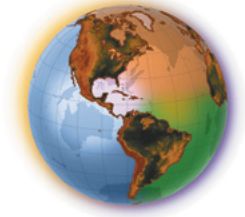


TRENDS

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER



NOV/DEC 2017



Trends November/December 2017

Table of Contents

Features

Critical thinking: ESA critical habitat’s ongoing redefinition2
 Murray Feldman and Bailey K. Schreiber

Why EPA’s Mercury and Air Toxics Standards matter—history and health5
 James L. Simpson

So the well won’t run dry: Artificial groundwater recharge in the West7
 Nathan S. Bracken and Clayton H. Preece

The abandonment and restoration of Pennsylvania’s constitutional public trust10
 John C. Dernbach

Can nonstatutory federal climate litigation drive federal climate policy?12
 David Markell

California regulation of agricultural runoff15
 Isaac Cheng and Alicia Thesing

In Brief17
 John R. Jacus

Section News

Views from the Chair: Cooperative federalism: What is it—now and in the future?21
 John Milner

People on the Move23
 James R. Arnold

Critical thinking: ESA critical habitat's ongoing redefinition

Murray Feldman and Bailey K. Schreiber

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Over a year ago, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the “Services”) issued two rules revising implementation of the Endangered Species Act’s (ESA) critical habitat provisions. [81 Fed. Reg. 7,214; 7,413](#) (Feb. 11, 2016) (the “Rules”). Since then, 20 states have sued the Services claiming that the Rules constitute federal overreach, President Trump took office and has sought to withdraw or delay many Obama-era environmental policies, and the frequency with which the Services are designating critical habitat has declined notably. This article discusses these developments, the underlying Rules, and their future prospects.

The Rules

ESA section 4 directs the Services to designate critical habitat for listed species. 16 U.S.C. § 1533(a)(3)(A). Section 3 defines critical habitat as the “areas within the geographical area occupied by the species, at the time it is listed” that are “essential to the conservation of the species” and “which may require special management considerations or protection,” as well as areas outside this occupied area that are “essential for the conservation of the species.” *Id.* § 1532(5)(A)(i).

ESA section 7 directs federal agencies to consult with the Services regarding actions that may affect listed species and prohibits federal agencies from engaging in activities that are likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat. *Id.* § 1536(a)(2).

In the Rules, the Services made a number of changes for identifying critical habitat and determining when the effects of a federal action are deemed to destroy or adversely modify critical habitat. In part, the Rules:

- **Change the framework for designating unoccupied areas.** The Rules provide for designating areas unoccupied by the species if they are “essential” to the species’ conservation. Under earlier regulations, the Services considered designating “areas outside this occupied area” only if a designation of occupied habitat would be

inadequate for the species' conservation. 50 C.F.R. § 424.12(e) (2015). The Services now abandon this requirement as “unnecessary and unintentionally limiting.”

- **Define “geographical area occupied by the species.”** The Services define the statutory phrase “geographical area occupied by the species” as “the geographical area which may generally be delineated around the species' occurrences, as determined by the Secretary (i.e., range).” This definition includes areas where a species is not continuously found, if there is “evidence of regular periodic use.”
- **Include already-degraded habitat.** The Rules recognize that critical habitat may include already-degraded habitat that has the potential to support recovery of listed species if developed and improved and that such habitat will generally be considered destroyed or adversely modified if an action “alters it to prevent it from improving over time relative to its pre-action condition.”
- **Redefine “destruction or adverse modification.”** Under previous regulations, “destruction or adverse modification” of critical habitat arose only if a federal action affected both the recovery *and* survival of a species. 50 C.F.R. § 402.02 (2015). In response to decisions setting aside this interpretation, *see Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059 (9th Cir. 2004); *Sierra Club v. FWS*, 245 F.3d 434 (5th Cir. 2001), the Rules redefine the term to mean a “direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” The Services use “conservation” to capture both the “survival” and “recovery” concepts, consequently an appreciable diminishment to either may now lead to a destruction or adverse modification determination.

Implementing the Designation Rule

Between March 14, 2106, when the Rules went into effect, and November 2016, the Services issued three proposed and 150 final designations in 12 rulemaking actions. Among these designations were the New Mexico jumping mouse and the Black Warrior waterdog. Both the final designation for the jumping mouse (81 Fed. Reg. 14,264 (Mar. 16, 2016)) and the proposed designation for the waterdog (81 Fed. Reg. 69,475 (Oct. 6, 2016)) included areas unoccupied by the species.

Since November 2016, the Services have designated critical habitat for just two species—the Atlantic sturgeon and the Guadalupe fescue. 82 Fed. Reg. 39,160 (Aug. 1, 2017); 82 Fed. Reg. 42,245 (Sep. 7, 2017). While the National Marine Fisheries Service included unoccupied habitat in the sturgeon proposal, it ultimately determined that the benefits of excluding unoccupied areas outweighed the benefits of designation. The Fish and Wildlife Service did not designate unoccupied habitat for the fescue.

Challenges to the Rules and designations

On November 29, 2016, 18 (now 20) states sued the Services, claiming that the Rules are an unlawful attempt to expand the Services' authority and control over state lands. *Alabama v. NMFS*, No. 1:16-cv-00593 (S.D. Ala.). The states argue that the Rules allow the designation of critical habitat regardless of whether a species occupies the area and whether an area is actually essential to a species' conservation. To give the Trump administration additional time to respond, the court granted the Services' request for a stay until November 10, 2017.

Pending before the U.S. Supreme Court is a certiorari petition in *Markle Interests, L.L.C. v. FWS*, No. 17-74, seeking review of a Fifth Circuit decision upholding the critical habitat designation for the dusky gopher frog. That designation included currently unoccupied habitat in one Louisiana parish, habitat that had been unoccupied for decades but that the Fish and Wildlife Service determined included historic breeding areas and other habitat elements for the species. While the challenged designation was made under the Services' former regulations, the case presents the overarching question of whether the Fish and Wildlife Service appropriately included unoccupied habitat and properly determined that the unoccupied areas were "essential for the conservation of the species." The Fish and Wildlife Service is scheduled to file its response to the certiorari petition on October 13, 2017.

The future of critical habitat

The Services' approach to critical habitat designation has come in three waves. During the first wave, the Services were largely disinterested in critical habitat, declaring that, "in most circumstances," designating critical habitat is of "little additional value for most listed species, yet it consumes large amounts of conservation resources." 64 Fed. Reg. 31,871, 31,872 (June 14, 1999).

The second wave followed a series of lawsuits that enforced the Services' duty to designate critical habitat and overturned their interpretation of the jeopardy and adverse modification standards. The Services then started designating critical habitat regularly and more expansively. These broad designations reached their zenith for the final polar bear and proposed ringed seal designations; the designated habitat for the former being larger than any single state except Alaska or Texas and the latter larger than Texas, Idaho, and Massachusetts combined.

The Rules are the third wave and continue to allow for potentially broad designations. The ultimate scope of future designations is uncertain, and the two final designations under the current administration give little guidance. It will be up to Congress, the courts, or possible executive action to decide the ebb or flow of this third wave. The courts may have the opportunity to do so in the Alabama litigation and perhaps the dusky gopher frog case, both of which generally challenge the designation of unoccupied habitat.

Why EPA's Mercury and Air Toxics Standards matter—history and health

James L. Simpson

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Coal-fired power plants are the largest source of mercury emissions in the United States, and the regulation of their emissions has a long history; but the health impacts of the Mercury and Air Toxics Standards (MATS) rule should be substantial.

Regulatory history

Until 2012 there were no federal standards to control emissions of toxic air pollutants such as mercury and arsenic from power plants, despite the availability of control technology and the U.S. Environmental Protection Agency's (EPA's) well-established National Emission Standards for Hazardous Air Pollutants (NESHAP) under the Clean Air Act. The 1990 Clean Air Act Amendments required EPA to issue standards to reduce emissions of hazardous air pollutants (HAPs) from many sources and to study whether to do so from power plants. See 42 U.S.C. § 7412(n)(1)(A). Congress wanted EPA to implement other provisions of the Clean Air Act first and then decide whether it was still necessary to regulate power plants directly.

EPA completed the required study in 1998. In 2000, EPA determined it was “appropriate and necessary” to regulate the emission of nearly 200 air toxics from power plants and added power plants to the Clean Air Act section 112(c) source category list. See 65 Fed. Reg. 79,825, 27 (Dec. 20, 2000). EPA reversed this finding in 2005, but in 2008 the D.C. Circuit vacated EPA's decision to remove power plants from the CAA section 112(c) source category list. See *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Ultimately, pursuant to a consent decree after additional litigation, EPA issued proposed standards for the control of HAPS from power plants on March 15, 2011.

Background of MATS

EPA issued the final MATS rule for coal-and oil-fired power plants on February 16, 2012. See 77 Fed. Reg. 9304 (Feb. 16, 2012). According to EPA, reducing emissions of mercury and other HAPs from the electric power industry will also have significant co-benefits of reductions in SO₂ and PM_{2.5}, largely in reduced human mortality. EPA estimated high compliance costs of almost \$10 billion, but monetized benefits of between \$33 billion and \$90 billion. EPA estimated the MATS rule would reduce power plant mercury emissions by 90 percent and, also, dramatically reduce emissions of other toxics like arsenic, nickel, dioxins, and acid gases.

Health impacts of mercury and air toxics

Mercury emissions make their way to waterbodies, where bacteria convert the mercury into the more toxic methylmercury (MeHg) that can bioaccumulate, especially in fish and shellfish. In turn, eating contaminated fish (and animals that eat the fish) is the largest source of human and wildlife exposure to organic mercury. Pregnant women are especially at risk because MeHg can cause neurological disorders in developing fetuses. In its appropriate and necessary finding, EPA found a “plausible link” between power plants’ mercury emissions and MeHg in fish. 65 Fed. Reg. 79,825, 27 (Dec. 20, 2000). EPA also found “that about 7 percent of child-bearing age women are exposed to MeHg at levels capable of causing adverse effects to the fetus, and about 1 percent were exposed to 3 to 4 times that level.” 76 Fed. Reg. 24,978. By 2011, all 50 states had issued fish advisories for mercury, totaling 16.4 million lake acres and 1.1 million river miles.

In addition to mercury, coal-fired power plants emit carcinogenic HAPs such as arsenic, nickel, cadmium, and chromium. Other toxic pollutants released include lead and the acid gases hydrogen chloride (HCl), and hydrogen fluoride (HF). According to EPA, these pollutants can cause lung irritations, central nervous system effects, kidney damage, and other acute disorders. See 76 Fed. Reg. 24,978.

What the MATS rule does

Generally, the MATS rule applies to power plants larger than 25 megawatts that burn coal or oil to generate electricity for sale and distribution through the national electric grid. EPA estimates the MATS rule impacts approximately 600 power plants, which include 1,100 existing coal-fired units and 300 oil-fired units. The rule provides numerical emission limits for mercury, particulate matter (PM), and HCl for existing and new coal-fired power plants, and numerical emission limits for PM, HCl, and HF for existing and new oil-fired power plants, using a variety of technologies to achieve these limits. The MATS rule also establishes work practice standards, instead of numerical limits, to limit emissions of organic air toxics from existing and new coal- and oil-fired power plants.

The MATS rulemaking attracted a lot of public attention; EPA received close to 1 million public comments on the proposed rule, substantially more than any prior rulemaking.

Supreme Court decision on costs

In 2015 the Supreme Court held that EPA acted unreasonably when it deemed cost irrelevant in its MATS “appropriate and necessary” finding. See [Michigan v. EPA](#), 135 S. Ct. 2699, 2712 (2015). In response to this ruling, EPA interpreted this decision narrowly and did not alter the MATS rule issued previously, but conducted a supplemental review and found that a consideration of costs does not change EPA’s earlier appropriate and necessary finding. In this supplemental finding, EPA concluded that \$9.6 billion annual costs of compliance should save at least \$37 billion in co-benefits. See 81 Fed. Reg. 24,247 (Apr. 25, 2016).

What lies ahead?

There is good news to report. According to EPA's Toxics Release Inventory (TRI), U.S. air releases of toxic chemicals decreased by 56 percent (nearly 400,000 tons) from 2005 to 2015, including significant decreases in emissions of hydrochloric acid, sulfuric acid, toluene, and methanol. EPA attributes the decrease to electric utilities shifting from coal to other fuel sources, the installation of control technologies at coal-fired power plants, and the implementation of environmental regulations like the Acid Rain Program. In particular, mercury from coal- and oil-fired power plants declined 69 percent during this period. However, EPA reported that electric utilities still accounted for 48 percent of the mercury air emissions reported to TRI, demonstrating the continued need for MATS.

Apart from these emissions reductions, opponents of the MATS rule have not stopped litigating. Indeed, the Trump administration's professed desire to stop the putative "war on coal" raises the question of how hard the current administration will defend the MATS rule. On April 27, 2017, the D.C. Circuit Court of Appeals granted EPA's motion to delay oral arguments in a case challenging EPA's supplemental appropriate and necessary finding on costs. EPA stated in its motion that political appointees were reviewing the supplemental finding to determine whether EPA should reconsider the MATS rule.

So the well won't run dry: Artificial groundwater recharge in the West

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Groundwater is essential to life in the West, but many western aquifers are declining faster than they can be recharged naturally. Artificial groundwater recharge is one vital tool that can help address this challenge.

Artificial groundwater recharge

Artificial recharge directs excess surface water or recycled wastewater into aquifers through injection wells or by spreading water on the surface to increase soil infiltration and percolation to the aquifer. The recharged water can then be withdrawn during droughts or periods of high demand. Storing water underground has several advantages compared to reservoirs: the water does not evaporate and it can be more easily protected from contamination. On the other

hand, the costs of recharge technology and methods may not be economically feasible in some situations, particularly in areas where raw water costs are low. Consequently, the feasibility of a recharge project will depend on climate, water demands, soil conditions, economics, and other factors that vary across the West.

Artificial recharge examples

Artificial recharge is most commonly used to store or bank excess water for future use. The Arizona Water Banking Authority, for example, oversees a program that stores unused portions of the state's Colorado River apportionment underground for future use in times of shortage. Arizona Water Banking Authority, *What Is Recharge?* <http://www.azwaterbank.gov>. In Utah, the Jordan Valley Water Conservancy District takes a slightly different approach, treating and injecting surface water supplies in the winter and spring when water demands are low for use during the summer when demands are high. Utah Division of Water Resources, *Conjunctive Management of Surface and Groundwater*, 62 (July 2005), <https://water.utah.gov/OtherReports/CMReport/CMReport1bCC.pdf>.

An increasing number of projects are leaving water in the aquifer to relieve overdrafting or address other issues. One can be found in Los Angeles, where reclaimed water is injected into the ground to create a freshwater mound. The mound then acts as a barrier between the fresh water supplies in the aquifer and intruding sea water that could make the aquifer unsuitable for most users if left unchecked. U.S. Geological Survey, California Water Science Center, *Aquifer Storage and Recovery* (Jan. 5, 2012), <https://ca.water.usgs.gov/misc/asr>.

The law and artificial recharge

State laws and policies govern artificial recharge. Although these laws vary, there are some common themes. First, most states require a permit, usually issued by a state agency or a regional entity. Second, permitting authorities generally consider impacts to other water rights and whether a recharge project will degrade groundwater quality. Third, some states require rechargers to show that they have control or dominion over the recharged water.

There are differences as well. Some states have comprehensive statutes specific to artificial recharge, while others address recharge through their general groundwater permitting regimes. In addition, most western states regulate groundwater under the prior appropriation doctrine, but some states assign different rights to groundwater and surface water. Moreover, while the public owns groundwater in most states, landowners in Oklahoma and Texas own the groundwater beneath their land. These considerations can impact who has rights to pump groundwater, including recharged water.

Artificial recharge in the High Plains aquifer system

Aquifers do not respect state boundaries, and groundwater pumping in one state can affect groundwater and surface supplies in another. This concern is particularly pronounced in the High Plains aquifer system, which includes the famed Ogallala aquifer and is a critical water source for parts of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming. Because the Ogallala aquifer has little natural recharge, water levels have steadily declined since irrigation began in the 1940s, with some parts of Kansas, New Mexico, Oklahoma, and Texas seeing declines of 100 feet, raising questions about the aquifer's future. U.S. Geological Survey, *High Plains Regional Ground-Water Study* (Aug. 2000), <https://pubs.usgs.gov/fs/2000/0091/report.pdf>.

Artificial recharge is one of the tools stakeholders in the region are considering to address declining aquifer levels. For example, the city of Wichita is recharging water from the Little Arkansas River into the Equus Beds aquifer at the eastern edge of the High Plains aquifer system, recharging about 8,600 acre-feet as of July 2016, or about 15 percent of the total Wichita draws in a year. Richard Banks, *Saving the Ogallala: How to Reverse Its Decline*, MYFARMLIFE.COM, <https://myfarmlife.com/features/saving-the-ogallala-how-to-reverse-its-decline>. In Texas, however, efforts to recharge the Ogallala with water from playa lakes have encountered water quality challenges due in part to legal constraints that prohibit water quality degradation in aquifers. O. Templar and L. Urban, *Conjunctive Use of Water on the Texas High Plains*, 106 J. OF CONTEMPORARY WATER RESEARCH AND EDUCATION 102, 105 (1997), http://www.ucowr.org/files/Achieved_Journal_Issues/V106_A13Conjunctive%20Use%20of%20Water%20on%20the%20Texas%20High%20Plains.pdf.

Interstate considerations

Artificial recharge projects that involve interstate aquifers present unique considerations and opportunities. Because some compacts may be construed to govern groundwater pumping, a careful review of potentially applicable compacts may be necessary before investing in an artificial recharge project. Conversely, a lack of clarity over rights to an interstate aquifer may create a disincentive to artificial recharge. In such cases, states may need to renegotiate existing surface water compacts or enter into new compacts to clearly define how water imported into the system by artificial recharge will factor into the apportionment scheme, including how artificial recharge can be used for compliance purposes. Finally, the power of the U.S. Supreme Court to require a state to disgorge profits relating to water must be factored into the analysis and negotiation of compacts, as evidenced by the Court's 2015 decision requiring Nebraska to disgorge \$1.8 million to Kansas for pumping excess groundwater in violation of the Republican River Compact. *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015).

The abandonment and restoration of Pennsylvania's constitutional public trust

John C. Dernbach

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In 1971, the voters of Pennsylvania overwhelmingly adopted an amendment to article I of the state constitution, which is the state's Declaration of Rights. Article I, section 27 provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

This article describes how the public trust provisions of section 27—its second and third sentences—were abandoned and restored. It also highlights some key issues section 27 raises for lawyers and policy makers.

Abandonment

In *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), citizens and others challenged a street-widening project, claiming that the loss of 0.59 acres of public park, less than 3 percent of the park's total acreage, violated the public trust provisions in the second and third sentences of section 27. The facts in this case helped convince the court that section 27 could be used to stop all development. Stating that judicial review under section 27 "must be realistic and not merely legalistic," the Commonwealth Court adopted a three-part balancing test as a *substitute* for the text of section 27:

1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
2. Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

This test, not section 27, was applied for more than four decades, even though it says nothing about the public trust. And according to [research](#) by a former student, the test was so easy to satisfy that claimants raising section 27 claims almost never won.

A glimpse at restoration

In *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), the Pennsylvania Supreme Court held unconstitutional several provisions of Pennsylvania's 2012 shale gas legislation. Chief Justice Ronald Castille's groundbreaking opinion relied on section 27 and provided a detailed explanation of what section 27 means and why its location in Article I matters. That opinion garnered only three of the court's seven votes, however; a fourth justice based his decision on substantive due process. Still, Pennsylvania lawyers began to read the text seriously and think about what it might actually mean.

Restoration

Pennsylvania Environmental Defense Foundation (PEDF) v. Commonwealth, 161 A 3d 911 (Pa. 2017), also involves shale gas. The state had run a modest oil and gas leasing program on state forests and parks since 1947. Then the Marcellus Shale boom and economic recession happened—at the same time. The state expanded drilling on state lands, bringing in hundreds of millions of dollars, and transferred much of that money to the General Fund to help balance the budget. PEDF sued, claiming the legislative diversion of gas leasing funds for purposes other than conservation violated section 27's public trust provisions.

On June 20, 2017, a majority of the Pennsylvania Supreme Court agreed—in a sweeping endorsement of the text of section 27 that substantially tracked *Robinson Township*. The court categorically rejected the *Payne* test, saying it “is unrelated to the text of Section 27 and the trust principles animating it.” Instead, the court said, “the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”

The second and third sentences create a public trust in “public natural resources” that requires the commonwealth (including the governor, the General Assembly, state agencies, and local governments) to “conserve and maintain” those resources for the benefit of both present and future generations. The corpus or body of the trust, the court said, includes state parks and forests, as well as the oil and gas they contain.

The Commonwealth has two public trust duties under section 27, the court said. The first is to “prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.” The second is to “act affirmatively via legislative action to protect the environment.”

The court said that private trust law is to be used to help determine the meaning of section 27. It identified as important the private trust law duties of loyalty (administering the trust for the benefit of the people), impartiality (managing the interests of all beneficiaries, including the interests of current and future generations), and prudence (exercising “reasonable care, skill, and caution”).

The court then held that diversion of oil and gas revenues to the general fund violates the public trust, thus impacting more than \$400 million in funds previously diverted to nonconservation purposes.

Many remaining issues

The *PEDF* decision raises many legal issues. On remand, the Commonwealth Court must decide how moneys received from oil and gas leasing on state land can actually be used. The Department of Environmental Protection, which issues hundreds of permits every year, is considering how a now-revitalized section 27 affects permit decisions. Pennsylvania’s 2,562 local governments are beginning to ask what it means to be a trustee. And there is also a question of what the decision means for the first sentence of section 27.

Conclusion

At long last, Pennsylvania courts are taking the constitutional public trust seriously. And there is certainly more to come.

Widener University Commonwealth Law School has published a [listing](#) of available section 27 resources with links.

Can nonstatutory federal climate litigation drive federal climate policy?

David Markell

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This article reviews two relatively recent lawsuits that invoke *nonstatutory* federal law in an effort to persuade courts to provide judicial direction to address climate change, *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Looorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014), and *Juliana v. Obama (now Juliana v. United States)*, 217 F. Supp. 3d 1224 (D. Or. 2016).

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A few observations concerning climate change litigation may provide helpful context. A 2017 United Nations [study](#) documents that the United States is at the forefront of a global increase in climate change-related litigation. The Supreme Court's seminal decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), opened the door in the United States for federal regulation of greenhouse gas emissions under the Clean Air Act and has spawned a substantial amount of litigation involving that act. A considerable body of case law has also emerged addressing agency responsibilities under other statutes, including the National Environmental Policy Act (NEPA), several state "little NEPAs," and the Endangered Species Act. For a comprehensive empirical study of the 201 pieces of climate change litigation matters filed through 2010, see David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business As Usual?* 64 FLA. L. REV. 15 (2012). For a current breakdown of cases, see the Columbia Law School Sabin Center's [website](#).

The Court's second significant climate change decision, *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), "shuts the judicial door" to suits to reduce greenhouse gas emissions based on federal common law nuisance. The Court held that Congress's authorization of the U.S. Environmental Protection Agency in the Clean Air Act to develop greenhouse gas emission standards "displaces" courts' authority to establish such standards under the federal common law. In the Court's words, when Congress has addressed a question, "the need for such an unusual exercise of law-making by federal courts disappears." 564 U.S. at 423. In *Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), the Ninth Circuit extended the Court's displacement rationale to include federal common law nuisance actions for damages. The Ninth Circuit held that, "if a cause of action is displaced, displacement is extended to all remedies." 696 F.3d at 857.

In the two recent cases cited above, plaintiffs have sought to invoke the "federal public trust doctrine" to galvanize the federal courts to chart their own course in the climate change arena. The plaintiffs in *Alec L. v. Jackson* asked the U.S. District Court for the District of Columbia to hold that the atmosphere is a public trust resource; that the United States government, as a trustee, has a fiduciary duty to protect that resource; and that the defendants have violated their fiduciary duties by "contributing to and allowing unsafe amounts of greenhouse gas emissions in to the atmosphere." The plaintiffs asked the court to enjoin the six defendant federal agencies to "take all necessary actions" to cap emissions of carbon dioxide by December 2012 and to ensure a decline of such emissions by at least 6 percent per year beginning in 2013.

The U.S. Court of Appeals for the D.C. Circuit affirmed the district court's decision to dismiss plaintiffs' claims that the doctrine imposes duties on the federal government and that "the defendants ha[d] abdicated their trust duty to protect the atmosphere from irreparable harm" by failing to reduce global atmospheric carbon dioxide levels to less than 350 parts per million during the century. The court found that it lacked subject matter jurisdiction over the claims, concluding that the Supreme Court has held that the public trust doctrine "remains a matter of state law" and does not provide for a federal cause of action.

The Oregon district court's decision in *Juliana v. United States* offers a very different perspective on the role of the federal courts and the viability of federal public trust doctrine claims in shaping climate change policy. In essence, the plaintiffs' claim in *Juliana* is that the federal governments' fossil fuel policies, in the aggregate, violate the plaintiffs' rights under the federal public trust doctrine and the U.S. Constitution by failing to protect the atmosphere, water, seas, seashores, and wildlife. To borrow the district court's summary, the case "alleges that defendants' actions and inactions—whether or not they violate any specific statutory duty—have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty." 217 F. Supp. 3d at 1261.

Characterizing the case as an "action . . . of a different order than the typical environmental case," the court held that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." *Id.* at 1250. The court further held that the due process and equal protection clauses of the U.S. Constitution prohibit the federal government from interfering with this right, as does the public trust doctrine, which the court found to be implicit in the due process clause.

The court declined to dismiss plaintiffs' claims, setting the case for trial in February 2018. At this writing, the U.S. Court of Appeals for the Ninth Circuit has determined that the federal government's petition for mandamus review of the lower court's decision "raises issues that warrant an answer." As a result, the fate of the litigation remains uncertain.

Two commentators, law professors Michael Blumm and Mary Christina Wood, have suggested that *Juliana* is "challenging the government's entire fossil-fuel policy, based on asserted constitutional rights to inherit a stable climate system." Michael C. Blumm & Mary Christina Wood, "[No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine](#)," 67 AM. U. L. REV. 101, 107 (forthcoming 2017). It is part of a "wave of atmospheric trust litigation"—a "campaign" that is a "full-scale, coordinated movement" that has "turned to the judiciary for eleventh-hour relief to force worldwide emissions reductions." *Id.* at 121.

Conclusions

In our 2012 comprehensive empirical study of climate change litigation matters, (David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business As Usual?* 64 FLA. L. REV. 15, 22 (2012)), Prof. J.B. Ruhl and I hypothesize that, because climate change poses significant new policy challenges, litigants might ask courts to chart new policy directions—to "craft[] a distinct climate change jurisprudence." Based on our empirical study, we concluded that, for the most part, courts have resisted efforts to make the judicial branch a direct arbiter of climate change policy.

Roger Martella of General Electric recently suggested that "industry should not 'underestimate' the creativity and strategic ability of . . . 'new era' climate cases." *In Wake of Harvey, CLF Targets*

Shell To Address Climate Under Water Law, INSIDEEPA/CLIMATE (Aug. 30, 2017). *Alec L and Juliana* are examples of efforts to turn to the judiciary for help in addressing climate change (state common law cases are another example of such efforts). Record fundraising by some environmental nongovernmental organizations and transformative advances in monitoring capacity and related fields are likely to fuel such initiatives. The significant implications for climate policy and our system of government suggest that courts' efforts to grapple with a wide array of "new era" climate cases will bear watching.

California regulation of agricultural runoff

Isaac Cheng and Alicia Thesing

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California's irrigated agriculture

Agriculture in California is a multibillion dollar industry that produces more than half of the nation's fruits, nuts, and vegetables. But this comes at a cost. Agriculture is the primary source of water pollution, with irrigation and rainfall sweeping excess fertilizers and pesticides off the fields into adjoining waters and, over time, leaching into groundwater. As a result, waterbodies—spanning roughly 8,000 miles of rivers and streams and 300,000 acres of lakes, bays, and wetlands—[are impaired](#).

Agricultural runoff

Although agricultural runoff often contains dissolved salts, pathogens, and sediments from soil erosion, the most serious water quality degradation in California is caused by excessive fertilizer and pesticide use.

Over [600,000 tons of nitrogen fertilizer](#) are applied to the fields every year, yet crops use, on average, [only a third to half of the nitrogen](#) applied. The rest enters waterbodies, resulting in algae blooms, fish kills, and restriction of recreational uses. Nitrogen also leaches into groundwater. Hundreds of thousands of residents in agricultural areas draw their drinking water from untreated wells with potential nitrate contamination, which has been [linked](#) with blue-baby syndrome in infants, birth defects, and various cancers. Often these low-income communities cannot afford alternative water supplies.

Pesticides sprayed on fields can be acutely toxic to freshwater and marine life. While two common pesticides, [diazinon](#) and [chlorpyrifos](#), have been largely banned by the U.S. Environmental Protection Agency, they enjoy an exemption for agricultural uses. Many waterbodies have been listed as impaired due to pesticides.

California's regulatory structure

Unlike the federal Clean Water Act, which does not regulate nonpoint sources such as agricultural runoff, [California's Porter-Cologne Act](#) covers any discharge activity that could affect the quality of surface water, wetlands, or groundwater. Agricultural nonpoint discharges may be regulated through general or site-specific permits called waste discharge requirements, waivers of waste discharge requirements, or prohibitions.

The nine Regional Water Quality Control Boards assume primary enforcement responsibility for permits and local water quality control plans—called basin plans—which set water quality standards needed to protect the beneficial use of local waterbodies.

Fulfilling section 319 of the Clean Water Act, California has a nonpoint source program plan that identifies sources of pollution and methods to control those sources. Its nonpoint source policy is incorporated into basin plans that must achieve water quality objectives, describe best management practices, include a specific time schedule and quantifiable milestones, and set out clear requirements for verification and enforcement.

Permits and basin plans must also comply with California's antidegradation policy, which complements federal antidegradation regulations. This state policy limits discharges that will degrade "existing high quality waters," defined as waters of better quality than the established water quality objectives.

Shift from general waivers to general permits

Beginning in the 1980s, agricultural runoff was generally covered by blanket waivers. The state legislature, in 1999, and again in 2003, amended the Porter-Cologne Act to require that the next generation of waivers comply with basin plans, include monitoring provisions, and expire after a five-year term.

Several regional boards, including the Central Coast, Los Angeles, Central Valley, and Colorado River regional boards, have since developed conditional waivers for wastewater from agricultural lands. These waivers have focused on (1) gathering data about on-farm practices, (2) aggregated reporting, and (3) tiering that places more stringent requirements on a small group of growers in the highest-risk tier. The Central Coast, a major agricultural region between Los Angeles and San Francisco, has relied on waivers since 2004 and, most recently, in 2017, readopted a prior waiver, despite a court's rejection of the prior waiver.

The Central Valley, covering the majority of California's agricultural lands, is at the forefront of a statewide shift from general waivers to general permits. The State Water Board is developing a new set of permits. Unlike general waivers that cover agriculture for an entire region for a five-year term, these new permits are tailored to specific geographic areas, such as the East San Joaquin valley, or to commodities, and they have no expiration date. The State Water Board has declared that these permits will be "precedential" for the state. It has also initiated a statewide Irrigated Lands Regulatory Program to coordinate the efforts of the nine regional boards.

Continuing challenges

Despite these efforts aimed at better regulating agricultural runoff, [in the words of the Central Coast regional board](#), "pollution gets substantially worse each year, and the actual numbers of polluted wells and people affected are unknown."

California has a regulatory patchwork for agricultural runoff, with some regions lacking any regulation, some covered by general waivers, and some covered by subregional permits. Regardless of the type of regulatory mechanism, California has yet to develop an approach to agricultural runoff that includes enforceable measures that ensure progress toward meeting water quality objectives.

One challenge is specifying effective nitrate controls for on-farm application; the regional boards largely rely on education campaigns and self-reporting. Some regional boards require that growers report the total nitrogen applied but have yet to cap nitrate applied for specific crops based on crop uptake. Permits could impose conditions on the timing and application rates of fertilizer and irrigation water to precisely match crop needs (known as nitrate balancing), i.e., set a maximum of "x" pounds of fertilizer per acre of lettuce.

Another challenge is specifying adequate monitoring to identify problem polluters, given infrequent monitoring stations and the reliance on grower reporting, done in the aggregate. Permits could require monitoring stations spaced at minimum distances and public reporting of discharges from individual farms. The highly anticipated Central Valley permits may be a bellwether to gauge whether California will finally impose effective controls on nitrates and pesticides.

In Brief

John R. Jacus

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Administrative Procedure Act, ripeness (Hydraulic Fracturing Rule)

[Wyoming v. Zinke](#), No. 16-8068, 2017 WL 4173619 (10th Cir. Sept. 21, 2017).

The Tenth Circuit Court of Appeals dismissed litigation challenging a 2015 Obama-era federal rule that strengthened hydraulic fracturing regulations on federal and Native American lands (2015 Rule) based on the Trump administration's comments and the U.S. Bureau of Land Management's (BLM) July 2017 proposal to officially rescind the 2015 Rule. Environmental groups and the BLM appealed a Wyoming federal judge's decision striking down the 2015 Rule, which was initially challenged by states and industry groups. Ultimately, the split three-judge panel dismissed the appeals and the lower court case as "prudentially unripe" because BLM has commenced rescinding the regulation. There is some uncertainty about the current status of the 2015 Rule, because the effective deadlines for implementation have passed.

Clean Air Act

[Clean Air Council v. Pruitt](#), 862 F.3d 1 (D.C. Cir. 2017).

The D.C. Circuit vacated EPA's administrative stay of portions of the methane regulations in the New Source Performance Standards (NSPS) for the Oil and Natural Gas Sector. EPA sought to stay further judicial review and issued a temporary stay of the prior rule pending the agency's reconsideration of those methane regulations. The court held, however, that EPA failed to comply with the requirements for reconsideration and stay contained in Clean Air Act § 307(d)(7)(B) and therefore that the agency's action was invalid. The majority opinion concluded that EPA's authority to stay the rule was expressly linked to the statutory requirements for administrative reconsideration set forth in § 307(d)(7)(B). EPA claimed broad discretion to reconsider its own rules, but the court disagreed, stating that EPA could not ignore or fail to enforce its own rules. Also, when EPA issued the stay, it relied upon § 307(d)(7)(B), and not a broader inherent authority. A subsequent petition for rehearing *en banc* was denied.

CERCLA

[Asarco, LLC v. Atlantic Richfield Co.](#), 866 F.3d 1108 (9th Cir. 2017).

The Ninth Circuit held that the plaintiff, Asarco, is entitled to a contribution claim against a fellow potentially responsible party (PRP) and defendant Atlantic Richfield under section 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) based upon a non-CERCLA settlement agreement. In 1998, the United States sought civil penalties under the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act, resulting in a judicially-approved settlement agreement with Asarco (the 1998 decree). Thereafter, Asarco filed for Chapter 11 bankruptcy protection and ultimately entered into a judicially-approved consent decree with the government under CERCLA in 2009 (the 2009 decree). In 2012, Asarco brought a contribution action against Atlantic Richfield and the district court dismissed Asarco's claims, holding that the 1998 decree triggered CERCLA's three-year statute of limitations and the 2009 decree did not create any new cleanup obligations or costs

not addressed in the 1998 decree. The Ninth Circuit first determined that the phrase “response actions,” under §113(f)(3)(B), which requires a party seeking contribution to first resolve its liability for “response actions,” is not limited to CERCLA actions and can include costs incurred for “corrective measures” under RCRA. The Ninth Circuit held that Asarco’s obligations under the 1998 decree were “response actions,” but rejected the district court’s ruling that the statute of limitations had expired because it held that Asarco’s claim was timely based on the 2009 decree. This determination turned on the court’s interpretation of what it means for a party to “resolve its liability” to the government in order to trigger a CERCLA contribution claim. Ultimately, the court held that the inquiry depends on a case-by-case analysis of the terms of the settlement agreement to determine if the settlement resolves, with “certainty and finality,” a PRP’s obligations for at least some of its response actions or costs. In this case, the court found that the 1998 decree did not provide “certainty and finality” because it referenced Asarco’s continued legal exposure and preserved all of the government’s enforcement options. As a result, the court of appeals remanded the case to district court to determine whether Asarco is entitled to compensation from Atlantic Richfield and in what amount.

[Emhart Industries v. New England Container Co.](#), C.A. No. 06-218 S, 2017 WL 3535003 (D.R.I. Aug. 17, 2017).

The District Court for Rhode Island in a multi-phase case involving the Centredale Manor Restoration Project Superfund Site ruled that several EPA decisions regarding the remedial action at the site were arbitrary, capricious, or otherwise not in accordance with CERCLA and the National Contingency Plan. While the court rejected most of potentially responsible party Emhart’s challenges to EPA’s decisions, the court found that groundwater at the site was far too contaminated to support the EPA’s classification of the groundwater as a potential drinking water source. The court also held that EPA did not sufficiently demonstrate that the remedy specified in the remedial order would likely result in restoring the groundwater to drinking water quality. Due to Emhart’s previous participation in the cleanup process, its good faith belief that the remedial order was arbitrary, and the fact that Emhart raised its objections throughout the process, the court found that Emhart had “sufficient cause” for noncompliance and was not liable for civil penalties. Ultimately, the court stayed EPA’s administrative order, remanded the case for further study, and retained jurisdiction. The court also noted that in the event the final remedies chosen by EPA “fundamentally alter” those previously proposed, EPA must restart the notice and comment process.

[Chevron Mining, Inc. v. United States](#), 863 F.3d 1261 (10th Cir. 2017).

The Tenth Circuit found that “bare legal title” was sufficient to establish owner liability under CERCLA as to the United States, which had legal title to the property that was the subject of mining operations by third parties. The court declined to reverse the trial court’s finding that the United States was not also an “arranger” under CERCLA because it never owned or possessed the hazardous substances which gave rise to CERCLA liability at the site in question. This result highlights the inter-circuit split concerning what level of ownership and owner

control triggers owner PRP liability under CERCLA. See *Next Millenium Realty, LLC v. Adchem Corp.*, below.

***Next Millenium Realty, LLC v. Adchem Corp.*, 690 Fed. App'x 710 [not for publication] (2d. Cir. 2017), petition for cert. filed (Sept. 28, 2017).**

The Second Circuit affirmed the district court's dismissal of CERCLA contribution and cost recovery claims against sublessor defendants with respect to a site operated as a textile manufacturing facility. Relying on Second Circuit precedent rejecting potential CERCLA owner liability for lessees and sublessors based upon their *de facto* ownership or site control, the court reasoned that if mere site control were enough to trigger liability, owner liability would balloon under CERCLA and operator liability would become practically meaningless. The court held that a sublessor/lessee should be considered liable only if it truly "stands in the shoes of an owner," and that "site control alone is an improper basis for the imposition of owner liability." The court also affirmed the district court's dismissal of claims against a certain defendant on a single enterprise theory due to certain lessor defendants having subleased the site to another defendant business entity that they owned. The court noted that management control alone is not enough to pierce the corporate veil and impose CERCLA liability under New York state law.

RCRA

[Delaware Riverkeeper Network v. Soil Safe, Inc.](#), Civ. No. 14-1349 (RMB/KMW), 2017 WL 2829603 (D.N.J. June 30, 2017).

This case involved a challenge to the use of recycled petroleum-impacted soils at three sites in New Jersey under RCRA's citizen suit provision. The soils in question were recycled according to the defendant's proprietary method of blending and conditioning contaminated soils and adding cement kiln dust to them, and were being used at the sites in question under the provisions of a remedial action work plan. The plaintiff non-governmental organization alleged that use of the recycled soil at remediation sites impacted by contaminated dredged materials presented an imminent and substantial endangerment to human health and the environment. After a trial, the district found that the defendant's product was not a solid waste under RCRA because the defendant engaged in legitimate recycling and beneficial use of the recycled soil, and that even if it was solid waste, its use at the sites did not present an imminent and substantial endangerment. The fact that defendant derived most of its revenue from the receipt of contaminated soil rather than from the sale of its recycled soils did not alter the court's analysis.

[American Petroleum Institute v. Environmental Protection Agency](#), 862 F.3d 50 (D.C. Cir. 2017).

The D.C. Circuit in a 2-1 split decision vacated significant portions of EPA's 2015 RCRA regulations limiting third-party recycling of hazardous secondary materials, but upheld provisions concerning how such materials are handled, and concerning emergency

preparedness requirements for generators storing hazardous materials for recycling. The regulations in question are borne of EPA's long-standing effort to revise the definition of "solid waste" to encourage legitimate recycling. Industry petitioners challenged the rule's legitimacy test and so-called "verified recycler exclusion" as exceeding EPA's authority. The court agreed with industry petitioners regarding a fourth factor of the EPA's legitimacy test with respect to secondary materials for which there were analogous raw materials. The rule required that products made with those recycled materials have a level of hazardous constituents the same or less than levels in products made with analogous raw materials. The D.C. Circuit rejected this factor for such secondary materials, noting that RCRA does not give EPA authority to require the removal or reduction of hazardous constituents when they pose no environmental or health risk.

Sovereign immunity, NEPA, ESA, and APA

[Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs](#), No. CV-16-08077-PCT-SPL, 2017 WL 4277133 (D. Ariz. Sept. 11, 2017).

The U.S. District Court for the District of Arizona dismissed an action by plaintiff environmental groups challenging the 25-year extension of an operating lease for the Four Corners Power Plant and the expansion of a mine on the Navajo reservation that provides fuel to the plant. Plaintiffs alleged the federal government had violated provisions of the National Environmental Policy Act, the Endangered Species Act, and the Administrative Procedure Act in so doing. The court dismissed the case because it held that intervenor defendant Navajo Transitional Energy Co. LLC (NTEC) was a necessary party to the dispute with a legally protected interest as mine owner, but had sovereign immunity as an arm of the Navajo Nation. Plaintiffs and the federal agency defendants opposed dismissal, but the court found that NTEC's interest in the outcome of the case "far exceed federal defendants' interest..." and that the interests of NTEC and defendants could diverge over time.

Views from the Chair

Cooperative federalism: What is it—now and in the future?

John Milner

[John Milner](#) is the Section of Environment, Energy, and Resources' 91st chair. A long-time Section member, Milner has previously served as publications officer, Council member, chair of the Special Committee on Section, Division and Forum Coordination, and chair of the Water Quality and Wetlands Committee. He is a partner in Brunini, Grantham, Grower & Hewes PLLC in Jackson, Mississippi.

One of the most prominent phrases in environmental law today is “cooperative federalism.” What does it mean? The Environmental Council of the States (ECOS), a national association that represents state environmental agencies, has recently focused on cooperative federalism, describing it as “[a] vision recasting state and federal roles for environmental management and public health protection at lower costs.” According to ECOS, cooperative federalism would result in the following positive changes:

1. Equal or greater environmental and public health protection and outcomes through smart deployment of resources on critical priorities;
2. Reduced operating costs due to a more efficient division of services, streamlined operating relationships, best practices sharing, and elimination of redundancies across states and divisions of EPA;
3. More effective allocation of limited resources by determining the best roles and functions states and EPA are each best suited to perform; and
4. With time, fewer disputes over who should take credit for successes and achievements, and who is responsible for decisions and actions that result in setbacks.

In June of this year, ECOS published a paper that provides a more in-depth explanation of its views: [“Cooperative Federalism 2.0: Achieving and Maintaining a Clean Environment and Protecting Public Health.”](#) The U.S. EPA, in its August 2017 “Draft FY 2018–2022 EPA Strategic Plan,” references this ECOS paper to point out that “states have assumed more than 96 percent of the delegable authorities under federal law” due to delegation authority agreements, while fully acknowledging that there are non-delegable programs and trust responsibilities for environmental protection in Native American areas for which it retains primacy. Consequently, an underlying theme of the EPA’s strategic plan’s perspective on cooperative federalism is “to reduce duplication of effort with authorized states and tailor its oversight of delegated programs.”

Due to its prominence, cooperative federalism was addressed at the 25th Section Fall Conference in Baltimore, as well as other important national issues, in the plenary session “News from Inside the Beltway: Administration and Congressional Priorities for Environmental, Energy, and Resources Law and Policy.” The moderator of this important panel was ECOS’s executive director, Alexandra Dunn, a former Section chair. Another panelist was Susan Bodine, senior advisor at U.S. EPA, who is also the administration’s nominee for assistant administrator of EPA’s Office of Enforcement and Compliance Assurance. Bodine’s nomination was approved by the Senate Environment and Public Works Committee (Committee) on July 12, 2017, and she currently awaits full Senate consideration. It is notable that Bodine agreed with (and quoted) ECOS’s projected results of cooperative federalism described above in her June 13 testimony before the Committee. (See transcript of Bodine’s June 13 Committee hearing

answers to “Questions for the Record,” at pp. 3, 5.) Joining Dunn and Bodine on the panel were Kevin Minoli, acting general counsel of U.S. EPA, and Tina Richards, Counsel, Committee on Energy & Commerce, United States House of Representatives. I hope that you were in Baltimore to hear this important panel discussion. For those who attended, materials provided by the panelists are available on the Section website.

Cooperative federalism is also a key focus for our Section beyond the Fall Conference. It has been designated as the initial “Section-wide” content topic to be addressed under the Section’s “content convergence” initiative. Through the content convergence process, committees will coordinate to explore the many facets of this important cutting-edge issue through webinars, newsletter articles, and other “deliverables.” Certainly, there will be questions and concerns raised about the meaning and implementation of cooperative federalism. The Section is committed to informing its members about the full diversity of perspectives on this issue as it evolves.

I have reserved the closing of this article for a heartfelt request that our Section members reach out to those who have been affected by the recent severe weather events, particularly in Texas, Florida, the Caribbean islands, and Mexico. We should not assume that, since these weather events are over, those affected no longer need help. In fact, this is the time that they most need our help. The Section’s website provides an up-to-date [“Severe Weather and Environmental Responses” webpage](#) to address assessment of a major weather catastrophe, evaluation of cleanup and insurance options, and long-term resilience strategies for the future. Let’s do all that we can to help!

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.

[Charles Franklin](#) has joined the Portland Cement Association as Vice President and Counsel, Governmental Affairs, in Washington, D.C. Franklin was formerly with Akin Gump Strauss Hauer & Feld, LLP, also in Washington, D.C. He advises and represents the Portland Cement industry on regulatory and legislative policy issues. Franklin is currently co-chair of the Section’s Special Committee on Congressional Relations and is a former chair of the Section’s Pesticides, Chemical Regulation, and Right-To-Know Committee. He contributes regularly to Section publications and programs.

[Emerson Hilton](#), formerly of Riddell Williams and Beveridge & Diamond in Seattle, has joined Hagens Berman Sobol Shapiro LLP as an associate. Hilton's practice focuses on environmental law, climate change, and clean energy. He has represented nonprofit environmental organizations, community groups, municipalities, Native American tribes, and others in a wide range of litigation. He currently serves the Section as co-chair of the Special Committee for Law Students.

[Joel Visser](#) has joined Dow Chemical Company in Midland, Michigan, as Counsel, Environmental Health and Safety. Visser was previously with Sidley & Austin LLP in Washington, D.C. His article "[International and Domestic Regulation of GHG Emissions from Aircraft](#)" was published in the Section's *Trends* newsletter in its March/April 2017 issue. Visser currently serves as co-chair of the Section's Special Committee for Section, Division, and Forum Coordination.