

10-4-2019

## Contemporary Issues in Environmental Law

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### Recommended Citation

Howard, Jenny; Garcia, Amanda; and Kempf, Bart (2019) "Contemporary Issues in Environmental Law," *Belmont Law Review*: Vol. 7 , Article 7.

Available at: <https://repository.belmont.edu/lawreview/vol7/iss2/7>

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# SYMPOSIUM PANEL DISCUSSION

## CONTEMPORARY ISSUES IN ENVIRONMENTAL LAW

OCTOBER 4, 2019

### *Panelists*

JENNY HOWARD,\* AMANDA GARCIA\*\* & BART KEMPF\*\*\*

### *Moderator*

TRAVIS BRANDON†

**Connor McDonald:**†† Ladies and gentlemen, we're going to begin our morning panel. Our panel is going to be led by Belmont's own professor, Travis Brandon. Professor Brandon earned a Bachelor of Arts degree from Stanford University and his JD from Stanford University School of Law. He also gained a Master of Arts and a Master of Philosophy degree in English Literature from Yale University. Also, he obtained his Master of Science degree in the Emmett Interdisciplinary Program in Environment and Resources from Stanford.

Before he began private practice, Professor Brandon clerked for the Honorable John T. Noonan on the United States Court of Appeals for the Ninth Circuit. He has worked in private practice in the Energy and Environment Group at Morrison & Foerster in San Francisco. Professor Brandon joined the Belmont University College of Law staff in 2013, where he teaches Environmental Law, Land Use, Remedies, and Property.

Thank you very much. Professor Brandon.

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**Travis Brandon:** Thank you, Connor. I just, first of all, want to congratulate the Law Review students for what's been a really excellent conference. I also want to take a moment, rather gratuitously since I see some recent graduates in the room, to congratulate the Class of 2019 for their stellar Bar passage results. We just got the news this morning. We had a 97% Bar passage rate here at Belmont.

Thank you very much. The purpose of the panel discussion today is to provide a practitioner's perspective on environmental law practice here in Tennessee, and we are immensely fortunate to have three very distinguished attorneys here who practice in very different areas of environmental law.

Let me introduce our panelists here starting on the left with Jenny Howard. Jenny has served as General Counsel for the Tennessee Department of Environment and Conservation since 2016. Before being named General Counsel, she served as Deputy General Counsel and Senior Counsel for Legislative Affairs for the department. She has been voted as a Nashville Business Journal Best of the Bar attorney in environmental law and named an Emerging Leader finalist in the environmental category of the Nashville Area Chamber of Commerce. She serves as the Tennessee Bar Association's Environmental Section President. She received her JD from Vanderbilt Law School.

Next, we have Amanda Garcia. She is the Managing Attorney of the Tennessee office of the Southern Environmental Law Center ("SELC"), where she and her team work across the state to protect Tennessee's clean water, clean air, and special places. Prior to joining SELC, Amanda practiced environmental law in the public interest in San Francisco. She has also taught federal courts and negotiation right here at Belmont University. Amanda clerked for the Honorable Alicemarie Stotler in the United States District Court for the Central District of California. She graduated from the NYU School of Law.

Last but not least, we have Bart Kempf. Bart practices at the law firm Bradley Arant Boult Cummings. Bart has a diverse practice involving litigation, agency proceedings, enforcement action, citizen suits, and transactional matters concerning a broad range of environmental, land use, and natural resources law. For nearly a decade, Bart practiced environmental land use law in Washington, D.C. From 2011 to 2016, he was a member of the Environment, Land, and Resources Department at Latham & Watkins. He has also served as the Senior Counsel on the U.S. Senate Committee on Agriculture, Nutrition, and Forestry. He received his J.D. from Georgetown Law.

Today, this is a practitioner's panel, so I'd like to get started by inviting each of you to talk about your role in your organization, and also the part that you see your organization playing in the greater project of environmental regulatory compliance here in Tennessee. Let's start on the left with Jenny.

**Jenny Howard:** Thank you, Professor Brandon. Hello. Thank you for the opportunity to be here. My role is General Counsel for the Tennessee Department of Environment and Conservation, a state agency. We have roughly 2,700 employees and a \$400 million budget. We oversee the 56 state parks, all of the state natural areas, and then we have our Bureau of Environment, which is the environmental regulatory agency for air pollution control, water resources, radiological health, solid and hazardous waste, and remediation.

As General Counsel, I'm part of the executive leadership team, which is essentially like a C-suite in a company. There are five of us that report to the Commissioner, and we run the department. As the General Counsel, I oversee legal compliance, provide legal advice, and handle legal proceedings. I have to give a shout-out to our Environmental Section at the Attorney General's Office because I see many of the attorneys from that section here in the audience. One thing that's fun about this role is that I oversee and work alongside twenty attorneys who are included in the over thirty legal professionals in my office, the Office of General Counsel. But I'm also a client—we work closely with and are represented by some brilliant attorneys within the Attorney General's Office.

You asked how we do compliance or what our role in compliance is. We promulgate rules and regulations through boards like the Water Quality, Oil & Gas Board, and the Underground Storage Tanks, Solid Waste Disposal Control Board, as well as through the Commissioner directly. This relates to compliance because when you are creating law, you want to understand what is going on in the regulated community, what people will need to do to comply with the law, how to make compliance straightforward, etc.

We also work closely with the Tennessee General Assembly as they write the law. Then, in our day-to-day, we are doing enforcement and issuing commissioner's orders or director's orders, and we are doing inspections of properties. That's on the civil side, and then on the criminal side, we are working with local DAs on prosecuting environmental crimes.

Additionally, we do permitting and work with companies that are requesting authorization for a portion of their operation that affects the environment, such as air pollution control, discharge into waters of the state, etc.

In education, we have a small business assistance group that does education, and then we also issue grants. In summary, we are the go-to environmental state agency for all types of issues.

**Amanda Garcia:** I'm Amanda Garcia. I'm the Managing Attorney of the Tennessee office of the Southern Environmental Law Center. The Southern Environmental Law Center is a non-profit law and policy organization. We work across six southeastern states. Those states, in addition to Tennessee, include Virginia, North and South Carolina, Georgia,

and Alabama. Our mission is to use the power of the law to protect our clean water, clean air, and the special places we love across the southeast.

Our clients are usually other non-profit environmental organizations or other non-profit community groups and organizations. We provide a voice to folks in the community who are working to protect our natural resources. We work across a broad range of issue areas, so everything from energy policy, which we've heard a lot about this morning here today, to water policy issues, which we've also heard a lot about today, as well as public lands, coasts, and wetlands. We really get involved in anything that might be having an adverse impact on the people or the environment in the southeast.

In terms of how our organization fits into the larger effort of advancing compliance, as a non-profit organization working in the public interest, one of our primary tools is the citizen suit, which is a feature of many of our foundational federal environmental laws. We do use the opportunity for citizens to step into the role of regulator and enforce our environmental laws directly against polluters. Sometimes, those polluters are private companies. Sometimes, they can be government entities. For example, we recently sued the Tennessee Valley Authority using the citizen suit provision for its coal ash pollution at the Gallatin Fossil Plant. We also participated alongside the state of Tennessee in a parallel enforcement action against the Tennessee Valley Authority for the coal ash pollution at the Gallatin Fossil Plant.

The citizen suit is a huge tool for compliance. As Jenny mentioned, there are lots of other parts of environmental law that are important. We also represent clients in participating in rulemaking and permitting decisions within the regulatory process as well.

**Bart Kempf:** My name is Bart Kempf. I'm an environmental attorney at Bradley in Nashville. We're a private law firm, and our clients are primarily businesses, but we also represent various public entities including municipalities, industrial development boards, and the like. As an environmental lawyer in a private law firm, I do three things mainly. First, I help regulated entities with their compliance obligations under federal and state environmental laws and regulations. This mainly involves reading and interpreting regulations and helping my clients comply with them. Often this work requires consultation with government agencies including the U.S. EPA and TDEC here in Tennessee.

The second part of my work is transactional. This mainly involves private-party to private-party contracts, for example mergers and acquisitions, purchase and sale agreements involving contaminated real property, and financing agreements. My focus here is on allocating environmental risk and liabilities between parties to a transaction.

My third focus is litigation. That is, when things get contentious, we will litigate on behalf of our clients.

Turning back to compliance for a moment, one of the things that I want to highlight is that compliance can be cooperative or adversarial. I'd say that the majority of my compliance work is cooperative. Usually, when we're working with TDEC on a compliance issue, it's relatively clear what needs to be done. The science is clear, the regulations are clear enough. You can usually resolve issues relatively cooperatively. Whether it's a Clean Water Act issue, air, usually, things can get resolved cooperatively. TDEC also has a brownfield program. Strictly speaking, it's a voluntary program that you enter into on a voluntary basis. You clean up a property to the standards set by TDEC, and in exchange, your liability is resolved, most of it or some of it. Engaging with TDEC in the brownfield program also tends to also be a cooperative endeavor. The brownfield program and TDEC are wonderful. There are many hardworking people that help get you through the program in a relatively short amount of time. Clients love it because it helps give them certainty as to any cleanup liability they may have at a site they want to redevelop. Lenders like the brownfield program because it gives them some certainty as to government oversight at a contaminated site and that human health and the environment are going to be protected, thereby protecting the lender's collateral.

As I mentioned before, sometimes things get adversarial. I'm looking at Amanda now. I don't have an active matter against SELC, at least that I'm aware of. Sometimes, things do get adversarial. I think that Amanda mentioned citizen suits. I'm currently defending two, one of which has over a dozen different claims under the variety of environmental laws such as the Clean Water Act, Clean Air Act, and RCRA, all environmental statutes. I would say that tool—that enforcement tool—is one where you definitely get into an adversarial posture. These are some of the things that we do as private attorneys.

**Travis Brandon:** Great. Thank you. We've just been talking about the very different roles that you all play. I'd be interested to hear, since you're each coming at this with your practice from a very different point of view, what do you see as the most important issues in environmental law and regulation here in Tennessee right now? Also, do you see any developing issues that you think are going to become more important over the next decade or so? Why don't we start here with Bart Kempf?

**Bart Kempf:** Well, there are some issues that are front and center now and that I see in the future in my practice. There are also broader environmental issues that I think are not going to necessarily touch my practice personally, but are key to what other people are practicing and just generally important in environmental law.

A couple of things in Tennessee and in the southeast. One is the coal ash issue. SELC, TDEC, and the state of Tennessee all have been very active on what to do with coal ash. That is an issue that is with us now and is not

going away anytime soon. Coal ash is very expensive to address and to remediate depending on what you do with it. There are so many coal ash impoundments in the southeast. How many are there? Do you know? Ballpark? 100?

**Amanda Garcia:** I don't know, but I do know that 70% of them are being required to be remediated by excavation at this point. In the southeast.

**Bart Kempf:** That is attributable in part to SELC. For those who don't know, they have had a coal ash campaign for a number of years. SELC has won and settled lawsuits requiring various coal ash remediation.

**Amanda Garcia:** The state of Tennessee recently had a pretty strong role in achieving the outcome of getting TVA to excavate its coal ash at the Gallatin Fossil Plant here as well.<sup>1</sup> As well as at the Allen Plant in Memphis, although I don't know if TVA would acknowledge that.

**Bart Kempf:** Climate change is huge, obviously, and so is flooding. Those of you who were in Nashville in 2010 experienced the flood. I was not living here then. I've only been here for three years. The coasts will be unbelievably impacted by climate change, and there will be far-ranging impacts. Water quantity is another big issue. I know that there was a speaker earlier who talked about the U.S. Supreme Court original jurisdiction groundwater case. I previously worked on the Florida-Georgia Supreme Court litigation when I was at my former firm. This case, which is ongoing, involves a dispute about water rights between the states of Florida and Georgia.<sup>2</sup>

I think these issues are going to be—they are now—and they're going to be even bigger. I'm currently working on a project for a company that's looking to establish operations in a part of Tennessee that has some water quantity challenges. Tennessee has plenty of water, usually. Right now, we've been in a drought. I haven't looked at the statistics to know what it's like. But the company I'm working for is looking at an area of the state that's a little bit water challenged, and it presents legal issues important to the outcome of the deal and the company's decision to come to Tennessee.

I think the transition to clean energy is a big, big thing. I do a fair amount of work with solar companies developing projects in the southeast and elsewhere. A couple of things that I've seen in my practice that I think are notable. First, corporate demand for 100% renewable energy when companies enter into a market. These companies demand that the energy they

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1. Jamie Satterfield, *TVA Agrees to Remove 12 Million Tons of Coal Ash from Gallatin Plant, Clean Contamination*, KNOX NEWS (June 13, 2019), <https://www.knoxnews.com/story/news/crime/2019/06/13/tva-agrees-dig-up-12-million-tons-coal-ash-gallatin-plant/1443294001/>.

2. See *Florida v. Georgia*, 138 S. Ct. 2502 (2018).

use to be 100% renewable. This is a huge driver of solar. It's been a huge driver of solar in TVA's region. A big reason is that several companies who have established operations in the region are demanding 100% renewables, and TVA then goes out and procures solar projects. It's a big reason why renewable development is happening in our region, and, as we move forward, it's going to be a big driver of renewable energy, especially in areas like ours where there hasn't been as much progress on renewable energy standards and the like.

I think that you're going to start to see more land use disputes. We've seen it in North Carolina now a little bit. There's a lot of solar in North Carolina, and there's some pushback by farmers and open space advocates. It's a classic competing land use issue. Of course, the power companies see distributed generation and solar as a potential threat to their business model. Those are some of the things I see as big now and big going into the future.

**Amanda Garcia:** Yes. Bart, we agree on many of the issues that are currently facing Tennessee and that we'll be continuing to face in the future. Bart mentioned coal ash. Of course, Southern Environmental Law Center has been engaged in addressing the pollution impacts of coal ash across the southeast for the past several years. Many states are requiring the utilities to move coal ash out of leaking unlined pits next to our rivers and streams and either recycle it or place it into lined landfills.<sup>3</sup>

As I mentioned, that's happened at a couple of sites here in Tennessee, but there are still six sites remaining to be addressed here in Tennessee. In addition, I couldn't agree more about the water quantity issue being a big issue facing Tennessee. Somewhat, to everyone's surprise, because Tennessee is a water-rich state, but Governor Haslam actually, in the last year of his administration, convened a large group of stakeholders to put together a water plan, or really, more of a strategic document called "TN H<sub>2</sub>O," which looked at some of the water quantity issues facing the state.<sup>4</sup>

We've heard about a big one this morning, which is the extraction in the Memphis Sand Aquifer. But there are actually a lot of smaller communities that rely—I mean, there are surface water issues, but there are also groundwater issues, and about a third of the people in Tennessee rely on groundwater for their drinking water. Many of those systems are small, they're vulnerable, they have infrastructure problems in terms of their drinking water treatment systems.

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3. *Mapping Out the Coal Ash Contamination*, EARTH JUST. (Nov. 6, 2019), <https://earthjustice.org/features/map-coal-ash-contaminated-sites> ("For decades, utilities have disposed of coal ash dangerously, dumping it in unlined ponds and landfills where the toxins leak into groundwater.").

4. Andy Sher, *Haslam Releases Statewide Water Plan, Seeks Public Feedback*, CHATTANOOGA TIMES FREE PRESS (Dec. 4, 2018), <https://www.timesfreepress.com/news/breakingnews/story/2018/dec/04/haslam-releases-statewide-water-plan-seeks-public-feedback/484370/>.



We're already working with some communities who are facing issues with their drinking water aquifers, and I think that's going to become an increasing issue in Tennessee, particularly when you pair it with what we're seeing at the federal level with an unprecedented reduction in the protection of the Clean Water Act for wetlands and streams, which you might not think have an effect on groundwater, but of course, water percolates down into groundwater.<sup>5</sup>

There are, increasingly, also going to be crossover water quality and quantity issues in Tennessee, as well as increased flooding risk as we reduce protections for wetlands at the federal level in the absence of stronger state regulation. One big issue is a question about will our state step up and fill any voids that are left by federal regulation in terms of protecting our citizens from things like increased flooding over time.

Also, Bart mentioned the transition to clean energy. We have seen a resurgence in aggressive action by the coal mining companies in Tennessee to both change the regulatory regime that applies in the state, as well as trying to ramp up coal mining under the current administration. At the same time that we have a lot of companies, cities, and other actors asking for more clean energy, we're also seeing a resurgence of the extractive coal industry in Tennessee.

On the clean energy side of things, the biggest challenge which Bart alluded to is the Tennessee Valley Authority and its inherent incentives to maintain a monopoly over energy production. That's going to make it harder as we move forward for companies and individual citizens to have access to the same suite of energy choices that are available throughout the rest of the country. That's a problem when we're trying to attract new companies and economic development.

**Jenny Howard:** This is a great question to go last because I can just “amen” everything that has been said.

**Bart Kempf:** There's a lot of that.

**Jenny Howard:** Just thinking of what I could add along those same lines. Speaking of flooding, water quality, and water quantity, something that has been important in my practice recently is the construction stormwater issue: how do you slow down runoff to prevent pollutants from going into surface water? That has flooding components to it too, though we're coming at it from the water quality standpoint, not the water quantity standpoint.

Communities like Metro Nashville—and I see lots of Metro Nashville attorneys here in the audience—have a MS4 permit from the state and they are issuing permits for local construction projects.

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5. Lacey McCormick, *New APA Proposal an Unprecedented Threat to America's Waters*, NAT'L WILDLIFE FED'N (Feb. 14, 2019), <https://www.nwf.org/Home/Latest-News/Press-Releases/2019/02-14-19-Wetlands-Streams-Losing-Protections>.

There was a presentation earlier on *Mississippi v. Tennessee*. I agree with that, and what you all said on the water wars between the states and access to water being hot topics.<sup>6</sup>

There's a panel later on emerging contaminants like PFAS. I agree there too. Those are issues we wrestle with and are trying to get ahold of as regulators. Coal Combustion Residuals—what do you do with the waste that's created when you burn coal to make energy, and then you have 12-13 million cubic yards of it at a single site, and you've got to stop it from traveling from groundwater to surface water? That's an issue that's very present for us, and we're pleased to have settled the TVA Gallatin suit.<sup>7</sup>

Tennessee, unfortunately, had the Kingston ash spill in '08, so that's something that our state has experienced—when you don't capture your coal ash well and it negatively impacts a natural resource. That's an issue we take seriously. We're working with TVA on the other sites and hope that we'll get to a good place like we did with the Gallatin site.

As for my practice, day-to-day, Bart mentioned our brownfields program. We work with people who want to tear something down and build something new, but there may be slightly contaminated urban soil there. For example, urban soil may have gasoline or diesel fuel remnants in it or other characteristics of city soil. We want to send waste to landfills that actually needs to be in landfills. Then, we want soil that can be reused to be put into productive use and keep recovered materials that are safe for human health and the environment out of the landfills. We don't want to needlessly fill up our landfill space or create unnecessary costs for the development community.

Another site I deal with on a daily basis is the Department of Energy's national priority list site in Oak Ridge, Tennessee. We are working to clean up the site and increase its productive use in the community.

You mentioned drinking water and wastewater treatment. That's also something that's very present in our practice and an ongoing issue, where communities need to be able to provide safe drinking water and treat their wastewater in a way that it doesn't end up in surface water and places that it shouldn't be. Communities don't always have the money to do that. We have the state revolving fund program where we lend money at low rates to communities to improve their wastewater infrastructure.

That reminds me of another recent topic of discussion in our state. Amanda mentioned our TN H2O statewide plan that we had worked on with

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6. *Tennessee, Mississippi Await Ruling in Water Rights Dispute*, ASSOCIATED PRESS (June 4, 2019), <https://apnews.com/6e03ae525852402a8129065a9d287ae5> (discussing Mississippi's claim that Tennessee is unlawfully pumping water from the Mississippi portion of the Memphis sand aquifer).

7. See Kelly Fisher, *Here's How TVA Says It Will Get Rid of a Massive Amount of Coal Ash at the Gallatin Fossil Plant*, TENNESSEAN (June 14, 2019), <https://www.tennessean.com/story/news/local/summer/2019/06/14/tva-officials-discuss-gallatin-fossil-plant-plans-following-lawsuit-settlement/1451455001/> (discussing the settlement and resolution regarding safe handling of the coal ash).

the previous administration and have picked up and continued to work on with the new administration. It involves planning for our water in Tennessee. For example, when we have a drought, you don't want multiple municipalities pulling out of the same water source and that resource running dry.

Another perennial state issue that we keep chipping away at is waste tires. They're not really a day-to-day problem, but they are an issue for local governments. The legislature passed a bill a few years ago and provided a source of revenue off of new cars that are sold. That revenue can be used for innovative ways to keep tires out of landfills, keep tires out of streams, and to manage tires better in our state.

**Bart Kempf:** Can I add one quick thing, if you don't mind? One issue that has struck me recently, and I'm sure that there's been some literature on this, is how the general public understands science, and how this may affect the evolution of environmental law.

One example is glyphosate, the active ingredient in Roundup. Every regulatory body in the world that has studied glyphosate, including the U.S. EPA, has determined that it's not carcinogenic or there's not enough evidence to call it carcinogenic.<sup>8</sup> Despite this widespread scientific

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8. *EPA Releases Draft Risk Assessments for Glyphosate*, EPA (Dec. 18, 2017), <https://www.epa.gov/pesticides/epa-releases-draft-risk-assessments-glyphosate> (“The draft human health risk assessment concludes that glyphosate is not likely to be carcinogenic to humans.”); *Re-evaluation Decision RVD2017-01, Glyphosate*, CAN. PEST MGMT. REG. AGENCY (Apr. 28, 2017), <https://www.canada.ca/en/health-canada/services/consumer-product-safety/reports-publications/pesticides-pest-management/decisions-updates/registration-decision/2017/glyphosate-rvd-2017-01.html> (“Glyphosate is not genotoxic and is unlikely to pose a human cancer risk.”); *Glyphosate Not Classified as a Carcinogen by ECHA*, EUR. CHEMICALS AGENCY (Mar. 15, 2017), <https://echa.europa.eu/-/glyphosate-not-classified-as-a-carcinogen-by-echa> (“RAC concluded that the available scientific evidence did not meet the criteria to classify glyphosate as a carcinogen, as a mutagen or as toxic for reproduction.”); *Regulatory Position: Consideration of the Evidence for a Formal Reconsideration of Glyphosate*, AUSTRALIAN PESTICIDES & VETERINARY MEDS. AUTHORITY (Sept. 2016), <https://apvma.gov.au/sites/default/files/publication/20701-glyphosate-regulatory-position-report-final.pdf> (“Glyphosate does not pose a cancer to humans when used in accordance with the label instructions”); *Review of the Evidence Relating to Glyphosate and Carcinogenicity*, NEW ZEALAND ENVTL. PROT. AUTH. (Aug. 2016), <https://www.epa.govt.nz/assets/Uploads/Documents/Everyday-Environment/Publications/EPA-glyphosate-review.pdf> (“Glyphosate is unlikely to be genotoxic or carcinogenic.”); *Proposal for Harmonised Classification and Labelling: Substance Name: N-(phosphonomethyl)glycine; Glyphosate (ISO)*, GER.’S FED. INST. FOR OCCUPATIONAL SAFETY AND HEALTH (May 2016), [https://echa.europa.eu/documents/10162/13626/clh\\_report\\_glyphosate\\_en.pdf](https://echa.europa.eu/documents/10162/13626/clh_report_glyphosate_en.pdf) (“No hazard classification for carcinogenicity is warranted for glyphosate according to the CLP criteria.”); *Glyphosate Herbicide Tolerant and Lepidopteran and Coleopteran Resistant Maize Line Containing Event DP-004114-3*, FOOD SAFETY COMM’N OF JAPAN (Dec. 16, 2014), [http://www.fsc.go.jp/english/fsc\\_activity/2014/Glyphosate\\_December\\_16.pdf](http://www.fsc.go.jp/english/fsc_activity/2014/Glyphosate_December_16.pdf) (“No neurotoxicity, carcinogenicity, reproductive effect, teratogenicity or genotoxicity was observed.”).

consensus, juries in California have concluded that glyphosate was the legal cause of plaintiffs' cancer.<sup>9</sup>

It strikes me that, possibly, the more information that is out there, maybe the less we know. Another example is that the science is settled that vaccinations don't cause autism. There may be people in this room who disagree, but I think the science is settled, yet, significant numbers of people believe that vaccinations cause autism. You can go from issue to issue and see that there are a lot of people in the public that just either don't believe in or don't trust scientific consensus. You see it with climate change. I don't know exactly how this will affect environmental law, but I do know that companies selling products in the marketplace are increasingly subject to juries who are different than the ones you saw out there 15 or 20 years ago.

**Amanda Garcia:** I just have to say one thing which is that —

**Bart Kempf:** We need to disagree on something.

**Amanda Garcia:** We're going to disagree on this a little bit. I take your point, but I will also point out that industry has for decades used the strategy of raising questions where there really aren't questions about the scientific consensus. That was true with tobacco. True with climate change. It's a two-way street. I guess I have some faith in the fact-finding process of the legal system. I think that it's not like the misinformation is all coming from the plaintiff's bar.

**Bart Kempf:** Understood.

**Amanda Garcia:** Thank you.

**Bart Kempf:** Yes. My point was not to suggest that the plaintiff's bar is out there feeding all this. Maybe I implied it. My point was this: how can you believe the scientific consensus on one thing and then ignore it on another? You see it all the time. People believe in science behind climate change, but they don't believe the science establishing that vaccinations do not cause autism.

**Amanda Garcia:** It's a good point that our discipline as environmental lawyers is very science-driven. That is what we do. We work with scientists and we try to find the right answers to challenging technical and scientific issues. There does have to be a baseline agreement about the role of science in decision-making.

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9. Josh Edelson, *Monsanto Ordered to Pay \$289 Million in Roundup Cancer Trial*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/business/monsanto-roundup-cancer-trial>.

**Bart Kempf:** We're always dealing with complexity and uncertainty. In environmental law, it's not a question of whether the light was green or red. Our facts are different, typically contestable, and we can argue a lot about it.

**Travis Brandon:** To follow up on that question of uncertainty and change, one of the biggest stories in environmental law over the last decade or so has been the major back and forth shifts in federal regulation. During the span of just a couple of years, we've seen the introduction of the Clean Power Plan, the withdrawal of Clean Power Plan, back and forth changes to the Waters of the United States rule, as you mentioned earlier, and then rollbacks in the auto emission standards, and water quality standards.<sup>10</sup> I'm curious, and maybe we'll start with Jenny here—how have these highly volatile changes in federal policy affected your practice?

**Jenny Howard:** Perhaps in government, we're just used to change. While from the sideline or reading the media, it might feel like a whiplash environment, I'll say on the ground, it hasn't felt that dramatic. It's not like I'm racing into our permitting folks once a week saying, "No, no, no, we can't do it that way anymore." There's a lot of litigation, there's a lot of rulemaking, and there's public comment. It is more gradual than you might expect from reading headlines.

On the Clean Power Plan specifically, we were one of the few states that didn't file suit because Tennessee is unique in having the Tennessee Valley Authority and some of the planning they've been doing overtime to reduce their dependence on coal. Then, on Waters of the U.S., we did file suit. But, on a day-to-day basis, you didn't see dramatic shifts in the way we do business.

As far as working with EPA, you might think the Obama EPA and Trump EPA would operate completely differently. But the day-to-day interactions are similar, as are many of the staff members. You may ultimately end at a slightly different place, but the interactions and mission-oriented focus of protecting human health and the environment aren't drastically different.

**Travis Brandon:** Amanda, would you like to comment on?

**Amanda Garcia:** I think the question is: how have changes in federal policy affected our work? As a public interest environmental practitioner, the federal environmental laws are the backstop and often what we would like to think of as the floor for acceptable standards of protection for public health and the environment in our communities. We've seen over

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10. Nadja Popovich, Livia Albeck-Ripka, and Kendra Pierre-Louis, *85 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html>.

the past few years with the current administration an unprecedented assault on those environmental laws.<sup>11</sup>

That extends not just to the substantive laws themselves, but also the fundamental underpinnings of the administrative state. We, at SELC, have had to become experts and aggressive litigators under the Freedom of Information Act because the current administration is depriving the public of access to the public's records at a pretty egregious level. There are assaults on the National Environmental Policy Act, which is our primary environmental disclosure statute that requires federal agencies to disclose and analyze the environmental impacts of their decision-making.

That requirement—for agencies to engage in that sort of reasoned decision-making about the environment—is often where the information that comes from about the environmental impacts of various decisions. Those laws being under assault is really even a deeper level of potential harm to the way that we come to decisions, policy decisions, in our country, about environmental law.

In terms of the day-to-day practice, I do have to agree with Jenny. Despite the constant onslaught of proposed rules and final rules that have come out in the past few years, the Trump administration has been losing a lot in court. Interestingly, rules promulgated under Obama had been losing a lot in court, not because they were too protective, but because they weren't protective enough. This is perhaps where my faith in fact-finding and judicial review comes from.

There are standards that apply to agency decision-making and the rollbacks are happening are not meeting those standards. The actual impacts on the ground have not been felt as hard yet. Maybe they will be, but there is a lot of uncertainty and there's a lot of delay going on.

**Bart Kempf:** Yes, the administrative law overlay on all of this cannot be under-emphasized. For those of you who don't practice in environmental law, you may not appreciate that the laws almost never change. They're almost never amended. The only thing that's ever changed are rules regulations and regulatory guidance. The process of rulemaking is arduous. It's slow and is governed by administrative law, at the federal level the Administrative Procedure Act, and in Tennessee the Uniform Administrative Procedures Act. When making or amending a rule, you got to dot your I's and cross your T's. As a result, changing environmental policy through regulatory changes is a big ship to turn, and the Trump administration has been slow in reversing things from the Obama administration.

Now, what happens every time you switch from a Democratic to Republican administration, or a Republican to a Democratic administration, you see major policy changes. For example, a Democratic administration

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11. *Id.*

may close off federal land to drilling, while a Republican administration may try to open it back up. The Obama administration broadened federal jurisdiction over water and wetlands, and the Republican administration is in the process of narrowing it. This is nothing new.

So it takes a really long time to implement a regulation and to defend it in court. As Amanda mentioned, the Trump administration has not had a great record of having their rules upheld. There was a Washington Post article maybe six or seven months ago that chronicled some of the losses.<sup>12</sup>

Change is slow when it comes to the environmental rules and regulations that apply to us. I have not seen a huge change on that front. I think that there have been statistics that show, and I've seen articles, that show that environmental enforcement is down as compared to the Obama administration.<sup>13</sup> I do some enforcement but not enough to really see a big difference in my practice. But I think the numbers bear out the fact that enforcement is down.

I think the compliance emphasis has changed. There was a smorgasbord of memo writing right when the Trump administration came in, and they're changing compliance emphasis to more carrot, less stick. This can get codified, so to speak, in a memorandum at EPA headquarters, and then that trickles down to the regions. If you're subject to an enforcement action, you can point to the memo and say, "Hey, according to this enforcement policy, you should do this, this, and this instead of what you're doing," so you can maybe get a more favorable resolution for a client in an enforcement action.

For us practicing in Tennessee, day-to-day, most of our interaction is with TDEC and dealing with TDEC regulations. Those have not changed substantially since Trump was elected.

**Travis Brandon:** Great. We have come to the end of our time. I want to thank all of our panelists for this really wonderful discussion. We appreciate it.

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12. Lisa Heinzerling, *Trump is Losing His War on Regulations*, THE WASH. POST (Mar. 27, 2018, 6:15 PM), [https://www.washingtonpost.com/opinions/trump-is-losing-his-war-on-regulations/2018/03/27/820d59da-1e61-11e8-ae5a-16e60e4605f3\\_story.html](https://www.washingtonpost.com/opinions/trump-is-losing-his-war-on-regulations/2018/03/27/820d59da-1e61-11e8-ae5a-16e60e4605f3_story.html).

13. Juliet Eilperin and Brady Dennis, *Under Trump, EPA Inspections Fall to a 10-Year Low*, THE WASH. POST (Feb. 8, 2019, 4:36 PM), <https://www.washingtonpost.com/climate-environment/2019/02/08/under-trump-epa-inspections-fall-year-low/> ("[A]ccording to EPA figures[,] [t]he number of civil cases the division started and completed in 2018 hit a 10-year low, and the \$69 million in civil penalties it leveled represents the lowest in nearly a quarter-century.").