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Regulating GHGs from the business perspective
Kenya Rothstein

Kenya Rothstein is an attorney at Aqua Terra Aeris Law Group, an environmental advocacy and litigation law firm. Her recent research paper on SEC authority to regulate climate disclosures was cited by the SEC in its proposed rule.

This article expands on a related one in Trends*' July/August 2022 issue.*

The March 21, 2022, U.S. Securities and Exchange Commission (SEC) proposed rule sets greenhouse gas (GHG) emissions disclosure requirements for registered companies. This agency action reflects a paradigm shift in the investment world; increasingly, banks and pension funds are concerned about the impacts of climate change on a company's bottom line. The proposed rule responds to this demand for comparable, accurate, and reliable information about registrant's climate risks by enhancing and standardizing climate-related disclosures.

GHG emission reporting requirements

The proposed rule would require a registrant to make disclosures about its scope 1, 2, and 3 GHG emissions. Scope 1 emissions are a company's direct GHG emissions. Scope 2 emissions are indirect emissions from purchased electricity or other forms of energy. Scope 3 emissions encompass upstream and downstream activities in a company's value chain.

Feasibility of reporting GHG emissions

Scope 1 and 2 emissions are fairly straightforward. A company has ready access to data regarding its direct and indirect emissions. But estimating scope 3 emissions poses more difficulties. Few registrants have a detailed understanding of emissions in their supply chains, making it difficult to report on scope 3 emissions accurately or at all.

Nonetheless, scope 3 emissions are necessary to paint a complete picture of a registrant's GHG emissions. According to Deloitte, for many businesses, scope 3 emissions account for more than 70 percent of their carbon footprint. Without disclosing its scope 3 emissions, a registrant could appear stable despite a changing climate, when in fact the firm is facing serious climate risks with negative financial consequences.

The proposed rule attempts to make emissions reporting more feasible. First, the reporting requirements would not be enforced for several years down the line, to provide reporting companies time to consider their approach to compliance.

Second, the SEC does not mandate conformance with the GHG Protocol, comprehensive global standardized frameworks to measure and manage GHG emissions. Instead, the proposed rule allows a company to choose the reporting methodology that makes the most sense for its portfolio and financing activities. But while this is beneficial to reporting companies, it is not

ideal for investors. By not mandating a specific protocol, the lack of uniformity in reporting will make it difficult for investors to make accurate determinations and comparisons of companies' GHG emission data as part of their investment decisions.

The delay in effective date and the flexibility in methodology are examples of the SEC trying to make reporting more feasible. There is an additional layer of feasibility by way of industry guidance. The SEC's reporting requirements are not novel ideas. Industry professionals have spent years developing climate frameworks and guidance that are readily useable, which helps companies immensely.

Who must report?

The GHG reporting requirements vary depending on the type of registered company. Scope 1 and 2 disclosure requirements would be applicable to registered companies with the SEC. Companies that exceed revenue and public float limits set by law would have to secure assurances from third parties that their reporting is accurate.

The proposed rule exempts "smaller reporting companies" (SRCs) from scope 3 emissions disclosures, to lessen their reporting burden. SRCs must meet specific investor and revenue requirements to qualify.

Private companies are exempt from the proposed rule altogether. This exemption may encourage some larger companies to forego going public to avoid the reporting requirements of scope 3 emissions. It could also encourage reporting companies and firms to hide their emissions in private markets. That said, GHG emissions data of some private companies would be revealed when public companies have private companies in their supply chain. Further, businesses and firms might change suppliers or disengage from certain clients due to the effect that they have on the firm's Scope 3 emissions. This could create indirect pressure on private firms to control their emissions.

When scope 3 reporting is triggered

The proposed rule would require disclosure of scope 3 emissions for qualifying registrants in two scenarios. The first scenario is if reporting scope 3 GHG emissions is material. A disclosure is considered material if it would assist a reasonable investor in making an investment decision. Considering that investors have been requesting accurate, reliable, and comparable climate risks disclosures for some time, scope 3 emissions are considered material across most industries. At the same time, the materiality requirement gives the reporting requirements flexibility to adapt should scope 3 emissions no longer be material to a company in the future.

The second scenario is if the registrant has set GHG emissions targets or goals that include scope 3 emissions. This scenario has the potential to prevent companies from setting targets altogether so as to avoid reporting requirements.

Safe harbor

The proposed rules would provide a safe harbor for liability from scope 3 emissions disclosure if companies' estimates are wrong. This limitation on liability deems a scope 3 disclosure fraudulent only if it was made without a reasonable basis or disclosed other than in good faith.

Reporting companies are permitted to use industry averages and other data to estimate supplier emissions, rather than obtain real data from each supplier. This allowance is beneficial to reporting companies because it makes an already extensive reporting regime somewhat less intensive. By relying on industry averages, registrants can avoid the difficult task of gathering the emissions data throughout the supply chain. On the other hand, this safe harbor also significantly reduces the motivation to seek precise data, which will leave investors wondering if the information is accurate.

What's next?

The SEC's proposed rule attempts to protect investors by ensuring they have access to a registrant's climate-related risks that are reasonably likely to have a material impact on its business, results of operations, or financial condition. The GHG emission reporting requirements balances the competing interests of the reporting companies and investors—that being the burden of reporting and the need for information. There has been robust public comment on the proposed rule from many stakeholders. The final rule will yield legal and practical challenges. However, industry professionals, investors, registered companies, and other stakeholders have been carving out the practice of climate-related disclosures for years, which will cushion the transition.

Lawyers exacerbate the climate crisis: Here's how we can help

Catherine Rocchi and Camila Bustos

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We are living through an unprecedented planetary crisis. Climate change has already caused immense human suffering and governments around the world have yet to deliver on their Paris Agreement commitments. But we do not have the luxury of giving up. "Every fraction of a degree matters," a lead Intergovernmental Panel on Climate Change scientist recently stated. "Even if we go beyond 1.5, that doesn't mean we throw up our hands and despair." Law firms and law schools can take concrete actions to transform themselves into leaders of a just transition.

Moral nonaccountability is a climate problem

Model Rule of Professional Responsibility 1.2(b) states that representing a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." This narrative casts lawyers as neutral service providers who need not consider the economic, political, or ethical implications of their actions. Despite robust arguments to the contrary, many attorneys remain unreceptive to the idea that their duty to the public interest extends to their choice of cases and clients. Moral nonaccountability enables most law schools and firms to assign prestige to careers that damage society.

But tides are shifting in the legal profession, and law students—arguably the members of the legal community with the *least* power—have taken a stand. In September 2020, a group of students founded Law Students for Climate Accountability (LSCA), an advocacy network that has expanded to law schools across the country. LSCA ranks law firms according to their litigation, lobbying, and transactional work for fossil fuel companies. Over the last two years, more than 200 students have signed LSCA's Law Student Climate Pledge. Signatories commit to "stigmatize and ultimately eliminate the legal industry's complicity in perpetuating climate change" by refusing to work for firms that represent fossil fuel industry clients, financial circumstances permitting.

This trend of renewed moral accountability for one's work extends beyond the legal profession. For example, Clean Creatives connects public relations and advertising professionals who refuse to serve clients that cause social harm. For more than a decade, Rainforest Action Network has shed light on the role of big banks in financing fossil fuel projects. Even the United Nations secretary general recently issued a plea to young people: "Don't work for climate wreckers."

BigLaw is in bad shape

Between 2017 and 2021, top law firms took on 420 lawsuits on behalf of fossil fuel companies and facilitated a stunning $1.62 *trillion* in fossil fuel transactions. Moreover, according to the Corporate Pro Bono Institute, "the percentage of pro bono environmental law work within corporate law departments dropped from a paltry 6% in 2012 to an even more startling 2% in 2020."

Yet law firms have a range of opportunities to correct this pattern. At a minimum, firms could adhere to a "do no harm" principle. Such a commitment would require firms to develop transparent standards used to reject cases or clients with legal goals that exacerbate climate change. The nuances of an ethics screen should be the subject of debate, but any filter would be an improvement over the status quo.

Functionally, as we explain in an op-ed in Law 360, the rules of professional responsibility permit lawyers to drop clients that insist upon destructive behavior. Under the American Bar Association's Model Rule 1.16(b)(4), lawyers may withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." There is precedent for firms ending representation of a specific client or moving away from a practice area. Kirkland & Ellis, for example, recently announced that it would no longer handle Second Amendment litigation after a wave of mass shootings across the United States. Firms also have another, less controversial lever at their disposal: simply choosing to avoid new clients and matters that involve destructive climate behavior.

Additionally, firms can support climate resilience by taking on new clients that protect the climate or strengthening a pro bono practice that supports climate change adaptation. These paid and pro bono clients need not be limited to conspicuous renewable-energy companies. Climate change stands to wreak havoc on myriad economic sectors. A corresponding range of legal strategies—ranging from zoning to antitrust—can expedite a clean energy transition and foster local resilience to climate stress.

While law firm associates can develop a substantial pro bono practice or push their firm to discontinue fossil fuel representation, law firm partners are ultimately responsible for a firm's choices. Partners have the power to turn down lucrative contracts that undermine the possibility of a livable future.

Dismantling the school-to-firm pipeline

Most law schools funnel students toward corporate law firms. By easing financial burdens and enabling students to imagine alternative careers, law schools can both empower graduates to make positive change and pressure firms to offer more ethically compelling work to their associates.

The most important aspects of the school-to-firm pipeline are financial. The escalating cost of law school requires many students to take on massive debt. For example, between 2008 and

2021, the annual cost of attendance at Stanford Law School rocketed from $60,616 to $107,055 per year. Students from disadvantaged backgrounds tend to shoulder the additional burdens of supporting family members and building generational wealth.

Law schools could ameliorate these burdens by offering more generous aid packages and financial incentives to pursue public interest work. Stanford Law School, for example, recently upgraded its loan assistance repayment program, which forgives student loans for some public interest graduates. Between 2008 and 2022, Stanford Law School graduates who earned an annual salary that exceeded $50,000 in public interest careers were required to at least partially repay their student loans. While the program's recent salary floor increase to $75,000 is a substantial improvement, these changes have not kept pace with the increases in inflation, cost of living, and firm salaries over the same period.

Law schools can also support climate work by narrowing the gap between the support and programming available to students entering law firms and those pursuing public-interest goals. The private sector career centers at many law schools—usually called simply "career services"—often employ numerous staff to guide students through structured firm recruitment programs on campus. Yet, at Yale Law School, *one* full-time staff member advises public interest students through disaggregated application timelines and across a wide range of interest areas. These students often rely on their classmates and alumni to navigate a competitive public-interest market. Providing more robust career counseling for jobs outside the private sector would help give students more opportunities to engage in climate-forward (or at least climate-neutral) work. This effort might be especially important at law schools that lack the resources to provide direct financial assistance to public-interest students.

Law schools should also increase the number of opportunities available to pursue climate work after graduation. For example, schools could expand institution-specific fellowships that support students and graduates interested in systemic advocacy. Law firms bankroll most public-interest fellowships. It may not be a coincidence that these fellowships tend to focus on direct services rather than impact litigation; direct services are less likely to undermine firms' corporate clients than systemic change. New fellowships focusing on environmental and climate justice would go a long way toward expanding professional opportunities for public-interest graduates. Law firms, law schools, companies, and foundations should support these fellowships with a generosity that parallels the scale of the challenges we face.

Moving forward with integrity

Creating a legal profession that stands on the right side of history will require many institutions—and the individuals at the heads of those institutions—to buck financial incentives and settled practices in favor of doing the right thing. This responsibility does not rest with law students, and especially not with students from low-income and first-generation backgrounds, who must contend with unreasonable and escalating student debt. Instead, law firm partners and university administrators must align their actions with the urgency and existential severity of the climate crisis.

Tire-driven stormwater toxicity and salmon mortality from 6PPD-quinone

Sean Dixon and Chen-Yen Goh

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Coho salmon make their way back to coastal rivers and lakes after a few years at sea in their final migration. Once they're upstream it's all about spawning; they put all their energy into reproduction, and then die once they've spawned. This effort to create the next generation of coho also fuels forest regrowth and provides food for bugs, birds, bears—and everything in between.

Or that's how it's supposed to go.

Rubber meets the road

Since the 1990s, researchers in the Pacific Northwest have documented the impacts of stormwater toxicity on salmonids, including the impacts of urban runoff on coho pre-spawn mortality. As coho migrate upstream through waterways that receive stormwater discharges, they rise to the surface, gasp, and swim around in circles. They then die before getting a chance to spawn. Over the years, scientists pieced together data showing that these deaths occur where stormwater discharges were draining areas of vehicle traffic—roads, bridges, parking lots. Indeed, since 2011, the National Oceanic and Atmospheric Administration has been studying and confirming this "direct and highly consequential threat to salmon conservation." Related research at the time also confirmed that running stormwater discharge through soil with plants, for example rain garden-type basins, before the discharge entered a stream, solved the problem and protected salmon.

In December 2020, a team of University of Washington Tacoma chemists isolated the specific chemical in stormwater that is killing coho: a transformation product called 6PPD-quinone (N-(1,3-Dimethylbutyl)-N′-phenyl-p-phenylenediamine-quinone) that is formed when a ubiquitous anti-degradant in tires (called 6PPD) is exposed to ozone. According to a review by the California Department of Toxic Substance Control, 6PPD makes up about 1 to 2 percent, by weight, of all tires, and has been in use for over 50 years.

Over the past two years, research into 6PPD-quinone has rapidly advanced. Data suggest that that 6PPD-quinone "is among the most toxic chemicals known for aquatic organisms." With coho mortality occurring at ~0.1 parts per billion, 6PPD-quinone is "among a very small group of pollutants, mostly organophosphate or organochlorine pesticides, with acute toxicity expectations at tens of nanograms per liter," or incredibly small amounts. *See* Zhenyu Tian et al., 6PPD-Quinone: Revised Toxicity Assessment and Quantification with a Commercial Standard, Table 1. In addition to the chemical's known toxic effects on coho, research is beginning to show that 6PPD-quinone adversely affects other fish species as well.

Source control and pollution prevention

6PPD-quinone enters salmon streams from stormwater running off roads and recycled-tire infrastructure (e.g., playfields, recreational trails). Particles generated as tires physically wear down can also be deposited directly into streams or collected and concentrated through catch basins and storm drains. 6PPD-quinone has been found to be widespread in surface waters wherever it has been studied.

Addressing toxic 6PPD-quinone discharges involves activation of two well-understood pathways for pollution prevention: finding safer alternatives and managing stormwater.

The good news, which has been well understood for decades, is that bioinfiltration green infrastructure such as soil-based bioswales or rain gardens protects receiving waters and coho salmon from 6PPD-quinone. Municipal stormwater permittees must reduce the unfiltered discharge of street runoff and tire wear particles by installing and implementing green infrastructure in salmon waterways. Further, sources of 6PPD-quinone pollution such as tires used as bumpers along working waterfronts and recycled tires used in parking lots and drainage systems also need to be identified, and either removed, replaced with a non-toxic alternative, or runoff from these sources captured and treated.

A host of efforts are underway to find, test, and possibly deploy replacement tire preservatives. In Washington, the state legislature funded a survey in 2021 of potential 6PPD alternatives but concluded that "data gaps—particularly around transformation products and urban runoff mortality syndrome" make finding safer choices difficult. In May 2022, California's Department of Toxic Substances Control proposed listing motor vehicle tires containing 6PPD as "Priority Products" under the Safer Consumer Products regulations. (As of the drafting of this article, the public comment period for this action was open until July 20, 2022. For updates on that rulemaking, see https://dtsc.ca.gov/scp/motor_vehicle_tires_containing_6ppd/.) If listed, California would not be banning 6PPD in tires, but instead would be requiring manufacturers of tires containing 6PPD to notify the state that they produce these products and either perform an alternatives analysis or pursue other options as identified in California Code of Regulations, Title 22, section 69505.

With years of data about how green infrastructure functions and can filter out chemicals found in stormwater, and after a legislatively mandated synthesis of the current knowledge of 6PPD and 6PPD-quinone, including physicochemical properties, sources, fate, and transport within the built environment, the Washington State Department of Ecology finalized new Stormwater Management Manual guidance in June 2022. This update included an assessment of the stormwater best management practices expected to reduce concentrations of 6PPD and 6PPD-quinone in runoff.

Tires, tires, everywhere, and not a drop (for coho) to drink

Beyond safer alternatives and stormwater management, a host of other systems play a part in protecting salmonids from 6PPD-quinone.

First, environmental impact reviews, solid waste management plans, recycling policies and credits, producer responsibility laws, and even tariffs will likely see some shifts given the damage to fish these sources of 6PPD can cause. In 2019, the United States generated an estimated 263.4 million scrap tires, and tires have been recycled for use in everything from artificial reefs to building roofs. *See* Product-Chemical Profile for Motor Vehicle Tires Containing 6PPD (March 2022), Table 5.

Second, most salmonids are endangered throughout most of their ranges and experience stormwater-driven mortality that can now be traced to one chemical, from one discrete source: 6PPD-quinone from tires. Moreover, salmonids are a critical food source for endangered orca populations. Agency consultations for projects affecting these species and habitats should be considering ways to prevent exposure to 6PPD-quinone. This is especially true for major infrastructure bills and other stimulus programs that tend to prioritize federal spending for new bridges, roads, and highways.

Third, coho, and other salmon and trout species we know are affected to varying degrees by 6PPD-quinone, have cultural and subsistence importance. As such, this 6PPD-quinone salmon mortality crisis must be a focal point in all our communities.

Conclusion

Whether through removal at the source or retrofitting streets with green infrastructure, coho and other salmonids will not survive until and unless we eliminate 6PPD-quinone from our waterways. Tire reformulation will need to occur, and stormwater permits, federal transportation projects, recycling and solid waste management, and fisheries management will need to account for this highly toxic chemical.

First Circuit reconsiders Clean Water Act bar on citizen suits seeking declaratory and injunctive relief

Christine Y. LeBel

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What a difference 31 years makes. In 1991 the U.S. Court of Appeals for the First Circuit found it "inconceivable" that the federal Clean Water Act's (CWA's) bar on citizen suits extended only to civil-penalty actions and not declaratory and injunctive actions, finding that the ban applied to all three. *North and South Rivers Watershed Ass'n v. Scituate,* 949 F.2nd 552, 558 (1st Cir. 1991), reviewing CWA section 309(g)/33 USC §1319(g)(6). On April 26, 2022, the same circuit not only conceived it, but made it so, finding that alleged violators are no longer shielded by the CWA's bar on citizen suits seeking declaratory and injunctive relief, even when a state has commenced and is diligently prosecuting enforcement under state law. *The Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc. et al.,* case no. 19-2095 (1st Cir. Court of Appeals, April 26, 2022). The circuit's about-face has potentially significant implications for governmental enforcement actions under the CWA.

State enforcement and case origins

The *Blackstone* decision arose from a 2016 CWA lawsuit by the environmental nonprofit Blackstone Headwaters Coalition (Blackstone) against the developers and builders of a large apartment complex in Worcester, Massachusetts, for alleged pollution of the Blackstone River by silt-laden stormwater runoff from inadequate erosion and sediment controls.

Three years prior to Blackstone's lawsuit, in 2013, the Massachusetts Department of Environmental Protection (MassDEP) had addressed the runoff by issuing a Unilateral Administrative Order (UAO) for violations of the Massachusetts Wetlands Protection Act (MWPA), Mass. Gen. Laws, Ch. 131, § 40. That UAO was ultimately settled by way of an Administrative Consent Order with Penalty (Consent Order) requiring a monetary payment and various remedial actions.

Shortly after the Consent Order was issued, Blackstone filed suit, contending that discharges were continuing despite the Consent Order, and sought penalties; a declaration that the defendants were violating the CWA; and an injunction prohibiting further violations, requiring restoration of polluted wetlands and waters, and requiring that defendants report future stormwater issues to the EPA and to Blackstone.

The citizen-suit ban

Blackstone brought its suit pursuant to the CWA's citizen-suit provision at 33 U.S.C. § 1365(a)(1), which authorizes "any citizen" to "commence a civil action on his own behalf" against "any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under" the CWA. 33 U.S.C. § 1365(a)(1). That same section, however, sets forth that such civil actions may *not* be brought under certain circumstances, including those set forth in section 1319(g)(6), which specifies that the following "shall not be the subject of a civil penalty action": actions for which the federal government "has commenced and is diligently prosecuting an action under this subsection;" actions for which "a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection;" or actions for which the federal or state government "has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law." 33 U.S.C. § 1319(g)(6)(A).

Re-situating the *Scituate* decision

In summary judgment motions, the *Blackstone* defendants contended that, with respect to the above limitations, MassDEP's enforcement actions constituted "diligent prosecution" under state law "comparable" to the CWA for the "same violations" alleged by Blackstone, such that Blackstone should be banned from pursuing its suit. Blackstone countered that MassDEP's enforcement actions did not constitute "diligent prosecution," that the MWPA was not, unlike the Massachusetts Clean Water Act, a state law "comparable" to the CWA, and that the CWA only applied to "civil penalty actions," not injunctive/declaratory relief. The district court found for the defendants. In doing so, it relied on the *Scituate* case precedent.

The appeals court, however, revisited the *Scituate* decision, holding that the summary judgment ruling against Blackstone should be reversed as to its holdings on declaratory and injunctive relief because the limitation in 33 U.S.C. §1319(g)(6)(A) applies only to a citizen suit for civil penalties, not other types of relief. The appeals court did agree with the district court that MassDEP conducted diligent prosecution (finding that it did so through its UAO, Consent Order, and related inspections), and questioned the MWPA's comparability to the federal CWA.

The *Scituate* court had based its decision upholding the citizen-suit ban on several considerations. That appeals panel found that "[t]he primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts *where Federal and State authorities appear unwilling to act*." *Scituate*, 949 F.2nd at 555. In other words, the court concluded that any citizen suit should be supplemental to governmental enforcement. "[W]hen it appears that governmental action under either the Federal or comparable State Clean Water Acts begins and is diligently prosecuted, the need for citizen's suits vanishes." *Id*. To find otherwise, the appeals court reasoned, would mean that citizen's suits could undermine government enforcement efforts. *Id*. at 556. Further, "it would be absurd" to find that the ban on civilian actions only extends to penalties, since that result would "lead to deferring to the primary enforcement responsibility of the government only where a penalty is sought . . . , as if the policy

considerations limiting civilian suits were only applicable within that context." *Id.* at 558. Additionally, "[d]uplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort." *Id*. at 556.

The *Blackstone* court, however, was persuaded to narrow the citizen-suit ban to only those actions seeking monetary penalties by referring to the explicit language of the statute, which speaks only to "civil penalty" actions, not injunctive/declaratory relief. In doing so, the court emphasized legislative history (which the *Scituate* court had eschewed). The court quoted references in the history suggesting that agencies could intervene in citizen suits or bring their own judicial actions. The court also looked to a 2005 Tenth Circuit case that made clear that "[t]he governing principle behind [the CWA's citizen-suit ban] is to avoid duplicative monetary penalties for the same violation . . . [but that provision] does not apply to equitable relief." The court noted no evidence that Congress planned to extend the bar farther.

Implications

So, what does the narrowing of the citizen-suit ban mean for the regulators and the regulated? Time will tell, but, as the *Scituate* court had considered, it could negatively impact government enforcement efforts. If the threat of a citizen suit hangs over the regulated community, why would a regulated entity or individual want to settle an administrative action? And why would government, with its typically limited resources, bother pursuing violations that could be upended by citizen suits, which themselves might require extensive government resources to address? Suddenly, actions which, if pursued administratively, could have been satisfactorily resolved in relatively short order, now could be extended by litigation for years.

Supreme Court review
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This issue of *Trends'* Supreme Court Review provides a summary of selected environmental, energy, and natural resources cases decided by the U.S. Supreme Court (Court) during its October 2021 Term. The impact of the two decisions summarized here is quite significant, with broad implications for state water supplies and the regulation of greenhouse gas emissions.

Interstate water rights litigation

***Mississippi v. Tennessee*, 142 S. Ct. 31 (2021)**

The Court unanimously held that the waters of the Middle Claiborne Aquifer underlying eight states are subject to the judicial remedy of equitable apportionment of the shared groundwater resource. In so doing, the Court rejected Mississippi's claim of sovereign ownership of all water beneath Mississippi state lands and sustained Tennessee's objection to the special master's recommendation to grant Mississippi leave to amend its complaint to seek equitable apportionment. The Court overruled in part and sustained in part exceptions to the special master's recommendation and dismissed the case.

Mississippi and Tennessee have waged a 17-yearlong battle over groundwater pumping from the Middle Claiborne Aquifer. Memphis, Tennessee, employs numerous wells to withdraw this groundwater, some of which are located near the Mississippi border and ultimately extract groundwater from beneath Mississippi. In 2005, Mississippi sued Memphis in federal district court, seeking damages for the city's pumping of groundwater under state common-law tort theories. The Northern District of Mississippi concluded, and the U.S. Court of Appeals for the Fifth Circuit affirmed, that the aquifer is an interstate water resource subject to equitable apportionment. Because the Supreme Court has original jurisdiction over equitable apportionment actions between the states, and because Tennessee is a necessary party to such an action, the Court dismissed the case without prejudice. Mississippi petitioned for certiorari and simultaneously moved the Court for leave to file a bill of complaint. The Court denied certiorari review and denied Mississippi leave to amend, though without prejudice to refile.

In 2014, Mississippi again sought leave from the Court to file a bill of complaint against Tennessee and Memphis, disavowing any equitable apportionment claim. The Court granted leave and referred the case to a special master. Following years of discovery and a five-day evidentiary hearing, the special master issued a report in November 2020, concluding that the Middle Claiborne Aquifer is an interstate water resource. The special master reasoned that 1. geographic variability in hydrogeological characteristics does not justify treating subunits of the aquifer separately; 2. Tennessee's pumping draws water from beneath Mississippi, demonstrating a hydrologic connection; 3. groundwater naturally flows toward Tennessee, albeit

slowly; and 4. the Wolf River is hydrologically connected to the aquifer and flows between the states. The special master then explained that equitable apportionment provides the appropriate remedy for allocating the interstate groundwater resource and that, as part of the federal common law, equitable apportionment also displaces Mississippi's state law claims. He recommended the Court dismiss Mississippi's complaint with leave to file an amended complaint based on an equitable-apportionment theory.

Both Mississippi and Tennessee filed exceptions to the special master's report. Tennessee's exception was simple: the special master erred in recommending the Court grant Mississippi leave to seek equitable apportionment because, in Tennessee's view, granting leave to amend would allow Mississippi to sidestep the stringent pleading standards of equitable apportionment. Tennessee argued that Mississippi had not alleged any actual harm, and expressly disavowed a claim for equitable apportionment in its 2014 complaint.

Mississippi filed numerous exceptions to the special master's report, chief among them its claim of sovereignty "over groundwater located in Mississippi—a natural resource found in the soils of Mississippi and not shared like the surface water flowing through interstate rivers and streams." In contrast to interstate rivers, Mississippi argued that it retains plenary control over Middle Claiborne Aquifer groundwater as a resource conveyed in trust to the state upon its admission to the Union in 1817. Mississippi also argued that, as another matter of state sovereignty, Tennessee has no right to capture groundwater outside of its territorial boundaries, citing *Tarrant Regional Water District v. Herrmann*, 569 U.S. 614 (2013). In *Tarrant*, the Court addressed Texas's claim that it could cross Oklahoma's border to access water to which it was entitled under the interstate Red River Compact. The Court in *Tarrant* rejected Texas's claim, holding that the Compact did "not create any cross-border rights in signatory states" and explaining that "as sovereign entities in our federal system, the States possess an 'absolute right to all their navigable waters and the soils under them for their own common use.'" The special master viewed *Tarrant* as addressing physical intrusion by signatory states, but not standing for the principle asserted by Mississippi. In support, the special master cited *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983), in which the Court rejected the notion that a state may "preserve solely for its own inhabitants natural resources located within its borders."

Writing for a unanimous court, Chief Justice Roberts observed that, while the Court had not previously addressed whether equitable apportionment applies to interstate aquifers, apportionment of the Middle Claiborne Aquifer is sufficiently similar to past applications of the doctrine to warrant the same treatment for several reasons. First, the aquifer's multistate character seems beyond dispute. Additionally, the aquifer contains groundwater that flows naturally between the states, and although that flow is slower than surface streams, the Court has apportioned surface water from streams and rivers that periodically run dry. And Tennessee's pumping clearly has effects on groundwater beneath Mississippi, creating a cone of depression in the water table beneath Mississippi. For all these reasons, the Court held that the judicial remedy of equitable apportionment applies to the waters of the Middle Claiborne Aquifer.

The Court specifically rejected Mississippi's claim of sovereign ownership of the groundwater beneath it, observing that the Court has "consistently denied" the proposition that a state may exercise exclusive ownership or control of interstate "waters flowing within her boundaries," citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co*., 304 U.S. 92, 102. The Court further observed that Mississippi's ownership approach would allow an upstream state to completely cut off flow to a downstream one, a result contrary to the Court's equitable apportionment jurisprudence. Finally, the Court agreed with the special master that its decision in *Tarrant* does not support Mississippi's position, because *Tarrant* involved compact-signatory states, so there was no basis for the application of equitable apportionment.

Clean Air Act: Regulation of greenhouse gases

***West Virginia v. EPA*, No. 20-1530, 20-1531, 20-1778, 20-1780, 2022 U.S. LEXIS 3268, 2022 WL 2347278 (June 30, 2022)**

A 6-3 majority of the Court held that the Environmental Protection Agency's (EPA's) 2015 Clean Power Plan rule to regulate carbon dioxide emissions under Clean Air Act section 111(d), though withdrawn and replaced by a Trump administration rule that was itself challenged and then vacated by a lower court, still presented a justiciable controversy on petitions for certiorari by affected states. The Court then ruled that EPA had exceeded its congressional authority in attempting generation-shifting requirements at the power grid level in the Clean Power Plan rule as the best system of emissions reduction (BSER). The Court further held that the Clean Power Plan ran afoul of the "major questions doctrine," announced for the first time by the Court in this decision, finding more explicit authorization by Congress was needed to effect such a fundamental transformation of the U.S. energy sector.

EPA promulgated the Clean Power Plan rule in 2015 to address carbon dioxide emissions from existing coal and natural gas fired power plants as part of then-President Obama's Climate Action Plan. The agency based the plan on its authority under Clean Air Act section 111(d) with respect to regulation of pollutants from existing sources not already subject to regulation under other major Clean Air Act programs. Under that provision, EPA sets the emissions limit that sources will need to meet by determining the BSER that has been "adequately demonstrated." The Clean Power Plan did this at the individual facility level by requiring "heat rate improvements," but also went beyond that to require "generation shifting" across multiple power plants in each state from coal to natural gas fired plants, and from both of those types of plants to renewable energy resources consisting primarily of solar and wind generation facilities to deliver more significant emission reductions.

The Clean Power Plan was vigorously challenged and defended by various interested parties in the D.C. Circuit Court of Appeals. That court upheld the plan, but the U.S. Supreme Court stayed it in late 2016. Shortly thereafter, with the change in presidential administration in 2017, EPA developed a replacement rule, the Affordable Clean Energy rule (ACE Rule) promulgated in 2019. EPA took the position in the ACE Rule that the Clean Power Plan had exceeded EPA's statutory authority, and therefore limited its determination of BSER to a combination of

equipment upgrades and operating practices to effect heat rate improvements at individual power plants, but no generation shifting at the grid level. EPA repealed the Clean Power Plan in its ACE Rule. The ACE Rule was met with strong opposition and support in petitions for review filed by states and private parties, and the repeal of the Clean Power Plan was the subject of petitions for judicial review. The D.C. Circuit consolidated the various petitions and held that EPA's repeal of the Clean Power Plan relied upon a mistaken reading of the Clean Air Act, i.e., that "generation shifting" cannot be a "system of emission reduction." The court vacated the agency's repeal of the Clean Power Plan, vacated the ACE Rule, and remanded to EPA for further consideration. The D.C. Circuit's decision was followed by another change in presidential administration, after which EPA moved to partially stay the court's mandate as to the Clean Power Plan so the agency could consider whether to promulgate a new section 111(d) rule to control emissions of carbon dioxide from existing power plants. The D.C. Circuit granted EPA's partial stay of the mandate. State and private petitioners then sought writs of certiorari with respect to the D.C. Circuit's vacatur of the ACE Rule, which raised the prospect of the Clean Power Plan once again becoming effective. Certiorari was granted with respect to the scope of congressional authorization of EPA in 42 U.S.C. section 7411(d) to unilaterally decarbonize any sector of the economy, and the cases were consolidated.

At the outset, EPA opposed Supreme Court review of the lower court's ruling on the basis that none of the petitioners had Article III standing in light of EPA's stated intention not to enforce the Clean Power Plan. The Court disagreed, finding that state petitioners were likely injured by reinstatement of the Clean Power Plan, their injury is fairly traceable to the action being appealed (vacatur of the ACE Rule and reinstatement of the Clean Power Plan), and the reviewing court could redress such injury. The Court then indicated that EPA's stated intention not to enforce the Clean Power Plan did not moot the case, as EPA claimed, since such action would be akin to "voluntary cessation," and nowhere had EPA suggested it will not reimpose emissions limits predicated on generation-shifting.

Turning to the merits, the Court majority evaluated Clean Air Act section 111(d) with respect to EPA's determination of the "best system of emission reduction" that has been adequately demonstrated for existing power plants in the Clean Power Plan and the agency's subsequent determination of the degree of carbon dioxide emission limitations achievable. In doing so, the Court identified the issue before it as whether restructuring the nation's overall mix of electricity generation to move from 38 percent coal-fired down to 27 percent by the year 2030 can constitute BSER within the meaning of section 111(d).

The Court observed that there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion provide a "reason to hesitate before concluding that Congress" meant to confer such authority, citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 and *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324, among other cases. The Court labelled the body of case law cited as the "major questions" doctrine, which it explained stands for the proposition that an agency must point to "clear congressional authorization" for the authority it asserts in such extraordinary cases, and then concluded this was a "major questions" case.

Turning to the history and text of section 111(d), Chief Justice Roberts observed that prior to 2015, EPA had always set section 111(d) limits based on the application of measures that would reduce pollution by requiring the regulated source to operate more cleanly, not by looking to a "system" that would simply shift polluting activity "from dirtier to cleaner sources." He rejected EPA's assertion that the 2005 Mercury Rule promulgated under section 111 relied upon a cap-and-trade mechanism, observing that in the Mercury Rule EPA set the cap based on technologies that could be installed and operated on a nationwide basis, while the Clean Power Plan provided no controls for a coal-fired power plant to install so as to meet the carbon dioxide emissions limits set by EPA therein. EPA's view of its authority under section 111(d) in the Clean Power Plan was not only unprecedented according to the Court, it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of. . . regulation" into an entirely different kind, citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231. Nor could the Court ignore that EPA's newly found view of its 111(d) authority enables it to enact a cap-and-trade program for carbon that Congress has considered and rejected multiple times.

Under these circumstances, and again citing the "major questions" jurisprudence identified above, the Court observed that EPA must point to "clear congressional authorization" to regulate in the manner provided by the Clean Power Plan. EPA's assertion that its authority to establish emission caps at a level reflecting the "application of the best system of emission reduction . . . adequately demonstrated" was not a sufficiently clear authorization for such a sweeping power generation shifting rule, according to the majority. The Court observed that the vague statutory grant in section 111(d) is not close to the sort of clear authorization required, and further rejected the government's reference to the Acid Rain and National Ambient Air Quality Standards programs utilizing "system" and similar words, concluding that those "systems" were not the kind of "system of emission reduction" referred to in section 111. Finally, the Court did not address the question of whether BSER under 111(d) refers exclusively to measures that improve the pollution performance of individual sources, although it observed that EPA has acted consistent with such a limitation for four decades. The D.C. Circuit's vacatur of the ACE Rule was therefore reversed and remanded.

Justice Kagan wrote a lengthy dissenting opinion that took issue with many of the majority's findings, noting that the Court need not even decide the issue given EPA's consideration of a different 111(d) rule prospectively, that Section 111(d) was not a legal "backwater" as the majority claimed, and that the Court's conservative textualist majority had crafted a "get-out-of-text-free card" in establishing the "major questions" doctrine, among other things.

SEER, environmental justice, and diversity—Toward implementing the 2021 ABA resolution

Norman A. Dupont

Norman A. Dupont is a partner with the firm of Ring Bender LLP, where he practices with a focus on environmental law. He is also the Section's publications officer.

Overview of ABA 2021 resolution for environmental justice

In August 2021 the ABA House of Delegates adopted a Section initiated and sponsored Resolution No. 513. That resolution provided for the ABA to advance environmental justice (EJ) programs and further resolved that the ABA urges all organizations with law-related practices to "consider the perspectives and communities of color, indigenous communities, low-income communities and other vulnerable populations." This article is one of a series in *Trends* addressing how the Section is implementing this resolution to serve EJ concerns and the overall interests of inclusion of all diverse and vulnerable populations. This article focuses specifically on SEER related initiatives, although SEER and other ABA Sections, Divisions and Forums are also participating in an overall ABA Environmental Justice Task Force set up as a result of Resolution No. 513.

The Section's EJ, diversity, equity, and inclusion programs and events since August 2021

Immediate past chair, Michelle Diffenderfer, made many leadership position appointments for the ABA 2021–2022 year. Among those appointments, Michelle selected Gwen Keyes Fleming as special advisor on environmental justice to the Council and Monty Cooper to head a Special Committee for Diversity, Equity, and Inclusion.

In February 2022 the Section hosted a specific program focusing on tribal rights. COVID-related precautions caused this to be a virtual program, which means you can still view many of the excellent panel presentations, including How Tribes are Leading the Way in Responding to Climate Change and Who Is Steering the Boat? Understanding Water Quality Regulation in and Around Indian Country.

A webinar presentation on Environmental Lawyers of Color: Mentoring for the Future was held in March 2022.

In March, the Section's environmental justice advisor established a specific webpage devoted to EJ issues and discussion of those issues within the Section. SEER has a separate webpage on its diversity, equity, and inclusion efforts.

In April 2022, Council voted to continue support and keep as an active resolution a prior resolution sponsored by the Section and adopted by the ABA in 2002, ABA Resolution No. 110. That resolution focuses on negotiation and settlement of Native American reserved water rights throughout the United States.

In April 2022 SEER recorded two separate discussions on diversity, equity, and inclusion led by Dawn Siler-Nixon. The first program discusses "Intersectionality—Impact of Shared Experiences," while the second discusses "Intentionality—Identifying and Counteracting Unconscious Bias, While Building Cultural Competence."

In July 2022 the Section sponsored the National LGBTQ+ Bar Association's annual Lavender Law Conference held in Los Angeles. This event attracted over 1000 participants.

In September 2022 the Section will host its 30th Fall Conference in Nashville, Tennessee. The Fall Conference will feature a number of "can't miss" programs including at least two with particular focus in the areas of EJ and diverse communities: 1. "Does the Arc of Environment Enforcement Bend Towards Justice" and 2. "Empowering Local Communities and Contaminated Sites." Other panels at the Fall Conference will consider EJ aspects in a variety of environmental fields, including a panel examining the Biden Environmental Protection Agency's (EPA's) focus on Clean Air Act and related aspects of EJ. Information on registering for the Fall Conference and its many EJ/diverse community programs is now available on the 30th Fall Conference registration page.

Section publications involving EJ and diverse communities since August 2021

Section publications, including this publication (*Trends), Natural Resources & Environment (NR&E),* the *2022 Year-In-Review*, and committee articles have similarly echoed the Section's focus on EJ and diverse communities. For example:

*NR&E'*s fall 2021 issue on Environmental Justice featured a wide variety of articles on this topic. Authors Lauren Bachtel, Kerry McGrath, Andrew Turner, and John Bobka discussed "Navigating Environmental Justice Issues in Federal Permitting."

*NR&E'*s spring 2022 on Land issues included a lead article involving an examination of the bases for tribal recovery of resources under CERCLA. In a moving article in its "Perspectives" feature, author Ian Smith discussed his personal observations on returning to a Tribal lands area and "Celebrating the Restoration of the National Bison Range to Its Rightful, Tribal Owners." This same issue also featured Jose Almanzar and Paul Schauwecker describing "How ESG Efforts Can Promote Environmental Justice."

In its May/June 2022 issue, *Trends* featured two articles of interest to lawyers in the EJ and diverse community fields. Bernadette Rappold, Lawrence Pittman, and Travis Kline analyzed the search for environmental justice in an era of statutory, regulatory and scientific uncertainty. In the same issue, Jessi Fierno reviewed Richard Rothstein's book: *The Color of Law: A Forgotten History of How Our Government Segregated America* and its lessons for society that aims to address and remedy legacy discrimination.

The *Year-in-Review-2021* was composed of contributions from 27 of the Section's substantive committees summarizing important events from the perspective of each of those committees. EJ was a significant component in many committee contributions, as discussed in the "Highlights" introduction specifically addressing developments related to EJ.

A number of Section committee articles also directly addressed EJ issues since the adoption of the ABA resolution last August. In April 2022, Robert A. H. Middleton and Daniel J. Deeb discussed new efforts to place environmental justice "front and center" in EPA's overall agenda. Richard Spradlin separately wrote "EPA: A Palpable Change in the Air" concerning the efforts of EPA Administrator Regan to focus agency enforcement actions on disadvantaged communities.

Section membership programs remain focused on recruiting and retaining members, including those from diverse communities

The Section's membership service group remains committed to attracting members from all backgrounds. The membership service group is home to the Special Committee for Diversity Equity, Inclusion and Belonging. The membership group also is home to the separate and long-standing "Membership Diversity Enhancement Program," which has produced a number of current leaders in the Section.

Individual SEER Committees have also focused on Environmental Justice issues, including the Climate Change, Sustainability and Ecosystems Committee, which has now appointed vice chairs specifically focused on EJ matters.

Whether viewed from one of its specific service-focused groups (programs, publications, or membership), on a Committee-based perspective, or from an overall perspective of the entire Section, much has been done to meaningfully implement ABA Resolution 513 on EJ and diversity. As examples in this article demonstrate, the Section continues its focus on these critically important issues for all its members.

Views from the Chair
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.

As I begin my year as Section chair, I cannot help but reflect on the experiences of our recent chairs—Michelle Diffenderfer, Howard Kenison, and Karen Mignone, who spent much or all their respective terms leading the Section from small boxes on our computer screens. Each of them, in their own way, did a fabulous job of maintaining connection with our members notwithstanding the disconnected period we endured, and our Section is richer for their efforts.

This year I want to focus on connection. As I write this it appears that we are emerging from the pandemic-related isolation; I can only hope that by the time you read this that will still be the case. My predecessors, together with Education Officers Susan Floyd and Roger Martella, did a tremendous job of pivoting all our programming to a virtual format during the pandemic. This brought our programming to a new segment of our Section, members who had not previously attended our in-person events. My job and that of our new Education Officer Christine Jochim, will be to keep the connections we made with those virtual participants while re-engaging with our usual in-person conference attendees and sponsors. As part of that effort, we are planning the Section's first-ever true hybrid conference. The Energy Transition Conference: What Evolving Legal Frameworks Mean for Us and the U.S. Energy Grid is scheduled for November 3, 2022. It will be held both in person at Howard University School of Law and online—attend whichever way works for you but do participate!

Our choice of Howard University, a historically Black college, is not an accident. My predecessors have put real focus on initiatives relating to diversity, equity, inclusion, and belonging and that is a priority I aim to continue. Getting our diverse communities more involved in our Section and reaching out to diverse bars are a form of connectivity that remains vital to the health and future of our Section. I am proud to serve as chair of the youngest, most diverse executive committee and council in recent memory, likely ever.

Prior to the Energy Transition conference is our 30th Fall Conference, September 21–24 in Nashville, Tennessee. This will be our first in-person Fall Conference in three years—a can't-miss opportunity with unmatched educational and networking opportunities with influential legal leaders in environmental, energy, and resources law. It's not too late to register!

As the first international lawyer to chair the Section, connections with the international bar and international initiatives will be a priority for me. I have asked Lee DeHihns to chair a new committee on international bar outreach and initiatives. We will maintain our close relationships with the Canadian and Mexican Bars as well as the UK Environmental Law Association, and I have asked Lee to pursue relationships with other foreign bars as well. I have appointed two

Canadian lawyers and a Mexican lawyer to co-chair substantive committees in our Section. And I am pleased to report that we will be hosting the third Environmental Summit of the Americas later this winter in Los Angeles. As with the first two, this will be a joint session with the International Bar Association's Section of Environment, Energy, Resources, and Infrastructure Law. Our focus will be on environmental, social, and governance from an international perspective, and it will be a roundtable session not to miss.

One of my other priorities will be to ensure that you, our Section members, get the maximum benefit of your membership, and part of that effort will be to work toward getting every Section member to join one or more substantive committees. Joining a committee is a rare thing—no cost and all benefit. There is no cost to joining a committee and you do not have to take on any responsibility (unless you want to!). But by joining a committee you will, though our platform ABA Communities, get a regular stream of information and opportunities to learn and network, specific to your area of practice. To get more information on joining a committee you can click here.

I would be remiss if I did not mention our publications. This is a principal way we connect with you, our members. Through our books, our flagship periodical *Natural Resources & Environment*, *Trends*, *The Year in Review*, and our committee articles we will continue to provide you with the insight, analysis, and information you count on. I urge those of you who are interested in writing for a publication to let us know. Details can be found here.

I am honoured to serve as chair of the Section this year. I look forward to connecting with you over the coming months.

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****.*

Angela R. Morrison has joined Hunton Andrews Kurth LLP as a senior attorney. Formerly, she was a partner at Earth & Water Law PLLC. Morrison practices in Florida and D.C., is a Florida Bar Board Certified administrative law attorney, and brings more than three decades of experience to the firm. Her environmental law practice primarily focuses on air quality, climate change, and siting energy facilities on behalf of industry and utility clients. In addition to those areas, Morrison also helps clients navigate evolving laws and regulations surrounding water use and water quality, wetlands mitigation, endangered species, and solid and hazardous waste management. Active for many years in the Section, she recently co-authored the Section's third edition of *Clean Air Essentials*, and serves on the Section's Book Publishing Board. Morrison is a former editor-in-chief of *Trends.*

Benjamin F. Wilson was recently honored by the establishment of the Benjamin F. Wilson/Beveridge & Diamond PC Environmental Law Scholarship Fund at Howard University School of Law (HUSL). The scholarship fund was created in recognition and with gratitude for a distinguished career of extraordinary service to the clients and firm. The fund will award one annual scholarship to an HUSL student who demonstrates an interest in pursuing a career in environmental law. This announcement was made on June 28, 2022, to celebrate Wilson's retirement from the firm and the practice of law at the end of 2021. Wilson is a current member of the ABA Environment Justice Task Force and previously served as co-chair of the Section's Special Committee on Environmental Justice.