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Environmental rights amendments: Misconceptions and application

Todd Ommen

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Several states have recently enacted—or are considering enacting—constitutional amendments protecting a right to a clean and healthful environment, often referred to as Green Amendments or environmental rights amendments (ERAs). Most recently, on November 2, 2021, the people of New York ratified an amendment that ensured that “Each person shall have a right to clean air and water, and a healthful environment.” N.Y. Const., Art. 1, § 19. Montana and Pennsylvania have similar (though varying) protections, and multiple other states have constitutional protections to a clean environment that are not in the form of a fundamental individual right. Activist groups, led by [Green Amendments for the Generations](#), often lead the efforts to adopt ERAs, and, as expected, ERAs generally face pushback from business and industry. The arguments underlying this resistance are myriad, but two that appear frequently are based on a poor understanding of the purpose and nature of ERAs.

The imaginary flood of litigation

Prior to enactment, ERAs face claims that they will be a boon to plaintiffs’ attorneys, creating endless litigation against industry that will cripple economies and chase businesses from the state. This argument is factually unfounded. The effect of ERAs has been studied, and the results unambiguously show that the feared flood is barely a trickle. When one considers what an ERA is, this result is not at all surprising.

State constitutions, like the U.S. constitution, protect the people from infringement of their rights *by the government*. The constitution defines the powers that the state government has. In the context of fundamental rights of the people such as an ERA, typically found in a “bill of rights” under a constitution, amendments explicitly say what the government *cannot* do. So, ERAs, constitutional amendments describing the rights of the people, ensure that the *government* cannot infringe the peoples’ fundamental right to a clean environment. Constitutional amendments do not provide any cause of action for one private citizen against another citizen or a corporation. This is a common misunderstanding people have concerning what our fundamental rights are. Just as I can’t sue Twitter for violating my free speech rights, I can’t sue ChemCorp for violating my constitutional right to a clean environment.

That is not to say that private industry will never have to deal with litigation related to ERAs. Where there is an intersection between a business, private citizens *and* the government, then the ERA may result in litigation that burdens the private business. A clear example of this is in the context of permitting or approvals for business operations. In this context (and others), the second layer of pushback from industry—also based on a misunderstanding of the reason for ERAs—comes to light.

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The imaginary need for statutory or regulatory specifics

By definition, ERAs must be stated in general terms. They promise “clean” or “healthful” environments without specifics as to any particular contaminant. Consequently, when citizens attempt to rely on ERAs by arguing that a government is depriving them of their right to a clean or healthful environment by (for example) permitting a particular activity by industry, the argument in response is often something along the lines of, “until the legislature or the state environmental agency enacts specific limits and definitions establishing what is ‘clean and healthful,’ the ERA is unenforceable.” This argument has some facial appeal but ignores the purpose and context of a properly enacted ERA.

If the ERA is adopted as a fundamental right in a constitution (like New York’s), and if it is implemented for the same reasons that gave rise to the New York amendment, then the argument that it requires additional legislative or regulatory action should fail. First, fundamental rights, as a general matter, are self-executing. One does not need further laws or regulations defining governmental restrictions on our speech or our right to free exercise of religion. These rights are effective without the need for further statutes or regulations.

Second, one key reason for an ERA precludes an interpretation that further legislative or regulatory action is necessary. As is clear from the legislative history, one of the driving motivations for the New York amendment was in response to the tragic impacts of chemicals that remain unregulated. Newly developed chemicals in this country can be put to use without first establishing their safety. As we have seen, this sometimes leads to people facing long-term exposure to toxic substances with no remedy from their governments. This set of facts played out catastrophically in Hoosick Falls, New York, where residents were drinking water contaminated with perfluorooctanoic acid (PFOA, a type of per- and polyfluoroalkyl substance, or PFAS) for years because PFOA was [unregulated and untested](#) for water providers with under 10,000 users.

This regulatory “gap” was one of the driving forces behind New York’s amendment: What happens when a substance that is harmful to health is not covered by existing statutes and regulations? An ERA is supposed to fill this gap and give the people a way to compel action and protection by environmental governmental agencies, even when existing statutes and regulations may not cover exposure to a harmful pollutant. The argument that an ERA can have no force and effect unless and until statutes and regulations are passed defining the scope and limits of the ERA turns this context on its head. It uses the lack of regulation that gave rise to the need for an ERA as a weapon to neuter it. To be sure, defining what “clean” or “healthful” means in the absence of numbers and charts will require some work by agencies and the judiciary, and it will certainly lead to some uncertainty for industry. But that is what the people have asked for: protection of their environment even in the absence of specific statutes and regulations. Uncertainty is one result, but it is not a reason to make the ERA a useless, albeit well-meaning, aspiration.

ERAs certainly will create some additional litigation, uncertainty, and burden on business and industry. But they are being enacted precisely to address the uncertainty and burden that currently falls on the people due to risks from unregulated exposures. This is the burden shift underlying and motivating the recent enactment of ERAs. For this reason alone, ERAs would appear to be justified. The question remains, will this be sufficient to curtail business and industry efforts to avoid or neuter them moving forward?

A California court decision—bees are fish—shines new light on the biodiversity crisis

Matthew J. Sanders

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In September, the California Supreme Court [left in place](#) a lower-court [decision](#) holding that bees are fish—at least for the purpose of protecting them under California’s endangered species law. Public-interest environmental lawyers, including the clinical students I teach at Stanford Law School, are accustomed to working in the shadows behind the clients and causes we serve. But this case, on which many of my students tirelessly worked, has stolen the spotlight. Celebrated in the environmental community, criticized by industry, dissected by legal scholars, and alternately lauded and ridiculed in social media posts, the decision that bumble bees and other terrestrial invertebrates may be listed as “threatened” or “endangered” under the California Endangered Species Act seems like a sea change in environmental law.

It is and it isn’t. Let’s start with how it isn’t, which means starting with the decision itself (-- Cal. Rptr. 3d --, 2022 WL 437847 (May 31, 2022)). When California’s Third District Court of Appeal ruled in *Almond Alliance v. California Fish & Game Commission* in May of this year, the press and the public seized on the obvious, and admittedly amusing, storyline that “bees are fish,” often followed by various versions of “only in California . . .” But the *Almond Alliance* decision doesn’t actually say that. In fact, it rejects that notion—that whether state law protects terrestrial invertebrates like bumble bees turns on common or even scientific understandings of “bees” or “fish.” The decision instead explains that whether the four species of California native bumble bees at issue in the case should be listed as “endangered” turns on what the law says. The California Endangered Species Act, passed in its current form in 1984, protects any native “bird, mammal, *fish*, amphibian, reptile, or plant” that is at risk of extinction. Cal. Fish & Game Code §§ [2062](#), [2067](#), [2068](#). And California law defines “fish” to mean “a wild fish, mollusk, crustacean, *invertebrate*, amphibian, or part, spawn, or ovum of any of those animals.” *Id.* § [45](#). Accordingly, the California Endangered Species Act protects “invertebrates” as “fish.”

I’ll be the first to admit that protecting “bees” as “fish” is not a legislature legislating at its finest. When the California Supreme Court declined to take the case, the chief justice and two associate justices [took note](#) of the “clear disconnect” between the Court of Appeal’s legal conclusion and “common knowledge.” Moreover, some legal scholars [point out](#) that the other kinds of animals protected under the definition of “fish” are often associated with aquatic environments. (There are good responses to these and other points, and the Supreme Court and Court of Appeal discuss many of them in their decisions.) In any event, the California Supreme Court thought the case was unworthy of review; the Court of Appeal employed long-settled legal doctrines to fairly interpret a single provision in a single law.

Where this case really matters is outside the law. We hear most often about global climate change, but that crisis overshadows and contributes to another one: plummeting biodiversity. A 2019 United Nations [report](#) (with a much shorter [summary](#)) estimates that one-quarter of the Earth's animals and plants are threatened, with 13 percent of known species facing extinction. That rate is tens to hundreds of times higher than the average extinction rate over the past ten million years. According to the World Wildlife Fund, vertebrate populations have [declined](#) by nearly 70 percent since 1970. As for insects, which make up three-quarters of all the world's living species, the estimates of their decline range from 10 to 90-plus percent depending on the species. The real figures may be [much worse](#).

The crisis is local, too. A recent [analysis](#) of imperiled species in the United States, one of the few to include insects, yields a [breathtaking map](#) of the nation's most at-risk biodiversity hotspots. In recent decades, the iconic monarch butterfly has declined by [70 percent](#) in Mexico and [95 percent](#) in California. In the case of North American bumble bees, [28 percent](#) are faced with real risk of extinction. The four native bumble bee species at the center of the *Almond Alliance* case have each declined by 57 to 77 percent on average. One is listed as "endangered" under federal law, and three are recognized as "endangered" or "critically endangered" by the International Union for the Conservation of Nature.

The declines in these species, and in ones like them, matter: native bumble bees are often [more nimble and efficient pollinators](#) than commercial honeybees, and have the benefit of already living in (and being adapted to) local conditions. Pollinating insects are, in turn, the base of our food pyramid. According to the Center for Food Safety and the Xerces Society for Invertebrate Conservation, [one in every three bites of food](#) requires pollination, and more than [85 percent](#) of flowering plants require pollination to reproduce. Yet our current systems of industrial agriculture, which rely heavily on [pesticides](#) and other harmful products and practices, [kill](#) many of our most powerful pollinators, especially when they are combined with widespread habitat destruction and climate change. The results are crashing insect populations and [food insecurity](#), with the poorest human populations often experiencing the worst effects. Declines in pollinating insects like bumble bees, not to mention in insects generally, are an inescapable sign that we are living unsustainably and inequitably.

The *Almond Alliance* decision brings necessary, specific attention to this crisis and reminds us that we need every tool available at our disposal to stop and reverse it. Many of those tools, like the [cooperative conservation measures](#) that the Xerces Society is undertaking with some farmers, hold great promise. Besides pesticides, native bees and other insects are threatened by habitat loss and fragmentation, overgrazing, invasive species and pathogens, and [climate change](#). Accordingly, programs that work to protect and restore habitat, reduce or eliminate pesticide use, and gather critical information about bumble bees and other insects will be essential. But to work these measures have to be innovative, implementable, and implemented.

In the meantime, and likely for the long term, we also need laws that can step in when other efforts aren't working. Now, following the *Almond Alliance* decision, there is no doubt that California law can serve that purpose. (The federal Endangered Species Act [also protects](#) insects,

but state laws like California's can provide [additional protections](#).) Expressly making imperiled terrestrial invertebrates eligible for protection under state endangered species laws will help provide this additional, necessary level of protection. State and local agencies will have to consider how approvals for development and other projects may affect the most vulnerable insects, and those undertaking activities that could jeopardize such insects will have to take measures to avoid driving them closer to extinction. Endangered species laws also often unlock resources aimed at helping failing species recover instead of just survive.

Many are understandably concerned about the consequences of formally listing insects for legal protection. Laws add process, and process adds cost. Endangered species laws also restrict what people can do in places where listed species are present. But *Almond Alliance* doesn't portend a future in which every homeowner has to get a permit to mow their lawn. First, and most important, legal protections are available only for species that are at risk of disappearing forever. In California, a species must be (or be likely to become) in "serious danger" of extinction to warrant legal protection. Most species that meet this high threshold exist in vanishingly small areas and numbers—meaning there just aren't that many of them. Second, collaborative, voluntary conservation measures to change existing practices can go a long way toward avoiding the need for regulation. Third, legal protections should and typically do kick in only where voluntary measures don't materialize or aren't sufficient. Finally, it takes less money than you might think to protect endangered species—just one percent of the value of the food Americans waste each year would provide [sufficient funding](#) to recover all of the species listed under the federal Endangered Species Act. And if federal and state wildlife agencies currently lack the resources or expertise to deal with insect declines, that's a [reason to do more](#), not less.

The costs of protecting imperiled insects like bumble bees are far lower than the costs of driving them to extinction. Insects are, as the biologist E. O. Wilson observed, "the little things that run the world." Forty years ago, the California Legislature heeded this wisdom, recognizing that we need animals without backbones and that *they need us*. If it takes a few jokes about California, Bumblebee tuna, and Finding Beemo to spread that message, so be it. We ignore insects' and other invertebrates' fate at risk to our own.

Recent legislation expected to spur development of carbon capture utilization and sequestration projects

Myles Culhane

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Carbon capture, utilization, and sequestration (CCUS) technologies and projects have been in various stages of development for more than two decades. During that time, [several projects](#) in the United States and globally have successfully captured carbon dioxide (CO₂) directly from a point source or from the atmosphere and either utilized the CO₂ in products or permanently stored it in formations deep beneath the earth's surface. However, in its 2019 study, the National Petroleum Council [reported](#) that while the United States currently deploys approximately 80 percent of the world's CO₂ capture capacity, the 25 million tonnes per annum (Mtpa) captured mitigates less than 1 percent of the nation's CO₂ emissions from stationary sources. With the need to arrest climate change and its causes growing more urgent by the day, new incentives to deploy CCUS technologies more broadly are badly needed.

Recent legislation

On August 15, President Biden signed into law the [Inflation Reduction Act \(IRA\) of 2022](#). The IRA includes nearly \$370 billion earmarked for reducing consumer energy costs and increasing American energy security while substantially reducing greenhouse gas emissions. The IRA also includes provisions to further spur decarbonization of the economy by increasing and extending what is commonly referred to as 45Q tax credits for capturing and sequestering carbon dioxide. The IRA follows last year's Bipartisan Infrastructure Law (BIL). The BIL included provisions to provide more than \$10 billion in grants for carbon dioxide removal projects to be administered through the Department of Energy's Office of Fossil Energy and Carbon Management ([formerly the Office of Fossil Energy](#)). The grant programs include [\\$2.5 billion for carbon capture demonstration projects](#), [\\$900 million for large-scale carbon capture pilot projects](#), [\\$2.5 billion for carbon storage validation](#), and [\\$3.5 billion for direct air capture hubs](#).

States have also been hard at work seeking ways to tap into the potential for CCUS to address climate change, establish programs to ease adoption of carbon dioxide removal technologies, and create opportunities for new jobs deploying CCUS. For example, on July 22, 2022, California Governor Newsom articulated a need to accelerate development of natural and engineered carbon removal projects across the state and [requested](#) that the California Air Resources Board (CARB) set a 20 million metric ton (MMT) carbon removal target for 2030 and a 100 MMT carbon removal target for 2045. On September 16, 2022, California codified in statute a 2045 statewide carbon-neutrality target, a clear regulatory framework for carbon dioxide removal from

the air and carbon capture at point sources with subsequent utilization or sequestration, as well as requirements to develop an achievable carbon removal target for natural and working lands.

Novel legal questions remain to be answered

Financial incentives and numeric targets, however, are just one piece of the puzzle. Carbon removal projects are actually four complex, and often controversial, projects in one. They require equipment to capture CO₂, linear features such as pipelines to transport the CO₂, a site to safely, securely, and permanently sequester the CO₂, and, particularly in the case of direct air capture from the atmosphere, renewable or zero carbon energy projects to ensure that the net CO₂ captured exceeds the equivalent emissions from sequestering. The legal questions involved to construct such facilities run the gamut from conventional contracting to understanding the rights to pore space to accounting and allocating for the long-term liability of permanent storage in the earth. Along with generic authorizations required for building and constructing industrial infrastructure, CCUS projects may also require permits for Class VI wells authorized pursuant to the Environmental Protection Agency's (EPA's) Underground Injection Control (UIC) regulations or, in states with primacy, a state's UIC regulations, which permits are notoriously difficult to secure.

Several states have sought to clarify and streamline these processes. For example, [Wyoming](#), [North Dakota](#), and [Montana](#) have clarified their laws governing pore space ownership. But these nascent laws have proven to be [facially controversial](#), and further challenges to their application will likely follow.

Environmental justice considerations

Additional hurdles to deploying CCUS projects include fears that CCUS projects might prolong a reliance on fossil fuels and, with it, continued reliance on industrial activities that have historically overburdened disadvantaged communities. Steps that the Biden administration has taken to address these concerns include the president's [January 27, 2021, Executive Order](#), which requires that the investment and building of a clean energy economy must ensure that well-paying union jobs are created and that disadvantaged communities are turned into healthy, thriving communities. The executive order additionally established the [Justice40 Initiative](#), which calls for the development of recommendations on how 40 percent of the benefits of certain federal investments in clean energy and other sectors might be directed toward disadvantaged communities.

Complementing these efforts, the U.S. Department of Energy (DOE) has developed a [pilot data visualization tool](#) that displays DOE-specific investments to help illustrate how the Department's funding and investments are distributed to overburdened and underserved communities. This tool will create a means for holding the government accountable for its Funding Opportunity Announcements (FOAs) for the Carbon Capture programs and Direct Air Capture hubs under the BIL (expected in the third and fourth quarters of 2022).

More to come

DOE FOAs for the Carbon Capture programs and Direct Air Capture hubs are expected in the third and fourth quarters of 2022. Responses to the FOAs are likely to be requested in 60 to 120 days with selections to follow in early to mid-2023, although it is possible that the selections may take until later in 2023. Projects will then take several years to obtain authorization and begin construction. As the technology is deployed, it is expected that costs for CO₂ removal will decrease and CO₂ emissions will be substantially reduced.

States likewise are continuing to draft or revamp rules to simplify the construction of CCUS projects. [Texas](#) recently updated its rules in advance of seeking primacy for its administration of the UIC Class VI program (the permitting program authorizing CO₂ injection for purposes of geologic storage). This move follows successful primacy applications by North Dakota and Wyoming and a pending primacy application by Louisiana.

PFAS “slip slidin’” away down the regulatory superhighway

Steven Siros

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Unless you are living under a rock, you have undoubtedly heard references to per- and polyfluoroalkyl substances (PFAS), a class of emerging contaminants that are in the fast lane of the regulatory superhighway at both the state and federal levels. PFAS are a large, complex group of manufactured chemicals with unique nonstick, stain-resistant, and firefighting properties that have been used in many products over the past 70-plus years. Due to the unique characteristics of PFAS that allow it to instantly put out a jet fuel fire, prevent grease from leaking through a pizza box, or allow one to easily flip pancakes on a griddle, PFAS generally break down slowly in the environment and are therefore ubiquitous in the environment; they have been found in the blood of polar bears in the Barents Sea.

Although there are thousands of different PFAS compounds, our understanding of the potential impacts to human health and the environment is limited. And we don’t even know how to look for these compounds in the environment—at this stage, U.S. Environmental Protection Agency (EPA)-approved sampling methodologies allow us to identify only about 40 different PFAS and only in specific matrixes. Despite the limited scope of knowledge regarding the impact of PFAS on human health and the environment, regulators are moving at a very rapid pace to regulate PFAS (both on an individual and class basis). One of President Biden’s campaign pledges was to push for PFAS regulation, and in October 2021, EPA released its [PFAS Strategic Roadmap](#) that outlined the agency’s three-year strategy for addressing PFAS. Two key elements of EPA’s strategic roadmap were a promise to 1. promulgate drinking water standards for selected PFAS, and 2. regulate PFAS under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). Each of these elements is briefly discussed below.

PFAS drinking water standards

In 2016, EPA established health advisories of 70 parts per trillion (ppt) for two of the more widely known PFAS—perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS). Importantly, health advisories are not drinking water limits but rather levels that EPA has identified as having no adverse health or aesthetic effects. The 70 ppt health advisory level for PFOA and PFOS had been in place for five years, and EPA was under increasing pressure to revisit these levels. Then, in June 2022, EPA issued revised health advisories for PFOA and PFOS. The updated health advisory levels, which EPA claims are based on new science and

consider lifetime exposure, were set at 0.02 ppt for PFOS and 0.004 ppt for PFOA. EPA also set final advisories for hexafluoropropylene oxide dimer acid and its ammonium salts (also referred to as GenX) at 10 ppt, and perfluorobutane sulfonic acid (PFBS) at 2,000 ppt.

Interestingly, the PFOA and PFOS health advisories are more than three orders of magnitude below the analytical detection limits for these compounds. [Challenges](#) have already been filed to the GenX health advisory level of 10 ppt, claiming that the health advisory is “arbitrary and capricious, and otherwise inconsistent with the law, because [U.S.] EPA incorporated toxicity assumptions that dramatically deviate from its own standard methods[.]” For example, challengers claim that U.S. EPA relied on significantly inflated “uncertainty factors” to ratchet down its reference dose that deviated from its own guidance and practice. Challengers also argue that EPA’s use of its Safe Drinking Water Act authority to issue health advisories violates several constitutional requirements, including the non-delegation doctrine.

EPA also is in the process of promulgating an enforceable drinking water standard or maximum contaminant limit (MCL) for specific PFAS compounds. These recently issued health advisories portend extremely low MCLs (likely approaching zero). However, new MCLs are unlikely until the latter part of 2023 at the earliest although EPA did submit its proposed rule to the White House Office of Management and Budget (OMB) on October 6, 2022.

CERCLA/RCRA

On August 16, 2022, EPA published its proposed rule seeking to designate both PFOS and PFOA as “hazardous substances” under CERCLA. The OMB had previously completed its review of the proposed rule. Although OMB designated the proposed rule as “economically significant,” thus requiring a regulatory impact analysis, that designation is not expected to significantly slow EPA’s rulemaking.

Once EPA issues a final rule designating PFOA and PFOS as CERCLA hazardous substances, that action is likely to significantly expand the number of sites eligible for listing on the National Priorities List. In a letter submitted by the U.S. Chamber of Commerce to OMB, the Chamber estimated that the compliance costs associated with designating PFOA and PFOS as CERCLA hazardous substances could be as high as \$22 billion.

Any action by EPA to designate PFOA and PFOS as CERCLA hazardous substances may also be foreshadowing a similar effort to designate these and other PFAS as “hazardous waste” under RCRA, which would subject these compounds to RCRA’s cradle-to-grave regulatory scheme.

State actions

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Despite the regulatory initiatives discussed above, EPA remains in the slow lane as compared to the states. For example, as of August 2022, more than half of the states had implemented some form of PFAS drinking water regulation or guidance, and at least 12 states had implemented enforceable PFAS drinking water limits. The number of states with enforceable drinking water standards will likely continue to grow.

States are also increasingly regulating PFAS in a variety of products. For example, California has banned the sale of children's products with PFAS beginning in July 2023 and cosmetics containing PFAS beginning in January 2025. Maine has banned the intentional use of PFAS in any products beginning in January 2030. Numerous states have also banned the use of PFAS in firefighting foam. In addition to already promulgated regulations, dozens of states are also contemplating product-specific bans of PFAS in, among other things, carpets, rugs, textile, and other stain- and water-resistant products.

PFAS will continue to face significant regulatory pressure at both the federal and state levels. At some point, EPA will probably catch up to the states, and the existing patchwork of PFAS regulations will likely be replaced by a more uniform set of federal regulations. What is certain, however, is that we will continue "slip slidin'" away down the PFAS regulatory superhighway.

Supreme Court preview

John R. Jacus

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This is the second edition of Trends' Supreme Court Preview, a summary of environmental, energy, and natural resources cases to be decided by the U.S. Supreme Court in its upcoming session (October 2022 Term). Because there is a general dearth of environmental, energy, and natural resources cases confirmed for argument in the October 2022 Term, we focus exclusively and in depth on the case of *Sackett v. Environmental Protection Agency*.

Clean Water Act: Definition of "Waters of the United States"

[*Sackett v. Environmental Protection Agency*, Docket No. 21-454](#)

This case involves a second trip to the U.S. Supreme Court for Michael and Chantell Sackett, who purchased a residential lot near Priest Lake, Idaho in 2004. When they began to prepare the lot for construction by placing sand and gravel, they were issued a compliance order by the U.S. Environmental Protection Agency (EPA) indicating they could not place such fill on their lot without a Clean Water Act (CWA) section 404 dredge and fill permit because their lot contained wetlands. The Sacketts brought suit against EPA in the U.S. District Court for the District of Idaho arguing the CWA did not apply to their property. The District Court for the District of Idaho dismissed the suit for lack of subject matter jurisdiction, concluding there was no final, reviewable agency action. [*Sackett v. EPA*, No. 08-cv-185-N-EJL, 2008 U.S. Dist. LEXIS 60060, 2008 WL 3286801 \(D. Idaho Aug. 7, 2008\).](#)

The Sacketts appealed the District Court's dismissal to the U.S. Court of Appeals for the Ninth Circuit ([*Sackett v. EPA*, 622 F.3d 1139 \(9th Cir. Sept. 17, 2010\)](#)), which affirmed, and then to the U.S. Supreme Court. In *Sackett I*, the Supreme Court held the Sacketts could bring a civil action under the Administrative Procedure Act against EPA challenging its final action and remanded the case to the District Court. [*Sackett v. EPA*, 566 U.S. 120 \(March 21, 2012\)](#). On remand, the District Court granted summary judgment, holding that EPA correctly determined wetlands were present on the Sacketts' property and constituted waters of the United States (WOTUS) subject to jurisdiction under the CWA. The court's decision was based on several factors, including that the wetlands were adjacent to a navigable water body and hydrologically connected by a shallow subsurface flow to the adjacent lake. [*Sackett v. EPA*, No. 2:08-cv-00185-EJL, 2019 U.S. Dist. LEXIS 239377, 2019 WL 13026870 \(D. Idaho Mar. 31, 2019\)](#). The Sacketts again appealed, and the Ninth Circuit applied the "significant nexus" test authored by Justice Kennedy in the plurality opinion of [*Rapanos v. United States*, 547 U.S. 715 \(2006\)](#), affirming the District Court's grant of summary judgment and upholding EPA's assertion of jurisdiction to regulate the Sackett's residential lot under the CWA. Using Justice Kennedy's test, the Ninth Circuit found that the wetlands on the Sackett property, by virtue of the hydrologic connection, had a "significant nexus" to the lake, a traditional navigable water. [*Sackett v. EPA*, 8 F.4th 1075 \(9th Cir. Aug. 16,](#)

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[2021](#)). The Sacketts again filed a petition for certiorari with the U.S. Supreme Court, which the Court again granted, but limited to the question of “whether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the [Clean Water Act, 33 U.S.C. § 1362\(7\)](#).”

Of course, the Supreme Court’s impending consideration of the “proper test” to be addressed in *Sackett II* has been preceded for many years by back-and-forth rulemaking and litigation challenges to differing EPA and U.S. Army Corps of Engineers (Corps) rules attempting to define WOTUS, all coinciding with much of the Sackett’s circuitous legal battle. Major milestones include the Obama administration’s promulgation of the [Clean Water Rule in June 2015](#), which referenced and sought to implement Justice Kennedy’s concurring opinion in *Rapanos v. EPA*, and defined WOTUS to include eight categories of jurisdictional waters. Multiple lawsuits challenged the Clean Water Rule, the specific outcomes of which exceed the scope of this article. With the change in presidential administration, the Trump administration’s EPA and Corps repealed the Clean Water Rule and eventually replaced it the [Navigable Waters Protection Rule in 2020](#), which established four categories of waters considered to be within CWA jurisdiction and was aligned more closely to the plurality opinion of the late Justice Scalia in *Rapanos*, in part by including “perennial and intermittent tributaries that contribute surface water flow” to navigable waters; this excluded watercourses with less than intermittent flow regimes.

As with the Clean Water Rule, many groups challenged the Navigable Waters Protection Rule, and on August 30, 2021, the U.S. District Court for the District of Arizona vacated the rule. [Pasqua Yaqui Tribe v. United States EPA, 557 F. Supp. 3d 949 \(D. Ariz. 2021\)](#). Shortly thereafter the Biden administration’s EPA and Corps indicated they would interpret WOTUS in a manner consistent with the “pre-2015 regulatory regime,” taking the definition back to the so-called “Rapanos Guidance” promulgated by EPA and the Corps that applies both the Kennedy “significant nexus” test and the Scalia “continuous surface connection” test. EPA also began a stakeholder process to support a future rulemaking step to refine the definition of WOTUS. It is against this backdrop of rulemaking challenges and replacement definitions of WOTUS that the Sacketts’ challenge of the “proper standard” of what are “WOTUS” will be determined.

The Petitioners have asserted in their briefs that Justice Kennedy’s “significant nexus” test should be abandoned, instead urging a two-part test similar to the plurality in *Rapanos* (relative permanence of the “navigable water” and a continuous surface connection to wetlands), but with additional scrutiny over Congress’ commerce clause authority to regulate intrastate waters. In its response brief, the Biden administration argues that a “restrictive version of the ‘continuous surface connection’ test articulated by the [*Rapanos*] plurality . . . has no grounding in the CWA’s text, structure or history” and notes that such an approach would seriously compromise the Act’s protections afforded to many adjacent wetlands and the waters associated with them. Whatever the outcome, the Sacketts, permitting agencies, and permittees alike will benefit from a lasting measure of certainty concerning the scope of jurisdictional WOTUS following the Court’s decision.

Environmental justice in judicial opinions

Lauren Godshall and Devin Lowell

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The legal system finds itself at a crossroads: acknowledging the significance of environmental justice and the need to properly consider it in major decisions, but without sufficient legal mechanisms or remedies. While environmental justice is increasingly in the news, in presidential pronouncements and plans, and in pleadings, plaintiffs still lack means to take direct action in the courts to further environmental justice. The predominant legal remedy for challenging environmental injustice in federal court remains a National Environmental Policy Act (NEPA) challenge to agency decisions.

Parties seeking redress of siting and permitting processes that will clearly result in disproportionate burdens on minority populations have used NEPA's requirements as the vehicle to assert environmental justice claims, and judges have entertained such claims for years. But this has meant that "environmental justice" claims are largely procedural (i.e., did the agency do a good enough job reviewing environmental justice concerns before approving the project?) and not substantive (i.e., did the environmental justice analysis prove the facility could not be lawfully sited in this neighborhood?). As such, federal courts appear to view "environmental justice" as a *process*, not a *result*: "an agency is not required to select the course of action that best serves environmental justice, only to take a "hard look" at environmental justice issues." *Sierra Club v. Fed. Energy Comm'n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (referencing *Latin Ams. For Social & Econ. Dev. V. Fed. Highway Admin.*, 756 F.3d 447, 475–77 (6th Cir. 2014)). 974 F. Supp. 2d 18, 41 (D. Mass. 2013).

For example, in *Allen v. National Institutes of Health*, the district court reviewed the siting of "BioLab," a facility housing numerous pathogens in a largely minority neighborhood. 974 F. Supp. 2d 18, 41 (D. Mass. 2013). The court concluded that "plaintiffs' claim fails because the [environmental justice review] considers the potential impact the BioLab may have on low-income and minority populations." The report had not concluded that the BioLab was an environmental justice-neutral project, but that was immaterial. The court concerned itself solely with whether environmental justice considerations were part of the process, regardless of the outcome.

Another pipeline case decided in the same year went the opposite way, but again plainly spelled out the purely procedural nature of the court's environmental justice review in the opinion's discussion of whether an environmental impact statement (EIS) met NEPA standards: "[W]e cannot see how this EIS was deficient. It discussed the intensity, extent, and duration of the pipelines' environmental effects, and also separately discussed the fact that those effects will

disproportionately fall on environmental-justice communities. . . . NEPA requires nothing more.” *Sierra Club v. FERC*, 867 F.3d 1357, 1369, 1371 (D.C. Cir. 2017).

NEPA’s “remedy” gap was made apparent in a recent Ninth Circuit dissent. The court upheld the adequacy of an environmental assessment evaluating a proposed air cargo facility in the San Bernadino Airport. The dissenting opinion began, “I do not say this lightly, but it must be said. This case reeks of environmental racism.” *Ctr. for Cmty. Action & Env’t Just. v. Fed. Aviation Admin.*, 18 F.4th 592, 614 (9th Cir. 2021). The dissent discussed several issues where the environment assessment by the Federal Aviation Administration fell short, particularly given the facility’s location in—and impact on—a disadvantaged community of color. Yet, as a concurrence by another justice claimed, no party had asserted an environmental justice issue in the underlying case—perhaps (or likely) because of the judicial system’s inability to do more than address the thoroughness of the assessment, not its outcome.

Several federal appellate courts have overturned agency decisions based on the quality of the environmental justice analysis, and in so doing have expanded what small path exists for asserting environmental-justice concerns in court. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the Third Circuit took a hard look at the Corps’ environmental justice review for the controversial Dakota Access Pipeline crossing tribal territory and found it faulty, using terms like “bare bones” and “cursory,” before concluding “the Corps did not properly consider the environmental-justice implications of the project and thus failed to take a hard look at its environmental consequences.” 255 F. Supp. 3d 101, 140 (D.D.C. 2017). The case was remanded and after further proceedings, the Corps was ordered to complete an EIS for the proposed pipeline. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 440 F. Supp. 3d 1, 11 (D.D.C. 2020), *aff’d sub nom. Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021).

In another recent example, *Friends of Buckingham v. State Air Pollution Control Board*, the Fourth Circuit remanded a state agency’s authorization of a natural gas pipeline in part for deficiencies in its environmental justice analysis. 947 F.3d 68 (4th Cir. 2020). The court’s analysis turned on the Virginia state agency’s failure to make findings on the demographics of the area surrounding a compressor station on the pipeline route. The state agency had relied solely on compliance with state and federal air standards to say that there could be no disproportionate impact. The Fourth Circuit was dissatisfied with this approach, stating, “Even if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the Compressor Station—an overwhelmingly minority population according to the Friends of Buckingham Survey—will be affected more than those living in other parts of the same county.” This opinion, while again largely procedural, hints at judicial recognition of the substance of environmental racism and environmental justice—a thread that perhaps future federal courts will pull on.

In short, judges increasingly recognize environmental justice as important and as an issue to be addressed by agency decision-makers, but there continue to be significant limitations to what can be substantively accomplished without any direct causes of action available.

Views from the Chair: Do you know what you are missing?

Jonathan Kahn

Jonathan Kahn is a partner with the firm *Blake, Cassels & Graydon LLP* in Toronto and is chair of his firm's national environmental group. He is the chair of the Section of *Environment, Energy, and Resources*.

People join the ABA Section of Environment, Energy, and Resources (SEER) for a variety of reasons. Some are looking for a community of people with similar interests with whom they can exchange views. Some are just looking to stay abreast of recent developments. Some need CLE. Others are looking for a platform to demonstrate their expertise and build profile. Still others see us as a potential vehicle to improve the world around us.

But whatever your reason for being a SEER member, it may be that you are missing out on a tool to get more out of your membership.

An astonishing number of our members have not joined a committee. I wanted to take this opportunity to ensure that you, our Section members, understand that a considerable amount of opportunity, information, and dialogue comes through our committees.

If you are a Section member you already get our flagship magazine *Natural Resources & Environment (NR&E)*, and of course you are reading this in *Trends*, our bimonthly online periodical. You get notice of CLEs such as the upcoming [Energy Transition Conference](#). And there is some information on our web page such as our Resources pages—see for example our newly updated Climate Change/COP 27 [resource page](#).

But if you are a committee member, you know that you get much more.

Committees hold regular non-CLE programming (Community Conversations) to keep their members up to date on recent developments. Bulletins and notices of new initiatives, developments, and opportunities get posted to the committee page on the ABA Communities platform.

[ABA Communities](#) is an online platform specifically designed to improve communication and collaboration. This is the way to maximize your membership—this is where people post updates, case summaries, notices about upcoming events, and opportunities to get involved.

I have joined all the committees to better keep abreast of all the great work the Section is doing. Following is a snapshot of what I have seen in just the week immediately preceding my writing of this article.

I was sent a link to a briefing update on recent climate change developments. I got information on a new addition to the Superfund National Priorities List. I was invited to a lunch and learn on the Supreme Court's new priorities. I got invited to mentor an environmental law student. I learned about the ABA's work gathering resources relating to National Hispanic Heritage Month. I got information about a new program related to fertilizers. I was invited to a free luncheon on hot topics relating to marine resources. And much more.

It is important to note that you can adjust your settings in Communities to get notices grouped in an update just once a day so that your e-mail inbox will not be deluged with material.

If you are looking for a community of people with your legal interests, committees are where you find them. If you are looking for a way to stay up to date in developments, this is how you best do so. If you want an opportunity to develop profile, here is a way to reach your peers. If you are looking for information on projects related to diversity, environmental justice, or climate change (to name just a few), you learn about them through committees and hear about them through Communities.

Plan to attend the Section's virtual committee fair on November 16, where you can meet committee leaders and hear more about the benefits of committee membership. You can register for the committee fair [here](#). Or you can learn more about our committees [here](#). Take a few minutes and have a look. See which committees best align with your area of practice. And [sign up!](#)

And don't forget, joining a committee does not impose any obligations or expectations on you. Just sit back and take advantage of the opportunities, connections, and information you are getting. And for people who want to get more involved in the leadership of our Section, this is the place to start!

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 dana.jonusaitis@americanbar.org.

John C. Cruden, principal at Beveridge & Diamond, P.C., received The Robinson O. Everett Distinguished Life Service Award at the Judge Advocates Association's annual awards dinner on September 15, 2022. Cruden's long and distinguished career began after graduating from West Point and serving in airborne, ranger, and special forces units in Germany and Vietnam, before transferring after law school to the Army JAG Corps, achieving the rank of colonel, with assignments as general counsel of the Defense Nuclear Agency, staff judge advocate in Germany, and chief legislative counsel of the Army. Following this distinguished military career, he joined the U.S. Department of Justice, Environment and Natural Resources Division, where he rose from chief of enforcement to assistant attorney general. While serving as the assistant attorney general, Cruden personally led the negotiations in both the BP/Deepwater Horizon oil spill and the Volkswagen emission defeat devices cases. He continues to teach a masters class as an adjunct professor at George Washington University. Commenting on his award, he stated: "I am honored to receive this important award and join such an impressive group of prior recipients who served their country so admirably." Cruden has long been active in the Section, including serving as chair in 2009–2010. He is also currently a member of the ABA Board of Governors.

Lena Golze Desmond has joined Metergy Solutions as senior regulatory counsel in its New York, New York, office. Formerly, Desmond was at David Energy as its regulatory counsel. Desmond is an experienced environmental and energy law attorney, focusing on renewable and distributed energy markets. At Metergy Solutions, she will lead the company's regulatory and contract compliance efforts in the United States. Desmond serves as the co-chair of the Section's Energy Transition Conference.

Peter Gioello has joined Arnold & Porter Kaye Scholer LLP as counsel, in the firm's New York, New York, office. Formerly, Gioello was with Cahill Gordon & Reindel LLP as a senior attorney. Gioello has significant experience in both environmental, social, and governance (ESG) issues and environmental, health, and safety (EHS) issues, including in complex corporate transactions. His diverse practice includes advising clients on sustainability reporting and disclosure, ESG due diligence, environmental justice, climate change mitigation, and adaptation and consumer safety. Gioello is known for his "commercial and market-savvy" environmental transaction advice, and risk/liability evaluations on behalf of clients across a variety of industries. He currently is secretary of the Section; vice chair, Special Committee on Diversity,

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Equity, Inclusion, and Belonging; and on the planning committee for the Environmental Summit of the Americas (2023, New York).

Jesse T. Nation has joined McGuireWoods LLP as a renewable energy attorney in its Houston, Texas, office. Formerly, Nation was with Kruger Carlson PLLC, also in San Antonio. His legal practice focuses on real estate and project development. He collaborates with developers, utilities, and project sponsors to facilitate the development, acquisition, and sale of energy infrastructure projects, including those in the renewable and conventional power energy sectors. Nation serves as the co-chair of the Section's Renewable, Alternative, and Distributed Energy Resources Committee.

Austin Pierce has joined Latham & Watkins as an associate attorney in the firm's Houston, Texas, office. Formerly, Pierce was an environmental and natural resources associate attorney at another law firm in Houston. His practice focuses on helping public and private companies, funds, and their boards navigate their ESG matters—including climate change, biodiversity and natural capital, human rights, Indigenous rights, and corporate culture. Pierce regularly presents and publishes thought leadership on many topics related to sustainability and ESG, including their interplay with other sectors, such as maritime law and energy law and policy. Pierce serves as a vice chair of the Section's Native American Resources Committee.

Paige Samblanet has joined Brownstein Hyatt Farber Schreck, LLP as an associate attorney in its Los Angeles, California, office. Formerly, Samblanet was with The Sohagi Law Group, PLC in Brentwood, California. She uses her environmental science background to add depth to her natural resources practice and provide strategic legal advice to clients. As a passionate environmental justice advocate, she has particular experience in the clean energy, water law, and land use law sectors. Samblanet is a vice chair of the Section's Water Quality and Wetlands Law Committee.