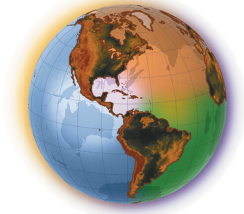


# TRENDS

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## ***County of Maui v. Hawai'i Wildlife Fund: A preview of the Supreme Court's review of Clean Water Act jurisdiction over groundwater***

**Norman A. Dupont**

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“O Groundwater, groundwater, wherefore art thou Groundwater? . . . ‘Tis but thy name that is mine enemy.”

In its October 2019 Term, the U.S. Supreme Court will grapple with yet another seemingly intractable Clean Water Act (CWA) definitional question—whether the act covers pollutant discharges that go to groundwater and thence to a navigable water? In *County of Maui, Hawai'i v. Hawai'i Wildlife Fund*, No. 18-260 (*Maui*), the Court granted certiorari on one question: “Whether the CWA requires a [NPDES] permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.”

This article previews the case, the positions of the litigants, and potential paths toward resolution by the Court. As suggested by the opening paraphrase of Juliet's anguished plea about Romeo's name, the real problem in this case may be the word “groundwater” itself.

### **1. The discharge of treated wastewater (sewage) into injection wells (point sources) that reach groundwater, and thence the Pacific Ocean**

Like many municipalities, the County of Maui (County) treats sewage at a wastewater treatment facility—in this case, the Lahaina facility. After secondary treatment at the Lahaina facility, the County discharges the treated wastewater directly into four injection wells.

The essential facts are undisputed. The County conceded below that the four injection wells that convey treated sewage to ground are “point sources” as defined under the Clean Water Act. *See* [33 U.S.C. § 1362\(14\)](#) (defining “point sources” and including “wells” as one example of point sources). The County also essentially conceded that once the point source injection wells discharge the pollutant (the treated sewage) into groundwater, the pollutant ultimately travels to a navigable water—the Pacific Ocean. *See* [Hawai'i Wildlife Fund v. County of Maui](#), 886 F.3d 737, 744 (9th Cir. 2018).

### **2. Is the medium (groundwater) in fact the message?**

To paraphrase Marshall McLuhan, the medium, groundwater, is the key issue between the litigants on the largely undisputed facts. The County argued in its petition for certiorari and will argue in its merits brief that the CWA distinguishes between “navigable waters” and “groundwater,” and will further argue that groundwater constitutes a “nonpoint source” under the

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statutory framework. Thus, for the County, the medium (groundwater) is the message: If a discharge from an admitted “point source” reaches groundwater (arguably a nonpoint source) before reaching a navigable water, then the discharge is no longer a “point source” discharge by the time the pollutant reaches its destination, in this case the Pacific Ocean.

In contrast, the respondents, a group of environmentally based nongovernmental organizations, in their brief opposing certiorari, quote from no less than Justice Scalia in [Rapanos v. United States](#), 547 U.S. 715, 743 (2006), in which Justice Scalia for the plurality stated: “The 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 in original). From this, the respondents argue that the medium (groundwater) is irrelevant as long as the ultimate “message” (a discharged pollutant) reaches a navigable water.

### **3. Potential decision point for the Court—do Justice Scalia’s past ruminations foretell the future?**

The Court could take several alternative routes to decide this case, including a decision that Congress in the Clean Water Act intentionally left regulation of groundwater to the states. One of the biggest issues the Court will face, however, is the implication of Justice Scalia’s plurality opinion in *Rapanos*. Justice Scalia concluded for the plurality (including the current Chief Justice and Justices Alito and Thomas) that the Clean Water Act’s definition of “waters of the United States” must be limited to only those “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features.’” *Rapanos*, 547 U.S. at 739.

In his typically combative fashion, Justice Scalia took on contrary arguments from respondents (including the United States) that “water polluters will be able to evade the permitting requirement of [CWA] §1341(a) simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters.” *Rapanos*, 547 U.S. at 742–743. As Justice Scalia responded in his plurality opinion: “This is not so. Though we do not decide the issue, there is no reason to suppose that our construction today significantly affects the enforcement of §1342....” This was so because, as Justice Scalia noted, “[t]he 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.’ §1362(12)(a) (emphasis added).” *Rapanos*, 547 U.S. at 743.

Perhaps the current Court will conclude that Justice Scalia’s musings were mere *dicta*, not necessary to the decision in *Rapanos*, and that his citations to lower court opinions discussing the “indirect” discharges into navigable waters were simply inapposite. This is the approach the U.S. Court of Appeals for the Sixth Circuit took in its 2–1 opinion dismissing Justice Scalia’s language as mere *dicta* and holding that discharges to groundwater from coal ash point sources are not regulated under the CWA. [Kentucky Waterways Alliance v. Kentucky Utilities Co.](#), 905 F.3d 925, 936 (6th Cir. 2018).

But, the respondents (and the Ninth Circuit in its opinion in *Maui*) have directly raised the issue of the validity of this portion of the *Rapanos* opinion. The Court in its 2019 Term must now confront how far it will go to dismiss an opinion by one of its most influential recent members. This issue will pose a key pivot point in the Court's ultimate decision in *Maui*.

Finally, the U.S. Environmental Protection Agency's (EPA's) April 12, 2019, [Interpretative Statement](#) is unlikely to prove persuasive to the Court. There, EPA concludes that "the text, structure and legislative history of the CWA demonstrate Congress's intent to leave the regulation of groundwater wholly to the states under the Act." But the Court, in its seminal decision in *Chevron* and in prior cases, has consistently held that, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

In *Maui*, if the Court concludes that the language of the CWA is clear, then that will end the matter, no matter what EPA suggests in its Interpretative Statement.

## **Preemption and purpose: *Virginia Uranium, Inc. v. Warren***

**Matthew E. Price and Max Minzner**

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The Atomic Energy Act creates a comprehensive federal scheme governing radioactive safety. Like many such schemes, the statute carves out and protects certain areas where states retain the authority to act, while empowering the federal government to regulate other areas. The statute, though, is unusual in that it makes preemption turn on the state's *purpose*: Congress expressly preserved state authority to "regulate [even covered] activities for purposes *other than* protection against radiation hazards." 42 U.S.C. § 2021(k) (emphasis added).

*Virginia Uranium, Inc. v. Warren*, 848 F.3d 590 (4th Cir. 2017), concerns a Virginia state law adopting a moratorium on uranium mining. The parties agreed that the Atomic Energy Act does not regulate uranium mining, leaving states to regulate that activity pursuant to their police powers. Despite that fact, the challenger (which owns a large uranium deposit) contends that the moratorium is preempted, because, although nominally addressing mining, the moratorium's actual aim was to prevent radiation hazards arising from milling and tailings storage—activities that the statute *does* regulate. The case was argued at the U.S. Supreme Court in November 2018 and is now pending for decision.

One central question in the case concerns whether Virginia, despite having regulated only uranium mining, nevertheless intruded into a federal field because of its alleged *purpose*. According to Virginia, so long as it regulates activities outside the scope of the statute, its purpose is irrelevant. Section 2021(k) is merely a savings clause, preserving state regulation even of activities covered by the statute, except when enacted with an improper purpose. If the state is regulating an uncovered activity, such as mining, then there is no need to ask about purpose, because such state has not regulated in the federal field at all. Here, Virginia contends, the moratorium concerns only mining—not milling or tailings storage—and thus is lawful no matter what the purpose.

The challenger and the United States respond that, under the Atomic Energy Act, a state can intrude into the federal field even if it does not regulate there directly, by enacting otherwise permissible regulations with an impermissible purpose. This notion—that a state can intrude into a federal field even when the state does not regulate *in* that field—seems self-contradictory. A more apt framework would view the challenger and government’s argument as one about *conflict* preemption: Even if the state has regulated in its own field, that regulation may nevertheless be preempted if it creates an obstacle to achieving Congress’s regulatory goals. Yet conflict preemption was not a main focus of the briefing or argument.

To the extent Virginia’s purpose is nevertheless relevant to field preemption, a second question in the case is how to identify the state’s purpose—the forbidden one of protecting against radiation hazards, or a different, permissible purpose? One approach to that question is to attempt to assess the legislature’s actual motivation in enacting the legislation as a factual matter. Was the legislature motivated to regulate for a reason prohibited by the statute? Such an effort, however, is fraught. For one thing, there may be no answer to that question. Different legislators may view the law as serving different purposes; some legislators may have multiple purposes in mind when voting for a statute. In addition, evidence of the purpose may be lacking. Legislators are not required to disclose their purpose at all; and in many states, conventional sources of legislative history, such as committee reports, are unavailable. What is more, focusing on the legislature’s subjective purpose can lead to anomalous results: two identical statutes, with identical effects on federal interests, could be viewed differently depending on the legislature’s subjective purpose in adopting them. That is an odd approach to preemption.

A different approach is to ask the question hypothetically: could a rational legislator have had a purpose in enacting the law other than the one forbidden by the Atomic Energy Act? If so, then the statute would survive. This “rational basis” approach to purpose is similar to the analysis undertaken by the Supreme Court when assessing whether a state law was enacted with the purpose of discriminating against interstate commerce. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7, 471 n.15 (1981). At argument, the government seems to have favored this approach.

As things stand now, we'll just have to wait, but not for long. A decision is expected by the end of June.

## **Still standing: The New U.S.-Mexico-Canada Agreement and the fate of the Commission for Environmental Cooperation**

**Tracy Hester**

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Like a hardy survivor in a long-running disaster movie, the Commission for Environmental Cooperation (CEC) has outlasted the tortuous negotiation of the U.S.-Mexico-Canada trade agreement (USMCA) and, unexpectedly, emerged stronger than before. The USMCA's environmental provisions, especially when viewed in concert with the new Environmental Cooperation Agreement (ECA) between the parties, now address long-running criticisms of the CEC's operational processes and goals. The new language—if approved by Congress—offers the prospect of revitalized environmental cooperation between the three nations under a reenergized CEC.

### **NAFTA and the original CEC**

First, some background. When the United States, Canada, and Mexico negotiated the North American Free Trade Agreement (NAFTA) to establish one of the world's largest free trade zones, critics immediately raised concerns that the agreement would encourage corporations to relocate to jurisdictions with cheaper labor and laxer environmental regulations. To assure NAFTA's passage before a skeptical Congress, the Clinton administration pursued two side agreements to NAFTA that focused on labor and environmental concerns. The North American Agreement on Environment Cooperation (NAAEC), the name given to the environmental side agreement, accompanied NAFTA into force on January 1, 1994.

Even through the haze of 25 years of history, NAAEC is an innovative and groundbreaking agreement. It committed all three nations to foster sustainable development and protect the environment within their territories. It also specifically committed them to enhancing compliance with environmental laws and promoting transparency in developing new environmental regulations and policies. NAAEC art. 1. It additionally established an independent international organization, the CEC, to help the parties coordinate their activities to address cross-border environmental impacts. The CEC in turn included three new international entities—the Council, which consists of the highest-level environmental officials of each nation and governs the CEC; the Secretariat, which independently administers the Council's directives; and the Joint Public

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Advisory Committee, which consists of 15 citizens and advises the Council on matters within the scope of NAAEC. *Id.* at art. 8.2. These three bodies have helped spur environmental research and coordinate policy initiatives on a broad array of concerns, including transnational shipments of hazardous waste.

NAAEC also established a new citizen submission process to identify and highlight alleged failures to enforce national environmental laws or requirements. Under the new Submittal on Environmental Matters (SEM) process, residents of the NAFTA parties can allege that any of the NAFTA parties has failed to effectively enforce its own environmental laws. Notably, NAAEC allows private parties—including individuals and nongovernmental organizations (NGOs)—to raise these claims directly rather than through their own national governments. To invoke the process, the petitioner must make a submission to the Secretariat raising the allegation. The Secretariat in turn must assess whether the submission meets detailed criteria, both substantive and procedural, set out in NAAEC. These conditions include providing “sufficient information to allow the Secretariat to review the submission” and showing that the submission “appears to be aimed at promoting enforcement rather than at harassing industry.” NAAEC art. 14.1. Notably, the Secretariat must find that the submission involves one or more “environmental laws,” it alleges failures to “effectively enforce” those laws, and those failures are ongoing.

If the submission survives this gauntlet, the Secretariat can recommend the development of a factual record to investigate and corroborate the nation’s alleged failure to enforce. If the Council approves the Secretariat’s recommendation, the Secretariat can begin its investigation and development of the record; it cannot, however, provide a legal conclusion as to whether the nation has failed to enforce its environmental laws. The factual record, true to its name, simply sets out the actions and background surrounding the alleged nonenforcement. The premise of NAAEC’s environmental submittal process is that the simple light of public disclosure and transparency will drive the nation to address any enforcement shortfall. Last, after the Secretariat completes the factual record, the Council could then decide whether to make the final factual record publicly available by a majority vote (i.e., two-thirds vote). *Id.* at art. 14.2.

In practice, structural design flaws slowly hobbled the CEC’s effectiveness, particularly as to the SEM process. Some criticized the NAAEC during the initial negotiations, saying that it lacks any enforceable mechanism to compel one of the NAAEC parties to bring their environmental enforcement practices into line. That criticism persisted over the next two decades. This complaint, however, simply highlighted the political realities surrounding NAAEC’s approval. The three nations at that time clearly would not have accepted such an infringement into their national sovereignty as part of a corollary agreement accompanying a trade agreement.

NAAEC’s other shortfalls, particularly as concern its SEM process, grew over time. Some of the difficulties arose from inadequate funding commitments and shifting environmental priorities among the three nations. The SEM process suffered from several detrimental practices, including the Council’s willingness to narrow the scope of issues considered (“scoping”); aggressive



claims by a responding nation that its pending legal or administrative proceeding, however limited, already addressed the underlying environmental violation; and the outright rejection by the Council, at its discretion, of the Secretariat's determinations or recommendations. Despite attempts to modernize the SEM process and reform the Secretariat's guidelines, the number of submittals has fallen steadily over the past decade, and at least one party took the extraordinary step of withdrawing its submittal because of its concerns over the Council's scoping practices.

### **USMCA's changes and challenges**

Despite fears that NAAEC would fall by the wayside in the aftermath of the United States' withdrawal from the Trans-Pacific Partnership (TPP) negotiations and renegotiation of NAFTA, the new USMCA surprisingly leaves the CEC and SEM process in better shape than before. First, USMCA puts some teeth into specific environmental obligations of the three parties by including detailed commitments on important subjects such as fisheries management, ozone protection, endangered species protection, and marine ship pollution. USMCA at arts. 24.9-.12, 24.15-.23. These provisions echo similar commitments sought in the TPP, but without the troubling retreat from NAAEC's review process found in the proposed TPP agreement. The USMCA also commits the three nations to provide enough funding to empower the CEC to carry out its mandate. This step will hopefully alleviate the Council's chronic and deteriorating resource shortfalls.

The SEM process also survived the USMCA negotiation process, and, in fact, it unexpectedly emerged with important improvements. Most notably, the USCMA incorporates many of the administrative reforms to the SEM process directly into the text of the side agreement. As a result, the three nations now have direct obligations to meet timeline requirements and satisfy transparency and disclosure obligations. USMCA at art. 24.27-.28 (SEM timeline requirements); art. 24.5 (transparency and disclosure).

Separately, like NAFTA, the USMCA also has its own side agreement: the ECA. The ECA confirms many of the USMCA's commitments and provides important detailed direction on operations, funding, and priorities. For example, the ECA specifically directs the three nations to answer information requests needed to develop factual records (a perennial sore point under NAAEC), and it allows the CEC to accept and use funding from supplemental sources. This latter innovation could hopefully encourage the development of NGO support of the CEC from groups akin to the United Nations Association.

The USMCA, of course, must first be approved by Congress, and some of its other provisions raise independent environmental concerns. But considering the dim prospects for NAAEC's survival during the TPP and USMCA negotiations, its unanticipated survival—and potential reinvigoration under the new ECA—offer hope for renewed credibility and effectiveness for this important, yet beleaguered, institution.

## Sizing up *Sturgeon v. Frost*

Matthew Sanders

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In 2005, I had the good fortune of visiting Alaska to present oral argument before the U.S. Court of Appeals for the Ninth Circuit. My case concerned whether the U.S. National Park Service (Park Service) could require a family living on an inholding in Wrangell-St. Elias National Park and Preserve to obtain a permit before clearing an old road through the park. After the argument, I spent five days backpacking in the shadow of the Alaska Range, wondering, as any lawyer would, whether I would win my case. I did, but more lasting than my victory was the indelible feeling that trip left me with: that Alaska is in all respects *sui generis*.

And so the Supreme Court has concluded in its most recent decision in *Sturgeon v. Frost*. [Sturgeon](#), 587 U.S. --, 2019 WL 1333260 (Mar. 26, 2019). For public lands lawyers, the question from the start has been whether *Sturgeon* would turn out to be a gamechanger for federalism and public lands management or a narrow statement on an Alaska-specific law. We now know it's more the latter, but *Sturgeon* still raises important questions about federal authority inside our nation's largest state. And the answers to those questions may quietly reverberate "Outside," the name Alaskans give to the rest of the country.

### Background

Like the access case I argued in 2005, *Sturgeon* is a case about how far the federal government can reach in Alaska. In 2007, rangers from the Park Service found John Sturgeon piloting his hovercraft in the waters of the Nation River near Alaska's eastern border with Canada. When the rangers found him, Sturgeon was on the part of the Nation River that flows through the 1.7-million-acre Yukon-Charley Rivers National Preserve (Yukon Preserve), a unit of the National Park System. When the rangers told Sturgeon that nationwide regulations prohibited him from using his hovercraft, Sturgeon sued, arguing that the Park Service had no authority over the Nation River because the state of Alaska owned it.

The district court granted summary judgment to the Park Service, and the Ninth Circuit affirmed. The legal issue in both courts' decisions—whether the Park Service could enforce its nationwide hovercraft ban within the Yukon Preserve—turned on section 103(c) of the [Alaska National Interest Lands Conservation Act \(ANILCA\)](#), 16 U.S.C. § 3103(c). See 2013 WL 5888230 (Oct. 30, 2013); [768 F.3d 1066 \(9th Cir. 2014\)](#). ANILCA, passed in 1980 and codified at 16 U.S.C. §§ 3101–3233, created "conservation system units" (including the Yukon Preserve) to preserve wild areas, protect subsistence uses by Alaska Natives, and promote natural resource development by the state. Section 103(c) limited the authority of the Park Service to "public lands" within the units (with "lands" defined as "lands, waters, and interests therein") to which the United States

had “title,” and exempted “non-public lands” (defined as certain state, Native, and private lands) from “regulations applicable solely to public lands within such units.” 16 U.S.C. §§ 3102(1)-(3), 3103(c).

In a unanimous 2016 decision [previously covered in Trends](#), the U.S. Supreme Court reversed. 136 S. Ct. 1061 (2016). Like the lower courts, the high Court addressed only section 103(c). However, the Court directed the Ninth Circuit to consider on remand whether the Park Service could regulate hovercraft, not under section 103(c), but by virtue of the river being a “public land” under ANILCA or on some other basis. And while the Court’s opinion was narrow, it hinted that the underlying question—whether the Nation River was a “public land” under ANILCA—raised issues that “touch on vital issues of state sovereignty, on the one hand, and federal authority, on the other.” *Id.* at 1072.

When *Sturgeon* returned to the Ninth Circuit, that court looked to the “federal reserved waters rights” doctrine to determine whether the Nation River was a “public land” under ANILCA. In doing so, the court was relying on its prior *Katie John* decisions, which had used the reserved water rights doctrine to delineate subsistence uses under ANILCA. Under the doctrine, when the United States reserves land for particular purposes, it also reserves the unappropriated water necessary to meet them. *See, e.g., Cappaert v. United States*, 426 U.S. 128, 138–39 (1976); *John v. United States*, 720 F.3d 1214, 1223–27, 1229–32 (9th Cir. 2013). Applying the doctrine to the Nation River, the Ninth Circuit concluded that the river was indeed a “public land” under ANILCA. [872 F.3d 927 \(9th Cir. 2017\)](#). The court concluded that, because President Carter had “reserved all water necessary to the proper care and management of” the objects within the Yukon Preserve when he created it in 1977, banning over-water motorized vehicles like hovercraft served the preserve’s purposes. *See id.* at 934–35; 16 U.S.C. § 410hh(10).

The Supreme Court once again granted certiorari on the question whether ANILCA “prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.” 138 S. Ct. 2648 (2018).

### **The Court’s latest decision**

In a [unanimous decision](#), the Supreme Court has again reversed the Ninth Circuit. The opinion holds that the Park Service lacks the authority to regulate hovercraft on the Nation River within the Yukon Preserve. Justice Sotomayor, joined by Justice Ginsburg, filed a concurrence to “emphasize the important regulatory pathways that the Court’s decision leaves open for future exploration.” Concurrence, at 1.

In its opinion, the Court first concludes that the Nation River is not a “public land” under ANILCA. The statute defines “public land” to mean “lands, waters, and interests therein,” the “title to which is in the United States.” 16 U.S.C. § 3102(1)-(2). Because running waters cannot

be owned by anyone, the Park Service cannot have title to the Nation River “in the ordinary sense.” Slip op. at 12. And because Alaska’s Statehood Act incorporated the Submerged Lands Act, Alaska, not the federal government, has “title to and ownership of the lands beneath [its] navigable waters.” *Id.* at 13 (quoting 43 U.S.C. § 1311).

Does the reserved water rights doctrine make the Nation River a “public land,” as the Ninth Circuit held? No, the Court says. Even if the federal government could hold “title” to a reserved water right (the Court suspects it can’t), the title would be only to the “interest” in the amount of water required to fulfill the purposes of the Yukon Preserve. Reserving a specific quantity of water does not give rise to plenary authority, including the authority to ban hovercraft, at least absent a showing that banning hovercraft somehow serves that interest—e.g., by keeping the Nation River from being depleted, diverted, or polluted. Slip op. at 14–15.

Having concluded that the Nation River is not a “public land” under ANILCA, the Court asks next whether the Park Service may regulate hovercraft, even on nonpublic lands (again, those lands and waters that, like the Nation River, are within the boundaries of federal conservation units but not owned by the federal government). Again, it answers no. The Yukon Preserve’s boundaries, like those of other conservation system units under ANILCA, “followed the area’s ‘natural features,’ rather than (as customary) the Federal Government’s property holdings.” Slip op. at 17 (quoting 16 U.S.C. § 3103(b)). As a result, the preserve includes lands owned by Alaska, Native Corporations, and private persons, all of whom wanted to be exempt from Park Service control. Slip op. at 17. Accordingly, section 103(c)—part of ANILCA’s “grand bargain” between federal conservation and other, non-federal uses—“deem[s]” those non-federal lands to be outside the Preserve; “[g]eographic inholdings thus become regulatory outholdings, impervious to the [Park] Service’s ordinary authority.” *Id.* at 19, 22. And the general instructions in ANILCA and other statutes to, for example, “protect and preserve rivers,” 16 U.S.C. § 3101(b), does not overcome section 103(c)’s more specific instruction to exempt nonpublic lands from Park Service control. Slip op. at 26–29.

Notably, the Court observes that its decision does not disturb the Ninth Circuit’s *Katie John* precedent. *Id.* at 15 n.2. That outcome was vital to Alaska Natives. The Court is also clear that *Sturgeon* does not affect the Park Service’s authority to regulate waters outside of conservation system units or on public lands “flanking” nonpublic rivers. *Id.* at 19 n.5, 28.

### Looking downstream

In its first *Sturgeon* decision, the Supreme Court observed that “Alaska is often the exception, not the rule.” 136 S. Ct. at 1071. In this latest decision, the Court makes that observation and another like it (“Alaska is different”) no fewer than eight times, and repeatedly discusses how ANILCA was a unique compromise among the stakeholders in Alaska’s lands and waters. So channelized, *Sturgeon* will not be the federalism blockbuster that some had desired and others feared. Instead it will remain primarily a case about Alaska.

Still, Alaska is a big place. ANILCA's conservation system units comprise 44 million acres—more than 10 percent of the state—and 18 million of these are nonpublic lands. Slip op. at 6, 8. Most obviously, we know from *Sturgeon* that the Park Service cannot enforce its nationwide hovercraft ban on the Nation River, or on other waters to which Alaska holds title, and that as a result John Sturgeon gets to “take his hovercraft out of storage.” *Id.* at 11.

But *Sturgeon*'s impact is not limited to hovercraft on the Nation River. The decision calls into question similar assertions of authority by the Park Service. To be sure, the decision expressly leaves open the possibility that the federal government can regulate what happens on such lands and waters on other grounds, including under other federal environmental statutes (e.g., Endangered Species Act, the Clean Water Act); through “cooperative agreements” with Alaska; or by buying those nonpublic lands. *Id.* at 24 n.9, 26 n.10, 28. And indeed this is the point Justice Sotomayor makes in her concurrence: *Sturgeon* holds only that the Park Service may not apply a nationwide hovercraft ban on nonpublic lands inside conservation system units in Alaska. Concurrence, at 1–2. The Court does not decide whether the Park Service could use its authority under the Park Service Organic Act, 54 U.S.C. § 100101 *et seq.*, to regulate navigable waters in other ways to protect park units, or under the Wild and Scenic Rivers Act, 16 U. S. C. § 1271 *et seq.*, to protect those Alaskan rivers that bear that designation (the Nation River does not). *Id.* at 2, 8–11. In addition, the Court does not decide whether the Nation River is a “public land” pursuant to ANILCA under the navigational servitude, a wide-ranging Commerce-Clause power that was discussed in one of the Ninth Circuit's *Katie John* cases. *Id.* at 5 n.5; *see also John v. United States*, 247 F.3d 1032, 1034–44 (Tallman, J., concurring). All this may be tepid comfort to the federal government; now it will need to test, and the courts will need to define, the contours of some or all of these alternative theories.

Will *Sturgeon* have any impact outside Alaska? Maybe. Justice Sotomayor explains that *Sturgeon* “introduces limitations on—and thus could engender uncertainty regarding—the Service's authority over navigable rivers that run through Alaska's parks.” Concurrence, at 2. That is, while *Sturgeon* steers clear of significantly limiting the Park Service's authority, it also does not champion her point that, because the Park Service is obligated to preserve rivers and parks, it must have the authority—*some* authority—to do that. *Id.* at 2–3, 6, 12. If federalism finds a camel's nose in *Sturgeon*, it may be this studied indifference toward strong federal authority. For now, though, we are reminded that Alaska is “the exception, not the rule.”

## **Syngenta’s settlement: Will this create barriers to the pipeline of biotech crops?**

**Thomas Redick**

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Syngenta, an agricultural company that produces agrochemicals and seeds, faces litigation for disrupting U.S. corn exports to China. The verdicts and settlements in these grower and grain trader negligence cases could create potential barriers for biotech crops in the future. With new tools for plant breeding arriving on the market in the form of genetic editing, the threat of liability could undermine innovation for years to come.

### **Factual background—misleading messages on China approval**

Major market approval policies were invented by growers, in particular, the American Soybean Association—my client—in 1998 in negotiations to mitigate potential trade disruption by biotech crops that had not yet received approval by foreign regulatory agencies. A “major” market is calculated using a five-year rolling average of exports of U.S. soybeans, with the top 10 markets clearly “major” for soybeans and the rest subject to biannual confidential negotiations whereby growers, grain traders, and seed companies come to consensus (for corn exports, however, only Japan has been considered a “major” market historically, with Mexico, China, and Taiwan emerging as possible major markets). Seed companies participate in these meetings knowing that if they violate these industry standards their company could, according to these policies, be liable in a common law negligence lawsuit for causing adverse economic impacts to growers and grain traders (with billions of dollars in compensation paid to growers and grain traders). As seen below, however, recent litigation involving the company Syngenta, seeks to extend this duty to regulatory approval in markets that have not necessarily become “major” at a given moment in time, but *might qualify as a “major” market* in the future. These trends may prove difficult for seed companies to manage, however. Predicting grain trade should arguably be reserved for commodity traders, not seed companies with limited resources, which now face uncertain, perhaps unmanageable, liability risks.

The Syngenta litigation illustrates why this is so. In 2011, Syngenta obtained regulatory approval for the sale of its biotech corn trait, Agrisure Viptera<sup>®</sup> MIR162 (Viptera) from regulatory authorities in a host of countries: the United States, Argentina, Japan, Canada, and the European Union. It had not obtained such approval in China. Syngenta touts Viptera’s ability to control above-ground insects. Syngenta commercialized and began selling Viptera in the United States that year, and nationwide planting of Viptera corn began.

Syngenta sought importation and cultivation approval from China’s Ministry of Agriculture in March 2010, and expected approval to be issued in 2012. However, China had not yet indicated

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any intent to buy significant shipments of U.S. corn in 2011. In mid-2011, citing “market signals” coming from China about its corn needs and anticipated selling of corn to China, major grain trading companies told growers that they would not buy Viptera corn.

Syngenta ignored grain trader warnings, however, and continued to sell Viptera in the United States in 2011 and 2012. Syngenta’s decision had the support of the National Corn Growers Association (NCGA) and followed industry precedent. In so doing, NCGA appeared to place innovation needs (e.g., to kill insects) ahead of export-related concerns. China went from importing 1.2 million metric tons (MMT) of U.S. corn in 2009–10 (China was at that time the sixth largest U.S. corn market) to 0.98 MMT in 2010–11 (downgraded to the fifth largest U.S. corn market). Based on these minimal exports, which were declining, NCGA did not consider China to qualify as a “major” market in 2011, when Viptera was sold to corn growers.

Meanwhile, China steadily increased its U.S. corn imports and kept buying U.S. corn with traces of these unapproved corn varieties for two years, testing and banning U.S. corn only in November 2013 after finding the presence of Viptera. Like most nations, China had a zero-tolerance policy on the import of biotech corn traits that had not been approved by its government. (The United States and other nations with regulatory approval for biotech crops also impose zero or very low tolerances for unapproved varieties.) After China banned all U.S. corn imports, a grain trade association economist in April 2014 stated that Syngenta’s decision to market corn without China’s approval caused billion-dollar economic impacts. *See* Max Fisher, [Lack of Chinese Approval for Import of U.S. Agricultural Products Containing Agrisure Viptera™ MIR 162: A Case Study on Economic Impacts in Marketing Year 2013/14](#), Nat’l Grain & Feed Ass’n (Apr. 16, 2014). Then, in late 2014, China approved Viptera.

These events seem to suggest that Syngenta’s chief executive officer was ill-advised when he told stakeholders that China would approve Viptera in March 2012. Syngenta should have known, perhaps, based on feedback from regulatory agencies in China, that approval might take until 2014. *See* Paul Christensen, [Chinese Approval of Syngenta Agrisure Viptera](#), Seed in Context Blog (Feb. 21, 2012).

### **Summary of litigation against Syngenta**

The fallout from these events led to litigation in U.S. courts. Certain corn growers asserted claims in state and federal court; at the same time, certain grain traders brought claims for negligence and various other claims. *See, e.g., Hadden Farms Inc. v. Syngenta Corp.*, No. 3:14-cv-03302-SEM-TSH (C.D. Ill. filed Oct. 3, 2014) (“Syngenta Corn Class Action”). The federal grower cases were consolidated in multidistrict litigation (MDL) in the U.S. District Court for the District of Kansas. Plaintiffs claimed that Syngenta had (a) failed to follow industry standards for stewardship by allowing Viptera to disrupt exports and additionally (b) falsely told growers that China would approve Viptera in 2012 (not 2014). In the first test-plaintiff MDL trial

against Syngenta in June 2017, the jury awarded plaintiffs (over 7,000 Kansas-based farmers) a total of \$217.7 million.

In another case, an Ohio state court's verdict held Syngenta liable for causing "physical harm" to growers but held that the economic loss sought by growers was barred by the "economic loss doctrine." *Fostoria Ethanol, LLC vs. Syngenta Seeds, Inc.*, Ct. of Common Pleas of Seneca Cnty., Ohio, Case No. 15-CV-0323 (June 28, 2017) (granting motion to dismiss).

Parallel negligence actions in Louisiana state court brought by Cargill will be going to trial in mid-2019, with delays possible into September. Louis Dreyfus Co., another grain trader, has brought a similar case pending in Kansas District Court (the trial is set to take place in September). Efforts to settle as of April 2019 have been fruitless in both cases, according to counsel for Syngenta. Other cases have been successfully settled. For example, in 2017, Syngenta settled grower class actions for up to \$1.5 billion, excluding pending cases filed by grain traders Cargill, Louis Dreyfus Co. and Archer Daniels Midland Co. This court-approved settlement would include over 600,000 corn growers in the U.S. Corn Belt. Tiffany Dowell, [Syngenta Settlement: What Producers Need to Know](#), Texas Agriculture Law Blog (May 7, 2018).

## Conclusion

The decisions and settlements discussed above will define the boundaries of tort law in agricultural biotechnology. In particular, the new pipeline of genetic editing traits, including those developed by smaller companies, may not be able to meet the high cost of seeking overseas approvals that will be needed prior to marketing a crop in "major" markets. This could prevent the realization of benefits of new forms of genetic engineering and preclude the creation of perhaps the safest and most sustainable crops ever planted.

## How the EU's product stewardship regulations affect global supply chains

**Dr. Lucas Bergkamp**

*Dr. Lucas Bergkamp is a partner with Hunton Andrews Kurth LLP in Brussels.*

### The EU's approach to product stewardship

While the European Union (EU) does not have any legal principle specific to product stewardship, it has applied the full range of EU environmental law principles to create a comprehensive framework for product stewardship. These principles include the prevention and precautionary principles, sustainability, extended producer responsibility, supply chain

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responsibility, and corporate social responsibility. In addition, product stewardship is a key instrument in the EU's latest strategic environmental focus areas: the circular economy and the toxic-free environment, two main themes of current EU environmental policy making.

### **“Self-enforcing” regulation**

Product-based environmental regulation often is regulation that does not require as much government enforcement as traditional command-and-control regulation, because it is enforced through the marketplace. This is particularly true for consumer goods; retailers tend to be concerned about the reputational fall-out if products on their shelves appear to be non-compliant. So, they demand compliance, and proof of compliance, from their suppliers, which in turn demand the same from their suppliers, and so on.

### **Products subject to EU product stewardship regulations**

The first product subjected to EU product stewardship regulation was packaging. Thereafter, electronics were regulated through several EU laws, including the Restriction of Hazardous Substances (RoHS) Directive, which restricts chemicals in electronics; the Waste Electrical and Electric Equipment (WEEE) Directive, which requires take-back and recycling of waste electronics; the end-of-life vehicle Directive, which imposes both chemical restrictions and requires recycling of automobiles; the ecodesign program, which covers a wide range of electrical and other products and impose requirements to reduce their environmental impact; and the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulation.

REACH is the most “ambitious” chemical regulatory program in the world. It is aimed at managing chemical risk from cradle to grave, and uses a series of tools to achieve that objective—testing and registration of chemical substances; restriction, including prohibition, of some substances; and a user- and use-specific permitting program for hazardous chemicals, so-called substances of very high concern (SVHCs).

### **Types of requirements that affect supply chains**

Product-based environmental regulations may include several types of regulations, which differ in terms of their effects on supply chains. Not all such regulations have the same effect on supply chains; for instance, those that require end-of-life management do not always result in demands on the supply chain. This may be different, however, where recyclability or source reduction needs to be guaranteed or the absence of hazardous substances is required.

The types of requirements that implicate product stewardship are diverse. First, labeling, reporting, and other informational requirements often require that suppliers provide information to their customers, or guarantee a particular composition of their product. For instance, to be able

to provide nutritional information on a food product, the supplier of an ingredient needs to provide data on the ingredient's nutritional composition.

A second type of common product-based environmental requirement is a chemical restriction or prohibition. Typically, such a requirement imposes a concentration limit (for instance, the sum of concentration levels of lead, cadmium, mercury, and hexavalent chromium present in packaging may not exceed 100 ppm) or a prohibition (for instance, perfluorooctanoic acid may not be used in production of mixtures). Obviously, suppliers must ensure that the restrictions and prohibitions are complied with in relation to the components they provide.

Other types of product-based environmental requirements include performance requirements. An example is an energy efficiency requirement. Biological performance requirements may involve the absence of microbiological contamination.

The bottom line is that these regulations require product stewardship throughout the supply chain. Such product stewardship may be up- or downstream from a particular company in the value chain, or both.

### **REACH's effects on supply chains**

REACH makes references to the supply chain at several points, and imposes requirements on "actors in the supply chain" and "all manufacturers and/or importers and/or downstream users in a supply chain." The regulation contemplates explicitly that regulated entities pass information on hazardous substances up and down the supply chain.

To ensure that products and the information accompanying them placed on the EU market meet the applicable requirements, manufacturers, importers, and distributors use several tools. One such tool involves supplier selection; if suppliers understand the relevant requirements and appreciate the importance of compliance, the customer will likely have to spend much less time on monitoring. Another tool relies on contracting. Through contractual clauses, including representations and warranties, covenants and indemnities, customers can ensure that their suppliers accept the obligations that are necessary to reduce compliance risks, and respond to any compliance issues that may arise. Analytical testing is another tool, but, for cost reasons, is generally only used to a limited extent, where other tools are deemed not to provide the desired level of comfort.

### **Legal risk management and change management**

REACH presents legal risk management challenges not only with respect to regulatory compliance. It presents a much broader set of legal risks that require management.

Lawyers have a role to play with respect to many REACH-related activities, including registration and regulatory strategies, internal organization and process management, REACH consortia and related agreements, intellectual property protection, and, in particular, data protection and data access, competition law compliance, and, of course, supply chain management (product stewardship).

REACH legal risk management is not a one-time task. Rather, every time there is a relevant change, the consequences need to be evaluated. Relevant changes may involve new regulations issued pursuant to REACH, and changes in the marketplace, but also changes within the supply chain, e.g., a new supplier or a change in sourcing by an existing supplier.

### **Effects on corporate transactions**

Many corporate transactions are affected, directly or indirectly, by EU product stewardship regulations. Any purchasing, supply, or sales agreements, as noted above, should include clauses that facilitate compliance with EU regulations. Relatedly, any time a supplier is replaced or when a supplier makes a relevant change, the issue should be revisited; this requires strong “change management.” Even in mergers and acquisitions, compliance with EU product stewardship regulations comes into play. Adequate representations and warranties, covenants, and indemnities are essential to manage the transaction-related risks.

In short, EU product stewardship regulations present both compliance and transactional issues for practitioners to consider. Legal risk management is therefore critical.

## **In Brief**

### **John R. Jacus**

*John R. Jacus is a senior partner in the Environmental Practice Group of Davis Graham & Stubbs LLP in Denver. He is a past Section Council member and Environmental Committees chair and vice chair, and a contributing editor of Trends.*

### **CERCLA**

**[Mission Linen Supply v. City of Visalia](#), No. 1:15-CV-0672 AWI EPG, 2019 WL 446358, 2019 U.S. Dist. LEXIS 18567 (E.D. Cal. Feb. 5, 2019).**

The U.S. District Court for the Eastern District of California has held a current dry-cleaning service owner and the City of Visalia equally liable for solvent contamination from historic operations and the significant leakage of solvent-containing wastewaters from the municipal sewer system serving the business. The court considered many factors in making the allocation, but focused most heavily on the significant cooperation of the current owner, Mission Linen

Supply, with regulators in addressing the contamination, as well as the very poor condition of the sewer system and its lack of maintenance in contributing to the contamination. The city's attempt to raise CERCLA's third-party defense was rejected because the city could not establish that other parties (Mission and a defunct prior owner) were the sole cause of the releases into the environment of hazardous substances, due to the condition of the city's sewer system. The prior owner's orphan share was split and allocated equally to Mission and the city.

### **Clean Air Act, chemical release reporting**

#### **[Air All. Houston v. U.S. Chem. & Safety Hazard Investigation Bd.](#), No. 17-CV-02608 (APM), 2019 WL 450677, 2019 U.S. Dist. LEXIS 17270 (D.D.C. Feb. 4, 2019).**

The U.S. District Court for the District of Columbia ordered the U.S. Chemical and Safety Hazard Investigation Board (CSB) to promulgate final accidental chemical release reporting regulations within 12 months and chastised it for "an egregious abdication of a statutory obligation" to promulgate reporting regulations under the Clean Air Act Amendments of 1990. The CSB is required by the Clean Air Act to "establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction." The court dismissed the CSB's arguments that plaintiff environmental groups lacked standing, and then found that the board did "unreasonably delay" action after having failed to promulgate regulations for more than 25 years.

#### **[United States v. Ameren Missouri](#), No. 4:11 CV 77 RWS, 2019 WL 952108, 2019 U.S. Dist. LEXIS 31372 (E.D. Mo. Feb. 27, 2019).**

After previously finding defendant Ameren Missouri liable for Clean Air Act (CAA) violations due to the modification of two boilers at its power plant near St. Louis, Missouri, the U.S. District Court for the Eastern District of Missouri held on cross motions for summary judgment that (1) the CAA authorizes injunctive relief for past violations, (2) the court could determine (though it has not yet done so) what technology constitutes best available control technology (BACT), and (3) the court could also require emission reductions at another non-violating facility of Ameren's in Missouri, to offset excess emissions by Ameren's Rush Island plant (the Plant) associated with its past failure to obtain a Prevention of Significant Deterioration (PSD) permit and install BACT. The U.S. Environmental Protection Agency (EPA) had sued Ameren for failing to obtain a PSD permit and implement BACT. The court rejected Ameren's argument that the CAA "does not authorize injunctions as a remedy for past violations," noting that section 113(b) "gives the EPA authority to 'commence a civil action' for injunctive relief or civil penalties, 'or both,' whenever a person 'has violated or is in violation of any requirement or prohibition'" of the act. The court also held that federal courts have the authority to require implementation of a specific technology as BACT when an agency has properly determined that the technology in question represents BACT and requests that the technology be imposed as part of the remedy, noting that the few judicial opinions in which this issue was considered had never held that courts lacked authority to make such a determination. EPA also asked the court to

impose emissions reductions at another Ameren plant located in the same region to offset excess emissions that would not have occurred had Ameren implemented BACT at the Plant from the outset. Ameren argued that the court had no authority to award such relief, and that such an order had no basis in any legal authority, would be a penalty that EPA had already waived, and would violate EPA's own guidance regarding the PSD program, among other things. Because EPA was not asserting the other plant would need to comply with BACT to offset the Plant's excess emissions, the court rejected Ameren's arguments, and reserved the determination of BACT for trial.

## Clean Water Act

### [Nat'l Fuel Gas Supply Corp. v. New York State Dep't of Envtl. Conservation](#), No. 17-1164-CV, 2019 WL 446990, 2019 U.S. App. LEXIS 3519 (2d Cir. Feb. 5, 2019).

The U.S. Court of Appeals for the Second Circuit overturned New York's decision to deny National Fuel Gas Supply Corp. a water quality certification for a proposed \$455 million natural gas pipeline because the New York State Department of Environmental Conservation (DEC) did not adequately explain its decision. The reviewing panel said the agency failed to support its finding that the Northern Access Pipeline project would violate the state's water quality standards, stating that the agency's "denial letter here insufficiently explains any rational connection between facts found and choices made." In addition, the panel said DEC improperly based its denial "on considerations outside of petitioners' proposal . . .," possibly due to a misunderstanding of the record. The court vacated the denial and remanded the case to DEC "to more clearly articulate its basis for the denial and how that basis is connected to information in the existing administrative record."

## Natural Gas Act, Coastal Zone Management Act

### [Algonquin Gas Transmission LLC v. Town of Weymouth, Massachusetts](#), No. CV 18-10871-DJC, 2019 WL 538192, [2019 U.S. Dist. LEXIS 21409](#) (D. Mass. Feb. 11, 2019).

The U.S. District Court for the District of Massachusetts granted summary judgment in favor of Algonquin Gas Transmission LLC, ruling that the Natural Gas Act preempted a local ordinance adopted under the Coastal Zone Management Act (CZMA). The case was brought by Algonquin to resolve a dispute with the Town of Weymouth over construction of a compressor station as part of the Atlantic Bridge Pipeline project. The Federal Energy Regulatory Commission (FERC) had determined after significant public participation and voluminous comment that "the impacts associated with [the project] can be mitigated to support a finding of no significant impact," and issued a certificate to Algonquin authorizing construction and operation of the compressor station. Algonquin asserted that FERC's approval of the compressor station preempted the town's local wetlands ordinance. The court disagreed, noting that, while there are some exemptions from federal preemption within the CZMA, the local wetlands ordinance at issue did

not fall within either exemption and therefore “it is not an enforceable policy protected from preemption pursuant to the rights granted to states by the CZMA.”

### **Oil and gas law, forced pooling (Ohio)**

#### ***Kerns v. Chesapeake Expl., L.L.C.*, No. 18-3636, 2019 WL 423140, 2019 U.S. App. LEXIS 3450 (6th Cir. Feb. 4, 2019).**

The U.S. Court of Appeals for the Sixth Circuit upheld the dismissal of a constitutional challenge to Ohio’s statutory “forced pooling” provisions, noting that a permit issued by state oil and gas regulators to Chesapeake Exploration LLC (Chesapeake) doesn’t affect a “taking” under the Fourteenth Amendment to the U.S. Constitution. Landowners had challenged a forced pooling order issued by the Ohio Division of Oil and Gas Resources Management allowing Chesapeake to horizontally drill below their properties. The Sixth Circuit observed that (1) the Ohio Supreme Court has held the state’s forced pooling law is a legitimate use of its police power to regulate oil and gas development, (2) courts in other states have reached similar conclusions about their respective pooling laws, and (3) the plaintiff-appellants had cited no case authority for the proposition that forced pooling of oil and gas resources is unconstitutional. More specifically, the court noted that “[e]ach landowner’s property interest in the minerals remains intact; it is simply regulated. The landowners therefore have no takings claim as to the minerals below the surface of their land.” Regarding the landowners’ argument that Chesapeake’s horizontal drilling constituted a taking because it deprives them of exclusive use of their subsurface lands, the Sixth Circuit said “Ohio’s actual-interference requirement means that the landowners’ property interests in the space beneath their land springs to life only if Chesapeake’s drilling ‘actually interfere[s]’ with their ‘reasonable and foreseeable use of the subsurface,’” but “[t]he complaint fails to adequately plead such interference and thus fails to plead the requisite property interest.” Absent such a property interest, the landowners’ due process claims were also dismissed.

### **RCRA**

#### ***Schmucker v. Johnson Controls, Inc.*, No. 3:14-CV-1593 JD, 2019 WL 718553, 2019 U.S. Dist. LEXIS 26657 (N.D. Ind. Feb. 19, 2019).**

In a Resource Conservation and Recovery Act (RCRA) citizen suit in which neighbors of a former manufacturing facility alleged both “violation” claims and “endangerment” claims, the U.S. District Court for the Northern District of Indiana granted summary judgment to the defendant facility owner, Johnson Controls, for all violation claims, but let endangerment claims proceed to trial. The court reasoned that since the facility owner implemented an approved RCRA closure plan that was accepted by the state regulatory agency, ongoing contamination did not establish a RCRA violation. According to the court, performance standards cannot be enforced independent of the implementing regulations, and a court may not substitute its own judgment about appropriate facility closure when the agency has made such a closure

determination. Nevertheless, because the remaining contamination could potentially present an imminent and substantial endangerment to human health or the environment, and because there were factual disputes related to this issue, the court denied summary judgment regarding the endangerment claim.

**Liebhart v. SPX Corp., 917 F.3d 952 (7th Cir. 2019).**

The U.S. Court of Appeals for the Seventh Circuit reversed the prior dismissal of homeowners' claims for injunctive relief due to polychlorinated biphenyl contamination of their residential properties for having applied the wrong standard. The district court had granted summary judgment to defendant SPX Corporation because it held that RCRA plaintiffs must demonstrate "an imminent and substantial danger with evidence of health problems they have already suffered" in order to obtain injunctive relief under the statute.

**Alaska National Interest Lands Conservation Act**

**Sturgeon v. Frost, 139 S. Ct. 1066 (2019).**

The U.S. Supreme Court overturned a U.S. Court of Appeals for the Ninth Circuit Court decision that the National Park Service had the power to enforce its hovercraft ban on an Alaskan river, ruling unanimously that the Alaska National Interest Lands Conservation Act (ANILCA) protected a moose hunter's hovercraft use on certain portions of the Nation River. The pertinent provision of the act provides that state, Alaska Native, and private land isn't subject to "regulations applicable solely to public lands" within Alaska conservation system units. More specifically, the court held that the Nation River is not "public land" for the purposes of ANILCA, and that the Park Service doesn't otherwise have authority to regulate the plaintiff's activity on portions of the river within the Yukon-Charley Rivers National Preserve. The Ninth Circuit's holding that the river was public land under the law was rejected by the court, which noted that Alaska, not the federal government, held title to the land beneath the river. Writing for the unanimous court, Justice Kagan noted "[t]he [Park Service's] rules cannot apply to any non-federal properties, even if a map would show they are within such a unit's boundaries." In a concurrence, Justice Sotomayor stressed that the Park Service still has a role to play in the environmental regulation of rivers in Alaska parks. *See also* M. Sanders, Sizing up *Sturgeon v. Frost* (Trends May/June 2019).

**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,*

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*and chair of the Environmental Transactions and Brownfields Committee. She is a partner with Holland & Knight LLP in Washington, D.C.*

I hope that you are still feeling the buzz from our very successful Spring and Water Law Conferences in Denver, where we had informative keynote addresses from EPA Administrator Andrew Wheeler; Colorado Attorney General Phil Weiser; the global senior director for sustainability and alcohol policy at Molson Coors, Kim Marotta; and the special water masters in the Flint, Michigan, and the *South Carolina vs. North Carolina* water disputes. CLE sessions offered attendees new insights on breaking developments such as potential regulations of per- and polyfluoroalkyl substances (PFAS) and the status of the Waters of the U.S. rule (WOTUS). And as at all Section conferences, the networking was fantastic.

There is also more great programming on the horizon. Please join us in Atlanta for [Key Issues in EPA Region 4](#) on June 11 and a [Master Class on Complex Liability Resolution: State of the Art Strategies from Superfund to Brownfields](#) on June 12. These programs will address issues both national and unique to the Southeast and take a deep dive into the Trump administration's Superfund reforms and what they might mean to actual projects. Attendees will receive much "real world" advice through case studies and practical tips for practitioners.

### **New Membership Model, new logo, and benefits campaign**

The Section remains focused on the rollout of the ABA's New Membership Model and what this exciting new opportunity means for our Section members (and prospective members!). As mentioned in prior Views, the New Membership Model will offer substantially reduced membership dues for several categories of members, particularly young lawyers, nonprofit/public interest lawyers, government lawyers, and international lawyers. This dues reduction for members and prospective members in these categories is significant, and the enhanced benefits for all members will be substantial. Please contact Membership Officer Jeff Dennis if you would like to help in the Section's very important, new membership recruitment campaign. Increasing Section membership is key!

The ABA has unveiled its Branding Guidelines, which will govern the look of all ABA publications and other materials going forward, shortly after May 1, 2019. They will provide a more modern look and consistency in the ABA brand. Please take a look at the new logo and the promotional messages from the ABA. This is real change; embrace it and spread the word!

### **SEER Essentials**

One of the benefits that we can offer under the New Membership Model is our SEER Essentials webinar series. To date, SEER has held five SEER Essentials webinars on the following topics: the ABCs of Real Estate and Corporate Environmental Due Diligence; CERCLA 101; Waters of the U.S.: New Rule, Old Problem; Clean Water Act: Understanding and Navigating the NPDES



Permit Program; and the New TSCA: What All Lawyers and Consultants Need to Know. Every Section committee is being asked to develop at least one, 101-level webinar on a topic within its purview. If you have an idea for a webinar, please contact the chairs or programs vice chair of the relevant [substantive committee](#).

### **Other activities**

At its Spring Council meeting in late April, the SEER Council voted [to approve] an updated version of a 2008 climate resolution (HOD Resolution No. 08M 109) to take action on climate change. This resolution is expected to have two cosponsors and to be presented to the House of Delegates at the 2019 ABA Annual Meeting in August in San Francisco. Please lend your support to this effort by contacting your state House of Delegates representatives to encourage their support of the resolution.

### **Section outreach/new Congress**

With the change in leadership in the House, the Section has reinvigorated its outreach efforts to act as a bipartisan resource to members on the Hill on a wide range of issues. Martha Marrapese and Emily Fisher are spearheading this effort. If you are interested in helping to prepare a white paper or otherwise being involved on any specific issue, please reach out to the relevant [substantive committees](#) and to Martha and Emily.

### **Concluding thoughts**

As an environmental lawyer and a mother, I am particularly inspired by the fact that there appears to be a greatly motivated next generation:

- 16-year old Greta Thunberg, a Swedish teen who started the next generation climate movement by protesting outside the Swedish parliament and later a UN climate gathering;
- 13-year old Alexandria Villasenor, who has led a lonely strike in front of the UN since December 2018 to protest climate change;
- the thousands of students globally who skipped school on March 15, 2019, to protest the lack of action on climate change; and
- the 32,340 children and young people who filed an amicus brief in support in the *Juliana v. U.S.* (“kids climate”) case.

If these kids can fight for more informed and bipartisan action on climate change, then we should, too. The time for real discussion—and action—is now. Be aware that the voices of the naysayers remain strong. Please contribute your voice via social media or communications to your state delegates in support of the Section’s updated climate resolution as it moves forward this summer.

## 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).*

[Megan A. Moore](#), in November 2018, began work as an appellate law clerk for the Supreme Court of the U.S. Virgin Islands. The Court assumed its appellate jurisdiction in 2007. Moore clerks for the Honorable Associate Justice Maria M. Cabret. In college, she interned for several years at the U.S. Environmental Protection Agency and later served as a government Honors Law Clerk at EPA Headquarters in the General Counsel's Office of Air and Radiation Law while attending Temple University School of Law. Moore has supported the Climate Change, Sustainable Development, and Ecosystems Committee's contribution to Section's annual *The Year in Review*. She attributes her interest in environmental law and government policy to ABA publications, and remembers reading them as early as her first years of college while studying at George Washington University.

[Sarah Munger](#) has joined Beveridge & Diamond PC in Austin, Texas. Previously, Munger was with the Lower Colorado River Authority, also in Austin. Her experience includes legal counseling as to laws and regulations for new transmission and telecommunication facilities as well as developing guidance on county and municipal regulatory authority. Munger has assisted with settling contested wastewater discharge permits and has provided compliance counseling for numerous Texas and federal environmental laws and programs. She is *The Year in Review* vice chair for the Section's Science and Technology Committee.

[Jonathan Nwagbaraocha](#) has been promoted to Counsel - Environment, Health, Safety & Sustainability (EHS&S) and Compliance Leader for Xerox Corporation. Nwagbaraocha advises on various environmental, health, safety, and sustainability matters throughout operations as well as related areas within supply chain and procurement and enterprise governance on a global basis. He oversees the company's compliance with laws, rules and regulations, and internal policies. As EHS&S counsel and compliance leader, he provides legal advice and designs innovative compliance procedures. Nwagbaraocha has written and presented extensively in environmental health and safety and practical goals-oriented management. He is a member of the Section's Council and liaison to the Education Service Group.

[Ben Tannen](#) has joined Consolidated Edison Company of New York, Inc.'s environmental law group. Previously, Tannen served as an associate in Sidley Austin LLP's environmental group, first in the firm's Washington, D.C., office and then in the firm's New York City office. At Sidley, he represented clients in regulatory environmental matters and in civil and criminal environmental enforcement involving the Clean Water Act, Clean Air Act, RCRA, CERCLA, and other federal environmental statutes and related state laws. Tannen is a vice chair of the

Section's Environmental Enforcement and Crimes Committee and a member of the New York City Bar Association's Environmental Law Committee. Tannen has spoken on environmental enforcement and other environmental law-related topics at the Environmental Law Institute's annual Eastern Boot Camp on Environmental Law; the Section of Environment, Energy, and Resources' annual Water Law Conference; and for an online CLE provider.