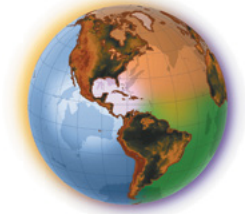


TRENDS



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Carbon tax rising?

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It might seem odd these days to be considering the possibility of carbon taxes as climate policy. But there is the distinct possibility that states will address climate change as the federal government abandons this policy area. Second, there remains the faint hope that the Trump administration or Congress will recognize carbon taxation as a vehicle for tax reform. Many, many policy experts, economists, and environmentalists have long been arguing that carbon taxation is the least costly and most effective way to reduce carbon dioxide emissions. But less commonly discussed is the fact that carbon taxation offers the opportunity to address a number of non-environmental objectives, such as fiscal reform, infrastructure funding, or reducing inequality.

A carbon tax is a unitary tax on actual carbon dioxide emissions. Carbon taxes can be levied upstream, at the point of extraction, refining (of oil), or distribution, or downstream, at the gasoline pump or as an addition to an electricity or heating bill. A carbon tax can be expanded to include other greenhouse gases, as long as the tax on emissions of these other greenhouse gases is calibrated depending on those gases' warming potential, using carbon dioxide as an index. In practice, carbon taxes are limited to consumption of refined gasoline, fossil fuel-generated electricity, and household and industrial uses of common natural gas and heating oil. Such a simple carbon tax generally covers the vast majority of carbon dioxide emissions.

A carbon tax is effective in reducing emissions and is also economically efficient. Carbon taxes can be applied very broadly and simply, as the tracking and taxation of fossil fuels is already quite routine. Because a carbon tax would build on existing regulatory infrastructure, the certainty that it will succeed in reducing emissions instead of bogging down in litigation is very high. Moreover, a carbon tax scales proportionately with the amount of emissions, so that it takes account of the different contributions that different fossil fuels make to climate change. Burning coal, which produces roughly twice the carbon dioxide emissions as burning natural gas, would be subject to twice the tax. That is how environmental law should work: the impetus to curtail an activity should be weighted by its environmental harm. As a side benefit, reducing emissions from coal extraction, transport, and combustion would also generate a number of health benefits unrelated to climate change, such as a reduction in respiratory diseases and deaths from cardio-pulmonary diseases. A carbon tax is not the only climate policy that would reap those health benefits, but it best internalizes these social costs to the emitter.

Breadth of application and accurate scaling also ensure that carbon taxation reduces emissions at the lowest cost. A carbon tax ripples across the entire economy, and up and down production chains, so that it is an accurate measure—and price—for a total end-product carbon footprint. As such, it will broadly recruit efforts to find efficiencies and reduce emissions, with the most attention being paid to where reductions are the greatest and cheapest. Critically, carbon taxation is agnostic as to specific strategies or technologies; there is no favoritism for a technology that will support the economy of an important swing state. What many other climate policies do—which makes them irresistible to politicians—is pick winners and losers. A carbon tax is the way to have *markets*, not politicians, determine which strategies or technologies best reduce emissions, and at the lowest possible cost.

On the rare occasions in which carbon taxation has been proposed, it has withstood withering assaults based on misleading assertions from the fossil fuel industry and its allies. Somewhat surprisingly, objections have also come from the political left, and not without reason. By itself, carbon taxation is regressive, hurting poor households more than wealthy ones. While wealthy households generally consume more energy and have a larger absolute carbon “footprint,” energy expenses occupy a larger *share* of a poor household’s budget and are thus more painful for the latter.

Climate change deniers and the fossil fuel industries, sowing discontent among the poor, would have you stop your analysis there. But to do that is to speciously assume that carbon tax revenues would be gathered together in a pile of bills and burned. A federal carbon tax of, say \$40 per ton of carbon dioxide, would produce first-year revenues of at least \$200 billion, which could go a long way towards reducing the financial impact to lower-income households, reducing distortionary taxes, such as corporate or personal income taxes, and even providing relief to industries and communities suffering disproportionately from the decline of fossil fuel use. If lawmakers wish to protect the lowest-earning 60 percent of households from carbon taxation, less than half of the proceeds would be needed to insulate them from any net loss. A carbon tax “rebate” could be in the form of a lump sum distribution or any number of other tax credits targeted towards lower income taxpayers. There would still be money left over for other priorities.

Fiscal benefits could make carbon taxation an especially attractive option at the state level. Washington State, for example, spurred by a failed but surprisingly popular carbon tax ballot initiative, has proposed a carbon tax that would provide funding for its chronically under-funded public schools. Other cash-strapped states might decide that a 40-cent-per gallon gas price increase (the product of a \$40 per ton carbon tax) might not anger motorists quite as much as continuing cuts to social services, education, or road maintenance. At levels currently discussed, a carbon tax is a relatively low but very broad tax, raising large amounts of revenue in small amounts, and minimizing economic disruption. For those people or industries that are disproportionately impacted, the revenues are generally large enough to provide meaningful compensation.

A carbon tax is unappealing, just because it is a tax. But lawmakers would do well to heed the call of Republican statesmen James Baker III and George P. Schultz, as well as prominent conservative economists Martin Feldstein and Gregory Mankiw, all of whom have recently called for a carbon tax. Once lawmakers accept that there are no free lunches, the simplest solution will reveal itself to be the best solution.

Despite attacks on judicial deference, reports of *Auer*'s demise are premature

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Conservative critics of federal regulation are questioning doctrines of judicial deference to agency actions. Now that President Trump has taken office, Congress is moving to roll back regulation and to reverse *Chevron* deference—the doctrine establishing that reviewing courts should defer to reasonable agency interpretations of ambiguous statutory provisions. Supreme Court nominee Judge Neil Gorsuch is a leading critic of *Chevron* deference. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

The late Justice Antonin Scalia, joined by Justice Clarence Thomas, campaigned against a different form of judicial deference known as *Seminole Rock* or *Auer* deference—the doctrine that courts should defer to an agency's interpretation of its own ambiguous regulations. This doctrine is rooted in the Supreme Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), reaffirmed in 1997 in *Auer v. Robbins*, 519 U.S. 452 (1997). The doctrine provides that an agency's interpretation of its own ambiguous regulations “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Seminole Rock* at 414.

Criticisms of *Auer* deference

Although Justice Scalia wrote the *Auer* decision for a unanimous Court, 15 years later he called for its doctrine of deference to be reconsidered. Scalia questioned the constitutionality of *Auer* deference because “it seems contrary to fundamental principles of separation of powers to permit the person who promulgates a rule to interpret it as well.” Justice Clarence Thomas maintains that *Auer* deference has two constitutional defects. “It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve

as a ‘check’ on the political branches.” *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1217 (2015).

Justice Scalia also maintained that *Auer* deference effectively gives agencies an incentive to promulgate deliberately vague regulations that later could be clarified through the issuance of interpretive rules without going through another round of notice-and-comment rulemaking. The application of *Auer* deference to these interpretive rules, Scalia maintained, was tantamount to allowing agencies to issue binding regulations without notice and comment.

Defenses of *Auer* deference

Despite calling for *Auer* to be overturned, even Justice Scalia recognized “undoubted advantages to *Auer* deference.” He noted that it “makes the job of a reviewing court much easier,” while imparting “certainty and predictability to the administrative process.” *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 69 (Scalia, J., concurring).

Defenders of *Auer* argue that agencies are uniquely qualified to say what their own regulations mean. They maintain that agencies are the appropriate entities for resolving regulatory ambiguities also because they are more accountable than the judiciary. By delegating rulemaking authority to agencies, Congress has given them the power to fill gaps and clarify ambiguities. When Congress left a gap in the law, it delegated the power to fill the gap to the agency responsible for implementing the law.

Auer’s defenders also maintain that it is simply not true that *Auer* deference inspires agencies to write deliberately vague regulations in order to empower them to issue interpretive clarifications later. Empirical studies seem to support this conclusion. Agencies are issuing more interpretive rules and policy statements, as expressly authorized by the Administrative Procedure Act, but not because of *Auer*. Rather it is because the requirements of notice-and-comment rulemaking have become increasingly cumbersome, and agencies have great discretion concerning which procedures to use. *Auer* encourages agencies to clarify the meaning of regulations in a manner that gives more notice to the regulated community than ad hoc adjudication would.

The separation of powers concerns articulated by opponents of *Auer* are really attacks on the constitutionality of the larger administrative state, *Auer*’s defenders state. The fact that some agencies can issue, enforce, and adjudicate controversies over their regulations is a core characteristic of administrative agencies performing their traditional functions within the executive branch.

Will the Supreme Court reconsider *Auer* deference?

Justice Thomas is the only current Justice who has declared *Auer* deference unconstitutional. Three years ago, Chief Justice Roberts, joined by Justice Alito, noted that the issue lies at

“the heart of administrative law” and that it “may be appropriate to reconsider [*Auer*] in an appropriate case.” But in 2015 when the Court reaffirmed *Auer* deference in *Perez v. Mortgage Bankers Association*, Chief Justice Roberts joined the majority opinion in full, while Justices Scalia, Alito, and Thomas continued to question *Auer*.

The Court seems to have no appetite at present to reconsider *Auer*. On October 28, 2016, the Court agreed to hear a challenge to the Education Department’s interpretation of its Title IX regulations when applied to the use of school restrooms by transgender students. The one question by the petitioner, the Gloucester County School Board, that the Justices expressly excluded from their grant of review was the following: “Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?”

Consequences of *Auer* for the Trump administration

Conservative critics of *Auer* may be largely motivated by their desires to restrict agency authority and relax federal regulations. But *Auer* works both ways—it provides deference to agency interpretations whether they make regulations more stringent or less stringent. In both environmental cases in which the Court prominently has employed *Auer*—*Coeur Alaska v. Southeast Alaska Conservation Council*, 128 S. Ct. 2458 (2009), and *Decker v. Northwest Environmental Defense Council*, 133 S. Ct. 1326 (2013)—it was used to uphold agency interpretations that defeated environmental claims. Many forget that the doctrine of *Chevron* deference was born in a case where the Environmental Protection Agency made it easier for industry to comply with Clean Air Act regulations. If *Auer* deference were eliminated, it could work to the detriment of the Trump administration’s efforts to persuade agencies to relax regulations. But for now, with Justice Scalia no longer on the Court, *Auer* deference seems reasonably secure.

Flint, Michigan: An essential lesson for state drinking water regulators

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As is often true during a public crisis, the long-running saga of lead-contaminated drinking water in Flint, Michigan, has generated significant finger-pointing. Undoubtedly, there is plenty of blame to go around among federal, state, and local agencies and officials for their failure to ensure that Flint's citizens have access to clean, safe drinking water. One agency, the Michigan Department of Environmental Quality, has been singled out for particular criticism. A [report](#) by the Michigan Governor's Flint Water Advisory Task Force was unsparing in its critique, stating that the department "failed in its fundamental responsibility to effectively enforce drinking water regulations."

State primacy

The focus of public attention related to Flint's drinking water woes on the Michigan Department of Environmental Quality is warranted. Under the [Safe Drinking Water Act](#), state regulatory agencies have "[primacy](#)"—or primary responsibility—for ensuring that public drinking water systems are in compliance with drinking water standards and other related requirements. The public justifiably relies upon state environmental and public health agencies to ensure that the water flowing out of our taps is safe to drink.

Drinking water regulators can use a variety of tools for this purpose, including technical support and funding to local drinking water system operators, as well as monitoring and enforcement if necessary. When state regulatory agencies are not able or ready to use all of these tools, including enforcement, the risk that public drinking water systems are not providing safe water increases substantially. This increase in risk threatens public health, particularly for the most vulnerable among us, including children, the elderly, and those with compromised immune systems. Of special note, [research](#) has demonstrated that Flint is not an anomaly; economically disadvantaged communities and communities of color across the country disproportionately receive contaminated drinking water.

Funding gap

The issue of how to develop more effective state strategies for overseeing public drinking water systems is not just an academic exercise. The American Society of Civil Engineers produced a [report](#) in 2013 summarizing the poor state of our nation's drinking water infrastructure—a result of our current and inadequate system of funding and oversight. Even as public officials at every level of government appear to agree we need to make greater levels of public investment to ensure safe drinking water, these same officials have engaged in a long-running argument regarding whether primary responsibility for paying for drinking water systems should reside at local, state, or federal level.

A consequence of our failure to resolve this debate or close the funding-gap is that public drinking water system operators, typically either municipalities or local water districts, are obligated to raise the necessary funds from their ratepayers to make up the difference. Because

water lines are underground (and therefore out of sight and out of mind), and because many water contaminants are invisible or tasteless, public water system operators may have difficulty persuading their customers to vote for water rate increases sufficient to properly maintain and operate their distribution lines and treatment facilities. This challenge is especially acute in economically disadvantaged and small rural communities. In the absence of sufficient funding, drinking water systems too frequently fail to meet drinking water standards and regulations. [EPA's 2013 National Public Water Systems Compliance Report](#) makes plain that Safe Drinking Water Act violations are occurring in every state.

To enforce or not to enforce

Most state drinking water regulators understand this challenge, yet are frequently stymied in their efforts to hold public drinking water system owners and operators accountable. Among the reasons are the negative public perception of environmental and public health regulatory programs and a lack of resources. A steady drumbeat of criticism by legislators and elected officials of all stripes has led to an erosion of public investment in our state regulatory agencies. Experience has taught regulators that taking enforcement action against public drinking water system operators who are facing a shortage of resources often seems overly harsh to the public and engenders cries of “unfunded mandates” from local officials. (I can attest from my own experience as a regulator that it can be a personal challenge to take enforcement against other public officials, knowing that they are well-intentioned but under-resourced.)

Enforcement does not need to be the first response when a public water system is not meeting standards. Many states have implemented programs that enable public water system operators to avoid non-compliance. Some states—including my home state of Vermont—have adopted [capacity assistance programs](#) in which experts employed by the state provide training and assistance in areas such as asset management and financial planning. Furthermore, some states, like Vermont, provide [planning grants](#) to assist public water system operators in performing inventories of their water system infrastructure needs, such as the extent of lead in the distribution system. Finally, every state has a Drinking Water State Revolving Fund that provides low-interest loans to public drinking water systems.

However, no amount of technical assistance, financial planning grants, or low-interest loans will ensure that public water systems with insufficient rate structures are meeting their obligations under state and federal drinking water laws and regulations. Such efforts are important, but insufficient, unless state regulators demonstrate the will and capacity to issue orders and assess penalties. Using [supplemental environmental project policies](#) can lessen the sting of penalty payments, but some level of penalty threat is required to leverage the necessary public water system investments. Until the unlikely day that Congress or state legislatures fully fund drinking water system needs, state regulatory agencies will need to provide a backstop of enforcement to ensure that public water system owners and operators, and their ratepayers, make the

investments necessary to meet drinking water standards. To do anything less is to run the risk of a public health crisis like the one residents of Flint face.

Polarization at sea: The emerging legal crisis of poleward shifts in marine fisheries

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Wild-capture fisheries are some of the most difficult resources to manage. First, and most fundamentally, marine fisheries are complex—managers must account for interactions between species, individuals, predators, and prey, as well as physical and chemical considerations such as habitat availability and thermal sensitivity. Second, as an extractive, renewable resource, fishery sustainability relies on a continuous reevaluation of data, models, and management objectives.

There will always be a need for robust fisheries science investment, collaboration with fishermen, and adaptive management. Experts in the field—including the fishermen, scientists, and managers—regularly juggle between the sometimes-aligned but often competing interests of optimum yield, habitat and ecosystem protection, and the need to recover stocks from past damage. Land-based pollution and wetland loss are additional concerns. In recent years, a new complication has been introduced to the mix: climate change-induced shifts in fishery population distribution.

Climate-induced distribution shifts

Recent science has documented these climate-induced shifts. For example, a 2012 study in the journal *Climatic Change* studied the shifts in distribution and landings for four key Atlantic Ocean species. The researchers concluded that “northward shifts in the species were mirrored by northward shifts in fisheries landings and landed value”; data showed the four species shifting from 27 to 78 kilometers northward per decade. Another study, published in 2016 in [PLoS ONE](#), detailed fisheries shifts in New England waters and the Mid-Atlantic Bight, concluding that not all distribution shifts are alike. Some species assemblages were shifting into deeper waters farther offshore from their traditional habitat (but not necessarily further north), others into shallower inshore and nearshore areas (including, due to the geology of the Gulf of Maine, southward shifts), while many others were migrating northward.

Moreover, as species track their most comfortable temperature habitats by shifting northward,

inshore, or offshore, fisheries do not always maintain optimal biomass densities. In some cases, as populations spread out into deeper waters or venture northward, their population can be diluted—leading to negative reproductive feedbacks or greater exposure to potential predation. Conversely, where fisheries are constrained to moving into shallower and inshore waters, population concentration occurs—leading to new and largely deleterious interactions with other species or ecosystem assemblages and increased competition for more finite resources.

Overall, according to [National Marine Fisheries Service \(NMFS\) in 2015](#), “about two-thirds of the fish populations on the Northeast U.S. continental shelf are moving northwards.” Other climate-driven changes in the marine ecosystem, such as biological timing triggers, acidification, or a decline in plankton abundance, are creating similar disruptions in ecosystem function. Marine fisheries are in a brand new type of flux—[according to NMFS](#), a constant “shuffling [of] the community of species in the ecosystem.”

Management implication

Beyond establishing sustainable yield quotas, the tools used in fisheries management generally fall into two categories: controls on fishing practices and permit programs. As to the former, managers generally apply time, area, and manner restrictions on fishermen. For instance, harvests can be limited to certain *times* of the year (such as when spawning is not occurring) or can be allowed in only certain *areas* (such as state waters or exclusions zones where subsea infrastructure is present). When employing permit programs, fishery managers often allocate quotas on a boat-by-boat, fishery-by-fishery basis, generally tied to state-by-state quota allocations. Most Fishery Management Plans (FMPs) developed by the nation’s Regional Fishery Management Councils (FMCs) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) use a mixture of all of the above.

When fishery distributions shift, each form of traditional management can be affected, and the effectiveness of FMPs can be undercut. In one example, [NOAA in 2015](#) noted that most black sea bass state quotas were set based on where the fish were in the late 1980s and early 1990s; as the stocks have shifted northward, fishery quotas have been reached in northern states much more quickly than in southern states. Similarly, a 2016 report on the future of fisheries oversight, [America’s Blueprint for Sustainable Fisheries \(“America’s Blueprint”\)](#), noted the broader “ecosystem implications of this [black sea bass] population shift” appears to be a greater impact on lobsters because the black sea bass’ favorite food is juvenile lobsters. As a result, for the first time, the state of Maine in 2014 needed to establish an FMP for lobsters.

For Rhode Island, the America’s Blueprint report also described the dysfunction that results from mismatched quotas and historic fishery involvement. Because Rhode Island had not traditionally been involved in certain fisheries traditionally found to the south, they were not only unable to land the fish they were catching, they also lacked a seat on the mid-Atlantic FMC, which would give them a voice in relevant quota allocations.

In short, shifting distributions have led to quota allocation, FMC representation, state program planning, and fishery economic impacts.

The national standards and evolving management framework

The federal government has sought to react to these developments. In late 2016, NMFS amended its implementation regulations for these (and other) standards. When asked about climate-induced distribution shifts by public commenters, NMFS stated it planned to make it easier for FMCs to amend FMP management objectives and allow FMCs to alter current “lead council” status for a shifting fishery. 81 Fed. Reg. 71,865. These potential solutions notwithstanding, the agency did not appear particularly interested in specifically tackling climate change under MSA National Standard 1 (NS1), which calls for “achieving, on a continuing basis, the optimum yield from each fishery.” 16 U.S.C. § 1851(a)(1). In a response to a comment requesting additional guidance on how Councils should manage stocks impacted by climate change, NMFS stated that existing guidelines were sufficient. The regulation that NMFS cited, 50 C.F.R. § 600.305(b)(2), states that to take account of the changing needs of fisheries over time, FMCs should reassess the FMP’s management objectives regularly. This language does not appear, however, to provide robust regulatory directives to guide FMCs’ consideration of climate shifts.

Fortunately, NMFS may not need to look beyond the MSA to find a goal statement for this new era of fishery management. Over the past several decades, many of the NS have been critical to evolving fisheries management best practices. We have seen budget and regulatory shifts toward more informed decision making (NS2’s call for best available science), litigation over sustainability (NS1’s optimum yield requirements), and a steady move away from wasted landings (NS9’s bycatch minimization mandate). 16 U.S.C. § 1851(a)(2), (1), and (9). NS6 establishes that “[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.” *Id.* § 1851(a)(6). NMFS’s regulations state that “variations arise from biological, social, and economic occurrences, as well as from fishing practices.” 50 C.F.R. § 600.355(c)(1). Federal regulations implementing NS6 currently demand that “every effort should be made to develop [management plans] that discuss and take into account these vicissitudes.” *Id.*, § (c)(2). Thus, if this is the era of variation, precaution may increasingly be the rule more than the exception when managers make quota allocation decisions. NS6 may provide a framework for such decisions.

Beyond identifying the appropriate framework, it will be crucial that NMFS and FMCs obtain and rely on the best available science. In 2015, NMFS released a “Fisheries Climate Science Strategy” in order to coordinate research across the nation—and specifically across FMC boundaries. Status reports and best management practices have been developed detailing some of the impacts of climate shifts on management and sustainability. A [2016 NMFS Procedural](#)

[Objective](#) directed the agency's scientists and managers to update quota allocations "where the spatial distribution of the species does not match the spatial distribution of the allocation or geographic location of the fishermen." The America's Blueprint report [warned](#) that "as these distribution patterns continue to shift" NMFS and the FMCs will need to follow up on the findings of emerging research. Any new legislation "must be strong yet flexible" to manage "shifting fish stocks and changes to species composition, particularly in adjacent regions."

Collaboration between FMCs across the arbitrary lines in the sea that fishery managers have drawn may be, for now, the best we can expect. The Trump administration's priorities for fisheries have not yet been fully formed, but recent movement away from research grants to states, away from investment in climate change adaptation planning, and away from federal agency authority itself does not bode well for what most experts agree is needed.

Like climate shifts, the question is not whether fisheries distribution shifts are caused by climate change; the question is whether these climate-induced variabilities can be accounted for by science, law, and—given Congress's role in funding national fisheries oversight—politics. In the 21st century, we know that our fishery resources are vulnerable to climate change. We have always known that fish swim among, between, and across jurisdictional boundaries. With climate-induced distribution shifts and ecological changes, the law must now also adapt.

International and domestic regulation of GHG emissions from aircraft

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Controlling greenhouse gas (GHG) emissions from aircraft poses perplexing challenges because aircraft can pass through numerous international regulatory regimes during a single day. Yet, aircraft GHG emissions account for 10 percent of U.S. transportation sector emissions and 2.7 percent of global transportation sector emissions. Thus, despite the significant difficulties they pose, aircraft emissions remain a focus of regulators. In 2016, important steps to regulate aircraft GHG emissions were taken at both the international and domestic level.

ICAO standards for GHG emissions from aircraft

The International Civil Aviation Organization (ICAO) is a United Nations agency that develops international aviation standards. ICAO's mandate covers aviation safety, security, efficiency, capacity, and environmental protection. ICAO's environmental standards are typically developed by the Committee on Aviation Environmental Protection (CAEP), comprising

representatives from member states, the aviation industry, and nongovernmental organizations (NGOs). CAEP's technical standards must be adopted by the ICAO Council and ICAO Assembly. Once ICAO adopts aviation standards, each member state is required to adopt standards that are at least as stringent and may ban the use within its airspace of any aircraft that does not meet ICAO standards.

In 2010 ICAO requested that CAEP develop a carbon dioxide emissions standard that would improve annual fuel efficiency and stabilize aviation GHG emissions at 2020 levels. Establishing such standards is particularly challenging given the paramount role that aircraft safety must play in aviation regulations and the need to develop a consensus approach among countries with interests that sometimes differ. Recognizing that aircraft GHG emissions are influenced by aerodynamics, weight, and engine technology, CAEP adopted an approach focusing on the entire aircraft instead of focusing solely on engines.

In February 2016, CAEP adopted recommendations for international GHG emission standards that would be applicable to both new aircraft types and in-production aircraft. The standards for new aircraft types would take effect in 2020. Less stringent standards for in-production aircraft would take effect in 2023 but could, nevertheless, result in the discontinuation of several currently-produced aircraft types.

At its October 2016 meeting, the ICAO Assembly “[w]elcomed the recommendation by CAEP on a new global CO₂ emissions certification standard for aeroplanes,” but did not move to adopt the recommended standards. ICAO could take further action on CAEP's recommended standards at its next meeting in March 2017.

At its October 2016 meeting, ICAO also approved a new agreement for GHG emissions from international flights, entitled the “Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).” See [Resolution A39-3: Consolidated statement of continuing ICAO policies and practices related to environmental protection—Global Market-based Measure \(MBM\) scheme](#). CORSIA includes a market-based scheme that utilizes a global carbon offset program to cap net GHG emissions from international flights between participating nations. Sixty-five member states, including the United States, representing 85 percent of international aviation activity have signed CORSIA.

CORSIA caps GHG emissions from international aviation based on 2020 emissions and will reduce the overall GHG intensity of international aviation as the sector continues to grow. If GHG emissions from international aviation exceed 2020 levels, operators will be required to purchase carbon offsets to make up the difference in GHG emissions. CORSIA will take effect on a voluntary basis in 2021 and become effective on most signatory states in 2027. The requirement to purchase offsets will initially be applied to all aircraft operators on a pro rata basis. Beginning in 2030, offset requirements will be based in part on the performance of each individual aircraft operator, creating an incentive to reduce GHG emissions.

CORSIA directs CAEP to develop guidance regarding the generation of offsets as well as a central registry for offsets under the auspices of ICAO. Member states must develop the necessary regulatory framework to implement CORSIA by 2020.

U.S. regulation of GHG emissions from aircraft

In the United States, environmental aviation standards are issued by the Environmental Protection Agency (EPA). For issues with international impacts, EPA typically follows ICAO's lead and adopts standards consistent with ICAO's. (The United States is actively involved in the development of ICAO standards.) The timing of EPA's regulation is intended to coincide with ICAO's adoption of GHG emission standards.

In 2007, several NGOs petitioned EPA to regulate GHG emissions from aircraft. In 2012, EPA granted the petition and announced that it would begin the process of regulating aircraft GHG emissions. Prior to regulating air emissions from aircraft, the Clean Air Act requires EPA to make a determination that those emissions "cause[], or contribute[] to, air pollution which may reasonably be anticipated to endanger public health or welfare." [42 U.S.C § 7571\(a\)\(2\)\(A\)](#). On July 1, 2015, EPA issued a proposed endangerment determination along with an advanced notice of proposed rulemaking that solicited comment on several issues related to CAEP's proposed GHG emissions standards. [80 Fed. Reg. 37,758 \(July 1, 2015\)](#).

EPA's final endangerment determination was issued on August 15, 2016, [81 Fed. Reg. 54,422 \(Aug. 15, 2016\)](#), and relied heavily on the 2010 endangerment determination for GHG emissions from motor vehicles. EPA concluded that the scientific evidence supporting the 2010 endangerment determination remained valid and was further supported by additional studies published after 2010. EPA further concluded that GHG emissions from aircraft cause or contribute to the endangerment of public health and welfare based on a comparison of aircraft GHG emissions to domestic and global GHG emissions.

While EPA's endangerment determination is a necessary prerequisite to the regulation of aircraft GHG emissions, the agency has not taken steps to issue such a regulation. Instead, the endangerment determination referenced CAEP's recommendations and suggested that EPA intended to defer regulation until ICAO adopts international standards. In doing so, EPA noted that it had an obligation under the Clean Air Act to issue aircraft GHG regulations in response to the endangerment determination, but asserted that it had discretion with respect to the timing of those regulations.

EPA's next steps will likely depend on the final adoption of GHG emission standards for aircraft by ICAO. There is no indication that EPA intends to depart from its past precedent of issuing regulations consistent with ICAO standards. Moreover, adoption of such regulations may be uncontroversial given the consensus-based approach followed by CAEP and ICAO. At the same time, given the change in administration, there may be some uncertainty regarding whether

EPA will continue to implement or reconsider its endangerment determination and endorse the ICAO standards.

States will continue to lead the charge on renewable energy

Kyle H. Landis-Marinello

[Kyle H. Landis-Marinello](#) is an assistant attorney general in the Environmental Protection Division of the Vermont Attorney General's Office. He is an active Section member and co-chairs the Constitutional Law Committee. Any opinions expressed in this article are entirely his own and do not necessarily reflect those of his employer.

States have been here before. The federal government's interest in renewable energy—and, more generally, in a diverse power grid that reduces our current dependence on greenhouse-gas-generating fossil fuels—waxes and wanes depending on who is in power. For a number of years, federal policies have favored renewable energy over non-renewable fossil fuels. But the federal government is now signaling an interest in promoting coal, oil, and natural gas. States, on the other hand, for years have provided a more sustained and consistent framework for promoting renewable energy.

Federal government begins regulating energy

For the first 150 years after the United States became a sovereign nation, state and local governments regulated energy. This was consistent with the constitutional structure of a limited federal government of enumerated powers. Then, in 1927, the U.S. Supreme Court held that states cannot regulate interstate transfers of electricity. *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). This led to the 1935 Federal Power Act, which created the Federal Power Commission (now the Federal Energy Regulatory Commission or FERC). FERC oversees all interstate transmission and wholesale transactions of electricity. Federal authority over interstate transmission and wholesale transactions is exclusive and leaves no role for the states. Additionally, in 1978, the federal government passed the Public Utility Regulatory Policies Act, which encourages energy efficiency and the development of renewable energy.

States retain authority over siting energy projects

When the federal government began regulating energy, it did not take over retail sales of energy to consumers. Nor did the federal government displace state and local control over the siting of energy projects. Each state also retains broad authority over the makeup of power generation within its borders. As the U.S. Court of Appeals for the D.C. Circuit has held, this authority includes the ability “to forbid new entrants from providing new capacity, to require retirement

of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities.” [*Connecticut Dep’t of Pub. Util. Control v. F.E.R.C.*](#), 569 F.3d 477, 481 (D.C. Cir. 2009).

States create renewable portfolio standards

In addition to their authority over the siting of in-state energy generation, states also have broad authority to require in-state electricity suppliers to purchase minimum amounts of renewable energy. The most common method for doing this is the creation of a renewable portfolio standard. According to the latest figures from the [National Conference of State Legislatures](#), 29 states and the District of Columbia have mandatory renewable portfolio standards. Another eight states have voluntary standards for promoting renewable energy. The mandatory standards range greatly. For instance, Indiana has imposed the modest requirement that by 2025, at least 10 percent of its energy must be “clean”—a term defined broadly to allow up to 30 percent of that goal to be met by nonrenewable energy sources such as nuclear and clean-coal technology. In other words, Indiana’s requirement for renewables amounts to only 7 percent. Hawaii, by contrast, has a renewable portfolio standard requirement of 100 percent renewable energy by 2045. Most other states fall somewhere in between.

Multistate efforts to promote renewable energy

In addition to efforts at the individual state level, there have been several multistate efforts to promote renewable energy and address the adverse impacts of climate change. For instance, in 2003, the governors of nine northeastern and mid-Atlantic states joined together to form what eventually became the Regional Greenhouse Gas Initiative. This initiative places mandatory market-based caps on the amount of carbon-dioxide emissions allowed from the power sector of participating states. The regional “carbon budget” decreases every year. Allocations are made through quarterly auctions, with the proceeds of those auctions reinvested in renewable energy.

Constitutional challenges to state efforts

Whenever states promote renewable energy, whether through a renewable portfolio standard or a multistate effort like the Regional Greenhouse Gas Initiative, it creates winners and losers. This often leads to litigation, with challenges based primarily on federal preemption and the Dormant Commerce Clause. Although states must be careful not to directly interfere with interstate commerce, states have traditional authority over in-state energy generation and retail purchases. Consequently, courts have for the most part upheld state-backed programs and initiatives. In general, the promotion of renewable energy represents an area where states have broad authority to regulate when (or, at times, because) the federal government has chosen not to. Recent developments at the federal level point to a significant shift back to the individual states and multistate efforts such as the Regional Greenhouse Gas Initiative in the promotion of renewable energy. When it comes to renewable energy in the United States, it seems the more things change, the more they stay the same.

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.

Whistleblower and First Amendment protection

[Berlyavsky v. N.Y.C. Department of Environmental Protection](#), No. 16-cv-1096, 2016 WL 7402667 (2nd. Cir. Dec. 20, 2016) (unpublished).

The Second Circuit upheld a trial court's dismissal of a suit by a former agency employee alleging employment discrimination and retaliation. The former New York City Department of Environmental Protection employee was fired after he reported concerns about the collection and handling of wastewater samples. The court of appeals held that the employee did not properly plead a claim for First Amendment retaliation. The employee's job was to collect water samples and thus he was speaking in his role as a public employee, and not as a public citizen. When public employees make statements pursuant to their official duties, the court held, the Constitution does not protect their statements from employer discipline.

[Competitive Enterprise Institute v. Michael E. Mann](#), Nos. 14-cv-101 and 14-cv-126, 2016 WL 7404870 (D.C. Ct. App. Dec. 22, 2016).

The Court of Appeals for the District of Columbia held that Penn State University climate scientist Michael Mann may bring a suit claiming defamation and intentional infliction of emotional distress based on articles that appeared on the websites of the Competitive Enterprise Institute and the National Review. Mann's complaint claimed that the articles, which criticized Mann's conclusions about global warming and accused him of deception and academic misconduct, and compared his alleged deception to deceptions by Penn State's disgraced assistant football coach, Jerry Sandusky, contained false statements that injured his reputation. The trial court ruled that Mann's claims were likely to succeed on the merits and thus were sufficient to defeat a motion to dismiss based on the District of Columbia's Anti-Strategic Lawsuits Against Public Participation Act. The court of appeals affirmed, concluding that Mann presented sufficient evidence for a jury to find, by a preponderance of the evidence, that the statements were false, defamatory and, by clear and convincing evidence, that appellants did so with actual malice. The case was remanded to the district court to determine whether the allegations are either verified or discredited. "If they are proven to be false, the statements breach the zone of protected speech."

CERCLA

***Alcoa Inc. v. APC Investment Co.* No. 2:14-cv-06456 (C.D. Cal. Sept. 12, 2016).**

A district court denied a motion to dismiss Comprehensive Environmental Response,

Compensation, and Liability Act (CERCLA) contribution suits against Exxon Mobil Corp. and Continental Heat Treating Inc. for groundwater remedial costs at operable unit number 2 of the Omega Superfund site in California. Exxon and Continental argued that a 2005 Administrative Order on Consent (AOC) between them and EPA provided them with contribution protection. The issue was whether a clause in the AOC providing contribution protection for “matters addressed in the AOC” encompasses the contribution for the operable unit number 2 costs in question. The federal government filed an amicus brief arguing that the 2005 settlement addressed liability for response costs at the Omega Chemical site near Whittier, not hazardous substances releases from separate properties like that in Santa Fe Springs. The district court agreed, stating that courts analyzing “matters addressed” language in consent orders “have refused to include any matter not expressly contemplated in the agreement.”

[ASARCO, LLC v. Noranda Mining, Inc.](#), 844 F.3d 1201 (10th Cir. 2017).

The Tenth Circuit reversed a trial court’s decision that ASARCO was estopped from pursuing its CERCLA contribution claims against Noranda Mining because of prior representations it made to a bankruptcy court in 2005 concerning its settlement with EPA for the site. In the bankruptcy settlement, ASARCO agreed to pay \$1.79 billion to claims at 52 sites, including \$7.4 million for the site at issue. Noranda argued that ASARCO represented that the \$7.4 million settlement was fair and represented ASARCO’s proportionate liability and thus should not now be allowed to argue for contribution on the grounds that it had paid more than its fair share. The Tenth Circuit held that ASARCO’s positions are not clearly inconsistent given the overall context of the settlement approved by the bankruptcy court, and that ASARCO “would not necessarily gain an unfair advantage by being allowed to pursue its claim now.”

For more information on this case, see the summary at http://www.americanbar.org/groups/environment_energy_resources/committees/snrdl_regional_updates/20170206_asarco_llc_v_noranda_mining_inc.html. For a summary of the prior decision of the district court see [In Brief](#), TRENDS, July/Aug. 2016.

Editor’s note: A member of the panel in this case was Judge Neil Gorsuch, now the nominee for a vacant position on the U.S. Supreme Court.

Air quality

[USA v. DTE Energy Co.](#), 845 F.3d 735 (6th Cir. 2017).

A divided Sixth Circuit reversed, for the second time, the district court’s grant of summary judgment in favor of a power company, DTE Energy, which was sued by EPA for failure to obtain a permit prior to construction pursuant to the New Source Review (NSR) program. Prior to construction, DTE informed the Michigan Department of Environmental Quality that the overhaul of one of its units was not a major modification because it was routine maintenance, repair, and replacement and, in addition, that the emissions were exempt based on demand growth. EPA’s enforcement action was dismissed by the district court, but on appeal the Sixth

Circuit reversed, holding that EPA could bring an enforcement action based on projected increases in emissions without first showing that emissions had increased after the project was constructed. *U.S. v. DTE Energy Co. (DTE I)*, 711 F.3d 643 (6th Cir. 2013). On remand, the district court again entered summary judgment for DTE, focusing on language in the Sixth Circuit's first opinion that the NSR regulations allowed operators to undertake projects "without having EPA second-guess their projections." The Sixth Circuit reversed again, and the panel rendered three opinions. Judge Daughtrey's opinion states that EPA is not prevented by the court's prior opinion in *DTE I* from challenging DTE's preconstruction projections, and that there are genuine issues of material fact that preclude a grant of summary judgment for DTE. His opinion also states that actual post-construction emissions have no bearing on the question whether DTE's preconstruction projections complied with the NSR regulations. Judge Batchelder concurred in the judgment, noting her continuing disagreement with *DTE I*, but conceding that it is the law of the Sixth Circuit. She emphasizes, however, that the rules contain no requirement that the operator obtain EPA review or approval of the pre-construction predictions, but EPA "deems both the operator's prediction and reality meaningless if EPA disagrees." Judge Rogers' dissent concludes that DTE complied with the basic requirements of the regulations for making projections and thus the district court properly granted summary judgment. "[R]equiring DTE to establish that its application of the exclusion was more reasonable than EPA's application of the exclusion would turn New Source Review into a *de facto* prior approval scheme by requiring a district court to hold a trial to resolve this issue before the operator could proceed to construction."

***Bahr v. U.S. Environmental Protection Agency.*, 836 F.3d 1218 (9th Cir. 2016).**

The Ninth Circuit rejected in part EPA's approval of the Arizona plan for airborne particulates in Maricopa County. Arizona submitted a plan revision pursuant to 42 U.S.C. § 7513a(d), which requires a 5 percent annual reduction in PM10. The court agreed with petitioners that EPA's approval was contrary to the statute because the contingency measures included in the plan had already been implemented. The court of appeals declined to defer to EPA's interpretation of the contingency measures requirement because under the plain language of section 7513(c) (9), contingency measures are measures that will be taken in the future, not measures already implemented. However, the court rejected the environmental petitioners' arguments that the plan did not include best available control measures and most stringent control measures as of 2012, holding that under the statute such demonstrations do not apply to a 5 percent reduction plan.

For background information on required plans for particulate matter pollution in nonattainment areas see [THE CLEAN AIR ACT HANDBOOK](#) (4th ed. 2016), chapter 4.

***Murray Energy Corp. v. McCarthy*, No 5:14-cv-00039, 2017 WL 150511 (N.D. W.Va. Jan. 12, 2017), *appeal filed*, No. 17-1170 (4th Cir. Feb. 6, 2017).**

A federal district court ordered EPA by July 1, 2017 to submit an evaluation of plant closures

and job losses in the coal industry and other entities affected by rules affecting coal mining and power generation. On October 17, 2016, the court granted summary judgment for plaintiffs and ordered EPA to provide, within two weeks, a plan and schedule for compliance with section 321(a) of the Clean Air Act, which requires the administrator to conduct continuing evaluations of potential loss or shifts of employment which may result from administration or enforcement of the Clean Air Act and applicable implementation plans. In response, EPA disagreed with the court's interpretation of section 321(a) and that it would take EPA two years to develop a methodology to use in an effort to comply with this provision. In its final order dated January 11, 2017, the court called EPA's response "wholly insufficient, unacceptable, and unnecessary. It evidences the continued hostility on the part of EPA to acceptance of the mission established by Congress." Reviewing EPA's responses to questions raised by members of Congress, the court's opinion states that EPA Administrator "McCarthy consistently articulated the agency's statutory interpretation that the precise question addressed by Section 321(a) is whether specific lay-offs result from EPA's actions, but she just as consistently admitted explicitly and implicitly that her agency is not conducting any efforts to answer it and claimed answering the question has 'limited utility.'" The court's order emphasized that in section 321(a) "Congress unmistakably intended to track and monitor the effects of the Clean Air Act and its implementing regulations on employment in order to improve the legislative and regulatory processes." In addition to its order requiring EPA to evaluate the coal industry and related industries by July 1, 2017, the court also ordered EPA by December 31, 2017 to submit evidence to the court demonstrating that EPA "has adopted measures to continuously evaluate the loss and shifts of employment which may result from its administration and enforcement of the Clean Air Act." Given the pending appeal to the Fourth Circuit, it is unclear which of these mandated deadlines will be met.

For information on a prior decision of the Fourth Circuit granting mandamus and reversing the district court's discovery order compelling a deposition of former EPA Administrator McCarthy in this case, see <http://www.ca4.uscourts.gov/Opinions/Unpublished/152390R1.U.pdf>.

Water quality

Fairweather Fish Inc. v. Pritzker, No. 3:14-cv-05685, 2016 WL 6778781 (W.D. Wash. Nov. 16, 2016), *appeal filed*, No. 17-35037 (9th Cir. Jan. 17, 2017).

A federal district court partially vacated and remanded a rule promulgated by the National Oceanic and Atmospheric Administration (NOAA) regulation for fixed gear halibut and sablefish fisheries in the North Pacific Ocean. The rule prevented fishermen from using hired masters to harvest any quota shares obtained after February 12, 2010. The court held that the final rule was impermissibly retroactive with respect to the regulation of halibut quota shares because it "goes well beyond frustrating Plaintiffs' business expectations." The court accordingly vacated the regulation of halibut quota shares before July 28, 2014, the date the final rule was published. The court also remanded the regulations for compliance with the national standards for fishery conservation and management, 16 U.S.C. § 1851(a).

[Ohio Valley Environmental Coalition v. Fola Coal Co. LLC](#), No. 16-1024, 2017 U.S. App. LEXIS 108 (4th Cir. Jan. 4, 2017).

The Fourth Circuit affirmed a district court decision holding that a coal company, Fola Coal Co., violated the Clean Water Act and ordering it to take corrective measures. The environmental groups had alleged that Fola violated a narrative permit condition that required compliance with water quality standards. In particular, the plaintiffs alleged that Fola discharged ions and sulfates causing increased conductivity in the receiving stream. The company argued that the state knew of the ions in its discharge and set no specific limits on conductivity, that Fola was in compliance with the effluent limits in its permit, and, therefore, the National Pollutant Discharge Elimination System (NPDES) permit shields it from liability. The Fourth Circuit rejected Fola's argument that the permit language was ambiguous and should be read as imposing obligations on the state, not the permit holder. The Fourth Circuit also rejected Fola's argument that a permit shields its holder from liability as long as it complies with effluent limits in its permit, explaining that numerical limits on specific pollutants are not the only proper subject of regulation under the Clean Water Act. "The terms of Fola's permit required it to comply with water quality standards. If Fola did not do so, it may not invoke the permit shield."

[Conservation Law Foundation v. U.S. Environmental Protection Agency](#), No. 15-cv-165, 2016 U.S. Dist. LEXIS 172117 (D. R.I. Dec. 13, 2016).

A district court dismissed a suit by an environmental group alleging that EPA determined that certain industrial dischargers contribute to water quality violations, but failed to notify the dischargers that they must obtain NPDES permits under the Clean Water Act. In particular, plaintiffs alleged that EPA's approval of Total Maximum Daily Loads (TMDLs) for certain Rhode Island water bodies constitutes a determination that stormwater controls are needed for discharges from industrial facilities. The court found that nothing in the TMDL documents indicate that EPA has made a determination that stormwater discharges from point sources contribute to a violation of water quality standards or that additional NPDES permits should be required. Because EPA's election not to require permitting does not constitute a failure to perform a nondiscretionary duty, the court found that it has no jurisdiction over the matter.

[Gulf Restoration Network v. Lisa P. Jackson](#), No. 2:12-cv-00677, 2016 U.S. Dist. LEXIS 173459 (E.D. La. Dec. 16, 2016).

A district court rejected a claim by environmental groups that EPA improperly denied a petition urging EPA to impose federal numeric water quality standards for the portion of the ocean protected by the Clean Water Act but outside the jurisdiction of any state. In particular, plaintiffs urged EPA to establish standards to control nitrogen and phosphorus pollution in the Mississippi River and the Northern Gulf of Mexico. EPA declined to make a "necessity determination," which the court viewed as "essentially deciding not to decide." EPA concluded that the most effective approach would be to build on its efforts to work cooperatively with states and tribes to strengthen nutrient management programs. The court concluded that EPA's assessment of the best approach to address nitrogen and phosphorus pollution is entitled to

deference, and the reasons given in EPA's denial were not arbitrary, capricious or contrary to law.

NEPA

[*Great Basin Resource Watch v Bureau of Land Management*](#), No. 14-16812, 2016 WL 7448094 (9th Cir. Dec. 28, 2016).

The Ninth Circuit affirmed in part and vacated in part a district court judgment in a suit challenging the Bureau of Land Management's (BLM's) approval of a molybdenum mining operation in Nevada. The court in particular held that BLM's analysis of the project under the National Environmental Policy Act (NEPA) was deficient because the selection of baseline levels of zero for several air pollutants was unsupported, and the analysis of cumulative air impacts was deficient because the BLM made no attempt to quantify the cumulative air impacts of the project or the effects of other activities. The court of appeals declined to address plaintiffs' claim that BLM violated its duty to protect lands withdrawn under Executive Order Public Water Reserve 107, stating that BLM should first address the deficiencies in its NEPA analysis. The court also asked BLM, on remand, to clarify its position whether four springs in the area of the project were covered by the executive order.

Views from the Chair

The premier forum and the rule of law

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. He has previously served as publications officer, Council member, and chair of the Environmental Transactions and Brownfields and Site Remediation Committees.

The past few months have not exactly been the cruise I signed up for. Now is a most challenging time to chair the premier forum for environmental, energy, and resources lawyers, as part of an organization that strives to serve equally its members, our profession, and the public. The ABA is defending liberty and delivering justice as the national representative of the legal profession and includes among its goals the advancement of the rule of law. Yes, those are quotes from the Section's and ABA's mission statements, both of which I consult on a frequent basis. What does it mean, in our current situation, to be the premier forum for our specialty areas? As the national representative of the legal profession, what does it mean to defend liberty and deliver justice? What does it mean to advance the rule of law? I struggle with these questions every day, and those concepts guide my actions as Section chair.

Our Section's forum continues to encourage open and public discussion of vital subjects. The Section's purpose is not only to provide the forum but to enhance the Section's preeminence. In applying these goals to the current contentious climate surrounding the change in federal administrations, our forum is not only open to the Trump administration's views and ideas but consider their inclusion to be essential.

For example, in planning our upcoming [Spring Conference](#) in Los Angeles, we have made every effort to invite speakers from the new administration. This effort has been complicated as an invitation to speak cannot be accepted until the completion of the confirmation process, and at the time of this writing, none of the key nominees in our subject areas have been confirmed. Despite this obstacle, we will have the Trump administration's points of view represented in Los Angeles, and we definitely will have them represented at our [Fall Conference](#) in Baltimore in October. We will have opposing views presented as well, and we invite dialogue and debate in a civil and professional manner.

The ABA is not a political organization. We are a professional organization, representing the entire legal profession of this nation. We stand for liberty and justice and will speak up when liberty and justice are threatened, regardless of the source of the threat. Steering such a course in the current political climate is no simple feat. I often hear from friends in "red states" that they love the Section but don't like it when the ABA takes political (read "liberal") stands. In reply, I tell them that a lot of my "blue state" friends tell me that they love the Section, but they don't like it when the ABA takes conservative positions. Well, at least they love the Section! Let's realize that we all need to keep our eyes on liberty and justice and justify everything we do with those lofty goals in mind.

Which brings us to the rule of law. For me, this concept embodies everything we stand for, everything we strive for, everything we do. We may not like the specific outcome on a particular issue, but we must respect the system, adhere to it, and improve it when necessary. The law can change and evolve, but it must do so properly. That's the rule of law. And when the rule of law is threatened, we must speak out. Linda Klein, our ABA president, spoke out at the ABA's Midyear Meeting in February, after President Trump publicly maligned federal judges who ruled against his executive orders on immigration:

What defines the American Bar Association at this critical moment? It is our commitment to the rule of law, due process, and access to justice. With these foundations, our country has weathered every crisis: civil war, world wars, economic depressions and social unrest.... Make no mistake, personal attacks on judges are attacks on our Constitution. Let us be clear. The independence of the judiciary is not up for negotiation... There are no "so-called judges" in America. There are simply judges—fair and impartial. And we must keep it that way.

And so we shall proceed. Openly, fairly, with an audience for all views. But we will constantly

keep our eyes on liberty and justice and, above all, the rule of law. And when those sacred principles are threatened, you can be sure we will be heard.

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, care of ellen.rothstein@americanbar.org.

[Suedy Alfaro](#) of Hunton & Williams LLP's San Francisco office has been elected a member of the Executive Committee of the Bar Association of San Francisco. Alfaro is an associate at Hunton & Williams LLP, where her practice focuses on regulatory compliance, pre-litigation counseling, environmental litigation, and transactional due diligence. She regularly represents clients in matters involving the Clean Air Act, the Clean Water Act, Superfund, and RCRA, as well as state and local environmental laws and regulations.

[Jeffrey B. Margulies](#) has been elected chair of the Environmental Law Section of the Los Angeles County Bar Association. Margulies is the partner in charge of Norton Rose Fulbright's Los Angeles office. His practice focuses on class action litigation and regulatory issues regarding consumer products and involves a variety of state, federal, product safety, chemical management, and related regulatory issues. Margulies also advises clients on environmental issues, including environmental regulation and litigation, climate change, and carbon regulation, and transactional support.

[Martha E. Marrapese](#) has joined Wiley Rein LLP as a partner in its Washington, D.C. office. Marrapese was formerly with Keller & Heckman LLP. She is an internationally recognized environmental law leader in emerging technologies in the industrial chemicals, alternative energy, antimicrobial pesticides, nanotechnology, plastic recycling, and food sectors. Marrapese is a recognized authority on chemical regulation and pre-manufacture approval under the evolving Toxic Substances Control Act. She is a member of the board and the executive committee of the Environmental Law Institute. Marrapese serves as co-chair of the Section's Special Committee on Congressional Relations and is past-chair of the Section's Pesticides, Chemical Regulation, and Right-to-Know Committee.

[Keith A. Matthews](#) has joined Wiley Rein LLP as counsel. Matthews was previously with Sidley & Austin LLP in Washington, D.C. He has practiced for over two decades in environmental and chemicals regulation law in the private sector and the government. Matthews' practice focuses on the federal government's regulation of biotechnology products by the U.S. Environmental

Protection Agency and the U.S. Department of Agriculture. He formerly directed the Biopesticides and Pollution Prevention Division in U.S. EPA's Office of Pesticide Programs, after working in the agency's Office of General Counsel. Matthews serves as chair of the Section's Pesticides, Chemical Regulation, and Right-to-Know Committee.

[Karen Mignone](#) has left Verrill Dana LLP of Westport, Connecticut, to become Global Director of Sustainability and Environmental Affairs for Xerox Technology Group of Sheffield, England. Mignone works with complex environmental and safety programs to develop proactive solutions. She has more than 25 years of experience in matters involving federal and state environmental and occupational health and safety agencies, including compliance and enforcement. Mignone has served in numerous leadership positions within the Section, including a term on the Section's Council. She is currently the Section's Membership and Diversity Officer.

[Kathy Robb](#) has joined Sive Paget and Riesel, P.C. as a principal. Robb was formerly with the New York office of Hunton & Williams. Her practice focuses on litigation in federal district and appellate courts across the United States, including the U.S. Supreme Court. Robb represents water districts, developers, investors, lenders, and industrial companies and chemical manufacturers, among others, on water rights, endangered species issues, environmental impact reviews, river sites with contaminated sediments, and large sites with contaminated groundwater. Robb is the president of the Environmental Law Institute's Leadership Council and is a former ELI Board member. She also serves as vice-president of the Waterfront Alliance in New York, on the Advisory Board of Bloomberg BNA's Environmental Due Diligence Guide, on the New York City Bar Association's Executive Committee, and as an adjunct professor at Pace Law School. In October, Robb was inducted into the American College of Environmental Lawyers. She co-chaired in 2012 and chaired in 2013 the Section's Annual Water Law Conferences.

[Mary Ellen Ternes](#) has become a member of Earth & Water Law LLC in Oklahoma City, Oklahoma. Ternes was previously a shareholder in Crowe & Dunlevy's Oklahoma City office. Her practice focuses on environmental law, where she advises clients on environmental permitting, compliance strategies, enforcement defense, transactions, due diligence and environmental assessments, voluntary cleanup programs, and federal and state litigation including citizen suits and common law actions. Ternes has more than three decades of experience with environmental projects throughout the United States. She is secretary of the American College of Environmental Lawyers. Ternes has served in various Section leadership positions, including chair of the Air Quality and Climate Change, Sustainable Development, and Ecosystems Committees. She currently chairs the Special Committee on *The Year in Review*.

[Benjamin Wilson](#) has been elected chair of the board of directors of the Environmental Law Institute. Wilson is the chairman of Beveridge & Diamond PC, resident in the firm's

Washington, D.C. office. He focuses his practice on a wide range of commercial and environmental litigation in both state and federal courts. Wilson has been lead counsel in several complex litigation matters for major corporations and developers and has represented cities and local government agencies on Clean Water Act enforcement, wetlands development, and Superfund cases. A recognized leader on diversity and inclusion in the legal profession, he also offers deep experience with environmental justice representations. In 2013, the Section presented Wilson with its *Dedication to Diversity and Justice Award*.

[George Wyeth](#) has retired from the U.S. Environmental Protection Agency and is now a visiting scholar at George Washington University Law School. Wyeth's career with U.S. EPA began with nine years in the agency's Office of General Counsel. He then served over thirteen years as director, first of the agency's Policy and Program Change Division, and then its Integrated Environmental Strategies Division. Wyeth also spent several years with the agency's enforcement program on the Next Generation Compliance initiative. He has served in various Section leadership positions, including on the Section's Council from 2007–2009.

[Justin A. Zucker](#) has been elected chair of the Executive Committee of the Environmental Law Section of the Bar Association of San Francisco. Zucker practices with the San Francisco office of Ropers, Majeski, Kohn & Bentley. His practice focuses on environmental law and insurance defense litigation, including product liability, class actions, environmental, toxic tort, and complex litigation.