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Table of Contents

Features

Section News

EPA's first regulation of greenhouse gas emissions from aircraft—is it the emperor's new clothes?

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In January 2021, during the waning days of the Trump administration, the U.S. Environmental Protection Agency (EPA) issued a new rule regulating greenhouse gas (GHG) emission standards for large commercial airplanes, what we might call simply the Airplane Rule. 86 Fed. Reg. 2136 (Jan. 11, 2021). Within a week, California, along with 10 other states together with the Commonwealth of Puerto Rico and the District of Columbia, sought judicial review, challenging the Airplane Rule as "unlawful" because it did not result in a *net* decrease of regulated emissions and, per the petitioners, it did not even consider any significant decrease as a regulatory option. Is this the bureaucratic equivalent of the emperor's new clothes, designed to cover over a naked, underlying flaw? We examine first the outline of the new Airplane Rule, the litigation by the states and environmental groups with industry intervenors, and the Biden administration's surprising decision not to revise the rule.

The Airplane Rule: Consistent with prior international standards, but can—and must we—do better?

The Airplane Rule began with a finding by President Obama's EPA administrator that GHG emissions from commercial aircraft contributed to air pollution that could endanger public health and the environment. As of 2014, EPA estimated that "U.S. aircraft" emissions constituted 12 percent of the total GHG emissions from the transportation industry and 3.2 percent of the total U.S. "inventory" of GHG emissions. 81 Fed. Reg. 54,422, 54,466 (Dec. 30, 2016). This endangerment finding set the stage under the Clean Air Act for meaningful regulation of the two principal GHGs emitted by covered commercial aircraft—carbon dioxide and nitrous oxide.

In 2020, EPA, acting under President Trump, announced its intent to promulgate a new rule in conformance with the prior endangerment finding. EPA stated that it intended to adopt the standard already embraced by the International Civil Aviation Organization (ICAO), but noted that U.S. manufacturers had already developed technologies to meet those standards, and concluded: "For these reasons, the EPA is not projecting emission reductions associated with these proposed GHG regulations." 85 Fed. Reg. 51,558 (Aug. 20, 2020). EPA's key rationale for adopting the ICAO standards was a policy decision—"aligning domestic standards with the

ICAO standards, rather than adopting more stringent standards, will have substantial benefits for future international cooperation on airplane emission standards, and such cooperation is the key for achieving worldwide emission reductions." *Id.*

Commentators, including states led by California, reacted with visceral scorn. California's comment letter, filed in October 2020 and joined by other states, noted that the proposed rule "would do nothing to control GHG emissions. . . . Far from a historic or 'major' rule for GHG emissions, the Proposed Rule is an empty exercise that substitutes feeble, already-obsolete standards for the critically needed regulation Congress intended."

The National Association of Clean Air Agencies, described as a nonpartisan association of air pollution agencies in some 41 states, similarly commented that "simply adopting the ICAO standards would fall short of what is necessary and feasible."

Nongovernmental organizations (NGOs) were equally scathing in their comments. The NGO comment letter criticized EPA's decision-making process and its alleged inconsistency with the cost-benefit analysis required by the Office of Management and Budget in its Circular A-4 (68 Fed. Reg. 58,366 (Oct. 9, 2003)).

EPA cast aside these comments and rushed out a final rule less than 90 days after they were received. Moreover, EPA declared the new Airplane Rule to be effective "immediately upon publication," stating that it wanted to provide "regulatory certainty." Airplane Rule, 86 Fed. Reg. at 2137.

Litigation begins and a new administration reconsiders the rule

Less than a week after EPA finalized the Airplane Rule, several states filed a petition for review with the U.S. Court of Appeals for the District of Columbia (Case No. 21-1018). The states alleged that the new rule was unlawful and should be remanded. The Center for Biological Diversity, Friends of the Earth, and the Sierra Club filed a similar petition (Case No. 21-1021). The Boeing Company and the Aerospace Industries Association of America moved to intervene in both actions, and Airlines for America sought to participate as an amicus party.

But as the litigation progressed to the courthouse forum, a new president was elected with a different set of environmental policies. Within five days of the filings of litigation, on the first day of his new administration, President Biden issued a series of Executive Orders, including one entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." This Executive Order, No. 13990, directed EPA (and other federal agencies) to review a number of the prior administration's actions, including the Airplane Rule.

By February 2021, EPA obtained an order from the D.C. Circuit putting the litigation on hold. In August, EPA sought a further order to place the litigation on hold. Over the objection of the environmental NGOs, the D.C. Circuit granted EPA's motion and set a deadline for further motions of November 15, 2021.

In November, EPA decided that it would not reconsider the Airplane Rule or initiate a new rule, and all parties filed a joint motion to lift the abeyance and submit a proposed briefing schedule by December 6, 2021. EPA separately issued a statement explaining that the Biden administration intended to "press for" new, more stringent, regulations at the next IOAC negotiations. EPA in its statement acknowledged that it had independent power to regulate such emissions under the Clean Air Act and promised vaguely that: "[W]e will be evaluating what opportunities for greater regulatory ambition exist through the commonsense exercise of our Clean Air Act authority." EPA did not explain what "commonsense" exercises it was considering under its admitted statutory authority.

The D.C. Circuit lifted the stay and the litigation challenging the new rule will proceed. We now await further litigation in the D.C. Circuit to determine whether the Airplane Rule will ultimately be determined to constitute another bureaucratic version of the emperor's new clothes, or alternatively, a case of EPA exercising its "commonsense" discretion.

The road to a cleaner, more fuel-efficient vehicle fleet: How far will the Biden administration's standards take us?
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In early August 2021, the Biden administration released a set of proposed passenger vehicle greenhouse gas (GHG) emissions and fuel economy standards aimed to replace a significantly weaker Trump administration rule. Immediately, the proposal drew ire—not just from groups that had supported the Trump administration's regulation, but from a bevy of environmental advocates who argued the Biden administration's proposal does not go far enough. By late September, 21 attorneys general and the cities of Los Angeles, New York, and Washington, D.C., had added their voices to the chorus calling for even stricter standards.

The U.S. Environmental Protection Agency (EPA) and its counterpart agency in the rulemaking endeavor, the National Highway Transportation Safety Authority (NHTSA), are now in the process of considering these reactions. Meanwhile, major automakers have announced zero-emission vehicle (ZEV) goals, and a number of the industry's biggest players continue to comply with a standards framework voluntarily negotiated during the Trump years with the state of California, which occupies a unique position given its statutorily recognized authority under the federal Clean Air Act to mandate more stringent vehicle emissions standards than the federal government where local circumstances so require.

The Biden administration rule's final requirements will have significant import: The transportation sector is now responsible for the largest share of the country's GHG emissions—nearly one-third of them—the great majority of which come from light-duty vehicles. Cutting transportation sector emissions will be key to any plan to meet international GHG emission reduction commitments. This article will recap the saga leading up to the Biden administration's most recent proposal and will consider the consequences of the current approach.

A brief history of light-duty vehicle GHG and fuel economy standards, from the Bush years to present

Our story begins way back in the mid-aughts, when California sought to exercise its authority to adopt motor vehicle GHG emissions standards in the absence of any federal standards. To do so, the Clean Air Act requires that California submit a waiver request to EPA, which the agency must grant unless one of three conditions exists: (1) California's finding that its standards are at least as stringent as the federal government's are arbitrary and capricious, (2) California does not need the standards to meet compelling and extraordinary conditions within the state, or (3) the standards and accompanying enforcement procedures are not consistent with Clean Air Act section 202 (generally having to do with technological feasibility and lead time).

Following the U.S. Supreme Court's ruling in *Massachusetts v. EPA* that EPA has authority to regulate GHGs under the Clean Air Act, California submitted a waiver request to allow it to set GHG emission standards for light-duty vehicles. The Bush administration denied that request on the ground, among others, that California's standards were not needed to meet "compelling and extraordinary conditions" in the state. The administration's rationale was that while past waivers were needed to combat California's worst-in-the-country smog pollution, which is exacerbated by climatic and geographic factors unique to the state, GHG emissions are less directly tied to disparately negative local outcomes in California. California took legal action to force EPA to reconsider its determination; while that action was pending, the Obama administration took

office, reconsidered the Bush administration's waiver denial, and granted the waiver in early 2009.

That same year, the Obama administration proposed a new program to adopt uniform federal standards that would regulate both fuel economy and GHG emissions. NHTSA, which has been required by the Energy Policy Conservation Act (EPCA) to set Corporate Average Fuel Economy (CAFE) standards for light-duty vehicle fleets since the 1970s; EPA; the State of California; and automakers began a negotiation process that ultimately resulted in a 2011 agreement to increase fleetwide average fuel economy for light-duty vehicles to 54.5 miles per gallon (mpg) by 2025. As part of the deal, California agreed to treat compliance with the negotiated federal standards as compliance with its own, different vehicle GHG emissions standards set through its Advanced Clean Cars (ACC) Program. Those standards were upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *Coalition for Responsible Regulation v. EPA*. Because NHTSA can set fuel economy standards only in five-year chunks, the joint rulemaking that set vehicle GHG emissions standards and CAFE standards for model years (MY) 2017–2025 required a midterm evaluation to make sure that the "augural" standards the rule set for MY 2022–2025 were still feasible. The Obama administration conducted that evaluation in 2016, and the agencies' conclusions that the MY 2022–2025 standards were still feasible were released in early 2017, shortly before Donald Trump became president.

The Trump administration moved quickly in a different direction, reconsidering the midterm evaluation's conclusions and signaling that it would replace the MY 2022–2025 standards. In 2018, EPA and NHTSA released a joint proposal to freeze Obama-era fuel economy standards and, in an action unprecedented in EPA's then nearly 50-year history, to revoke California's existing Clean Air Act waiver for portions of its ACC Program that set vehicle GHG emissions standards and mandated that a percentage of automakers' sales in California had to be electric vehicle sales.

The rule remained in development for over a year. When technical aspects of the standards-setting delayed its release, the federal agencies bifurcated the process, revoking California's ACC Program waiver and declaring state vehicle GHG emissions standards preempted by EPCA first, in September 2019, then setting new CAFE and vehicle GHG emissions standards for MY 2021–2026 second, in March 2020. While the Trump administration had initially proposed freezing the CAFE standards at 2020 levels, the final rule adopted a modest increase of about 1.5 percent year-over-year, with a 2026 endpoint of about 40 mpg, well below the Obama-era standards.

Unsurprisingly, both rules were challenged in court, including by California and a number of states who follow, or have expressed intent to follow, California's standards pursuant to Clean

Air Act section 177. And in the midst of all this regulatory uncertainty, as mentioned above, in July 2019 a group of automakers representing about one-third of the U.S. market voluntarily agreed to adhere to a modified set of GHG emissions and ZEV standards imposed by California.

Upon taking office in 2021, President Biden immediately signaled, via executive order, that he would revisit the Trump administration's actions, directing EPA and NHTSA to reconsider the waiver revocation and propose new CAFE and GHG emissions standards by mid-2021. The agencies followed through, issuing proposed rules reconsidering the waiver revocation and repealing the EPCA preemption determination in April before proposing new CAFE and GHG standards in August.

What's the upshot of the Biden proposal?

The Biden administration's proposal uses the voluntary agreement negotiated by California and automakers as a jumping-off point to begin to recover ground lost during the Trump years. Given that a number of automakers have already agreed that compliance with these targets is feasible, the administration's proposal has drawn little resistance from the auto industry. But while the rule mandates annual fuel economy increases of 8 percent through MY 2026, it would bring the MY 2026 standard only to 52 mpg, still below what the Obama-era augural standards would have required. Similarly, required reductions in vehicle GHG emissions would end up below the Obama standards by 2026. And although the agencies are directed to release standards for MY 2027 and beyond in future rules, because future standards will build off the levels set by this rulemaking, a lower MY 2026 baseline could mean constrained progress later.

The proposal will also have consequences for ZEV adoption. In concert with the release of the August proposals, President Biden signed an executive order setting a 2030 goal that 50 percent of all U.S. sales of new passenger cars and light-duty trucks will be ZEV. While some automakers have publicly made voluntary commitments that align with that goal, environmental advocates have questioned whether compliance flexibilities in the proposed rule will result in companies falling short of these nonbinding commitments.

For example, the proposal includes "incentive multipliers" for sales of electric vehicles, weighting those vehicles more heavily when calculating compliance with fleetwide average standards. Compliance flexibilities like these are intended to push ZEV adoption in the short term by encouraging automakers to sell more electric vehicles. But critics note that the administration's own analysis calculates that, under the rule, electric vehicles will make up only 8 percent of auto sales by 2026—with a long way to go to hit the 50 percent target just 4 years later. And some have voiced concern that incentive multipliers could actually work against the

need for speedy ZEV adoption when the point at which automakers receive enough compliance credit to meet fleetwide average emissions requirements falls below the 50 percent ZEV target.

Conclusion

The road to the Biden administration's current CAFE and vehicle GHG emissions standards has been long and complex—and tussles over the standards are far from over. Making a dent in transportation sector emissions is central to the administration's goal of making meaningful progress on climate change; the Biden administration's proposal advances the ball much farther than the Trump administration would have. But it remains to be seen whether the administration will stick with its more moderate approach in the face of calls to strengthen the proposal, and whether aspects of the rule will help or hinder the administration's aim of achieving significant ZEV uptake this decade.

Climate litigation rising: Hot spots to watch

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Despite what some claim, lawyers are people, too—and as such share in the fate of the planet. The legal profession's concern over climate change isn't new (the first climate lawsuit was filed in 1986),[1] but what is new is the unprecedented scale and diversity of claims related to climate change across the United States and internationally. Since 2015, over 1,000 new climate-related cases have been brought worldwide, and the cumulative number of cases has more than doubled.[2] Most of these cases sit in U.S. courts, but they span nearly 40 countries around the world.[3]

As climate change litigation grows, its complexity does, too. Many academic centers have been established to track, inform, and interface with climate lawsuits, such as Columbia University's Sabin Center for Climate Change Law, New York University's Climate Litigation Accelerator, and the University of Oxford's Sustainable Law Programme.[4] For busy lawyers, getting a handle on this emerging growth area can be a challenge. Here are hot spots to watch as climate litigation expands worldwide.

American tort and consumer protection law flexes its muscle

Since 2017, more than 20 suits have been filed against oil and gas companies by governmental entities across the United States, including seven by state attorneys general.[5] These suits generally allege historical and ongoing unlawful deceptive conduct by the defendants, including concealment of internal knowledge regarding global warming, affirmative misrepresentations of climate science, and ongoing deception regarding the defendants' activities and fossil fuel products.[6] Much of the historical evidence supporting these cases has been developed within the last decade by academics, journalists, and other researchers, and the evidentiary basis for the plaintiffs' claims continues to expand.[7] Nineteen of these suits remain ongoing, and their number has grown steadily, with four filed in 2021.[8]

For the most part, these suits fall into two categories: cost recovery and consumer protection. Thirteen cost recovery suits are ongoing under various causes of action including public nuisance, private nuisance, negligence, trespass, failure to warn, design defect, conspiracy, and unjust enrichment.[9] These suits seek compensation for climate adaptation costs, such as sea walls, on the theory that the defendants' allegedly unlawful conduct substantially contributed to those costs. (A recent study, for example, estimated the cost of sea walls to protect from sea level rise to be at least $400 billion nationwide by 2040.[10]) Because sea level rise is easily attributable to global warming, most of these suits have been filed by coastal cities, counties, and states, although ongoing advances in climate attribution science suggest that cost recovery suits may soon expand in geographic scope and the types of damages claimed.[11]

Thirteen consumer protection cases also remain ongoing (seven seek both cost recovery and consumer protection).[12] These suits are brought under state consumer protection statutes barring misleading consumer-facing communications and other unfair business practices. The evidentiary basis for these actions is similar to that for cost recovery suits, although the applicable statutes often don't require a showing of damages and instead carry a civil penalty for each instance of materially misleading communication.[13] These statutes helped undergird successful litigation against tobacco and opioid companies in the 1990s and 2010s, respectively.

Since 2017, these cost recovery and consumer protection suits have largely been occupied with pretrial motions, and no case has yet reached the merits. Plaintiffs, however, have generally prevailed against venue and dismissal motions, and at least some of these cases are expected to go to trial in 2022.[14]

Paris injunctions

Outside the United States, another legal approach has gained considerable traction: suits against governments and corporations seeking injunctions ordering alignment with the Paris Agreement.

The Paris Agreement, an international treaty on climate change adopted in 2015, seeks to limit global warming to 2 degrees Celsius or 1.5 degrees Celsius, if possible (global warming has already reached 1.1 degrees Celsius).[15] The treaty is legally binding procedurally but not in terms of reducing greenhouse gas (GHG) pollution. However, because over 190 countries are party to the agreement, it provides a consensus regarding the level to which global warming should be limited, if possible.

In 2013, the Dutch foundation Urgenda filed suit against the Dutch government, alleging that the country's inadequate GHG reduction policies violated the human rights of Dutch citizens. The Hague District Court agreed, ordering the government to set policies to reduce national GHG pollution by 25 percent by 2020 (compared to 1990 levels), which was affirmed by The Hague Court of Appeals and ultimately, in 2019, the Dutch Supreme Court. The courts based their decision on the minimum GHG reduction the Intergovernmental Panel on Climate Change had determined was necessary to prevent global warming of 2 degrees Celsius, as well as Articles 2 and 8 of the European Convention on Human Rights.[16]

Building from the *Urgenda* decision, in 2019 the Dutch foundation Milieudefensie and co-plaintiffs filed suit against Royal Dutch Shell, seeking a similar injunction ordering the multinational fossil fuel company to align its business operations with the goals of the Paris Agreement. Milieudefensie based its claim on the Netherlands' duty of care law (Dutch Civil Code Book 6, section 162) as well as Articles 2 and 8 of the European Convention on Human Rights. In 2021, The Hague District Court ruled for the plaintiffs, ordering Royal Dutch Shell to reduce GHG pollution across its entire product chain (including sold products) by 45 percent by 2030 compared to 2019 levels.[17] The decision marked the first time a business enterprise was held liable for its contribution to global warming. Royal Dutch Shell has indicated it plans to appeal.[18]

The *Milieudefensie* court examined the climate problem in detail and issued a number of significant holdings, including that:

- international human rights and other international legal frameworks, such as the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights, are properly considered when applying domestic duty of care standards in the context of climate change;
- the goals of the Paris Agreement represent an accepted and reasonable standard for assessing corporate action with respect to climate change;
- fossil fuel companies have an affirmative duty, separate from and additional to the duties of governments and other parties, to take action to meet climate goals;

- the obligations of fossil fuel companies extend through the entire business value chain, including sold products (often called "Scope 3" emissions);
- emissions produced by fossil fuel companies (including sold products) are sufficiently substantial for legal adjudication;
- the existence of current regulations on GHG pollution does not absolve fossil fuel companies of additional obligations found by courts;
- the shared interest in avoiding dangerous climate change outweighs the financial interests of fossil fuel companies;
- courts have a role in adjudicating disputes about climate change, and legislatures and other political processes are not exclusive vehicles for addressing climate; and
- for choice of law purposes, adoption of corporate plans and policies at company headquarters in a particular country may represent a source of damage to human rights and the environment, even if the company operates internationally.

Actions seeking injunctions based on duties of care have spread throughout Europe. In 2018, the French nonprofit Notre Affaire à Tous and other plaintiffs filed suit against the French government under the French Charter for the Environment and the European Convention for the Protection of Human Rights and Fundamental Freedoms, seeking various remedies including injunctions to compel compliance with the goals of the Paris Agreement and nationwide adaptation to climate change.[19] In 2021, the administrative court of Paris ordered the state to take immediate action to comply with its existing climate commitments, which include a 40 percent reduction in GHG pollution by 2030 (compared to 1990 levels) and carbon neutrality by 2050.[20]

Similarly, in 2021 the Federal Constitutional Court of Germany, in response to a suit brought by German youth under the Basic Law (the country's constitution), found Germany's Federal Climate Protection Act inadequate to protect human rights, ordering the government to pursue measures consistent with the goals of the Paris Agreement and holding that "one generation must not be allowed to consume large parts of the CO2 budget under a comparatively mild reduction burden if this would at the same time leave future generations with a radical reduction burden . . . and expose their lives to serious losses of freedom."[21] Building off this ruling, Greenpeace Germany is currently seeking a Paris Injunction against Volkswagen, the world's second largest car manufacturer.[22] A similar suit has been filed in Italy (against the government) and will be heard in December 2021.[23]

Broad horizons ahead

The United States and Europe aren't the only places where action is heating up. In 2021, the Federal Court of Australia ruled that governmental decision makers have a duty of care toward children in the country to avoid causing them harm through global warming pollution, a decision

that may significantly impact fossil fuel project approvals in Australia going forward.[24] And recently, Vanuatu announced it will seek an advisory opinion on climate change from the International Court of Justice, which may influence domestic and international courts worldwide.[25]

For any lawyer interested in corporate accountability, human rights, the environment, or the fate of the world, climate litigation is an area to watch and engage. The drivers behind these suits—worsening global warming, growing evidence of corporate malfeasance, advances in science allowing attribution of impacts and damages, increasing viability of non-fossil energy systems, and broadening psychological and political salience of climate—all point toward more action in the future. As the world continues to heat up, climate litigation will, too.

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Demand management agreement must be expanded to respond to drought in the Upper Colorado River Basin
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The Colorado River Basin is at a crossroad. Average annual flows in the Colorado River have declined by nearly 20 percent since 2000. More than half of that decline has been attributed to warming temperatures. Scientists predict that this trend will continue, as we expect to lose an additional 3 to 5 percent of annual flows with every degree of temperature increase. Reservoirs in the Colorado River Basin, filled to the brim at the end of the 20th century, are now at historic lows. Coming up short could put at risk the drinking water supplies of almost 40 million people in the Southwest, agricultural production, endangered species, the health of our rivers, and future economic growth, as well as the Colorado River's $26 billion outdoor recreation economy with its quarter-million jobs.

For the Upper Basin states of Colorado, New Mexico, Utah, and Wyoming, another year of hot and dry conditions dramatically reduced runoff into an already low Lake Powell, which, according to a 2021 report from the U.S. Bureau of Reclamation, is now at the lowest level since its filling in the early 1960s. Reclamation recently projected that, by early 2022, Lake Powell is likely to decline below elevation 3,525 feet—a level that begins to risk hydropower production at Glen Canyon Dam and increases the threat of lower water deliveries that could trigger harsh curtailment measures on Upper Basin water rights under the Colorado River and Upper Colorado Basin River Compacts.

The Colorado River Basin cannot afford to see Lake Powell continue to slide. Doing so would only lead to severe economic disruption from emergency mandatory cutbacks in use, uncertainty in available water supplies, loss of power generation, emergency releases from upstream reservoirs, and other reactive actions, including potentially devastating, costly, and protracted interstate litigation. No water user will be immune from this level of disruption.

With so much at stake, the seven Colorado River Basin states signed a series of agreements finalized in May 2019 to mitigate risks of extended drought called the Drought Contingency Plan. Through this framework, separate plans were put in place for the Upper and Lower Basins and tied together by a Companion Agreement.

A core component of the Upper Basin Drought Contingency Plan is the exploration by the Upper Basin states and the Upper Colorado River Commission of whether a demand management (DM) program to reduce the risk of Compact curtailment and hydropower loss is feasible. As outlined in the Demand Management Storage Agreement (DMSA), such a program would help ensure continued Compact compliance through temporary reductions in consumptive water uses and augmentation from water supplies introduced to the Upper Colorado River System. The DMSA authorizes a 500,000-acre-foot (AF) pilot pool at Lake Powell for water storage created through an Upper Basin DM program and outlines broadly what types of water could be used in such a program. (One acre-foot equals roughly 326,000 gallons, or enough water to cover an area of land about the size of a football field one foot deep.) Since 2019, each of the four Upper Basin states and the Upper Colorado River Commission have examined the feasibility of such a program, including engaging stakeholders.

During these discussions, however, many stakeholders, including Tribal Nations, have highlighted the limitations of the DMSA. The DMSA allows water to qualify for storage in Lake Powell or other Colorado River Storage Project Act Initial Units only if it was "beneficially and consumptively used under valid water rights prior to being conserved as part of an Upper Basin Demand Management Program" and was "physically available for diversion in the year it was conserved, and would have been beneficially and consumptively used within a state or states of the Upper Division but for the conservation for the benefit of an Upper Basin Demand Management Program." DMSA Para III.B.2.a.

There are outstanding questions that must be answered to better understand the current legal and administrative frameworks governing proactive compact compliance efforts and the operational parameters of a DM program under the DMSA, including:

- How could a DM program more fully incorporate contributions from Tribal Nations?
- Could municipal conservation programs, infrastructure improvements, improved water management, and agricultural practices such as crop switching contribute to a DM program under the DMSA or other proactive compact compliance activities?
- How can longer-term, more permanent water contributions be made to a DM program under the DMSA or other proactive compact compliance activities?

A narrow interpretation of these provisions results in more limited opportunities for participation from agricultural, municipal, industrial, and tribal water rights. To reduce water use across the Upper Basin in a meaningful way over time, all four types of water—agricultural, municipal, industrial, and tribal—will be needed to contribute to a DM program.

To clarify and expand opportunities for participation in a DM program, the types of conserved use that can be used in a DM program should be interpreted broadly, whether under the current DMSA or a future long-term demand management program. Importantly, these questions can be answered while the Upper Basin states are demonstrating the value of such a program.

ADM program is just one tool for creating long-term resilience in the Colorado River Basin. The Infrastructure Investment and Jobs Act recently passed by Congress and signed by President Biden includes substantial investment to help build drought resilience for western water infrastructure, through resilience strategies like forest management, improving agriculture infrastructure, natural distributed storage, and urban conservation. But these strategies will take time to get in place.

The unprecedented conditions we now face require that Upper Basin decision-makers act swiftly and decisively to develop and implement a plan and tools to protect and manage water and rivers in the Upper Basin for present and future generations. Existing conditions require a multitude of responses, and demand management is a vital tool to address the Upper Basin's water challenges.

Other solutions, including expanded water conservation and reuse, land use planning, infrastructure improvements, and investments to improve the health of forests and watersheds will also be required. A DM program, based on the bedrock principles of "temporary, voluntary, and compensated," and with sideboards to avoid disproportionate social and economic impacts and to ensure environmental protection, may be one of the most useful risk-reduction responses available, and it is available to us now.

With hydrology rapidly degrading, the longer we wait to develop effective tools to collectively mitigate risk on the Colorado River, the more likely we are to lose local control in shaping how the Upper Basin states will respond and what tools will be available to us. There is no time to waste.

Calm waters after *Guam v. United States*?

Shoshana (Suzanne Ilene) Schiller

Shoshana (Suzanne Ilene) Schiller (she/her) is a partner in the litigation group of Manko, Gold, Katcher & Fox LLP. A previous chair of ABA SEER's Superfund and Natural Resource Damages Litigation Committee, Schiller's practice centers on CERCLA, cost recovery, and contribution litigation. She is a frequent speaker at legal and industry trade conferences and seminars and a regular author on environmental and real estate issues.

The U.S. Supreme Court holds that resolving liability under CERCLA means exactly that, and nothing more

On May 24, 2021, the U.S. Supreme Court issued its unanimous decision in *Guam v. United States*, 141 S. Ct. 1608 (2021), yet another key case in a line of decisions interpreting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and, in particular, the interplay between section 107(a) and section 113(f)(3). The Court cleared up some of the murkiness between the two types of claims, holding that consent decrees and administrative orders between the United States and potentially responsible parties (PRPs) that do not expressly resolve liability CERCLA liability do not give rise to a contribution claim under section 113(f)(3). As a result, actions to recover amounts spent for expensive remediations under non-CERCLA settlements are no longer subject to a short three-year statute of limitations but instead can now take advantage of the much longer timeframes for cost recovery claims under section 107(a).

Sections 107(a) and 113(f)(3) of CERCLA

CERCLA, commonly known as Superfund, provides for the cleanup of hazardous waste sites, known as Superfund sites, and creates broad categories of parties potentially liable for a release or threatened release covered by CERCLA—PRPs. Generally, for any specific response action at a Superfund site, a party who has incurred costs responding to contamination will have a claim under either section 107(a) or section 113(f)(3), but not both. Under section 107(a), a party who voluntarily incurs costs to remediate a contaminated site may recover all its costs from other PRPs who are jointly and severally responsible for the contamination. Under section 113(f)(3)(B), in contrast, a party who has resolved its liability to the United States or a state may seek contribution from other PRPs only to the extent of that PRP's individual liability.

The distinctions between the two claims can be significant. Liability under section 107(a) is almost always joint and several, whereas under section 113(f)(3), a party may recover from a particular PRP only that PRP's share of liability. The burden of proof is lower for a section 107(a) claim than a section 113(f)(3) claim. And most importantly, section 107(a) claims must be brought within three years of completion of a removal action or six years after initiation of construction of a remedial action, whereas section 113(g)(3) actions must be brought within three years of the date of the judgment or settlement. In the world of Superfund response actions, that difference could mean a statute of limitations a decade or more longer for a section 107(a) claim (but much shorter for a section 113(f)(3) claim).

The decision in *Guam*

The case before the Supreme Court involved a consent decree entered into in 2004 between Guam and the United States to resolve claims under the Clean Water Act with respect to discharges from the Ordot Dump, which the U.S. Navy has used to dispose of military wastes. In 2017, Guam brought suit against the Navy to recover its removal and remediation costs under CERCLA, and the Navy moved to dismiss, arguing that the 2004 consent decree was a settlement that triggered Guam's contribution claim and, therefore, that it was time-barred.

The U.S. Court of Appeals for the District of Columbia Circuit, following the majority of circuits, agreed with the Navy. It held that section 113(f)(3) does not require resolution of CERCLA liability specifically, but, instead, simply requires that a settlement require the party to engage in removal or remediation that would be considered a response action under CERCLA. As a result, the district court dismissed Guam's case.

The Supreme Court reversed and remanded. Acknowledging that, "[r]ather than requiring parties and courts to estimate whether a prior settlement was close enough to CERCLA, the far simpler approach is to ask whether a settlement expressly discharged a CERCLA liability." Thus, the Court held that "[t]he most natural reading of § 113(f)(3)(B) is that a party may seek contribution under CERCLA only after settling a CERCLA-specific liability." Thus, Guam's action against the Navy was resuscitated.

The ripple effects of *Guam*

After *Guam,* one might have expected a spate of dismissal and summary judgment motions seeking to narrow pending litigation or a wave of new claims from performing PRPs who previously thought their claims were long dead. Seven months after the decision, that level of activity has failed to materialize. The parties in *Atlantic Richfield Co. v. ASARCO, LLC*, No. 20-1142 (S. Ct. 2020), promptly and jointly moved to dismiss the pending petition for writ of certiorari on the basis that *Guam* resolved the appeal, and, since then, there has been a dearth of sightings. Although 60 secondary sources refer to the opinion, there are only five decisions citing to it. Of those, only two address the substance of the decision, and only one, *WASCO LLC v. Northrop Grumman Corp.*, No. 1:20-CV-00227-MR, 2021 WL 4509176 (W.D.N.C. Sept. 30, 2021), applies the holding in *Guam* to dismiss a pending section 113(f)(3) claim. Of course, the *Guam* opinion is still fresh; most certainly, opinions will eventually bubble up to the surface as more litigants urge trial and appellate courts to apply *Guam* the matters before them. Nevertheless, it would appear that the Supreme Court has succeeded, at least for now, in its objective of clarifying how courts should apply the statute of limitations in contribution cases.

The benefits of interactive career panels for new and transitioning lawyers

Glenda Valdez

Glenda Valdez is a second-year law student at Lewis & Clark Law School with an interest in energy and environmental law. She currently serves as SEER's law student liaison to the ABA Law Student Division as well as membership vice chair for the Endangered Species Committee.

Law students, young lawyers, and lawyers looking to enter into or transition to new practice areas often seek opportunities to learn about different career paths. Internet research and networking are the most common ways for students and professionals to explore new paths, but web research is passive and networking is not comfortable for everyone, especially those who may find large group settings unwieldy or intimidating. An event involving a career panel and breakout rooms, like one held last year by two committees of the ABA's Section of Environment, Energy, and Resources (SEER), can lower barriers to access and provide for richer, more fruitful connections.

Interactive panels can offer accessible learning experiences

To supplement diffuse internet resources and traditional networking, various academic institutions and professional organizations publish career path guides for those interested in natural resources fields (e.g., *Different Career Paths in Environmental Law*, and *A Trail Guide to Careers in Environmental Law*). These guides can provide useful background, but they do not allow people to actively engage with practicing natural resources lawyers.

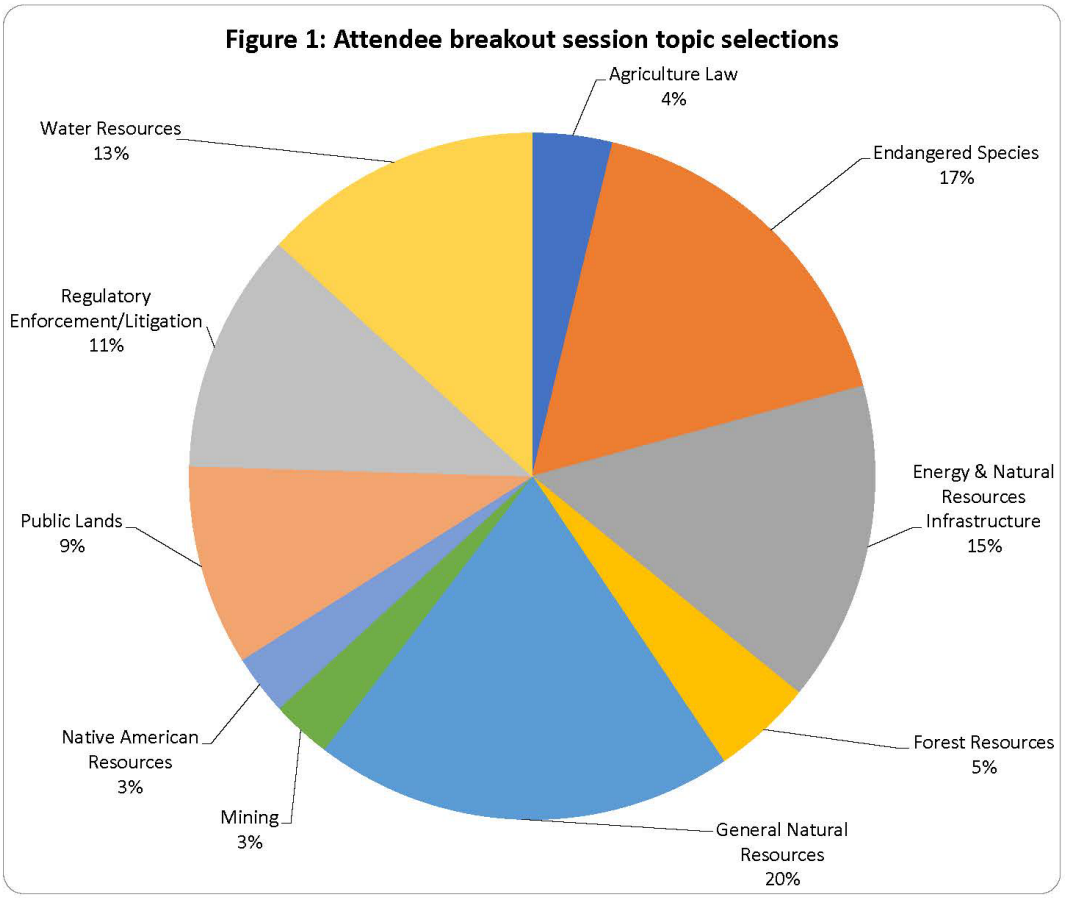
Recognizing this concern, last April SEER's Endangered Species Committee and Forest Resources Committee hosted a Careers in Natural Resources Law panel. This event, which occurred virtually due to the COVID-19 pandemic, allowed students and young lawyers to receive career advice in a large group and then break out into smaller groups to discuss more specific topics. More than 100 law students and lawyers attended the event, speaking to the need for and the power of interactive career panels within the legal profession.

An opportunity to learn about careers in natural resources law from a variety of viewpoints

The Careers in Natural Resources Law panel brought together lawyers from a wide range of practice areas: Travis Cushman, senior counsel for Public Policy at the American Farm Bureau Federation; Brian Potts, partner at Perkins Coie; Ryan Shannon, staff attorney at the Center for Biological Diversity; and Hayley Carpenter, trial attorney at the U.S. Department of Justice, Environment and Natural Resources Division. By gathering together lawyers from a variety of

natural resources jobs, this event allowed attendees to get a better picture of the practice areas available under the umbrella of natural resources law and of the skill sets and experiences that lawyers who are new to the field can expect. The panelists also offered tips for succeeding in the field, including learning to write effectively and making practical experience a priority.

The breakout rooms focused on substantive subjects, including agriculture, endangered species, energy and natural resources infrastructure, forest resources, mining, Native American resources, public lands, regulatory enforcement and litigation, water resources, and general natural resources law. These subject-specific small groups provided an opportunity for attendees to seek out a specific interest area and gain insight into that sub-field. See figure 1 (identifying participation by breakout room).



Informal conversation leads to more candid and fluid discussion

The Careers in Natural Resources Law panel provided a unique environment in which attendees connected with and received guidance from professionals in a structured yet informal and conversational space. Lawyers may not regularly have occasions to discuss career opportunities in such relaxed settings. For example, in the public lands breakout room, a Department of the Interior administrative law judge and nonprofit environmental lawyer who represents conservation groups in federal litigation led the discussion. These two spoke candidly about their experiences working with parties with whom they may not see eye-to-eye, as well as about case development and agency deference, among other topics.

By the conclusion of the event, the attendees had a much better sense of what natural resources law entails, and had learned about future opportunities to connect with professionals in their field of interest. Whether you are a law student or lawyer looking to learn about new career opportunities, or a seasoned lawyer looking to attract new talent, interactive panels can supplement other, more traditional, career transition resources. Thank you to all panelists and breakout room leaders for their time and expertise and to the ABA committees' co-chairs and SEER staff for their planning and leadership efforts.

Views from the Chair
Michelle Diffenderfer

Michelle Diffenderfer is president of Lewis, Longman and Walker, P.A. in West Palm Beach, Florida, and chair of the ABA Section of Environment, Energy, and Resources.

As we welcome 2022 with lots of hope in our hearts, I feel particularly grateful for our Section as a place for each of us to return to again and again for great programs, good reads, and stimulating discussion with peers. Last year I heard from many of you about how the Section has been there for you through the pandemic. That it has been a place to come to when you needed something more, whether it was something more fulfilling to work on or just someone interesting to chat with.

Sometimes we think of a professional association as being separate from us, an entity that furthers a particular profession, in our case the interests of environmental, energy, and resource lawyers. In many cases this is enough, but for those who want more, SEER offers a community of people who show up and support each other. Sometimes our members show up just to do something different, or to meet new people and many of us show up just for the chance of seeing

each other. I have been showing up virtually in a lot of new places in SEER this past year, including committee networking events, webinars, conference coffee hours, public service projects, the SEER committee fair, and the SEER Awards ceremony, to name a few. When I showed up at these events, I learned something new, met new people, caught up with friends, and felt the powerful emotions of our award winners. As a result, I have a greater appreciation of how many communities make up SEER. I hope you have found your community with us.

If you haven't found your groove in SEER yet, then please consider joining more substantive committees. The easiest way to learn about committee events and news is by joining a committee and its respective SEER community. On December 6, 2021, the ABA transitioned to a new member communication platform, ABA Communities. We need you to activate your new ABA Communities account so that you can receive committee updates and news of events. Note that your profile **must** be activated in order to receive these important committee updates. For details about the platform and activation, please go here.

Speaking of showing up, this year we hope to finally have a few opportunities to be together again in person. I look forward to the joy of discussing issues face to face, having a yummy beverage with you, and breaking bread together. There is nothing quite like being together with our peers; learning about all the environmental, energy, and resources law changes that are happening across the country; and then getting together afterwards to discuss the issues and learn more. This month we had hoped to be in Phoenix at our Intersection of Tribal Rights with Environmental, Energy and Resources Development Conference. Instead, we will be holding the Conference virtually in February, new dates should be posted soon. In April we still hope to be together in San Francisco for our 51st Spring Conference on Environmental Law, and in May we will once again hold our Superfund Master Class in Chicago. Please bring a friend or at least let them know you're going and see if they'd like to meet you there. ABA President Reggie Turner has inspired all leadership with his Each One Reach One membership initiative and the immense power of inviting a colleague to an experience with the ABA.

Although it can be hard to just show up virtually for a committee event or in person for a conference when you may not know anyone, I promise you that if you do, you will make a connection or a new friend, or reunite with someone you haven't seen in a long time. I've seen it happen again and again for people over the past months. And please let one of us in leadership know if you are new or haven't attended a program for a while and would like us to help with introductions. We would be happy to help. If you haven't checked in to something with us recently, sign up, show up, we would love to see you!

People on the Move
James R. Arnold

Jim Arnold is the principal in the Arnold Law Practice in San Francisco. Jim has served as Section secretary, Council member, Sponsorships Committee chair, In-House Counsel Committee chair, Superfund and Hazardous Waste Committee chair, Annual RCRA/CERCLA Update co-chair, and Section Fall Meeting (1999) co-chair, and is currently 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.*

Lauren Bachtel is now counsel at Mayer Brown LLP in New York, as a member of the Projects and Infrastructure group. Previously, Bachtel was a senior attorney at Hunton Andrews Kurth LLP in Washington, D.C. She has deep experience in permitting matters for project development and financing purposes, as well as drafting comments on administrative rulemakings. Bachtel's services include advising clients on policy and regulatory clarifications, negotiating proposed legislative bills, and conducting federal litigation. She also serves as an adjunct law professor at her alma mater, Pace University School of Law. Bachtel is the Section's communications vice chair for the In-House Counsel Committee.

Matthew Batista is now working at Klinedinst PC, in their San Diego office as a transactional associate. At Klinedinst, Batista advises clients across a wide range of transactional practice areas, including corporate, venture capital, intellectual property, sustainability, and real estate matters. He is also an independent associate at World Sports Agency, Inc. where he provides support to the lead agents on all aspects of athlete representation, brand management, and career progression. As a former staff sergeant in the U.S. Air Force as a Security Forces member, he was responsible for nuclear weapon security operations, and trained with a variety of military organizations, including the FBI. Batista serves as the communications vice chair for the Section's Environmental Disclosure Committee.

Michael Hockley, an environmental attorney at Spencer Fane, LLP, was recently elected as president of the American College of Environmental Lawyers (ACOEL). ACOEL is a professional association of distinguished lawyers who practice in the field of environmental law and whose members are dedicated to maintaining and improving the ethical practice of environmental law. Hockley's practice concentrates on litigation, environmental law, and renewable energy, with an emphasis on environmental litigation, permitting, and enforcement proceedings. In addition to his practice representing individual clients, he has also chaired and served as group counsel for Superfund site steering committees and has served as mediator in

complex multiparty litigation. Hockley also serves as the Civilian Aide to the Secretary of the Army for Kansas (East).

Ariel MacMillan-Sanchez is now an attorney advisor for the U.S. Environmental Protection Agency, Region 5. Before joining the EPA, MacMillan-Sanchez was a staff attorney for the New Mexico State Legislature where she helped draft bills, memorials, resolutions, amendments, and other legislative documents for New Mexico state legislators. She is a zealous advocate for environmental justice and land stewardship, and has a strong interest in legal representation and policy regarding the environment, natural resources, and those impacted communities. In 2020, MacMillan-Sanchez received her J.D. from the University of New Mexico School of Law, with a focus in energy, environment, and natural resources. She is currently serving as the committee articles vice chair of the Section's Environmental Enforcement and Crimes Committee.

Emily Lane is also joining the U.S. Environmental Protection Agency, Region 5, as an attorney advisor. Before joining EPA, Lane was a law clerk to the Hon. Jeffery P. Hopkins, Hon. John E. Hoffman, Jr., and Hon. C. Kathryn Preston in the U.S. Bankruptcy Court for the Southern District of Ohio. Prior to her service as a law clerk, Lane was a litigation associate at Porter Wright Morris & Arthur LLP, where she practiced environmental and utility litigation, as well as administrative law in the areas of environmental compliance, power siting, and wireless and telecommunications. Lane is returning to the Region 5 office after previously serving as a clerk to the deputy regional counsel. She is currently serving as this Section's chair of the Special Committee on Public Service.

Rebecca Pritchett recently joined Adams and Reese LLP as special counsel. Pritchett is an experienced environmental, natural resources, and oil and gas attorney, focusing on the intersection of government and business. Her practice includes environmental permitting and compliance, enforcement defense, hazardous waste, CERCLA contribution and cost recovery, water quality, water rights, oil and gas exploration and production, mining, timber, legislative drafting, and lobbying. Pritchett helps her clients deal with all aspects of contaminated property, from permitting and reporting requirements to brownfield redevelopment, financial incentives, and financing options. She is a co-chair of the Section's Oil and Gas Committee.