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CLIMATE CHANGE™

LAW & POLICY REPORTER

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CLIMATE CHANGE NEWS

THE CALIFORNIA OFFSHORE WIND INDUSTRY REPORT

The American Jobs Project is a "nonprofit, nonpartisan, think-and-do tank that works with partners across the nation to identify local pathways to creating good-paying jobs in advanced energy." On February 20, 2019, the American Jobs Project published a report entitled "The

California Offshore Wind Project: A Vision for Industry Growth" (Report). The Report:

> . . .analyzes the potential economic benefits of a California offshore wind industry and provides state and local leaders with high-level strategies to facilitate innovation, help businesses grow, and develop the workforce.

The What and Why of Offshore Wind Farms

According to the Report, offshore wind turbines are similar to the land-based turbines familiar to many Californians. The turbines deployed at sea, however, are several times larger with current turbine models taller than the Washington Monument with blades as long as a football field. The Report notes that although offshore wind farms are new to California, the technology has been around for almost 30 years. The first United States offshore wind farm was installed on the East Coast near Rhode Island in 2016 with a number of additional facilities currently in the permitting phase in other areas on the East Coast.

In the beginning, offshore wind turbines were limited to shallow waters due to their anchoring requirements (this kept them out of California's deep waters). Technological advances in the past few years, however, through the use of floating foundations normally used in the oil and gas industry, have sparked interest in the potential for California offshore wind farms. This interest is solidified by the potential energy to be derived from offshore wind farms. According to the Report "112 GW of technical offshore wind resource potential" exists along California's coastline, which is "enough to supply about 1.5 times the state's annual electric energy use." The Report opines that offshore wind "can provide value to the grid by balancing solar generation" as the state moves towards its goal of a zero-carbon electricity mix in 2045.

The Report's Five Policy Recommendations

The Report sets out five policy recommendations for the offshore wind industry in California. The recommendations are summarized below:

Policy 1—Appoint a California Offshore Wind Czar

The Report concludes that growing California's offshore wind industry will require comprehensive planning efforts across the state, federal, and international levels. The Report recommends a governor-appointed California Offshore Wind Czar who can lead the industry's growth and serve as the primary point of contact for California's efforts.

Policy 2—Set a Market Acceleration Target and Establish a Comprehensive Approach to Studies

The Report opines that California "has limited resources dedicated to sustainably building offshore wind projects and ensuring industry growth aligns with state values and leads to lower energy costs for ratepayers." The Report recommends a market acceleration target so that California leaders can prioritize areas of research.

Policy 3—Establish a Phased Approach to Offshore Wind Workforce Development

The Report contains short-term and long-term recommendations for California's offshore wind workforce. The short-term activities would be targeted to workforce planning, convening stakeholder groups on best practice strategies, and recruitment of professionals interested in working in the offshore wind industry. Long-term activities "could help build a diverse and inclusive workforce, formalize partnerships between industry and training providers, and ensure" investments in areas such as safety training,

operations and maintenance and technology research and development.

Policy 4—Align Innovation and Access to Capital Policies with Industry Needs

The Report notes that innovation is the key to the success of California's offshore wind industry. The Report recommends that California leaders facilitate innovation through a number of efforts, including, offshore wind research, knowledge exchange, business development and helping companies overcome barriers to market entry.

Policy 5—Upgrade Ports and Establish Port Innovation Districts

The Report notes that, globally, ports are the nucleus of offshore wind development. The Report recommends continued port planning and upgrades in California to support evolving offshore wind industry operations.

The Report also includes the following as reasons to develop offshore wind in California:

- Opportunity to demonstrate international leadership on climate change
- Opportunity to improve grid stability
- Opportunity to capitalize on growing demand and falling costs for offshore wind
- Opportunity to harness natural resource potential
- Opportunity to transition workers in legacy industries
- Opportunity to support good-paying jobs

Sierra Club Support

Although not detailed in the Report, the Sierra Club and other environmental groups generally support the idea of offshore wind farms. The Sierra Club maintains an offshore wind FAQ page on its website (https://content.sierraclub.org/coal/wind/offshore-wind-faq). The FAQ page includes answers to a number of questions on the safety, benefits, reliability, and environmental impacts of offshore wind farms. As discussed in the FAQ page, the Sierra Club sees offshore wind as a source of energy to replace "dirty coal":

> Offshore wind is a clean, safe, reliable way to power our homes, schools, and businesses. If we develop offshore wind, we can create millions of jobs nationwide while helping our nation retire the dirty coal-fired power plants that make us sick. Harnessing the power of wind off our coasts will allow the U.S. to power our country with clean, domestic energy and move beyond coal.

Conclusion and Implications

Although offshore wind farms have been used in other parts of the world for years, California's offshore wind industry is still in its early stages. The Report prepared by the American Jobs Project provides a comprehensive look at the opportunities and challenges for the offshore wind industry along California's coast in the coming years.
(Kathryn Casey)

CALIFORNIA WATERFIX UPDATE: GOVERNOR NEWSOM CALLS FOR SINGLE-TUNNEL PROJECT WHILE LEGISLATIVE PROPOSAL SEEKS TO INCREASE OVERSIGHT

The California WaterFix project, also known as the "Twin Tunnels," is the statewide plan to address water supply and delivery needs by constructing two 30-mile long tunnels, each 40 feet in diameter, to transport up to 9,000 cubic feet per second of Sacramento River water to state and federal export facilities in the southern Sacramento-San Joaquin Delta. Originally proposed as the Bay Delta Conservation Plan in 2006, WaterFix has undergone a number of reconfigurations over the years. Now, in another major shift, Governor Gavin Newsom has announced that he intends to scale the project back to a single tunnel as part of a broader portfolio approach to water security. The Governor's announcement prompted requests to stay pending litigation and other proceedings, giving WaterFix proponents time to map out a path forward. Meanwhile, Delta legislators have introduced Senate Bill (SB) 204, which would impose additional review requirements on any contracts used to finance, design, and construct the project.

Governor Newsom's State of the State Address

Governor Newsom's first State of the State address on February 12, 2019 discussed water issues in California, including drinking water safety and infrastructure. Notably, the Governor broke from former Governor Jerry Brown's longstanding conveyance vision of two tunnels in the Delta, in favor of a single-tunnel WaterFix. Governor Newsom also announced his appointment of Laurel Firestone, co-founder of the Community Water Center, to the State Water Resources Control Board (SWRCB) and appointment of Joaquin Esquivel as the new SWRCB Chair. The Governor underscored that these changes will help balance the state's diverse water needs by promoting a portfolio approach to water infrastructure and long-term planning.

Ongoing Court and Administrative Proceedings Temporarily Stayed

Governor Newsom's February 12th announcement left participants in the various ongoing WaterFix proceedings guessing as to how the Department of Water Resources (DWR) intends to reconcile the two-tunnel version of the project that was approved in 2017 with the Governor's vision of a one-tunnel project. On February 28, 2019, parties in the coordinated WaterFix cases pending in Sacramento Superior Court sought a 60-day stay to allow DWR to determine the extent to which the Governor Newsom's direction affects the project's environmental review documents and approval. The following day, DWR itself requested a 60-day stay in the long-running SWRCB hearing on DWR and the U.S. Bureau of Reclamation's joint water right change petition, and a 90-day stay in federal court litigation challenging the validity of the federal Biological Opinions for the project. As of the writing of this article, stays have been granted in the SWRCB hearing and CEQA litigation, while the federal district court directed that DWR must confirm it will cease all preparatory activity related to WaterFix (other than review of the project in light of Governor Newsom's announcement) before it considers granting the 90-day stay.

Proposed Oversight under Senate Bill 204

On the legislative front, State Senator Bill Dodd introduced SB 204 on February 1, 2019, which would add an additional layer of legislative oversight and public scrutiny to the WaterFix implementation process. SB 204 would require DWR and the Delta Conveyance, Design and Construction Authority, the entity tasked with financing WaterFix through participant contracts, to provide information on pending WaterFix-related State Water Project contracts and contract amendments to the legislature for review prior to finalization. Under the bill, all proposed contracts and amendments for the planning, design, or construction of WaterFix must be submitted to the Joint Legislative Budget Committee (JLBC) 60-days in advance of their execution. If the JLBC chooses to hold a public hearing to review a contract, DWR would be prohibited from approving the contract for 90 days after the first hearing.

SB 204 supporters argue that the proposed oversight is necessary to protect the Delta economy, culture, and environment, and to prevent increased

contractor reliance on Delta water. Opponents of the bill contend that the additional restrictions will significantly and unnecessarily delay any action on WaterFix and undermine efficiency and cost-effectiveness in the contracting process. The bill cleared its first committee hurdle on March 12, 2019, passing the Natural Resources and Water committee with a unanimous 6-0 vote.

Conclusion and Implications

As can be expected for a project of this scale, WaterFix has undergone numerous revisions and refinements in the past 13 years. Advocates may see these changes as hurdles potentially slowing the project down, but not ending it. To that end, the Governor emphasized that he wants to build on the important work that has already been done. However, his departure from his predecessor's vision at this stage of planning may be a more significant setback that requires additional administrative, environmental and court or even legislative review. With the temporary stays of the SWRCB hearing and the state court proceedings, it can be expected that DWR will announce its plans to implement Governor Newsom's direction in the coming months.
(Austin C. Cho, Meredith Nikkel)

RIVERS AND DAMS—LOS ANGELES COUNTY SUPERVISORS URGE FEDERAL GOVERNMENT TO CONSIDER HANDING OVER OWNERSHIP AND OPENING FEDERAL FUNDING FLOODGATE

The Los Angeles County Board of Supervisors (Board) recently approved sending letters to Congressional leaders and the U.S. Army Corps of Engineers (Corps) regarding a path toward transferring the Corps' ownership and responsibility over to the county for stretches of the Los Angeles River (River) and urging federal funding to flow for immediate repairs to be made to Whittier Narrows Dam and Reservoir which were recently deemed at risk of failure.

The Los Angeles River

In the early-to-mid-20th century, most of the 51-mile river bottom was lined with concrete to manage and mitigate flood risk through vast and densely populated Los Angeles. Since then, the county and nearly every jurisdiction straddling the River—not to mention many environmental, non-profit and other organizations—has developed plans for the River's long-term management and revitalization. The Corps and the Los Angeles County Flood Control District (District) work collaboratively to operate the Los Angeles County Drainage Area (LACDA) system, a broad network of water management infrastructure components in Los Angeles County including the River, which provides flood risk management for approximately 10 million residents and 2.1 million parcels with a value of more than $1 trillion. The District is responsible for 14 major dams and roughly 500 miles of open channels. The Corps owns and is responsible for managing most of the River for flood control purposes, including four dams and 40 miles of open channels.

The Whittier Narrows Dam

The Whittier Narrows Dam and Reservoir (Dam) is located on the San Gabriel River and Rio Hondo—tributaries to the Los Angeles River—in a densely populated area approximately 11 miles east of downtown Los Angeles, a focal point for the combined 556-square-mile drainage area of the San Gabriel River and Rio Hondo watersheds. The 56-foot-tall earthen Dam was built in 1957 primarily for flood control protection of approximately 1.25 million downstream residents and for groundwater basin recharge. The Dam is owned by the federal government and operated and maintained by the Corps. The Corps recently determined that the Dam is at very high risk of failure in a catastrophic flooding event and that it requires immediate major upgrades, retrofitting, and rehabilitation work.

Board Seeks Control Over River, Urging Federal Funding for Dam Repairs

The Board recently authorized its Chief Executive Officer to send a letter, signed by all members of the Board, to the Los Angeles County Congressional

Delegation requesting their support for a disposition study to examine transferring ownership and operations of Corps-owned River channels to the District. Last year, the District sent a similar letter requesting that the Corps initiate a disposition feasibility study to examine transferring ownership and operations of its channels in Los Angeles County to the District.

In these letters, the Board asserts that while the District has maintained its facilities over the years, many portions of the Corps infrastructure are "not being maintained at acceptable levels" due largely to what the Board describes as insufficient federal funding. The Board finds that the Corps needs approximately $193 million annually to address deferred maintenance, but only receives about 10 to 15 percent of that in any given year—a trend the Board expects will continue. According to the Board, assuming local control of the Corps-managed River channels would provide:

- efficiency in designing, building, and maintaining flood risk management projects;
- improved response to issues involving the homeless encampments in the River channels;
- greater opportunities for ecosystem restoration and recreation projects; and
- increased transparency and accountability among local cities with respect to River management.

At that same Board meeting at which the Board authorized the letter to the Los Angeles County Congressional Delegation requesting a disposition study to examine transferring ownership and operations of Corps-owned River channels to the District, the Board also approved sending a five-signature letter to the United States Department of Interior and the Los Angeles County Congressional Delegation, requesting an immediate allocation of Federal funds to expedite needed repairs and upgrades to the Dam. The Board also directed the County Director of Public Works to report back to the Board on efforts being made to coordinate with the Corps and downstream communities to ensure local measures are in place during emergencies.

Conclusion and Implications

The circumstances giving rise to the Board's letters are representative of much of California's vast and aging water infrastructure: Federally-funded, collaboratively managed, complex systems built in the mid-20th Century, subjected to 21st century regulation and now in desperate need of money and attention. While "local control" may—eventually—simplify the bureaucratic landscape (if there is such a thing), it would also accompany a hefty local price tag. When it comes to managing something as large as the River, defining "local" would itself present challenges as competing jurisdictions would likely seek to maximize benefits with minimal financial obligations. Of course, it doesn't hurt to start the conversation, and for that the Board should be commended.
(Derek Hoffman, Michael Duane Davis)

LEGISLATIVE DEVELOPMENTS

FEDERAL 'GREEN NEW DEAL' LEGISLATION INTRODUCED IN THE HOUSE OF REPRESENTATIVES

On February 7, 2019, Democratic House Member Alexandria Ocasio-Cortez and Senator Ed Markey introduced a Resolution termed the Green New Deal. The proposal comes in the wake an alarming report from the Intergovernmental Panel on Climate Change (IPCC) conveying that scientific research shows that if significant, or by many measures extraordinary, action is not taken to drastically reduce existing levels of greenhouse gas (GHG) emissions within the next twelve years, then the catastrophic effects of global warming will take an inevitable course of destruction and dislocation of communities.

The Green New Deal has been criticized by republicans for its significant costs and ambition, and even some senior democrats alleged that the proposal is too costly and lacks substance. However, the proposal has maintained its hold in the media and will likely stay a key policy issue in the upcoming race of Democratic presidential nominees, many of whom have already embraced the proposal.

Background

The Green New Deal—an overt reference to Franklin D. Roosevelt's expansive New Deal in the 1930s to launch job growth and social security initiatives in the wake of the Great Depression—builds upon an environmental ideology that some attribute to Thomas Friedman's 2007 book, *Hot Flat and Crowded*, and has since been touched on by politicians since, including in President Obama's stimulus bill. The overarching goal of the Green New Deal is to: 1) achieve "emissions neutrality" and reduce existing GHG levels, 2) create high-income job opportunities in the enactment of this environmental goal, and 3) achieve socio-economic justice in doing so.

The Proposal

The Green New Deal calls for the establishment of a select committee that would be charged with developing an action plan to address climate change and environmental justice. The Green New Deal as it is not just about climate policy, however, as it also calls for transforming the economy by bringing significant job growth for large-scale investments in infrastructure. The proposal is far-reaching in this regard, and dictates that the plan shall include labor training, particularly in areas "where the fossil fuel industry holds significant control over the labor market," and that such employment shall include:

> . . .additional measures such as basic income programs, universal health care programs and any others as the select committee may deem appropriate to promote economic security, labor market flexibility and entrepreneurism.

The Green New Deal includes a mandate to obtain carbon neutrality and the goal of meeting 100 percent renewable energy load within ten years, something many states across the United States (California under SB 100, New Jersey by executive order, Washington, Massachusetts, Hawaii) have passed or proposed implementing, and over one hundred cities have committed to 100 percent renewable energy use by varying timeframes. The Green New Deal also calls for the building and upgrade of an energy-efficient "smart" grid, the development of "green" technology and the elimination of GHG emissions from the transportation, manufacturing and agricultural industries.

Reception and Criticisms

The Green New Deal has been met with skepticism from both sides of the political aisle, as even some democrats have characterized the proposal as deeply ambitious, with significant costs and little detail. In an interview House Speaker Nancy Pelosi referred to the proposal as "the Green Dream, or whatever they call it" and California Senator Feinstein dismissed the proposal when confronted by a group of children protesting climate change.

In fact, republicans recently called for a vote on the proposal in with the political aim of dividing the democratic party. The republicans characterize the

proposal as part of a "radical left-wing ideology." Still, a number of candidates for the democratic presidential nomination have already come out in support of the Green New Deal, including Senator Corey Booker, Senator Kristen Gillibrand, Senator Amy Klobuchar, and Senator Kamala Harris. The candidates appear to recognize a growing movement within the democratic party, and significant grass-roots momentum from activist groups reacting to increasing climate warnings both from the scientific community and the increasing number of weather-related events-- whether fires, flooding, tornados.

Conclusion and Implications

Regardless of whether the Green New Deal progresses towards legislation, the Proposal has effectively raised the issue of climate change as a serious point of concern for politicians and the public. Particularly in the backdrop of an increased number of extreme weather incidents throughout the globe, this will likely remain a key campaign issue into the 2020 presidential race. In the interim, a significant number of states are raising the issue at the local level.
(Lilly McKenna)

CALIFORNIA LAWMAKERS PROPOSE SEVERAL SWEEPING ENVIRONMENTAL MEASURES THIS YEAR ON SINGLE-USE PLASTIC, WASTEWATER REUSE, AND MORE

State lawmakers will be considering a variety of sweeping environmental measures on single-use plastics, wastewater recycling, ocean resiliency, and more this Legislative Session. These bills signal California's keen interest in environmental protection and its unabated commitment to implement aggressive environmental laws that strive to improve air quality, afford water protection, and guard endangered species.

Background

February 22, 2019 was the deadline for the introduction of bills for the first half of the 2019-2020 California Legislative Session. Lawmakers will break for Spring Recess on April 12 and reconvene on April 22. The last day for bills to be passed out of the house of origin will be May 31, 2019.

While the deadline to submit bills for the current session has passed, legislators may still rewrite or amend the language in their proposals, and may even substitute existing bills with different measures. The following environmental bills were recently introduced and, as such, are still in the early stages of the legislative process. They will likely be modified to varying extents.

Summary of Proposed Environmental Bills

The proposed legislation addresses issues on environmental protections, promotes recycling, reduces the use of plastic and solid waste, and provides tax breaks for businesses that create "green jobs." What follows is a summary of eight environmental bills to watch this year:

- **Senate Bill 1** [SB 1] (Atkins, D) California Environmental, Public Health, and Workers Defense Act of 2019
SB 1 would make existing federal requirements and standards pertaining to air, water, and protected species enforceable under state law, even if the President or Congress rolls back those standards in the future. At its core, SB 1 would make sure that protections in existence prior to January 19, 2017 under the federal Clean Air Act, the federal Clean Water Act, the Safe Drinking Water Act, and the Endangered Species Act are not weakened and can be enforced by California state agencies.

- **Senate Bill 8** [SB 8] (Glazer, D) / **Assembly Bill 1718** [AB 1718] (Levine, D) Ban Smoking on State Beaches
SB 8 and AB 1718 both seek to prohibit smoking at designated picnic areas on state beaches and state parks. Legislators have passed similar bills with bipartisan support each of the previous three years, though each bill was vetoed by former Governor Brown.

- **Senate Bill 54** [SB 54] (Allen, D) / **Assembly Bill 1080** [AB 1080] (Gonzalez, D) California Circular Economy and Plastic Pollution Reduction Act

The companion bills of SB 54 and AB 1080 would create a framework to dramatically reduce the amount of plastic waste generated in California, setting a goal that single-use packaging and products sold or distributed in California be reduced, recycled, or composted by 75 percent by 2030.

•**Senate Bill 33** [SB 33] (Skinner, D) Solid Waste Reduction
As introduced, SB 33 states that it is "the intent of the Legislature to enact laws that would address the collapse of foreign recycling markets by reducing solid waste generation, encouraging transition to compostable or recyclable materials, and fostering domestic recycling markets." Specific details on the requirements and incentives remain to be determined.

•**Senate Bill 69** [SB 69] (Weiner, D) Ocean Resiliency Act of 2019
SB 69 aims to improve and protect the health of the Pacific Ocean along California's coastline by improving water quality, restoring ocean habitats, protecting keystone species, and convening a statewide advisory group to work on these and other issues impacting our oceans.

•**Senate Bill 332** [SB 332] (Hertzberg, D) Local Water Reliability Act
SB 332 calls for wastewater treatment facilities to reduce the volume of treated wastewater discharged into the ocean annually by 50 percent in 2030 and 95 percent by 2040.

•**Assembly Bill 161** [AB 161] (Ting, D) 'Skip the Slip'
AB 161 provides that, beginning in 2022, stores would be required to provide receipts digitally unless a customer requests a hard copy.

•**Assembly Bill 176** [AB 176] (Cervantes, D) California Alternative Energy and Advanced Transportation Financing Authority Act
AB 176 would provide tax breaks for businesses that promote California-based manufacturing, California-based jobs, advanced manufacturing, reduction of greenhouse gases, or reduction in air and water pollution or energy consumption.

A Deeper Look into Water Specific Bills

The reality, that more frequent and persistent periods of limited water supply due to a changing climate is occurring, has forced the State to rethink water conservation and efficiency methods and to move towards implementing changes that will improve and sustain the State's water for future generations. Several of the bills introduced this Legislative Session seeks to address these concerns and to make a big impact on water conservation.

Senate Bill 1

The Clean Water Act, which was enacted in 1948, grants vital protections to the waters of the United States by establishing the basic framework for regulating discharges of pollutants, and regulating quality standards for surface waters.

SB 1 ensures that these protections afforded by the Clean Water Act, and others, remain enforceable in California despite any deregulation by the federal government. According to Senator Stern (D- Canoga Park), "SB 1 is Trump insurance for California's environment."

Under this law, state environmental, public health, and worker safety agencies would have the authority to take all actions within their power to ensure water standards in effect and being enforced as of January 2017 remain in effect in California, notwithstanding any loosing of federal protections and standards.

Senate Bill 69

A major part of SB 69, the Ocean Resiliency Act of 2019, aims to improve and protect the health of the Pacific Ocean by reducing land-based sources of pollutants that acidify the ocean; restoring ocean habitats, such as kelp; preventing greenhouse gas emissions; and convening a statewide advisory group to work on various issues that impact the Pacific Ocean off of California's coastline.

According to Senator Wiener, the author of SB 69:

> Our ocean habitat is being damaged by the impacts of climate change. . . [w]ithout immediate action, these impacts will only get worse." Senator Wiener believes that this legislation is "a key step to reduce and mitigate the impacts of climate change on these ecosystems as well as our state's coastal communities and economy.

SB 69 will require that all waters going into the Pacific Ocean from most freshwater discharges be denitrified by 2024. Nitrates are one of the most significant land-based acidifying pollutants. The proposed bill will also help increase salmon populations by direct the Department of Fish and Wildlife to develop and maintain a priority list of dam removal projects within the State and ensure that salmon-bearing rivers and streams are not inadvertently damaged by sediment flows created during the logging process.

Senate Bill 332

In California, a billion gallons of water is used only once, then released into the ocean, on a daily basis. A climatologist's estimate, reported in the Los Angeles Times, projected that more than 80 percent of the region's rainfall upon the urban areas of Southern California ends up, unutilized, in the Pacific Ocean. SB 332's backers argue that this water should be recycled and used for landscape and agricultural irrigation to reduce the diversion of water from the Colorado River and the Bay-Delta watershed.

The Local Water Reliability Act attempts will require treatment facilities to increase recycling, conservation, and efficiency efforts to meet reduction targets of 50 percent by 2030 and 95 percent by 2040 for the amount of water dumped into the ocean.

A similar bill introduced in 2015 faced overwhelming opposition from water agencies because of the immense costs that would accompany reuse mandates, and was unable to get out of committee.

Conclusion and Implications

California has been a global leader in environmental protection for decades. Though these bills are still in the early stages, and may ultimately be amended or even substituted with different measures, these bills are the Legislature's most recent attempts to maintain California's environmental leadership. Several of these bills are duplicates of earlier bills that were vetoed by former Governor Brown; however, with a new governor in office, a new era of California's environmental leadership may be born.

Governor Gavin Newsom has pledged to build on California's past efforts to combat climate change, put California on a path to 100 percent renewable energy, preserve clean air and clean water, and improve the reliability of the state's water supply. As Governor Newsom begins his first term as governor, it remains to be seen how he will endeavor to guide our state, country, and the planet toward solutions that truly protect the climate, ecosystems and public health in a meaningful, responsible and sustainable way.
(Paula Hernandez, Michael Duane Davis)

EARLY CLIMATE CHANGE-RELATED BILLS INTRODUCED IN CALIFORNIA'S 2019-2020 LEGISLATIVE SESSION

The 2019-2020 California legislative session is on its way with over 2,500 bills introduced. This article provides a brief look at some of the climate change-related bills that are garnering attention in the early going.

California's Green New Deal

In the United States House of Representatives, Congresswoman Alexandria Ocasio-Cortez announced plans for a "Green New Deal" (*see*, feature article in 11 *Cal. Climate Change L. & P'lcy Rptr.* 7 (December 2018)). On February 7, 2019, Congresswoman Ocasio-Cortez officially introduced House Resolution 109 containing the details of her Green New Deal.

HR 109 calls for the creation of the Green New Deal with the following goals:

- achieving net-zero greenhouse gas emissions;
- establishing millions of high-wage jobs and ensuring economic security for all;
- investing in infrastructure and industry;
- securing clean air and water, climate and community resiliency, healthy food, access to nature, and a sustainable environment for all; and
- promoting justice and equality.

To reach these goals, HR 109 includes the projects to be accomplished during a ten-year mobilization effort:

•building smart power grids (*i.e.*, power grids that enable customers to reduce their power use during peak demand periods);

•upgrading all existing buildings and constructing new buildings to achieve maximum energy and water efficiency;

•removing pollution and greenhouse gas emissions from the transportation and agricultural sectors;

•cleaning up existing hazardous waste and abandoned sites;
ensuring businesspersons are free from unfair competition; and

•providing higher education, high-quality health care, and affordable, safe, and adequate housing to all.

In California Assembly, on February 21, 2019, Assembly member Rob Bonta introduced AB 1276 to also develop and implement a California "Green New Deal." AB 1276 would declare the California Legislature's intent to enact legislation to develop and implement a Green New Deal with similar goals to that contained in HR 109, including:

•Dramatically expanding existing eligible renewable energy resources and deploying new production capacity with the goal of meeting 100 percent of national electrical demand through renewable and carbon free sources;

•Building a national, energy-efficient, "smart" grid;

•Eliminating emissions of greenhouse gases from the manufacturing, agricultural, and other industries, including by investing in local-scale agriculture in communities across the country; and

•Funding massive investment in the drawdown of greenhouse gases.

Climate Change Research and Funding Bills

What follows is a summary of climate change related bills introduced in the California Legislature.

Assembly Bill 65—Coastal protection: climate adaption: project prioritization

On June 5, 2018, California voters approved Proposition 68 which authorized the issuance of $4,000,000,000 in bonds "to finance a drought, water, parks, climate, coastal protection, and outdoor access for all program." $40 million was specifically allocated to:

> . . .assist coastal communities, including those reliant on commercial fisheries, with adaptation to climate change, including projects that address ocean acidification, sea level rise, or habitat restoration and protection.

This funding is administered by the State Coastal Conservancy and AB 65, introduced by Assembly member Cottie Petrie-Norris, would require the conservancy to "prioritize projects that use natural infrastructure to help adapt to climate change."

Assembly Bill 296—Climate change: Climate Innovation Commission

AB 296, introduced by Assembly member Ken Cooley, would establish the Climate Innovation Grant Program, to be administered by the Climate Innovation Commission. The Climate Innovation Commission would be established in the Natural Resources Agency. The Climate Innovation Grant Program would award matching grants for the development and research of new innovations and technologies which would:

•Promote permanent and safe sequestration of greenhouse gases and carbon storage;

•Promote permanent and safe removal of criteria air pollutants;

•Promote a clean, reliable, and affordable electric grid;

•Promote clean, reliable, and affordable transportation solutions;

•Address water quality and reliability issues that reduce environmental impacts in an affordable manner; and/or

• Address soil quality issues in an affordable manner.

Assembly Bill 557—Atmospheric Rivers: Research, Mitigation, and Climate Forecasting Program

There have been a number of rain events this winter season in California, with increasing mentions of "atmospheric rivers" in the news. The Atmospheric Rivers: Research, Mitigation, and Climate Forecasting Program (Atmospheric Rivers Program) exists in the Department of Water Resources (DWR). Upon appropriation of funding, DWR must "research climate forecasting and the causes and impacts that climate change has on atmospheric rivers" and take certain flood control actions. AB 557, introduced by Assembly member Jim Wood, would appropriate $9.25 million to the DWR in the 2019–20 fiscal year to operate the Atmospheric Rivers Program.

Conclusion and Implications

California has typically been at the fore of addressing climate change and the 2019-2020 California legislative session is shaping up to remain true to that goal. The session contains a number of early climate change-related bills. These bills should be tracked as they make their way through the legislative session. (Kathryn Casey)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Predicting the Future Spread of Mosquito Species

Climate change has created conditions favorable to mosquitos in new areas normally not inhabited by mosquitos. This has the potential to spread mosquito-borne illnesses such has yellow fever, dengue, Zika, and chikingunya.

International collaborators from Boston Children's Hospital, University of Oxford, University of Washington, London School of Hygiene and Tropical Medicine, and University Libre de Bruxelles have developed prediction models on the spread of two mosquito species: *Aedes aegypti* and *Aedes albopictus*. Their models forecast that by 2050, 49 percent of the world's population will live in places where these species are established. The team gathered distribution data in Europe and the United States as far back as the 1970s through the present day. Then based on climate models and projections of urban growth, human migration, and travel patterns, the researchers projected the suitability of locations for these species in 2020, 2050 and 2080. Their findings show that *A. aegypti* tends to spread over longer distances, roughly 150 miles per year within the United States, while *A. albopictus* spreads more slowly at 37 miles per year in the United States and 93 miles per year in Europe.

Their models show that under current climate conditions, mosquito species will continue to spread globally in the future. *A. aegypti* is predicted to spread into new temperate areas in the United States and China, reaching as far north as Chicago and Shanghai by 2050. At the same time, populations of *A. aegypti* will decline in central southern United States and in Eastern Europe due to more arid conditions. *A. albopictus* is forecast to spread widely throughout Europe including large areas of France and Germany by 2050 and will reach parts of northern United States, South America, and East Africa. Over the next 5-15 years, the spread of both species will be mostly through human movement, but after that period the spread will be driven by changes in climate, temperature, and urbanization.

This work can be used to anticipate how the transmission of mosquito-borne diseases might be influenced by climate change. This can help policy makers predict human health impacts and guide strategies to limit the spread of disease.

See, Moritz U. G. Kraemer, Robert C. Reiner, Oliver J. Brady, et al. Past and future spread of the arbovirus vectors Aedes aegypti and Aedes albopictus. *Nature Microbiology*, 2019; DOI: 10.1038/s41564-019-0376-y

Sustainable Developments Do Not Always Reduce Greenhouse Gas Emissions

High-density, mixed-use, transit-oriented and bike- and pedestrian-friendly developments are commonly recommended in plans to reduce greenhouse gas (GHG) emissions in urban areas. Since transportation and building energy emissions typically comprise the majority of emissions from commercial and residential developments, efforts to construct energy-efficient buildings and reduce single-occupancy automobile trips should reduce emissions compared to existing suburban neighborhoods or office parks. Studies have quantified the benefits of different measures to include in Climate Action Plans or as mitigation measures for climate-friendly development. These studies typically compare the vehicle miles traveled and building energy use for a household that lives in an existing suburb versus a newer sustainable development.

Researchers from the University of Pennsylvania have studied the GHG emissions and consumption patterns in Seattle after Amazon and other technology companies brought in "sustainable" development. They conclude that the net global effect of this development may be increased GHG emissions and consumption rather than the expected decrease in emissions. Using zip code-level carbon footprint data and demographics data, the researchers found "carbon gentrification"; when big technology firms move to a zip code, more affluent residents move closer and displace lower-income former residents. The lower-

income displaced residents then may experience longer commutes and individually increased carbon footprints than at their original neighborhood. The new affluent residents consume more than the people they displace, with less public consumption such as in recreation centers and more private consumption in larger living spaces with high electricity plug loads. Affluent residents are less likely to take public transit than lower-income residents, and therefore transit and vehicle trip reduction plans may not achieve their maximum potential. While the affluent residents may have consumed even more living outside the sustainable development, the net carbon footprint when adding the emissions of displaced residents is unclear.

While data collection is ongoing and these results may vary by location, this study questions conventional wisdom on GHG reduction. It poses that there may be a need to evaluate not only the GHG emissions from within a given city or project boundary, but also the emissions that occur outside those boundaries due to displacement. Further studies may evaluate whether these impacts are mitigated by providing affordable housing or other anti-displacement measures in new developments near big tech.

See, Rice, J., et al. 2019. Contradictions of the Climate-Friendly City: New Perspectives on Eco-Gentrification and Housing Justice. *International Journal of Urban and Regional Research*. DOI: 10.1111/1468-2427.12740.

Energy Portfolios and Emission Reductions for the U.S. and China

In 2014, the presidents of the U.S. and China announced a shared effort to reduce GHG emissions. The Chinese president Xi Jinping committed to no further emissions increases past 2030; the U.S. president Barack Obama committed to a 26-28% reduction below 2005 levels by 2025. These commitments were reaffirmed at the Paris Accord in 2015. Even though the U.S., under the Trump administration, has since retracted their commitments, sixteen states that make up over 46 percent of the U.S.'s national gross domestic product (GDP) retain this emission reduction commitment.

Once emission reduction pledges are made, it is important to determine a cost-effective way of achieving these targets. Since the energy production sector contributes to a large portion of national GHG emissions, it is a good starting point for identifying potential cost-effective emissions reductions.

A team of researchers at Portland State University developed and utilized a new model for understanding how various. energy portfolios and geoengineering strategies contribute to national GHG emissions. For the U.S., they ran eight different scenarios to understand the resulting GHG emissions and nominal total energy costs. These scenarios adjusted the amount of carbon pricing, natural gas reserves, electric cars, nuclear power, and tree planting and found that the U.S. will need to shift the mix of energy resources in order to achieve the 2014 emissions goals. Strategies that were the most cost-effective in doing this were a $100/ton carbon tax, increased use of electric vehicles, and a shift from coal towards natural gas, wind, biofuel, nuclear, and/or solar. For China, the scenarios and results were similar, however the shift away from coal is paramount for China to meet its emissions reduction goals. For China to move away from coal cost-effectively, national coal subsidies will need to be eliminated.

As two of the largest world economies, the U.S. and China can significantly reduce global GHG emissions by reducing their national contributions. Changes in the national energy portfolio of each country can significantly reduce GHG emissions and should be considered as a method of achieving national emission reduction commitments. Reducing emissions from the energy sector, however, cannot be the only sector with reduced emissions; in order to find a cost-effective solution for reducing emissions to these targets, the U.S. and China will need to implement economy-wide GHG reduction measures.

See, Anasis, John G., et al. Optimal energy resource mix for the U.S. and China to meet emissions pledges. Applied Energy, 2019; DOI: 10.1016/j.apenergy.2019.01.072.

(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 March 7, 2019, the U.S. Environmental Protection Agency (EPA) announced settlements with three automotive parts manufacturers for violations of the federal Clean Air Act (CAA). The companies allegedly manufactured or sold aftermarket auto parts, or defeat devices, that bypass or disable required emissions control systems. The first company, Car Sound Exhaust Systems, Inc., dba MagnaFlow, manufactured and sold 5,674 aftermarket exhaust systems intended for model years 2001-2007 diesel trucks that enabled removal of diesel oxidation catalysts. Car Sound Exhaust Systems, headquartered in Oceanside, California, will pay a penalty of $612,849. The second company, Flowmaster, Inc. sold aftermarket exhaust system parts for motor vehicles that enabled the removal of catalytic converters on light-duty gasoline vehicles. Flowmaster, headquartered in Santa Rosa, California, will pay a $270,000 penalty. The third company, Weistec Engineering, Inc. manufactured or sold 110 aftermarket exhaust components for light-duty gasoline vehicles that enabled the removal of catalytic converters. The company also developed and sold 13 custom files that allowed for the removal of catalytic converters by disabling certain emission-related trouble codes. The company, headquartered in Anaheim, California, will pay a penalty of $8,500.

•On March 8, 2019, EPA announced that Diodes Incorporated has agreed to pay a $229,456 civil penalty to settle alleged violations of accident prevention provisions of the CAA at the company's former semiconductor manufacturing facility in Lee's Summit, Missouri. The settlement is based on alleged violations of the CAA General Duty Clause and the Risk Management Program regulations. An inspection at Diodes' facility revealed it was processing, handling, and storing multiple extremely hazardous substances with significant toxicity and flammability concerns. The facility was operating at the time of the inspection, but was in the process of decommissioning and removing the extremely hazardous substances from the site. The inspection also revealed that Diodes failed to satisfy the General Duty Clause elements and failed to develop and implement a Risk Management Program when it periodically stored anhydrous hydrogen chloride above threshold amounts. EPA worked with Diodes and the local fire department as the company completed its decommissioning process to ensure hazardous substances were handled safely. The facility is no longer in operation at Lee's Summit. Under the settlement, Diodes certified that it is now in compliance with its CAA requirements.

•On March 7, 2019, EPA and the U.S. Department of Justice (DOJ) announced a settlement with ExxonMobil Oil Corporation to resolve CAA claims arising from a 2013 fire at the company's oil refinery in Beaumont, Texas, which killed two employees and injured ten others. EPA and U.S. DOJ allege that ExxonMobil violated CAA § 112(r), to prevent accidental releases of extremely hazardous substances. The 2013 fire occurred when workers used a torch to remove bolts from the head of a heat exchanger. The torch ignited hydrocarbons released from the head. Under the settlement, ExxonMobil will pay a $616,000 civil penalty, hire an independent third party auditor to conduct a compliance audit of ExxonMobil's procedures for opening process equipment at ten different process units at the refinery, and purchase a hazardous materials Incident Command Vehicle, valued at $730,000, for the Beaumont Fire & Rescue Service as a supplemental environmental project. The auditor will also evaluate the company's procedures for conducting risk-based mechanical integrity inspections. The Incident Command Vehicle

will contain equipment specifically tailored to enhance the Fire & Rescue Service's hazardous material response capabilities.

•On March 13, 2019, EPA announced that Fiat Chrysler Automobiles has agreed to voluntarily recall 862,520 vehicles in the United States as a result of in-use emissions investigations conducted by EPA and in-use testing conducted by Fiat Chrysler under CAA regulations. EPA will continue to investigate other Fiat Chrysler vehicles which are potentially non-compliant and may become the subject of future recalls. Due to the large number of vehicles involved and the need to supply replacement catalytic converters, this recall will be implemented in phases during the 2019 calendar year beginning with the oldest vehicles first.

•On March 25, 2019, EPA announced that a settlement with Global Partners LP, Global Companies LLC, and Chelsea Sandwich LLC (collectively, Global) to resolve alleged CAA violations at Global's South Portland, Maine petroleum product storage and distribution facility. Data from emissions testing indicated that Global's tanks emitted volatile organic compounds at substantially higher levels than previously estimated. Global will pay a $40,000 penalty and install mist eliminator systems on its heated tanks that store residual #6 fuel oil and asphalt. Global will apply for a revised permit from Maine that will limit the amount of #6 oil and asphalt that company can pass through the facility and will limit the number of days it will heat the tanks and the number of tanks that can store #6 oil at any one time. Global will also invest at least $150,000 in a project to encourage the replacement or upgrades of wood stoves in the area.

•On February 28, 2019, EPA announced that it reached a settlement with E. & J. Gallo Winery to resolve CAA violations at its wine production facility in Fresno, California. E. & J. Gallo will pay a $57,839 civil penalty and spend an estimated $350,000 to reduce the risk of chemical accidents at its facility. In 2015, EPA inspectors found violations of the CAA Risk Management Plan involving the facility's industrial refrigeration system, which uses anhydrous ammonia, including deficiencies in the plant's hazard assessment, process safety information, operating procedures, mechanical integrity program, compliance audits, incident investigations, and emergency response program. E. & J. Gallo has addressed all of the identified violations. The company will complete a supplemental environmental project to enhance safety equipment and procedures at the Fresno facility, including installing new valves and upgrading emergency shutoff switches allowing an operator or emergency responder to remotely shut down the ammonia refrigeration systems, including in an emergency situation.

•On March 5, 2019, EPA announced a settlement with Veolia ES Technical Solutions for hazardous waste air pollution violations at Veolia's facility in Azusa, California. Under the settlement agreement, Veolia will pay a $43,606 civil penalty and spend more than $161,000 on an environmental project to reduce air pollution at a school in the Los Angeles area. Veolia's facility in Azusa stores, processes, treats, recycles, and ships hazardous waste received from offsite sources. EPA's May 2016 inspections found the company violated federal Resource Conservation and Recovery Act regulations and California's hazardous waste air emission control regulations. The violations include failure to conduct leak detection monitoring of equipment; failure to maintain records of tank inspections, equipment defects, and repairs; and failure to develop and implement a written inspection and monitoring plan for its equipment. Veolia will install an air filtration system at a school in the Los Angeles area to reduce exposure to ultrafine particulate matter, black carbon, and fine particulate matter from vehicles. Veolia has also upgraded air emissions monitoring equipment to detect leaks in a timely manner, conducted additional hazardous waste tank assessments, and improved its leak detection and repair program. These improvements will cost approximately $350,000.
(Allison Smith)

JUDICIAL DEVELOPMENTS

THE TRUMP ADMINISTRATION BORDER WALL— NINTH CIRCUIT AND DETERMINES ILLEGAL IMMIGRATION ACT ALLOWS FOR WAIVER OF ENVIRONMENTAL LAWS

Center for Biological Diversity et al. v. U.S. Department of Homeland Security et al., ___F.3d___, Case Nos. 158-55474; 18-55475; and 18-55476 (9th Cir. Feb 11, 2019).

In August and September of 2017, the Secretary of the Department of Homeland Security (Secretary) published a notice of determination in the Federal Register that waived applicable environmental laws for the construction of the border wall in San Diego and Calexico. On February 11, 2019, a three-judge panel from the Ninth Circuit Court of Appeals determined the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorizes the Department of Homeland Security's (DHS) waiver of environmental laws that environmental groups seek to enforce is appropriate.

Factual Background

On August 2, 2017, the Secretary published a notice of determination regarding the construction and evaluation of wall and replacement of fourteen miles of fencing in San Diego County. The Secretary invoked § 102 of the IIRIRA's authorization to waive all legal requirements that the Secretary herself determines necessary to ensure expeditious construction barriers under the IIRIRA. Similarly, On September 12, 2017, the Secretary again invoked § 102's waiver in another notice of determination in the Federal Register in Calexico. The construction in Calexico involved a three-mile replacement of primary fencing along the border near Calexico. The secretary deemed both the projects as "necessary" and waived twenty-seven federal laws in its notice.

Plaintiffs, the State of California, Center for Biological Diversity (Center), and various environmental groups (Coalition) asserted three claims: 1) *ultra vires* claims, which alleging that the Department of Homeland Security exceeded its statutory authority in working on the border barrier projects and issuing waivers; 2) environmental claims contending that DHS violated various environmental laws by building the wall; and 3) constitutional claims asserting that the Secretary's waivers violate the U.S. Constitution.

The U.S. District Court rejected the constitutional claims and granted summary judgment to DHS with respect to the others. Plaintiffs each appealed the District Court's judgment. Now in a consolidated case, the Ninth Circuit Court heard the appeals and chose not to decide the environmental claims at this time stating that the claim was not ripe.

The Ninth Circuit's Ruling

Jurisdiction

Section 102(c)(2)(A) states that the U.S. District Courts of the United States:

> . . .shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought or claim alleging a violation of the Constitution of the United States.

The Ninth Circuit Court interpreted this provision to mean that only constitutionally based claims are under the exclusive jurisdiction of District Courts.

Paragraph 1 includes a waiver provision that the:

> . . .Secretary of Homeland Security shall have the authority to waive all legal requirements… in such secretary's sole discretion, determines necessary to ensure the expeditious construction of the barriers and roads under this section.

Additionally, § 102(c)(2)(C) states that:

> . . .[a]n interlocutory of final judgment decree, or order of the district court may be reviewed upon petition for a writ of certiorari to the supreme court of the United States.

The Ninth Circuit Court interpreted the three provisions to mean that the Supreme Court's direct review only applies to claims under the District Court's exclusive jurisdiction—the constitutional claims—and have no bearing on any other claim including Plaintiffs' ultra vires and environmental claims.

Ultra Vires Claims Do Not Survive Summary Judgment

Plaintiffs argue that the San Diego and Calexico Projects are not authorized by § 102(a) ad 102(b) and challenge the scope of the Secretary authority to build roads and walls.

Under § 102 (a) of the IIRIRA states that:

> . . .[t]he Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install *additional physical barriers and roads* (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of *high illegal entry* into the United States. (Emphasis added.)

Specifically, plaintiffs argued that § 102(a) only applies to "additional physical barriers" and because the projects aim to replace the border fencing and do not technically create new and additional barriers, they fall out of the scope of the statute's authority. Plaintiffs contend that legislative intent was to only include construction of barriers that would add to the total miles of the border wall.

By relying on *Webster's Dictionary*®, the Ninth Circuit Court ultimately held that the term "additional" is equivalent to "supplemental" and that barrier means "a material object…that separates…or serves as a unit or barricade." The Ninth Circuit Court further opined that, common sense supports the court's analysis and to suggest that Congress would authorize DHS to build barriers but implicitly prohibit its repairs "makes no practical sense."

Plaintiffs also argued that the borders were not in areas of "high illegal entry" because there are other places with *higher* illegal entry. However, plaintiffs' argument failed because the IIRIRA does not define what constitutes "high illegal entry" and it certainly does not dictate that illegal entry is a comparative determination. Further, the panel found that plaintiffs did not dispute the DHS' statistics that show that San Diego and El Centro are in the top 35 percent of the border where the most illegal immigrants are apprehended. In essence, plaintiffs were challenging the Secretary's discretion in selecting where to exercise her authority under § 102(a), which is barred under § 102(c). Finally, the Ninth Circuit determined that § 102(b) does not impose limits on the section's broad grant of authority.

The Dissent

In her dissent, Ninth Circuit Judge Consuelo M. Callahan's argued that the plain language of § 102 of limits appellate review of the lower California court's decision to the U.S. Supreme Court. Judge Callahan disagrees and reasons the majority ignores the plain language of the text which requires that for all actions filed in a District Court that arises from "any section undertaken, or any decision made, by the Secretary of Homeland Security," —that appellate review is limited to the Supreme Court.

Callahan criticizes majority's analysis and contends that the opinion ignored the statute's restriction on appellate jurisdiction by arguing that the ultra vires claims do not "arise out of" the Secretary's waiver of legal requirements under § 102 (c). Thus, § 102(c) restricts review of this case to the Supreme Court and should have never been determined by the Ninth Circuit.

Conclusion and Implications

In this 2-1 decision, the Ninth Circuit ultimately upheld the Trump administration's decision to reconstruct a border wall in Calexico and San Diego, supporting the Secretary's decision. The Ninth Circuit Panel's discussion of its interpretation of the statutes provides a seemingly iron-clad protection for the Secretary's decisions made under § 102(c) and even bolsters the Secretary's authority by holding that the section does not impose any limits. The Secretary's broad authority stems from legislative intent to prioritize border security and sacrifice other federal policy concerns including many environmental considerations. The panel's ruling in *In Re Border Infrastructure Environmental Litigation* is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/02/11/18-55474.pdf

(Rachel S. Cheong; David D. Boyer)

CLIMATE CHANGE™
LAW & POLICY REPORTER

DISTRICT COURT HOLDS THAT FEDERAL STATUTES PREEMPT LOCAL LAND USE ZONING ORDINANCE FOR NATURAL GAS PIPELINE PROJECT

Algonquin Gas Transmission, LLC v. Town of Weymouth,
___F.Supp.3d___, Case No. CV 18-10871-DJC (D. Mass. Feb. 11, 2019).

The U.S. District Court for the District of Massachusetts held that the Federal Energy Regulatory Commission's (FERC) issuance of a Certificate of Public Convenience and Necessity (Certificate) for a natural gas pipeline preempted the Town of Weymouth (Weymouth) from applying a local zoning ordinance to prohibit the construction of a compressor station in the town.

Factual and Procedural Background

Algonquin Gas Transmission, LLC (Algonquin) filed an application with FERC for a Certificate under the federal Natural Gas Act (NGA) to construct and operate a natural gas pipeline and associated facilities (AB Project). Pursuant to its obligations under the National Environmental Policy Act (NEPA), FERC prepared an Environmental Assessment (EA), finding that with mitigation the AB Project would have no significant impact. Accordingly, FERC did not prepare a more detailed Environmental Impact Study (EIS).

In January 2017, subject to specific environmental conditions, FERC granted Algonquin's application for a Certificate for the AB Project. FERC's issuance of the Certificate authorized Algonquin to construct a compressor station in Weymouth, in a "coastal zone" under the federal Coastal Zone Management Act. (CZMA). Accordingly, Algonquin was required to obtain a consistency certification from the Massachusetts Office of Coastal Zone Management (MCZM), the state agency charged with implementing the Massachusetts Coastal Management Program (Program) under the CZMA.

In considering an application for a consistency certification for a project requiring federal permits in a coastal zone, the MCZM must determine whether the proposed project complies with the "enforceable policies" of the Program. The MCZM maintains a policy guide listing all of the state and local enforceable policies approved by the National Oceanic and Atmospheric Administration (NOAA), the federal agency responsible for administering the CZMA. One of the enforceable policies listed in MCZM's Program policy guide requires applicants to obtain a license from the Massachusetts Department of Environmental Protection (DEP) under the Massachusetts Public Waterfront Law (Chapter 91 License).

In May 2017, the DEP issued a written determination stating that it intended to approve Algonquin's application for a Chapter 91 License, subject to Algonquin submitting documentation demonstrating it had obtained local approval for the project. Weymouth filed an administrative appeal with the DEP, arguing that Algonquin's construction and operation of the compressor station would violate a Weymouth's wetlands ordinance and a zoning ordinance prohibiting buildings from emitting noxious or offensive odors (Zoning Ordinance). In November 2018, the DEP officer considering Weymouth's appeal ruled that Algonquin was required to obtain a local zoning certificate prior to the DEP issuing the Chapter 91 License. In a separate case, *Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission et al.*, Case No. 17-cv-10788-DJC (D. Mass. Dec. 29, 2017), the same court held that the NGA preempted Weymouth's application of the wetlands ordinance. That case is currently under review in the First Circuit Court of Appeal.

In May 2018, Algonquin filed a declaratory relief action seeking an order that the NGA preempts application of the Zoning Ordinance to the construction and application of the AB Project. Weymouth moved to dismiss Algonquin's complaint and Algonquin moved for summary judgment.

The District Court's Decision

The court initially rejected Weymouth's claims that because Algonquin had not applied for a zoning certificate Algonquin lacked standing and the dispute was not ripe for adjudication. Relying on statements from the DEP presiding officer that if the Zoning Ordinance was preempted the DEP could issue the

Chapter 91 License without the zoning certificate, the court found that Algonquin had suffered a redressable concrete injury traceable to Weymouth's conduct, noting that the Zoning Ordinance dispute had delayed the DEP's issuance of the Chapter 91 License for almost two years. With respect to Weymouth's ripeness argument, the court determined that a "question of preemption may be ripe for review even where 'regulatory approval . . . is ongoing.'"

Federal Preemption

As to preemption, Weymouth argued that the NGA's savings clause, which preserves state's rights under the Clean Water Act, Clean Air Act, and the CZMA, protected the Zoning Ordinance from being preempted. While the court agreed that the NGA did not preempt Massachusetts' rights under the CZMA, the court explained that the Zoning Ordinance is not included among the enforceable policies in the MCZM's Program policy guide. The court also found that the Program did not otherwise incorporate the Zoning Ordinance by reference. Based on this analysis, the court concluded that the Zoning Ordinance was not "immune from preemption" under the NGA, CZMA, or the Program.

Having found that Weymouth's Zoning Ordinance was subject to preemption, the court easily found its application to the AB Project preempted under the doctrine of conflict preemption. The court explained that Weymouth repeatedly argued to the DEP that the Zoning Ordinance prohibited Algonquin's construction of the compressor station, and concluded:

> Because FERC has already 'carefully reviewed the very' proposal Weymouth 'seeks [ ] to further regulate and, after considering the environmental impact CZMAs, authorized the project,' the Ordinance 'clearly collides with FERC's delegated authority and is preempted' in its entirety.

Conclusion and Implications

This case illustrates the complex, interlocking levels of federal, state, and local environmental regulations, and suggests that, despite this complexity, careful reading and methodical analysis can produce straight-forward answers to difficult questions. In the end, federal law often trumps the normal sanctity of land use decisions which are often decided at the municipal level of government.
(Dakotah Benjamin, Rebecca Andrews)

DISTRICT COURT DISMISSES LAWSUIT CHALLENGING FEDERAL ROLLBACK OF CLIMATE CHANGE REGULATIONS

Clean Air Council, et al., v. United States, et al., Case No. 17-497, *Dismissed* Feb. 19 2019 (E.D. Penn).

On February 19, 2019, U.S. District Judge Paul Diamond for the Eastern District of Pennsylvania granted defendants' motion to dismiss a lawsuit challenging various actions undertaken by the Trump administration to "roll back regulations and practices previously directed at addressing and minimizing the United States contribution to climate change."

Background

On November 6, 2017, the environmental organization, Clean Air Council, and two children, by and through their parents and guardians, filed a lawsuit against the United States seeking a declaration that its "roll back" of regulations and practices aimed at addressing and minimizing the contribution of the United States to climate change:

> . . .affirmatively increases the United States contribution to climate change and intensifies its effects, thereby endangering the lives and welfare of United States citizens in violation of the Due Process Clause of the Constitution. [*Clean Air Council v. United States of America, et al.*, E.D. Penn., Case No. 2:17-cv-04977-PD].

The lawsuit was filed in the Eastern District of Pennsylvania against the following defendants: The United States; Donald Trump, in his official capacity as President of the Unites States; U.S. Department of Energy; Rick Perry, in his official capacity as Secretary of Energy; U.S. Environmental Protection Agency (EPA); and Scott Pruitt, in his official capacity as Administrator of the EPA.

The amended complaint, filed on March 15, 2018, also named the U.S. Department of the Interior and Ryan Zinke, Secretary of the Interior, as defendants.

At issue were actions taken by the defendants starting in January 2017 to reverse or roll back certain regulations, policies, and practices previously taken by the United States to address climate change (Rollbacks). The amended complaint states that the federal rules and regulations that existed as of January 1, 2017:

> . . .represented a necessary minimum effort by the Government to address, understand, and respond to United States contribution to climate change. Rolling back, weakening, revoking, or rescinding those regulations and laws increases the clear and present dangers of climate change and its life-endangering effects.

The Lawsuit

The amended complaint contained two causes of action against the federal defendants: 1) Violation of the Due Process Clause of the Fifth Amendment; and 2) Violation of the Public Trust Doctrine. The plaintiffs sought a declaration that:

> Defendants cannot effectuate or promulgate any rollbacks that increase the frequency and/or intensity of the life-threatening effects of climate change based on junk science in violation of Plaintiffs' constitutional rights to a life-sustaining climate system and the public trust doctrine.

In their amended complaint, the plaintiffs allege that climate change presents a "clear and present danger to life and life-sustaining resources," identifying human health impacts, extreme weather events, droughts, flooding, wildfires, sea level rise, and impacts to agriculture and ocean life as examples of such threats. The complaint alleges that the defendants have "rel[ied] on junk science to wage a war on facts, data, and reliable principles and methods arising out of scientific, technical, and specialized knowledge" and, in doing so, have:

> . . .acted with reckless and deliberate indifference to the established clear and present dangers of climate change, knowingly increasing its resulting damages, death, and destruction.

According to the plaintiffs, the Rollback program:

> . . .increases the United States contribution to climate change and intensifies its effects, thereby endangering the lives and welfare of United States citizens in violation of the Due Process Clause of the Constitution.

The District Court's Ruling

On February 19, 2019, the court granted defendants' motion to dismiss, concluding that plaintiffs lacked standing and, in the alternative, that their claims were not viable. The court concluded that the Clean Air Council failed to satisfy the requirements for organizational standing because they "failed to show how CAC members would 'have standing to sue in their own right.'" According to the court, the individual plaintiffs also lacked standing, in part, because their anticipated injuries are not imminent or certain, they failed to establish that their injuries are "fairly traceable" to the challenged actions, and they failed to establish that it is likely that their alleged injuries would be redressed by a favorable decision by the court. In addition, the court concluded that prudential considerations relating to the "proper role of federal courts" and separation of powers precluded the court from acting on plaintiffs' complaint, a common theme throughout the court's order:

> Plaintiffs thus effectively ask me to supervise any actions the President and his appointees take that might touch on 'the environment.' . . . Because I have neither the authority or inclination to assume control of the Executive Branch, I will grant Defendant' Motion [to dismiss].

In the alternative, the court concluded that the plaintiffs' claims are not viable because:

> (1) there is no legally cognizable due process right to environmental quality; (2) the Ninth Amendment provides no substantive rights to sustain Plaintiffs' action; and (3) Plaintiffs' public trust claim has no basis in law.

In finding that plaintiffs have no "fundamental right to a life-sustaining climate system," the court noted that only one court—in *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016)—has recognized a substantive due process right analogous to that

asserted by plaintiffs. According to Judge Diamond, "the *Juliana* Court certainly contravened or ignored longstanding authority." Judge Diamond also rejected plaintiffs' public trust claim, one that was also recognized by *Juliana* court:

> The *Juliana* Court alone has recognized this new doctrine… Again, that Court's reasoning is less than persuasive. Once again, I decline to arrogate to the Courts the authority to direct national environmental policy.

Conclusion and Implications

As noted, Judge Diamond disagreed with several key findings of United States District Judge Ann Aiken in the *Juliana* case, which grappled with claims analogous to those brought by plaintiffs in this case, and which are now before the Ninth Circuit Court of Appeals.
(Nicole Martin)

DISTRICT COURT GRANTS SUMMARY JUDGMENT TO U.S. FISH AND WILDLIFE SERVICE IN RESPONSE TO TEXAS' EFFORTS TO DELIST WARBLER FROM THE ESA

General Land Office of Texas v. U.S. Fish & Wildlife Service,
___F.Supp.3d___, Case No. 1:17-cv-00538-SS (W.D. Tex. Feb. 6, 2019).

On February 6, 2019, the U.S. District Court for the Western District of Texas granted a motion for summary judgment filed by defendant U.S. Fish and Wildlife Service (FWS) against plaintiff General Land Office of the State of Texas (Texas) relating to the listing of the golden-cheeked warbler (Warbler). In June 2017, Texas requested judicial review of the FWS' decision to deny a petition to delist the Warbler from the endangered species list. On March 1, 2019, Texas filed an appeal to the U.S. Court of Appeals for the Fifth Circuit.

History of the Warbler in Texas

The Warbler is a small, migratory songbird that breeds exclusively within central Texas. 55 Fed. Reg. 18,846-01 (May 4, 1990). Its breeding range is miniscule due to the Warbler's dependence on bark from specific juniper trees to construct nests. Due to an influx of planned developments in the City of Austin and Travis County in the 1980s, the Warbler's available breeding habitat was significantly impacted and reduced. The threat of eviscerating more of the Warbler's breeding habitat caused an emergency petition to be filed with the FWS in February 1990. The emergency petition urged for the Warbler's protection under the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq*. (ESA). The Warbler was determined to be endangered because of the ongoing and threatened destruction of its range, the threat of nest predation, the inadequacy of existing regulatory mechanisms, and the threat of habitat fragmentation. At that time, the FWS did not designate a critical habitat because specific elements of the required habitat for the Warbler's survival were not known.

Pursuant to the ESA, the FWS was required to develop and implement a recovery plan for the conservation and survival of the Warbler (Recovery Plan). 16 U.S.C. § 1533. The Recovery Plan identified criteria to be considered for delisting the Warbler:

- Sufficient breeding habitat has been protected to ensure the continued existence of at least one viable, self-sustaining population in each of the eight Texas regions outlined in the Recovery Plan. . . .

- The potential for gene flow exists across regions between demographically self-sustaining populations where needed for long-term viability. . . .

- Sufficient and sustainable non-breeding habitat exists to support the breeding populations,

- All existing Warbler populations on public lands are protected and managed to ensure their continued existence . . . .and

- All of these criteria have been met for 10 consecutive years.

The Recovery Plan also encouraged research on the Warbler to help establish the necessary habitat(s) for the Warbler's survival, including taking other steps to manage and protect the population and its habitat.

The 2014 Five-Year Review

The Recovery Plan mandated that the FWS conduct a review of the Warbler's endangered status every five years. For unexplained reasons, the first five-year review occurred in 2014 (although several reviews were required since the FWS issued its final rule in 1990). The FWS determined that although progress had been made toward meeting the five-factor criteria for delisting in the Recovery Plan, the Warbler was still threatened by the widespread destruction of its habitat largely due to rapid suburban development. At that time, the Warbler remained in danger of extinction and the FWS did not recommend a change to its status.

The Petition to Delist

Less than one year after the conclusion of the 2014 Five-Year Review, a petition was filed with the FWS requesting the removal of the Warbler from the endangered species list (Petition to Delist). The Petition to Delist primarily argued that the FWS' initial listing relied on studies that dramatically underestimated the Warbler's population size and size of the Warbler's breeding habitat.

Those in favor of removing protections for the Warblers cited to a Texas A&M Institute of Renewable Natural Resources survey conducted in 2015 (A&M Study). The A&M Study demonstrated that the Warbler's breeding habitat was more widely distributed and variable than originally anticipated by the FWS. Additionally, the A&M Study stated that the Warbler population was possibly five times greater than the FWS believed in 1990.

The Petition to Delist identified two reasons to explain the increased habitat and population of the Warbler in the A&M Study: 1) the technological advances since the initial 1990 listing provided improved satellite imagery and sampling techniques, which provided scientists with the ability to identify Warbler population and habitats; and 2) the shift in understanding what was required for a better breeding habitat for the Warbler. The Petition to Delist argued that since the destruction of the Warbler's habitat did not threaten the continued survival of the Warbler, it was inappropriate for the Warbler to remain on the endangered species list. According to the Petition to Delist, since the initial delisting was founded upon "a fundamental misunderstanding of the existing abundance and population structure" of the Warbler, the Petition to Delist should be granted.

The Service's 90-Day Finding

Upon receipt of a petition to remove an animal from the endangered species list, the FWS is required to issue a 90-day finding. In the instant case, the FWS acknowledged that the Warbler population and habitat size may be larger than initially estimated, but that:

> . . .threats of habitat loss and habitat fragmentation are ongoing and expected to impact the continued existence of the warbler in the foreseeable future. (M000449 (Petition to Review Form).)

The FWS also questioned the reliability of the A&M Study since population estimates were difficult to ascertain and the study overestimated the Warbler populations in areas of low Warbler density. Ultimately, despite the information and data presented in the A&M Study, the FWS concluded that the Warbler continues to be in danger of extinction and none of the recovery criteria set forth in the Recovery Plan had been achieved.

The Lawsuit to Delist

Texas argued that the FWS improperly denied the Petition to Delist when it failed to consider new and substantial scientific data and refused to designate a critical habitat for the Warbler. A "critical habitat" consists of specific areas within the existing habitat that contained physical and biological features essential to the animals' conservation that may require special protections, as well as areas beyond the existing habitat determined to be essential for conservation.

Alleged New and Substantial Scientific Data

Texas alleged that during the 90-day finding, the FWS ignored the studies, specifically the A&M Study, presented in the Petition to Delist. According to Texas, the A&M Study consisted of new scientific information that would undoubtedly lead a reason-

able person to conclude delisting may be warranted. However, the District Court remained unconvinced of Texas' position because the FWS took into account several of the data points and information presented in the A&M Study during its 2014 Five-Year Review. Additionally, the A&M Study merely compiled the existing literature already available on the Warbler population and habitat. It did not present any new evidence that the FWS allegedly ignored.

The District Court's Decision

Texas contended that the FWS acted arbitrarily and capriciously when it failed to designate a critical habitat for the Warbler upon adding the bird to the endangered species list. The plaintiff believed the FWS must designate the Warbler's critical habitat necessary for its survival or the Warbler must be delisted. The District Court, however, found that these claims had no support within the language of the law.

The ESA specifically requires the FWS to consider five factors, and only those five factors, in determining whether a delisting was appropriate. None of the five factors required the FWS to designate a critical habitat.

The District Court looked to the legislative history for further support of its position. The legislative history of the ESA revealed that Congress wanted to avoid the economic analysis that comes with a critical habitat designation. *Alabama-Tombigee Rivers Coal. V. Kempthorne*, 447 F.3d 1250, 1266 (11th Cir. 2007). The *Kemthorne* court stated that in prior versions of the ESA that required economic analysis and designation of a critical habitat, the pace of the listing process slowed. Based on the clear intention of Congress, the District Court decided that the FWS' failure to designate a critical habitat for the Warbler was not fatal to its continued listing.

Conclusion and Implications

In the end, the District Court rejected all of Texas' claims and the Warbler remained protected under the ESA.

With Texas' appeal to the Fifth Circuit currently pending, Texas continues its uphill battle to delist the Warbler. If the Fifth Circuit reverses the District Court's decision to keep the Warbler on the endangered species list, then it is likely that rapid residential and commercial development would begin in lands previously protected as Warbler habitats. Development in these areas has been stalled due to the high costs to mitigate such lands to protect the Warbler population and habitat.

For more information regarding the current listing status of the Warbler, visit www.fws.gov.
(Nicolle A. Falcis, David D. Boyer)

DISTRICT COURT REJECTS MOTION TO RESTRAIN ENFORCEMENT OF ILLINOIS ATTORNEY GENERAL'S 'SEAL ORDER' REGARDING DISCHARGES OF ETHYLENE OXIDE

Sterigenics U.S., L.L.C. v. Kim, ___F.Supp.3d___, Case No. 19-cv-01219 (N.D. Ill. Feb. 20, 2019).

The U.S. District Court for the Northern District of Illinois dismissed a motion for a temporary restraining order brought by a discharger of ethylene oxide against a "Seal Order" issued by the Attorney General of Illinois and the State's Attorney General for DuPage County, Illinois (collectively: State).

Factual and Procedural Background

Plaintiff Sterigenics U.S., L.L.C. operates an ethylene oxide sterilization facility, which is regulated by a federal Clean Air Act permit. On October 30, 2018, the State filed a lawsuit against Sterigenics for causing, threatening or allowing air pollution. In briefing, Sterigenics claims its facility operates in full compliance with all regulatory requirements. The State, however, asserted that a 2016 study by the federal government, known as the *Integrated Risk Information System: Ethylene oxide*, concluded ethylene oxide emissions are 30 times more potent at causing cancer than previously estimated. Based on high levels of ethylene oxide detected near the Sterigenics' facility, the State filed its October 30, 2018 action. The State's action was removed to federal court on December 5, 2018, on motion of Sterigenics. On January 3, 2018, the State moved to remand the action to

state court. The federal court requested supplemental briefing on the remand motion on February 15, 2019.

That same day, the State issued an administrative Seal Order to Sterigenics pursuant to § 34(b) of the Illinois Environmental Protection Act (Section 34(b)). Section 34(b) provides the State with certain remedies in the case of emergency conditions or an imminent and substantial endangerment to the public health or welfare or the environment. The order required Sterigenics to seal all storage containers of ethylene oxide due to the presence of high concentrations of a known carcinogen in the area surrounding Sterigenics.

In response to the Seal Order, Sterigenics filed a two-count complaint in federal court against the State, alleging: 1) the Seal Order did not satisfy procedural due process requirements; and 2) the Seal Order constituted an improper use of Section 34(b). In the complaint, Sterigenics argued the Seal Order sought essentially the same relief as the pending state action, and as a result, the Seal Order constituted an attempt to circumvent the regulatory and judicial process.

Sterigenics also sought a temporary restraining order and preliminary and permanent injunction against the State and the Seal Order.

The Motion for Temporary Restraining Order

A temporary restraining order or preliminary injunction is warranted where a plaintiff establishes a reasonable likelihood of success on the merits, no adequate remedy at law, and irreparable harm absent the order or injunction.

In support of its likelihood of success on the merits, Sterigenics argued that the State's issuance of the Seal Order without any hearing constituted a due process violation, because the State did not claim that storage containers of ethylene oxide constituted an immediate and substantial endangerment in accordance with the Illinois Environmental Protection. Sterigenics also argued the Seal Order was facially deficient and factually unsupported because it made no attempt to show immediate and substantial danger, in light of evidence that the facility was compliant with regulatory obligations. Sterigenics argued the Seal Order threaten the public interest in securing sterile medical devices and would irreparably damage Sterigenics' reputation, business interests, and employees' livelihoods. Finally, Sterigenics argued it had no adequate remedy for these damages.

The court denied Sterigenics' motion for a temporary restraining order, reasoning that Sterigenics failed to show a reasonable likelihood of success on the merits. First, the court reasoned the due process claim lacked merit because the proper focus of Sterigenics' due process claim is not whether a party received due process under a statutory scheme, but whether the statutory procedure itself was incapable of affording due process. The court concluded that the Illinois Environmental Protection Act afforded due process through administrative and judicial review of the Seal Order. Second, the court determined that the Eleventh Amendment prohibits a federal court from enjoining a state agency or official on the basis of state law.

Sterigenics' motions for preliminary and permanent injunctions and the State's motion to dismiss were deferred for a later date.

Conclusion and Implications

This case illustrates the tension between a person's due process rights to undertake activities in apparent compliance with a Clean Air Act permit and a regulatory agency's authority to immediately stop permitted activities when a new study shows those activities may be harmful to humans and the environment. The sufficiency of pre- and post-deprivation hearings may become key due process considerations in this and similar cases.
(Rebecca Andrews)

DISTRICT COURT FINDS BLM'S FAILURE TO QUANTIFY GREENHOUSE GAS EMISSIONS PRIOR TO AUTHORIZATION OF OIL AND GAS LEASES VIOLATED NEPA

WildEarth Guardians, et al. v. Zinke, et al., ___F.Supp.3d___, Case No. 16-1724 (D. D.C. Mar 19, 2019).

On March 19, 2019, in *WildEarth Guardians, et al. v. Zinke, et al.* U.S. District Judge Rudolph Contreras of the U.S. District Court for the District of Columbia held that the U.S. Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA) when it authorized oil and gas leases on federal land without adequately quantifying climate change impacts of the oil and gas leasing. The court granted in part plaintiffs' motion for summary judgment and remanded the NEPA documents at issue to the BLM "so that BLM may satisfy its NEPA obligations in the manner described [in the court's order]."

Background

Plaintiffs WildEarth Guardians and Physicians for Social Responsibility challenged BLM's approval and issuance of 473 oil and gas leases, issued through 11 different lease sales, covering over 460,000 acres of land in Wyoming, Utah, and Colorado. The parties agreed to first brief the merits of plaintiffs' claims concerning the Wyoming leasing decisions, to be followed by briefing on the Utah and Colorado leasing decisions. The court's March 19, 2019 decision addressed the Wyoming lease sales.

As summarized by the court, the BLM's authorization of oil and gas development on federal lands is governed by the Federal Land Policy and Management Act, NEPA, and BLM's Land Use Planning Handbook, and involves the following three stages: 1) Land Use Planning Stage; 2) Leasing Stage; and 3) Drilling Stage. In this case, the plaintiffs challenged BLM's failure to comply with NEPA at the Leasing Stage.

Under NEPA, federal agencies must "consider the environmental consequences of their actions" and prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." (42 U.S.C. §4332(C).) BLM determined that the lease sales at issue did not require issuance of EISs and instead issued Environmental Assessments (EA) and Findings of No Significant Impacts (FONSI). Plaintiffs alleged that the EAs and FONSIs:

> failed to sufficiently account for the greenhouse gas (GHG) emissions that would be generated by oil and gas development on the leased parcels.

The court ultimately agreed.

The District Court's Decision

BLM's NEPA Analysis of Potential GHG Emissions Was Inadequate

The court concluded that:

> . . .BLM did not take a hard look at drilling-related and downstream GHG emissions from the leased parcels, and it failed to sufficiently compare those emissions to regional and national emissions. These shortcomings also rendered the challenged FONSIs deficient, because the FONSIs could not convincingly state that BLMs leasing decisions would not significantly affect the quality of the environment.

First, the court summarized the general principle under NEPA that:

> . . .an agency cannot defer analyzing the reasonably foreseeable environmental impacts of an activity past the point when that activity can be precluded.

Because the BLM cannot preclude oil and gas drilling after having sold leases authorizing such drilling, it cannot defer more detailed environmental analysis until a later time. "While it may be true that after the leasing stage BLM can impose conditions to limit and mitigate GHG emissions and other environmental impacts, . . .the leasing stage is the point of no return with respect to emissions. Thus, in issuing the leases BLM 'made an irrevocable commitment to allow some' GHG emissions" and must "fully analyze the reasonably foreseeable impacts of those emissions at the leasing stage."

Although the BLM was not required to analyze the site-specific environmental impacts of individual drilling projects, given that BLM could not reasonably foresee the projects to be undertaken on specific leased parcels at the Leasing Stage, it was required quantify drilling-related GHG emissions in the aggregate, across the leased parcels as a whole:

> BLM had at its disposal estimates of (1) the number of wells to be developed; (2) the GHG emissions produced by each well; (3) the GHG emissions produced by all wells overseen by certain field offices; and (4) the GHG emissions produced by all wells in the state. With this data, BLM could have reasonably forecasted, by multiple methods, the GHG emissions to be produced by wells on the leased parcels.

In addition to drilling-related GHG emissions, BLM was also required to evaluate the potential indirect effects associated with the leases, namely, the GHG emissions generated by the downstream use of oil and gas produced from the leased parcels. Under NEPA, an agency must evaluate the indirect effects of a proposed action "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." (40 C.F.R. §1508.8(b).) The court concluded that:

> . . .the lease sales are a 'legally relevant cause' of downstream GHG emissions, and BLM was required to consider those emissions as indirect effects of oil and gas leasing.

Although the court required BLM to evaluate on remand whether quantification of emissions from downstream oil and gas use is possible, it did not mandate such quantification, as it did with respect to drilling-related emissions.

Finally, the court agreed with plaintiffs that the BLM's failure to quantify GHG emissions rendered the EA's cumulative impacts analysis inadequate:

> Without access to a data-driven comparison of GHG emissions from the leased parcels to regional and national GHG emissions, the public and agency decisionmakers had no context for the EA's conclusions that GHG emissions from the leased parcels would represent only an 'incremental' contribution to climate change.

Conclusion and Implications

Rather than vacating the leases, the court elected to remand the NEPA documents to the BLM. "BLM's NEPA violation consists merely of a failure to fully discuss the environmental effects of those lease sales; nothing in the record indicates that on remand the agency will necessarily fail to justify its decisions to issue EAs and FONSIs." However, the court did enjoin BLM from authorizing any new drilling on the lands subject to the Wyoming leases until "BLM sufficiently explains its conclusion that the Wyoming Lease Sales did not significantly affect the environment." (Nicole Martin)

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