**NOTE TO STUDENTS CONSIDERING APPLYING FOR THE FALL 2019 ENVIRONMENTAL LAW WRITING SEMINAR:**

**Applications for the Seminar are due May 13, 2019. You will be notified by May 20 as to whether your application has been accepted. In deciding whether to apply, please note that once you enroll, you may not withdraw, even though you will not receive the topics from which you will choose until late July.**

**To assist you in deciding whether you wish to apply, below you will find the topics from which students chose in fall 2018.**

**OF COURSE, THESE TOPICS WILL NOT BE AVAILABLE IN FALL 2019.**

**If you have any questions, please contact Bob Infelise.**

Welcome to the Environmental Law Writing Seminar! Below are the 16 available topics. For each, we have suggested possible angles you might take in writing about the topic. These are only suggestions. We are very open to your ideas. We are also very happy to work with you to brainstorm your approach.

# ***Hawaii Wildlife Fund v. County of Maui***, 886 F.3d 737 (9th Cir. 2018) and ***Forever v. Kinder Morgan Energy Partners***, 887 F.3d 637 (4th Cir. 2018): The federal Clean Water Act generally requires National Pollution Discharge Eliminate System (NPDES) permits for the discharge of waste from a point source into a water of the United States. In both of these cases, the discharge was directed into groundwater which then in turn entered into a waterway. (In the *Hawaii* case, it was discharge from a sewage treatment plant into groundwater and then into an ocean; in the *Kinder Morgan* case, it was a leak from an underground pipeline into groundwater that then entered into navigable waters.

# The case is important in part because the question of whether the discharge of pollutants into groundwater is covered by the permit system of the Clean Water Act has not been addressed by the courts in the past. These holdings may cause a significant change (likely expansion) to the regulatory scope of the Clean Water Act. In addition, legal scholars, policymakers, and scientists have long noted the important connections between groundwater and surface water, and have called for environmental law and regulation to take greater account of those connections. Please note that cert petitions for both of these cases may be pending before the U.S. Supreme Court; if cert is granted, the paper may require substantial revision or alteration.

# ***National Association of Manufacturers v. Department of Defense***, 138 S. Ct. 617 (2018): The Obama Administration promulgated a regulation (the Waters of the United States or WOTUS Rule) that attempted to clarify the jurisdictional scope of the Clean Water Act. For a number of years, there has been significant uncertainty about the geographic scope of the Clean Water Act as a result of U.S. Supreme Court decisions overturning various provisions of the implementing agency regulations. The uncertainty has been particularly acute for the regulation of dredge and fill activities that impact wetlands under Section 404 of the Clean Water Act. The WOTUS Rule was highly controversial politically, and prompted numerous legal challenges. Those challenges almost immediately got caught up in a dispute about whether the Clean Water Act requires challenges to the Rule to be initially filed in district court or the court of appeals. In this decision, the Supreme Court held that jurisdiction for the challenges lay in the district courts.

The case is significant because the Trump Administration is attempting to repeal the WOTUS Rule, which may have a range of consequences for regulation of water pollution and protection of wetlands and other aquatic habitats. In addition, the case is an excellent example of a common phenomenon and problem in environmental law – complex and confusing statutory provisions that identify where plaintiffs should file their challenges to agency rules.

# ***A Community Voice v. EPA***, 878 F.3d 779 (9th Cir. 2017): Old lead-based paint is present in many residential structures in the United States. A group of environmental and environmental justice groups petitioned the EPA to revise regulations identifying the level of lead present in dust produced by old lead-based paint. The EPA granted the rulemaking petition eight years ago, but has since refused to act on the petition. The groups filed suit in court to force EPA to act, and the Ninth Circuit issued a mandamus order requiring a final rulemaking by EPA within one year. Setting this standard triggers a range of additional regulatory and other actions by the EPA and the states. *See* 15 U.S.C. § 2681, *et seq*.

The case is significant because lead remains a major public health risk for many Americans, particularly in low-income and minority urban neighborhoods. The case is also significant because courts rarely step in to force agency action, and thus it might help illuminate what kind of agency inaction might prompt judicial intervention. Finally, the case is an important example of successful legal action in the environmental justice context. Please note that a cert petition for this case may be pending before the U.S. Supreme Court; if cert is granted, the paper may require substantial revision or alteration.

# ***WildEarth Guardians v. U.S. Bureau of Land Management***, 870 F.3d 1222 (10th Cir. 2018): The federal government leases substantial amounts of federally-owned land to coal mining companies, including large amounts of land in Wyoming. Leasing federal public lands for fossil fuel extraction has become increasingly controversial because of its implications for climate change. The Bureau of Land Management (BLM), which is in charge of the coal leasing program, granted extensions to existing leases for coal mines in Wyoming.

# The National Environmental Policy Act (NEPA) requires federal agencies to analyze and disclose the environmental impacts of their proposed actions. Environmental groups sued the BLM, arguing that NEPA required the BLM to consider the environmental impacts of the Wyoming coal leases on climate change. The Tenth Circuit concluded that the agency had failed to undertake adequate analysis, and required additional review.

The case is potentially significant because it is an example of the litigation and policy fights prompted by the “Keep It in the Ground” movement that seeks to end fossil fuel extraction in the United States, particularly on federal lands. It is also an example of ongoing fights between environmental groups and the Trump Administration, as the Administration seeks to facilitate fossil fuel development and minimize or eliminate policy responses to climate change. The case may have wider implications for NEPA analysis of climate change impacts stemming from other public lands management decisions. Please note that a cert petition for this case may be pending before the U.S. Supreme Court; if cert is granted, the paper may require substantial revision or alteration.

# ***U.S. v. Washington***¸17-269 (June 11, 2018): Treaties govern the relations between many Native American tribes, on one hand, and the federal and state governments, on the other. Many tribes in Washington State have treaties ostensibly protecting their rights to use their historic fisheries, including salmon fisheries. Salmon populations have crashed over the past several decades as a result of overfishing, habitat destruction, and water pollution. Tribes responded by trying to use their treaty rights to force salmon habitat restoration. In this case, tribes (joined by the United States, which can represent tribal interests in court) sought to require the state of Washington to eliminate barriers to fish passage on waterways caused by highway culverts. The Ninth Circuit held that the tribes’ treaty fishing rights included some kind of right to habitat for the relevant fisheries, and ordered the state to implement a long-term plan to eliminate the barriers caused by culverts. The Supreme Court in a one-line *per curiam* opinion affirmed the Ninth Circuit decision by an equally divided court.

The case is important because it is an example of the important role that Native American tribes and tribal treaty rights might play in environmental law and management in the United States. The Ninth Circuit’s interpretation of the relevant treaty language might create additional opportunities for tribal litigation to require environmental restoration. It is also an example of the challenges facing protection and restoration of biodiversity in a changing world, particularly for aquatic resources. Finally, students might focus on the environmental justice issues raised by Native American claims or rights to natural resources on their historic lands.

# ***SB 35*** (California state legislation enacted September 29, 2017): Housing prices have soared throughout much of California, and one cause might be the role that local land-use regulation plays in discouraging housing development. SB 35 provides that affordable housing projects meeting a range of requirements are exempt from a significant number of local land-use regulations (generally, those regulations do not have objective, measurable criteria). SB 35 was enacted as part of a much larger package of housing legislation in September 2017.

SB 35 was controversial at the time. Many land-use law observers believe it might have a significant impact on residential development in California. SB 35 (and the broader issues of housing development in urban California) is also important from an environmental perspective, since the state of California has concluded that significant increases in transit-oriented, urban infill residential and mixed-use development are required to meet the state’s goals of reducing greenhouse gases. (Much of California’s greenhouse gas emissions come from transportation.)

The student who works on this topic may wish to focus solely on SB 35, or more broadly on the housing package enacted by the legislature. The student might also focus on other proposals circulating in the California legislature to impact environmental and local land-use laws, including the California Environmental Quality Act.

# ***Grid Reliability and Resilience Pricing***, 162 FERC ¶ 61,012 (Jan. 8, 2018): The Trump Administration has issued multiple proposals to intervene in the electricity markets to support both coal and nuclear power. Both sources of electricity face significant economic challenges in the face of competition from cheap natural gas and renewable energy. The rapid shift to deregulated markets and the increasing use of natural gas and renewable energy in the U.S. has also raised questions about whether the electric grid is sufficiently reliable and resilient in the event of major natural or human-caused disasters. In 2017, Secretary of Energy Perry requested that FERC intervene into regional electricity markets to require that power sources that had a 90-day supply of fuel on-site be paid an extra subsidy to continue producing; the rationale was that these kinds of electric power sources (chiefly coal and nuclear plants) had a particular benefit for grid resiliency, a benefit not currently considered in the regional electricity markets. In this order, FERC rejected the proposal.

The Trump Administration’s proposal to intervene in the electricity markets was unprecedented, and would have undercut FERC’s efforts over two decades to deregulate U.S. electricity markets. It would also have come into sharp conflict with the policies of many states to encourage renewable energy. The Trump Administration continues to propose additional interventions to prop up coal-fired electric power plants, which continue to close. The student who works on this topic could focus on the Trump Administration’s efforts and their legality and implications. Alternatively, the student could discuss the broader issues of grid reliability and resilience in the face of deregulation and a shift in energy sources. Finally, the student might focus on the implications of deregulation on, and the shift in U.S energy sources for, climate change.

# ***City of San Buenaventura v. United Water Conservation District.***, 3 Cal. 5th 1191 (Cal. . 2017) and ***California Building Industry Ass’n v. State Water Resources Control Board***, S226753 (Cal., May 17, 2018): California has recently emerged from a major drought, and it will face ongoing challenges in providing water for a growing state in a mostly arid region in which precipitation and water storage capabilities will be negatively affected by climate change. A number of policies have been adopted or proposed by state and local agencies to address both the issues of water scarcity and climate change, policies that often impose fees or other charges for the use of scarce resources or the emission of pollution. California’s constitution contains strict procedural requirements for the imposition of new taxes, requirements that have often spawned litigation challenging state environmental policies. Both of these cases involved such challenges – one to a conservation system enacted by a water district, the other to fees charged for water discharge permits. In both cases, the California Supreme Court upheld the fees or charges as constitutional.

These kinds of constitutional challenges to California’s environmental programs that include fees will continue in the future. Thus, these cases are important both as examples of an important legal trend in California, and as indicators as to how courts may treat similar cases in the future. Students may wish to explore the broader pattern of increased litigation and conflict, or analyze the questions of whether and how these charges might be constitutional.

# ***National Environmental Development Ass’n Clean Air Project v. EPA***, 2018 WL 2749179 (D.C. Cir., June 8, 2018): After EPA lost a decision in the Sixth Circuit about the proper definition of a “major source” of pollution for Clean Air Act permitting purposes, EPA sought to apply varying definitions of the term. EPA adopted the Sixth Circuit’s interpretation only within the Sixth Circuit, but relied on its preexisting definition outside the Sixth Circuit. EPA also amended its regulations to allow for varying interpretations of the law depending on variations in circuit court precedent. EPA’s regulation was challenged, and the D.C. Circuit upheld it.

Prior to the events leading up to this case, EPA generally relied on uniform definitions in implementing the Clean Air Act. Now, Clean Air Act mandates will vary depending on the location of the facility. This may result in a higher or lower level of protection depending on how the applicable circuit court precedent interacts with EPA policy. This issue may become particularly relevant as the Trump Administration’s attempts to roll back regulations are challenged in courthouses across the country. Please note that a cert petition for this case may be pending before the U.S. Supreme Court; if cert is granted, the paper may require substantial revision or alteration.

# ***Friends of Animals v. USFWS***, 879 F.3d 1000 (9th Cir. 2018): The Migratory Bird Treaty Act (MBTA) generally prohibits the killing of barred owls. Nonetheless, the U.S. Fish and Wildlife Service authorized the killing of barred owls to help protect northern spotted owls, which are a listed species under the Endangered Species Act (ESA). An animal rights group challenged the authorization as inconsistent with the MBTA, arguing that the ESA only authorizes the take of MBTA-protected species if the take would help that species. The Ninth Circuit rejected that argument, holding that the statute grants broad authority for the agency to authorize take for scientific research purposes, including understanding how controlling one species might help protect another species

The case is an example of the challenging biodiversity conservation conflicts that are increasingly arising in a changing world, where species are threatened by the interaction of climate change, habitat modification, and the introduction of non-native species. These conflicts often raise difficult questions about (i) how to advance biodiversity conservation, (ii) the goals of biodiversity conservation, and (iii) how achieving those goals might conflict with other goals (in this case, animal rights). The case also is an example of the issues raised by allowing an agency broad discretion to interpret statutory language, and how giving agencies that power might advance or harm environmental protection.

# **Florida v. Georgia, No. 142 (Original Case) (U.S. Supreme Court, June 27, 2018)**: Florida sued Georgia in an original jurisdiction case in the Supreme Court, alleging that Georgia as the upstream state was taking more than its share of water from an interstate river system that flowed from Georgia into Florida. The Special Master appointed by the Supreme Court dismissed Florida’s complaint, concluding that Florida could not demonstrate that a court order could redress Florida’s harm. The Supreme Court remanded, concluding the Special Master applied an overly stringent standard for determining whether a state could proceed with an interstate water dispute claim.

The case is an example of interstate water disputes, disputes that will likely increase in number as climate change affects water need, availability, and quantity. Similar disputes are also occurring between other states (*e.g*., Texas and New Mexico). Students might focus on the broader issues of water law and policy, interstate water disputes, and climate change raised by the case, or on a more specific discussion of the role the Supreme Court plays in resolving these disputes.

# ***Orchard Hill Building Co. v. U.S. Army Corps of Engineers***, No. 17-3403 (7th Cir., June 27, 2018): Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers regulates the disposal of dredge or fill material in “Waters of the United States.” “Waters of the United States” includes at least some wetlands, but whether a particular wetland is covered by Section 404 is often quite controversial. (This is the same question that the WOTUS Rule sought to address in the *National Association of Manufacturers* case, discussed above.) The Corps sought to exercise regulatory jurisdiction over a 13-acre parcel of land, building on a standard in which the wetland must be shown to have a “significant nexus” with navigable waters. The landowner challenged that determination in court. The Seventh Circuit held that the Corps had not established that jurisdiction was appropriate, concluding that the agency had not shown how the apparently “trivial” impact of the loss of one wetland on a river system constituted a “significant nexus.”

The case is an example of the legal and political fights over the scope of Section 404 jurisdiction, and how those fights are playing out in individual cases. It is also an example of the challenges that courts might have to confront in determining whether impacts of human activities on the environment are significant enough to warrant regulatory or legal intervention, a problem that extends beyond wetlands to areas such as climate change. Please note that a cert petition for this case may be pending before the U.S. Supreme Court; if cert is granted, the paper may require substantial revision or alteration.

# ***Delaware Riverkeeper Network v. FERC***, No. 17-5084 (D.C. Cir., July 10, 2018): Environmental groups fighting gas pipeline projects in Pennsylvania challenged the Federal Energy Regulatory Commission decision-making process as biased against them in violation of due process requirements under the Fifth Amendment. They argued that the fact that FERC receives fees from project applicants that cover its budget gives the agency an improper incentive to encourage and approve more applications. The D.C. Circuit rejected the claim, first holding that even though the Pennsylvania state constitution provides a guarantee of environmental rights, it does not provide property rights that are covered by due process under the Fifth Amendment. The court also held that even if there were property rights at stake, the funding system for FERC did not create enough of an incentive for the agency to raise due process issues.

The case is another example of the many legal fights over natural gas and oil pipelines in the United States, as advocates seek to obstruct the construction of fossil fuel transportation infrastructure. It also raises interesting and important questions about whether environmental interests can (or should) be characterized as property rights. Finally, it raises questions about the ways in which agency budgets are financed might shape those agencies’ decisions.

# ***Ogala Sioux Tribe v. Nuclear Regulatory Commission***, No. 17-1059 (D.C. Cir., July 20, 2018): The Ogala Sioux Tribe objected to the Nuclear Regulatory Commission’s approval of a uranium mine on lands the Tribe considers culturally and religiously significant, arguing that the NEPA review for the project was inadequate. In its administrative process, the NRC agreed with the Tribe that the NEPA review was inadequate, but refused to stay its decision approving the mine because the Tribe had failed to prove that sites significant to the Tribe would be harmed by the project. The Tribe filed a petition for judicial review of the NRC’s refusal to stay its decision. The D.C. Circuit held that the NRC should have stayed the decision, because without the NEPA review process the Tribe would be unable to identify whether and which significant sites would be harmed by the mine.

The case is an example of the challenges agencies and courts face in considering the remedies for NEPA violations, an issue that has been prominent in the courts for a number of years. It raises that issue in the context of administrative agency decisions; the court held that a different remedy analysis should apply for an administrative agency, as opposed to a court, decision. The case also is an example of tribes using federal law to protect important cultural and religious sites, and of the broader environmental justice issues raised by development on historic tribal lands. Finally, uranium mines are an essential component for the development of nuclear energy, which has a contested role in addressing climate change. Please note that a cert petition for this case may be pending before the U.S. Supreme Court; if cert is granted, the paper may require substantial revision or alteration.

# ***NRDC v. EPA***, No. 16-1413 (D.C. Cir., July 20, 2018): A core component of the Clean Air Act is the National Ambient Air Quality Standards (NAAQS), which set minimum air quality requirements for all parts of the country. Regions with air dirtier than the NAAQS face significantly stricter regulation. That means that determining air quality for an area is a politically and legally significant issue. However, air quality might be dirty for reasons (such as dust storms and wildfires) outside the control of regulators. The Clean Air Act excludes “exceptional event” contributions from assessments of the air quality of a particular region. EPA sought to redefine its “exceptional events” definition to allow a broader range of activities to qualify. Environmental groups challenged the decision. The D.C. Circuit deferred to EPA’s interpretation of the relevant statutory language.

This case is significant for states like California, where an increasingly important contributor to air pollution is the particulates produced by wildfire. The Central Valley of California, which already has the dirtiest air in the country, now also has periods when air quality is significantly worsened by wildfire. The new EPA definition might allow less regulation of air quality in places such as the Central Valley, because the contributions of air pollution caused by fire (and other sources such as dust storms on fields and dry lake beds) are not counted. On the other hand, the new EPA definition may also allow more active management of fires in forests, which in the long run may reduce fire risk and air pollution. Climate change will only increase the fire and dust storm problems at issue in the “exceptional events” regulations in the Western United States. Please note that a cert petition for this case may be pending before the U.S. Supreme Court; if cert is granted, the paper may require substantial revision or alteration.

# ***St. Bernard Parish Gov’t v. U.S.***, 887 F.3d 1354 (Fed. Cir. 2018): Property owners in the New Orleans area filed a takings claim against the federal government, arguing that the U.S. Army Corps of Engineers’ construction and maintenance of a major canal, the Mississippi River-Gulf Outlet, caused significant flooding in the wake of Hurricane Katrina in 2005. The Federal Circuit held that the landowners failed to show that the government’s actions had caused damage to their properties, and that the government’s failure to take action to prevent flooding via the canal could not be the basis for takings liability.

The case is significant in part because liability for flooding as occurred in the aftermath of Hurricane Katrina will be increasingly common as a result of sea level rise associated with climate change. In particular, questions of government liability for flooding in coastal areas will be common, as the state and federal governments own and maintain substantial infrastructure, such as canals, sea walls and stormwater systems. Please note that a cert petition for this case may be pending before the U.S. Supreme Court; if cert is granted, the paper may require substantial revision or alteration.