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# CLIMATE CHANGE™

## LAW & POLICY REPORTER

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FEATURE ARTICLE

# WILL ANYTHING ALTER THE TRUMP ADMINISTRATION'S ENTRENCHED POSITION ON CLIMATE CHANGE?

*By Kathryn M. Casey and Eddy Beltran*

Even before taking the presidency, Donald Trump freely expressed his climate change skepticism on Twitter®:

> The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive. [November 6, 2012];
>
> They changed the name from "global warming" to "climate change" after the term global warming just wasn't working (it was too cold)! [March 25, 2013];
>
> Ice storm rolls from Texas to Tennessee—I'm in Los Angeles and it's freezing. Global warming is a total, and very expensive, hoax! [December 6, 2013];
>
> NBC News just called it the great freeze—coldest weather in years. Is our country still spending money on the GLOBAL WARMING HOAX? [January 25, 2014].

While these statements are attention grabbers, climate change proponents have been more concerned about President Trump's actions. Since taking office, President Trump has changed the way scientific information is gathered at the federal level, has rolled back and continues to roll back many of President Barack Obama's climate change policies, and has questioned, distorted or otherwise ignored climate change conclusions in federal reports.

Climate change proponents are hopeful that the new make-up of Congress after the mid-term elections will alter the pattern established by President Trump and may once again bring back scientific climate change debate. The Trump administration's response to the release of the Fourth National Climate Assessment, however, shows that the hoped for change may be hard to come by.

## The Trump Administration's Revised Scientific Approach to Climate Change

In October 2017, then acting U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt, eliminated a number of EPA scientist and academic advisory positions and also issued new rules that would prevent anyone who receives EPA grant money from serving on EPA scientific advisory panels. Some have opined that the new rule takes advisory positions away from academics and transfers them to industry representatives.

According to the EPA, in October 2018, EPA's acting Administrator, Andrew Wheeler, disbanded the Clean Air Scientific Advisory Committee Particulate Matter Review Panel, which, according to EPA, was:

> . . .charged with providing advice on the scientific and technical aspects of the policy-relevant science and the National Ambient Air Quality Standards (NAAQS) for particulate matter. The panel had been focused on developing more stringent standards for soot produced by cars and trucks and other sources. Similarly, the EPA also eliminated a plan for another panel of experts to review smog impacts. Some have described these EPA actions as attempts to cut science out of the rulemaking process.

Climate change proponents have also argued that even when federal reports acknowledge climate

change, the Trump administration has used the information to propose actions contradictory to the information contained in the reports. One example is the recent Draft Environmental Impact Statement (DEIS) issued in connection with the Trump administration's proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE Vehicles Rule).

The proposed SAFE Vehicles Rule, announced by the Trump administration on August 1, 2018, is a plan to freeze vehicle emission standards at model year 2020 levels. It has been widely criticized by many, including environmentalists and the State of California. According to the DEIS, global temperatures are expected to rise by seven degrees by the end of the century. This DEIS conclusion, however, has not been used by the Trump administration as proof that climate change is real or to address or mitigate the potential impact from implementation of the SAFE Vehicles Rule. Instead, it is being used to support a conclusion that although the SAFE Vehicles Rule would likely increase greenhouse gas emissions, the amount would be infinitesimal when compared to the seven degree projected temperature rise.

### The Fourth National Climate Assessment

While many in the United States were enjoying turkey leftovers, watching college football or Black Friday shopping, the Trump administration quietly released the Fourth National Climate Assessment. Known as "NC4," the report is required under The Global Change Research Act of 1990, which mandates that the U.S. Global Change Research Program (USGCRP) deliver a report to Congress and the President every four years that:

> 1) integrates, evaluates, and interprets the findings of the [USGCRP]…; 2) analyzes the effects of global change on the natural environment, agriculture, energy production and use, land and water resources, transportation, human health and welfare, human social systems, and biological diversity; and 3) analyzes current trends in global change, both human-induced and natural, and projects major trends for the subsequent 25 to 100 years.

The NC4, at over 1,600 pages, was prepared by a "team of more than 300 experts guided by a 60-member Federal Advisory Committee" and "was extensively reviewed by the public and experts, including federal agencies and a panel of the National Academy of Sciences." The NC4 concludes that global warming is attributable to human causes and that only:

> . . .steep reductions in greenhouse gas emissions can alter the upward trajectory of air and ocean temperatures and their related impacts.

According to the NC4, it "aims to present findings in the context of risks to natural and/or human systems."

In preparing the report, the NC4 authors considered the following questions: 1) What do we value? What is at risk? 2) What outcomes do we wish to avoid with respect to these valued things? 3) What do we expect to happen in the absence of adaptive action and/or mitigation? and 4) How bad could things plausibly get? Are there important thresholds or tipping points in the unique context of a given region, sector, and so on?

### The 12 Summary Findings

The NC4 contains 12 summary findings, which represent "a very high-level synthesis" of the material in the report. The findings are addressed below.

- Communities—Climate change creates new risks and exacerbates existing vulnerabilities in communities across the United States, presenting growing challenges to human health and safety, quality of life, and the rate of economic growth.

- Economy—Without substantial and sustained global mitigation and regional adaptation efforts, climate change is expected to cause growing losses to American infrastructure and property and impede the rate of economic growth over this century.

- Interconnected Impacts—Climate change affects the natural, built, and social systems we rely on individually and through their connections to one another. These interconnected systems are increasingly vulnerable to cascading impacts that are often difficult to predict, threatening essential services within and beyond the Nation's borders.

•Actions to Reduce Risks—Communities, governments, and businesses are working to reduce risks from and costs associated with climate change by taking action to lower greenhouse gas emissions and implement adaptation strategies. While mitigation and adaptation efforts have expanded substantially in the last four years, they do not yet approach the scale considered necessary to avoid substantial damages to the economy, environment, and human health over the coming decades.

•Water—The quality and quantity of water available for use by people and ecosystems across the country are being affected by climate change, increasing risks and costs to agriculture, energy production, industry, recreation, and the environment.

•Health—Impacts from climate change on extreme weather and climate-related events, air quality, and the transmission of disease through insects and pests, food, and water increasingly threaten the health and well-being of the American people, particularly populations that are already vulnerable.

•Indigenous Peoples—Climate change increasingly threatens Indigenous communities' livelihoods, economies, health, and cultural identities by disrupting interconnected social, physical, and ecological systems.

•Ecosystems and Ecosystem Services—Ecosystems and the benefits they provide to society are being altered by climate change, and these impacts are projected to continue. Without substantial and sustained reductions in global greenhouse gas emissions, transformative impacts on some ecosystems will occur; some coral reef and sea ice ecosystems are already experiencing such transformational changes.

•Agriculture and Food—Rising temperatures, extreme heat, drought, wildfire on rangelands, and heavy downpours are expected to increasingly disrupt agricultural productivity in the United States. Expected increases in challenges to livestock health, declines in crop yields and quality, and changes in extreme events in the United States and abroad threaten rural livelihoods, sustainable food security, and price stability.

•Infrastructure—Our Nation's aging and deteriorating infrastructure is further stressed by increases in heavy precipitation events, coastal flooding, heat, wildfires, and other extreme events, as well as changes to average precipitation and temperature. Without adaptation, climate change will continue to degrade infrastructure performance over the rest of the century, with the potential for cascading impacts that threaten our economy, national security, essential services, and health and well-being.

•Oceans and Coasts—Coastal communities and the ecosystems that support them are increasingly threatened by the impacts of climate change. Without significant reductions in global greenhouse gas emissions and regional adaptation measures, many coastal regions will be transformed by the latter part of this century, with impacts affecting other regions and sectors. Even in a future with lower greenhouse gas emissions, many communities are expected to suffer financial impacts as chronic high-tide flooding leads to higher costs and lower property values.

•Tourism and Recreation—Outdoor recreation, tourist economies, and quality of life are reliant on benefits provided by our natural environment that will be degraded by the impacts of climate change in many ways.

The NC4 notes that although climate change cannot be stopped overnight "or even over the next several decades," the amount of climate change can be limited "by reducing human-caused emissions of greenhouse gases." According to NC4, the:

> . . .challenge in slowing or reversing climate change is finding a way to make these changes on a global scale that is technically, economically, socially, and politically viable.

### The Trump Administration Reacts to the Fourth National Climate Assessment

The NC4 was scheduled to be released in early December 2018. When questioned about the draft NC4 by Axios on HBO® reporters in early Novem-

ber 2018, President Trump, while acknowledging that climate change is real, said he had not read it and disputed conclusions that humans are responsible for climate change and that actions are needed to prevent further harm. Instead, President Trump opined that climate change is cyclical and environmental conditions could "go back" on their own.

On Thanksgiving Eve, President Trump continued his criticism by tweeting:

> Brutal and Extended Cold Blast could shatter ALL RECORDS - Whatever happened to Global Warming? [November 21, 2018].

Then, after releasing the NC4 on "Black Friday," the White House moved quickly to discredit it. White House Deputy Press Secretary Lindsay Walters issued a statement noting that the preparation of the NC4 had begun during President Barack Obama's administration and stating that although there were many potential scenarios, the NC4 was "largely based on the most extreme scenario." Ms. Walters also remarked that the next National Climate Assessment, which would be issued during a second term for President Trump, would be prepared under a "more transparent and data-driven process that includes fuller information on the range of potential scenarios and outcomes."

Katherine Hayhoe, the NC4's co-author, provided a quick response on Twitter and defended the NC4:

> I wrote the climate scenarios chapter myself so I can confirm it considers ALL scenarios, from those where we go carbon negative before end of century to those where carbon emissions continue to rise. What WH says is demonstrably false. [November 23, 2018]

On November 26, 2018, reporters asked President Trump if he had read the NC4. President Trump said, "I've seen it. I've read some of it, and it's fine." One reporter followed up and asked him what he thought about the NC4's conclusion that the economic impact of climate change would be devastating. President Trump dismissed the conclusion stating: "I don't believe it." When the reporter said "You don't believe it?," President Trump again stated, "No, no, I don't believe it." President Trump then remarked that the United States is the cleanest it has ever been, but if the United States is "clean, but every other place on earth is dirty, that's not so good."

### The Democrats' Response and the Green New Deal

Democrats in Congress opined that the Trump administration sought to bury the NC4 by releasing it on Black Friday. In a statement, United States Senator Edward Markey, chairman of the Senate Climate Change Task Force, said:

> The Trump administration may want to bury this report so that it doesn't get attention, but we can't bury our heads in the sand to the threat of climate change. We need to take action now to reduce carbon pollution and implement the clean energy solutions that will help save our planet.

On November 23, 2018, newly-elected representative Alexandria Ocasio-Cortez, a Democrat from New York, tweeted, "People are going to die if we don't start addressing climate change ASAP" when retweeting a CNN tweet about the release of the NC4. In her tweet, Representative-elect Ocasio-Cortez also pushed for her proposed Green New Deal, having previously posted a draft resolution on her website calling for the establishment of a United States House of Representatives Select Committee For A Green New Deal.

On November 25, 2018, in a retweet of a tweet by @thehill about her draft resolution, Representative-elect Ocasio-Cortez summarized her proposal as follows:

> 1. Aspirational Goals: Push the limits of what's possible.
> 2. Nuts + Bolts: Our lives are on the line. We shouldn't let the planet be destroyed because it's "too expensive" to save.
> 3. Supporters: Many
> 4. Opponents: Fossil fuel industry
> 5. Beyond Energy: A Federal Jobs Guarantee"

As set forth in the draft resolution, the select committee would have the:

> . . .authority to develop a detailed national, industrial, economic mobilization plan [the

"Plan for a Green New Deal"] for the transition of the United States economy to become carbon neutral and to significantly draw down and capture greenhouse gases from the atmosphere and oceans and to promote economic and environmental justice and equality.

Specifically, the Plan for a Green New Deal would be developed in order to achieve the following within ten years from the start of the plan:

- 100 percent of national power generation from renewable sources;
- building a national, energy-efficient, "smart" grid;
- upgrading every residential and industrial building for state-of-the-art energy efficiency, comfort and safety;
- decarbonizing the manufacturing, agricultural and other industries;
- decarbonizing, repairing and improving transportation and other infrastructure;
- funding massive investment in the drawdown and capture of greenhouse gases;
- making "green" technology, industry, expertise, products and services a major export of the United States, with the aim of becoming the undisputed international leader in helping other countries transition to completely carbon neutral economies and bringing about a global Green New Deal.

## Conclusion and Implications

Since being elected, President Trump has seemingly slowly backed away from his opinion that climate change is a hoax. However, he does not appear to agree that humans are responsible for climate change or that any action is needed to address climate change. In addition, President Trump and his administration continue to attack or attempt to discredit federal reports that detail the expected impacts from climate change.

The result of the recent Congressional mid-term elections may impact that approach, however, because many high-ranking Democrats have recently announced that the House of Representatives will hold hearings on the impacts of climate change and potential solutions when they take the majority in the House in 2019. Those hearings may include discussions of some of the goals outlined in Representative-elect Ocasio-Cortez's Green New Deal proposal, especially if she is able to obtain a seat on the House of Representatives' Energy and Commerce Committee.

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## CLIMATE CHANGE SCIENCE

# RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

### Dynamics of Climate Change, Urbanization, and Heat- Mitigating Technologies

Urban development and climate change each contribute to warming cities, but the dynamics between the two are poorly understood. Current climate projections estimate that temperature increases in urban cities will be 2 to 7°C by the end of the century. New ways of designing and building cities will be important for mitigating the effects of climate and these will depend on increased sophistication of predictive models. This information will be important as cities plan to adapt to forthcoming increasing temperatures.

Researchers at the Urban Climate Research Center and the School of Geographical Sciences and Urban Planning of Arizona State University are studying the dynamic interaction between climate change and urban development in the continental US. Previous studies simply "added" the effects of urbanization and greenhouse gas impacts together, but the researchers at ASU found that there was a more complicated, nonlinear interaction between urban expansion and climate change that resulted in temperature increases in cities. Their sophisticated computer modeling used a "diurnal" scale in three-hour intervals whereas previous studies have typically looked only average daily temperature. Also, previous studies have shown that conventional strategies reduce warming only during daytime temperatures rather than night time temperatures, where cities have the greatest impacts on the thermal environment. Their models predict that by the end of the century, there could be increases of 1 to 6°C in the afternoon and 3 to 8°C at night in urban US cities. The night time warming will be the strongest in the Appalachian, Great Lakes, and the California Central Valley. Afternoon urban warming will be more pronounced in the Eastern US.

The researchers also modeled how various mitigation measures would perform. More conventional methods of cool roofs, green roofs, and street-level trees reduced temperatures by 1.3 – 2.0°C during the daytime, but reduced temperatures by less than 1°C at night. Engineered materials such as low-thermal-admittance materials had a more moderate reduction of temperatures at night time hours. The research points out that even with a full application of adaptation measures, concurrent and substantive greenhouse gas emissions reductions will still be critical in minimizing temperature increases in cities.

*See*, E. Scott Krayenhoff, Mohamed Moustaoui, Ashley M. Broadbent, Vishesh Gupta, Matei Georgescu. Diurnal interaction between urban expansion, climate change and adaptation in US cities. Nature Climate Change, 2018; DOI: 10.1038/s41558-018-0320-9

### Food Origin and Type Both Affect Greenhouse Gas Emissions

Food systems are a large source of global greenhouse gas (GHG) emissions, comprising between 19 and 29 percent of total human-caused emissions. Reductions in food GHG intensity will be part of the solution to reduce worldwide GHG emissions. However, how to accurately account for GHG emissions from producing, transporting, and consuming food products remains a difficult question. Domestic emissions inventories are often production based rather than consumption based and do not account for export emissions or track food that may be exported long distances and mixed or processed in several locations.

Researchers from Helsinki, Finland; Queensland, Australia; Laxenburg and Vienna, Austria; and Frankfurt, Germany have analyzed how trade and country of origin impact GHG footprint for food consumption in the European Union (EU). They find a wide range in dietary emissions depending on country, ranging from 610 kilograms of carbon dioxide equivalents per year (kg $CO_2$e/yr) in Bulgaria to 1,460 kg $CO_2$e/yr in Portugal. The researchers combined country-level food supply statistics with trade flow data. Country-level food consumption of plant and live-stock based commodities was gathered from United Nations datasets for years 2009 through 2011. Animal feed requirements and feed crop requirements along with

other farm-level sources such as rice cultivation, fertilizer use, and land use changes were included in emissions. Country-level food trade statistics were used for 450 different primary and secondary food and feed crop products divided into imports and exports. The largest dietary emissions sources were enteric fermentation and manure management, emitting much more than international transportation of food. Meat, egg, and dairy product consumption, respectively, accounted for the majority of dietary emissions.

Given that global emissions need to decrease toward net carbon neutrality by mid-century, reductions in dietary emissions will be needed. This study shows that a transition toward a plant-based diet would reduce emissions more than a transition to more locally produced food. Further studies are needed to evaluate whether these conclusions and recommendations hold true in other parts of the world.

*See*, Sandstrom, V., et al. 2018. The role of trade in the greenhouse gas footprints of EU diets. *Global Food Security*, DOI: 10.1016/j.gfs.2018.08.007.

### Riparian Forest Restoration as a Promising Carbon Sink

To meet the Paris Agreement climate goal, action is crucial not only to reduce carbon emissions but also to sequester carbon from the atmosphere. One of the strategies for reducing atmospheric carbon is reforestation, the act of planting new forests. Reforestation also has non-climate change benefits, such as providing habitats for organisms. However, the amount of carbon sequestered by a forest is still relatively unknown; it depends on many factors, including tree type, climate conditions, and forest age.

A riparian forest is a forest that exists adjacent to a water source. Often, these are next to streams or ponds. A group of researchers with Point Blue Conservation Science and Santa Clara University performed a metadata analysis on studies of varying forest types to understand the effectiveness of carbon storage in riparian forests. They compiled data from 117 studies from around the world and showed that riparian forests have properties that make them fast-acting and effective sinks for carbon. When analyzing the carbon contained in the soil, they found that riparian forests have the potential to increase soil carbon stocks by 200 percent relative to unforested soil carbon. Riparian forests are also effective at storing carbon in tree biomass; riparian tree biomass on average is among the highest of any biome worldwide. Overall, they showed that riparian forests are very strong carbon sinks due to their proximity to water and their warm, wet climate conditions.

Floodplains suitable for growing riparian forests make up less than one percent of global land surface. However, the authors estimate that if all of the floodplains in the world were converted to riparian forests, they would be able to store up to 6.7 percent of the estimated carbon that is currently stored in vegetation worldwide. Additionally, riparian forests have benefits beyond typical reforestation projects: these forests create transition zones to protect cities from flood water, provide habitats for fish and wildlife, and create recreational activities such as fishing and hunting. While the land area is small, the potential for fast and effective carbon storage from reforesting riparian areas could provide some of the urgent carbon sequestration needed to meet the Paris Agreement climate goals while simultaneously benefitting biodiversity and flood management.

See, Kristen E. Dybala, Virginia Matzek, Thomas Gardali, Nathaniel E. Seavy. Carbon sequestration in riparian forests: A global synthesis and meta-analysis. Global Change Biology, 2018; DOI: 10.1111/gcb.14475

### Global Trends in Methane Emissions and Ozone Formation

Methane ($CH_4$) is a greenhouse gas with a global warming potential 28 times larger than carbon dioxide ($CO_2$) and is a precursor of ozone ($O_3$), which is itself a greenhouse gas and short-lived climate forcer, but also an air pollutant that is harmful to human health, ecosystems, and agricultural crops. A new report from the European Commission's Joint Research Centre (JRC) summarizes studies conducted on methane and its impact on ozone and reviews international developments around methane.

Global $CH_4$ emissions increased by 17 percent between 1990-2012 (compared to a 53 percent increase in $CO_2$), and $CH_4$ concentrations in the atmosphere have been increasing again over the past decade after stabilizing during the 1990s. The potential future scenarios for methane emissions vary drastically, with projections to 2050 showing that unabated emissions could increase between 35-100 percent across a range of "pessimistic" scenarios, resulting in 40,000-90,000 additional premature deaths from ozone pollution

compared to the present, or decrease by up to 50 percent for "optimistic" scenarios, result in 30,000-40,000 fewer premature deaths from ozone pollution. The optimistic scenarios include those that target 2 degrees Celsius goals laid out in the Paris Agreement.

It is estimated that approximately 60 percent of global methane emissions are from anthropogenic sources, primarily agriculture, wastewater and landfills, and fossil fuel production and transportation. The JRC report highlights a substantial global mitigation potential in these sectors. Mitigations can be grouped into two categories: i) reducing energy, waste and wastewater, and animal/crop production for decreased production overall (for example, reduced consumption of meat and milk products, maximizing waste separation and treatment, and substitution of fossil fuels) and ii) technological control measures that result in lower emissions per unit of production (for example, adjustment of animals' diets and vaccines to reduce enteric fermentation emissions, improved wastewater treatment with gas recovery and utilization, and reduced leakage along gas transmission pipelines).

The JRC also notes that the benefit of methane mitigation is globally distributed, thus, global mitigation strategies are most effective for realizing broader health benefits. As Asia, the Middle East, and Africa account for 60-70 percent of the emissions difference between high and low emissions trajectories, the largest mitigation opportunities are found in those regions.

Additionally, substantial work is needed to understand the large-scale $O_3$ concentration trends, the commitments in the Nationally Determined Contributions concerning $CH_4$, and the impact of ozone on crop yields, among other areas for further scientific collaboration. The JRC recommends developing a shared policy perspective to cut across regions as well as enhanced international scientific collaboration on the impact of methane on ozone concentrations.

*See,* Van Dingenen, R., Crippa, M., Maenhout, G., Guizzardi, D., Dentener, F. Global trends of methane emissions and their impacts on ozone concentrations. EUR 29394 EN, Publications Office of the European Union, 2018; DOI:10.2760/820175
(David Kim, Libby Koolik, Malini Nambiar, Shaena Berlin Ulissi)

## 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.*

•On October 29, 2018, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (U.S. DOJ) announced a settlement with Aux Sable Liquid Products LP to resolve alleged federal Clean Air Act (CAA) violations at Aux Sable's natural gas liquids extraction and fractionation plant located near Chicago, Illinois. Under the settlement, Aux Sable will pay a $2.7 million civil penalty and spend at least $4.5 million on improvements to air pollution controls at its Chicago facility and projects to reduce volatile organic compounds (VOCs) and nitrogen oxide emissions (NOx). Aux Sable allegedly violated CAA New Source Review rules on fugitive emissions of VOCs since the facility began operating in 2000, with equipment leaks at the facility significantly exceeding the emissions thresholds in its synthetic minor source permit. EPA also alleged that Aux Sable failed to comply with New Source Performance Standards (NSPS) applicable to natural gas processing facilities, including Leak Detection and Repair requirements to limit fugitive VOC emissions from leaking equipment, as well as the NSPS regulations applicable to synthetic organic chemical manufacturing distillation units and reactor processes. Aux Sable failed to obtain sufficient VOC emission allotments under Illinois Emission Marketing Reduction System, the state's VOC cap-and-trade program, and failed to correctly report VOC emissions under the state emission report program. Aux Sable has addressed its noncompliance with the Illinois volatile organic material emission trading program by purchasing from the Illinois EPA VOC emission allotments and required emission excursion compensation to cover VOC emission-allotment deficiencies from 2001 to 2015, at a cost of more than $156,000. Aux Sable also submitted to Illinois corrections to past annual emission reports. Aux Sable has agreed to take measures to reduce its VOC emissions, including (1) expanding its fugitive emission leak detection and repair program to cover thousands of fittings at its facility, (2) complying with a more stringent leak threshold for making repairs to valves throughout the facility, (3) installing state-of-the-art low-emissions technology to replace or repack older leaking valves, (4) achieving 99 percent control efficiency of VOC emissions at the facility's off-gas incinerators, (5) complying with flare operation monitoring requirements, and (6) installing ultra-low NOx burner technology at the facility's two process heaters. EPA estimates that Aux Sable will spend at least $1.5 million in capital costs and at least $250,000 per year in incremental operational and maintenance costs to complete these improvements. To mitigate the environmental harm caused by the CAA violations, Aux Sable has agreed to spend $3 million to implement mitigation projects to reduce VOC and NOx emissions at locomotive switchyards located in the Chicago area, which will include repowering switcher locomotives and installing switcher locomotive idle-reduction technology.

•On November 1, 2018, EPA announced settlements with two interstate trucking companies, Schneider National, Inc. and Old Dominion Freight Line, Inc., which together will pay a total of $225,000 in penalties to resolve violations of California's Truck and Bus Regulation. The companies failed to install particulate filters on some of their heavy-duty diesel trucks and failed to verify that trucks they hired for use in California complied with the state rule. As part of the settlement, the companies will spend a combined $575,000 on air filtration systems at schools near freeways in the Los Angeles, California metropolitan area. Schneider National, Inc., headquartered in Green Bay, Wisconsin, operated 150 heavy-duty diesel trucks in California from 2013 to 2016 without the required diesel particulate filters. In addition, the

company failed to verify that nearly 1,200 of the carriers it hired in California complied with the Truck and Bus Regulation. Schneider National will pay a $125,000 penalty and spend $350,000 on air filtration projects at schools. Old Dominion Freight Line, Inc., headquartered in Thomasville, North Carolina, operated 117 heavy-duty diesel trucks in California from 2013 to 2016 without the required diesel particulate filters. The company did not verify that 64 of the carriers it hired in California complied with the Truck and Bus Regulation. Old Dominion will pay a $100,000 penalty and spend $225,000 on air filtration projects at schools.

•On October 24, 2018, EPA announced that Stavis Seafoods, Inc. agreed to pay $700,000 in civil penalties to settle alleged violations of the CAA, the Emergency Planning and Community Right-to-Know Act (EPCRA), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Stavis Seafoods is a seafood distribution company formerly operating in Boston, Massachusetts. Many of the violations relate to a March 23, 2016 incident in which more than 2,100 pounds of anhydrous ammonia was released from the refrigeration system at Stavis' facility, located in a densely populated, urban neighborhood in Boston in close proximity to hotels, restaurants, residences, and other businesses. The accidental release killed one employee of the company and shut down streets for several hours under an order to shelter in place. Stavis allegedly failed to comply with the general duty clause of the CAA related to prevention of accidental chemical releases, failed to notify national emergency response authorities about the ammonia release in violation of CERCLA, and failed to submit hazardous chemical inventory forms to state and local emergency response agencies under EPCRA. Following the release, Stavis removed the remaining ammonia from the facility in accordance with a compliance order issued by EPA. The facility is no longer in operation.

•On October 25, 2018, EPA, the U.S. DOJ, and the Mississippi Department of Environmental Quality announced a $2.95 million settlement with Chevron U.S.A. Inc. Chevron allegedly violated CAA Risk Management Plan requirements at five of its refineries located in Mississippi, California, Utah, and Hawaii. As part of the settlement, Chevron will spend approximately $150 million to replace vulnerable pipes, institute operating parameters and alarms for safer operation, improve corrosion inspections and training, centralize safety authority within the corporation, conduct a pilot study of safety controls for fired heaters, and make other safety improvements at all of Chevron's domestic refineries. Chevron will also implement supplemental environmental projects worth at least $10 million in the communities surrounding the refineries in Mississippi, California, Utah, and Hawaii, supplying emergency response equipment to local jurisdictions surrounding the five refineries. EPA's initial investigation was spurred by an August 6, 2012 fire involving high-temperature hydrocarbons released in the crude unit at Chevron's Richmond, California refinery. The fire prompted a shelter-in-place order by Contra Costa County officials, endangered nine employees, and caused 15,000 local residents to seek medical attention. During the investigation, Chevron experienced accidental releases of regulated chemicals at two of its other refineries, including a 2013 explosion and fire in Pascagoula, Mississippi that caused the death of one employee, and a 2013 rupture in El Segundo, California that caused a loss of power and flaring at the refinery. The proposed settlement also resolves claims under CERCLA and EPCRA regarding delayed reporting of an August 2, 2012 hydrogen sulfide release from the Richmond, California refinery.

•On November 1, 2018, EPA, the U.S. DOJ, the State of Oklahoma, the Pennsylvania Department of Environmental Protection, and the State of West Virginia announced a settlement agreement with MPLX LP and eleven of its subsidiaries related to CAA violations at twenty natural gas processing plants in Pennsylvania, Ohio, West Virginia, Kentucky, Texas, and Oklahoma. The settlement addresses alleged violations of federal and state laws governing the control of emissions from equipment leaks, pressure relief devices, storage tanks, truck and railcar loading, combustion devices, and process heaters. As part of the settlement, MPLX will pay a $925,000 penalty, perform supplemental environmental projects, and spend $700,000 install equipment to control VOC emissions from truck loading operations at two natural gas compressor stations. MPLX will spend approximately $2.78 million to install and operate new technologies as well as improve and expand existing

control techniques that minimize VOC emissions at its natural gas processing plants. The settlement also requires MPLX to comply with NOx emission limits applicable to process heaters at MPLX's facilities. MPLX will implement supplemental environmental projects involving the installation and operation of ambient air monitoring stations adjacent to four natural gas processing plants located in Pennsylvania, West Virginia, Kentucky, and Texas, respectively, at a cost of $2.5 million. MPLX will also implement a supplemental environmental project involving the study of the effectiveness of computer predictive modeling of fugitive leaks as a potential emission reduction tool, at a cost of $75,000.

•On October 18, 2018, EPA and the U.S. DOJ announced that they had entered into a settlement with Heritage Thermal Services Inc., resolving allegations that the company violated the CAA at its hazardous waste incinerator located in East Liverpool, Ohio. EPA alleges that Heritage violated the CAA on hundreds of days beginning in November 2010 and continuing thereafter, including violations emanating from an explosion at the incinerator on July 13, 2013, which ruptured incinerator dusting, releasing untreated flue gas, steam, and boiler ash beyond the incinerator's fence line. The violations allegedly include failures to comply with applicable emissions limits, operating parameter limits, and other CAA regulatory requirements. The settlement requires that Heritage undertake extensive measures designed to bring its operations into compliance with the CAA. For instance, Heritage will not accept certain wastes that cause the kind of excess emissions that contributed to the July 2013 incident. Heritage is also required to investigate and implement corrective measures to reduce future emissions and will study whether other changes in its production process would also prevent CAA violations. Heritage will pay a penalty of $288,000 and spend at least $302,500 performing lead abatement work at properties within 25 miles of East Liverpool, Ohio where the owners cannot afford to undertake lead abatement or replacement of lead water service lines.
(Allison Smith)

## REGULATORY DEVELOPMENTS

# CALIFORNIA AND THE AUTO INDUSTRY RESPOND TO THE U.S. EPA'S PROPOSED 'SAFE AFFORDABLE FUEL-EFFICIENT VEHICLE EMISSIONS RULE'

On August 1, 2018, President Donald Trump's administration announced its plan to freeze vehicle emission standards at model year 2020 levels as set forth in the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE Vehicles Rule). (*See*, https://www.epa.gov/regulations-emissions-vehicles-and-engines/safer-affordable-fuel-efficient-safe-vehicles-proposed/)

Governor Jerry Brown called President Trump's proposal "reckless" and vowed that "California will fight this stupidity in every conceivable way possible."

As a result, the California Air Resources Board (CARB) took steps to continue with the Obama administration fuel economy standards for model years 2022-2025, which are more stringent than the standards proposed by the Trump administration. Since that time, however, some progress has been made which could, eventually, lead to a national standard.

### California's Response to the SAFE Vehicles Rule

According to some reports, implementation of the SAFE Vehicles Rule would establish lower emissions standards, which could result in 500,000 barrels per day more oil consumption by the 2030s. The SAFE Vehicles Rule would also prohibit California from mandating electric vehicle sales. CARB has noted that EPA's proposal would increase emissions of carbon dioxide in California by 12 million metric tons per year by 2030.

After the SAFE Vehicles Rule was announced, 20 states, including California, asked the White House to drop the consideration of the SAFE Vehicles Rule and vowed that they would litigate otherwise. On September 28, 2018, CARB took its first action to address the SAFE Vehicles Rule. CARB affirmed what is known as the "deemed to comply" provision of California's greenhouse gas vehicle regulation.

According to CARB, the "deemed to comply" provision, adopted in 2012, establishes that cars meeting federal standards for model years 2017-2025 are "deemed to comply" with California's standards. This, in turn, allows a single national program for automakers to meet one set of fleet-wide standards throughout the nation, including in California and the 12 other states that have adopted California's standards. CARB made it clear, however, that the "deemed-to-comply" provision, is not applicable to a "massive and unfounded federal rollback that weakens public health protections in California" (*i.e.* the proposed SAFE Vehicles Rule).

### The Auto Industry's Response to SAFE Vehicles Rule

Although many contend that the SAFE Vehicles Rule is backed by the auto industry, two manufacturers have broken ranks with the Trump administration and recommended alternatives to the SAFE Vehicles Rule, seeking a middle ground. In October 2018, General Motors announced its plan for a nationwide electric car-sales program, known as the National Zero Emissions Vehicle program.

The General Motors program includes the following recommendations:

- Establish Zero Emission Vehicle (ZEV) requirements (by credits) each year, starting at 7 percent in 2021 and increasing 2 percent each year to 15 percent by 2025, then 25 percent by 2030.

- Use of a crediting system modeled on the current ZEV program: credits per vehicle, based on electric vehicle (EV) range, as well as averaging, banking and trading.

- Requirements after 2025 linked to path toward commercially viable EV battery cell availability at a cost of $70/kWh and adequate EV infrastructure development.

- Establishment of a Zero Emissions Task Force to promote complementary policies.

- Program terminates when 25 percent target is met, or based on a determination that the battery cost or infrastructure targets are not practicable within the timeframe.

- Additional consideration for EVs deployed as autonomous vehicles and in rideshare programs.

In addition to General Motors' proposal, Honda Motor Co. submitted a public comment on the proposed rule recommending keeping the current mileage targets through 2025 and encouraging state and federal officials to work together on a nationwide standard.

### Progress Towards a Middle Ground?

Reports have surfaced that CARB officials would meet with federal officials in November to discuss California's opposition to the Trump administration's proposed fuel economy regulations. According to the report, that would be the first discussion between the two sides since September.

In another sign of good news, on November 13, 2018, the EPA announced the Cleaner Trucks Initiative to cut back toxic nitrogen oxide emissions. According to acting EPA Administrator Andrew Wheeler, the:

> Cleaner Trucks Initiative will help modernize heavy-duty truck engines, improving their efficiency and providing cleaner air for all Americans.

CARB spokesperson Stanley Young told The *Washington Post*:

> CARB petitioned EPA to begin this process, as have many other state and local agencies, so we are pleased that the agency is moving forward to address the next generation of new heavy-duty engines.

### Conclusion and Implications

When announced, many predicted a long battle between California and the EPA over the SAFE Vehicles Rule. While that may still occur, there have been some encouraging signs of progress. That may ultimately lead to an acceptable solution, though the terms of that acceptable solution remain far from clear.

(Kathryn Casey)

## LAWSUITS FILED OR PENDING

# ENVIRONMENTAL GROUPS FILE FEDERAL SUIT CHALLENGING BLM'S ROLLBACKS ON WASTE PREVENTION REGULATIONS RELATED TO OIL AND GAS PRODUCTION ON FEDERAL LANDS

On September 28, 2018, 18 environmental conservation and tribal citizens groups commenced a lawsuit in the U.S. District Court for the Northern District of California against the U.S. Department of the Interior (Department of Interior), Ryan Zinke, in his official capacity as Secretary of the Interior (Secretary Zinke), and the Bureau of Land Management (BLM). The complaint argues that BLM's actions in its final rule, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (Rescission Rule), which repeals nearly all of the provisions of the Waste Prevention, Production Subject to Royalties, and Resources Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (Waste Prevention Rule) is entirely inconsistent with BLM's prior findings regarding high levels of natural gas waste during President Obama's administration. The conservation and tribal groups contend that BLM fails to meet its statutory obligations under the Mineral Leasing Act, Federal Land Policy and Management Act (FLPMA), Administrative Procedure Act (APA), and National Environmental Policy Act (NEPA) to protect against negative domestic and global impacts of natural gas waste. [*Sierra Club v. Zinke*, Case No. 3:18-cv-05984, *filed* Sept. 28, 2018 (N.D. Cal.).]

### Background

### Natural Gas Regulations under the NTL-4A

Oil and gas companies create "waste" by intentionally venting natural gas into the air, burning the gas in flares (commonly referred to as "flaring"), and allowing gas to leak from equipment. Under prior regulations, gas and oil companies must request individual approval prior to venting or flaring natural gas from its wells. Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, 44 Fed. Reg. 76,600 (Dec. 27, 1979) (NTL-4A). However, an increase in individual requests for approval resulted in inconsistent applications from various Bureau field offices, overburdening BLM's limited resources.

New techniques and technologies were developed to create different ways to minimize waste in the oil and gas production industry. As the industry began to change, the provisions of the NTL-4A became outdated and insufficient for BLM to meet its statutory duties to "use all reasonable precautions to prevent waste of oil or gas" pursuant to the Mineral Leasing Act. 30 U.S.C. § 225.

In 2008, the Government Accountability Office (GAO) recommended that BLM update its regulations to reflect new advancements to minimize natural gas waste. The Bureau of Land Management estimated that oil and gas companies vented or flared enough gas to supply over 6.2 million households for one year. This estimation was considered to be "unacceptably high." 81 Fed. Reg. at 83,015.

### The Waste Prevention Rule Changes

In 2014, BLM, under the Obama administration, commenced a rulemaking process to create a new regulation to minimize natural gas waste. This process included public hearings and tribal outreach at various locations throughout the country.

The Waste Prevention Rule mandated nationally uniform regulations related to venting, flaring, and leaks from gas production. This uniformity eliminated inconsistencies amongst field offices and oil and gas companies.

The provisions of the Waste Prevention Rule also included "capture targets" that increased over time which mandated that gas and oil companies capture natural gas that they would have otherwise flared or vented. Additionally, oil and gas operators were required to reduce natural waste from equipment through required periodic inspections and prompt repairs of any leaks.

The Bureau of Land Management recognized in its proposed Waste Prevention Rule:

> A focus on oil development rather than gas capture may be a rational decision for an individual operator, but it does not account for the broader

> impacts of venting and flaring, including the costs to the public of losing gas that would otherwise be available for productive use, the loss of royalties that would otherwise be paid to States, tribes, and the Federal Government on the lost gas, and the air pollution and other impacts of gas wasted through venting or flaring . . . . Thus, a decision to vent or flare that may make sense to the individual operator may constitute an avoidable loss of gas and unreasonable waste when considered from a broader perspective and across an entire field. 81 Fed. Reg. 6616, 6638 (Feb. 8, 2016).

The Bureau of Land Management estimated that the proposed regulations when passed would reduce venting by approximately 35 percent and reduce flaring by 49 percent. 81 Fed. Reg. at 83,013. The goals to capture natural gas, as opposed to flaring or venting, were also found to "significantly benefit local communities, public health, and the environment." 81 Fed. Reg. at 83,009. The Bureau of Land Management concluded that the Waste Prevention Rule's regulations were "economical, cost-effective, and reasonable." *Id.*

## A New Administration and New Rules

On March 28, 2017, President Donald Trump issued Executive Order 13,738, requesting a review of the Waste Prevention Rule by Secretary Zinke and BLM. The purpose of the review was to ensure that the Waste Prevention Rule:

> . . .promote[d] clean and safe development of [the United States'] vast energy resources, while avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Exec. Order No. 13,738, 82 Fed. Reg. 16,093 (March 28, 2017).

During its review, BLM made a few attempts to stay the implementation and compliance deadlines of the Waste Prevention Rule. The States of California and New Mexico, alongside an action commenced by the Conservation and tribal Citizens Groups, were ultimately successful in obtaining a preliminary injunction against BLM's suspension of the Waste Prevention Rule.

Once enjoined from staying the implementation and compliance deadlines of the Waste Prevention Rule, Secretary Zinkie sought to rescind nearly all of the regulations in the Waste Prevention Rule that "pose[d] a compliance burden to operators" through a new regulation. 83 Fed. Reg. 7,924, 7,938 (Feb. 22, 2018) (Proposed Rescission Rule).

## Enactment of the Rescission Rule

The final Rescission Rule, which rolled back almost all key provisions of the Waste Prevention Rule, was published on September 28, 2018. 83 Fed. Reg. at 49,184.

In its Rescission Rule, BLM stated that the Waste Prevention Rule overstepped BLM's statutory authority by overlapping regulations with the authority of the U.S. Environmental Protection Agency (EPA) and various state regulations. The Rescission Rule also created a new definition of "waste of oil or gas" as:

> . . .where compliance costs are not greater than the monetary value of resources they are expected to conserve. 43 C.F.R. § 3179.3.

## The Complaint

In its complaint, the conservation and tribal citizens groups allege that this definition emphasizes and promotes the profit of private oil and gas companies, rather than highlighting the negative effect of natural gas waste on the greater public. They were of the view that the new definition of "waste of oil or gas" obviates BLM's statutory obligations to protect the interests of the United States and public welfare under the Mineral Leasing Act, 30 U.S.C. § 187, and fails to manage public lands "in a manner that will protect the quality of the … scenic … environmental, [and] air and atmospheric … values" and "prevent unnecessary or undue degradation" under the FLPMA. 43 U.S.C. § 1701(a)(8), 1732(b).

## Allegations of Arbitrary Revisions

The complaint further alleges that BLM made arbitrary revisions utilizing arbitrary "interim" cost and benefit assessments when creating the Rescission Rule.

Under the Administrative Procedure Act, federal agencies are required to give "good reasons" for

changing a rule and offer a "reasoned explanation" for its change in position to revise final and effective regulation. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009). The conservation and tribal citizens groups contend that BLM failed to provide support for its change in prior positions, including the need to revise the NTL-4A due to its insufficiencies and ineffectiveness and the need for uniformity when dealing with natural gas waste.

The complaint alleges that BLM undermines the benefits of the Waste Prevention Rule by relying on an "interim" social cost of methane, which ignores significant national and global impacts. Specifically, the complaint argues:

> The Bureau … omits consideration of relevant factors and data, relies on factors which Congress did not intend the agency to consider, and offers rationales that are unsupported or run counter to the evidence in the administrative record, lack a rational basis, represent unexplained and unsupported changes in position, and are otherwise arbitrary and capricious in violation of the APA.

## The Environmental Assessment

Pursuant to its obligations under NEPA, BLM prepared a 26-page Environmental Assessment (EA) that analyzed the environmental impacts of the Rescission Rule. The EA conceded that the Rescission Rule will cause an additional 175,000 tons per year of methane, 79,000 tons per year of volatile organic compounds (VOCs), and up to 2,030 tons per year of hazardous air pollutants over a ten-year evaluation period. Despite these findings, the complaint maintains that BLM failed to analyze how these increased emissions would affect human health and the environment.

NEPA requires that federal agencies take a "hard look" at the environmental impacts of proposed actions before the agency makes an irreversible and irretrievable commitment of resources. 42 U.S.C. § 4332; 40 C.F.R. §§ 1500.1, 1508.9. NEPA also requires that federal agencies consider the short-term and long-term direct, indirect, and cumulative impacts of their actions, including global, national, and local impacts. 40 C.F.R. §§ 1508.8, 1508.27. Executive Order 12,898 (Feb. 16, 1994) mandates that federal agencies incorporate environmental justice in their missions, including the consideration of whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or tribes. Lastly, an environmental report, whether an EA or Environmental Impact Statement (EIS), must discuss alterative actions to be taken by the federal agency. 42 U.S.C. § 4332. The conservation and tribal citizens groups allege that BLM fails to meet every one of these requirements.

## Conclusion and Implications

Although in its early stages, this case will likely modify regulations for natural gas waste. As a result, oil and gas companies will be fiscally impacted by of the cost of compliance, and the court should consider this cost against the environmental and public health concerns of the domestic and global community in its fight to protect the environment. If the Rescission Rule is not vacated, it may be the responsibility of the states to regulate natural gas waste occurring on federal or tribal lands, where it is unclear if states have the authority to regulate. The full text of the Rescission Rule can be found here: https://www.federalregister.gov/d/2018-20689. The complaint is available online at: https://earthjustice.org/sites/default/files/files/BLM-Methane-Rule-Rescission-Complaint.pdf
(Nicolle Falcis, David Boyer)

# NEW YORK STATE SUES EXXON FOR FRAUD BASED ON ALLEGED MISREPRESENTATION OF CLIMATE CHANGE-RELATED RISKS

On October 24, 2018, the Attorney General of the State of New York, Barbara Underwood, filed a complaint against Exxon Mobil Corporation (Exxon), asserting statutory and common law claims of fraud arising from the company's alleged misrepresentations and omissions in its disclosure of certain climate change-related risks. [*People of the State of New York, et al., v. Exxon Mobil Corp.*, Case No. 452044/2108 (N.Y. Supreme Ct).]

## Background

The lawsuit focuses on Exxon's alleged failure to properly account for and disclose information relating to risks associated with future climate change regulations that could impact the company. The lawsuit was filed nearly three years after then New York Attorney General Eric Schneiderman issued a subpoena to Exxon demanding production of documents relating to the integration of climate change-related issues into the company's business decisions and the disclosure of climate change impacts (including risks and opportunities), among other topics.

## The Complaint

The complaint alleges that:

> Exxon provided false and misleading assurances that it is effectively managing the economic risks posed to its business by the increasingly stringent policies and regulations that it expects governments to adopt to address climate change.

Much of the complaint focuses on Exxon's use of a "proxy cost" for this climate change-related risk. As explained in an October 24 press release from the Attorney General's office:

> A proxy cost serves as a stand-in for the likely effects of expected future events; in this case, the effects of the increasingly stringent climate change regulations that Exxon has publicly stated it expects governments throughout the world to impose and steadily increase over the course of several decades. As the complaint alleges, Exxon told its investors that it used that proxy cost in its investment decisions, corporate planning, estimations of company oil and gas reserves, evaluations of whether its long-term assets remain viable, and estimations of future demand for oil and gas.

Yet, contrary to those representations, the complaint alleges that Exxon frequently did not apply the proxy costs as represented in its business activities. Instead, in many cases Exxon applied much lower proxy costs or no proxy cost at all.

The complaint includes four claims: two statutory claims based on New York's General Business Law § 352 *et seq.* (Martin Act Securities Fraud) and Executive Law § 63 ("Persistent Fraud and Illegality") and two common law claims ("Actual Fraud" and "Equitable Fraud"). Each claim is based on Exxon's alleged misrepresentations and omissions concerning: 1) its use of proxy costs in its cost projections, including its investment decision-making, business planning, oil and gas reserves and resource base assessments, and impairment evaluations; 2) its consistent application of proxy costs; 3) its use of proxy costs in its demand and price projections; and 4) the risks to its business posed by a two degree scenario.

In an October 25, 2018 press release, Exxon characterized the lawsuit as meritless, stating that the:

> . . .baseless allegations are a product of closed-door lobbying by special interests, political opportunism and the attorney general's inability to admit that a three-year investigation has uncovered no wrongdoing.

## Conclusion and Implications

As climate change-related risk disclosures continue to evolve, increased scrutiny of corporate accounting and disclosures of this risk may result in expanded litigation of claims similar to those asserted in the lawsuit. For more information regarding the lawsuit, *See*:: https://ag.ny.gov/press-release/ag-underwood-files-lawsuit-against-exxonmobil-defrauding-investors-regarding-financial; and for a copy of the complaint, *see:* https://ag.ny.gov/sites/default/files/summons_and_complaint_0.pdf)
(Nicole Martin)

# PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS FILES CLIMATE CHANGE LAWSUIT ADDRESSING OCEAN TEMPERATURES

On November 14, 2018, the Pacific Coast Federation of Fishermen's Associations, Inc. (PCFFA) sued 30 oil and gas companies for harm to the crab fishing industry caused by rising ocean temperatures associated with global warming.

## Background

According to a November 14, 2018 statement issued by PCFFA, the lawsuit seeks:

> . . .to hold 30 fossil fuel companies accountable for losses caused by four straight years of fishery closures that have harmed crabbers, their businesses, their families, and local communities in California and Oregon.

According to PCFFA, the repeated closures of significant portions of the dungeness crab fishery since 2015 has been the result of climate change—specifically:

> . . .algal blooms and domoic acid flare-ups [that] are linked to a warming of the Pacific Ocean knowingly caused by the fossil fuel industry.

## The Complaint

The complaint, which was filed in San Francisco Superior Court, asserts five causes of action: 1) nuisance; 2) strict liability-failure to warn; 3) strict liability—design defect; 4) negligence; and 5) negligence—failure to warn. The complaint alleges, in part:

As an actual and proximate consequence of defendants' conduct, the crab fishing industry has been deprived of valuable fishing opportunities, and consequently suffered severe financial hardships. These injuries derive from rising ocean temperatures in the eastern Pacific Ocean generally and periodic extreme marine heatwaves—the results of anthropogenic ocean warming caused by the foreseeable and intended use of defendants' products. Recent marine heatwaves along the United States' west coast created the ideal conditions for the toxic algal group *Pseudo-nitzschia* to increase in abundance and invade the marine regions that correspond with some of the most productive dungeness crab fishery grounds. The massive *Pseudo-nitzschia* bloom generated unprecedented concentrations of the neurotoxin domoic acid, a compound which, when ingested by humans, causes "amnesic shellfish poisoning" which induces symptoms including vomiting, diarrhea, cramps, and other gastrointestinal upset, permanent short-term memory loss, and, in severe cases, death.

As detailed in the complaint, the California Department of Fish and Wildlife, in coordination with the California Department of Public Health, closed significant portions of the California Coast to commercial dungeness crab fishing in the 2015-16 fishing season, and again in 2016-17 in response to this public health threat. The Oregon Department of Fish and Wildlife and the Oregon Department of Agriculture also closed large areas of the Oregon coast to commercial crabbing during the 2015-16, 2016-17, and 2017-18 commercial crab season due to domoic acid toxicity.

PCFFA further alleges that the closures resulted in:

> . . .substantial economic losses due to those lost fishing opportunities. . .[and]. . .had damaging ripple effects throughout California's and Oregon's fishing families and communities, creating severe hardships that many fishermen and fishing businesses, including Plaintiff's members, have struggled to overcome.

According to the complaint, the "domoic acid incidents" and related injuries to the industry "are the new normal." "These phenomena will increase in severity and frequency as the oceans continue to change with anthropogenic global warming."

## Conclusion and Implications

It will be interesting to see how the PCFFA lawsuit fares in relation to similar lawsuits filed by cities and counties in California against oil and gas companies, several of which remain embroiled in battles over whether the cases should ultimately be heard in state or federal court. A copy of the PCFFA complaint is available at the following location: https://www.sheredling.com/wp-content/uploads/2018/11/2018-11-14-Crab-Complaint-1.pdf
(Nicole Martin)

## JUDICIAL DEVELOPMENTS

# THIRD CIRCUIT RECOGNIZES CERCLA'S JURISDICTIONAL BAR TO MEDICAL MONITORING CLAIMS RELATED TO POLLUTED WATER WELLS

*Giovanni v. United States Department of the Navy*, 906 F.3d 94 (3rd Cir. 2018).

When a federal government agency creates contamination or hazardous materials, what laws are available to remedy the resulting harm? Generally, the President has the authority to require federal agencies to remove and remediate environmental contamination. Specifically, the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USC §§9601-9675) is a wide-ranging federal law that grants "the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (2009). To ensure that any CERCLA initiated clean-up plan can proceed without interference, CERCLA also explicitly states that federal courts do not have the jurisdiction under federal or state law "to review any challenges to removal or remedial action" initiated by the federal government under CERCLA. (42 USC §9613(h)) In other words, if the federal government initiates a "removal or remediation action" pursuant to CERCLA to address hazardous materials, parties cannot bring actions under state law or federal law that would interfere with the cleanup plan. Thus, federal courts have often addressed the specific meaning and scope of the "challenges to removal or remediation action" language in CERCLA. A recent Third Circuit Court of Appeals case provides more clarity as to what types of actions are barred as improper challenges under CERCLA.

### Background

In *Giovanni v. United States Department of the Navy*, hazardous chemicals released by properties owned by the Navy came under review. In summary, the Navy operated properties in Pennsylvania that polluted the local water supply, and specifically, the private wells of two local property owners (plaintiffs). The Navy acknowledged the contamination and initiated environmental cleanup efforts pursuant to CERCLA. In the meantime, each property owner initiated separate legal action against the Navy based on Pennsylvania state law, known as the Pennsylvania Hazardous Sites Cleanup Act. These actions sought orders requiring the Navy to pay for medical monitoring to assess any harm to the plaintiffs or other effected individuals and to conduct a health assessment or health effects study to generally assess the potential effects of the contamination on human health. Because the Navy had already initiated clean up measures, the cases where removed to federal court pursuant to CERCLA which grants exclusive original jurisdiction of all controversies arising under CERCLA to federal court. 42 USC §9613(b). The plaintiff's individual cases where then consolidated and the Navy argued that the entire matter should be dismissed because the relief sought by the plaintiffs constituted "challenges to removal or remediation actions" which is barred by CERCLA, specifically Section 9613. Thus, the court had to decide whether the two actions sought by the plaintiffs, namely: 1) payment for medical monitoring and 2) conducting a health assessment or effects study, constituted a barred challenge to either the Navy's removal or remedial actions.

After the U.S. District Court ruled in favor of the Navy, finding the relief requested by the plaintiffs was barred by CERCLA because it was a barred challenge to the Navy's removal and remedial actions, the plaintiffs appealed the matter to the United States Court of Appeals for the Third Circuit.

### The Third Circuit's Decision

In its decision on the matter, the Court of Appeals provided a detailed analysis of what constitutes "challenges to removal or remediation actions" under CERCLA.

First, the court stated that prior case law establishes the word "challenges" to include any action that will delay, interfere with, or "call into question"

a CERCLA-initiated removal or remediation action. Thus, any action that dictates a specific remedial action or alters the method of cleanup will constitute a challenge. However, the Court of Appeals also noted that practically any lawsuit could increase costs of cleanup or divert recourse from it and therefore, when assessing whether the cost of an action constitutes a challenge, the courts look to the nexus between the nature of the suit and the CERCLA cleanup.

While prior case law provides a well-established definition of the term "challenge", the Court of Appeals noted that CERCLA includes rather lengthy definitions for the terms "removal" and "remediation action." Thus, the court initiated a three-part analysis to determine whether either of the legal actions constituted challenges to either a removal or remediation plan.

### Relief Sought and Removal and Remediation Classifications

The Court of Appeals began its analysis by considering whether the relief sought could be classified as a step in the removal or remedial process, in which case it would clearly interfere with the removal or remediation action initiated by the Navy. With respect to the request for medical monitoring, the court found that "monitoring" can generally be considered a removal action. However, CERCLA's language suggests that monitoring is only a removal action it if involves oversight activities directly related to addressing the hazardous waste, not monitoring the potential harm caused by the waste. The medical monitoring sought by the plaintiffs focused solely on the health of individuals who may be affected by the hazardous material, not the hazardous material itself. Similarly, medical monitoring is not a remedial action since it is not related to preventing or minimizing the release of hazardous materials.

The court came to a different conclusion regarding the plaintiff's request for a health assessment study. The court found that such a study is typically done by the federal government to help determine what actions should be taken to reduce human exposure to hazardous substances. Thus, the plaintiffs' requested report could have a direct effect on what removal or remediation actions are taken by the Navy. This type of assessment is left to the jurisdiction of the federal government through CERCLA and therefore, any attempt by a private party to initiate a general health assessment study would interfere with the removal and remediation efforts, which is banned per § 9613 of CERCLA.

The second part of the Court of Appeals' analysis focused on the form of relief sought by the plaintiffs. The court noted that generally, any request for injunctive relief that relates in any way to a current or pending response by the federal agency could constitute a challenge. For example, if the relief sought would require the federal agency to engage in any activity that could be part of a cleanup effort, it is likely an impermissible challenge under CERCLA. However, requiring the federal agency to pay money is not generally enough to establish a challenge. Here, even though the medical monitoring would require the Navy to take specific action, the court found that the monitoring was not related to cleanup and therefore, did not constitute a challenge. However, the health study was an action that could be contemplated in the Navy's cleanup plan since, again, general health assessment studies are usually part of the process to identify the specific removal or remediation actions to take. Therefore, the plaintiffs' requested study could force the Navy to change the details of the assessment it would otherwise have conducted. Thus, the court concluded that the health study was a challenge under this factor as well.

### Potentially Conflicting, Impacting or Interfering with Cleanup Efforts

Finally, the Court of Appeals looked at whether the medical monitoring would conflict, impact, or otherwise interfere with ongoing cleanup efforts. The Navy argued that the medical monitoring could interfere with its cleanup efforts because it required funding and may ultimately tie up or delay the Navy's cleanup efforts since it would have to deal with litigation and identifying funds to pay for the costs. The court rejected this argument, finding that the medical monitoring would only require the Navy to set up a trust to cover the costs of another party to conduct the monitoring. Conversely, the court again found that this factor indicated that the plaintiffs' health assessment request constituted an impermissible challenge because it would interfere with the Navy's efforts to assess how best to address the hazardous material. Again, the court noted that CERCLA generally contemplated health studies as part of remediation plans and therefore, the plaintiff's efforts to compel

the Navy to conduct a specific health assessment would interfere with the Navy's cleanup work.

Based on this analysis, the Court of Appeals found that that the plaintiffs could seek medical monitoring relief but were barred pursuant to CERCLA from seeking their requested health assessment relief.

### Conclusion and Implications

While the Court of Appeals generally followed prior case law addressing CERCLA and the language prohibiting prior challenges to federal agency "removal or remediation actions", the *Giovanni* decision case does break some new ground by providing a roadmap for analyzing what specific acts could constitute a challenge. Beyond this roadmap, the decision focused on, and indicated that the court's findings were consistent with, the overall goal of CERCLA which is to ensure federal agencies adequately address their contamination while allowing private parties to seek certain remedies without unduly interfering with remediation plans.
(Stephen M. McLoughlin, David Boyer)

## D.C. CIRCUIT DENIES PETITIONS FOR REVIEW OF THE EPA'S 'UNCLASSIFIABLE' DESIGNATIONS UNDER NATIONAL AMBIENT AIR QUALITY STANDARDS

*Masias v. U.S. Environmental Protection Agency*, 906 F.3d 1069, 1080 (D.C. Cir. 2018).

On October 19, 2018, the District of Columbia Circuit Court of Appeals denied an appeal for review of the U.S. Environmental Protection Agency's (EPA)designation of three areas as "unclassifiable" for Sulphur dioxide. The appeal concerned three separate petitions challenging three separate designations. All three cases were consolidated into this single case.

### Background

Under the federal Clean Air Act (CAA), EPA sets the standard for the maximum permissible concentration of pollutants in the ambient air, known as the National Ambient Air Quality Standards (NAAQS). When the EPA sets a new NAAQS, each state must submit a list of locations that are in "attainment," "non attainment" or "unclassifiable." Attainment areas are places that meet the NAAQS. Nonattainment areas are those that fall below the NAAQS. Unclassifiable areas are those that lack sufficient information for the EPA to make a determination.

In 2010, the EPA created a new standard for sulfur dioxide levels in the atmosphere. In 2016, the EPA designated 61 areas as either meeting or failing to meet the NAAQS. The petitioners challenged three of the EPA's "unclassifiable" designations.

### The D.C. Circuit's Decision

#### Kansas City Board of Public Utilities Claim

In the first challenge, the Kansas City Board of Public Utilities (Board) challenged the EPA's designation of Wyandotte County as "unclassifiable." The Board argued that the area at issue should be designated as "attainment." The Board's case presented an unusual argument for a power plant operator. Such plaintiffs typically claim that an area was erroneously designated as "nonattainment" and caused the plaintiff to incur significant regulatory compliance costs. The court determined that the Board lacked standing to bring a claim because the Board was not required to undergo any heavy regulatory burden as a result of the "unclassifiable" designation. An "unclassifiable" designation does not impose any greater regulatory burdens than an attainment designation. Further, an "unclassifiable" designation does not make it more likely that the EPA would designate the area as a nonattainment area. As a result, the court held that the Board failed to show it suffered a cognizable injury and the petition was dismissed.

#### The Sierra Club Claim

In the second claim, the Sierra Club challenged an unclassifiable designation in Gallia County, Ohio.

The challenges was based, in large part, on conflicting air dispersion modelings the EPA received in 2015 from both the Ohio EPA and the Sierra Club. One report designated Gallia County in nonattainment and the other showed it in attainment. The EPA rejected both models and designated the area as "unclassifiable." In 2016, the Ohio Environmental Protection Agency submitted a new model, after the time for public comment had closed. The EPA again rejected the modeling due to an error in one of the sulphur dioxide inputs. The Sierra Club believed that the Ohio modeling error was due to a simple mathematical flaw and resolving that flaw would show the area was in nonattainment. The court, however, held that because Sierra Club did not raise the objection at issue during public comment on the action under review the case was not properly before the court.

The court also noted that because the time for public comment had closed before the new modeling was available, the Sierra Club was unable to raise its objections during the public comment period. The process for raising an objection that cannot be raised during public comment period is to petition EPA for administrative reconsideration before raising the issue in court. Sierra Club petitioned EPA for a rehearing, and EPA agreed to evaluate ambient air quality monitoring data when available. EPA did not, however, reconsider its designation in light of Sierra Club's objection. The court noted that Sierra Club did not appeal the EPA's decision on the rehearing petition, so it was not properly before the court.

### The Masias Claim

The final claim came from Samuel Masias, regarding the "unclassifiable" designation of Colorado Springs. The EPA received and rejected a modeling that showed the Colorado Springs area was in nonattainment. The EPA said the meteorological data in the modeling was based on data from the Colorado Springs Airport and did not adequately represent the surrounding area, which included a power plant. Masias claimed that the EPA failed to provide a substantive definition for the term "representative" and claimed that the EPA used different standards when determining the representativeness of an area.

The court disagreed, and found that the EPA does have an adequate multi-factor test for determining the representativeness of measured data. The court held that the EPA properly relied on the multi-factor test when rejecting the data. Furthermore, the allegation that the EPA used different standards when determining the representativeness of meteorological data was dismissed, since the EPA adequately responded to such claims during the required comment period. As a result, the court denied Masias's petition for review.

### Conclusion and Implications

The court's denial of these petitions reiterates the importance of participating in the EPA's public comment process. Participation provides the only means of preserving arguments for later judicial review. Failure to raise arguments during the public comment period is fatal to a subsequent legal challenge. This case also highlights the ongoing importance of standing as one of the few defenses available to defendants in environmental cases. The court's decision is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/1D6FEC0B04AB474B8525832B004D75B5/$file/16-1314-1756054.pdf
(Rebecca Andrews, Daniella V. Hernandez)

# DISTRICT COURT STAYS KIDS CLIMATE CHANGE TRIAL PENDING NINTH CIRCUIT REVIEW

*Juliana v. United States of America*, Case No. 6:15-cv-01517 (D. Or.).

On the Wednesday before Thanksgiving, U.S. District Court for Oregon Judge Ann Aiken, stayed the high-profile climate change lawsuit brought by a group of children against the federal government, pending the Ninth Circuit Court of Appeals' review of the federal government's motion to dismiss the case. Judge Aiken's decision to stay the case pending Ninth Circuit review represents a reluctant "reconsideration" of her previous denial of the same such request, and comes after a recent U.S. Supreme Court order denying the defendants' petition for a writ of mandamus. The Supreme Court based its decision to deny the federal government's request on a finding that "adequate relief" could still be obtained from the Ninth Circuit Court of Appeals. The Supreme Court's narrow order is available online at: https://static1.squarespace.com/static/571d109b04426270152febe0/t/5bdcdb7e352f53417a05cab8/1541200766565/18A410+In+Re+United+States+Order.pdf

## Background

The lawsuit, *Juliana v. United States of America*, was originally filed during the Obama administration in August 2015, but has endured protracted discovery and procedural disputes leading up to this stay. The plaintiffs are comprised of a group of 21 children ranging from 8 to 19 years of age (now 11-22 years of age). The group is represented by attorney Julia Olson from Our Children's Trust and Philip Gregory of Gregory Law Group.

The lawsuit alleges that the policies of the federal government have contributed to climate change, and that these actions have deprived plaintiffs of their constitutional rights to life, liberty and property. The lawsuit further alleges that the federal government has failed to responsibly administer and protect vital public natural resources, in violation of the public trust doctrine. The complaint contends that, despite knowing of the profound risks created by increasing carbon dioxide levels, the administration continued to permit excessive fossil fuel production and consumption, and failed to act responsibly as the public trustee of national public natural resources, including the air, seas, shores of the sea, water and wildlife.

The fossil fuel industry initially intervened in the litigation and sought to assist the federal government in having the case dismissed. However, these efforts failed when the motion to dismiss was denied, and the fossil fuel industry was subsequently granted leave from the case. The federal defendants subsequently sought a writ of mandamus from the Ninth Circuit Court of Appeals, and, after hearing oral argument, the Ninth Circuit rejected their petition on March 7, 2018. A trial date of October 29, 2018 was set, however on October 18, 2018 federal defendants sought a second petition for mandamus from the Supreme Court and obtained a temporary, administrative stay while the Court considered the request.

## More Recent Events

On November 2, 2018, Chief Justice John Roberts issued an order denying the federal defendants' petition, based on a finding that "adequate relief may be available in the United States Court of Appeals for the Ninth Circuit." Justice Roberts continued, noting that:

> Although the Ninth Circuit has twice denied the Government's request for mandamus relief, it did so without prejudice. And the court's basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs' claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions. Those reasons are, to a large extent, no longer pertinent.

The case now awaits decision from the Ninth Circuit as to whether it will intervene, and to what extent, at this early junction of the underlying case.

## Conclusion and Implications

Many view this lawsuit as both ambitious and intriguing. It is pushing the scope of legal doctrine in

a novel way, but has grounding support and has already survived multiple legal challenges. If the Ninth Circuit decides against the defendant federal government, the Supreme Court left open a clear opportunity for defendants to return for final consideration. At the same time, Judge Aiken's November 21 order made clear that, if returned to the Oregon District Court, the case would proceed to trial for further review on the merits. The District Court's order staying the trial on the merits pending decision by the Ninth Circuit appears here: https://static1.squarespace.com/static/571d109b04426270152febe0/t/5bf5d42f8985833c371a2ac2/1542837296123/Doc+444+ORDER.pdf (Lilly McKenna)

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