AMERICAN BAR ASSOCIATION
Environment, Energy, and Resources Section

trends

May/June 2022

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION | SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Trends May/June 2022
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Published in Trends May/June 2022, Volume 53, Number 5, ©2022 by the American Bar Association.

Cumulative risk by any other name: Seeking environmental justice in an era of statutory, regulatory, and scientific uncertainty

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On his first day in office, President Biden issued Executive Order 14008, calling on federal agencies to prioritize environmental justice and find ways to address disproportionate pollution impacts on low-income or minority communities. The president's directive is clear and succinct, but its path to implementation far less so, as agencies struggle with statutory limitations, critical data gaps, and budgetary constraints.

U.S. Environmental Protection Agency (EPA) Administrator Michael Regan's tour last November through the South's "Cancer Alley"—the predominantly Black and low-income, 85-mile swath of Louisiana that is home to more than 25 percent of the nation's petrochemical plants—highlights the reality of these obstacles. Compared to the national average, residents in certain cities in Cancer Alley are reportedly 50 to 800 times more likely to contract cancer. Some say they no longer sit outside in the evenings to avoid what they describe as a "golden mist" of chemicals that descends when the sun sets.

On his return to Washington, Regan did not announce the closure or relocation of any of these plants, nor did he pledge to impose new permitting terms to curb emissions. Doing so would

have exceeded EPA's authority under the nation's major environmental laws, which generally provide no framework for addressing cumulative risk. Instead, Regan pledged to aggressively exercise EPA authority to conduct unannounced inspections and follow-on enforcement and to provide $600,000 to impacted Cancer Alley communities to purchase new ambient air monitoring equipment.

While the administrator's directives are important steps to addressing disproportionate burden and risk, their impacts are uncertain, as are the means to predict and assess them. After all, EPA and the broader scientific community have yet to agree on a common framework for quantifying and managing cumulative risk and hazard, which represent proxies for understanding the multiple environment insults to which environmental justice communities are subject.

EPA currently manages cancer risk and other toxicological hazards (e.g., risk of chronic organ failure) as distinct phenomena. Moreover, it is unclear whether current authorities provide a method to consider and assess the cumulative impact on a system that aggregates human health and environmental impacts. Significant data gaps further complicate the analysis.

Viewed through this lens, it is uncertain how much funding for air monitors will ultimately be required for Cancer Alley, an area of roughly 2,000 square miles: each air quality monitor costs tens of thousands of dollars, with installation, operation, and maintenance adding significantly more. A handful of new monitors, while helpful, is inadequate to foster a more robust understanding of the drivers of cumulative risk. Meanwhile, inhalation exposures tell only part of the story. To effectively manage community-level exposures, other media must be considered—air and water, but also other complete exposure pathways associated with soil, homegrown fruits and vegetables, local fish and shellfish, among others.

Scientists will need years of research to fill data and analytical gaps, to understand cumulative risk and the potential synergistic effects of various contamination sources. In the meantime, EPA has taken action to provide the public with new tools to visualize risks within their communities and states.

For example, EPA's Office of Compliance recently deployed a new web tool. ECHO Notify users can register to receive weekly emails with local enforcement alerts, such as a notice of violation issued to a nearby facility. Likewise, the agency recently updated its Community Environmental Justice Mapping Tool, EJ Screen 2.0. The update incorporates the newest available demographic information, and provides new indicators on unemployment, food deserts, medically underserved areas, life expectancy, and asthma and heart disease.

While these and other new tools offer overburdened communities greater insight into the multiple risks they face, many still await the environmental justice they seek. Absent other statutory and regulatory authority, EPA is working to resolve a backlog of complaints brought under Title VI of the Civil Rights Act, which prohibits recipients of federal funds and grants from discrimination on the basis of race, color, or national origin in any program or activity.

Title VI recently proved instrumental for an overburdened community in Southeast Chicago. On February 18, 2022, the Chicago Department of Public Health denied an applicant's permit to operate a scrap metal recycling facility on Chicago's Southeast side, following community pushback, federal civil rights investigations, and, critical pressure from Regan and other Biden administration officials to suspend permit review pending analysis of likely cumulative impacts to the overburdened community. While this approach secured victory for one community, the transaction costs are high and the procedural steps uncertain.

For now, as federal agencies, including EPA, prioritize their efforts to address environmental justice, it may be helpful for them to think in terms of near-, mid- and long-term goals. Agencies need to redirect enforcement resources to overburdened communities now to ensure, at a minimum, that polluters in these communities are being held to the same standards that apply in less burdened, more affluent communities.

In the midterm, the federal government must make cumulative risk assessment a scientific and socioeconomic research priority and begin to take regulatory actions that push the envelope of the one-pollutant-at-a-time analysis that has long been the hallmark of EPA decision-making. After all, remedying environmental injustice will cost money, and policymakers and taxpayers will want to know that resources are directed to the most urgent problems—that is, toward communities facing the greatest cumulative risks. What are the most important drivers of the overburdening that environmental justice communities face? Which can EPA most effectively address? Which developing technologies, including hyperlocal monitoring devices such as smartphone dongles that measure air pollution, show the most promise? And may the federal government rely on evidence gathered by citizen-scientists in legal actions?

In the long-term, stakeholders from government, business, nongovernmental organizations, and communities must collectively determine the breadth of action to address environmental injustice. If the American experience on other societal ills (e.g., poverty, lack of access to healthcare, disparate public education outcomes) is a guide, consensus may be difficult. While Americans generally agree that people should not be subject to disproportionate environmental insult because of race, ethnicity, or lack of income, they agree less on the lengths to which government should go to remedy it.

Technology may point the way. Increasingly hyperlocal monitoring, big data, and artificial intelligence may provide a kind of "forced transparency" on polluters, where citizens know exactly what is being emitted and when. It is unclear how courts might react to agency actions predicated on the results of citizen-led research and emerging technologies. In the meantime, EPA's emphasis on inspections and enforcement in overburdened communities may lessen those burdens and demonstrate to citizenry that the cop is on the beat.

Lessons learned from Richard Rothstein's *The Color of Law: A Forgotten History of How Our Government Segregated America*

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> "Only if we can develop a broadly shared understanding of our common history will it be practical to consider steps we could take to fulfill our obligations."

In *The Color of Law: A Forgotten History of How Our Government Segregated America*, Richard Rothstein calls upon his readers and American society at large to look at our country's history of racist practices head-on. With detailed specific examples and carefully tracked source material, Rothstein explores the forgotten depths of multifaceted, often government-led, segregation that laid the foundation for many of the race-based inequities we are grappling with today. As a result, reading *The Color of Law* seems especially important in an era when there is increasing polarization around how, and indeed whether, to talk about race and its impacts on everything from housing law to environmental law and policy.

Florida Senate Bill 148 (2022), for example, would have filtered history so that schools and businesses would not make people feel "psychological distress on account of his or her race, color, sex, or national origin." Such a law obviously would make addressing environmental injustice more complicated. Packed with distressing facts, Rothstein's work might have been shunted into obscurity under SB 148, and still might be even though the bill was withdrawn March 12, 2022. Time will tell what similar bills come about, as Florida is not alone in such proposals.

The many forms of government-sponsored housing discrimination

> "Without our government's purposeful imposition of racial segregation, the other causes —private prejudice, white flight, real estate steering, bank redlining, income differences, and self-segregation—still would have existed but with far less opportunity for expression. . . . Private discrimination also played a role, but it would have been considerably less effective had it not been embraced and reinforced by government."

Rothstein argues that African Americans were unconstitutionally denied the means and the right to integrate in middle-class neighborhoods. Through "redlining," the federal government-created Home Owners' Loan Corporation used color-coded maps in the 1930s to decide who would receive assistance and low interest rates—regularly rescuing homeowners in white middle-class suburbs while viewing red areas of the map (often African American neighborhoods) as higher risk. The federal government also directly financed growth in California and throughout the West in the decades following WWII on a racially restricted basis by making financial support more readily available to those purchasing new homes in predominantly to exclusively white subdivisions. The Federal Housing Authority similarly allowed racial exclusions in property deeds long after the U.S. Supreme Court ruled that the government could not enforce such clauses.

Though most readers may be familiar with these historic practices, some might find it surprising to learn that they are not all relics of a bygone era. Rothstein documents discriminatory lending practices in the late 1990s and beyond, including practices that resulted in African Americans being three times more likely to accept subprime loans in the early 2000s, and ultimately much more likely to be impacted by the housing bubble collapse in 2008.

Impacts beyond housing

Rothstein further documents how government housing policies ensured and exacerbated broader income discrepancies between White and Black Americans, as differences in home ownership have constrained opportunities for Black Americans to pass on home equity, the main source of wealth for middle-class Americans, to the next generation. "African American families today, whose parents and grandparents were denied participation in the equity-accumulating boom of the 1950s and 1960s, have great difficulty catching up now." In addition to its impact on inherited wealth, unequal obstacles to generating home equity faced by Black Americans has made it more difficult to plan and pay for college and retirement, and to muster the resources to respond to emergencies.

The impacts of discriminatory housing policies have furthermore had more than financial implications. Being restricted from certain neighborhoods also allowed for the concentration of a variety of harms in areas made available to Black Americans. For example, zoning differences have resulted in higher industrial uses and toxic waste close to African American neighborhoods. As documented in a 2017 report from the NAACP and the Clean Air Task Force, African Americans are 75 percent more likely to live near facilities that produce hazardous waste. With the advent of climate change, we are also seeing disproportionate heat island effects in non-White urban neighborhoods, a fact that was recently corroborated by researchers at Portland State University and the Science Museum of Virginia, who found that areas redlined in the early to mid-1900s are now, on average, 5 degrees warmer than non-redlined neighborhoods. Racial discrimination and violence were also more easily concentrated, as demonstrated by the myriad of examples unearthed by Rothstein of police officers and other public servants engaging in discriminatory activities, while superiors encouraged these activities or took inadequate steps to restrain them. Condoning housing discrimination at nearly every level of government further allowed a culture of inequity to permeate and persist within society's other economic engines. The National Labor Relations Board, for example, did not refuse to certify White-only unions until 1964, at which point racial income inequality was already well-established.

Acknowledging uncomfortable truths

> "We like to think of American history as a continuous march of progress towards greater freedom, greater equality, and greater justice. But sometimes we move backward, dramatically so."

Rothstein tells history like it is, asking us to sit with uncomfortable facts about our nation's past that, no matter one's political views, we cannot deny. *The Color of Law* provides interpretation and a significant amount of credible evidence about how our past has informed our present and can be used to shape laws and policies that right historic wrongs, particularly when it comes to matters of housing and the environment. Hopefully, as more of us read and share *The Color of Law*, this account can contribute to "broadly shared understanding of our common history," and perhaps eventually a more equitable society.

The butterfly effect: How proactive policy can unite industry to protect a species

Elise Laarman

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America's favorite butterfly is in trouble. Known for its iconic black-and-orange patterns and spectacular fall migrations, the monarch butterfly may be listed under the Endangered Species Act (ESA) as soon as 2024. Given that the monarch is found throughout the lower 48 states, a protected status could have an extensive impact on industry. For example, a listing could lead to delays for infrastructure projects and increased costs due to regulatory consultations. Understanding these implications and wanting to make a proactive difference for an at-risk species, landowners and managers from the energy and transportation sectors seized an opportunity provided under section 10(a)(1)(A) of the ESA. These entities helped produce a first-of-its-kind nationwide conservation agreement by agreeing to manage their lands voluntarily in a manner that would provide valuable habitat for monarchs in exchange for certainty and flexibility from regulatory agencies.

Why monarchs?

Over the past few years, the monarch butterfly has experienced precipitous population declines. The latest U.S. Fish and Wildlife Service status review reports that the eastern monarch population, which migrates up to 3,000 miles to overwinter in Mexico, has dropped 88 percent since 1996. The annual Western Monarch Count conducted by the Xerces Society for Invertebrate Conservation reports that the western population has dropped nearly 95 percent since the 1980s. Because the monarch is recognized across the country, it has become an ambassador of sorts for the many pollinator species in decline. Experts are calling for an "all-hands-on-deck" approach to unite landowners from across the public and private sectors to tackle the scale of conservation needed to reverse population declines.

Building habitat corridors across the nation

More than 40 energy companies and state departments of transportation came together under the leadership of the University of Illinois Chicago's Energy Resources Center and the Rights-of-Way as Habitat Working Group that the university hosts to develop a voluntary conservation agreement for the monarch butterfly. The agreement, known as the National Monarch Butterfly Candidate Conservation Agreement with Assurances for Energy and Transportation Lands (Monarch CCAA), is a regulatory mechanism that encourages nonfederal landowners and

managers to adopt voluntary measures that create a net benefit for the butterfly. These measures include modifications to vegetation management practices along highways and under powerlines, such as mowing at certain times of year and using more targeted herbicide applications. These modifications encourage diverse groundcover and limited impacts to milkweed, the monarch's host plant. The agreement was developed with the guidance of the U.S. Fish and Wildlife Service, which approved the agreement in 2020.

What's in it for the companies?

Building habitat for a beloved species makes for great publicity. But for organizations interested in signing onto the Monarch CCAA, the benefits do not stop there. The distinction of a CCAA from other section 10 conservation agreements (i.e., safe harbor agreements and habitat conservation plans) is the assurance it provides landowners and managers that no additional requirements beyond the activities in the CCAA will be mandated if the species is ultimately listed under the ESA. The Monarch CCAA functions much like an insurance policy that guarantees certainty in the face of undetermined regulatory requirements and potential litigation—e.g., litigation to force the listing of the butterfly under the ESA. Large-scale projects needed to update our nation's aging infrastructure and support the energy transition can take years to plan, permit, and construct. Regulatory certainty is essential for sectors that foresee accelerated growth and wish to avoid significant delays on these expensive, long-term projects.

A hopeful future

Early counts of overwintering numbers for the western monarch butterfly population indicate it is not too late to make a difference. With a 100-fold increase from last year's western count, the monarch demonstrates tremendous resilience despite continued habitat degradation and loss. More than 30 companies have applied to join the Monarch CCAA since its approval. Their commitments yield more than 800,000 acres of meaningful butterfly habitat. The CCAA also serves as an innovative and proactive model for large-scale collaborative conservation that could be replicated for other at-risk species and in other sectors. As many species across the nation are experiencing broad population declines, a collaborative approach to voluntary conservation may be a beneficial solution for both critters and people.

Spire STL's legacy: Notes on updated FERC infrastructure certification policy

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Through the Natural Gas Act (Gas Act), the Federal Energy Regulatory Commission (FERC or Commission) strives to be our energy system's bulwark against corporate abuse. It took Spire STL, a Midwestern gas pipeline that was arguably the worst of its ilk—supported by a single precedent agreement between affiliated entities—to effect serious change in how the Commission evaluates new gas infrastructure development. Such change came only through the combined efforts of environmental advocates, nonprofit lawyers, courts, ratepayers, economists, and regulatory experts, all working in concert to counter the corporate legerdemain resulting from FERC's approval of this controversial pipeline project. The story of Spire STL is the story of a regulated state gas utility that took advantage of the financial benefits of constructing new gas infrastructure in the absence of gas demand growth or contracted shippers other than an affiliate.

Over the last few years, the U.S. Court of Appeals for the District of Columbia Circuit had begun to recognize troubling legal mistakes in FERC's gas infrastructure approvals, both substantive and procedural. *See*, *e.g.*, *Allegheny Defense Project v. Federal Energy Regulatory Commission: Schrödinger's Cat Scratches Back* (discussing the D.C. Circuit Court's critique of FERC tolling orders); *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019) (remanding to FERC to explain why foreign export contracts satisfy public convenience and necessity test); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (remanding to FERC for failure to consider greenhouse gas emissions in its public convenience and necessity analysis). But the court's decision in *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021), and the aftermath of that ruling, highlight why it is so critical that the Commission is now changing its approval process.

The court found that the Commission erred in determining that the Spire STL pipeline served the public convenience and necessity. However, by the time the court issued its decision, the pipeline was not only operational, but Spire Missouri, the state-regulated utility holding contracts for 100 percent of the pipeline's long-term firm gas capacity, had reconfigured its gas system to "put all its eggs" in the proverbial single basket. The Commission was then left to deal with how to unwind an unneeded pipeline project that should never have been built, but that was effectively grandfathered into the system to make it costly and difficult to disentangle. (As this article was set for publication, Spire STL petitioned the U.S. Supreme Court for certiorari on the

D.C. Circuit Court's remedy of vacatur, and the Court is expected to decide whether to grant certiorari sometime prior to the end of its current term.)

When the D.C. Circuit Court upended the FERC-issued certificate of public convenience and necessity for the Spire STL pipeline, its decision marked two things. First, the culmination of years of litigation that revealed how the Commission's decision-making had strayed from its Gas Act mandate. Second, the decision marked the beginning of the Commission's work to realign its process for approving new fossil fuel infrastructure with the public interest of ensuring that we have a safe and reliable energy system that can also achieve our climate goals. Very recently, the Commission released its Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, which found that:

> looking only to precedent agreements and ignoring other, potentially contrary, evidence may cause the Commission to reach a determination on need that is inconsistent with the weight of the evidence in any particular proceeding, in violation of both the [Gas Act] and the Commission's responsibilities under the Administrative Procedure Act.

178 FERC 61,107 (Feb. 18, 2022). Citing *Environmental Defense Fund v. FERC*, the Updated Policy Statement acknowledges that evidence concerning the market need for a gas pipeline is too easy to manipulate when affiliates contract for pipeline capacity, and specifically provides that for affiliate-dominated projects, such precedent agreements will be insufficient evidence of market demand.

The Commission's updated policy recognizes how the Commission must refocus its approval process to ensure that it once again becomes a strong defense against corporate abuses in the fossil gas infrastructure space. The Commission committed to examining the following when making a need determination in *all* cases, not just those involving affiliate precedent agreements: (1) precedent agreements; (2) circumstances surrounding the precedent agreements, including open seasons and LDC or generator RFPs; (3) end use(s) of gas to be transported; (4) data showing why the project is needed to serve that use; (5) pipeline utilization rate; (6) if the project is predicated on increased gas demand, market study projecting volumetric or peak day load growth; (7) why other suppliers are not able to meet that incremental demand with existing capacity; (8) shippers' load growth profiles, gas supply portfolios, and any prior approval by state public service commissions; (9) for projects general supply projects (producer-driven or utility-driven to lower supply costs or increase supply volume), regional projections for supply and market growth; (10) for efficiency-driven projects or infrastructure-improvement projects, documentation of system benefits such as reduced operating costs, increased pipeline integrity, or reduced gas leaks; (11) demand projections accounting for current and future policy and regulatory developments; and (12) alternatives to the project with supporting data.

Most importantly, the Commission explains in its Updated Policy Statement that "[e]nsuring the orderly development of natural gas supplies includes preventing overbuilding," and finds that state utility commissions are particularly well-positioned to assist the Commission in determining proposed new capacity's impact on existing legacy pipelines—including those on which the shippers may turn back capacity when contracting for new gas capacity. The Updated Policy Statement makes clear the long-held Commission position that it can deny an application based on adverse economic or adverse environmental impacts, or both, and is accompanied by an Interim Greenhouse Gas Policy Statement setting out how FERC will evaluate gas infrastructure's greenhouse gas emission impacts in its Gas Act review. We can hope that these clarifications and additional steps will ensure that the Commission appropriately weighs each new project's environmental consequences when determining if the project serves the public interest. But the story of Spire STL shows that overbuilding can be prevented from the outset, by asking the right questions to properly assess need, collecting data rather than assertions, and ensuring that there is true market demand for new infrastructure that cannot be met in a less costly or destructive manner.

Georgia ruling signals new concerns for PFAS users and wastewater treatment systems

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On September 20, 2021, Judge Amy Totenberg, a senior judge on the U.S. District Court for the Northern District of Georgia, issued what she termed an "odyssey" of an Order, totaling 180 pages, in response to 12 motions to dismiss in a per- and polyfluoroalkyl substances, or PFAS, lawsuit, *Jarrod Johnson v. 3M, et al.*, 4:20-cv-00008-AT (N.D. Ga.).

Rate payers and water subscribers in the Rome, Georgia, area filed the suit, alleging that an upstream 9,800-acre land application system (LAS) has polluted, and continues to pollute, their drinking water with the PFAS compounds used by the carpet manufacturing industry in Dalton, Georgia. The suit is one of many filed in Georgia alleging Clean Water Act violations, together with state and common law claims, against PFAS manufacturers and suppliers, carpet manufacturers, and in some cases, the City of Dalton's water utility companies.

The court largely denied the defendants' motions, the implications of which are twofold: (1) by casting doubt that LASs are not point sources under the Clean Water Act—an argument not yet addressed by the U.S. Court of Appeals for the Eleventh Circuit—the Order places Georgia's existing LAS operators in a vulnerable position, operationally, financially, and with regulatory compliance; and (2) the Order indicates a shift toward a more expansive view of potential liability for PFAS exposure damages beyond just PFAS manufacturers.

PFAS and carpet manufacturing

Dalton, Georgia—often referred to as the Carpet Capital of the World—is located in northern Georgia and produces nearly 90 percent of the world's carpet. PFAS are used throughout the carpet production process to impart stain resistance and durability to carpet fibers. Due to their oil-, water-, and heat-repellant properties, PFAS can persist in the environment with significant longevity.

Discarded PFAS-containing effluent from Dalton's carpet manufacturers is transported to Dalton Utilities, where the wastewater is land-applied by Dalton's LAS following certain wastewater treatment measures.

Plaintiffs argue that this land application contributes PFAS into the Conasauga River and its tributaries through hydrological connections, ultimately contaminating downstream communities' drinking water.

Georgia ruling exposes added vulnerabilities to LAS operators

In its attempts to secure dismissal from the case and, specifically, the Clean Water Act claims, Dalton Utilities argued that its operations are properly permitted under all applicable state and federal regulatory frameworks. Judge Totenberg, however, was persuaded by plaintiffs' argument that a separate National Pollutant Discharge Elimination System (NPDES) permit may be required for the LAS, as the LAS may be a point source of PFAS pollution.

Under the Clean Water Act, point source designation is a threshold determination for permitting. The typical point source is a discernible pipe discharging pollutants directly into a stream, or the "functional equivalent" of such a discharge, per the U.S. Supreme Court's recent decision, *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). LASs incorporate a network of spray nozzles, which irrigate using wastewater over land and, accordingly, do not fit so clearly within the conventional understanding of a point source.

According to Georgia case law, LASs are permitted as nonpoint sources, and many Georgia industries have relied on this conclusion. Consequently, Judge Totenberg's ruling muddies the water for Georgia's existing LAS permitting framework by casting doubt as to whether LASs require additional NPDES permitting. Faced with this uncertainty, many existing LASs may halt land application operations or be forced to turn to other less practical and more costly wastewater treatment measures, at least while Georgia, Congress, or federal appellate courts further evaluate the issue.

In the meantime, one thing is clear: LAS operators are now—at least in the Northern District of Georgia—more vulnerable to regulatory actions and civil claims under theories that the systems require additional NPDES permits.

Ruling opens the door to reaching product manufacturers

The Order also provides a new focus in PFAS litigation directed at downstream commercial producers that use the chemicals, rather than solely holding PFAS manufacturers like 3M and DuPont accountable for PFAS environmental remediation claims. The Order specifically noted that plaintiffs ". . . failed to point to any authority from Georgia establishing a duty on the part of a chemical supplier to protect an unknown third-party, rather than its consumer, from harm resulting from the negligent use or disposal of the chemical." Users such as Dalton's sophisticated carpet producers, however, are deemed to know the risks of disposal.

Despite Judge Totenberg's reliance on Georgia law, product manufacturers like Dalton's carpet producers should heed the Order's implications on national PFAS litigation and anticipate a heightened risk for liability exposure from litigants seeking remediation costs and damages for alleged PFAS pollution and exposure. It appears that the days of only large-scale PFAS manufacturers bearing the brunt of PFAS pollution and exposure costs may be a thing of the past.

The future of antiquities: Challenges on the horizon for national monuments

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The Antiquities Act of 1906 (Act) is one of America's oldest conservation laws. The Act allows the president to set aside "objects of historic or scientific interest" on federal lands for protection as national monuments, provided the land reserved is "confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(a), (b). Over a century of jurisprudence has affirmed the president's broad discretion in declaring national monuments. However, contentious changes to the boundaries and protections of three national monuments in recent years—Bears Ears, Grand Staircase-Escalante, and the Northeast Canyons and Seamounts—may signal the end of this era. Moreover, a recent statement from Chief Justice Roberts indicates a heightened potential for curbing the president's authority under the Act in a way that could hinder its continued use to protect ecosystems.

Unilateral action, restrictions spark controversy

Once designated, land and resources within a national monument are subject to use restrictions. No evidentiary record, nor confirmation of an imminent threat to the objects the monument seeks to protect, is required for designation. Moreover, presidential proclamations are not subject to the procedural constraints of other conservation laws, allowing more expeditious action. While many consider the immediacy of protection a key strength of the Act, its mechanism of unilateral action can engender tension with state and local communities, and monument prohibitions may constrain certain types of economic development.

Case law confirms the Act's broad scope, limited judicial review

The U.S. Supreme Court has expressly held that geological features are protectible and that the president can reserve submerged lands—including waters above them and wildlife inhabiting those waters—as national monuments. *Cappaert v. United States*, 426 U.S. 128, 142 (1976); *Alaska v. United States*, 545 U.S. 75, 103 (2005). Additionally, the Court has implied that ecosystems are protectible "objects." *Alaska*, 545 U.S. at 99, 102–03.

Case law has also outlined the contours of judicial review under the Act. The U.S. District Court for the District of Columbia has held that such review is limited to "the face" of the proclamation—factual findings are not reviewed. *Tulare County v. Bush*, 185 F. Supp. 2d 18, 25 (D.D.C. 2001). The U.S. Court of Appeals District of Columbia Circuit has further noted that plaintiffs seeking to challenge a monument's boundaries must raise "specific, nonconclusory factual allegations" identifying "with sufficient particularity" parts of the monument that do not contain the natural resources and ecosystems the president sought to protect. *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002); *see also Massachusetts Lobstermen's Association v. Ross*, 349 F. Supp. 3d 48, 55 (D.D.C. 2018).

Chief Justice Roberts weighs in

Despite the judiciary's historical deference to presidential discretion in establishing monuments, a recent statement by Chief Justice Roberts denying certiorari for *Massachusetts Lobstermen's Association* reveals the Supreme Court's interest in revisiting this question—particularly concerning the establishment of spatially extensive monuments. Although denial of certiorari carries no precedential value and the Court need not explain its reasoning, Chief Justice Roberts included a lengthy statement condemning the Northeast Canyons and Seamounts Marine National Monument as "part of a trend of ever-expanding antiquities." The Chief Justice appears chiefly concerned with how the "smallest area compatible" provision applies in the context of monuments protecting ecosystems. He posits that this restriction on presidential authority has "ceased to pose any meaningful restraint," transforming the Act into "a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea."

Chief Justice Roberts's statement demonstrates his, and perhaps the Court's, inclination to hear a case that challenges the use of the Antiquities Act to create expansive monuments. A case proposing a new standard for assessing the "smallest area compatible" with "proper care and management" of ecosystems and natural resources might receive the Court's consideration. However, to obtain *ultra vires* review of a national monument's boundaries, challengers would need to point to specific portions of the reserved lands or waters that lack scientific or historic value—in other words, areas in which the natural resources or ecosystem components the president sought to protect are absent.

Presidential ping-pong

In 2017, President Trump shrunk Bears Ears National Monument—the first to be established upon request of a Tribal nation—to just 15 percent of the area designated by President Obama and reduced Grand Staircase-Escalante National Monument by approximately half. Land removed from these monuments, including areas considered sacred by five Tribal nations, was

reopened to oil and gas drilling and uranium mining. President Trump also removed restrictions on commercial fishing established by President Obama in the Northeast Canyons and Seamounts Marine National Monument. In 2021, President Biden fully restored the boundaries and protections of these three monuments, specifically citing the importance of intact ecosystems and ecological linkages.

Looming litigation

President Biden's proclamations resulted in the voluntary dismissal of a lawsuit contesting President Trump's changes to the Northeast Canyons and Seamounts National Monument. Voluntary dismissals of similar suits concerning Bears Ears and Grand Staircase National Monuments, for which unopposed motions to stay were granted in March 2021, are expected to follow. However, the specter of litigation still looms over these monuments, as opponents to their restoration are likely to challenge President Biden's actions in court. The State of Utah has retained a law firm to explore potential avenues for litigation contesting the restoration of Bears Ears and Grand Staircase-Escalante National Monuments, and cases raising other challenges to the president's authority to modify or expand national monuments remain active in the federal courts.

New legislation ahead?

Congress has used its authority under the Property Clause to modify—and abolish—national monuments and has twice-imposed state-specific limitations on the president's Antiquities Act authority. After numerous monument declarations in Wyoming and Alaska sparked controversy, legislation was passed to restrict a president's ability to create monuments in those states. While this is one potential path to resolve site or state-specific conflicts, members of Congress could also suggest general limitations on presidential authority under the Act moving forward or pass legislation codifying the boundaries of current monuments.

Both sides of the political aisle have called for a legislative solution to increase the permanence of monument protections. Then-Representative Deb Haaland (now Secretary of the Interior) introduced legislation in 2019 that would have required an act of Congress to reduce or revoke certain national monuments. More recently, Utah's governor called for a "permanent legislative solution" to bring certainty to monument management. President Trump's modifications of Bears Ears and Grand Staircase-Escalante National Monuments spurred a flurry of legislation in the 115th and 116th Congresses; however, none of those bills succeeded in passing even one chamber, suggesting that Congress may struggle to amass the political consensus needed to pass such legislation.

Building foundations to last

The time may be ripe for practitioners to propose a new standard, palatable to the current composition of the federal courts, under which the "smallest area compatible" with the proper care and management of ecosystems can be evaluated. Accordingly, the increasing specificity of modern presidential proclamations is an important trend to sustain. Detailing the "objects of historic or scientific interest" intended for protection along with specific management measures may help ensure that protections outlast the designating president. Given the potential for increased judicial scrutiny ahead, it would be wise to fortify the record in support of existing and future monuments. Although not required by the Act's text, developing a robust scientific record in support of their boundaries as designated could help guard monuments against subsequent reductions in size. Just like the pueblo ruins that inspired the Antiquities Act's passage, modern national monuments must have (legal) foundations that are built to last.

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.*

Rachel Bowen has joined the Florida Fourth District Court of Appeal in West Palm Beach, Florida, as senior law clerk. Previously, Bowen was assistant attorney general at the Tennessee Attorney General's Office where she represented the interests of ratepayers before the Tennessee Public Utility Commission. Bowen is a Programs vice chair for the Water Resources Committee.

Matthew Cohn has joined USG Corporation in Chicago as assistant general counsel–Environmental. Cohn was formerly an officer with Greensfelder, Hemker & Gale, P.C., also in Chicago. His experience includes a broad range of environmental law, e.g., CERCLA cost recovery, RCRA citizen suits, toxic tort cases, environmental enforcement actions at the state and federal level, permitting disputes, and insurance coverage claims, as well as compliance with environmental and similar regulations and environmental due diligence. Cohn most recently wrote about U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance's enforcement discretion during and after the COVID-19 pandemic. His work at USG

will include regulatory compliance, due diligence, environmental litigation, sustainability, and energy. Cohn currently serves as a Programs vice chair of the Section's Environmental Transactions and Brownfields Committee.

Kathryn (Katie) Ostman is the new senior vice president of Legal at Swift Current Energy in Boston. Previously, Ostman was a partner in the Project Finance group at Morgan, Lewis and Bockius LLP. At Swift Current, she leads the legal aspects of financing and other transactions related to the company's wind, solar, and storage projects. Ostman's practice is primarily concentrated on project finance, energy, commercial finance, and corporate transactions. She has represented a variety of parties in connection with the development, construction, acquisition, divestiture and financing of natural gas, wind, solar, and other electrical generating and infrastructure projects. Ostman is an At Large vice chair for the Section's Energy Infrastructure, Siting, and Reliability Committee.

Allyn Stern has been elected as a principal at Beveridge & Diamond PC in Seattle. Stern was regional counsel at U.S. Environmental Protection Agency (EPA), Region 10 before she joined Beveridge & Diamond in 2019. Stern has over 30 years of EPA experience and uses her expertise to help businesses develop proactive environmental compliance strategies, navigate governmental regulations, and negotiate with agencies to identify reasonable and implementable solutions to enforcement matters. Her work has influenced national decision making, particularly on Superfund and Clean Water Act litigation and policy. Stern is co-chair of the Section's Waste and Resource Recovery Committee.