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FOR LAWYERS, CONSULTANTS, AND LENDERS WHO COUNSEL BUSINESS, COMMERCIAL, AND REAL ESTATE CLIENTS

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FEATURE ARTICLE

CALIFORNIA SUPREME COURT ISSUES HIGHLY-ANTICIPATED CEQA DECISION ADDRESSING THE STANDARD OF REVIEW FOR EIRS AND REQUIREMENTS FOR AIR QUALITY ANALYSES

By Chris Stiles

On December 24, 2018, the Californian Supreme Court issued its highly-anticipated decision in *Sierra Club v. County of Fresno*. Finding that portions of the air quality analysis in an Environmental Impact Report (EIR) violated the California Environmental Quality Act (CEQA), the High Court made four important holdings: 1) when reviewing whether an EIR's discussion of environmental effects "is sufficient to satisfy CEQA," courts must be satisfied that the EIR "includes sufficient detail to enable those who did not participate in its preparation to understand and consider meaningfully the issues the proposed project raises"; 2) an EIR must show a "reasonable effort to substantively connect a project's air quality impacts to likely health consequences"; 3) a lead agency "may leave open the possibility of employing better mitigation efforts consistent with improvements in technology without being deemed to have impermissibly deferred mitigation measures"; and 4) a lead agency "may adopt mitigation measures that do not reduce the project's adverse impacts to less than significant levels, so long as the agency can demonstrate in good faith that the measures will at least be partially effective at mitigating the project's impacts."

Factual Background and Procedural History

The controversy arose over an EIR prepared by the County of Fresno (County) for the Friant Ranch project, a proposal for a master-planned community near the unincorporated community of Friant in north-central Fresno County. The project included a Specific Plan and Community Plan Update. The Specific Plan provided the framework for the development of approximately 2,500 single and multi-family residential units that are age restricted to "active adults" age 55 and older, other residential units that are not age restricted, a commercial village center, a recreation center, trails, open space, a neighborhood electric vehicle network, and parks and parkways. The project also included 250,000 square feet of commercial space on 482 acres and the dedication of 460 acres to open space. The Community Plan update expanded a pre-existing Community Plan's boundaries to include the Specific Plan area and added new policies that were consistent with the Specific Plan and the County's General Plan.

The County certified the EIR and approved the project on February 1, 2011. In its analysis of air quality impacts, the EIR generally discussed the health effects of air pollutants such as Reactive Organic Gases (ROG), oxides of nitrogen (NOx), and particulate matter (PM), but without predicting specific health-related impacts resulting from the project's emissions. The EIR found that the project's long-term operational air quality effects were significant and unavoidable, even with implementation of all feasible mitigation measures. The EIR recommended a mitigation measure that included a "substitution clause," allowing the County, over the course of project build-out, to allow the use of new control technologies equally or more effective than those listed in the adopted measure. The County chose to approve an alternative that was identified as the "environmen-

tally superior alternative" in the EIR, rather than the initial proposal.

Shortly after the County approved the project, the Sierra Club filed a lawsuit alleging that the EIR violated CEQA in various ways. The trail court denied the petition in full. The Sierra Club appealed.

The Fifth District Court of Appeal reversed the trial court's judgment on three grounds. First, the court held that the EIR was inadequate because it failed to include an analysis that correlated the project's emission of air pollutants to its impact on human health. Second, it found that the mitigation measures for the project's long-term air quality impacts violated CEQA because they were vague, unenforceable, and lacked specific performance criteria. Third, the court held that the EIR's statement that the air quality mitigation provisions would *substantially* reduce air quality impacts was unexplained and unsupported.

The real party in interest, Friant Ranch, L.P., petitioned the California Supreme Court to review four issues:

> (1) Does the substantial evidence standard of review apply to a court's review of whether an EIR provides sufficient information on a topic required by CEQA, or is this a question of law subject to independent judicial review?
>
> (2) Is an EIR adequate when it identifies the health impacts of air pollution and quantifies a project's expected emissions, or does CEQA further require the EIR to correlate a project's air quality emissions to specific health impacts?
>
> (3) Does a lead agency impermissibly defer formulation of mitigation measures when it retains discretion to substitute the adopted measures with equally or more effective measures in the future as better technology becomes available, or does CEQA prohibit the agency from retaining this discretion unless the mitigation measure specifies objective criteria of effectiveness?
>
> (4) Do mitigation measures adopted by a lead agency to reduce a project's significant and unavoidable impacts comply with CEQA when substantial evidence demonstrates that, on the whole, the measures will be at least partially effective at mitigating the impact, or must such measures meet the same (or even heightened) standards of adequacy as those adopted to reduce an impact to a less than significant level?

The Supreme Court granted review on October 1, 2014. Given the nature of these issues, the case garnered widespread attention. Numerous entities, including air districts, environmental groups, governmental organizations, and building associations, participated in the case as *amici curiae*.

The Supreme Court issued a unanimous decision on December 24, 2018, affirming in part, and reversing in part, the Court of Appeal's decision.

The Supreme Court's Decision

The Standard of Review

First addressing the standard of review, the Supreme Court set out to answer the following question: What standard of review must a court apply when adjudicating a challenge to the adequacy of an EIR's discussion of adverse environmental impacts? The court held that, in certain circumstances at least, claims alleging that the discussion of environmental impacts in an EIR is inadequate may be reviewed *de novo* under the "procedural" prong of CEQA's standard of review.

The Court started its analysis with the key CEQA statute, which provides that:

> . . .abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. (Pub. Resources Code, § 21168.5.)

The Court explained that, based on this language, its prior decisions have articulated "a procedural issues/factual issues dichotomy," with a substantially different standard of review applied to each type of error. While courts determine *de novo* whether an agency has employed the correct procedures, the agency's substantive factual conclusions are accorded greater deference and will be upheld if they are supported by substantial evidence. In other words, when reviewing an agency's compliance with CEQA, procedural issues are reviewed de novo and factual

issued are reviewed under the "substantial evidence" standard.

After observing that the distinction between *de novo* review and substantial evidence review has worked well in judicial review of agency determinations, the Court explained that the issue of whether an EIR's discussion of environmental impacts is adequate, such that it facilitates "informed agency decision-making and informed public participation," does not "fit neatly within the procedural/factual paradigm." The Court then examined some of its previous decisions, as well as those of the courts of appeal, that addressed the standard of review for a variety of claims.

Relying heavily on its previous decision in *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376 (1988), the Court held that, although there are instances where the agency's discussion of significant project impacts may implicate a factual question that makes substantial evidence review appropriate:

> . . .whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question.

The Court explained, for example, that:

> . . .a conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

The Court held that in these instances, claims that an EIR's discussion of environmental impacts is inadequate or insufficient may be reviewed *de novo*. Although agencies have considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR, the Court concluded that a reviewing court must determine whether the EIR includes enough detail:

> . . .to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.

The Court determined that this inquiry presents a mixed question of law and fact, and as such, "it is generally subject to independent review."

The EIR's Air Quality Discussion

Having established the applicable standard of review, the Court next considered whether the EIR's air quality analysis complied with CEQA. The challenged EIR quantified the amount of air pollutants the project was expected to produce and also provided a general description of each pollutant and how it affects human health. The EIR also explained that a more detailed analysis of health impacts was not possible at the early planning phase and that a "Health Risk Assessment" is typically prepared later in the planning process. Nevertheless, the Court of Appeal found that the EIR was inadequate under CEQA because its analysis failed to correlate the increase in emissions that the project would generate to the adverse impacts on human health. The Supreme Court agreed, with qualifications.

According to the Supreme Court, an EIR must reflect "a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." Stated differently, the Court held that an EIR must show "a reasonable effort to discuss relevant specifics regarding the connection between" 1) the "general health effects associated with a particular pollutant" and 2) the "estimated amount of that pollutant the project will likely produce." The Court further explained that an EIR must:

> . . .provide an adequate analysis to inform the public how its bare [emissions] numbers translate to create potential adverse [health] impacts or it must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further.

Here, the EIR quantified how many tons per year the project would generate of ROG and NOx (both of which are ozone precursors), but did not quantify how much ozone these emissions would create. Although the EIR explained that ozone can cause health impacts at exposures for 0.10 to 0.40 parts per million, the Court found this information to be meaningless because the EIR did not estimate how much ozone the project would generate. Nor did the

EIR disclose at what specific levels of exposure to PM, carbon monoxide, and sulfur dioxide would trigger adverse health impacts. In short, the Court found that the EIR made:

> . . .it impossible for the public to translate the bare numbers provided into adverse health impacts or to understand why such translation is not possible at this time (and what limited translation is, in fact, possible).

Outlining the unhealthy symptoms associated with exposure to various pollutants, as the EIR at issue had done, was insufficient to fulfill the requirements of CEQA.

Notably, the Court was not persuaded by the real party in interest's explanation, which was supported by *amici curiae* briefs submitted by air districts, as to why the connection between emissions and human health that the plaintiffs sought could not be provided in the EIR given the state of environmental science modeling in use at the time. Even if that was true, the Court explained, the EIR itself must explain why it is *not* scientifically possible to do more than was already done in the EIR to connect air quality effects with potential human health impacts.

The Court noted that, on remand, one possible topic to address would be the impact the project would have on the number of days of nonattainment of air quality standards per year, but the Court stopped short of stating such a discussion is required. Instead, the Court noted that the County, as lead agency, has discretion in choosing the type of analysis to provide.

Mitigation Measures

The Court next turned to the EIR's discussion of mitigation measures that were identified to reduce air quality impacts. The specific mitigation measure at issue (Mitigation Measure 3.3.2) included a suite of measures that were designed to reduce the project's significant air quality impacts by providing shade trees, utilizing efficient "PremAir" or similar model heating, ventilation, and air conditioning systems, building bike lockers and racks, creating bicycle storage spaces in units, and developing transportation related mitigation that will include trail maps and commute alternatives. The measure included a substitution clause that allowed the lead agency to:

> . . .substitute different air pollution control measures for individual projects, that are equally effective or superior to those propose[d] [in the EIR], as new technology and/or other feasible measures become available [during] build-out within the [project].

The EIR stated that the measures would "substantially reduce" air quality impacts related to human activity within the entire project area, but not to a level that is less than significant. Accordingly, the EIR concluded that even with mitigation, the project's operational air quality impacts were significant and unavoidable.

The Fifth District Court of Appeal concluded that the EIR's use of the term "substantial" to describe the impact the proposed mitigation measures would have on reducing the project's significant health effects, without further explanation or factual support, amounted to a "bare conclusion" that did not satisfy CEQA's disclosure requirements. The Supreme Court agreed. According to the Court, the EIR "must accurately reflect the net health effect of proposed air quality mitigation measures." Here, however, the EIR included no facts or analysis to support the inference that the mitigation measures will have a quantifiable "substantial" impact on reducing the adverse effects.

The Court then examined whether the air quality measure impermissibly deferred formulation of mitigation because it allowed the County to substitute equally or more effective measures in the future as the project builds out. The Court held that this substitution clause did not constitute impermissible deferral of mitigation because it allows for "additional and presumably better mitigation measures when they become available," consistent with CEQA's goal of promoting environmental protection. The Court noted that mitigation measures need not include precise quantitative performance standards, but they must be at least partially effective, even if they cannot mitigate significant impacts to less than significant levels. The Court also held that the mitigation was adequately enforceable even though the County had some discretion to determine what specific measures would be implemented.

Finally, the Court decided:

> . . .whether a lead agency violates CEQA when its proposed mitigation measures will not reduce a significant environmental impact to less than significant levels.

The Court held that "the inclusion of mitigation measures that partially reduce significant impacts does not violate CEQA." The Court noted that, in enacting CEQA to protect the environment, the Legislature did not seek to prevent all development, and that if, after feasible mitigation measures have been implemented, significant effects still exist, a project may still be approved if it is found that the unmitigated significant effects are outweighed by the project's benefits. Thus, mitigation measures will not be found inadequate simply because they do not reduce impacts to a less than significant level.

Conclusion and Implications

Although the California Supreme Court endeavored to settle the standard of review, its opinion leaves the door open for further debate. In summarizing its main holding, for example, the Court explained that the question of whether an EIR's discussion of a potentially significant impact is sufficient or insufficient (*i.e.*, whether it includes enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project") is "generally" subject to independent review because it presents a mixed question of law and fact, implying that a different standard of review might apply in some circumstances. Indeed, the Supreme Court concluded the same paragraph by stating that:

> . . .to the extent a mixed question requires a determination whether statutory criteria were satisfied, de novo review is appropriate; but to the extent factual questions predominate, a more deferential standard is warranted.

Elsewhere, the Court emphasized that "agencies have considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR" and also noted that "there are instances where the agency's discussion of significant project impacts may implicate a factual question that makes substantial evidence review appropriate," providing the decision to use a particular methodology as an example. Thus, it seems litigants in CEQA cases will *continue* to argue over which standard of review should apply for claims that present mixed questions of law and fact, and whether a particular dispute concerns the "sufficiency" of the discussion or instead the "manner" in which it is presented. Agencies and applicants are likely to emphasize the need for courts to defer to agencies on methodological issues and factual conclusions, and to assert that EIR discussions should be upheld as long as they are not too conclusory. Project opponents, on the other hand, are likely to claim that, regardless of how detailed an analysis might be, it might still be insufficient to allow members of the public "to understand and consider meaningfully the issues the proposed project raises." In any event, the new rule that courts must determine whether an EIR includes "sufficient detail" for the discussion of any topic, without any deference to the lead agency, will likely create more uncertainly in the CEQA domain.

The Supreme Court was somewhat clearer in articulating CEQA's requirements for the analysis of air quality impacts in EIRs, but *considerable uncertainty* remains there as well. The Court's basic holding was that an EIR must reflect "a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." To satisfy this very general requirement, the Court explained, an EIR must:

> . . .provide an adequate analysis to inform the public how its bare [emissions] numbers translate to create potential adverse [health] impacts or it must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further.

Whether this is viewed as a "new" requirement or a clarification of existing law, EIRs have not typically included the type of air quality analysis that the Court held CEQA requires. Agencies and practitioners are working to figure out what will pass muster under this new decision, particularly the requirement that EIRs discuss hypothetical analysis that is not scientifically possible to do. The greatest technical challenges will likely arise in connection with efforts

to ascertain the ultimate health effects of ozone precursors, which must rise into the atmosphere before being converted to ozone in the presence of sunlight. Ascertaining the ultimate fate of these specific ozone molecules may prove to be exceedingly difficult, particularly for relatively small projects.

The Court's discussion regarding the adequacy of mitigation measures is helpful, but not as groundbreaking as the other issues. Including a substitution clause that allows for additional and presumably better mitigation measures when they become available does not constitute impermissible deferral of mitigation, and is consistent with CEQA's goal of promoting environmental protection. The Supreme Court seemed not to want a rigid application of CEQA to impede technological innovation. Similarly, an agency may adopt mitigation measures that reduce environmental impacts, even if they do not reduce impacts to a less than significant level, because CEQA was not enacted to prevent all development and some reduction in environmental impacts is better than none.

The Supreme Court's opinion is available at: http://www.courts.ca.gov/opinions/documents/S219783A.PDF

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PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Due to the recent federal government shut down, many of the agencies who report on Clean Water Act and Clean Air Act civil and criminal enforcement actions have been silent resulting in a smaller than usual number of summaries below.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

December 18, 2018-The U.S. Environmental Protection Agency announced a settlement of a significant hazardous waste liability case against Stericycle, a company that treats and stores hazardous wastes at facilities in Kent and Tacoma, Washington. Stericycle agreed to pay a $150,000 penalty after EPA found that the company violated terms of its waste-handling and storage permit by failing to maintain a liability insurance policy that would provide adequate coverage to third parties—neighbors—whose health and properties could be harmed by a release of hazardous wastes from the facilities. Stericycle agreed to the settlement without admitting the allegations it contains. Liability insurance is a particularly important issue in the low-income areas where these types of facilities often operate. Such insurance is a key component of the overall permitting system, which is intended to ensure the safe operation of commercial hazardous waste handling facilities, where dangerous fires, spills, and other incidents can occur. EPA found that payouts in Stericycle's policy could have been consumed by legal fees rather than payment to those harmed by such a release. EPA is looking closely at the liability insurance policies at all hazardous waste handlers in the Pacific Northwest and is working closely with the states' environmental agencies to ensure these handlers are meeting all their permit obligations.

•December 18, 2018-A Hartland, Maine, tannery has agreed to come into compliance with state and federal hazardous waste laws and to pay a penalty of $48,000 to settle claims by the U.S. Environmental Protection Agency (EPA) that it violated these laws at its facility in Hartland. Another Maine company, GVS North America of Sanford, also recently came into compliance with state and federal hazardous waste laws and agreed to pay a penalty to settle charges of violations of hazardous waste regulations by EPA's New England office. Tasman Leather Group, LLC agreed to correct all violations of the federal Resource Conservation and Recovery Act (RCRA) and State of Maine Hazardous Waste Management Rules, and certified compliance with these requirements. This case stems from a June 2016 inspection by EPA inspectors who found that the facility had failed to get a site-specific identification number, maintain a compliant hazardous waste contingency plan, conduct an annual review of hazardous waste training, and conduct an adequate hazardous waste determination, among other alleged violations. Without a site-specific identification number, a facility may avoid regulatory oversight. Without a compliant contingency plan and proper training, facility employees and emergency responders may not know how to respond in an emergency. These violations posed a threat to the health and safety of employees and the surrounding community because they could have led to hazardous waste releases. This settlement reduces the likelihood of a release of hazardous waste to the Hartland community. The Hartland facility, which re-tans and finishes leather for the military, footwear and fashion industries, generates hazardous waste, including flammable solvents. According to EPA, GVS North America—a Delaware-based subsidiary of a company based in Italy—was found to be out of compliance in that they failed to provide employee hazardous waste management training, failed to have adequate space between containers of hazardous waste, and failed to do weekly inspections of hazardous waste containers, among other violations of RCRA and the

State of Maine Hazardous Waste Management Rules. In the case of GVS North America, the company is now doing the training and inspections necessary to comply with federal and state hazardous waste laws. GVS also agreed to pay a penalty of $63,036 to settle claims by EPA that it failed to properly manage its hazardous waste. The Sanford facility, which makes filters for life sciences applications as well as throttle plates for cars, generates hazardous wastes containing sodium hydroxide, sulfuric acid, methanol NMP, flammable solids, universal wastes, and chromium.

Indictments Convictions and Sentencing

•January 10, 2019-The Department of Justice, the Environmental Protection Agency and the State of California announced a settlement with Fiat Chrysler Automobiles N.V., FCA US, and affiliates (Fiat Chrysler) for alleged violations of the Clean Air Act and California law. Fiat Chrysler has agreed to implement a recall program to repair more than 100,000 noncompliant diesel vehicles sold or leased in the United States, offer an extended warranty on repaired vehicles, and pay a civil penalty of $305 million to settle claims of cheating emission tests and failing to disclose unlawful defeat devices. Fiat Chrysler also will implement a program to mitigate excess pollution from these vehicles. The recall and federal mitigation programs are estimated to cost up to $185 million. In a separate settlement with California, Fiat Chrysler will pay an additional $19 million to mitigate excess emissions from more than 13,000 of the noncompliant vehicles in California. In addition, in a separate administrative agreement with the United States Customs and Border Protection, Fiat Chrysler will pay a $6 million civil penalty to resolve allegations of illegally importing 1,700 noncompliant vehicles. The Environmental Protection Agency and California settlement (EPA/California Settlement) resolves claims of EPA and California relating to Fiat Chrysler's use of defeat devices to cheat emission tests. Defeat devices are design elements (in this case, software functions) installed in vehicles that reduce the effectiveness of the emission control system during normal on-road driving conditions. The affected vehicles are model year 2014 through 2016 Ram 1500 and Jeep Grand Cherokee vehicles equipped with "EcoDiesel" 3.0-liter engines. The settlement does not resolve any potential criminal liability. The settlement also does not resolve any consumer claims or claims by individual owners or lessees who may have asserted claims in the ongoing multidistrict litigation. In addition to its separate settlement addressing excess emissions for affected vehicles in California, the state of California has entered into another settlement with Fiat Chrysler resolving alleged violations of California consumer protection laws relating to the affected vehicles.

•December 18, 2018-IAV GmbH (IAV), a German company that engineers and designs automotive systems, has agreed to plead guilty to one criminal felony count and pay a $35 million criminal fine as a result of the company's role in a long-running scheme for Volkswagen AG (VW) to sell diesel vehicles in the United States by using a defeat device to cheat on U.S. vehicle emissions tests required by federal law. IAV is charged with and has agreed to plead guilty to one count of conspiracy to defraud the United States and VW's U.S. customers and to violate the Clean Air Act by misleading the EPA and U.S. customers about whether certain VW- and Audi-branded diesel vehicles complied with U.S. vehicle emissions standards. IAV and its co-conspirators knew the vehicles did not meet U.S. emissions standards, worked collaboratively to design, test, and implement cheating software to cheat the U.S. testing process, and IAV was aware the VW concealed material facts about its cheating from federal and state regulators and U.S. customers. Under the terms of the plea agreement, which must be accepted by the court, IAV will plead guilty to this crime, will serve probation for two years, will be under an independent corporate compliance monitor who will oversee the company for two years, and will fully cooperate in the Justice Department's ongoing investigation and prosecution of individuals responsible for these crimes. Pursuant to the U.S. Sentencing Guidelines, IAV's $35 million fine was set according to the company's inability to pay a higher fine amount without jeopardizing its continued viability. The guilty plea of IAV represents the most recent charges in an ongoing investigation by U.S. criminal authorities into unprecedented emissions cheating by VW. In March 2017, VW pleaded guilty to criminal charges that it deceived U.S. regulatory agencies, including the EPA and the California Air Resources Board, by installing defeat devices in diesel vehicles emissions control systems that were designed to cheat emissions tests. As part of its plea agreement with the Department, VW paid a criminal fine of $2.8 billion

and agreed to an independent corporate compliance monitor for three years. Eight individuals were previously indicted in connection with this matter, two of whom have pleaded guilty and been sentenced. The other six charged defendants are believed to reside in Germany. According to the statement of facts that will be filed with the court in IAV's case, in 2006, VW engineers began to design a new diesel engine to meet stricter U.S. emissions standards that would take effect by model year 2007. This new engine would be the cornerstone of a new project to sell diesel vehicles in the United States that would be marketed to buyers as "clean diesel." When the co-conspirators realized that they could not design a diesel engine that would both meet the stricter standards for nitrogen oxides (Nox) and attract sufficient customer demand in the U.S. market, they decided they would use a software function to cheat the U.S. emissions tests. VW delegated certain tasks associated with designing its new "Gen 1" diesel engine to IAV, including parts of software development, diesel development and exhaust after-treatment. In November 2006, a VW employee requested that an IAV employee assist in the design of defeat device software for use in the diesel engine. The IAV employee agreed to do so and prepared documentation for a software design change to recognize whether a vehicle was undergoing standard U.S. emissions testing on a dynamometer or it was being driven on the road under normal driving conditions. If the software detected that the vehicle was not being tested, the vehicle's emissions control systems were reduced substantially, causing the vehicle to emit substantially higher NOx, sometimes 35 times higher than U.S. standards. By at least 2008, an IAV manager knew the purpose of the defeat device software, instructed IAV employees to continue working on the project and directed IAV employees to route VW's requests regarding the defeat device software through him; the manager was involved in coordinating IAV's continued work on it. Starting with the first model year (2009) of VW's new "clean diesel" Gen 1 engine, through model year 2014, IAV and its co-conspirators caused defeat device software to be installed on all of the approximately 335,000 Gen 1 vehicles that VW sold in the United States. (Andre Monette)

LAWSUITS FILED OR PENDING

AUTOMAKERS FILE *AMICUS* BRIEF IN THE NINTH CIRCUIT IN THE VOLKSWAGEN 'CLEAN DIESEL' SUIT ARGUING FOR FEDERAL PREEMPTION

On December 13, 2018, the Alliance of Automobile Manufacturers Inc., the Association of Global Automakers, and the U.S. Chamber of Commerce filed its *amicus* brief to support Volkswagen in its opposition against an appeal filed by the Environmental Protection Commission of Hillsborough County, Florida and Salt Lake City Utah (Counties). The Counties sued Volkswagen for violating state and local laws for tampering with emission control devices on vehicles they manufactured that ultimately allowed a car's emissions to exceed the legal limits. The Counties seek to reverse an order dismissing their claims based on both implicit and explicit federal preemption by the Clean Air Act (CAA). [*The Environmental Protection Commission, et al v. Volkswagen Group of America, et al.*, Case No. 18-15937 (9th Cir. 2018).]

Factual Background

In 2016, the U.S. government, on behalf of the U.S. Environmental Protection Agency (EPA), filed a federal Clean Air Act suit against Volkswagen and its subsidiaries for installing defective devices in their vehicles and selling approximately 585,000 of the defective, new models to the U.S. The defective device contains software that tampers with the vehicle's emission controls and effectively allows cars to pass government emissions test but also enables the vehicle to pollute by as much as 35 times the permissible emissions while the vehicle was being driven.

Volkswagen entered into a settlement with the federal government for $4.3 billion in criminal penalties, $2.0 billion to invest in Zero Emission Vehicles, and $2.925 billion in a mitigation fund to be used to remedy the environmental harm the company caused. Furthermore, Volkswagen also agreed to pay $10.033 billion to buy back certain defective vehicles and pay the owners and lessees of said vehicles restitution. Soon after the EPA's suit, multiple class actions filed by consumers, dealerships, investors, and municipalities followed.

Disposition of the Counties' Suit

The Counties filed suit in the U.S. District Court for the Northern District of California (District Court), against Volkswagen for violating state and local laws regarding the tampering of emissions controls in vehicles. These laws generally prohibit anyone from removing or rendering inoperable a vehicle's emission control system. 42 U.S.C. §7522(a)(3)(A) specifically makes it unlawful for:

> . . .any person to remove or render inoperative any device or element of design installed on or in a motor vehicle…or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser.

In addition to the tampering claims, the Counties also alleged that Volkswagen updated its defeat device to increase the device's efficiency and added new defeat devices during vehicle maintenance and post-sale recalls.

On April 16, 2018, the U.S. District Court granted Volkswagen's motion to dismiss with prejudice, on the grounds that the Counties' tampering claims were expressly preempted by § 209(a) of the CAA. It also concluded that the Counties' claims based on subsequent tampering were impliedly preempted.

The District Court heavily relied on Wyoming's disposition of a similar suit against Volkswagen. The District Court reviewed the relevant sections of the CAA. Section 209(a) provides:

> No state or any political subdivision thereof shall *adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles* or new motor engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle as condi-

> tion precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." (42 U.S.C. § 7543(a)) (emphasis added)
>
> Section 209(d) states:
>
> Nothing in this part shall preclude or deny to any State or political subdivision thereof the right to otherwise *control, regulate, or restrict the use, operation,* or movement of registered or licensed motor vehicles." (42 U.S.C. § 7543(d)) (emphasis added)

Through § 209(a), Congress tasked the EPA to regulate emission-control devices on new vehicles and enforce these standards by its certification process. In effect, Congress created a uniform regulatory regime for governing emissions from new vehicles to avoid the possibility of 50 different regulatory standards in every state. The District Court ultimately held that the Counties claims are expressly preempted by 209(a) because the Counties, to an extent, sought to regulate Volkswagen's conduct of manufacturing the device and installing it into new vehicles which equates to an "attempt to enforce [a] standard relating to the control of emissions from new motor vehicles," which states are expressly preempted from under Section 209(a).

On the claims regarding subsequent tampering, the CAA requires vehicles to meet EPA emissions standards not just as a new vehicle but also throughout its "useful life." (42 U.S.C. § 7521(a)(1)) This means that Volkswagen's subsequent modifications to the defective devices will still continue to be federally regulated and state and local government regulation are subject to limitations imposed by federal law. The District Court also reviewed the legislative history regarding § 209(d). The District Court concluded that it was Congress' intent to authorize state and local governments to adopt transportation planning regulations and not to regulate vehicle manufacturers.

The Counties' Appellate Brief

On October 04, 2018, the Counties filed an appeal to the Ninth Circuit on the issue of whether the District Court erred in holding that all of their claims were preempted, even where Congress expressly authorized:

> . . .any State of political subdivision thereof. . .[to]. . .control, regulate, or restrict the use, operation or movement of registered or licensed motor vehicles. (Section 209(d))

The Counties arguments can be placed into three categories: 1) that it was Congress's intent for state and local governments to act as partners for air pollution control; 2) that the Counties' claims are not expressly preempted because only conflicting emissions standards for new vehicles should be preempted and that the Counties are not attempting to enforce any standard relating to the control of emissions of air pollutants; and 3) the their claims are not impliedly preempted because they do not conflict with the Congressional purpose and objectives in the CAA.

Expanding on their arguments above, first, the Counties contend that Congress granted EPA the power to set emissions standards but preserved the power to assist with enforcing these standards to state and local governments. The Counties argue that this delineation is explicit in § 209(d) of the CAA and further argues that subsection (d) "preserves the field of regulation of old motor vehicles to state control."

Second, the Counties argue that their claims are not expressly preempted by the CAA because the language of § 209 is inapplicable to their regulations. The Counties' anti-tampering regulations do not "adopt or attempt to enforce any "standards relating to the control of emissions" but instead, only prohibit anyone from tampering or disabling emissions control systems. Additionally, the Counties argue that § 209 only preempts claims relating to the manufacture, sale, or purchase of "new motor vehicle" and that the Counties' regulations prohibit anyone from altering or disabling the emissions control of vehicles that already have been certified and placed "in-use."

Lastly, the Counties contend that the regulations are also not impliedly preempted. They argue that Congress does not occupy the entire field because § 209 only encompasses "new motor vehicles" and that the claims are not barred by conflict preemption because it is not impossible to comply with both federal and state law—that Volkswagen designs a federal law-compliant emissions control system that is also subject to anti-tampering state laws.

The *Amicus* Brief

On December 13, 2018, the Alliance of Automobile Manufacturers Inc., the Association of Global Automakers, and the U.S. Chamber of Commerce (Amici) filed its *amicus* brief in support of affirming the District Court's decision—that the Counties claims are preempted by the CAA in their entirety. The Amici provides perspective on the existing federally-regulated process for implementing post-sale software updates and the negative impacts of allowing individual states the authority to inject themselves into the process.

The *amici* emphasize that the EPA comprehensively regulates configurations of motor vehicles from their initial certification phase to the end of their useful lives. For example, the EPA heavily regulates "running changes" and requires a manufacturer to notify the EPA of these changes. 40 C.F.R. § 86.1842-01 (b)(1). Manufacturers often make "running changes" which is the regular modifying of vehicles already in-use to update or implement changes to improve their performance, reliability, and safety. In fact, the EPA monitors these changes for the duration of the vehicle's useful life and may order a recall, or require additional testing to ensure that the vehicles remain compliant with emissions standards. 40 C.F.R. § 86.1842-01 (b)(2).

The *amici* end their brief by reminding the Court of Appeals of the impracticalities of allowing every state and local government the authority to regulate model-wide, post production changes. The Amici argues that such allowance would:

> . . .destabilize EPA's careful regulatory scheme and would inject unwarranted complication and confusion into the process.

Conclusion and Implications

Given the commonality of post-sale recalls and updates to software for in-use vehicles, it is unlikely for the Appellate Court to out-right define routine maintenance acts as acts of "tampering" under the regulations of individual states and local governments. The District Court's ruling is a strong indication of a court's propensity to defer to the EPA and its rules, given Congress' intent to set a uniform regime regarding vehicular emissions control, as it did when it conferred to the EPA exclusive authority in setting the standards.

(Rachel S. Cheong, David Boyer)

STATE OF WYOMING FILES APPEAL TO THE NINTH CIRCUIT SEEKING TO OVERTURN THE DISTRICT COURT'S DECISION REGARDING THE ESA LISTING OF THE GREATER YELLOWSTONE GRIZZLY BEAR

On December 5, 2018, the State of Wyoming, shortly followed by several co-defendants, filed an appeal to the Ninth Circuit Court of Appeals of the U.S. District Court for the District of Montana's (District Court) decision to vacate the delisting of the Greater Yellowstone Ecosystem grizzly bear (Yellowstone Grizzly) from the federal Endangered Species Act (ESA). Wyoming's appeal of the District Court's ruling continues the ongoing battle between conservationists and the hunting community regarding a well-beloved species. [*Crow Indian Tribe v. United States*, ___F.Supp.3d___ (D. Mt. 2018).]

Grizzly Bear Population in the United States

Before European settlement began, upwards of 50,000 grizzlies roamed the lands of the United States. As settlement moved westward in the 19th Century, the government began "bounty programs aimed at eradication, [and] grizzly bears were shot, poisoned, and trapped wherever they were found.": (Final Rule: Endangered and Threatened Wildlife & Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 82 Fed. Reg. 30,502, 30,508 (June 30, 2017)) (2017 Final Rule). Most recently, only six ecosystems of grizzly bears remain in the United States: 1) the Greater Yellowstone Ecosystem (GYE), covering portions of Wyoming, Montana, and Idaho; 2) the Northern Continental Divide Ecosystem (NCDE) of north-central Montana; 3) the Cabinet-Yaak area extending from northwest Montana to northern Idaho; 4) the Selkirk

Mountains in northern Idaho, northeast Washington, and southeast British Columbia; 5) north-central Washington's North Cascasdes area; and 6) the Bitterroot Mountains of western Montana and central Idaho. 82 Fed. Reg. 30,508-09. The GYE and NCDE maintain the largest grizzly bear populations with an estimated 700 to 900 bears. *Id*. Fewer than 100 bears occupy each of the remaining four ecosystems. *Id*.

First Attempts to Delist the Yellowstone Grizzly

In 2007, the Fish and Wildlife Service (Service) published its final rule (2007 Final Rule), which identified the Yellowstone Grizzly as a "distinct population segment" and delisted the Yellowstone Grizzly from the endangered and threatened species list. A "distinct population segment" of a larger species may be listed once the Service finds that, in addition to being endangered or threatened, the population segment is discrete—that is, "markedly separated from other populations of the same taxon"—and significant. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4725 (Feb. 7, 1996).

As litigation ensued challenging the 2007 Final Rule, the Ninth Circuit Court of Appeals affirmed the lower court's ruling to vacate and remand the 2007 Rule to the Service to determine the listing status of the Yellowstone Grizzly. The Ninth Circuit affirmed the District Court's ruling because the Service failed to rationally take into account the emerging threat of whitebark pine tree (a prominent food source to the Yellowstone Grizzlies) loss when delisting the Yellowstone Grizzly from the ESA.

The *Humane Society v. Zinke* Decision

In August 2017, as the Service continued to analyze the listing status of the Yellowstone Grizzly, the United States District Court for the District of Columbia (D.D.C.) decided *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) (*Humane Society*). The court in *Humane Society* invalidated a similar final rule published by the Service relating to the designation of the Western Great Lakes population of the gray wolf as a distinct population segment and the Service's decision to delist the Western Great Lakes gray wolves.

Importantly, the D.C. Circuit provided that the Service must review the status of the entire listed species from which the distinct population segment was carved, which had been ignored entirely in its delisting determination of the Western Great Lakes population. Thus, the Service was compelled to analyze the effects of delisting the Western Great Lakes gray wolves on the larger gray wolf species as a whole.

2017 Final Rule Delisting Yellowstone Grizzly

Approximately ten years after the Ninth Circuit remanded the 2007 Final Rule, the Service again published a final rule delisting the Yellowstone Grizzly on June 30, 2017 (2017 Final Rule). *See,* Final Rule, 82 Fed. Reg. at 30,505. Recognizing that the holding in *Humane Society* may have some relevance in its analysis, the Service reopened public comments on the impacts of the *Humane Society* decision on its determination to delist the Yellowstone Grizzly.See, Request for Comments: Endangered and Threatened Wildlife & Pants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 82 Fed. Reg. 57,698 (Dec. 7, 2017) (Request for Comments). Ultimately, after the Request for Comments period, the Service determined that the 2017 Final Rule did not require modification. The Service found that despite the D.C. Circuit's decision in *Humane Society*, the "consideration and analyses of grizzly bear populations elsewhere in the lower 48 States is outside the scope of [the 2017 Final Rule]." *See,* 2017 Final Rule, 82 Fed. Reg. at 30,546.

Shortly after the publication of the 2017 Final Rule, the Crow Tribe (Tribe), along with several coplaintiffs (plaintiffs), commenced a lawsuit objecting to the Service's actions relating to the Yellowstone Grizzly as arbitrary and capricious under the ESA and Administrative Procedure Act (APA).

The District Court's Decision

Arbitrary and Capricious Standard of Review under the APA

Pursuant to § 706(2)(A) of the APA, a court is required to:

> . . .hold unlawful and set aside agency action, findings, and conclusions found … to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Of the four factors to be considered under the arbitrary and capricious standard, Plaintiffs alleged that the Service "entirely failed to consider an important aspect of the problem.": *See, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Specifically, the District Court analyzed if the Service acted arbitrarily and capriciously when: 1) delisting the Yellowstone Grizzly and analyzing its impacts of such action on the remaining endangered and threatened grizzly bear population not located in the GYE; 2) failing to include a recalibration methodology utilizing the best available science in its 2017 Final Rule; and 3) analyzing the need for translocation or natural connectivity of other grizzly bear populations in other regions.

The Services' Piecemeal Approach to Grizzly Bear Protections

The thrust of the plaintiffs' argument rests with the fact that the Service blatantly excluded any analysis or consideration of the effect of delisting the Yellowstone Grizzly on other members within the grizzly bear species, which remain protected under the ESA. Specifically, plaintiffs relied heavily upon the similar fact pattern and analysis by the D.C. Circuit in *Human Society* to argue that the Service acted in violation of the APA and ESA. The Service maintained that *Humane Society* was wrongly decided, and that the facts in *Humane Society* were distinguishable because the remaining grizzly bear populations outside of the GYE remained protected, unlike the remaining population of the gray wolves in *Humane Society*. The District Court was unconvinced by the Service's arguments:

> The Service does not have unbridled discretion to draw boundaries around every potential healthy population of a listed species without considering how that boundary will affect the members of the species on either side of it.

The District Court further held that the Services' "piecemeal approach" in segmenting off a healthy portion of an endangered species population contravenes the ESA's "policy of institutionalized caution.":See, *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2011).

Removal of Recalibration Methodology

A recalibration method is used to calculate new estimates for a species population in any given year and then utilized in making listing and delisting determinations. Additionally, the ESA requires that the Service make listing and delisting determinations "solely on the basis of the best mandates and commercial data.": 16 U.S.C. § 1533(b)(1)(A). The Service conceded that the current recalibration model may not remain the best available science but that the methodology will remain in place until another population estimator was approved. The Service ignored concerns about the existing recalibration methodology and removed the requirement to utilize the "best available science" for changing the estimator in the 2017 Final Rule mostly due to political pressures from the states. The District Court ruled that there was clear evidence that the Service made its decision on recalibration in the 2017 Final Rule not based on the best available science or law, but rather, a concession to the states' hardline position in utilizing old recalibration methods.

Lack of Natural Connectivity Provisions

The ESA provides that the Service consider the "natural or manmade factors affecting [the Yellowstone Grizzly's] continued existence," including the population's genetic health while under the threat of endangerment. 16 U.S.C. § 1533(b)(1)(A). In its 2017 Final Rule, the Service recognized that "[t]he isolated nature of the [Yellowstone Grizzly] was identified as a potential threat when listing occurred in 1975.": 82 Fed. Reg. at 30,535. Without an adequate gene pool, the Yellowstone Grizzly will be at an increased risk of endangerment than currently exists. 82 Fed. Reg. at 30,535-36.

The District Court held that the Service failed to logically support its conclusion that the Yellowstone Grizzly population was not threatened by its isolation. Specifically, in the 2007 Final Rule, the Service:

> . . .recommended that if no movement or successful genetic interchange was detected by 2020, grizzly bears from the [NCDE] would be translocated into the [GYE] grizzly bear population to achieve the goal of two effective migrants every 10 years (i.e., one generation) to maintain current levels of genetic diversity. 82 Fed. Reg. at 30,536.

The 2017 Final Rule did not maintain the same commitment to translocation in order to create a genetically diverse grizzly bear population. The lack of commitment to translocation was based on the Services' reliance on two distinct studies that were "illogically cobbled together" to conclude the Yellowstone Grizzly population is currently sufficiently diverse.

Conclusion and Implications

The holding in *Crow Indian Tribe v. United States* stayed the first grizzly hunt in 44 years in Wyoming. As Wyoming and its co-defendants appeal the District Court's decision to the Ninth Circuit, the current conservation strategy to protect the Yellowstone Grizzly and remaining grizzly bear population remains in place. As the public sentiment shifts toward environmental concerns and conservation efforts, Wyoming faces an uphill battle in its appeal to argue that the 2017 Final Rule should not be vacated but reaffirmed. The District Court's decision is available online at: https://www.mtd.uscourts.gov/sites/mtd/files/Order%20in%20Crow%20Indian%20Tribe%2C%20et%20al%20vs.%20U.S.A.%2C%20et%20al%20and%20State%20of%20Wyoming%2C%20el%20al.pdf

Wyoming's December 2018 appeal to the Ninth Circuit is available online at: https://www.courtlistener.com/recap/gov.uscourts.mtd.55114/gov.uscourts.mtd.55114.280.0.pdf
(Nicolle Falcis, David Boyer)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT GRANTS PETITION FOR REVIEW OF SPECIAL USE PERMIT AND ROD ISSUED BY FOREST SERVICE FOR NATURAL GAS PIPELINE

Cowpasture River Preservation Association v. U.S. Forest Service, 911 F.3d 150 (4th Cir. 2018).

The U.S. Court of Appeals for the Fourth Circuit granted a petition to review the U.S. Forest Service's (Forest Service) amendment of the forest plans for George Washington National Forest (GWNF) and Monongahela National Forests (MNF), issuance of a Record of Decision (ROD) and Special Use Permit (SUP) authorizing the construction of a natural gas pipeline through parts of the GWNF and MNF, and grant of a right of way through the Appalachian National Scenic Trail (ANST). The court held that the Forest Service's decisions "arbitrarily and capriciously" violated the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA). The court also determined the Forest Service violated the Mineral Leasing Act (MLA) because it lacked the statutory authority to issue a pipeline right of way across the ANST.

Factual and Procedural Background

Atlantic Coast Pipeline, LLC (Atlantic), proposed a 604.5-mile natural gas pipeline called Atlantic Coast Pipeline from West Virginia to North Carolina. The proposed route crossed parts of the GWNF and MNF and required a right of way across the ANST. Construction of the pipeline would require clearing trees and other vegetation in the national forest and digging, blasting, and flattening ridgelines.

NEPA requires an Environmental Impact Statement (EIS) any time a federal agency takes major action which significantly affects the quality of the human environment. An EIS must include a description of likely environmental effects, adverse environmental effects, and potential alternatives for the project being considered.

The Federal Energy Regulatory Commission (FERC) was the lead agency for preparing the EIS and approved the route for the pipeline. As FERC prepared the EIS, the Forest Service reviewed and provided comments on drafts. The Forest Service requested ten site-specific stabilization designs in areas with challenging terrain and identified several concerns about potential adverse environmental impacts, including landslide risk, erosion impact, and degradation of water quality.

In May 2017, however, the Forest Service "suddenly and mysteriously" withdrew its requests for the site-specific stabilization designs. In late 2017, the Forest Service issued a final ROD to adopt the EIS and project-specific amendments to 13 standards in the GWNF and MNF forest plans. In early 2018, the Forest Service granted a SUP for a pipeline right of way across the ANST.

Cowpasture River Preservation Association and other groups (petitioners) filled a petition to review the Forest Service's decision on February 5, 2018. Petitioners claimed the Forest Service violated NFMA, NEPA and MLA when issuing the SUP, ROD, and the right of way across the ANST.

The Fourth Circuit's Decision

The National Forest Management Act

The NFMA requires the Forest Service to develop a forest plan consistent with promulgated regulations (2012 Planning Rule). A forest plan provides a framework for "where and how certain activities can occur in a national forests." The Forest Service is then required to ensure that all activities on national forest land comply with the forest plans. Substantive requirements in the 2012 Planning Rule apply to forest plan amendment if the requirement is "directly related to the plan direction being added, modified, or removed by the amendment."

The Court of Appeals determined that the Forest Service acted "arbitrarily and capaciously" when

it concluded the forest plan amendments for the pipeline project were not directly related to the 2012 Planning Rule and that the amendments would not have a "substantial adverse effect" on national forest land. As a result, the court remanded the matter to the Forest Service to conduct a proper analysis of the amendments in light of the 2012 Planning Rule.

In addition, the court determined the Forest Service violated NFMA and its own forest plans by failing to analyze whether the project's needs could have reasonably been met on non-national forest land. The court remanded this issue to the Forest Service for consideration.

The National Environment Policy Act

Under NEPA, the Forest Service can only adopt FERC's EIS if the Forest Service undertakes an independent review of the EIS and determines that all of its comments and suggestions are satisfied. Petitioners argued the Forest Service violated the NEPA because it failed to study alternative routes and failed to look at landslide risk, erosion, and degradation of water quality based on the Forest Service's own comments on the EIS. The court held that the Forest Service was required to resolve all of its comments and concerns before adopting the FERC's EIS. The Forest Service acted "arbitrarily and capriciously" in not taking a "a hard look at the environmental consequences" of the pipeline project.

The Mineral Leasing Act

The Forest Service argued that it had the proper authority to grant a right of way across the ANST under the MLA. The Court of Appeals disagreed and held that the MLA specifically excludes lands in the National Park System from the authority to grant pipeline rights of way. Additionally, the Forest Service would not be the appropriate agency head because it handles trail management and not trail administration. Therefore, the court vacated the Forest Service's ROD and SUP, which granted the right of way to the project proponent.

Conclusion and Implications

This case presents a relatively rare instance where a federal agency's actions are determined to be arbitrary and capricious under several environmental laws.

(Daniella V. Hernandez, Rebecca Andrews)

INDUSTRIAL ACTIVITIES AND THE CLEAN WATER ACT: SECOND CIRCUIT DECISION HELPS CLARIFY WHAT ACTIVITIES MAY REQUIRE A CLEAN WATER ACT PERMIT

Sierra Club v. Con-Strux, LLC, ___F.3d___, Case No. 18-257 (2nd Cir. Dec. 17, 2018).

The federal Clean Water Act (CWA) regulates the discharge of pollutants into the waters of the United States by requiring certain activities that lead to stormwater runoff to obtain a permit. 33 USC 1251(a). Specifically, the CWA lists several activities that require a National Pollutant Discharge Eliminations System (NDPES) permit which generally limits what can be discharged, establishes specific monitoring and reporting requirements, and implements requirements specific to the action to protect water quality and people's health. Thus, challenges often occur over whether a specific activity is covered by CWA and therefore, requires a NDPES permit. In *Sierra Club v. Con-Strux, LLC*, the U.S. Court of Appeals for the Second Circuit provided guidance to help determine what activities may require a NDPES permit as well as how the CWA provisions should be interpreted.

Background

The activities at issue in the *Sierra Club* case were conducted by a New York company Con-Strux, LLC, which, according to the court, operated a facility that:

> . . .recycles demolished concrete, asphalt, and other construction products that it then process-

es and resells on the wholesale market for use by the construction industry.

Thus, Con-Strux's operations involved two separate and distinct processes: 1) recycling construction waste and 2) selling the materials it created from the recycling to the construction industry.

The Sierra Club brought an action against Con-Strux claiming its activities required a NDPES permit which it did not have. Thus, the court was charged with assessing the requirements of CWA to determine if Con-Strux's failure to obtain a NDPES permit constituted a violation of the CWA.

The NDPES Permit Process

The CWA requires NDPES permits for facilities that "are considered to be engaged in 'industrial activity.'" 40 CFR 122.26(b)(14)(i)-(xi). To define the phrase "industrial activity," the CWA provides several "Standard Industrial Classifications" (SIC) which generally describe the types of activities that either require or do not require a NDPES permit. In the *Sierra Club* case, the court reviewed two of these categories.

The Second Circuit's Decision

First, the court reviewed SIC 5093, which is entitled "Scrap and Waste Materials" and applies to any facility engaged in "assembling, breaking up, sorting, and wholesale distribution of scrap and waste materials." To fit within this SIC, the activity must involve the use of certain materials listed within the SIC, including what the court identified as a "catch-all" category of "scrap and waste materials—wholesale." Sierra Club alleged that Con-Strux's activities involved scrap waste, and therefore required a NDPES permit pursuant to SIC 5093.

Con-Strux argued that its work instead fit under SIC 5032 which does not require a NDPES permit. SIC 5032 covers facilities:

> . . .primarily engaged in the wholesale distribution of stone, cement, lime, construction sand, and gravel; brick (except refractory); asphalt and concrete mixtures; and concrete, stone , and structural clay products (other than refractories).

After the lower court granted Con-Strux's motion to dismiss, finding that Con-Strux's activites best fit under SIC 5032 and therefore did not require a permit, the Second Circuit took up the issue. Thus, the court was tasked with deciding how to properly classify Con-strux's activities.

First, the court acknowledged that Con-strux's operations were multi-faceted and therefore, the court addressed how to classify facilities that conduct multiple and distinct activities. The lower court, in ruling in favor of Con-strux, approached the analysis by deciding that Con-strux's activities on the whole best fit into the description of SIC 5032 and, therefore, found that Con-strux did not need a permit. The court rejected this analysis, finding nothing in the CWA indicating that the CWA created an "either or" process where the activities of a facility must be placed into one category. Instead, the court found that one facility could fit into multiple SIC if it engaged in distinct activities. Importantly, the court noted that this "either or" analysis would allow businesses to avoid the NDPES permit requirements by dedicating a portion of its facilities to clean activities, while the remainder creates pollution without consequence. Thus, the court establishes that one facility could fit into multiple SIC but be required to obtain a NDPES permit if any of the activities fit into a SIC that requires a permit.

The court went on to separately analyze the portion of Con-strux's operations dedicated to the processing of construction debris for recycling to determine if it required a NDPES permit. The court explicitly dismissed the theory argued by Con-strux that its operations had to be reviewed collectively and fit into one SIC that best fit its facilities as a whole. In this analysis, the court found that Con-strux's recycling of "demolished concrete, asphalt, and other construction products" fit within SIC 5093 and therefore, required Con-strux to obtain a NDPES permit. Even though the specific materials used by Con-Strux were not explicitly mentioned in SIC 5093, the court found that the "catch all" category in SIC 5093 covering "scrap and waste materials" applied to materials not listed in SIC 5093 that were treated as construction waste. The court reasoned that a strict interpretation of SIC 5093, which would require the material at issue to be listed in the language of SIC 5093, would make the catch-all provision in SIC 5093 superfluous.

Conclusion and Implications

Although the Second Circuit Court of Appeals ended its analysis by noting that its conclusion was limited to concluding that the lower court improperly dismissed Sierra Club's complaint and did not address the merits of the issue, there are a couple lessons that can be gleamed from the court's analysis. First, an NDPES permit can be required for a facility even if some of its activities do not fit into a SIC requiring the permit. In other words, facilities cannot shield polluting activities from the NDPES permit requirement by conducting non-polluting activities at the same site. Secondly, the language SIC 5093 can be interpreted broadly to cover recycling of construction waste and is not limited to the specific materials identified in the language of SIC 5093. Taken together, the court's analysis suggests that the NDPES permit requirements should be interpreted broadly to address any type of polluting activity, even if such activity is combined with other, non-polluting activities and the specifics of the polluting activity is not explicitly identified in the CWA. The court's opinion is available online at: http://www.ca2.uscourts.gov/decisions/isysquery/27928a3e-3711-44ac-ad0a-4403cb6117a6/1/doc/18-257_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/27928a3e-3711-44ac-ad0a-4403cb6117a6/1/hilite/
(Stephen McLoughlin, David Boyer)

FOURTH CIRCUIT FINDS ARMY CORPS LACKED STATUTORY AUTHORITY TO NULLIFY STATE-IMPOSED SPECIAL CONDITIONS ON CWA NATIONWIDE PERMIT

Sierra Club v. U.S. Army Corps of Engineers, 909 F.3d 635 (4th Cir. 2018).

A pipeline developer sought to rely on a nationwide permit under the federal Clean Water Act (CWA) for various stream crossings. However, the pipeline's Federal Energy Regulatory Commission (FERC) approval allowed stream-crossing construction techniques at odds with the applicable state conditions on the nationwide permit at issue. The Fourth Circuit held that the U.S. Army Corps of Engineers (Corps) has no statutory authority to impose a "special" condition that, in effect, nullifies a state-imposed condition.

Background

Mountain Valley Pipeline, LLC, seeks to build a 304-mile, 42-inch diameter natural gas pipeline through Virginia and West Virginia along a path that crosses:

> . . .591 federal water bodies, including four major rivers (the Elk, Gauley, Greenbrier, and Meadow), three of which are navigable-in-fact rivers regulated by Section 10 of the Rivers and Harbors Act of 1899 (the Elk, Gauley, and Greenbrier). 33 U.S.C. § 403.

Mountain Valley obtained certification to build and operate the pipeline from FERC, and then sought clearance from the Corps to discharge fill into water of the United States, pursuant to the Clean Water Act. 33 U.S.C. § 1344(a).

Rather than seek an individual permit, Mountain Valley sough coverage under nationwide permit 12 (NWP 12):

> . . .which acts as a standing authorization for developers to undertake an entire category of activities deemed to create only minimal environmental impact. *Chrutchfield v. Cty. of Hanover, Va.*, 325 F.3d 211, 214 (4th Cir. 2003).

Potential permittees "must satisfy *all* terms and conditions of an NWP for a valid authorization to occur." Citing 33 C.F.R. § 330.4(a) (emphasis original):

> NWP 12. . .authorizes the discharge of dredged or fill material into federal waters attributable to 'the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States.'

The applicant for a § 1334 permit, including coverage under NWP 12:

> . . .'shall provide the [Corps] a certification from the State in which the discharge originates or will originate,' unless the state waives, either explicitly or by inaction, its right to independently certify the project. 33 U.S.C. § 1341(a)(1).

When the state's certification imposes additional conditions, the Corps must incorporate those as conditions on the permit. 33 C.F.R. § 330.4(c)(2). "West Virginia imposed, after providing public notice and receiving public comment, several additional 'Special Conditions' as part of its certification of NWP 12," including Special Condition C limiting "construction of stream crossings to a 72-hour window, except for certain rivers not at issue in the instant case."

In early 2017, West Virginia issued certification of the project; environmental groups challenged that certification. The state ultimately requested that the Fourth Circuit vacate the certification and remand it to the state for further evaluation. Once that request was granted, the state:

> . . .purported to waive its requirement that Mountain Valley obtain an Individual 401 Water Quality Certification. Accordingly, Mountain Valley does not have an individual state water quality certification under Section 401 of the Clean Water Act.

The Corps issued a:

> . . .the Verification concluding that the Pipeline project meets the criteria of NWP 12, provided Mountain Valley 'compl[ies] with all terms and conditions of the enclosed material and the enclosed special conditions.'

But the Verification allowed for Mountain Valley to use:

> . . .plans to use a 'dry open cut' method to construct the Pipeline through four major, Corps-managed rivers (the Elk, Gauley, Greenbrier, and Meadow), which requires installing cofferdams directing water away from a riverbed construction area to minimize sedimentation and erosion. This 'dry' open-cut method takes longer than 'wet' open-cut construction, which involves constructing a pipeline while water continues to flow over the riverbed.

The environmental groups sought a stay of the Verification on grounds that contrary to the 72-hour limit set forth in Special Condition C, Mountain Valley expected to take four-to-six weeks to construct river crossings for the Pipeline through the Elk, Gauley, Greenbrier, and Meadow Rivers. The Corps then "suspended" the Verification to consider "the extent of [Mountain Valley's] compliance with Special Condition C's 72-hour limit on construction of stream crossings.

The Corps and the state then corresponded to establish that the state believed the use of the "dry" cut construction method ... is more protective of water quality at each of the crossings' and 'provides more stringent water quality protection that the time requirement of Special Condition C. However, the state "did not notify or solicit feedback from the public in any manner before responding to the Corps' letter." Reinstating the Verification, the Corps relied on its authority to modify a "case specific activity's authorization under an NWP" pursuant to 33 C.F.R. § 330.5(d)(1), imposing a new Special Condition 6 providing for use of the dry-cut construction method at specific crossings and stating that Special Condition 6 "shall apply in lieu of Special Condition C."

Various environmental groups brought suit, challenging the Corps' actions under the Administrative Procedures Act. 5 U.S.C. § 706(2)(A).

The Fourth Circuit's Decision

Standard of Review and Agency Deference

The Fourth Circuit first rejected both *Chevron* and *Skidmore* deference as applied to the Corps' actions. *Chevron* deference did not apply because the Corps' interpretation of the CWA and its regulations did not "derive[] from notice-and-comment rulemaking." *Knox Creek Coal Corp. v. Sec'y of Labor, Mine Safety & Health Admin.*, 811 F.3d 148, 159 (4th Cir. 2016). *Chevron* deference may yet apply if the agency decision at issue nonetheless bears the "procedural hallmarks of legislative decision-making," including "[a]t minimum ... future application to claim rulemaking

power." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 287 (4th Cir. 2018). However, the court pointed out that:

> . . .the imposition of Special Condition 6 is highly specific to the four river crossings across the Greenbrier, Gauley, Elk, and Meadow Rivers, and makes no mention of the Condition even applying to all future crossings across those rivers. . . .Nor does the Reinstatement indicate any 'adversarial or deliberative process where opposing views were presented or considered' with respect to whether the Corps has the statutory authority to substitute its own conditions in place of state-imposed conditions. *Sierra Club*, 899 F.3d at 288.

Rather, the Corps' decisions here resulted from "a one-off, independent, and case-specific determination."

As for *Skidmore* deference—which may be warranted depending on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control," *Skidmore v. Swift & Co.*, 323 U.S. 124, 140 (1944)—none was due as the Corps' decision "is completely devoid of any statutory analysis—Special Condition 6 does not even reference the Clean Water Act":

> There is no effort made to explain or justify how the statutory text affords the Corps the authority to issue one special condition. . .in lieu of" a state-imposed condition, as it did in replacing Special Condition C with Special Condition 6.

The Clean Water Act Claim

Turning to the text of the CWA itself, the Fourth Circuit concluded:

> . . .[t]he plain language of Section 1341(d) of the Clean Water Act provides that any state certification '*shall* become a condition on any Federal license or permit.' (Emphasis original.) The court cited *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1218 (9th Cir. 2008), as collecting cases to establish that:
>
> . . .[e]very Circuit to address this provision has concluded that 'a federal licensing agency lacks authority to reject [state Section 401 certification] conditions in a federal permit.'

As Special Condition 6 is inimical to Special Condition C, the Corps lacked any statutory authority to impose it, and therefore in reinstating the Verification the agency acted without authority of law.

Conclusion and Implications

Agency deference is not always deference. When squaring the circle of competing conditions on permits from various cooperative, supportive agencies, as the Fourth Circuit demonstrated, it is vitally important to guard against agency actions that overreach statutory authority. The court's opinion is available online at: http://www.ca4.uscourts.gov/Opinions/181173R1.P.pdf
(Deborah Quick)

NINTH CIRCUIT FINDS FISH AND WILDLIFE SERVICE COULD NOT WITHHOLD SOME DRAFT JEOPARDY OPINIONS FROM DISCLOSURE UNDER FOIA EXEMPTION

Sierra Club, Inc. v. U.S. Fish and Wildlife Service, 911 F.3d 967 (9th Cir. 2018).

This action deals with materials generated during the U.S. Environmental Protection Agency's (EPA) proposed new regulations under § 316(b) of the federal Clean Water Act (CWA) for cooling water intake structures and its consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS; and together the Services) about potential impacts under the federal Endangered Spe-

cies Act (ESA). The consultation was to ensure that the agency's action would not be likely to jeopardize the continued existence or result in the destruction or adverse modification of habitat of any endangered or threatened species. Plaintiff Sierra Club made a request under the Freedom of Information Act (FOIA) to the Services for records generated during EPA's rulemaking process in connection with the cooling water intake structure regulations. The Services withheld many of the documents under "Exemption 5" of FOIA, which shields documents subject to the "deliberative process privilege" and this appeal from the U.S. District Court's ruling followed.

FOIA Exemption 5: Must be Pre-Decisional and Deliberative

Because FOIA mandates a policy of broad disclosure of government documents, agencies may only withhold documents under the act's exemptions. Under Exemption 5, FOIA's general requirement to make information available to the public does not apply to interagency or intra-agency memorandums or letters that would not be available by law to a party other than another agency in litigation with the agency. The deliberative process privilege, claimed by the Services in this case, permits agencies to withhold documents:

> . . .to prevent injury to the quality of agency decisions by ensuring that the frank discussion of legal or policy matters in writing, within the agency.

Thus, to qualify under this exemption, a document must be both "pre-decisional and deliberative."

A document is pre-decisional if it is:

> . . .prepared in order to assist an agency decision-maker in arriving at his [or her] decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

Similarly, deliberative materials include subjective documents which reflect the personal opinions of the writer rather than the policy of the agency or that inaccurately reflect or prematurely disclose the views of the agency. Under the "functional approach," the Ninth Circuit considered whether the contents of the documents reveal the mental processes of the decision-makers and would expose the Services' decision-making process:

> . . .in such a way as to discourage candid discussion within the agency and thereby undermine [their] ability to perform [their] functions.

The Ninth Circuit's Decision

The court noted that although some of the Biological Opinions in this action were not *publicly* issued, they nonetheless represented the Services' final views and recommendations regarding the EPA's then-proposed regulation:

> Both the Supreme Court and this court have held that the issuance of a biological opinion is a final agency action. *Bennet v. Spear*, 520 U.S. 154, 178 (1997); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 940 (9th Cir. 2006). So our focus is on whether each document at issue is pre-decisional as to a biological opinion, not whether it is pre-decisional as to the EPA's rulemaking.

Where a document is created by a final decision-maker and represents the final view of an entire agency as to a matter which, once concluded, is a final agency action independent of another agency's use of that document, it is not pre-decisional. Here, the record reflected the finality of the conclusions in many of the draft opinions, which had been approved by final decision-makers at each agency and were simply awaiting signature. Therefore, these opinions were not within the scope of FOIA's Exemption 5.

Only some of the draft jeopardy opinions could reveal inter- or intra- agency deliberations and were thus exempt from disclosure. Those documents were successive drafts of the Services' recommendations for the proposed rules, and comparing the drafts would shed light on the internal vetting process.

But many of the documents did not contain line edits, marginal comments, or other written material that exposed any internal agency discussion about the jeopardy findings. Nor did they contain any insertions

or writings reflecting input from lower level employees. Since they did not reveal any internal discussions about how recommendations were vetted, those materials were not deliberative.

Conclusion and Implications

This opinion highlights the fact that FOIA's exemptions must be interpreted narrowly because the act is meant to promote public disclosure. For purposes of withholding documents under Exemption 5, an agency has the burden to prove that the documents are both pre-decisional and deliberative, and therefore are not subject to disclosure. The opinion may be accessed online at the following link:

http://cdn.ca9.uscourts.gov/datastore/opinions/2018/12/21/17-16560.pdf

(Nedda Mahrou)

DISTRICT COURT ADDRESSES CLEAN WATER ACT MOTIONS TO DISMISS IN INTERNATIONAL BOUNDARY WATER POLLUTION DISPUTE

City of Imperial Beach v. International Boundary & Water Commission, ___F.Supp.3d___, Case No. 18CV457 JM (S.D. Cal. Dec. 11, 2018).

The U.S. District Court for the Southern District of California recently denied the government's motion to dismiss a claim for a violation of the federal Clean Water Act (CWA) on sovereign immunity grounds, and granted in part and denied in part defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim under the federal Resource Conservation and Recovery Act (RCRA).

Factual and Procedural Background

This case arises of out the management and operation of facilities in the Tijuana River Valley in San Diego intended to direct and treat water flowing from Mexico into the U.S. The International Boundary and Water Commission (Commission), a bi-national organization comprised of the International Boundary and Water Commission—United States Section (USIBWC) and the Comisión Internacional de Limites y Aguas in Mexico. The Commission entered into a treaty in 1944 related to the use of water in the Tijuana River.

In 1990, the Commission entered into an agreement to address the border sanitation problems in San Diego and Tijuana. As a result, the South Bay Plant (Plant) was constructed in the Tijuana River Valley in San Diego and designed to treat 25 million gallons of sewage flowing from Mexico each day. USIBWC owns the plant and Veolia Water North America—West, LLC (Veolia) operates the Plant's wastewater systems. The Plant is subject to a National Pollutant Discharge Elimination System (NPDES) Permit that authorizes the discharge of pollutants at the South Bay Ocean Outfall only after the water has been treated.

Six canyon collectors are designed to capture polluted wastewater in shallow detention basins and convey the water via pipes to the Plant for treatment and eventual discharge at the South Bay Ocean Outfall. When water cannot drain into the pipes for treatment, it overflows the basins and travels into the downstream drainages.

In 1978, USIBWC constructed a flood control conveyance that directs water, sewage, and waste flowing from Mexico into an area of the Tijuana River Valley in which the Tijuana River had not previously flowed. Unlike canyon collectors, the flood control conveyance is not subject to an NPDES Permit and Veolia is not involved in its operation. USIBWC constructed temporary sediment berms at the border to reduce the volume of flow entering the flood control conveyance via the Tijuana River from Mexico. However, the berm also temporarily detains and causes water to pool in the flood control conveyance.

On September 27, 2017, City of Imperial Beach, San Diego Unified Port District, and the City of Chula Vista sent defendants the U.S. and Veolia a notice of intent (NOI) to sue. On March 2, 2018, plaintiffs

brought suit against defendants for violations of the federal Clean Water Act (CWA) and RCRA. On September 12, 2018, plaintiffs filed a Second Amended Complaint (SAC) alleging three causes of action: 1) against USIBWC, for discharges of pollutants from the flood control conveyance without an NDPES permit, 2) against both defendants, for discharges of pollutants from the canyon collectors in violation of the CWA, and 3) against both defendants, for contribution to an imminent and substantial endangerment in violation of RCRA.

Defendants filed separate motions to dismiss.

The District Court's Decision

The Clean Water Act Claims

USIBWC argued the CWA was barred by sovereign immunity because the application of the CWA to the flood control conveyance would affect or impair the 1944 treaty. Section 501(a)(1) of the CWA provides a partial waiver of sovereign immunity and allows suits against the U for violations of effluent standards or limitations. At issue was whether § 511(a)(3) of the CWA limited this partial waiver on the grounds that the CWA cannot be construed as "affecting or impairing the provisions of any treaty of the U.S." Following the Eighth Circuit Court of Appeals the court here determined the U.S. consented to suit under the CWA, but only to the extent that it does not affect or impair a treaty. The court then denied USIBWC's motion to dismiss on the grounds that impairment of the 1944 treaty is a factual question, and USIBWC failed to present sufficient evidence that compliance with the CWA would affect or impair the treaty.

The court next considered defendants' two arguments that the RCRA claims failed for 1) lack of subject matter jurisdiction, and 2) failure to state a claim upon which relief could be granted.

The RCRA Claims

Defendants argued they did not receive proper notice for suit under RCRA and the court lacked subject matter jurisdiction. Defendants alleged that the NOI Plaintiffs sent defendants focused on "the mere passage of wastewater through USIBWC's facilities." The court disagreed and determined that the NOI contained sufficient information to allow defendants to identify the alleged violations, and that the court had subject matter jurisdiction. However, the court also determined the NOI failed to place defendants on notice of plaintiffs' claim relating to waste dispersed by wind, and the court lacked subject matter jurisdiction over those claims.

Defendants next argued plaintiffs failed to state a RCRA claim because plaintiffs did not allege defendants "contributed" to the:

> . . .handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

The court disagreed, citing to the Ninth Circuit Court of Appeals' definition of "contribution," which requires active involvement or control over waste disposal. Plaintiffs' SAC adequately alleged defendants' active role in connection to the waste, alleging the design of the canyon collector detention basins and flood control conveyance changed the character of the waste to make it more harmful. The SAC also described the wastewater in the flood control conveyance and canyon collectors as "open toxic waste pits" plagued with "mosquitoes and flies" and more likely to contain carcinogenic compounds, heavy metals and pollutants. Thus, the court granted in part and denied in part defendants' motion to dismiss for failure to state a RCRA claim.

In two related cases, the court denied defendant USIBWC's motion to dismiss a CWA claim brought by Surfrider Foundation on sovereign immunity grounds for the same reasons expressed in this case, *see*, *Surfrider Found. v. Int'l Boundary and Water Comm'n*, (2018), and granted the California State Lands Commission's motion to intervene under § 505(b)(1)(b) of the CWA, *see*, *California ex. Rel. Regional Water Quality Control Board*, (2018).

Conclusion and Implications

This case highlights how a partial waiver of sovereign immunity under the Clean Water Act can be limited and still provide the U.S. with immunity protection. This case also provides an example of how insufficient notice to bring suit under the Resource Conservation and Recovery Act can result in dismissal of that claim.

(Joanna Gin, Rebecca Andrews)

RULE DELAYING APPLICABILITY OF REVISED DEFINITION OF 'WATERS OF THE UNITED STATES' VACATED BY THE DISTRICT COURT DUE TO SERIOUS PROCEDURAL ERRORS

Puget Soundkeeper Alliance v. Wheeler, ___F.Supp.3d___, Case No. C15-1342 (W.D. Wash. Nov. 26, 2018).

The much-contested revised definition of "waters of the United States" was adopted in 2015, which essentially defines the scope of the federal Clean Water Act. A 2018 rule delayed its effective date to 2020, and provided that the pre-2015 definition would be applied in the interim. During the 2018 rulemaking process, no comments were accepted or responded to regarding the substance of the pre-2015 definition or 2015 Rule. The U.S. District Court for the Western District of Washington, applying a Fourth Circuit opinion, held that the re-imposition, even on a temporary basis, of a previously superseded rule required compliance with the Administrative Procedure Act's notice and comment period provisions. Refusing to accept or respond to comments on the substance of the pre-2015 definition violated the act.

Background

In 2015 the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) issued a final rule (2015 Rule) defining "waters of the United States" (WOTUS), as used to define the jurisdiction of those agencies under the Clean Water Act (CWA: 33 U.S.C. § 1251 *et seq.*). The 2015 Rule "sought to make 'the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science. . . .'" 80 Fed. Reg. 37,054 (June 29, 2015). The 2015 Rule became effective on August 28, 2015; multiple lawsuits were filed contesting the 2015 Rule. The Sixth Circuit Court of Appeals issued a nationwide stay of the 2015 Rule, and then in early 2016 asserted original jurisdiction over challenges to the 2015 Rule. *In re U.S. Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of Water of U.S.*, 817 F.3d 216, 274 (6th Cir. 2016). Overturning the Sixth Circuit, in:

> January 2018, the U.S. Supreme Court reversed the Sixth Circuit and held that challenges to the WOTUS Rule must be brought in federal District Courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018).

The nationwide stay was vacated. *In re United States Dep't of Def.*, 713 F. App'x 489, 490 (6th Cir. 2018).

Meanwhile back at the agencies, a new rule was proposed to add an "applicability date" to the 2015 Rule, *i.e.*, that:

> . . .would delay the effect of the WOTUS Rule for two years from the date that final action was taken on the proposed rule, in order to maintain the status quo and provide regulatory certainty in case the Sixth Circuit's nationwide stay was vacated. 82 Fed. Reg. 55,542, 55,542 (Nov. 22, 2017).

A 21-day comment period was noticed, and comments were solicited "only the issue of whether adding an applicability date would be desirable and appropriate"; comments were "expressly" not solicited:

> . . .on the merits of the pre-2015 definition of 'waters of the United States,' or on the scope of the definition that the Agencies should adopt if they repealed and revised the WOTUS [2015] Rule. *Id.* at 55,544–45.

The final rule adopting the applicability date (2018 Rule) was promulgated in February 2018 "suspend[ing] the effectiveness of the WOTUS Rule until February 2020." 83 Fed. Reg. 5,200, 5,200, 5,205 (Feb. 6, 2018). Until that time, "the Agencies would apply the pre-2015 definition of 'waters of the United States.'" *Id.* at 5,200. The plaintiff environmental group filed suit challenging, *inter alia*, the agencies' compliance with the Administrative Procedure Act (APA: 5 U.S.C. § 500 *et seq.*) in adopting the 2018 Rule.

The District Court's Decision

Analysis under the *North Carolina Growers* Decision

The District Court relied on the Fourth Circuit's analysis in *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012) (*NC Growers Ass'n*), in concluding that the agencies acted "arbitrarily and capriciously" in limiting the scope of the public comments to the desirability and appropriateness of delaying the effective date of the 2015 Rule.

NC Growers Ass'n addressed whether the Secretary of Labor ran afoul the APA in issuing a notice of proposed rulemaking that would temporarily suspend regulations adopted in 2008 "for further review and consideration"; during the reconsideration period, the prior regulations—dating from 1987—would be reinstated. *Id.* at 760. The proposed rulemaking provided a ten-day comment period, and stated that the Department of Labor:

> . . .'would consider comments concerning the suspension action itself, and not regarding the merits of either set of regulations (the content restriction).' *Id.* at 761.

The Fourth Circuit "rejected the defendants' argument that the reinstatement of the 1987 regulations did not constitute rule making under the APA," noting that:

> When the 2008 regulations took effect on January 17, 2009, they superseded the 1987 regulations for all purposes relevant to this appeal. As a result, the 1987 regulations ceased to have any legal effect, and their reinstatement would have put in place a set of regulations that were new and different "formulations" from the 2008 regulations. 702 F.3d at 765.

Having concluded that the temporary reinstatement of superseded regulations constituted rulemaking, the Fourth Circuit held that:

> . . .because the Department did not provide a meaningful opportunity for comment, and did not solicit or receive relevant comments regarding the substance or merits of either set of regulations. . .the Department's reinstatement of the 1987 regulations was arbitrary and capricious in that the Department's action did not follow procedures required by law. *Id.* at 770.

The District Court concluded that the agencies' rule suspending the 2015 Rule's effectiveness until 2020, and resurrecting the pre-2015 definition of WOTUS during the interim was "substantively indistinguishable" from the facts examined in *NC Growers Ass'n*. Promulgation of the 2015 Rule and "rendered the pre-2015 legally void" as of the 2015 Rule's effective date. Reinstatement, even temporary, of the pre-2015 Rule constitutes rulemaking under the APA:

> Although the Agencies held a 21-day comment period, they expressly excluded substantive comments on either the pre-2015 definition of "waters of the United States" or the scope of the definition that the Agencies should adopt if they repealed and revised the WOTUS Rule. 82 Fed. Reg. 55,542 at 55,545. Instead, the Agencies limited the content of the comments considered to the issue of "whether it is desirable and appropriate to add an applicability date to the [WOTUS Rule]." *Id.* at 55,544. By restricting the content of the comments solicited and considered, the Agencies deprived the public of a meaningful opportunity to comment on relevant and significant issues in violation of the APA's notice and comment requirements. *BASF Wyandotte Corp.* [*v. Costle*], 598 F.2d [637,] 641 [(1st Cir. 1979). Therefore, the Agencies acted arbitrarily and capriciously when they promulgated the Applicability Date Rule.

The District Court remanded with *vacatur*, finding the agencies' "serious procedural error" warranted setting "aside the entirety of the unlawful agency action, as opposed to a more limited remedy particular to the plaintiffs in a given case," citing 5 U.S.C. § 706(2)(A).

Conclusion and Implications

The convoluted ins-and-outs regarding the scope of the Clean Water Act jurisdiction have undoubtedly engendered confusion and uncertainty in the regulated community. However, this attempt to provide a

pause prior to implementation of the 2015 Rule was derailed by an ill-considered attempt to truncate the process for public involvement. Once again, attention to the niceties of the APA goes a long way towards reducing uncertainty and confusion.
(Deborah Quick)

RECENT STATE DECISIONS

SUPREME COURT OF ALABAMA DISMISSES STATE CLAIMS AGAINST VOLKSWAGEN AG ON FEDERAL PREEMPTION GROUNDS

Alabama v. Volkswagen AG, ___S.3d___, Case No. 1170528 (Al. Dec. 14, 2018).

The Alabama Supreme Court recently affirmed the dismissal of claims filed by the State of Alabama (State) against automobile manufacturer Volkswagen AG pursuant to the Alabama Environmental Management Act (AEMA) and the Alabama Air Pollution Control Act (AAPCA). The State alleged that Volkswagen installed and maintained software in its vehicles that was designed to cheat state emissions standards. The High Court held that the federal Clean Air Act (CAA) preempted the State's claims.

Factual and Procedural Background

The Alabama Department of Environmental Management (ADEM) administers and enforces the AAPCA and establishes rules and regulations governing emission-control systems for vehicles. Regulation 335-3-9-.06 of the Alabama Administrative Code, provides, in pertinent part:

> No person shall cause, suffer, allow, or permit the removal, disconnection, and/or disabling of a positive crankcase ventilator, exhaust emission control system, or evaporative loss control system which has been installed on a motor vehicle; nor shall any person defeat the design purpose of any such motor vehicle pollution control device by installing therein or thereto any part or component which is not a comparable replacement part or component of the device.

On September 15, 2016, the State filed a complaint in an Alabama trial court alleging that Volkswagen intentionally installed and maintained in new and certain used motor vehicles sophisticated software, called a "defeat device," designed to cheat emissions standards in certain Audi, Porsche, and Volkswagen diesel engine vehicles by disabling the exhaust emissions control system each time a vehicle was driven on a road or highway. In its complaint, the State alleged that Volkswagen, and third parties acting on behalf of Volkswagen, violated Regulation 335-3-9-.06 by installing defeat devices in its vehicles.

On October 14, 2016, Volkswagen removed this action to the U.S. District Court for the Northern District of Alabama. This action, among others, was ultimately assigned to the U.S. District Court for the Northern District of California, which was handling various actions as part of multidistrict litigation related to Volkswagen's defeat device software. On May 23, 2017, the District Court entered an order granting motions to remand filed by various states, including Alabama.

On August 31, 2017, the District Court released its decision in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 264 F.Supp.3d 1040 (N.D. Cal. 2017). That case involved a complaint filed by the State of Wyoming against Volkswagen in the U.S. District Court in Wyoming, which was subsequently transferred to the MDL court. In its complaint, Wyoming asserted that every time one of the vehicles with defeat device software was driven in that state, Volkswagen violated two provisions of Wyoming's Clean Air Act state-implementation plan. Volkswagen filed a motion to dismiss on the ground that the claims were preempted by the federal CAA. The MDL court ultimately held that Wyoming's claims were preempted by the federal CAA.

On October 26, 2017, Volkswagen filed a motion to dismiss the State of Alabama's complaint on the ground that the State's claims were preempted by the federal CAA, as in Wyoming. On December 19, 2017, the trial court granted Volkswagen's motion to dismiss. The State subsequently appealed that decision to the Alabama Supreme Court. In its appeal,

the State only challenged the dismissal of its allegation that Volkswagen violated Alabama law by installing defeat device software on *used* vehicles; it did not appeal the dismissal of its allegation with respect to *new* vehicles.

The Alabama Supreme Court's Decision

The Court reviewed Volkswagen's motion to dismiss without a presumption of correctness, accepting the allegations of the State's complaint as true and considering whether the State could possibly prevail. The threshold issue was whether the State's allegation that Volkswagen violated Alabama's emissions tampering law, as applied to used vehicles, was preempted by the federal CAA.

The Court began its analysis by reviewing federal preemption law, noting that the United States Constitution provides Congress with the power to preempt state law. Courts generally recognize three categories of preemption: 1) express preemption, which arises when the text of a federal statute explicitly manifests Congress's intent to displace state law; 2) field preemption, which occurs when a congressional legislative scheme is so pervasive that it is reasonable to infer that Congress left no room for states to supplement it; and 3) conflict preemption, which may arise when it is impossible to comply with both the federal and state laws or when the state law stands as an obstacle to the objective of the federal law. The Court concluded that express and field preemption did not apply and focused its analysis on conflict preemption.

Conflict Preemption

The Court restated and followed the conflict preemption analysis from the factually similar Wyoming case. In the conflict preemption analysis, the Court noted that Congress adopted a federal emissions' tampering provision as part of the CAA, which prohibits any person from removing or rendering inoperative emission control devices either before or after the vehicles in which the devices are installed are sold to ultimate purchasers. This gives EPA authority to regulate individual vehicle owners' compliance with federal emission standards. The Court next noted that when tampering involves thousands of vehicles, and the changes are made through software updates instituted on a nationwide basis, EPA is in a better position to regulate conduct than states. Citing to the Wyoming court's conflict preemption analysis, the Alabama Supreme Court concluded that Alabama's emissions tampering claim was preempted by the federal CAA on the basis of conflict.

The Court concluded that the trial court properly granted Volkswagen's motion to dismiss and affirmed the trial court's judgment.

Conclusion and Implications

This case, and the other cases associated with Volkswagen's defeat device, together clarify that state emissions tampering laws, as applied to new and used vehicles, are preempted by the federal Clean Air Act. (Sophie Wenzlau, Rebecca Andrews)

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