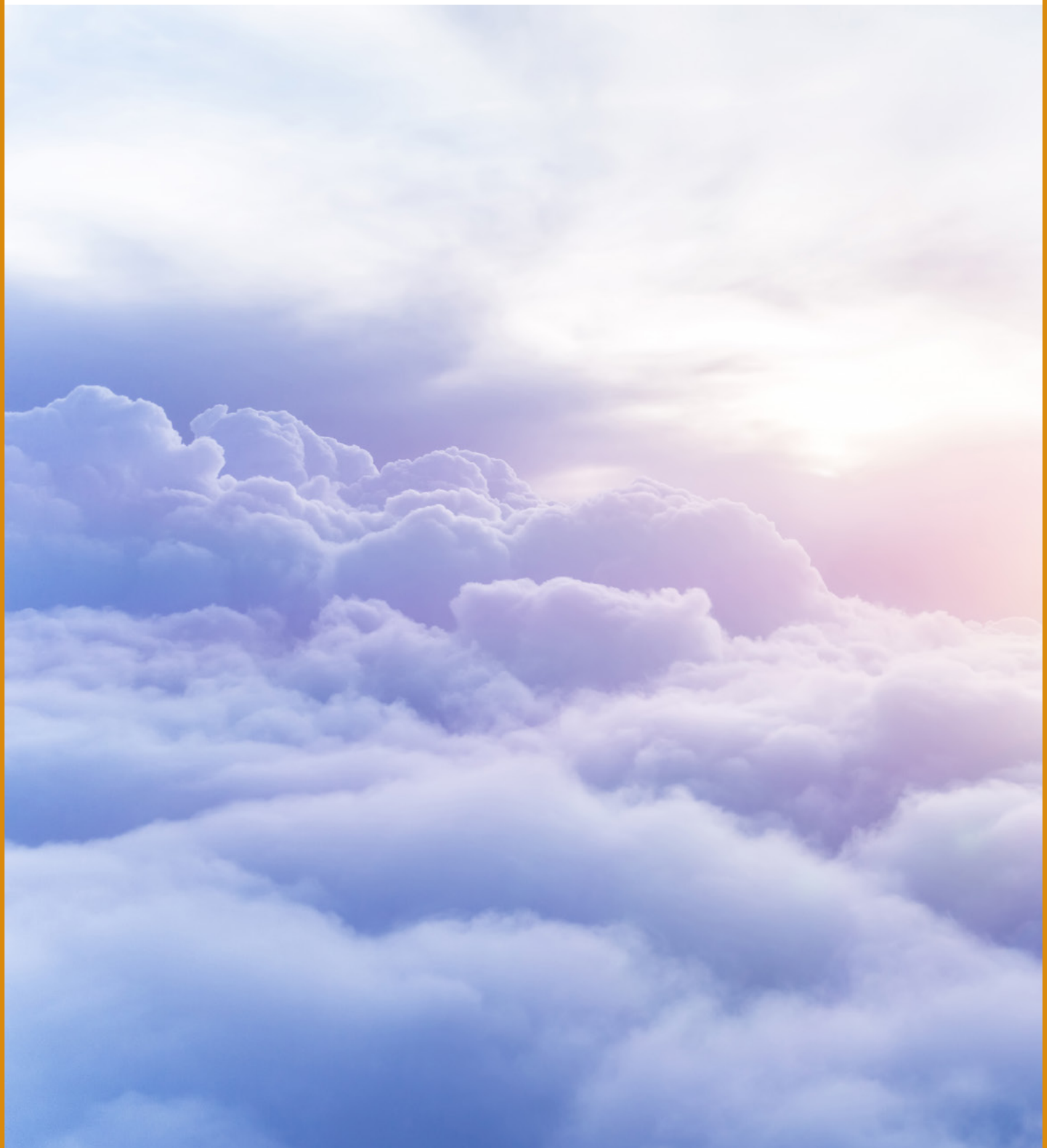
TRENDS

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

NOV/DEC 2016



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Change in administrations, change in course? What the next president could do to vacate or reform Obama's Clean Power Plan (Part 2 of 2)

Thomas A. Lorenzen and Sherrie A. Armstrong

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

On September 27, 2016, more than a dozen lawyers and ten D.C. Circuit judges debated the legality of U.S. Environmental Protection Agency's (EPA's) signature climate change rule, the Clean Power Plan. That rule aims to cut carbon dioxide emissions from existing fossil fuel-fired power plants by requiring steep reductions in and replacing that generation with power from low- or zero-emitting sources. A decision is not expected until sometime in 2017, and the case is likely headed to the U.S. Supreme Court, which in early 2016 granted an extraordinary stay pending review.

Whatever the judicial outcome, Congress and the executive branch also have tools for voiding or amending the Clean Power Plan. As we discussed in the last issue of *Trends*, legislative action is possible but unlikely to succeed. Lorenzen & Armstrong, *Change in administrations, change in course? The staying power of Obama's Clean Power Plan and possible avenues for change (Part 1 of 2)*, Trends Sept/Oct, Vol. 48, No. 1. Though the president has many powers, even the president cannot erase the Clean Power Plan through executive fiat. In the second part of this series, we explore the actions a new administration could take to withdraw or amend the rule.

Vacating the rule by executive action

A new administration could admit error and seek vacatur of the rule, but such a strategy is unlikely to succeed. The Obama administration attempted this with respect to a surface mining rule issued in the final days of the Bush administration, 73 Fed. Reg. 75,814 (Dec. 12, 2008). The rule took effect days before President Obama's inauguration and was promptly challenged by environmental groups. The Interior Department took the unusual step of filing a motion to remand and vacate the rule because Secretary Salazar had determined OSM had failed to engage in Endangered Species Act consultation. An industry intervenor was the only party in the case to oppose vacatur.

The district court agreed vacatur was not appropriate absent a merits ruling, significant new evidence, or all parties' agreement. *Nat'l Parks Conservation Ass'n v. Salazar*, 1:09-cv-00115 (Aug. 12, 2009). The court held that, under those circumstances, vacatur would "wrongfully permit the Federal defendants to bypass established statutory procedures for repealing an agency rule" under the Administrative Procedure Act (APA). *Id.*, slip op. at 4–5.

It is not clear there is a vehicle for a similar motion before the D.C. Circuit or before the U.S. Supreme Court. The environmental and state intervenors in support of the rule also would undoubtedly oppose such a tactic, making that strategy unlikely to succeed.

Refusal to defend or enforce the rule

Short of seeking vacatur, a new president could instruct the Department of Justice to decline to continue to defend the rule, as President Obama did in the case involving the constitutionality of the Defense of Marriage Act (DOMA). Such an action would inform the reviewing court of the new administration's policy position but may not have much practical effect as states and other groups supporting the Clean Power Plan could continue to defend the rule. In short, the rule could be upheld by the courts, notwithstanding the executive branch's decision not to defend it.

A new president could also encourage EPA to exercise its enforcement discretion and refuse to enforce the state plan deadlines and other requirements imposed by the Clean Power Plan. Although day-to-day control of EPA is vested in the EPA administrator, the president could appoint a new administrator who would be amenable to that approach (subject to Senate confirmation) and could remove an administrator who is not abiding by the president's policy choices.

Even if the agency chose not to defend or enforce the rule, it would still remain in full legal effect, giving any person the ability to bring a Clean Air Act citizen suit under section 304(a) against EPA or alleged violators to enforce the rule's provisions.

A new rulemaking

The most effective way a new administration could revoke or revise the Clean Power Plan is through a new rulemaking, although that is a lengthy and resource-intensive process. Under the APA and the Clean Air Act, a legislative rule having the force and effect of law must be issued through notice-and-comment proceedings.

A new rulemaking requires development of a new proposed rule and a record of scientific, economic, and other supporting information, which can take considerable time. Once a new rule is proposed, the public notice-and-comment period typically takes three to six months, followed by the agency's preparation of a final rule, with any necessary revisions, and development of the agency's responses to public comments. The agency also would engage with stakeholders and perform a legal and policy review of the rule during that time.

All told, the rulemaking could easily take two years to complete and maybe more. In our previous example of the Bush-era surface mining rule, which was ultimately vacated in February 2014 on summary judgment, a new proposed rule did not issue until July 2015, and

the rule is yet to be finalized.

During the pendency of a rulemaking, the Clean Power Plan would remain in effect and be enforceable by EPA or through citizens' suits. And, like the Clean Power Plan, any new rule would be subject to legal challenge. To prevail, EPA would have to establish that revocation of the rule is not contrary to the Clean Air Act, revocation was reasonable, and revocation would not endanger public health or welfare.

There is a very limited exception to the general notice-and-comment requirements that allows repeal of a regulation under APA section 553(b) where an agency finds good cause that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest. That exception is typically invoked only for emergency situations involving substantial endangerment to public health and is narrowly construed by the courts. EPA is unlikely to employ such an approach in this context; it would also likely not survive judicial scrutiny.

Revocation of a duly-issued rule through subsequent rulemaking is neither easy nor quick, and judicial invalidation of any new rule replacing the Clean Power Plan with something less stringent remains a considerable threat. A new administration also would typically need to consider whether business decisions have already been made in response to the Clean Power Plan, but that may not be relevant in light of the Supreme Court stay.

In short, revocation of the Clean Power Plan by a new administration is possible, and more easily accomplished than through congressional action, but by no means certain.

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

Turtles all the way down: Justice Scalia and the Clean Water Act

Mark A. Ryan

Mark A. Ryan, a principal with Ryan & Kuehler PLLC, is the long-standing editor of the ABA's The Clean Water Act Handbook, and serves on the editorial board of the Section's Natural Resources & Environment magazine.

Despite his huge presence on the U.S. Supreme Court from 1986 to 2016, Justice Antonin Scalia did not loom large in Clean Water Act (CWA or Act) jurisprudence. Scalia authored only two CWA opinions during his lengthy tenure: *Rapanos v. United States,* 547 U.S. 715 (2006) and *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009). He participated in 20 CWA decisions

while on the Court, and, as was his style, wrote separate concurring or dissenting opinions in almost half of those cases. The Justice frequently split his concurrence or dissent in each case based on the issues. He was anything but shy.

Because Justice Scalia authored only two CWA opinions, his impact on the Act was limited. But those two cases offer a perfect snapshot of the Scalia we all knew—at times surprising, often confounding, and, usually, strictly construing the statute at hand. In *Entergy*, the Court held that the U.S. Environmental Protection Agency (EPA) permissibly relied on cost-benefit analysis in setting national performance standards and in providing cost-benefit variances from those standards as part of the Phase II power plant regulations. Scalia gave deference to EPA's reading of the CWA, holding that "best technology available for minimizing adverse environmental impacts" can mean the technology that most *efficiently* produces a good, rather than a technology that achieves the greatest reduction in adverse environmental impacts at a reasonable cost to industry.

But no case personifies Scalia's style more than *Rapanos.* The issue in *Rapanos* was whether the petitioner's wetland, which was distant from any larger rivers and connected to downstream rivers via a series of much smaller ditches and creeks, was a "water of the United States." The CWA regulates discharges to "navigable waters." Congress defined navigable waters as "the waters of the United States" but was largely silent on what the term meant, by default leaving EPA and the U.S. Army Corps of Engineers (Corps) to flesh it out. As a result, the EPA/Corps definition of "waters of the United States" has been the source of much litigation since Congress passed the CWA in 1972.

In his plurality opinion in *Rapanos*, Scalia was foremost a textualist (a term he used to describe himself), carefully analyzing the words of the statute to divine what Congress intended. Scalia, in his usual style, attacked the ambiguous statutory language, not by referring to the Congressional Record, but by turning to *Webster's Dictionary* to discern what Congress meant by its use of the term "waters." He concluded:

> [i]n sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute."

547 U.S. at 739.

Scalia's interpretation of the CWA was completely new—he read the Act in ways no court, the

agencies, or Congress itself had ever considered—and in so doing significantly curtailed the scope of the Corps/EPA definition of "waters of the United States" that had been in place for 35 years. His opinion was also internally inconsistent. He concluded that intermittent streams were not covered by the Act, but opined in footnote 5 that seasonal rivers are. Seasonal rivers are by definition intermittent. How can a river with a well-defined bed and bank (a geographic feature) that carries 15,000 cubic feet per second of flow (a torrent) for months in the spring and early summer, but dries up every summer (either naturally or through irrigation diversions), not be a "relatively permanent body of water?" Such intermittent streams exist in many places in the arid West, and they constitute an important part of the nation's hydrology. Yet one can read Scalia's opinion to conclude that such water bodies are not protected by the Act owing to Congress' use of the term "water" in the definition.

While Scalia generally professed to be motivated solely by his apolitical interpretation of the words of the statute, he tipped his conservative hand. He devoted several pages of the introduction to his plurality opinion in *Rapanos* to a discussion of how expensive and onerous the wetlands permitting procedures are. If his strict-construction methodology were correct—and we should only look to the text of the statute to divine its meaning—why lay out a background of the perceived negative impacts of the regulation? It should be irrelevant.

In *Rapanos*, Justice Kennedy wrote a solo concurring opinion that expanded on the significant nexus theory of jurisdiction that was first established in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Scalia harshly attacked Justice Kennedy's concurring opinion for its lack of logical foundation. To make his point, Scalia recounted the classic story of the guru who thought the world was supported on the back of a tiger, which was supported by an elephant, which was supported by a giant turtle. When asked what was under the turtle, the guru hesitated, then replied, well, it was "turtles, all the way down." Scalia thought Kennedy's significant nexus theory of CWA jurisdiction was similarly balanced on the back of turtles.

Say what you want about his politics or his arguable overreliance on strict statutory construction, Justice Scalia wielded a mighty pen. One can admire the quality of the work without admiring the outcomes. His insistence on approaching all legal analyses as a "textualist" was arguably no less open to abuse than traditional legal analyses that rely on legislative history and policy to interpret statutory ambiguity. Nevertheless, one cannot question Scalia's sharp intellect and his willingness to challenge judicial orthodoxy. He was a gadfly and every court needs at least one to keep the majority honest. Scalia was pugnacious, dismissive of those who disagreed with him, sometimes internally inconsistent, yet always persuasive. And he was never boring.

Further reading
Justice Scalia: The energy regulation cases
Justice Scalia and environmental law—the Clean Air Act Cases

Arbitral panel sides with Philippines in South China Sea dispute

Holly Doremus

Holly Doremus is the James H. House and Hiram H. Hurd Professor of Environmental Regulation; co-faculty director of the Center for Law, Energy and the Environment; and faculty director of the Law of the Sea Institute at the University of California, Berkeley, School of Law.

On July 12, an Arbitral Tribunal from the Permanent Court of Arbitration in The Hague issued an important decision in the long-running conflict between China and its Southeast Asian neighbors over control of territory and access to resources in the South China Sea. The decision was a sweeping win for the Philippines. The panel confirmed the force of the binding dispute resolution provisions of the United Nations Convention on the Law of the Sea (UNCLOS). It forcefully rejected China's claims to exclusive rights over vast areas of the South China Sea, concluded that China had unlawfully intruded on the Philippines' sovereign rights, found that China had violated its obligation under UNCLOS to protect the marine environment, and condemned China's acceleration of island-building activities while the dispute was pending.

Six coastal nations assert claims in the South China Sea, which encompasses key global shipping routes and harbors potentially extensive oil and gas resources, highly productive fisheries, and delicate coral reef ecosystems. In recent years, China has asserted its claims more aggressively, claiming sovereignty over most of the South China Sea, building artificial islands, chasing off non-Chinese fishing boats, and challenging military vessels and aircraft in the region. The Philippines, which asserts competing claims over portions of the sea, initiated arbitration proceedings in 2013 after a high-profile encounter between Chinese and Philippine vessels at Scarborough Shoals. The Philippines sought resolution of the two nations' "respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea."

The arbitral panel's interpretation and application of UNCLOS is significant in a number of respects.

First, following up on an earlier decision on its jurisdiction, the panel took an expansive view of the scope of UNCLOS's binding dispute resolution provisions. When China joined UNCLOS, it invoked all the limits on those provisions that UNCLOS permits, including rejecting compulsory resolution of boundary delimitations and claims of historic title. China regards its conflict with the Philippines as, at base, a dispute about overlapping jurisdictional claims and, therefore, not subject to binding arbitration. The arbitral panel rejected China's objections. It characterized the dispute as one about maritime entitlements rather than boundary delimitation, noting that while "all sea boundary delimitations will concern entitlements, the converse is not the case." The result is to narrow the boundary delimitation exception to the literal drawing of boundary lines between competing nations, allowing compulsory resolution of many conflicts with important but less direct consequences for maritime boundaries.

Second, the panel rejected China's assertion of historic rights in the South China Sea. China has claimed that a "nine-dash line" first published on an official government map in 1948 establishes its historical sovereignty over almost the entire extent of the South China Sea. China has never clearly explained the factual nature of its historic activities within the nine-dash line or the legal basis of its claim. The panel found it unnecessary to evaluate that history in detail, because it concluded that when China ratified UNCLOS it necessarily relinquished any inconsistent prior maritime claims. UNCLOS, the panel ruled, established a comprehensive framework for recognizing maritime entitlements that superseded earlier divisions. By joining UNCLOS, China (and other parties) gained firm rights within their own exclusive economic zones (EEZs) at the price of relinquishing whatever rights they might have claimed in areas that became the EEZs of other nations.

In addition to rejecting China's claim of historic rights in the region, the panel conducted an exhaustive examination of the various geographic features in the South China Sea over which China claims sovereignty. UNCLOS draws a distinction between "islands," which can give rise to a 200-mile EEZ, and mere "rocks," which can at most support a 12-mile territorial sea. The panel opined that islands, in addition to being above water at high tide, must be capable in their natural condition of sustaining human habitation and "an independent economic life," one neither dependent on continued infusion of outside resources nor based entirely on extraction to serve distant markets. It found that none of the features China claimed in the region qualified as islands within the meaning of UNCLOS. As a result, none could expand China's claimed EEZ or provide a basis for China to interfere with the Philippines' petroleum-leasing or to extend its fishing operations into the Philippines' EEZ.

Third, the panel discussed at some length the obligation UNCLOS imposes on all parties to protect and preserve the marine environment. It interpreted that obligation as including a "duty to prevent the harvest of endangered species," and to take measures to protect ecosystems and habitats. Although private fishing boats were directly responsible for the poaching and environmentally destructive fishing the Philippines complained of, the tribunal noted that China not only failed to enforce its own prohibitions on harvesting endangered species, China was fully aware of and "actively tolerated" the take of endangered species and "propeller chopping" of coral reefs.

Furthermore, the panel ruled that China's artificial island-building program has "caused devastating and long-lasting damage to the marine environment," also violating its duty to protect and preserve the marine environment. That program also, according to the tribunal, violated the duty to cooperate with other states and the duty to assess environmental impacts and share the results of such assessments.

There can be no doubt that the arbitral decision was a convincing victory for the Philippines and a resounding endorsement of the scope of UNCLOS. It remains unclear, however, what

impact it will have. The decision may change the terms of the political debate, but there is no mechanism to directly enforce it. China, which has consistently characterized the arbitration as illegitimate, refused to participate in the tribunal proceedings, and rejected the ruling even before it was issued, has shown no signs of softening its position. If anything, tensions in the South China Sea appear to have been heightened. China and Russia recently conducted joint military exercises there and China may have begun new island-building activities at Scarborough Shoals. Meanwhile, the new administration in the Philippines has signaled that it may be more willing to negotiate with China. Bilateral negotiations, however, cannot resolve the conflict in the South China Sea, which involves not only the six coastal states but global powers including the United States and Russia. A forum for larger negotiations is urgently needed but does not seem to be in the offing.

FOIA gets a facelift

Stephen Gidiere

Stephen Gidiere is a partner in the Environmental and Natural Resources Section of Balch & Bingham LLP in Birmingham, Alabama. He is the author of the Section's book The Federal Information Manual, a guide to FOIA and other federal information laws, as well as a number of related articles published by the Section.

The original version of this article contained an editorial error, which has since been corrected.

On June 30, 2016, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received a modest—but potentially impactful—overhaul. Most notably, the FOIA Improvement Act of 2016 (Public Law No. 114-185) makes several significant changes to how agencies apply FOIA's exemptions and charge fees to requesters, all in an attempt to increase transparency and to tackle the growing backlog of pending requests at federal agencies. The last major amendments to FOIA were enacted in 2007.

In passing the amendments, Congress said it wanted to "ensure that FOIA remains the nation's premier transparency law" and "further modernize the law." Sen. Rep. No. 114-4 at 2, 4. Lofty goals aside, the devil is in the details. So what's in it for practitioners? For those of us who submit FOIA requests for our clients, what changes can we expect?

New presumption of disclosure

One of the more touted changes in the statute is the adoption of a so-called "presumption of disclosure" in applying FOIA's exemptions. Under the change, an agency "shall withhold information" from a FOIA requester "only if—(I) the agency reasonably foresees that disclosure

would harm an interest protected by an exemption [or] (II) the disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A).

What this means is that—for exemptions that an agency may generally invoke (or not) in its discretion, like Exemption 7 which applies to certain law enforcement information—the agency now has an additional burden to show that harm would foreseeably result from the disclosure before the agency may withhold the information. This change is intended to put an end to the practice in recent history of dueling memorandums from attorneys general—changed each time a new president takes office—about how agencies should apply exemptions and to codify the current approach in the memorandum from Attorney General Holder issued in 2009.

The practical effect of this change to agency practice should be nothing since the same "presumption of disclosure" has, at least in theory, been in place since 2009. Right? But now requesters have a new tool: an enforceable agency obligation that can be reviewed by the courts for compliance. The Holder memorandum is not enforceable in courts; the new statute is. Agencies will now have to demonstrate why they reasonably foresee harm from disclosure and support that finding in the record before they can invoke a discretionary FOIA exemption. More importantly, courts can review those findings.

This change, however, will not impact application of all of FOIA's nine exemptions. For example, the disclosure of trade secrets and confidential business information that falls within Exemption 4 is "prohibited by law" (e.g., by the Trade Secrets Act, 18 U.S.C. § 1905) and thus such information cannot be disclosed by the agency even without a finding of foreseeable harm.

Changes to fee provisions

Congress also made a change to FOIA's fee provisions that may help requesters receive timely responses. Generally, FOIA allows the agency to charge fees for searching, reviewing, and copying records (subject to several exceptions for various types of requesters). Before the new amendment, if the agency missed the 20-working-day response deadline in the statute, the agency was prohibited from charging any requester search fees (and, for some requesters, copy fees). But the agency could avoid this bar if it simply found that "unusual or exceptional circumstances" existed.

Under the amendments, "unusual circumstances" only allow the agency an additional 10 days to respond, and if that deadline is missed, the fees cannot be assessed. 5 U.S.C. § 552(a)(4)(A)(viii)(II). A new exception to this bar, however, was added—if "unusual circumstances" exist *and* the request involves more than 5,000 pages of records. Here's a practice tip: submit your request for potentially voluminous records in a series of separate, discrete requests.

Reining in deliberative process privilege

The new law also tries to tackle what has become a massive loophole in FOIA's disclosure requirement: the deliberative process privilege. This privilege—which seeped its way into the statute through FOIA Exemption 5—allows an agency to, in general, withhold internal memorandums and other records that reflect the agency's deliberations prior to making an agency decision (like issuing a final rule). Recognizing the increased usage of this privilege and others in recent years, Congress attempted a partial solution in the new amendments (in addition to the "foreseeable harm" standard discussed above, which should also reduce the number of instances in which the privilege can be invoked). The new amendments expressly provide that the "deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." 5 U.S.C. § 552(b)(5). This change may be of more use to historians than environmental law practitioners, but it is a step in the right direction and reflects Congress's intent to limit the application of this run-away privilege. Here's an idea for the next FOIA amendments: change 25 years to one year. Or six months.

In fiscal year 2015, federal agencies received 713,168 FOIA requests, a near record year. If you are one of the thousands of FOIA requesters each year, understanding these changes and others in the new amendments will help you get the records that you need as quickly and inexpensively as possible.

Further reading
The Federal Information Manual, Second Edition
Federal information access gets an upgrade

Toxic taps: Flint litigation and drinking water infrastructure

Molly Cagle and Samia R. Broadaway

Molly Cagle and Samia R. Broadaway practice environmental law in Baker Botts L.L.P's Austin, Texas, office.

It is hard to believe that the City of Flint, Michigan was once notable because it was the industrial heart of 19th and 20th century automobile manufacturing. It now has a new reputation—at least according to media reports—as the poster child for the nation's aging drinking water infrastructure and the potential for lead contamination in drinking water. The Flint River, the source of drinking water in the City of Flint, may not be "fishable" or "swimmable," but the river water itself was not the source of the lead contamination. Rather, the corrosive river water ate away at the aging drinking water distribution pipes owned and operated by the City, as well as in the homes served by it, dissolving the lead-bearing pipes until

faucets ran brown.

Pending civil lawsuits arising from the Flint water crisis allege everything from Safe Drinking Water Act (SDWA) violations to intentional infliction of emotional distress. Flint officials and others also face criminal charges. But decaying drinking water infrastructure exists throughout the country and mistakes can happen anywhere. By assuming no ill will behind Flint's water crisis, we may all learn the lessons of Flint and hope to avoid similarly devastating mistakes elsewhere.

The Flint litigation

Since late 2015, various groups of plaintiffs have filed class-action lawsuits alleging due process violations and torts as well as SDWA claims.

In January 2016, the Natural Resources Defense Council (NRDC) sued officials and the City of Flint under the SDWA, alleging that defendants failed to: (1) operate and maintain corrosion control equipment, (2) conduct proper tap sampling to monitor drinking water for lead, (3) comply with SDWA reporting requirements, and (4) timely notify customers of tap water sampling results. In addition to declaratory and injunctive relief, NRDC also asked the federal court to order defendants to "promptly complete full replacement of all lead service lines in the Water System at no cost to customers." NRDC Compl. at 55. This request targets the root of a wide-spread and complex infrastructure problem: functional but old lead-bearing service lines are found throughout the country. Most importantly, there is currently no requirement to remove or replace intact lead-bearing pipes.

Lead in infrastructure

The U.S. Environmental Protection Agency's (EPA) maximum contaminant level *goal* for lead in drinking water, an aspirational standard, has always been zero. According to EPA, the agency "set this level based on the best available science which shows there is no safe level of exposure to lead." EPA, "Basic Information about Lead in Drinking Water." But EPA never set a Maximum Contaminant Level for lead. Instead, EPA's Lead and Copper Rule establishes a treatment technique to manage lead in drinking water by controlling the water's corrosivity and requiring regular tap sampling and reporting.

Amendments to the SDWA also require that all new water service lines and repairs be "lead free," defined as containing "not more than a weighted average of 0.25 percent lead when used with respect to the wetted surfaces of pipes, pipe fittings, plumbing fittings, and fixtures" and not more than 0.2 percent lead for solder and flux. 42 U.S.C. § 300-g-6(d)(1). Critically, however, the SDWA does not mandate that existing lead pipes be dug up, removed, or replaced. That type of mandate would cost billions of dollars, based on testimony in Congress.

Lead service lines remain in use throughout the country today: On average, approximately 30 percent of the community water systems surveyed in a recent American Water Works Association survey reported having some lead service lines in their systems. David A. Cornwell et al., *National Survey of Lead Service Line Occurrence*, J. Am. Water Works Ass'n (Apr. 2016).

In light of Flint, there is intense public pressure to address existing lead-bearing service lines. Existing research supports these actions: A 2015 study sent to EPA by the Lead and Copper Rule Working Group to the National Drinking Water Advisory Council recommended that EPA revise its Lead and Copper Rule to require proactive replacement of lead service lines. Report of the Lead and Copper Rule Working Group to the National Drinking Water Advisory Council at 6 (Aug. 24, 2015).

A new wave of litigation?

Drinking water contamination scares people. It scares those who drink water. It scares those who provide water to families, employees, and communities. Large-scale crises, like Flint, make headlines, but the insidious problems—low-grade leaching from eroding pipes or unregulated new contaminants popping up in drinking-water fountains—those are the truly worrisome challenges facing water providers.

With the renewed emphasis on drinking water infrastructure after Flint, water providers can expect to see increased momentum behind SDWA investigations and, potentially, citizen suits. Some public water system information is available publicly; other information on water quality at individual homes and businesses must be generated by door-to-door sampling. Post-Flint, water suppliers should expect increased scrutiny, enforcement, and litigation, particularly in places that rely on pre-1986 drinking water infrastructure.

Tilting at windmills: The D.C. Circuit again stalls Cape Wind's offshore turbines due to failure to comply with federal environmental safeguards

William S. Eubanks II

William S. Eubanks II is a partner at the public interest environmental law firm Meyer Glitzenstein & Eubanks LLP, where he manages the firm's western office located in Fort Collins, Colorado. He is also a summer faculty member at Vermont Law School.

The Cape Wind Project—once hailed as "America's first offshore wind farm"—calls for 130 commercial offshore wind turbines in Nantucket Sound. Since 2001, Cape Wind Associates, the

private developer behind the project, has sought federal government approval for this project through various statutes that regulate the ocean floor, airspace, and wildlife that intersect with the project's footprint. In 2010, after many consultations and other obligations imposed by pertinent laws, the Bureau of Ocean Energy Management (BOEM) issued a long-term lease to Cape Wind Associates to construct and operate the nation's first offshore wind energy facility.

Federal litigation history

A 2004 *Natural Resources & Environment* article—*The "Degreening" of Wind Energy: Alternative Energy v. Ocean Governance*—provided background on early legal compliance issues surrounding the Cape Wind Project from the outset of the federal approval process. Donald C. Baur & Jena A. MacLean. *The "Degreening" of Wind Energy: Alternative Energy v. Ocean Governance*. Nat. Resources & Env't, Summer 2004, at 44–49. Much has transpired since that time.

In 2004, the First Circuit affirmed the U.S. Army Corps of Engineers' approval of the Cape Wind data tower but called into question whether the project could be authorized under only a section 10 permit pursuant to the Rivers and Harbors Act. *Ten Taxpayer Citizen Grp. v. Cape Wind Associates, LLC*, 373 F.3d 183 (1st Cir. 2004). In response to that ruling, Congress amended the Outer Continental Shelf Lands Act, in part to compel the Cape Wind Project to start over with a new lease application under that much broader statutory authority.

In 2011, after BOEM issued a commercial lease to Cape Wind Associates, several plaintiffs challenged the Federal Aviation Administration's (FAA) no-hazard determinations finding that none of the proposed Cape Wind turbines would create hazards for air navigation. *Town of Barnstable v. FAA*, 659 F.3d 28 (D.C. Cir. 2011). In reviewing that claim, the D.C. Circuit held that the FAA acted arbitrarily and capriciously in rendering its no-hazard determinations for this project because the agency abandoned its own established procedures. In turn, the court vacated and remanded the no-hazard determinations to the FAA, thereby postponing construction until new determinations could be made—determinations that the D.C. Circuit subsequently upheld. *Town of Barnstable v. FAA*, 741 F.3d 681 (D.C. Cir. 2014).

In 2014, a challenge to BOEM's approval of the lease to Cape Wind Associates came before the U.S. District Court for the District of Columbia. *Pub. Employees for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67 (D.D.C. 2014). That case involved numerous claims against BOEM and other federal agencies concerning environmental protection and navigational safety. While rejecting certain claims, the court ruled against the Cape Wind Project in two crucial respects, finding: (1) the U.S. Fish and Wildlife Service (FWS) and BOEM violated the Endangered Species Act (ESA) by allowing BOEM and Cape Wind Associates—rather than FWS as the expert wildlife agency—to make a determination as to the reasonableness of a measure to conserve ESA-protected birds that the statute requires FWS to make; and (2) the National Marine Fisheries Service and BOEM violated the ESA by failing to specify how many

endangered right whales would be harmed by this project and the steps the agencies would take if harm to whales exceeded an allowable level. The federal government did not appeal these adverse rulings, leading to another remand for further decision making to comply with the court's order. Following remand, the court held that BOEM had now addressed those issues and entered summary judgment in favor of BOEM an all issues.

On appeal, the D.C. Circuit recently reversed on several issues. *Pub. Employees for Envtl. Responsibility v. Hopper*, No. 14-5301, 2016 WL 3606363 (D.C. Cir. July 5, 2016). First, the court held that BOEM acted arbitrarily and capriciously, and in violation of the National Environmental Policy Act (NEPA), by failing to adequately analyze in its environmental impact statement all subsurface hazards that could affect the ability of the seafloor to withstand large structures such as wind energy turbines. Second, the court found that FWS acted arbitrarily and capriciously when it reopened its ESA decision-making record on remand concerning reasonable and prudent measures for endangered and threatened bird species, but then refused to consider any of the scientific and economic feasibility data submitted by plaintiffs concerning harm to birds as required by the ESA. Finally, the court explained that it was "tak[ing] defendants at their word that the lease requires a migratory bird permit and that Cape Wind will apply for one," meaning that Cape Wind Associates or BOEM must now also secure a permit from FWS under the Migratory Bird Treaty Act (MBTA) before project construction may begin. In short, the D.C. Circuit's ruling means that this project now faces, at a minimum, three new decision-making processes under NEPA, the ESA, and the MBTA before construction and operation may commence.

Legal and practical implications

The D.C. Circuit's recent Cape Wind ruling provides a blueprint for energy companies—renewable or otherwise—for what *not* to do in order to obtain swift and environmentally appropriate approval from the federal government. First, advocating that decisionmakers cut corners in the approval process is a penny-wise, pound-foolish approach likely to lead to ultimate delays in the project timeline, unnecessary litigation expenses, and remanded decision-making processes. Second, it is imperative that project developers reach out early in the process to affected communities, environmental organizations, and other stakeholders to address their concerns in a timely and collaborative manner, rather than in an adversarial proceeding. Third, this D.C. Circuit ruling illustrates that renewable energy projects, despite their environmental benefits, can expect to be held to the same standards as other regulated energy entities when it comes to federally protected wildlife, the seafloor, and other aspects of our shared ecosystem. Finally, the ruling highlights the need for federal agencies to serve as objective and impartial decisionmakers in approving development projects to ensure the integrity of essential statutory processes.

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.

Constitutional law

***EQT Production Company v. Wender*, No. 16-00290, 2016 WL 3248503. (S.D. W. Va. June 10, 2016), app. pending No. 16-1938 (4th Cir.).**
A federal district court granted a motion for summary judgment to plaintiff EQT Production Company, which operates oil and natural gas wells in West Virginia, in a lawsuit challenging a county ordinance banning the storage or disposal of wastewater produced in the course of oil and gas well production in any underground injection control (UIC) well. The ordinance provided for civil penalties and also for citizen enforcement. The trial court held that the ordinance was preempted by the West Virginia Oil and Gas Act, which comprehensively regulates oil and gas matters, including storage at drilling sites, and gives the state Department of Environmental Protection "[a]ll authority to oversee gas and oil exploitation in West Virginia." The court also held that the ordinance was preempted by the West Virginia UIC program administered by the state pursuant to the Safe Drinking Water Act because it stands as an obstacle to state law. "[T]he state has undertaken to allow UIC wells, an action that operates to diminish the counties' powers to prohibit them." The court therefore held that the Fayette County Commission's ban on disposal of wastewater in UIC wells and the regulation of wastewater storage at drilling sites are unenforceable.

***People v. Rinehart*, 1 Cal. 5th 652, 206 Cal. Rptr. 3d 571 (Cal. 2016).**
The California Supreme Court held that federal mining law does not preempt a state law banning the issuance of permits for suction dredging, a technique used by miners to remove matter from the bottom of waterways. Defendant Rinehart, charged and convicted with unpermitted use of a suction dredge, claimed that the moratorium on suction dredging prevented him from using the only commercially practical means to extract gold from his mining claim. He defended on the grounds that federal mining law, principally the Mining Law of 1872, (30 U.S.C. § 22) should be interpreted as preempting any state law that unduly hampers mining on federal land. Reviewing the legislative history of the Mining Law, the California Supreme Court concluded that the 1872 statute was concerned with conferring property rights to allow occupation and development of one's claim but did not insulate against state regulation. Instead, the court concluded that the Congress was aware of and acquiesced in state regulation of mining methods.

***North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016).**
The Eighth Circuit affirmed a district court's granting of summary judgment and an injunction,

on Commerce Clause grounds, against provisions in a Minnesota statute prohibiting utilities from using electricity imported from outside the state that contribute to or increase power sector carbon dioxide emissions. The lead opinion of Circuit Judge Loken noted that the statute seeks to reduce emissions that occur outside Minnesota by prohibiting transactions that originate outside Minnesota, thus imposing Minnesota's policies on neighboring states. In a separate opinion, Circuit Judge Murphy disagreed that the provisions violate the Commerce Clause, but concurred in the judgment on the grounds that the state provisions are preempted by the Federal Power Act, which gives the Federal Energy Regulatory Commission jurisdiction to regulate the sale and transmission of electricity in interstate commerce. Circuit Judge Colloton concurred in the judgment on the grounds that the state statute conflicts with both the Federal Power Act and the Clean Air Act, the latter of which contains various mechanisms by which a state may address concerns with emissions from its neighbors.

CERCLA

***Lockheed Martin Corp. v. United States*, No. 14-5302, __F.3d__ (D.C. Cir. Aug. 19, 2016).**
The D.C. Circuit rejected government arguments that would have precluded Lockheed, a government contractor, from pursuing a CERCLA contribution claim against the U.S. Lockheed spent $287 million cleaning up three sites in California, at which Lockheed produced rockets for the United States, and expected to spend another $124 million to complete the cleanup. Lockheed received reimbursement of approximately $208 million of its costs via overhead charges on its contracts with the government. The United States contended that its contractual payments to Lockheed made under various government contract provisions fulfilled its Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) obligations, and that CERCLA prohibited a double recovery of such obligations. The district court rejected the government's CERCLA section 114(b) double recovery defense and awarded Lockheed a percentage of its future, post-judgment, response costs. The court of appeals affirmed. The reason that the government will end up paying more than its equitable share of cleanup costs, the D.C. Circuit concludes, is that "it voluntarily agreed to let Lockheed pass through its share, too." The government has not clearly identified how the crediting mechanism is a source of inequity rather than "a problem of the government's own making." Moreover, the government is not being required to pay any amount for past costs, and the government's payment of a percentage of future costs will not be "for the same removal costs" under section 114(b) as it already paid, and thus do not implicate the double recovery bar.

Air quality

***United States Sugar Corp. v. EPA*, __F.3d__, 2016 WL 4056404 (D.C. Cir. July 29, 2016).**
The D.C. circuit granted in part challenges by various industry and environmental groups to three U.S. Environmental Protection Agency (EPA) Clean Air Act regulations governing hazardous air pollutant emissions from industrial and commercial boilers, process heaters,

and solid waste incinerators. The court of appeals agreed with environmental groups that EPA improperly excluded sources that are unrepresentative of typical units in the subcategory in establishing the Maximum Achievable Control Technology (MACT) floor instead of considering all sources included within the subcategories. The court vacated MACT standards for affected boiler categories. The court also remanded, without vacatur, other provisions of the rules, for EPA to explain how CO acts as a reasonable surrogate for non-dioxin/furan Hazardous Air Pollutants, to set emission standards for cyclonic burn barrels, to determine whether certain sources (burn-off ovens, soil treatment units, and space heaters) are solid waste incinerators and, if so, to set standards for these sources, to explain the exclusion of synthetic boilers from Title V permit requirements, and to explain the choice of using the more lenient Generally Available Control Technology standards rather than MACT standards for non-mercury metals. The court upheld EPA's use of upper prediction limits (UPL) and rejected arguments by environmental groups that UPL is not a proper average of the best-performing source emissions. The court also rejected industry challenges to EPA's failure to take into account higher emissions during periods of facility shutdown, startup, and malfunctions, stating that the statute allows EPA to set strict MACT standards during unpredictable malfunction periods and then account for through its enforcement discretion, also noting that courts can exercise their judicial authority to craft appropriate remedies in such cases.

Water quality

***Mingo Logan Coal Co. v. EPA*, 829 F.3d 710 (D.C. Cir. 2016).**
In 2013 the D.C. Circuit held that EPA had the authority under the Clean Water Act to withdraw two sites from a permit issued to a coal company four years earlier by the Corps of Engineers, a permit which allowed the excavation of the tops of several West Virginia mountains. On remand from the 2013 decision, the district court considered and rejected the company's remaining Administrative Procedure Act challenges. The company appealed and the district court's decision was affirmed in a split decision. The plurality was not persuaded by the company's argument that EPA failed to engage in reasoned decision making by ignoring the company's reliance on the initial permit from the Corps. Importantly, both the majority and the dissent accept the proposition that "an agency should generally weigh the costs of its action against the benefits." The majority concludes that although the company alleged that it spent "millions of dollars" in reliance on the permit, the company forfeited the argument because it failed to explain why it believes its reliance costs must be considered and to supply sufficient information about its costs to allow EPA to consider them. The dissent disagreed and concluded that the company's allegations were sufficient to alert EPA that it had to consider and justify the costs of revoking the permit. The dissent would vacate EPA's action and remand the matter for EPA to consider the costs and benefits of its proposed permit revocation and supply a more reasoned justification.

***City of San Jose v. Monsanto*, __F. Supp.__, 2016 WL 4427492 (N.D. Cal. Aug. 22, 2016).**

A federal district court has rejected public nuisance claims by three California cities against Monsanto arising from municipal stormwater contaminated with polychlorinated biphenyls (PCBs). The cities allege that Monsanto was the sole U.S. manufacturer of PCBs and that the cities were forced to spend money to reduce PCBs in stormwater discharges to comply with federal and state requirements. The district court held that the cities must establish a property interest in order to pursue their private nuisance claims, but stormwater is public water belonging to the state, and the cities do not take ownership of the stormwater just because it flows through municipal pipes on the way to San Francisco Bay. Thus the cities cannot meet the threshold requirement to establish a property interest that is injured. However, the court stated it would grant leave to the cities to amend their complaint to allege a property interest. The court also dismissed, without leave to amend, the cities' equitable indemnity claim, stating that the cities had to spend money because of a regulatory requirement, not an adverse judgment, and therefore could not establish entitlement to the traditional "common law right of equitable indemnity."

Editor's note: The City did indeed file a first amended complaint re-alleging claims of public nuisance on September 13, 2016. As of this writing, a further challenge to the first amended complaint has not been heard.

Energy

***Sierra Club v. United States Forest Serv.*, 828 F.3d 402 (6th Cir. 2016).**
The Sixth Circuit affirmed a district court's grant of summary judgment rejecting claims by the Sierra Club that the U.S. Forest Service (USFS) improperly reissued a permit to Enbridge Energy to operate a pipeline on federal land. The Sierra Club argued that the USFS violated the National Environmental Policy Act in failing to prepare an environmental impact statement prior to reissuing the permit. The court of appeals agreed with the USFS that an environmental impact statement or environmental assessment was not required because the permit was subject to a categorical exclusion for an authorization for a new term to replace an existing or expired authorization when the only changes are administrative, there are no changes in the authorized activities, and the applicant is in compliance. The court of appeals rejected the Sierra Club's argument that Enbridge increased the volume of oil flow within the pipelines, stating that the permit only authorizes use of a right-of-way and the USFS has never regulated the flow of oil inside pipelines. Although an endangered species, the Kirtland's warbler, is known to exist in the area, the USFS decision memo includes a biologist's report concluding that the authorization would have no effect on the warbler. The court also held because the agency's action falls within a categorical exclusion, the USFS was not required to assess the cumulative effects of its action prior to applying the exclusion.

Toxic torts

***Chevron Corp. v. Donziger*, __F.3d__, 2016 WL 4173988 (2d Cir. Aug. 8, 2016).**
The Second Circuit affirmed a district court's judgment enjoining defendants from enforcing in the United States an $8.6 billion Ecuadorian judgment against Chevron Corporation and imposing a constructive trust for Chevron's benefit on any property defendants have received or may receive anywhere in the world traceable to the Ecuadorian judgment. The $8.6 billion judgment resulted from a lawsuit alleging that Texaco Inc. released crude oil into the Amazon rainforest during its oil-drilling operations. The district court found, after a bench trial, that the Ecuadorian judgment had been procured through defendant's bribery, coercion, and fraud, warranting relief against defendant Donziger and his law firm under the Racketeer Influenced and Corrupt Organizations Act (RICO) and New York common law. The Second Circuit rejected appellants' challenge on grounds of Article III standing and mootness, holding that the Ecuadorian appellate decisions affirming the trial court's award did not cleanse the taint from the original judgment. With respect to RICO injury and causation, the Second Circuit noted that among the predicate acts were the ghostwriting of the Judgment and the promise of $500,000 to Judge Zambrano for signing it. The Second Circuit also rejected appellant's international comity arguments, noting that the district court's injunction is limited to the United States and also that the Ecuadorian courts expressly deferred to the U.S. courts for adjudication of Chevron's allegations of corruption by plaintiff's legal team.

***Ebert v. General Mills, Inc.*, 823 F.3d 472 (8th Cir. 2016).**
A district court's grant of class certification in an environmental contamination lawsuit was reversed by the Eighth Circuit. The company disposed of trichloroethylene (TCE) by burying it in perforated drums at its facility resulting in TCE contaminated groundwater below and near the facility. General Mills undertook cleanup efforts under a state consent order and in 2013 discovered TCE in soil vapor in some residential properties. Residential property owners in Minneapolis sued General Mills alleging that this contamination caused threats to plaintiffs' health and diminished property values. The district court certified a proposed class but the court of appeals reversed, finding that the class lacks the requisite commonality and cohesiveness to satisfy Rule 23. The court of appeals concluded that there likely will be a property-by-property assessment of the extent of contamination and whether each plaintiff acquired the property prior to or after the alleged diminution in value. The court noted that General Mills installed vapor mitigation systems in 118 homes where TCE vapors exceeded a threshold beneath the slab foundations, but the company's expert found that 327 homes had no detectable levels of TCE. Remediation efforts will be unique, if awarded. Accordingly, the court of appeals concluded that individual issues pre-dominate the analysis of causation and damages that must be litigated.

Views from the Chair: Some thoughts about our conferences

Seth A. Davis

Seth Davis is the chair of the Section of Environment, Energy, and Resources for 2016–2017. Seth is a partner in Elias Group LLP in Rye, New York. A long-time Section member, he has previously served as publications officer, Council member, and chair of the Environmental Transactions and Brownfields and Site Remediation Committees.

After I went on at some length in my last column about the fun I have had with the Section through the years, I was asked if I could actually point to a tangible bit of Section content from which my practice has directly benefitted. Well, I answered, where do I start? All of those briefs and memos amplified by obscure cases I found in *The Year in Review*? Enlightenment from Ted Garrett's unrivalled "In Brief" summaries in *Trends*? No, the place to start was the first time I went to Keystone.

For many years, the Annual Conference on Environmental Law, held every March at a ski resort in Keystone, Colorado, was *the* Section event. Conference attendees would hear from the brightest luminaries in environmental law in the morning, spend all evening dining and imbibing in the most convivial fashion, and, in between that, some people went skiing. Keystone, everyone told me, was where I *had* to go if I wanted to be in the forefront of the environmental field. The problem was that I worked for a company that took a dim view of "boondoggles."

So I wrote out an affirmation pursuant to section 2106 of the New York Civil Practice Law and Rules (a statement in lieu of an affidavit—a privilege also available, by the way, to physicians, dentists, and osteopaths) stating, in relevant part, that I was not a skier, that I had no plans to ski, that I wanted to go to Keystone purely for professional reasons, and that I did not, under any circumstance, intend to have anything resembling a good time. My boss had no choice but to let me go.

The conference's highlight was a panel on how to handle a complex environmental case. Experienced speakers laid out how to coordinate the efforts and contributions of inside and outside counsel, technical and medical experts, public relations personnel, and representatives from a host of other fields. I took copious notes. My company had just become involved in a challenging case under the new Superfund law, in which it was facing an eight-figure cleanup cost (big money in those days), plus personal injury suits from over 800 people who had been evacuated from a nearby housing project due to alleged chemical contamination. I came down from the mountain and organized the company's defense team exactly as the ABA panelists had recommended. Eight years later, following that plan, and following the submission by the company to EPA of a study showing that contamination was only minimal and the housing project was not contaminated, the matter was resolved by a vastly less costly cleanup and the

repopulation and rehabilitation of the housing project. Thank you, ABA Section of Natural Resources Law (as we were then known)!

We don't go to Keystone any more, but the Section continues to offer programming of the same depth and quality. By the time these words are published, our 24th Fall Conference in Denver, chaired by Alf Brandt, will be over, and we will be looking forward to our 46th Spring Conference—the lineal descendant of Keystone—in Los Angeles. I have had the privilege of working along with Maggie Peloso and her planning committee, and I can tell you that this spring's conference will be superb. The planning process entails submission of ideas by all of the Section's dozens of committees; open, collaborative discussion of these ideas in a series of conference calls; and a day-long, in person working session of the conference planning committee, which is a microcosm of our Section's capabilities, experience, and diversity. This collaboration and interaction makes the resulting program unique.

What you saw in Denver and what you will see in Los Angeles is, thus, the product of a long effort by many people. And it is a product that only the Section could produce. Think back to our Fall Conference in Baltimore three years ago, when the federal government had shut down and almost all of the high-ranking government speakers on our program had to cancel. Amy Edwards, then conference planning chair, managed to replace all of the cancelling speakers—mostly with Section members who formerly held their same positions! No other group could have done it.

So come to Los Angeles! Tell your boss that you'll be cooped up for a couple of days with leading experts in the fields of environmental, energy, and resources law. Emphasize that you will come back with knowledge and insights that will make you a better, more effective lawyer. Point out that you will make contacts with lawyers in private practice and government that you just can't make anywhere else. But be careful about promising not to have a good time. Because, my youthful affirmation notwithstanding, it is quite likely that you will.

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.

Laura Duncan has joined Marten Law as a partner in its San Francisco office. A significant portion of Duncan's practice is focused on product regulation, pesticide regulation, consumer product safety, Proposition 65, the U.S. Lacey Act, and formaldehyde regulations applicable to

wood products, refrigerants, and other chemical regulations. Prior to joining Marten Law, she was a shareholder in the San Francisco office of Beveridge & Diamond, P.C., where she was the leader of that firm's Global Product Stewardship and Chemicals practice group.

Emily Fisher has been elected to the position of Vice President, Law, of the Edison Electrical Institute. Fisher previously served as EEI deputy general counsel, energy & climate. She joined EEI in 2008. Her primary areas of responsibility have included energy and environmental regulation, with a focus on climate change, air quality, permitting, electric vehicles, and energy efficiency. Fisher also has participated in efforts before the Federal Energy Regulatory Commission, the Department of Energy, and the Federal Trade Commission. She is co-chair of the Section's Climate Change, Sustainable Development, and Ecosystems Committee.