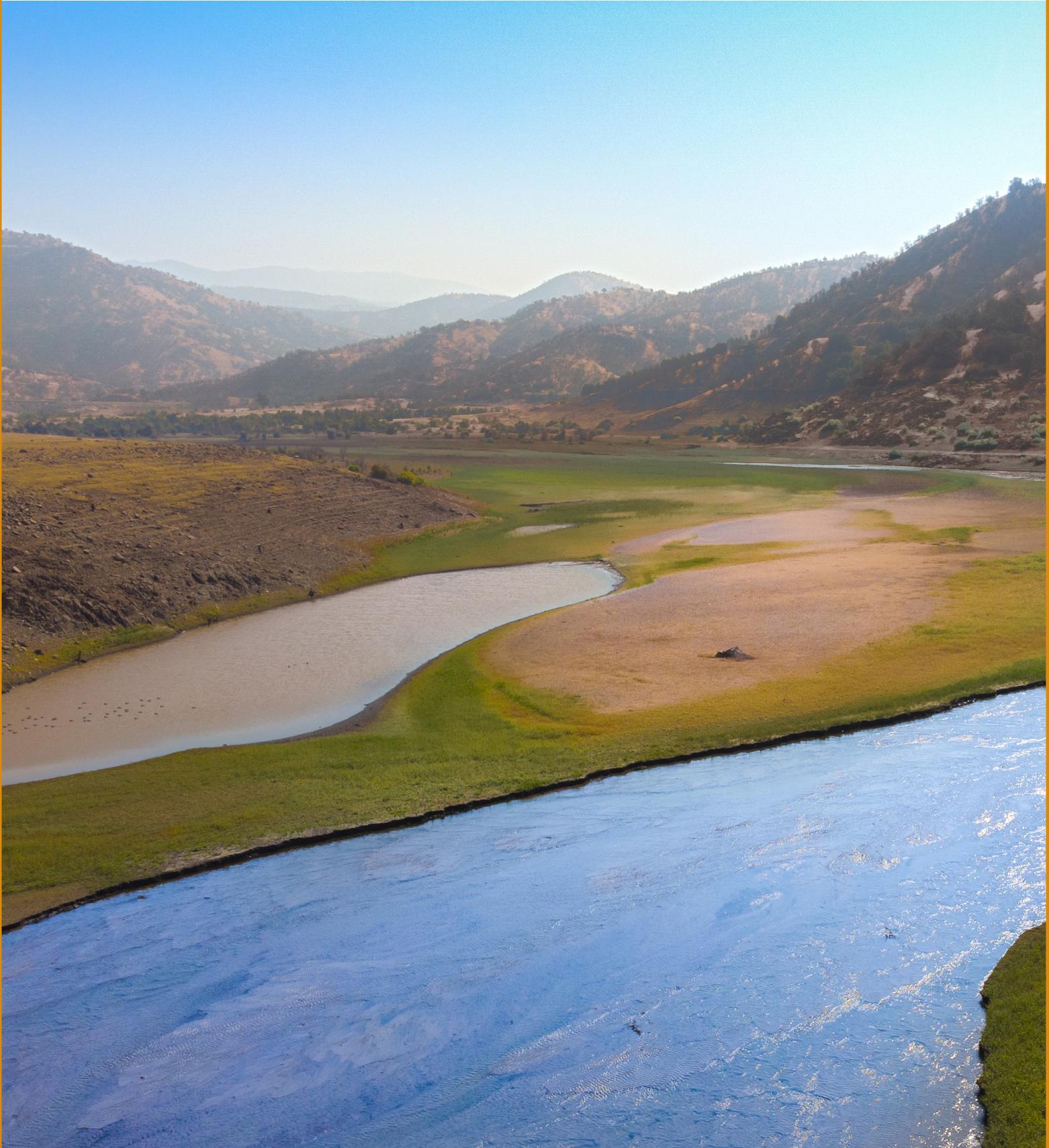


# TRENDS

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## Addressing surface water pollution carried by groundwater

Frank Holleman

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Does the Clean Water Act apply to pollution of navigable waters that has moved some distance from the point source through groundwater? Or is navigable water pollution exempted from the act altogether if the pollution travels any distance through groundwater? Recently, the U.S. Courts of Appeals for the Ninth and Fourth Circuits ruled in favor of Clean Water Act protections, while the Sixth Circuit simply held that the Clean Water Act does not apply. *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018); *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018); *Tennessee Clean Water Network v. TVA*, 905 F.3d 436 (6th Cir. 2018). That circuit split led the U.S. Supreme Court to agree to review the Ninth Circuit's decision next term.

Here's a preview of what the Supreme Court will decide.

### The language of the Clean Water Act

The Clean Water Act makes unlawful a "discharge of a pollutant" without a permit. 33 U.S.C. § 1311 (a). It defines a "discharge of a pollutant" to be "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Though pollution traveled through groundwater, in each of these cases there is an "addition" of a pollutant "to navigable waters." The act's point source definition includes a "well," a "container," "rolling stock," and a "concentrated animal feeding operation," all of which do not deliver pollutants directly to navigable waters. 33 U.S.C. § 1362(14).

Congress did not require that pollutants be added "directly" to navigable waters or "by" a point source. As Justice Scalia noted in *Rapanos v. United States*, 547 U.S. 715, 743 (2006): "The [Clean Water] Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" (Emphasis added.)

If another reading were adopted, then polluters could simply bury their pipes a few feet from the waterway or pull them back a short distance and allow pollution to flow into navigable waters under or over ground. The Clean Water Act would then be at the mercy of audacious manipulation of discharge structures.

## What is not at issue

No one disputes that the Clean Water Act does not prohibit groundwater pollution. Likewise, these cases do not present instances of nonpoint source pollution which “is caused by diffuse sources” and “does not result from a discharge at a specific, single location (such as a single pipe).” EPA Office of Water, *Nonpoint Source Guidance* 3 (1987). In these cases, pollution flows a short distance directly from specific locations: sewage wells, a pipeline, and coal ash lagoons.

## The cases

Unlike the Sixth Circuit, every other court of appeals that has addressed a case of navigable water pollution carried from a point source by groundwater found that the Clean Water Act applied, including the Second, Seventh, and Tenth Circuits. Proponents of the narrow interpretation sometimes cite language from other Fifth and Seventh Circuit decisions, but those decisions did not involve pollution of navigable waters carried by groundwater. Many district courts have found Clean Water Act jurisdiction in these circumstances, while a minority can be cited to the contrary. Still other decisions recognize that Clean Water Act discharges may travel through or over other media to the navigable water, such as through the air or over land.

## EPA

Over four decades, administrations of both parties upheld Clean Water Act coverage of navigable water pollution that travels some distance through groundwater—most recently in a 2016 U.S. Environmental Protection Agency (EPA) and U.S. Department of Justice amicus brief in the Ninth Circuit case that is before the Supreme Court. As the 2016 amicus brief sets out, EPA’s long-standing position is contained in a number of EPA and state agency permits. However, in advance of the Supreme Court’s hearing next term, the Trump administration’s EPA recently reversed course in an April 2019 “Interpretative Statement,” now open for public comment.

## What’s next?

EPA’s Interpretative Statement suggested a limit on its position by stating that when pollutants move from a point source to a waterway through a medium other than groundwater, EPA would decide on a case-by-case basis whether pollution violates the Clean Water Act. However, the act does not carve out an exception just for groundwater. Only time will tell whether, after the comment period ends, the Trump administration will leave its Interpretative Statement untouched and whether it will adopt regulations or undertake to revise or advise states to revise permits regulating pollutants that travel to a navigable water through groundwater. Regardless, the Supreme Court is scheduled to decide the issue next term.

## Equitable development and brownfields redevelopment

Letitia D. Moore

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A major focus of the federal Superfund program is promoting revitalization of properties across the country to support and improve the communities that host contaminated sites. This broader purpose for brownfields redevelopment is the concept of equitable development. In the context of putting formerly contaminated properties back into economic circulation, regulators, local governments, and community leaders are looking to address a variety of adverse impacts, including blight, urban sprawl, and jobs and housing imbalance in economically distressed communities. Communities and regulators are asking owners and developers of contaminated and formerly contaminated properties to pursue notions of equity in the course of their brownfields redevelopment.

In context, equitable development involves investing in the communities that have been host to the industries that produced contaminated sites and host to the abandoned contaminated or formerly contaminated sites. Equitable development asks that responsible parties engage in sustainable cleanup and redevelopment of brownfields land in order to reduce adverse impacts, stimulate economic development, and promote community benefits. For responsible parties hoping to clean up and market brownfield land, equitable development presents a new measure of success, not just remediation and not just redevelopment, but also economic development, land revitalization, and community improvement. Fortunately, equitable development may also offer a long-term solution to risk management.

For responsible parties looking for freedom from the yoke of a brownfields site, equitable development may sound like a ball and chain. In addition to cleanup costs and the normal transaction costs involved in selling land, there are now community aspirations to contend with: city councils, planning commissions, school districts, and neighbors looking for parks, housing, community centers, commercial centers, or schools. Legitimate questions arise concerning the intersection of remediation obligations and community development. At that intersection we encounter questions about cleanup standards and liability. Are you cleaning up for commercial or residential use? Does a responsible party have a role or responsibility for future development? Will the developer have a role in or responsibility for cleanup? Can the local land use planning authority have a role or responsibility in the cleanup? The right answers to these questions can help you manage your client's risk and liability.

Regardless of whether a party is interested in righting the wrongs of the past and contributing to the community good, pursuit of equitable development should be part of brownfields asset management. Every owner of a brownfields site wants to manage risk and liability, i.e., limit the risks posed by legacy contamination and prevent future risk to avoid future liability. With the right investment of resources, equitable development can provide a pathway to long-term

reduction of both risk and liability by giving a brownfields site a future. While an underutilized brownfields site is a liability, a brownfields site with a development future is an asset. Assets generate income and, as such, are managed to retain value.

The typical discussions of the benefits of equitable development revolve around benefits to the community (e.g., economic revitalization for new land uses, elimination or reduction of environmental contamination, or new community assets/resources such as housing, parks, schools, community centers, civic buildings, and restored green spaces). The benefit to the responsible party is usually described as good will. In some instances, good will leads to financial gain, i.e., a sales price that covers remediation costs. What often is not talked about is that a developed property, hosting a long-term investment in the community, offers long-term risk management. A successful real estate transaction for construction of a viable land use, a use that will not be abandoned and will be managed as a valuable asset, is far superior to an empty or underutilized property. With an equitable development goal, the cleanup will be targeted to a concrete future use. The property will be managed to support that future use, including proper care and maintenance of treatment systems or caps and active efforts to avoid future contamination.

Success lies in approaching the brownfields matter as a real estate transaction, rather than merely a remediation. In this, the responsible party becomes the community partner, playing a role in demystifying the environmental issues and managing expectations. The goal is development of a viable, long-term, community-serving land use at your brownfields site. Under the right circumstances, the cleanup can be tailored to the actual future use. Remediation activities or long-term operation and maintenance may be incorporated into the development design and engineering. In the role of community partner, give thought to the technical, financial, and regulatory resources that can assist local governments and community stakeholders in setting reasonable expectations and achievable goals. Community-serving public projects can attract public, private, and nonprofit investments. The U.S. Environmental Protection Agency provides assessment, cleanup, workforce, and job training grants, as well as revolving loan funds, to local governments and communities to facilitate brownfield revitalization projects. Nonprofit organizations like the Center for Creative Land Recycling bring resources, advice, and expertise that enhance a community's capacity for effective brownfields development. A successful community development project on a brownfields site can generate long-term stewardship and change a liability into an asset.

## The impact of Brexit on environmental law in the UK

Simon Tilling and Ben Stansfield

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### Introduction

Brexit—the United Kingdom of Great Britain and Northern Ireland's (UK's) proposed departure from the European Union (EU)—will undoubtedly have an impact on environmental law and protection in the UK, and many fear it would be for the worse. But it should nevertheless be said that Brexit has stimulated a healthy and vibrant debate on what the UK might achieve once environmental policy and law is back in its own hands. In this article, we look ahead to what might happen, if, and when, the UK exits the EU (at the time of writing, the UK is still “in,” just!).

We need to start, of course, by explaining the options for exiting the EU. There is a spectrum of outcomes, ranging from a no-deal exit through to remaining a full member of the EU, possibly after another referendum. In between these two options is a “deal”—whether that's the deal championed by Prime Minister Theresa May, or something else—in which a new relationship between the UK and the EU is created. There is currently no Parliamentary majority for a no-deal Brexit or a second referendum and much disagreement as to what the deal should look like (much of which results from Northern Ireland, which has the only land border with the EU)—as a result Parliament is in deadlock.

Notwithstanding that Parliament has stalled, the UK government still has work to do and the Department for Environment, Food and Rural Affairs (Defra) has been in hyper-drive setting out its vision for environmental law and policy after Brexit. It is no coincidence that Defra's leader, Secretary of State Michael Gove, was a proponent of leaving the EU and sees his Ministry as a platform for promoting a positive vision of life outside the EU. Mr. Gove can sense the public's mood, and the conversations around #GreenBrexit have tapped into a well of growing environmentalism in the UK.

In addition to proposing new policies, Defra and its related agencies have been planning for a no-deal Brexit, drafting close to one hundred pieces of secondary legislation to ensure a legislative “business as usual” regime in the UK.

A full review of the implications of Brexit on environmental law is well beyond the scope of this short article. Instead, we have selected four areas of environmental law that illustrate some wider

points around the difficulties the UK faces in attempting to disentangle over 40 years of UK and EU environmental law.

### **The EU as a single market: REACH**

There is no better illustration of the practical difficulties of Brexit than the regulation of chemicals, which in the EU is as much about protecting the integrity of the single market as it is about protecting human health and the environment.

The UK has willingly participated in an EU system for decades and has no independent system of its own. As a result, Brexit has been a major headache for the chemicals industry and those who rely on chemicals because, in a no-deal Brexit world, businesses would need to comply with two near-identical regimes of registrations and authorizations, rather than just one.

The big complaint about the EU's flagship chemicals regulation, Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), is that it achieves its aims through placing a heavy burden on businesses. Having a duplicate regime only compounds that burden. To make matters worse, the rush to get a UK-REACH into place resulted in several errors and mistakes in the UK legislation. The glitches are being fixed, but it does little to inspire confidence.

### **The EU as a player on the global stage: The EU Emissions Trading System**

Another difficult question arises for the UK's participation in the EU Emissions Trading System (ETS). The EU ETS is modelled on its UK-only precursor, the UK ETS, and was intended to be the seed from which a global trading system could develop. EU ETS is much less about protecting the single market and much more about the EU leading the charge on global carbon reductions.

If the UK leaves the EU with a "deal," the UK will stay in EU ETS for the transition period. Thereafter, the UK proposes to implement a carbon pricing system "of at least the same effectiveness and scope" as EU ETS, but the details have not yet been published.

If the UK withdraws from the EU with no deal, then participation in EU ETS will cease. In this scenario, EU ETS will be replaced in the short term by a domestic carbon tax (£16 per tonne), with the longer-term goal of instituting a replacement market-based emissions trading scheme. UK installations previously in receipt of free EU ETS allowances would continue to enjoy equivalent benefits under this carbon tax.

Longer term, a revised UK ETS could link with the EU ETS, just as the Swiss are doing now, but that will be far from straightforward.

## **The EU's role in setting common goals: The Birds and Habitats Directives**

Biodiversity improvements and habitats creation are often cited as great successes of the EU's environmental policy. Since the adoption of the Birds Directive in 1979, followed by the Habitats Directive in 1992, the EU has protected, conserved, and enhanced the natural capital within its Member States: currently over 18 percent of the EU's territory is designated as a protected area for nature.

In the UK, we have a complex tapestry of legal protections for habitats and species, designated locally, nationally, by European law, and by international conventions. We protect cold-water coral reefs, saltmarshes, and mountain summits; and dunes, grassland, rivers, and woodland, which are together home to thousands of species.

Currently, much of the Brexit planning in the UK is concerned with preparations for a possible no-deal (see above) and there seems little political appetite, let alone time, to consider cuts to the scope of environmental law in the UK as part of those Brexit-planning legal changes, or indeed in the short-term following Brexit.

There is, however, a growing concern that future governments may want to deregulate. In that scenario, protected habitats and species may find themselves an easy target, with rules relaxed to enable development to proceed in areas that would otherwise be protected.

## **The EU's role as enforcer of environmental standards: The Office for Environmental Protection**

The European Commission has a critical governance role, having the power to act against its Member States where they have infringed EU law. So, if the UK leaves the EU, who will "police" the UK government in place of the Commission? The answer lies in the proposed establishment of the Office for Environmental Protection (OEP).

At the end of 2018, the government published a draft Environment Bill, containing proposals to establish the OEP and setting out its powers. It is expected that the bill will be introduced later this year and receive Royal Assent in early 2020, although realistically the OEP may not be running until late 2020 at the earliest.

The OEP will be a body independent of Parliament and will hold the government and public bodies to account on environmental matters. The OEP will scrutinize and report upon progress made in improving the natural environment and will monitor and report upon the implementation of environmental law. In all cases, the government will be obliged to respond to the OEP's findings, as it does with recommendations made by the UK's Committee on Climate Change.

The OEP will have powers to investigate public bodies for failing to comply with environmental law and it will issue decisions and take legal action to ensure compliance. This is a wholly new area of regulatory oversight in the UK and the questions of how willing the OEP will be to use its sharp enforcement “teeth” and how the UK copes with another layer of regulation remain to be seen.

## Conclusion

Three years ago, we feared that environmental issues would be lost in the maelstrom of Brexit negotiations, but fortunately this hasn't been the case. Lawyers at Defra have worked tremendously hard to ensure “business as usual” in the event of a no-deal Brexit, and policy managers have pumped out a number of impressive papers in recent months proposing changes to the UK's waste, air quality, and packaging regimes. This is a time of great potential for change for UK environmental law, and there is a lot of work to do for UK's environmental lawyers, whatever the route forward.

## Water 2070: A focus on water quantity

Robert (Bo) Abrams

*Bo Abrams is a professor of law at Florida A&M University School of Law. This article is a substantially shortened version of the materials presented at the 48th SEER Spring Conference held in Denver, Colorado, on March 28, 2019.*

Looking ahead 50 years and projecting the nation's water future is a daunting, but important, undertaking. Based on the most respected governmental forecasts, that future involves significant changes in water availability such that we must begin to prepare soon. This article discusses four areas of water use that must be met for the nation's water security needs: (1) water for concentrated populations, (2) water for ecological stability, (3) water for food production, and (4) water for energy production.

Let us begin with where we are at. The 2018 Climate Change Assessment explains:

Significant changes in water quantity and quality are evident across the country. These changes, which are expected to persist, present an ongoing risk to coupled human and natural systems and related ecosystem services (high confidence). Variable precipitation and rising temperature are intensifying droughts (high confidence), increasing heavy downpours (high confidence), and reducing snowpack (medium confidence). Reduced snow-to-rain ratios are leading to significant differences between the timing of water supply and demand (medium confidence). Groundwater depletion is exacerbating drought risk (high confidence).

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U.S. GLOBAL CHANGE RESEARCH PROGRAM, Fourth National Climate Assessment 158 (2018).

The Third National Climate Assessment illustrates the nation's water future for 2050 using a Water Supply Sustainability Risk Index:

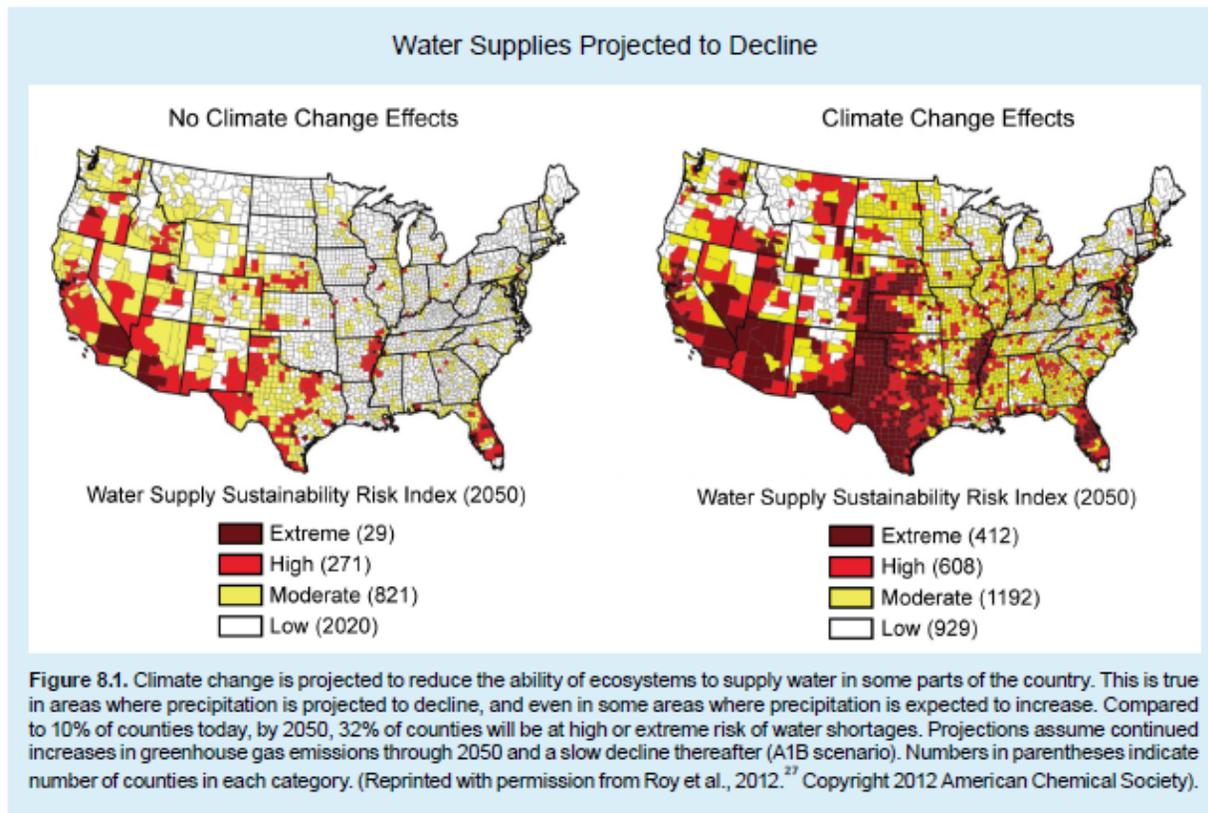


Figure 1. Source: Jerry M. Melillo et al., [U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 198 \(2014\)](#).

Finally, the 2015 U.S. Geological Survey (USGS) Data on Water Demand (Use) study presents a statistical picture of total water use by sector:

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<b>Sector</b>	<b>Withdrawals (in millions of gallons per day)</b>	<b>Withdrawals (in millions of acre feet per year)</b>	<b>Percentage</b>
<b>Public Supply</b>	39,000	43.7	12%
<b>Irrigation</b>	118,000	132	37%
<b>Livestock</b>	2,000	2.2	1%
<b>Aquaculture</b>	7,550	8.4	2%
<b>Mining</b>	4,000	4.4	1%
<b>Domestic</b>	3,260	3.6	1%
<b>Industrial</b>	14,786	16.6	5%
<b>Thermoelectric Power</b>	133,000	149.4	41%
<b>Total</b>	<b>322,000</b>	<b>361.0</b>	<b>100%</b>

Figure 2. Source: USGS 2015 Water Use Report Tables 2a and 2b at 10–11.

<b>Sector</b>	<b>Withdrawals (in MGD)</b>	<b>Consumption (in MGD)</b>	<b>Withdrawals (in MAF/yr)</b>	<b>Consumption (in MAF/yr)</b>	<b>Percentage Consumed</b>
<b>Irrigation</b>	118,000	73,200	132,000	82,000	62.0%
<b>Thermo-electric Generation</b>	133,000	4,310			3.2%

Figure 3. Source: USGS 2015 Water Use Report, Tables 7 and 12 at 27, 43.

In reporting on irrigation, the USGS notes, “Consumptive use of irrigation water represents the fraction of water that was originally withdrawn from a source for irrigation and is subsequently removed from availability owing to evaporation, transpiration, or incorporation into crops.”<sup>1</sup>

Putting the Climate Assessment and USGS information together, three of the four categories of water security are at great risk. Almost all major metropolitan areas in the United States, with a

<sup>1</sup> USGS 2015 Water Use Report at 30.

few exceptions in the Midwest, are areas of Extreme or High risk. Perhaps even more concerning, the broader swatches of elevated risk speak to the possibility of ecological collapse. Particularly in the West, already-stressed riparian environments experience frequent and at times sustained episodes of dewatering as the region's water users exercise their rights to divert water from heavily appropriated streams. On the food security front, the extreme risk regions coincide with the nation's most vital agricultural regions for specialty crops (California, Arizona, and Central Florida), and primary areas of grain and forage crop production.

Only one category—water security for energy—escapes a major water supply problem. That is largely because the relationship of water supply to energy security is less apparent, and because thermoelectric generating facilities can be built almost anywhere. And even though water used for thermoelectric generation now exceeds the water withdrawn for food production, thermoelectric generation-related water use is becoming more efficient. Where increased irrigation efficiencies now yield consumption rates as high as 70 percent, more than 95 percent of current thermoelectric cooling water is returned to the stream. Additionally, closed loop systems, the presently preferred technology, further reduce withdrawals. Finally, the trend underway to avoid carbon dioxide emissions and switch to “clean” energy renewables such as wind (no water needed) and solar (little or no water needed, depending on the technology employed) will lessen the overall water demand of the energy sector as older generating plants are retired.

### **The predicted response to the threats to water security**

*Water for Concentrated Populations' Security.* Failure of water supply for a major city is almost unthinkable. Imagine the dislocations that would cascade from even a few days without water flowing through the pipes. While this hypothetical is not realistic, it makes a simple point: water security to support concentrated populations is imperative. Even if it meant dewatering some streams and diverting water away from agriculture and power generation, sufficient water would somehow find its way to the cities.

The elements of a proactive solution to this problem are comparatively easy to identify and already largely at hand. Cities make only 12 percent of the nation's withdrawals and most cities return as much as 90 percent of the water to streams after treatment. When things get bad enough, landscape irrigation uses can be curtailed, making the urban water footprint even smaller. Other elements include: (1) laws that ensure water transfers can take place, (2) better, more predictable response mechanisms that can meet unusual drought conditions (e.g., water banking institutions, emergency order authority), and (3) reliable storage and conveyance facilities that will include enabling aquifer storage and recovery projects and the ease of water wheeling. These mechanisms already exist, but improvements are necessary. Of course, because potable water for drinking and bathing is so valuable and requires such small quantities, the price people would be willing to pay for the water supporting those uses is quite high, as much as 100

(or more) times the value of the same water in agricultural use. As we say in water-law circles, “water runs uphill to money.”

*Water for Ecological Security.* The motivating risk here is ecological collapse, where the absence of water or extreme overuse of water triggers a cascading effect and loss of ecosystem services. The tragedy that transpired in California’s Owens Valley due to dewatering is an object lesson of far-reaching unintended environmental and economic consequences of a water transfer that left no water behind. The law in most of the West to address this problem is weak but not nonexistent, whereas much of the East has yet to recognize this as a potential issue. Almost all Western states have added a public interest standard to their requirements for perfecting new appropriative rights, and some apply that standard to changes in water rights. As conditions become increasingly dire, the minimal needs of whole ecosystems will hang in the balance. In contrast, at present, there are comparatively few serious in situ versus off-stream use conflicts, and even the most pronounced of them are over several species of endangered fish or snails.

Looking ahead, a public interest standard may be too vague a protection to withstand the economic and political pressure for offstream uses that drive so much economic development. A more sure-footed protection for ecologically vital water use is the setting and enforcement of minimum flows and levels grounded in sound science. Very few states have implemented minimum flows and levels aggressively, and even fewer have enforced minimum flows and levels rigorously in the face of developmental pressures. Washington state is an exception and is now working out the means needed to meld unflinching protection of minimum flows and levels with local needs for water to sustain traditional uses and growth.

*Water for Food Security.* Food security for the United States equates to the continued productivity of the agricultural sector, including dairy, livestock, and aquaculture. In places with extremely fertile soils and long growing seasons, such as the Central Valley of California, Arizona, and Central Florida, continued cultivation of high-value specialty crops will out-compete low value row crops and forage crops (though not cities or, in some cases, the environment). Thus, for those areas, the solution might be emphasizing high-value crops and ceding water used for lower-value crops and marginal land to cities.

In contrast, those same choices are unlikely to be available in the nation’s midsection, where the unsustainable pattern of irrigation from the Ogallala and Sparta aquifers poses “extreme” and “high” water shortage risk across the entire region by 2050, with worse likely to come by 2070. The two principal 20th century remedies for water shortage, importation and increased groundwater pumping, will not work. While there may appear to be “unused” water available from points north and east, gravity and geography price major importation projects out of reach. Regional streamflow is going to be decreasing, thereby adding more pressure on groundwater, but pumping more groundwater simply speeds up the exhaustion of the region’s already overdrafted groundwater supplies. For the nation’s midsection, the prospect is grim; irrigated farming will not remain a universal option.

Looking from a national perspective, food production is exceedingly vital, in terms of both domestic food security and economic effects. Realistically, the U.S. land and water base in this technologically sophisticated age is sufficient to provide food security, but major changes in how water is used will and must occur. On the Great Plains there will be no choice but to switch to dry-land farming techniques, selectively augmented by the judicious use of groundwater, with a newfound need to use high-efficiency irrigation to maximize crop yields. Cropping patterns are likely to change, with drought-resistant crop varieties and crops having lower water needs as the plantings of choice. Inevitably, major amounts of food production will move to the wetter areas of the nation, including the corn belt, rust belt, and certain areas of the Southeast.

## Conclusion

Water law has always been adaptive to meet society's most pressing needs. This was true in the early years of American legal history, when natural flow riparianism gave way to reasonable use riparianism. This legal adaptability was at work when prior appropriation emerged to meet the needs of the West's arid climate and general lack of readily available streams and will again take center stage as the climate-challenged citizenry of the 21st century find ways to modify water law to support their security needs for concentrated populations, ecological health, food, and energy. We can, we must, expect no less.

## **Doing *less with less* at EPA: Environmental enforcement has plummeted in the era of Trump. Here's what we can do about it.**

**Paul Gallay**

*Paul Gallay has been president of Riverkeeper, an advocacy organization for the Hudson River and its tributaries, since 2010. Paul previously served in New York State's Departments of Law and Environmental Conservation, in the land conservation movement, and in private practice. He teaches "U.S. Water and Energy Policy" at Columbia University.*

### **EPA enforcement policy under the Trump administration**

The U.S. Environmental Protection Agency (EPA) enforcement policy has always changed between presidential administrations, but the administration of President Donald J. Trump is unique in its passion to deregulate, cut EPA enforcement programs, and reduce facility inspections.

Indeed, President Trump's stated agenda for EPA is to eliminate the agency "in almost every form" and leave behind only "[tidbits](#)." Brady Dennis, *EPA Head Defends White House's Plan*

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*for Massive Cuts to His Agency*, WASH. POST, June 15, 2017. Beginning in 2017, Trump has consistently sought a greater than [30 percent reduction](#) in spending at EPA, the staff of which is already [8 percent smaller](#) than it was at the start of the current administration. J. Eilperin et al., *New EPA Documents Reveal Even Deeper Proposed Cuts to Staff and Programs*, WASH. POST, Mar. 31, 2017; B. Dennis et al., *With a Shrinking EPA, Trump Delivers on His Promise to Cut Government*, WASH. POST, Sept. 8, 2018. The largest cuts at EPA have been those at the Office of Compliance and Enforcement, the staff of which is 16 percent smaller than it was just two years ago.

A wide range of EPA enforcement statistics, from total actions commenced to fines and penalties collected to the number of negotiated settlements, show extraordinary declines under the Trump administration. For example, in 2018, total penalties collected by EPA [dropped at least 55 percent](#) compared with averages during the previous two decades, and the total number of compliance inspections performed by EPA [has fallen by half](#) since 2010. J. Eilperin & B. Dennis, *Civil Penalties for Polluters Dropped Dramatically in Trump's First Two Years, Analysis Shows*, WASH. POST, Jan. 24, 2019; J. Eilperin & B. Dennis, *Under Trump, EPA Inspections Fall to a 10-Year Low*, WASH. POST, Feb. 8, 2019.

EPA officials have argued that individual states and territories can pick up the slack left by steep cuts in federal environmental inspections and enforcement. Such arguments don't hold up, though, as budget cuts at many state agencies, fed by reductions in federal funding, are driving [declines, not increases](#), in state-level inspection and enforcement. Institute for Policy Integrity New York University School of Law, *Irreplaceable: Why States Can't and Won't Make Up for Inadequate Federal Enforcement of Environmental Laws*, June 2017.

### **Less enforcement, more pollution**

The decline in federal and state enforcement and inspection programs described above is exposing Americans to higher levels of pollution. From 2015 to 2018, inspections of large water pollution discharge permit holders declined by 8 percent, while serious incidents of water pollution [increased by 10 percent](#) (rising from 1,507 to 1,659). U.S. Environmental Protection Agency: Enforcement and Compliance History Online: State Water Dashboard. Similarly, inspections at facilities regulated under the Clean Air Act also dropped between 2015 and 2018, correlating with a striking [28 percent increase in high profile violations](#) at such facilities (rising from 362 to 462). *Id.*

This means trouble for our health and welfare. Whether due to the abandonment of efforts to control methane flaring in North Dakota, the loosening of selenium and sulfur dioxide restrictions at power plants in West Virginia and Texas, or the significant delays related to regulating [chlorpyrifos in California farm fields](#), countless Americans are less safe due to the increases in pollution associated with President Trump's desire to eliminate EPA "in almost every form." S. Eder et al., *This Is Our Reality Now*, N.Y. TIMES, Dec. 27, 2018. The damage

will [fall most seriously on people of color](#), as shown by studies like that by Dr. Robert Bullard, Distinguished Professor at the Barbara Jordan-Mickey Leland School of Public Affairs at Texas Southern University, who famously demonstrated that “poor whites do better than middle-class blacks,” when it comes to exposure to pollution, because of inequitable housing policies, barriers to full participation in permit proceedings, and the resulting concentration of toxic activities in heavily-minority neighborhoods.

### **Reversing the trend**

History suggests that inspections and enforcement totals will eventually climb again, especially given the aberrant nature of current EPA enforcement policies. But, can anything be done during the balance of the current administration to reduce the damage caused by efforts to eliminate the EPA “in almost every form”?

The best antidote to Trump-era anti-environmentalism may lie in citizen science and community advocacy, which can trigger more robust action by state governments for cleaner rivers and safer drinking water. For example, years of bacteria testing by nongovernmental organizations and volunteer citizen scientists drove New York State to enact a comprehensive “[Sewage Pollution Right to Know Act](#),” in 2012, to assure public access to critical information about water treatment plant failures and storm-related contaminant discharges into the waters where everyday New Yorkers swim, boat, and fish.

In 2017, with local advocates clamoring for action in the face of well over two thousand “right to know” pollution incident reports, New York State lawmakers approved \$2.5 billion in grants, over five years, to cut emissions from aging wastewater treatment plants, leaking septic systems, old landfills, lead in water supply lines, overburdened stormwater systems, and the state’s expanding dairy industry. [Another \\$500 million](#) in clean water grants was added in 2019. A. Dunne, *Environmental Groups Say More Is Needed To Fund Water Infrastructure Projects*, WAMC, Apr. 1, 2019.

Just as importantly, in 2017, New York State enacted an “[Emerging Contaminants Protection Act](#),” as a companion to its multibillion-dollar infrastructure improvement grant program. As a result, the Department of Health will require virtually all of New York State’s public drinking water supplies to test for a broad suite of previously unregulated chemical pollutants, the health impacts of which are only now becoming known.

Together, these measures exemplify the principle of “using all the tools in your toolkit”: they represent a multifaceted program of legislation, inspection, enforcement, compliance assistance, and investment, supported and spurred on by citizen science and broad public disclosure of water pollution incidents, all helping to deliver cleaner rivers and safer drinking water.

## Fulfilling the promise of clean air and water

In 1972, the Clean Water Act promised every American drinkable, swimmable, fishable water within ten years. Now, nearly 50 years later, [nearly half our rivers aren't safe for recreation and tens of millions lack safe water to drink](#). U.S. Environmental Protection Agency: National Summary of State Information, Assessed Waters of US; B. Plumer & N. Popovich, *Here Are the Places That Struggle to Meet the Rules on Safe Drinking Water*, N.Y. TIMES, Feb. 12, 2019. Without a robust new federal commitment to environmental inspection, law enforcement, and infrastructure investment, coupled with citizen action and public disclosure of pollution incidents, access to the benefits of the Clean Water Act and other bedrock environmental laws will become harder to achieve—and easier to lose—for millions of Americans.

What we must do, to provide healthier rivers, safer drinking water, and a cleaner environment for all Americans, is *inspect, report, enforce, and invest* in achieving compliance with our environmental laws. What we must not do, if we aspire to a cleaner, safer environment, is to allow continuation of the declines in staffing, inspections, and law enforcement that have been seen at EPA in recent years.

## In Brief

**John R. Jacus**

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## Clean Air Act

[\*\*Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC\*\*](#), No. 2:17-CV-32, 2019 WL 1126347 (D. Utah Mar. 12, 2019).

The U.S. District Court for the District of Utah granted partial summary judgment to an environmental nongovernmental organization (NGO) for violations of the Clean Air Act by several Utah companies and their corporate officer defendants (who are, incidentally, also performers in the reality television show *Diesel Brothers*) for illegally modifying diesel trucks to defeat emission controls, selling parts to achieve the same end, and selling such modified trucks, among other actions. Defendants moved for summary judgment, but the court denied the motion in large measure, and granted the plaintiff's cross motion except with respect to the scope of injunctive relief sought. In so ruling, the court found that plaintiff did have standing to sue, since the alleged violations contributed to air pollution along the Wasatch Front in the Salt Lake City area, and plaintiff's members were injured in fact by such pollution, which was redressable by the relief being sought in most respects. Though defendants argued that plaintiff's members'

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injuries were not fairly traceable to their conduct, since their contribution to air pollution was so insignificant, the court rejected this argument and adopted a standard first applied in Clean Water Act cases involving multiple parties discharging pollution into a single waterway. The court held that plaintiff had met the standard by showing defendants discharged a pollutant that causes or contributes to the kinds of injuries suffered by its members along the Wasatch Front. Defendants also argued that the Clean Air Act did not permit civil enforcement against responsible corporate officers, and individual defendants should therefore be dismissed. In evaluating this argument, the court followed decisions by several other courts under the Clean Air Act and Clean Water Act, concluding that the individual defendants can be held liable in this case to the extent that they knew of their respective company's Clean Air Act civil violations, had the authority to prevent or correct those violations, and failed to do so. Finally, the court held that defendants can be liable for violations of the Clean Air Act by (1) selling trucks with parts that defeat emission controls even if they did not install them, provided they knew or should have known of their presence, and (2) giving such a truck away as a prize, since the benefit to their television show and reputation was sufficient consideration to qualify as a sale under the statute.

## Clean Water Act

### [Southwestern Elec. Power Co. v. United States Env'tl. Prot. Agency](#), 920 F.3d 999 (5th Cir. 2019).

The U.S. Court of Appeals for the Fifth Circuit has ordered the U.S. Environmental Protection Agency (EPA) to strengthen its rules for managing so-called "legacy" wastewaters produced primarily at coal-fired power plants. EPA's 2015 power plant effluent limitation guidelines rule was challenged by industry and also by several environmental NGOs. The NGOs challenged the rule on the ground that EPA had impermissibly designated impoundments as Best Available Technology Economically Achievable (BATEA) for leachate and legacy wastewaters (produced before a date to be determined in the future). The court agreed with the NGOs concerning legacy wastewaters, noting that EPA had rejected impoundments as BATEA for most of the same specific categories of wastewater produced prospectively (non-legacy wastewaters), and so its acceptance of impoundments as BATEA for legacy wastewaters was not supported by substantial evidence in the record, and signals arbitrary and capricious agency action. Likewise, with respect to leachate, the challenged rule determined that the same impoundment technology identified by EPA decades earlier as Best Practicable Control Technology Currently Available was now also BATEA for leachate, but the court found that doing so was inconsistent with the statute's articulation of those two different standards. Industry's challenges to other aspects of the rule have been severed from the court's consideration of the NGOs' claims. The NGO-challenged portions of the rule were vacated by the court and remanded to EPA for further rulemaking.

## Clean Water Act, Administrative Procedure Act

### **[Sanitary Bd. of City of Charleston, W. Virginia v. Wheeler](#), 918 F.3d 324 (4th Cir. 2019).**

The U.S. Court of Appeals for the Fourth Circuit recently affirmed EPA's rejection of the state of West Virginia's proposed water quality standard for copper. The state approved the revised standard in 2015, which would have allowed the discharge of higher levels of copper by the Charleston Sanitary Board's wastewater treatment plant into receiving waters. EPA rejected the proposed standard and the Sanitary Board brought suit under the Clean Water Act and the Administrative Procedure Act in the U.S. District Court for the Southern District of West Virginia. The Sanitary Board argued in the district court that EPA had a nondiscretionary duty under the Clean Water Act to approve the proposed standard, and even if it had discretion to disapprove the standard, its disapproval violated the Administrative Procedure Act. The district court disagreed, and the Sanitary Board appealed to the Fourth Circuit. The Fourth Circuit affirmed the lower court's ruling, holding that EPA has discretion under the Clean Water Act, even after the 60 days provided by statute, to determine whether the proposed water quality standard was sufficiently protective and based on a sound scientific rationale. The court also held that EPA's decision was not arbitrary or capricious even though the state's proposal was based upon a long-accepted methodology, since EPA's denial was based upon a protocol that was newer and had been openly recommended by EPA as preferred, and was thoroughly explained in its rejection letter to the Sanitary Board. Finally, the court rejected the Sanitary Board's argument the administrative record should have been closed after the 60-day deadline for EPA to have rendered a decision on the proposed standard, since that would have removed critical information explaining EPA's decision.

### **[Blue Water Baltimore, Inc. v. Pruitt](#), No. CV GLR-17-1253, 2018 WL 704847, 2018 U.S. Dist. LEXIS 18456 (D. Md. Feb. 5, 2018).**

The U.S. District Court for the District of Maryland has reversed a decision of EPA to deny the petition of certain environmental NGOs to determine whether stormwater discharges from certain industrial and commercial sites were contributing to violations of water quality standards. EPA's denial of that petition was grounded in substantial part on the existence of state and local programs to address the stormwater discharges at issue. In reviewing that denial, the court found that EPA was not entitled to *Chevron* deference because the statute was not ambiguous or silent on the matter of investigating such sources of stormwater discharges. The Clean Water Act directs EPA to determine whether the discharges contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States. 33 U.S.C. § 1342(p)(2)(E). If they do, EPA must issue a permit or bring enforcement to abate the discharges, or both. The court went on to find EPA's denial arbitrary and capricious under the Administrative Procedure Act because it did not rely on or apply the scientific criteria provided in the Clean Water Act itself concerning such a determination, citing *L.A. Waterkeeper v. Pruitt*, 320 F. Supp. 3d 1115 (C.D. Cal. 2018) (previously summarized in *In Brief, Trends*, Vol. 50, No. 2 (Nov.- Dec. 2018)).

## NEPA, Administrative Procedure Act

### [Citizens for Clean Energy v. U.S. Dep't of the Interior](#), No. CV-17-30-GF-BMM, 2019 WL 1756296, 2019 U.S. Dist. LEXIS 67259 (D. Mont. Apr. 19, 2019).

The U.S. District Court for the District of Montana has held that the U.S. Department of the Interior's (DOI's) reversal of a coal-leasing moratorium instituted in 2016 constituted a major federal action that failed to comply with the minimum requirements of the National Environmental Policy Act (NEPA), and also was final agency action reviewable under the Administrative Procedure Act (APA). At issue was the order of the former Secretary of the Interior, Sally Jewell, instituting a moratorium on coal leasing pending preparation of a programmatic environmental impact statement (PEIS) concerning the coal leasing program (the Jewell Order), and the recent action of the immediate past Secretary, Ryan Zinke, to reverse that order so as to expeditiously resume coal leasing pursuant to various executive orders concerning energy independence and regulatory reform issued by President Trump (the Zinke Order). The United States characterized the recent reversal of the Jewell Order as a return to the status quo not requiring review under NEPA, and citing the case of *Western Organization of Resource Councils v. Zinke*, 892 F.3d 1234 (D.C. Cir. 2018) (*WORC*), as dispositive. The court disagreed, noting, *inter alia*, that the holding in *WORC* involved no federal action beyond the initial 1979 PEIS for the coal leasing program, and was limited to finding that DOI's reliance on the 1979 PEIS was not itself a major federal action warranting NEPA review. The Zinke Order was different, since it lifted the moratorium and authorized coal leasing to commence, thereby constituting the major federal action that was missing in *WORC*. The court then found that the Zinke Order constituted final agency action reviewable under the APA, concluding that "[t]he decision to revoke the Jewell Order and expedite coal lease applications constitutes the consummation of Federal Defendants' decisionmaking on the moratorium and coal-leasing program. . . ." and that the "legal consequences that flow from the Zinke Order are evident." Finally, the defendants' decision not to initiate the NEPA process with respect to the Zinke Order was found to be arbitrary and capricious. Plaintiffs' additional request for the court to require the Bureau of Land Management to resume preparation of a PEIS for the coal-leasing program was denied, however, as a matter left to agency discretion and beyond the court's authority under NEPA. The court ordered the parties to meet and confer in good faith regarding remedies in light of the court's rulings.

## Indian law, Tribal treaty preemption

### [Herrera v. Wyoming](#), No. 17-532, 2019 WL 2166394, 2019 U.S. LEXIS 3538 (2019).

The U.S. Supreme Court overturned a Native American's conviction for hunting off his tribe's reservation on Wyoming state lands, and in so doing reversed a more than 120-year-old precedent concerning the effect of statehood on tribal treaty rights. The Wyoming Court of Appeals had affirmed the conviction of Clayvin Herrera, a native Crow Tribe member, for

pursuing a herd of elk off the reservation on to state jurisdiction lands. Herrera claimed his tribal treaty rights to hunt were not abrogated by Wyoming statehood, but the Wyoming Court of Appeals disagreed, relying on a 1995 case decided by the U.S. Court of Appeals for the Tenth Circuit and an 1896 Supreme Court decision, which held that Wyoming statehood impliedly repudiated the tribe's treaty rights to hunt beyond the boundaries of the reservation. *Crow Tribe of Indians v. Repsis*, 73 F. 3d 982 (10th Cir. 1995), citing *Ward v. Race Horse*, 163 U.S. 504 (1896). The 5–4 majority opinion concluded that “there simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act,” and went on to state “nor is there any evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so . . . .” Accordingly, the conviction was vacated.

## CERCLA

**[Garrett Day, LLC v. Int'l Paper Co.](#), No. 3:15-CV-36, 2019 WL 1331680, 2019 U.S. Dist. LEXIS 49478 (S.D. Ohio Mar. 25, 2019).**

The U.S. District Court for the Southern District of Ohio has held that dissolved corporations may be held liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a state agency granting funds for redevelopment of a brownfield site can be a CERCLA cost–recovery claimant, and a brownfields redevelopment company that purchased a former papermill site with knowledge of contamination and later sold it for redevelopment was not liable as a CERCLA owner or operator. On a motion for summary judgment by certain defendant former operators of the paper mill, each which had dissolved in the early 1990s, the court noted the split of authority on the amenability of dissolved corporations to suit under CERCLA, but then noted no exceptions in CERCLA's definition of “person,” and how the statute's broad remedial purposes would be frustrated by such a limitation, among other factors. The court, therefore, denied the motion, holding defendants amenable to suit as former owners and operators. One of the former owner operators also sought summary judgment against the state agency grantor of brownfields redevelopment funds, arguing that it could not seek cost recovery since it had not incurred response costs. The funds in question were granted to the city of Dayton for cleanup and redevelopment. The court also dismissed this motion, reasoning that because the agency reviews and administers the grant of funds to allow the city to pay its contractors, it should be eligible to recover response costs and reimburse taxpayers. The necessity and consistency of such response costs with the national contingency plan were issues yet to be litigated. Finally, the court granted summary judgement to a brownfield redevelopment company that asserted it was never a CERCLA owner or operator since the paper mill was not operational when it bought and then sold the property for purposes of redevelopment.

## CERCLA, RCRA

[Colorado Dep't of Pub. Health & Env't, Hazardous Materials & Waste Mgmt. Div. v. United States](#), No. 17-CV-02223-RM-SKC, 2019 WL 1147601, 2019 U.S. Dist. LEXIS 40530 (D. Colo. Mar. 13, 2019).

The U.S. District Court for the District of Colorado held certain CERCLA and Resource Conservation and Recovery Act (RCRA) claims of the state of Colorado against the United States and Shell Oil with respect to the Rocky Mountain Arsenal Superfund Site (Site) to be valid and not susceptible to sovereign immunity and lack of operator status defenses, but then dismissed a federal claim as time barred under applicable statutes of limitations, and preserved another state statute of limitations defense for later resolution. The state brought the action to challenge the defendants' failure to obtain certain post-closure permits under RCRA and the Colorado Hazardous Waste Act, and the transfer of federal land at the Site to a local municipality in violation of the CERCLA Record of Decision (ROD), among other authorities. With respect to the land transfer, Colorado claimed that the defendants transferred the federal land at the Site outside the federal government in violation of various agreements, CERCLA, the ROD for the Site, and a Colorado Executive Order. In response, the defendant, Shell, argued that it was not an operator under CERCLA, and because plaintiff failed to allege that Shell was presently operating the site, it should be dismissed. The court disagreed, finding that Shell could be considered an operator, relying on the definition of "operator" under CERCLA, and citing *United States v. Bestfoods*, 524 U.S. 51 (1998). The plaintiff had alleged that Shell did in fact currently make decisions about compliance with environmental regulations at the Site. Shell also argued that CERCLA's permit waiver precluded plaintiff's claim that Shell is required to obtain a post-closure permit because the permit would address work already being carried out as part of the CERCLA remedy. The court again disagreed, finding that the CERCLA permit waiver does not preempt permitting requirements for units that are being regulated under RCRA and state statute at the time the CERCLA action commences. The United States asserted sovereign immunity from liability for Colorado's claims, but the court disagreed with these defenses, as well. The court reviewed RCRA's sovereign immunity waiver in 42 U.S.C. § 6961 and noted that the first sentence of the provision imposes certain mandates on each department, agency, and instrumentality of the federal government, and later in the same provision Congress expressly waived any immunity of the "United States" as a whole. The court concluded that this amounted to a waiver of sovereign immunity under RCRA. With respect to the CERCLA claims, the court noted that the text of 42 U.S.C. § 9620 obligates the United States to comply with the substantive and procedural requirements of the "chapter," and plaintiff's claims were based on 42 U.S.C. § 9620(h), which is part of the chapter in question. Finally, concerning defenses based on applicable statutes of limitation, the court found that Colorado's CERCLA claim regarding property transfer was time-barred, since the transfer took place in 2007, and section 2401(a) requires that suit be filed within six years of when the right of action first accrues. The Court also denied a motion to dismiss based on Colorado's 2-year limitations period for bringing an action concerning post-closure permitting, but preserved the issue for resolution later.

## State utility regulation

**[Citizens v. Brown](#), No. SC18-213, 2019 WL 1856444, 2018 Fla. LEXIS 1928 (Fla. Apr. 25, 2019).**

The Florida Supreme Court recently affirmed a decision of the state's Public Service Commission (PSC) allowing Florida Power and Light (FPL) to recover the costs of environmental remediation and damage mitigation from its rate-paying customers under state statute. The case involved the migration of hypersaline cooling water from FPL's cooling water canal system serving two nuclear power generating units at its Turkey Point power plant, contaminating the Biscayne Aquifer. Monitoring performed by FPL in connection with an "uprate" action for the plant that was approved by the PSC revealed extensive contamination by and migration of the plant's hypersaline cooling water from the FPL canals, resulting in the issuance of notices of violation to FPL by the state and other local authorities. FPL agreed in two settlements to extensive remedial and mitigation actions to halt and reverse the contaminant migration over a 10-year period that was estimated to eventually cost \$176 million. FPL later petitioned the PSC for recovery of its costs, claiming they were reasonable and prudent costs of complying with orders of regulators and necessary to protect the environment. The Florida Office of Public Counsel and NGOs opposed the petition on grounds that the costs were necessitated by FPL's mismanagement of its canal system at Turkey Point, that FPL's characterization of those costs as an outgrowth of the PSC-approved monitoring plan that revealed the magnitude of contamination was improper, and the cost recovery provision at issue was intended for the recovery of prospective compliance costs, and not the costs of remediation of past harms to the environment. The PSC approved the petition for cost recovery in the amount of \$132 million, and the Florida Office of Public Counsel appealed to the Florida Supreme Court. The court upheld the PSC's ruling that the costs at issue were an extension of the PSC-approved monitoring plan. The court went on to examine *de novo* the argument that cost recovery was only available for prospective actions to protect the environment, but ultimately disagreed, noting that the remediation of past harm through abatement of a pollution-causing source and cleanup of contaminated resources is an essential part of shielding as-yet uncontaminated ecosystems, or portions thereof, from harm. The decision of the PSC was, therefore, affirmed.

## 27th Fall Conference in Boston

**Shelly H. Geppert**

*Shelly H. Geppert is of counsel with Eimer Stahl LLP in Chicago. She is the planning chair for the 27th Fall Conference in Boston.*

Surround yourself in the warm hues of New England's fall foliage, and watch the lazy flow of the Charles River pass by as you indulge in a cup of chowder—we are heading to Boston for the Section of Environment, Energy, and Resources' [27th Fall Conference](#). Our conference takes place September 11–14, 2019, at The Westin Copley Place, perfectly situated among landmarks such as Fenway Park.

A carefully curated program includes a keynote presentation by the Hon. Jeffrey Clark, Assistant Attorney General, Environmental and Natural Resources Division, U.S. Department of Justice; the Hon. Matthew Leopold, General Counsel, U.S. Environmental Protection Agency; and the Hon. Mary Neumayr, Chairwoman, White House Council on Environmental Quality, focusing on the Trump administration's environmental, energy, and resources agenda. And, a Day Two keynote presentation featuring Alicia Barton, President and Chief Executive Officer, New York State Energy and Research and Development Authority; the Hon. Maura Healey, Attorney General, Commonwealth of Massachusetts; and Alexandria McBride, Chief Resilience Officer, City of Oakland, California, will address the promotion of renewable energy and its use to mitigate climate change.

Plenary sessions offer you opportunities to test out trial themes before a mock jury as renowned litigators Nadira Clarke of Katten Muchin Rosenman LLP and Jessica Grant of Venable LLP take the stage for oral argument in a groundwater contamination matter, and to learn about the impact of the Trump administration's efforts to reduce regulatory burdens with respect to the environment and natural resources from Megan Ceronsky, Executive Director for the Center for Applied Environmental Law and Policy; Ron Tenpas of Vinson & Elkins LLP; and Cathy Woollums, Senior Vice President and Chief Sustainability Officer at Berkshire Hathaway Energy.

In addition to the two plenary sessions, a further 16 CLE accredited sessions will be presented, including:

- Living in Interesting Times: China's Impact on Environmental and Energy Law
  - Panelists: Barbara Finamore, Senior Strategic Director, Asia, Natural Resources Defense Council; Jay Monteverde, Director, Global Environmental Programming, American Bar Association Rule of Law Initiative; Steve Wolfson, Senior Attorney, Office of General Counsel, U.S. Environmental Protection Agency; and Hongjun Zhang, Holland & Knight LLP.
- Corporate Environmental Leadership and Innovation

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- Panelists: Sonya Bishop, Managing Counsel, Phillips 66; Marisa Blackshire, Senior General Counsel, BNSF Railway; Roger Martella, Director and General Counsel, Global Environmental, Health and Safety Operations, General Electric; and Yesenia Villaseñor, Managing Environmental, Health and Safety Counsel, Tesla.
- The Price of Power: Promoting Power Production and Progress
  - Panelists: Sarah Hofmann, Commissioner, Vermont Public Utility Commission; Travis Kavulla, Director of Energy, Policy Team, R Street; Clare Kindall, Solicitor General, Connecticut Office of the Attorney General; and Harvey Reiter, Stinson Leonard Street LLP.
- Pesticides: Do Litigation Pressures Effectively Supersede Government Safety Determinations and Threaten to Exterminate Important Products?
  - Panelists: Trenton Norris, Arnold & Porter Kaye Scholer LLP; Stephanie Parent, Senior Attorney, Center for Biological Diversity; Robert Perlis, Assistant General Counsel for Pesticides, U.S. Environmental Protection Agency; and Sara Beth Watson, Steptoe & Johnson LLP.

Plan to join friends old and new in Boston for stimulating presentations on a wide variety of pressing issues, networking, scheduled activities such as yoga, a run/walk, a public service project that has us working alongside the Charles River Conservancy, cocktail hours, and dine-arounds. You don't want to miss this wicked smart event. Please visit our [webpage](#) to view the full conference schedule and register.

## Views from the Chair

**Amy L. Edwards**

*Amy L. Edwards became the Section of Environment, Energy, and Resources' 92nd chair during the Section's annual business meeting in August 2018. A longtime Section member, Edwards has previously served as education officer, Council member, 21st Fall Conference planning chair, and chair of the Environmental Transactions and Brownfields Committee. She is a partner with Holland & Knight LLP in Washington, D.C.*

As my year as chair comes to an end, I wish to express my gratitude to all who have assisted me on this journey. This year has been extraordinary and has gone by very quickly. We have had five very successful conferences, with great attendance, dynamic networking, and fantastic keynote speakers. We have continued to attract very high-profile speakers, including EPA Administrator Andrew Wheeler, Colorado Attorney General Phil Weiser, and Special Counsel to the Administrator Peter Wright. Our publications continue to be outstanding. We saw the rollout of the ABA New Membership Model and are promoting these benefits to recruit new members.

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I especially want to thank all of my officers and Council members, particularly Karen Mignone, Howard Kenison, Jonathan Kahn, Jeff Dennis, Susan Floyd, and Michelle Diffenderfer, for all that they have done this past year to support the Section's efforts. I also want to thank our committee chairs, vice chairs, Section members, and our staff for their contributions to all that we do as a Section. We would not be successful without your support.

I want to highlight the Section's updated climate resolution and report, which was approved by the Council on April 26 and submitted to the ABA on May 7. In this resolution and report we urge the United States government, state, tribal, territorial, and local governments, and the private sector to take leadership roles to achieve the following goals: to reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and to contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above preindustrial levels. We urge the United States government to engage in active and constructive international discussions under the United Nations Framework Convention on Climate Change and its progeny, and to remain in, negotiate, or ratify treaties and other agreements to reduce greenhouse gas emissions and adapt to climate change. We also encourage lawyers to engage in pro bono activities to aid efforts to reduce greenhouse gas emissions and adapt to climate change. This updated resolution and report will be presented to the ABA House of Delegates for approval this summer at the 2019 ABA Annual Meeting. This resolution and report is the result of the extensive work of several individuals, but notably the efforts of John Dernbach of Widener Law School. Thank you, John, for your substantial contribution in advancing this important effort. I also want to thank Lee DeHihns, Michael Gerrard, Tracy Hester, Marisa Martin, and Roger Martella for their valuable contributions.

This has been a challenging year, with the rollout of the new ABA website and ABA Connect, requests that the Sections produce a significant number of CLEs for the free CLE library, and funding cuts from the ABA, but we have tightened our belts and stepped up to these challenges. We appreciate your patience and understanding as we have adjusted to these new demands.

### **The Section's goals and accomplishments this past year**

Over the past year, as the ABA has unveiled its New Membership Model, we have tried to remind members (and nonmembers) why SEER membership matters. SEER remains the premier forum for environmental, energy, and resource lawyers in the United States. During these turbulent times, it is more important than ever for us to have a place where we can have a vigorous debate about the ongoing vitality and merit of any given issue, program, or institution. For example: *How is your state responding to the guidance out of Washington, D.C., on what is a "Water of the US"? Are discharges to groundwater regulated under the Clean Water Act?* Under the leadership of Alf Brandt, we have attempted to provide committees with a platform using SEER Connect to foster a lively debate on the issues about which our members care most deeply. This is a platform that we hope to continue.

During my year as chair, I emphasized three primary goals: *engagement*, *recruitment*, and *outreach*.

1. *Engagement*. We encouraged all of our members to join at least one [committee](#). The unveiling of the new ABA website gave our members an opportunity to revisit the committees to which they belong (and to sign up for new committees). Committees continue to be the best way to get involved in our Section—to write an article, propose a panel idea for an upcoming conference, or contribute to a webinar. We know that there were many frustrations earlier in the year when the new ABA website and SEER Connect were first unveiled, but we believe that those vehicles are now working well. So, if you haven't visited lately, see how the [website](#) and [SEER Connect](#) can work for you!
2. *Recruitment*. We encouraged all our members to recruit new members. In particular, continue to reach out to our Membership Officer, Jeff Dennis, with ideas about member benefits and recruitment; or to the cochairs of our Special Committee on Diversity Bar Outreach and Engagement, Roger Martella and Dawn Lettman; or to the cochairs of our Special Committee on Young Lawyers, Kelly Poole and Taylor Hoverman; or to the membership vice chair of your favorite committee.
3. *Outreach*. Over this past year, we have had meetings with the Rocky Mountain Mineral Law Foundation; cosponsored programs with the Environmental Law Institute; spoken at conferences sponsored by the Canadian Bar Association's National Environmental, Energy, and Resources Law Section and the United Kingdom Environmental Law Association; invited their leaders to speak at our conferences; and sent a delegation to speak at the World Justice Forum VI in The Hague.

I emphasized three additional goals, as well: refining *member benefits*, *mentoring* younger members, and *content convergence*.

1. *Member benefits*. With the rollout of the New Membership Model on May 1, we continued to examine the bundle of benefits that we offer SEER members.
2. *Mentoring* younger lawyers. We have built up our library of SEER Essentials webinars that will in the future become part of the free CLE library for ABA members. We continued our formal mentoring of future leaders through our Leadership Development Program and Membership Diversity Enhancement Program.
3. *Content convergence*. We continued to emphasize the importance of having our members collaborate in developing programming and publications and having our committees with overlapping interests talking with one another.

Thank you. It has been a true honor and privilege to serve as your chair this past year. I know the Section will be in very capable hands going forward under the talented leadership of chair-elect Karen Mignone.

## 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](mailto:ellen.rothstein@americanbar.org).*

**Joshua Bloom** has joined Environmental General Counsel LLP in Berkeley, California. For his nearly 30 years of practice in Washington, D.C., and the San Francisco Bay Area, Bloom's work has encompassed a broad array of state and federal environmental and natural resources laws, covering litigation, transactions, and counseling for both public and private clients. His expertise includes brownfields redevelopment and associated risk-based cleanup, risk allocation, and negotiating regulatory agreements and environmental insurance policies, with specialization in endangered and protected species laws, the Clean Water Act, wetlands, hazardous wastes, and consumer laws such as California's Proposition 65, TSCA, and green chemistry regulation. Bloom has written articles for *Natural Resources & Environment* and *Trends* concerning risk allocation and the Clean Water Act.

**JoAnne Dunec** has joined the Office of the City Attorney of Oakland, California, as Deputy City Attorney-Real Estate Unit. Dunec was a vice president and underwriting counsel with Old Republic Title Company in San Francisco. She is treasurer of the John Muir Association, which supports the National Park Service in the John Muir Historic Site, and has served as a director and officer of the Bay Planning Coalition and the Urban Land Institute. Dunec has been active in the Section for many years, serving on the editorial board of *Natural Resources & Environment* for more than 20 years.

**Sheila Hollis** is the newly elected chair of the United States Energy Association, the U.S. member of the World Energy Council. Hollis is an internationally recognized energy lawyer and represents clients worldwide in multiple major energy law matters, including investigations and enforcement actions, and major developments of worldwide energy projects of all types. She is the founding managing partner and current chair of the Washington, D.C. office of Duane Morris LLP, having served on the firm's five-member executive committee for many years. Hollis taught energy law for two decades at the George Washington University Law School and is widely published in energy and environmental issues. Hollis is the first attorney in private practice to receive the Platt's Global Energy Award for Lifetime Achievement. She served as president of the Women's Council on Energy and Environment and received its Woman of the Year award. Hollis is the first woman president of the Energy Bar Association and chaired the Energy and Environment Section of the Federal Bar Association. She has served the ABA for decades. Hollis has served in many roles in the Section of Environment, Energy, and Resources, notably as the Section chair, and currently is the Section's representative to the ABA House of Delegates. She has also chaired the ABA's Standing Committee on the Law Library of Congress, the Board of Editors of the *ABA Journal*, the ABA's Standing Committee on Gavel Awards, the

## ABA's Fund for Justice and Education, and the ABA's Standing Committee on Environmental Law

**George Knapp** has been appointed the general counsel and senior vice president of Cogentrix Energy Power Management, LLC in Charlotte, North Carolina. Knapp was previously general counsel of PowerFin Partners, LLC, a solar energy company in Austin, Texas. He has also served as general counsel of renewable energy companies Microgrid Energy, LLC, and Wind Capital Group, LLC. Knapp's earlier career included partnerships with international law firms in Washington, D.C., and as deputy assistant general counsel with the Federal Energy Regulatory Commission. He served as Section chair in 1998–1999 and has been a leader in the Section in many roles.

**Angela R. Morrison** has joined the Earth & Water Law team and will manage its Tallahassee office as part of the firm's growing Southeast practice. Morrison has practiced environmental law for three decades. She is board certified by the Florida Bar in state and federal government and administrative practice. Morrison represents utility and industry clients with legislative, regulatory, permitting, and compliance matters. She has been very active with the Section for many years in air quality, energy, Section publications, and, most recently, serving on the Section's Council.

**Angila Retherford** is now the vice president of environmental and corporate responsibility for Centerpoint Energy. The company recently merged with Vectren Energy of Evansville, Indiana. At Vectren she was vice president for environmental affairs and corporate sustainability.