TRENDS

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TSCA amendments: Highlights and implications for downstream users of chemicals

Daniel E. Uyesato

Daniel E. Uyesato is a partner with Hunton & Williams LLP in Raleigh, North Carolina, practicing in the firm's Environmental Law Group.

On June 22, 2016, President Obama signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Act), a bipartisan bill passed by large margins in both houses, which amended the Toxic Substances Control Act of 1976 (TSCA). Effective as of that date, the Act made substantial revisions in the regulation of chemicals in the United States, which by its terms must now be implemented by the U.S. Environmental Protection Agency (EPA), subject to the challenges which EPA outlined in its First Year Implementation Plan for the Act. The Act received broad stakeholder support and reflected compromises acceptable to business and public interest groups. The following highlights the most significant structural changes to TSCA and identifies implications for downstream users of chemicals.

Risk-based safety standard

Central to the Act is a new, risk-based safety standard, based on whether a chemical presents an unreasonable risk of injury to potentially exposed or susceptible subpopulations under the conditions of use. This amendment eliminates TSCA's prior risk/benefit analysis. EPA may not consider costs or other nonrisk factors in its evaluation; if EPA finds that a chemical presents "an unreasonable risk," it must take regulatory action to eliminate that risk. In this phase, while EPA is no longer required to select the "least burdensome" requirements available, EPA may consider cost and other nonrisk factors in selecting among risk management options as long as such risk is eliminated; the Act also provides for an exemption process by rule for critical uses.

New chemical review

EPA is required to make affirmative findings respecting all new chemicals or significant new uses (SNUs) of existing chemicals subject to Significant New Use Rules (SNURs). EPA must find whether the chemical or SNU presents an "unreasonable risk." If so, EPA must take regulatory action to eliminate such risk prior to market entry. If EPA finds that the chemical or SNU is not likely to present an unreasonable risk and publishes such a finding, manufacturing/processing/import can immediately take place. If EPA finds that it has insufficient information to make such a determination, or finds that the chemical may present an unreasonable risk of injury or that such chemical will be made in substantial quantities, EPA shall take regulatory action. In any case, EPA must take affirmative action for a chemical's manufacture, import, or use to commence. This requirement contrasts with prior TSCA provisions, which provided that the

manufacture, importation, or significant new use of a chemical could commence if EPA failed to act within a 90-day window after notification.

Existing chemical review

By June 2017, EPA must establish by rule a risk-based process for prioritizing chemicals, considering various hazard and exposure factors. EPA must designate a chemical as high priority if it finds that the chemical may present an unreasonable risk of injury. EPA must conduct a risk evaluation on any chemical designated as high priority.

Within 180 days, EPA must begin risk evaluations on at least 10 priority chemicals from EPA's TSCA Work Plan; high-priority designation triggers mandatory completion within 3 years, with a possible 6-month extension. Within 3½ years of enactment, EPA must have 20 risk evaluations ongoing (50 percent of all ongoing risk evaluations must be drawn from the TSCA Work Plan) and designate at least 20 chemicals as low priority. EPA must also give preference to chemicals on the TSCA Work Plan with a Persistent, Bioaccumulative and Toxic (PBT) score of 3, as well as known human carcinogens or chemicals with high acute and chronic toxicity.

Testing authority

The Act provides EPA with expanded authority to test chemicals for prioritization or conducting risk evaluations. EPA will no longer have to show potential risk to require testing.

CBI

The Act makes it more difficult for the regulated community to protect its Confidential Business Information (CBI) from disclosure. Greater substantiation of a CBI claim will be required, and CBI protection will expire after 10 years, unless renewed.

Preemption

The Act preempts state laws that: (1) restrict chemicals that EPA has restricted, (2) require notification of SNUs specified by EPA, (3) require testing already required by EPA, or (4) otherwise conflict with EPA actions under TSCA. States also may not restrict chemicals determined by EPA to not present an unreasonable risk and may not impose new restrictions on high-priority chemicals during EPA risk evaluations. However, where EPA has determined that a chemical presents an unreasonable risk, but has not yet completed its risk management rulemaking, states may "fill the gap" by imposing restrictions on such chemicals. Once EPA restricts such chemicals, any state law would again be preempted. Preemption will not apply to state laws or regulations enacted before April 22, 2016, nor to future actions taken under state laws passed before August 31, 2003, such as California's Proposition 65. The Act does not restrict states from requiring additional reporting and monitoring respecting regulated

chemicals.

Downstream impacts

The Act in section 3 introduces a new concept in the term "Conditions of Use," which is defined as the "circumstances, as determined by the Administrator, under which a chemical is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of." Not only will EPA's determination be important to manufacturers and importers, it will also be significant to their downstream users as well, since it is the basis for risk evaluations and resultant regulatory actions restricting that chemical. Given EPA's authority under TSCA to restrict chemicals that contravene the safety standard, a downstream user (as well as those parties up the supply chain) will need to participate in rulemakings.

Articles

The Act does limit EPA's authority to require Significant New Use Notifications for import or processing of a chemical as part of an article or category of articles if EPA makes an affirmative finding by rule that the reasonable potential for exposure to the chemical through the article or category of articles justifies notification. The Act also limits EPA's authority to restrict chemicals contained in an article or category of articles "only to the extent necessary to address the identified risks from exposure" to such chemical and exempts replacement parts for "complex durable goods and complex consumer goods" as specified in the Act unless EPA finds that they contribute significantly to the risk in question.

Relationship to other federal laws

The Act requires EPA, when it learns of chemical releases or exposures that may be prevented or reduced under other federal laws, to notify the relevant agency and, if such agency does not act in the time period prescribed by EPA, EPA is required to take regulatory action. While the Act specifically requires EPA to consult with the U.S. Occupational Safety and Health Administration (OSHA) prior to EPA's imposing restrictions addressing workplace exposures, this is no guarantee that EPA and OSHA will agree and, if not, what the impact on the regulated community will be.

Implications for downstream users

Given that there has been very little regulatory action restricting the use of chemicals under TSCA to date, the TSCA compliance obligations of downstream users have been, by and large, limited to ensuring that chemicals they buy are on the TSCA Inventory. This will need to change, given the likely increase in EPA regulatory action restricting the use of chemicals.

Further reading
ABA Toxic Substances Control Act (TSCA) Reform webpage
Global Chemical Control Handbook: A Guide to Chemical Management Programs

Change in administrations, change in course? The staying power of Obama's Clean Power Plan and possible avenues for change (Part 1 of 2)

Thomas A. Lorenzen and Sherrie A. Armstrong

Thomas A. Lorenzen is a partner and Sherrie A. Armstrong is an associate in the Environment and Natural Resources Group at Crowell & Moring LLP.

On August 3, 2015, the U.S. Environmental Protection Agency (EPA) released its signature climate change rule regulating carbon dioxide (CO_2) emissions from existing coal- and gas-fired power plants under section 111(d) of the Clean Air Act. Widely known as the Clean Power Plan, the rule requires steep reductions in fossil fuel-fired generation beginning in 2022 and replacement of that generation with power from lower-emitting and zero-emitting sources like renewables.

The legality of the rule is currently under review by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) in consolidated cases brought by a coalition of 28 states, numerous utilities and rural electric cooperatives, labor groups, coal and mining interests, and other representatives of the business community and affected industries. The rule was stayed by the U.S. Supreme Court in an extraordinary 5–4 decision issued days before Justice Antonin Scalia's passing, and oral argument is scheduled to be heard in the first instance before the D.C. Circuit sitting *en banc* (also an extraordinary event) on September 27, 2016. In its ruling, the D.C. Circuit—and the Supreme Court on an almost-certain petition for *certiorari* by whichever side does not prevail below—will consider whether EPA has exceeded its authority under the Clean Air Act and, if not, whether EPA has offered reasonable explanations for the choices it made in the rule.

Judicial review could well end with the Clean Power Plan being vacated or remanded in whole or in part, but it is not the only conceivable avenue through which the rule could be altered or revoked. The rule was adopted by EPA after notice-and-comment rulemaking pursuant to section 307(d) of the Clean Air Act, which spells out in detail the procedures for adopting (or undoing) a rule like this one. Given that those procedures require considerable time and present the risk of judicial review (a topic we'll cover in the next issue of *Trends*), how else might the Clean Power Plan be undone by a future administration that disagrees with its goals

or methodology? This article explores whether Congress could rescind, revise, or frustrate implementation of the Clean Power Plan even if it is upheld.

The Congressional Review Act

Although the Congressional Review Act (CRA) offered a potential legislative avenue of redress when the rule was initially adopted, it is an option whose time has passed. Under the CRA, Congress can pass a joint resolution of disapproval blocking a federal agency rule from becoming final. Such resolutions must be adopted within 60 days after the time Congress receives the final rule. Congress did not act under the CRA after receiving the Clean Power Plan and is now time-barred from doing so.

That Congress did not act here is hardly surprising, given that it rarely takes action under the CRA. Since 1996, out of the 100-plus resolutions that have been introduced in the House or Senate to disapprove of a duly-promulgated rule, only one has successfully been passed by both houses and signed by the president.[1] Even if Congress were to take that unusual action as to the Clean Power Plan, however, the president could veto the disapproval resolution and a two-thirds supermajority vote in both houses would be required to overturn the veto. Thus, even if the time for CRA action had not already run, it would have had very little chance of success.

The authorization process

Should the Republicans retain control of Congress after the 2016 election, Congress could attempt to vote to repeal or revise the Clean Power Plan through substantive legislation. Congress could also amend the Clean Air Act itself to deprive EPA of authority to implement the rule. Such action is unlikely, however, as Senate passage would be nearly impossible given current cloture and filibuster rules requiring a supermajority of 60 votes to move any legislation to a vote. Those rules tend to give the minority party significant control over the passage of legislation. At this time, there are only 54 Senate Republicans and they lack the 60 votes necessary to block a filibuster. If a Democrat is elected president, the prospect for revocation legislation becomes even more remote, as the Senate would need 67 votes to overcome a presumptive presidential veto. Only Republican retention of majorities in both houses, coupled with capture of the presidency, would make revocation more likely (though not probable).

The appropriations process

If the Republican Party retains control of Congress, Congress also could act through the appropriations process by passing legislation to deny EPA the budget necessary to implement or enforce the Clean Power Plan, as federal agencies may only implement such programs using monies that Congress has specifically appropriated to them. The rules governing appropriations bills are different from those that apply to substantive legislation and the minority party may not as easily block their passage. But if a Democrat is elected president, she likely would

threaten to veto the appropriations bill if it contained language preventing EPA from taking action under the Clean Power Plan, effectively threatening another costly (and unpopular) government shutdown. As the past few years have shown, the president typically prevails in such stand-offs.

Implications for congressional action

Although Congress has missed the window for CRA disapproval, legislative reform or vacatur of the Clean Power Plan is still possible through the authorization or appropriations processes—but it is unlikely. Even if the Republicans controlled the White House and Congress after the next election, legislative action would have a low likelihood of success, given the hurdles to passage in the Senate. And if the Republicans fail to gain control of the White House, that distant possibility would become even more remote, leaving the Clean Power Plan in place absent vacatur by the courts.

If a Republican wins the presidential election, however, there remains a possibility that a new rulemaking could replace or revoke the Clean Power Plan—a topic to be addressed in Part 2 of this series.

[1] In 2001, Congress used the CRA to overturn the Clinton administration's Occupational Safety and Health Administration ergonomics rule, 65 Fed. Reg. 68,262 (Nov. 14, 2000). After the change in administrations in January 2001, both houses passed the CRA resolution. President George W. Bush then signed the resolution into law on March 20, 2001, effectively overturning the rule.

Justice Scalia: The energy regulation cases

Jeffery S. Dennis

Jeffery S. Dennis is senior counsel at Akin Gump Strauss Hauer & Feld, LLP in Washington, D.C., and publications officer for the ABA Section of Environment, Energy, and Resources. Previously, he served in a variety of roles at the Federal Energy Regulatory Commission for over a decade.

Justice Scalia's lasting impact on federal and state regulation of the electric and natural gas industries may ultimately result from just a few cases that were decided in the last decade of his tenure on the U.S. Supreme Court. He authored the majority opinion in just one of those cases—*Morgan Stanley Capital Group v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008)—but penned important dissents in the other two, *FERC v. Electric Power Supply Association*, 136 S. Ct. 780 (2016) (*EPSA*) and *Oneok Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (*Oneok*).

Morgan Stanley—the "Sanctity of Contracts" vs. the "Just and Reasonable Standard"

Justice Scalia's majority opinion in *Morgan Stanley* can be fairly viewed as an outlier from his usual approach to applying the plain language of statutes and precedent. There, he applied 50 years of precedent in sweeping fashion to carve out a significant role for private contracts within the Federal Power Act's (FPA) tariff-based rate regulation regime, even though the statute does not explicitly provide for such a role.

Morgan Stanley arose from the politically charged aftermath of the California energy crisis, when a flawed market design and market manipulation combined to create electricity shortages and huge price spikes. At the height of that crisis, utilities were forced to sign contracts for wholesale electricity supply on behalf of their customers at extremely high prices. Those contracts were not initially reviewed by the Federal Energy Regulatory Commission (FERC), which had allowed the sellers to contract at "market-based" rates without filing individual contracts for preapproval.

After the crisis had passed, consumers demanded relief, and the utilities filed complaints on their behalf at FERC asserting that the high prices in the contracts violated the FPA's requirement that wholesale rates be just and reasonable. That raised a key question: When can FERC, applying the FPA's just and reasonable standard, reform electricity rates set by private contract?

Beginning with the Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), federal courts have consistently held that FERC must satisfy a higher threshold to modify or abrogate contractually-set rates. Called the "*Mobile-Sierra* doctrine," this precedent was generally understood to require FERC to demonstrate not just that the existing rates in a private contract were unjust and unreasonable, but rather, that failing to reform them would "adversely affect the public interest" (e.g., by significantly impairing the utility's finances or casting an excessive burden on other customers).

Justice Scalia penned the majority opinion in *Morgan Stanley*, however, and in so doing turned the *Mobile-Sierra* doctrine into more than just a higher burden on FERC. Instead, he concluded that the doctrine firmly establishes that wholesale rates set by private contract must be presumed to be just and reasonable, even where FERC has not had the opportunity to initially review them. Such a presumption, as Justice Stevens noted in dissent, placed private contacts in such a position as to arguably "immunize" them from the FPA's just and reasonable standard. In addition, such a presumption is not reflected in the language of the FPA itself.

This new presumption represented a significant change from previously settled ideas about the scope of the *Mobile-Sierra* doctrine and the role of private contracts in the FPA's tariff-based regulatory scheme. While FERC and the judiciary are still sorting out the scope of the

presumption, when FERC may apply it, and what it takes to overcome it, Justice Scalia's majority opinion will likely be remembered as constraining FERC's authority under the FPA to reform private contracts.

Drawing the statutory "bright line" between federal and state jurisdiction

Both the FPA and the Natural Gas Act (NGA) similarly divide regulatory authority over electric and natural gas utility services between the federal and state governments: The federal government regulates the transmission and wholesale sale of electricity and natural gas in interstate commerce, while the states regulate local delivery and retail sales. Although simple in concept, this "bright line" drawn by the statutes has become much less clear as both industries have evolved.

During Justice Scalia's last two terms, the Court grappled with where this jurisdictional line is drawn in three cases—all arising in the context of a much more competitive energy sector than the one that existed when the FPA and NGA were passed. Justice Scalia's dissents in the two cases which he lived to hear reflected his more familiar approach of focusing squarely on the statutory text. In each case, he found that the Court had strayed too far from the text of each statute when resolving federal and state jurisdictional conflicts.

In the first, *EPSA*, the Court held that FERC may assert jurisdiction to regulate the rates paid in the wholesale market to retail customers providing what is known as "demand response." Demand response is a commitment to refrain from consuming electricity. In the increasingly competitive wholesale power markets, FERC concluded that the ability to offer such commitments and receive compensation for them would make demand-side participants more active in the markets (similar to other commodities). This result, FERC reasoned, would improve competition, ensure just and reasonable wholesale rates, and contribute to reliability. It thus asserted jurisdiction to regulate the compensation paid to them. The Court upheld FERC's exercise of jurisdiction over demand response as a "practice affecting" wholesale rates and concluded that because demand response occurs only in the wholesale market and FERC's aims in regulating it only concern improving the wholesale markets subject to its jurisdiction, FERC's regulation of the prices paid for demand response does not constitute regulation of retail sales, an area left explicitly to state regulation by the FPA.

Justice Scalia objected to the majority's overall approach to resolving this federal-state jurisdictional question. He wrote that the majority's focus on whether FERC's regulation of demand response payments would improperly regulate retail sales subject to state jurisdiction "inverts the proper inquiry." Because the statute affirmatively grants FERC jurisdiction over only wholesale sales, and prohibits FERC from regulating "any other sale of electric energy," he argued that the Court should have focused on whether demand response is a sale at wholesale. He went on to answer that question in the negative, concluding that demand response is not within FERC's regulatory purview. This framing of the jurisdictional question assumes that

FERC's authority is much narrower than the majority's framing assumed.

In the second case, *Oneok*, the Court concluded that the NGA does not preempt the states from applying their own antitrust laws to the activities of interstate natural gas pipelines that are also subject to FERC jurisdiction. Here, too, Justice Scalia would have drawn a brighter line between state and federal jurisdiction based on the statutory text. This time, however, his reading of the statute favored federal authority and preemption of the states. Justice Scalia wrote that while the NGA expressly grants FERC authority to regulate "practice[s] . . . affecting [wholesale] rate[s]," nothing in the statute "suggests that the states share power to regulate those practices." Because state antitrust suits "target pipelines (entities regulated by [FERC]) for behavior . . . regulated by [FERC]," Justice Scalia would have found them preempted, leaving FERC as the sole authority policing the conduct of natural gas market participants.

Justice Scalia's application of the text of both the FPA and the NGA, had they prevailed, would have drawn much sharper divisions between federal and state regulatory authority. He would have rejected the shared (in the case of *Oneok*) or overlapping (in the case of *EPSA*) approaches found permissible by the majorities in those cases. As wholesale competition and other technological changes continue to transform the electricity and natural gas industries, and strain the jurisdictional provisions of these statutes, both approaches to resolving jurisdictional disputes will continue to be debated, likely giving Justice Scalia's dissents continued life for some time to come.

With a new update, EPA's Supplemental Environmental Projects Policy comes of age

Caroline D. Makepeace

Caroline Makepeace is chief of the Litigation and Cross-Cutting Policy Branch in the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance. The views expressed in the article are those of the author and do not necessarily represent official U.S. Environmental Protection Agency positions.

Last year, the U.S. Environmental Protection Agency (EPA or the Agency) issued a 2015 Update to the 1998 U.S. EPA Supplemental Environmental Projects Policy, which provides guidance on when and how Supplemental Environmental Projects (SEPs) can be included in the Agency's civil settlements under the nation's environmental laws. SEPs are voluntary projects, not otherwise legally required, that defendants undertake as part of a settlement and that are tailored to provide environmental or public health benefits to communities affected by the violations alleged by the Agency.

Why did EPA update this policy and what does it cover?

Throughout the 17 years since EPA issued its 1998 Final SEP Policy, as new issues arose in practice, the Agency made many implementation decisions and issued over 20 supplementary memoranda related to SEPs. As a result, it became challenging for practitioners to fully grasp the nuances of the policy and, for many, daunting to use it. The update consolidates all SEP-related guidance in a single, more user-friendly document. Based on nearly two decades' worth of implementation experience, the update also clarifies certain elements that warranted further explanation. It is intended to help facilitate more efficient and effective inclusion of SEPs in civil environmental enforcement settlements, whenever appropriate.

The update underscores the Agency's continuing strong support for SEPs, which can be powerful tools to secure significant environmental and public health benefits beyond those achieved by compliance. SEPs can provide a "win-win" opportunity for impacted neighborhoods that will benefit from projects taking place in their communities and for defendants whose performance of a voluntary project may boost community goodwill and is reflected in the determination of the final penalty agreed to in settlement.

The update discusses when it is appropriate to include a SEP in an enforcement settlement, explains how EPA should evaluate proposed SEPs, and describes what should be included in a settlement agreement which has a SEP. It highlights Agency priorities, including children's health, environmental justice, innovative technology, and climate change, and encourages potential projects supporting EPA's mission.

What is new in the update?

To enhance clarity, reflect current practice, and facilitate use, the update not only synthesizes existing SEP guidance, but also makes other helpful improvements for environmental practitioners. Specifically, the update provides:

- Guidance for EPA case teams to consider SEPs early in the settlement process and even to proactively suggest SEP ideas to defendants, in appropriate cases;
- Encouragement of appropriate public outreach to affected communities, both by the defendant and by EPA;
- A clarified discussion of SEP legal guidelines, intended to make "nexus" requirements and augmentation issues easier to understand;
- A restructured discussion of how to calculate and appropriately mitigate the final settlement penalty;
- A checklist to help defendants and EPA staff do the necessary analysis to ensure the SEP does not augment appropriations or federal funding;

- A consolidation of all SEP-related certifications that need to be included in the text of the settlement agreement;
- A revised, more flexible approach to assessing stipulated penalties in the event a SEP is not satisfactorily completed;
- A new explanation of the role of third parties who implement or receive SEPs, clarifying that defendants are responsible for the selection of any third parties, and remain responsible for full performance of the project.

What has remained unchanged?

The substantive requirements for SEPs are not fundamentally different. While EPA has broad discretion to settle cases, the Agency must follow certain legal and policy guidelines to guide the proper exercise of that discretion, to provide for the fair and consistent mitigation of civil penalties, and, perhaps most importantly, to ensure that all applicable legal requirements are met. Therefore, SEPs must still:

- Be well-defined projects, which will provide tangible benefits that improve, protect, or reduce risks to public health or the environment;
- Have a sufficient "nexus," or relationship, between the project and the alleged violation(s) resolved under the settlement;
- Demonstrate that the project is designed to reduce the likelihood of similar future violations, decrease specific adverse impacts from the violation(s), or lessen the overall risk of harm to which the violations contributed;
- Cover matters that "go beyond" what is legally required for compliance with applicable environmental laws and are not otherwise required by any federal, state, or local law or regulation;
- Be consistent with, and advance at least one objective of, the statutes upon which the case being settled is based;
- Not augment federal funding or appropriations;
- Be evaluated to assess how well the project: (1) provides significant, quantifiable benefits to public health or the environment; (2) mitigates damage or reduces risk to communities with environmental justice concerns; (3) reflects community input; (4) furthers development and implementation of innovative processes, technologies, or methods; (5) reduces emissions to more than one media; and (6) develops and implements techniques and practices that reduce the generation of a pollutant;
- Be part of a settlement that includes a penalty amount that recoups any economic benefit that the defendant gained from the alleged noncompliance, along with gravity-based penalties that reflect the environmental and regulatory harm caused by the

violation(s) while taking into account the benefits of the SEP.

What is next?

Since the update was issued, recent EPA settlements have included a number of commendable community-based SEPs, such as:

- Use of safer chemicals at water treatment facilities;
- Lead paint abatement;
- Wood stove change-outs;
- Pharmaceutical and hazardous household chemicals take-back programs; and
- Repair or replacement of defective sewer lateral lines for low-income citizens.

In addition, since the update promotes innovative projects, EPA anticipates an uptick in SEP proposals that make use of new and emerging technologies, e.g., development and use of GPS-guided dredge technology; and advanced equipment for emergency responders. By encouraging SEPs and clarifying the conditions under which they can be included in settlements, the update should facilitate a better understanding of SEPs and how they can provide environmental and community benefits.

Superfund—still going strong after 35 years

Peter L. Gray

Peter Gray is a partner at Dentons in Washington, DC. He is co-chair of the firm's US Environment and Natural Resources practice. Mr. Gray is the author of the Section's book The Superfund Manual: A Practitioner's Guide to CERCLA Litigation.

"Why write a book about a dead statute like Superfund?" a friend recently asked me. To paraphrase the immortal words of Mark Twain, the reports of Superfund's death have been greatly exaggerated. Thirty-five years have passed since the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund). Although the pace of litigation over the law's innumerable ambiguities has slowed somewhat, Superfund litigation remains an important element of many, if not most, environmental law practices. Every year, EPA adds new sites to the National Priorities List (NPL, a list of the nation's most hazardous sites) and queues them up for federal response activity under CERCLA. In addition, EPA frequently identifies new threats (such as "vapor intrusion") at previously remediated NPL sites, leading to a new round of cleanup—and the potential for conflict among potentially responsible parties (PRPs). Finally, some of the most

complex and expensive NPL sites have yet to be cleaned up, in some cases two or three decades after the sites were first added to the NPL. The contaminated sediment "mega-sites"—such as the Passaic River, a 25-year resident of the NPL for which cleanup is estimated to cost nearly $1.4 billion—exemplify this situation.

Nearly every section of CERCLA has been the subject of litigation. For certain sections of CERCLA, like the liability provisions in section 107, even the placement of commas has been the subject of litigation. One issue that continues to be litigated in federal courts is the question of when a private party can recover cleanup costs from other parties and whether the proper mechanism is a cost-recovery claim under section 107 or a contribution claim under section 113 (despite the fact that the U.S. Supreme Court has considered and ruled on that issue twice in the last decade).

It is precisely because Superfund is still going strong that environmental litigators can benefit from an in-depth resource like *The Superfund Manual*. And litigators are not the only lawyers who will find the book useful. Lawyers who perform environmental due diligence for mergers and acquisitions and other corporate transactions need a working knowledge of Superfund and the case law interpreting its language. A key element of environmental due diligence is identifying and quantifying potential CERCLA liability and recommending approaches for insulating a buyer from such liability (e.g., by perfecting the "bona fide prospective purchaser" defense). Lawyers involved in advising public entities on their obligations for disclosure of environmental liabilities under the securities laws likewise must understand CERCLA jurisprudence.

The Superfund Manual provides a comprehensive analysis of the key issues that have been litigated under CERCLA, as well as practice tips that should offer deeper insights to litigators and transactional attorneys—and new and experienced practitioners—alike.

Grounded: Supreme Court ducks federalism questions in Alaska hovercraft ban

Nathaniel S. Currall

Nathaniel S. Currall is with the firm Chupka Currall LLC in Ketchikan, Alaska.

The Supreme Court's decision in *Sturgeon v. Frost,* 577 U.S. ___ (2016), overturned a "topsy-turvy" holding by the Ninth Circuit, leaving unresolved significant federalism issues regarding navigable waters within federal lands. At issue was whether an Alaskan could continue to use his small personal hovercraft on his annual moose hunt on Alaska's Nation River. While

navigating the remote river in 2007, three U.S. National Park Service (NPS) rangers informed Mr. Sturgeon he was illegally operating a banned vehicle within a national preserve. Mr. Sturgeon argued that title to the waters of the river, located within the Yukon-Charley Rivers National Preserve and managed by the NPS, was granted to the State of Alaska at the time of statehood, well before the park's creation. Despite protests that he was complying with state law, the federal agents required him to leave under threat of criminal liability.

The Ninth Circuit gets it wrong

Mr. Sturgeon sued the United States seeking a declaration that the federal agents did not have authority to ban his hovercraft, arguing the Nation River is state-owned and that Alaska does not ban hovercrafts. The Ninth Circuit, after finding the State of Alaska lacked standing, affirmed the district court's grant of summary judgment in favor of the United States. The Ninth Circuit's reasoning turned on its interpretation of section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), finding the statute did not bar the NPS from enforcing its nationwide ban on hovercrafts within, regardless of ownership.

Sturgeon and Alaska argued that title to navigable waters, including the Nation River, were clearly granted to Alaska at statehood and that ANILCA section 103(c) did not intend to convey ownership of navigable preserve waters. From that premise, Sturgeon argued section 103(c) prevented the NPS from regulating activities on private or *state-owned* lands and waters lying within the park boundaries set by ANILCA. The Ninth Circuit rejected this argument, holding that since the ban was not applied *solely* to public lands in Alaska, it could be enforced on both preserve public and *nonpublic* lands. However, in its briefing, the United States devoted a single paragraph to defending the Ninth Circuit's strained reasoning, a fact not lost on the Court. During oral arguments, Justices Alito and Sotomayor referred to the Ninth Circuit's holding as "wrong" stating "It's a ridiculous interpretation . . ."

The property interests in the U.S. preserve are "complicated"

Justice Roberts delivered the Court's unanimous decision, detailing Alaska's property history, from acquisition from Russia, to statehood, and on to the "Great Denali-McKinley Trespass" (analogous to the recent Bundy standoff in Oregon). Justice Roberts detailed the competing interests of the United States, Alaska, and Native and private stakeholders leading to the ANILCA "grand bargain," which created the Yukon-Charley Rivers Preserve together with numerous other Alaska national parks, refuges, and monuments. ANILCA set aside 105 *million* acres of land in conservation system units (CSUs), drawn to include 18 million acres of additional nonpublic land. The scale of land was immense, tripling land within U.S. parks, all placed under federal management. The complex interests involved led to difficult ownership and control issues, including whether the navigable waters within the preserve remained state land, and to what extent federal authority controls. While questioning counsel about the title interests raised, Justice Breyer noted "[i]t's too complicated."

Impact of an eight-member Court: Can the NPS regulate activity, even over nonpublic park areas?

Sturgeon v. Frost was notably Justice Scalia's final oral argument. He enthusiastically argued against the U.S. position stating "[i]f it's not within the unit, it's not within the basic authority of the Park Service to issue regulations, period…" and "you're telling us that the river, that the government holds title to the river. It doesn't. It has usufructuary rights in the river." Justice Scalia's statements show he was prepared to address the significant federalism issues presented, and perhaps find in Sturgeon's favor.

The NPS had already used the Ninth Circuit's broad ruling to impose additional regulations on nonfederal, nonpublic land within Alaska parks (regulating oil activities), upsetting the state, which argued "the hits are going to keep on coming unless this Court stops this interpretation . . . ." The Supreme Court's decision unambiguously rejected the Ninth Circuit's "implausible" holding, likely ceasing further NPS regulation on nonpublic ANILCA lands, but the Court did not take the additional steps Scalia hinted at taking. Instead, while questions of U.S. authority over navigable waters in federal parks were brought front and center, the Court refused to address any issues of nationwide importance, possibly as a strategic compromise by an eight-member Court lacking any majority. In rejecting the Ninth Circuit ruling, the Court stated "we do not decide whether the Nation River qualifies as 'public land' for purposes of ANILCA." Noting that the case touched "on vital issues of state sovereignty…and federal authority," the Court did *not* "decide whether the Park Service has authority…to regulate Sturgeon's activities on the Nation River, even if the river is not "public" land…[w]e leave those arguments to the lower courts . . ."

While the decision may initially appear a victory for Sturgeon and state's rights, the NPS has made clear that its nationwide regulations will continue to be enforced within federal ANILCA lands, recently "reminding" citizens that its ban remains in effect "until a court rules otherwise." Despite the Chief Justice's detailed rendition of how "Alaska is different," the federal government will continue to treat Alaska the same by grounding Mr. Sturgeon's hovercraft pursuant to its nationwide ban.

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

***Pakootas v. Teck Cominco Metals, Ltd.*, No. 15-35228, 2016 WL 4011196 15-35228 (9th Cir. July 27, 2016).**

Reversing a district court's decision, the Ninth Circuit held that the owner of a smelter in Canada is not liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for hazardous substances emitted into the air that resulted in contamination of land and water in the state of Washington. The issue for the court was whether the owner that emitted contaminants through a smokestack can be said to have arranged for the "disposal" of those contaminants under section 9607(a)(3) of CERCLA. Noting that CERCLA's definition of "disposal" refers to the definition in the Resource Conservation and Recovery Act (RCRA), the *Teck* panel found persuasive the Ninth Circuit's decision in *Center for Community Action v. BNSF Railway*, 764 F.3d 1019 (9th Cir. 2014), which held that emitting diesel particles from railroad locomotives in rail yards into the air and allowing the particles to be transported by wind onto the land and water did not constitute "disposal" under RCRA. Congress knew how to use the word "emit" when it wanted to, the Court found. The *Teck* panel also stated it was bound by the Ninth Circuit's *en banc* decision in *Carson Harbor Vill. Ltd. v. Unocal Corp*, 270 F.3d 863 (9th Cir. 2001), holding that the term "deposit" under CERCLA is akin to "putting down, or placement" and does not include "chemical or geologic processes or passive migration." Thus, although the panel concluded that plaintiffs had presented an "arguably plausible" construction of "disposal," the decision in *Carson Harbor* compelled the panel to hold otherwise. The *Teck* panel rejected the argument that excluding the smelter emissions would thwart the overall statutory scheme, and noted that if "aerial depositions" were to give rise to liability, then "'disposal' would be a never-ending process, essentially eliminating the innocent landowner defense." Finally, the panel's opinion notes that it has not been presented with an agency interpretation of "deposit" to which it might owe deference.

For further information:
Summary of district court decision: *The Little Hocking Water Assoc., Inc. v. E.I. duPont De Nemours & Co.*, Case No. 2:09-CV-1081, Document No. 439 (Mar. 10, 2015).

Constitutional law

***GG Ranch, Ltd. v. Edwards Aquifer Authority*, 639 Fed. Appx. 269 (Mem), 2016 WL 2609800 (5th Cir. May 5, 2016).**
The Fifth Circuit summarily affirmed the dismissal of a Fifth Amendment takings suit by property owners complaining of the denial of permits to withdraw groundwater located beneath their properties. The court agreed with the reasons in the district court's order, which held that the 10-year statute-of-limitations for the takings claims began in 1996 when plaintiffs lost their historical access to the water rights and instead had to apply for a permit to continue using water under a new Texas water use law. The district court was not receptive to plaintiffs' argument that the 10-year clock should have started running when their permit applications were denied in 2014 and the Fifth Circuit affirmed the district court's position.

***Western Watersheds Project v. Michael,* No. 15-CV-00169, 2016 WL 3681441 (W.D. Wyo. July 6, 2016).**
A district court in Wyoming dismissed a lawsuit by public interest groups challenging the constitutionality of both civil and criminal Wyoming data-gathering or trespass statutes that prohibit the collection of "resource data" on private land without express permission or authorization by the landowner. In this case, plaintiffs Western Watersheds Project and other environmental groups sought to collect water samples designed to prove that overgrazing of the land by the cattle industry was polluting the water supply. The district court concluded that the plaintiffs' claims are erroneously premised on a perceived First Amendment right to enter upon private property in order to collect resource data. The opinion noted that the Supreme Court has not recognized a free speech right on privately owned property, citing *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 558 (1972) and concluded: "The ends, no matter how critical or important to a public concern, do not justify the means, violating private property rights." Finally, the court declined to rule on plaintiffs' challenge to the statutory provision requiring the expunging of data collected in violation of the statutes, concluding that such restrictions on publication of information should be addressed on an "as applied" basis not presented here.

International organizations

***Jam v. International Finance Corp*., No 15-cv-00612, 2016 WL 1170936 (D.D.C. Mar. 24, 2016), *appeal pending* No. 16-7051.**
A district court dismissed a lawsuit by fishermen and farmers against the International Finance Corporation (IFC), which provided a $450 million loan for construction of a coal-fired power plant in India. Plaintiffs alleged that the power plant caused various environmental impacts, including warm water discharges that depress the fish catch, causing salt water intrusion into groundwater making it unusable for drinking or irrigation, and emissions degrading air quality. The IFC's Ombudsman issued a report concluding that the IFC failed to adequately consider the environmental and social risks posed by the power plant, but was unable to provide relief

to plaintiffs, who subsequently filed suit. The district dismissed the suit because the IFC has immunity under the International Organizations Immunities Act, 22 U.S.C. 288 et seq. and the IFC has not waived its immunity from suit.

Air quality

***Sierra Club v. U.S. Environmental Protection Agency*, No. 1:10-cv-01541, 2016 WL 3281244 (D.D.C., June 14, 2016).**
A district court issued an order directing EPA to file a schedule for proposing and completing action on a Clean Air Act "good neighbor" federal implementation plan (FIP) for Texas with respect to particulate matter (PM) 2.5. The district court rejected EPA's argument that EPA performed its duty to promulgate an interstate transport FIP for Texas for PM 2.5 by promulgating the cross-state air pollution rule (CSAPR). Plaintiffs also alleged that EPA failed to promulgate an interstate transport FIP for Texas with respect to PM 2.5. EPA argued that plaintiffs' Texas PM 2.5 interstate transport claim is moot in light of *EME Homer*, which invalidated the sulfur dioxide emission budgets for Texas in the CSAPR. *EME Homer City Generation v. EPA*, 795 F.3d 118, 128–29 (D.C. Cir. 2015). The district court was not persuaded, noting that the D.C. Circuit urged EPA to on "move promptly on remand." *Id*. at 132. The court held plaintiffs' interstate transport claim in abeyance until completion of EPA action adopting a valid PM 2.5 good neighbor FIP for Texas.

Water quality

***Wyoming v. U.S. Department of Interior*, No. 2:15-cv-00043, 2016 WL 3509415 (D. Wyo. June 21, 2016),** *appeal pending No. 16-8069* **(10th Circuit).**
A district court followed its earlier ruling on a preliminary injunction and issued a final order setting aside the Bureau of Land Management's (BLM) 2015 rule relating to hydraulic fracturing on federal and Indian lands. The BLM rule focused on well bore construction, chemical disclosures, and water produced during operations. Lawsuits were filed by industry groups, two states, and an Indian Tribe. The district court found that Congress has not delegated to the Department of the Interior the authority to regulate hydraulic fracturing. The court was not persuaded by BLM's argument that the fracking rule simply supplements existing requirements for oil and gas operations, noting that BLM previously took the position that it lacked the authority to regulate hydraulic fracturing. Congress delegated regulatory authority over groundwater to EPA, the opinion states. Although the Federal Land Policy and Management Act authorizes BLM to take action to prevent degradation of public lands, the statute at is core is a "land use planning statute" and provides no specific authority for the BLM to regulate fracking. Finally, the court concluded that *Chevron* deference to BLM was not warranted since this case does not involve an agency construction of a specific statutory provision where the agency had clearly been granted regulatory authority: "If this court were to accept [the BLM and environmental groups'] argument, there would be no limit to the scope or extent of

Congressionally delegated authority BLM has, regardless of topic or subject matter." The district court had earlier issued a preliminary injunction against the BLM rule, and that earlier ruling has been briefed to the United States Court of Appeals for the Tenth Circuit.

***In re: City of Taunton Department of Public Works*, NPDES No. 15-08 (EPA Environmental Appeals Board May 3, 2016).**
EPA's Environmental Appeals Board (EAB) denied a petition for review filed by the City of Taunton challenging a National Pollutant Discharge Elimination System permit issued by EPA to the city. The city challenged the need for a nitrogen limit and the specific limit imposed. The city also challenged the permit's copper limits, the decision not to set separate wet weather limits, and EPA's authority to limit flow. Regarding the nitrogen limit, the EAB held that EPA reasonably found that there was a "reasonable potential" to cause an exceedance of water quality standards even though the river was not on the Massachusetts list of impaired waters and even though EPA did not show actual impairment. The EAB also found that EPA reasonably determined a nitrogen limit taking into account the flow of the river, the reductions needed, and the limits of technology.

NEPA

***Public Employees for Environmental Responsibility v. Town of Barnstable*, No. 14-5301, 2016 WL 3606363 (D.C. Cir. July 5, 2016).**
The D.C. Circuit reversed a district court judgment that upheld a decision of the Bureau of Ocean Energy Management to issue a lease for a wind project off the coast of Massachusetts. The proposed project called for 130 wind turbines to generate electricity for Cape Cod and surrounding islands. The court of appeals agreed with plaintiffs that the Bureau violated the National Environmental Policy Act (NEPA) when it issued the lease without obtaining sufficient site specific geological data concerning seafloor and subsurface hazards. The court of appeals vacated the impact statement and required the Bureau to supplement it, but did not vacate the project lease or other regulatory approvals based on this NEPA violation. The court of appeals also vacated the incidental take statement under the Endangered Species Act (ESA) because the Fish and Wildlife Service disregarded plaintiffs' submissions concerning the "feathering" of turbines to minimize the impact on listed species of birds when it reopened the record to consider the views of an in-house economist concerning the reasonableness of feathering.

FIFRA

***Mendoza v. Monsanto Co*., No. 1:16-cv-00406, 2016 WL 3648966 (E.D. Cal. July 8, 2016).**
A district court denied a motion by Monsanto to dismiss a lawsuit by an individual who claims to have developed non-Hodgkin lymphoma as a result of using Monsanto's Roundup® product. The lawsuit seeks damages based on strict liability, failure to warn, negligence, and breach of express and implied warranty. Monsanto moved to dismiss, arguing that the claims were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), citing various

statements by EPA. The district court found that documents cited by Monsanto did not support Monsanto's claims. The court also concluded that plaintiffs' state law claims, if successful, would not necessarily impose any additional requirements beyond FIFRA's requirement that the product not be misbranded, and that a registration under FIFRA is not conclusive as to whether or not a product is misbranded. Finally, the court rejected Monsanto's argument that the design defect claims were barred by comments to the Restatement of Torts (Second) section 402A.

Endangered species

***National Wildlife Federation v. National Marine Fisheries Service*, No. 3:01-cv-00640-SI, 2016 WL 2353647 (D. Or. May 4, 2016).**
A district court granted the summary judgment motions of plaintiff environmental groups with respect to claims that the National Marine Fisheries Service (NMFS) violated the ESA and the Administrative Procedure Act when it issued a biological opinion concerning the operations of the Federal Columbia River Power System. NMFS had concluded that the operations do not violate the ESA based on 73 "reasonable and prudent" alternatives described in the biological opinion. The court found that the no jeopardy conclusion relied on actions that are not reasonably certain to occur or have uncertain benefits, including habitat mitigation, and found NMFS's "trending toward recovery" standard to be arbitrary and capricious. The court concluded that NMFS failed to properly evaluate the degree to which climate change will cause added harm and reduce the effectiveness of mitigation measures. The court also held that the Army Corps of Engineers and the Bureau of Reclamation violated NEPA by failing to prepare an environmental impact statement with respect to the 73 reasonable and prudent alternatives described in the biological opinion. The court directed NMFS to file a new biological opinion with the court by March 1, 2018. The court also retained jurisdiction to ensure that the federal defendants develop appropriate mitigation measures, produce a biological opinion that complies with the ESA, and prepare an EIS that complies with NEPA.

Views from the Chair

Seth A. Davis

Seth Davis became the Section of Environment, Energy, and Resources' 90th chair during the Section's annual business meeting in August 2016. A long-time Section member, Davis has previously served as publications officer, council member, and chair of the Environmental Transactions and Brownfields and Site Remediation Committees. He is a partner in Elias Group LLP in Rye, New York.

To be entrusted with the leadership of the Section of Environment, Energy, and Resources is truly a high honor and a responsibility I eagerly embrace. To paraphrase another Section leader,

I have had many jobs in my career, but only one section—only one true professional home. To those of you with whom I share that home, my pledge is a simple one: More of the Same. The things we do well we shall continue and we shall strive to do them even better. What makes us special must be maintained and must be made available for all interested professionals.

We are at a time where the sustainability of the traditional bar association is sharply in question. Fewer positions are available for new law school graduates, fewer legal employers readily underwrite the cost of bar association memberships, fewer lawyers are willing to devote their energies to volunteer efforts that don't lead directly to more business. In the face of these trends, as we worry about sustaining our environment and our economy, how can we, the Section, sustain *ourselves*? What can we offer that sets us apart?

For me, the answer is simple: collegiality and community. As we say in our mission statement, we strive to be the premier forum for environmental, energy, and resources lawyers; a meeting place where they can find the most current and sophisticated analyses of the complicated environmental, energy, and resource problems facing the United States and the world; and where they can learn, teach, and contribute to solving those problems while serving the public interest. And we do so in a most appealing and collegial way. A way that for me has involved seeing colleagues get married, leading dozens of colleagues on their first trip in New York's subway system to a memorable feast in Chinatown, just missing the Pick 4 at Charles Town, West Virginia, snowshoeing in the Rockies, kayaking down Antietam Creek, visiting a Soviet submarine, tasting wines at too many places to remember, teaching several Southerners how to eat a lobster, and performing the hallowed chicken dance at an altitude of 11,000 feet. And I can hardly wait to see what this year holds in store!

The Section is a community without peer. We are a forum of incredible diversity and vitality. The issues we deal with are vital and essential, and we deal with them in a frank, open, exciting, and refreshing way. We supply the personal dimension of learning and professional development that, frankly, can only come with frequent, in-person collaboration. As we approach another exciting Fall Conference—this year in Denver—we remind ourselves, in the face of critics who say that flying hundreds of miles to conference is not "sustainable," that such gatherings are in fact the very lifeblood of sustaining our precious community, our unique collaboration, our premier forum. It's not just the ability to purchase carbon offsets (which I always do, of course) that makes us sustainable—it's the breadth of our programming and publications, the openness of our dialogue, and the ability to make contacts and gain knowledge through personal contact that simply cannot be done in any other way or found anywhere else. All of this has been and will continue to be open to all of our members, and I urge you all to participate as actively as you can.

I propose to continue two paths of improvement and introspection initiated by my immediate predecessors. Steve Miano emphasized integration of our activities—within the Section, with

other ABA entities, and with outside groups—and we learned to work more collaboratively and without regard to traditional disciplinary boundaries. Pam Barker emphasized outreach and we substantially increased the frequency of our cooperation with bar associations at the state, local, and international levels. And I hope to develop a new way of developing and coordinating the content we produce—programs, publications, social media, podcasts, whatever—so that we are driven by ideas and concepts and develop and disseminate integrated content of the highest possible quality.

So that's it—More of the Same. But only more so. Come join with us as we try to make the premier forum even better. Come join with us as we collectively address the issues that will truly determine the future quality of life on this planet. Everyone is welcome, everyone is needed, and everyone can have a meaningful role. I may not be able to do the chicken dance for you this year, but I promise you that your experience will be memorable.

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.

Fatima Maria Ahmad has joined the Center for Climate and Energy Solutions (C2ES) as a Solutions Fellow in Arlington, Virginia. Ahmad analyzes federal and state energy policy to support emerging energy technologies, such as carbon capture, use, and storage. She also reviews mechanisms to finance climate change mitigation, adaptation, and resilience. Ahmad was formerly counsel with AZI Consulting, Inc. in Oakton, Virginia. Ahmad is Co-Chair, ABA Section of International Law's International Environmental Law Committee and is the vice-chair for Membership of the Women's Council on Energy & the Environment.

Scott Breen has become an attorney advisor in the Attorneys Honors Program class at the National Oceanic and Atmospheric Administration in Washington, D.C. Breen is a past chair of the Section's Membership Diversity Enhancement Program.

Cheri Budzynski became a partner at Shumaker, Loop & Kendrick LLP in Toledo, Ohio. Budzynski's practice includes environmental regulatory, permitting, and compliance issues that affect the utility industry, the steel/coke industry, the pharmaceutical industry, and the ethanol industry. She has prepared an overview of the major environmental regulations in the United States and European Union, which was presented to the Ministry of Environmental Protection for the People's Republic of China to aid in the development of glass industry regulations in

China.

Christine LeBel has been promoted to Chief Regional Counsel, Western Region, of the Massachusetts Department of Environmental Protection, in Springfield, Massachusetts. LeBel supervises the staff and operations of the region's legal office, including coordination of enforcement matters with other agencies and the Commonwealth's Attorney General, as well as maintaining a substantive caseload of diverse matters under the state agency's authority. LeBel is a member of the Section's Council.

Angela Morrison has resumed her solo practice, Morrison Environmental Law. Based in Florida, Morrison continues to assist utilities, manufacturers, and other industrial clients with environmental permitting and compliance matters, climate change and sustainability practices, and land use approvals. She is a member of the Section's Council and is one of the authors of the Section's recently published *The Clean Air Act Handbook* (Fourth Edition).

James W. Rubin has joined Dorsey & Whitney LLP as a partner in its Washington, D.C. office. Rubin's practice focuses on air pollution; climate change law and policy; natural resource laws; hazardous materials transportation; and federal, state, and citizen enforcement matters—particularly those related to the energy sector. He also provides counsel to businesses on domestic and international compliance matters in the environmental context and on corporate transactions. Rubin was formerly with Dentons LLP in Washington, D.C.

Steve Sarno has joined Amazon.com as corporate counsel for Amazon Web Services, in Seattle, Washington. Sarno's primary responsibilities include environmental compliance oversight for data centers around the world. He was formerly with Beveridge and Diamond, P.C, in San Francisco. Sarno is a member of the Section's Council and the Special Committee on Content Convergence.

Larry Schnapf has been elected chair of the Environmental Law Section of the New York State Bar Association. Since Schnapf was elected, the ABA Section of Environment, Energy, and Resources has co-sponsored two programs of the state bar association's environmental law section. He is the principal in Schnapf LLC in New York City, NY. Schnapf is also a professor at New York Law School.

Danielle L. Schreiber has joined Verdant Law PLLC as a senior associate in Washington, DC. Schreiber's practice focuses on the environmental regulation of products. This includes advising, compliance counseling, defending against enforcement actions, litigating, and providing support for internal audits for companies with respect to their obligations under environmental statutes including TSCA, FIFRA, the Clean Air Act, and RCRA. She also provides strategic advice regarding EU's REACH program and advises companies on compliance with green marketing regulatory requirements under the Federal Trade Commission Act. Schreiber was formerly an attorney advisor to Administrative Law Judge L. Zane Gill at the Federal Mine

Safety & Health Review Commission and served as the Environmental Legal Fellow to Senator Sheldon Whitehouse.

Nimasha Weliwitigoda has become a staff attorney in the Air Quality group of the Office of Legal Services of the Texas Commission on Environmental Quality in Austin, Texas. Weliwitigoda represents the Commission in air quality issues. She previously had a fellowship at the Commission.