled to have great attendance at both with many Water Law attendees staying on for the Spring Conference. These conferences will be co-located again next March in Los Angeles, so plan on being with us!

Here are a few highlights from the Water Law and Spring Conferences that demonstrate the all-star line-up of speakers that the Section of Environment, Energy, and Resources can bring to its members:

- John Cruden, Assistant Attorney General of the DOJ Environment and Natural Resources Division, shared his "in-box" and "out-box" issues as he summarized what the Department of Justice has accomplished and what it plans to accomplish in the next year. He also provided his insight regarding the unprecedented number of interstate disputes before the U.S. Supreme Court addressing surface and groundwater issues.
- Mathy Stanislaus, the U.S. Environmental Protection Agency's Assistant Administrator for the Office of Land and Emergency Management, presented the case that an economic perspective in environmental regulation can also bring about justice, transformation, and progress—particularly for those most at risk for experiencing injustice.
- The general counsels of the Department of Energy, Environmental Protection Agency, White House Council on Environmental Quality, and National Oceanic and Atmospheric Administration had a lively and informative discussion about what the Obama administration has achieved to date and hopes to achieve before the end of the president's second term.
- Bruce Gelber, DOJ Environment and Natural Resources Division, and Cynthia Giles, EPA, had an honest discussion about compliance, enforcement, and initiatives on the horizon.
- A luncheon address that included comments from Ron Curry, Regional Administrator, EPA Region 6; Michael Teague, Secretary of Energy and Environment, State of Oklahoma; and Ali Zaidi, Associate Director, Natural Resources, Energy, and Science Office of Management and Budget Executive Office of the President.
- Professors Robert Abrams and Dan Tarlock had an in-depth discussion regarding changes in water resource allocation under both prior appropriation doctrine and riparian law.

We are proud of our conferences and other program offerings and are always considering new ways to bring more new members into the Section to enjoy such events.

Over the past few years, the ABA has been providing opportunities for non-members to learn about the ABA by offering free partial-year memberships. So how do we bring in new members and get them to stay? Research suggests that engaging new members in ABA activities is an important part of member retention. I'm sure that many attendees at the recent conferences in Austin are already planning to attend the 24th Fall Conference in Denver or one of the spring conferences next year. And if you have written for a Section publication, you are likely looking forward to proposing a future article.

I would therefore like to challenge you to engage with new members and get them involved in our Section. Once they understand the wide range of member benefits, they will want to remain Section members. To kick off this initiative, I am asking each of you to reach out to someone who has not yet attended one of our Fall Conferences—either a non-member or a new member—and encourage him or her to attend our Fall Conference in October. What's in it for you? You will receive a discount of $100 on your conference registration fee per new registrant—up to a maximum of $300 for three new attendees. Each new recruit will receive a registration fee discount of $100.

Alf Brandt and his 24th Fall Conference planning committee are developing a fabulous conference in a wonderful location. While CLE is a core part of these programs, other elements including networking opportunities and technical roundtables enhance the value of participating. First-time attendees will experience the wonderful camaraderie of our Section, as they meet colleagues from throughout the country and have opportunities to make new contacts and expand their professional networks. I am hopeful that after the great conference experience each first-time attendee will become active in one or more of our committees and become an integral part of our outstanding organization.

Please accept my challenge. In most of my "Views from the Chair" columns, I have written about outreach, which I think is so important. There is no question that personal outreach is the most effective means of recruiting new, active members. Your experience and enthusiasm for our Section and its benefits are often the only inducement needed to get others involved. This is an opportunity for you to have a direct impact on making the Section stronger, which will be good for you, good for the new member, and good for the Section. We all benefit from a diverse and robust membership.

I look forward to seeing everyone in Denver!

Spotlight on Section programming

Amy L. Edwards

Amy L. Edwards is a partner at Holland & Knight LLP in Washington, D.C. She is the education officer for the ABA Section of Environment, Energy, and Resources.

Over the past two years, the Section of Environment, Energy, and Resources has focused on offering a wider range of programming, at lower cost where possible, with the goal of creating more opportunities for members to access the Section's excellent programming content. We hope as a Section member you are aware of, and taking advantage of, one or more of these programming options.

Committee program calls

If you are a member of one or more Section committees, you may have participated in a committee program call. This free member benefit provides you with focused information important to your practice. The recordings of some of these calls can be found post-program at http://www.americanbar.org/groups/environment_energy_resources/committees.html.

If you are not yet a committee member, information on the Section's 33 substantive committees can be found at http://www.americanbar.org/groups/environment_energy_resources/committees.html.

Podcasts

Check out our new podcast channel, available on iTunes and the Section website! The Section is building a catalog of short episodes (15 to 20 minutes each) that address hot topics in environmental, energy, and resources law and career development. Subscribe now so you won't miss out on new episodes. On iTunes, search for "ABA Environment." On the Section website, visit the "Section Recordings" page at http://www.americanbar.org/groups/environment_energy_resources/resources/recordings.html.

Webinars

The Section offers both CLE and non-CLE webinars. Recognizing that Section members may not always be able to attend the Section's in-person conferences, due to time constraints or cost, the Section provides this quicker, lower-cost alternative. The Section's goal is to provide at least two webinars per month, focused on "late-breaking" developments, "essentials," or topics of broad interest to the Section's membership. Watch your e-mail for announcements of upcoming programs. If you would like to propose a topic for a webinar, please contact the Section's Virtual Learning co-chairs, Lee Paddock and Mike McLaughlin. Webinar content is available for purchase from http://www.ShopABA.org post-program.

In-person conferences

We hope you are a regular attendee in one or more of the Section's annual conferences: the Fall Conference, the Spring Conference, the Water Law Conference, and the Petroleum Marketing Attorneys' Meeting. The Section's in-person conferences are held in different parts of the country to allow for greater participation. In addition to featuring top speakers on hot topics, the Section's conferences provide excellent networking opportunities with leading government officials, academics, and experienced practitioners in the field.

Besides the annual conferences, the Section hosts several other in-person conferences each year. For example, the Key Environmental Issues in U.S. EPA Region 5 Conference and a

Superfund Master Class will be held in Chicago in mid-June. If you are unable to attend one of the Section's annual conferences, one of these programs may be more accessible. The Section will also be hosting a limited number of Committee Proposed In Person Programs (CPIPPs) if those programs meet the criteria set forth in the Guidelines approved by Council at its Winter Council meeting.

Finally, the Section is beginning to develop a database of potential speakers for its programs. For more information, please contact Wendy Crowther, Lee Paddock, or me.

Co-sponsored programs with outside organizations

The Section receives many requests for the Section to co-sponsor a program being organized by another organization (such as another ABA Section, a state or local bar association, or a law school) on a topic of potential interest to our members. If the Section is a co-sponsor, often Section members will benefit from a special registration rate. Watch your e-mail for announcements of co-sponsored programs. If you would like to propose a co-sponsored program, please note that the ABA has fairly rigorous criteria that must be met to co-sponsor a program. Please contact Section staff for more information at environ@americanbar.org.

Keep in touch!

Please visit the Events and CLE page of the Section's website for information on upcoming programs, sponsorship opportunities, best papers, and event photos. Also, remember to follow the Section on Facebook, LinkedIn, and Twitter and to subscribe to our podcast channel!

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.

Gregory Dutton has joined the Louisville, Kentucky, firm of Goldberg Simpson as counsel. Dutton will head the firm's energy and utility practice and counsel clients in environmental litigation and regulatory compliance and administrative law. He was most recently an assistant attorney general in the Kentucky Attorney General's office, where he represented the commonwealth in litigation with USEPA on ozone standards and other rules. Dutton also represented ratepayers before the Kentucky Public Service Commission in various issues. Prior to joining the Kentucky Attorney General's office, Dutton had a legal fellowship with the

USEPA's Office of Water.

Michael Einhorn has joined the California Department of Transportation as a deputy attorney in the agency's Oakland, California, office. Before joining Caltrans, Einhorn was an associate at Edgcomb Law Group in San Francisco, focusing on environmental litigation (CERCLA cost recovery, RCRA injunctive relief, and state law tort claims) and hazardous waste site remediation and legal compliance.

Kristen Kortick has transferred from the University of Hawai'i at Manoa - William S. Richardson School of Law to the Lewis and Clark Law School in Portland, Oregon. Kortick holds a master's degree in anthropology. She is a Hot News writer for the Section's Environmental Transactions and Brownfields Committee.

Karl Moor has joined Balch & Bingham LLP in Birmingham, Alabama, as counsel in the firm's Environmental and Natural Resources Section. Moor was formerly chief environmental counsel for the Southern Company, a U.S. regional electrical utility company. He has more than three decades of experience counseling on environmental regulatory and legislative issues in the energy industry. Moor served six years with the U.S. Senate Judiciary Committee, the Senate Labor and Human Resources Committee, and in the Reagan administration. He is a member of the board of directors of the Atlantic Council and has served as chair of the Edison Electric Institute Task Force on Carbon Capture and Sequestration.

David Ossentjuk of Ossentjuk and Botti in Westlake Village, California, has joined the board of advisors of the Roberts Environmental Center at Claremont McKenna College in Claremont, California. Ossentjuk focuses his practice on oil and gas transactions and litigation, involving conveyances, leasing, operations, title issues, joint ventures and operating agreements, and compliance with federal, state, and local oil and gas regulations. He also represents clients in general business, real estate, and environmental litigation.

Mark Ryan and Natalie Kuehler have formed Ryan & Kuehler PLLC in Winthrop, Washington. Their practice will focus on water law litigation and counseling, including the Clean Water Act and water rights law. Ryan previously was with Region 10 of USEPA for 24 years litigating Clean Water Act cases. He is the long-standing editor of the Section's *The Clean Water Act Handbook* and is a member of the *Natural Resources & Environment* board. Kuehler served as an assistant U.S. attorney in the Southern District of New York and, before that, was a litigation associate with Sullivan & Cromwell. As an AUSA, Kuehler specialized in litigation under the Clean Water Act, the Safe Drinking Water Act, environmental bankruptcies, and Medicare fraud.

Craig Sundstrom has joined Apex Clean Energy, Inc. in Charlottesville, Virginia, as government and regulatory affairs manager, where he will manage the company's efforts in Midwest states and Oklahoma. He previously served as deputy secretary of Energy in the Office of the

Oklahoma Secretary of Energy and Environment. Sundstrom was a member of the Section's 2016 Spring Conference Planning Committee and a participant in the 2013–2014 Leadership Development Program.