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

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FEATURE ARTICLE

CALIFORNIA WEIGHS IN ON WATER QUALITY

By Clark Morrison and Scott Birkey

On April 2, the State Water Resources Control Board (SWRCB) adopted sweeping new regulations for the protection of wetlands and other waters of the State of California. The regulations, carrying the ungainly title, *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State* (collectively: Procedures), will become effective nine months following the completion of review by the California Office of Administrative Law. Once effective, the Procedures will layer on additional complexity to an already onerous permitting regime for the fill of wetlands and other waters in California.

The Procedures include two principal parts. The first is a statewide definition of the term "wetlands" that includes certain features that are not treated as wetlands under the federal Clean Water Act. The second is a set of rigorous permitting standards and application requirements to be implemented by the Regional Water Quality Control Boards (RWQCBs) in their review of applications for "Section 401 Certifications" and "Waste Discharge Requirements" under the Porter-Cologne Water Quality Control Act. The Procedures are intended for inclusion in the state's *Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California*.

Background

The Procedures were adopted in the context of the Trump administration's proposed roll-back of federal wetland jurisdiction under § 404 of the Clean Water Act. Although California originally proposed adopting its own wetland definition during Governor Wilson's administration—and the Procedures had been in the works for ten years—it was the Trump administration's proposed roll-back that provided the impetus for final adoption.

Following the U.S. Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County* (*SWANCC*), which eliminated federal jurisdiction over isolated non-navigable waters, the SWRCB began to assert state jurisdiction over those features. Until then, the RWQCBs generally regulated wetland fill activities only when presented with a proposed U.S. Army Corps of Engineers (Corps) permit requiring state certification under § 401 of the Clean Water Act. When the Corps stopped regulating isolated wetlands and other waters, the RWQCBs lost their regulatory hook under § 401. In order to "fill the *SWANCC* gap," as many of us described it, the RWQCBs began to regulate the fill of these features, independently, through the issuance of Waste Discharge Requirements (WDRs) under their Porter-Cologne authority.

It eventually became apparent that the RWQCBs had no consistent standards to apply in either the § 401 certification or WDR processes. Accordingly, in 2008, the SWRCB directed its staff to develop a state-wide wetlands definition and a set of permit standards for the discharge of dredged or fill material to wetlands and other "waters of the State" (*i.e.*, the Procedures). The process to develop the Procedures was slow and painstaking. In fits and starts over the next nine years, the SWRCB released drafts of the Procedures and other materials related to the Procedures.

Then came the national election in 2016 and the arrival of a new federal administration. Shortly after being elected, President Trump issued an Executive Order on February 28, 2107, signaling his intent to "repeal and replace" an Obama-era regulation that defined federal wetland jurisdiction quite broadly based upon Justice Kennedy's opinion in the Supreme Court's decision, *Rapanos v. United States*, 547 U.S. 715 (2006); *See*, https://www.supremecourt.gov/opinions/05pdf/04-1034.pdf.

The President's proposal, published in the Federal Register on February 14, 2019, would limit federal jurisdiction under the Clean Water Act, essentially to traditional navigable waters, their tributaries, and abutting wetlands. The comment period on the new definition closed on April 15, 2019.

The Executive Order created a flurry of activity at the SWRCB. Later in 2017, the SWRCB issued an updated version of the Procedures and initiated a renewed stakeholder and hearing process that became fairly intense in late 2018 and continued until final board action on April 2, 2019.

The Wetlands Definition

Much of the public debate focused on the Procedures' inclusion of a wetland definition that is broader than the federal definition. Under the federal definition, an area is a wetland if it satisfies three parameters: wetland hydrology; wetland (hydric) soils; and, *[under normal circumstances,]* the presence of wetland (hydrophytic) plants in certain concentrations. Under the state's definition, an area will be classified as a wetland if it exhibits wetland hydrology and wetland soils under normal circumstances, even if the area lacks vegetation (although if the area does exhibit vegetation, that vegetation must by dominated by hydrophytes to be considered jurisdictional). Think mudflats, playa pools and similar features. As such, the state definition eschews the three-parameter test in favor of a two-parameter test, jettisoning the requirement that hydrophytic vegetation be present before a feature can be considered a wetland.

The state's expanded wetlands definition caused considerable consternation throughout the regulated community, including homebuilders, mining interests, agriculture and public water and flood control agencies. Not only does the definition expand wetland protections to new areas, but it also creates the potential for confusion and inconsistency in the permitting of projects that include federal wetlands and other waters of the United States (WOTUS) and non-federal wetlands and other waters or the State (WOTS). That is, even though the state and federal government will apply the same technical manuals (*i.e.*, the 1987 Wetlands Delineation Manual and the Regional Supplements; *See*, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/) in determining whether an area meets certain parameters, the ultimate jurisdictional calls and applicable permits standards for any particular project or area may be quite different as between the two levels of government. Unfortunately, industry's efforts to push back on the state's proposed two-parameter definition were effectively countered by the environmental community, which expressed considerable disappointment in the state's failure to adopt a one-parameter definition.

To make matters more confusing, the Procedures state that "artificial wetlands" are considered waters of the State except in very narrow circumstances. In particular, any artificial wetland greater than one acre in size is jurisdictional unless it *currently* used and maintained primarily for one of eleven identified purposes (various types of water and stormwater treatment purposes, crop irrigation or stock watering, fire suppression, industrial processing or cooling, active surface mining, log storage, groundwater recharge, and fields flooded for rice growing). These identified exemptions for artificial wetlands are subject to some additional specific limitations and, in any case, are considerably narrower than those provided by the Corps even under the expansive wetland regulations promulgated by the Obama administration.

Making matters worse, the problem of different—and in some instances potentially irreconcilable—state and federal wetland definitions are dwarfed by broader questions of state and federal jurisdiction over waters under the Clean Water Act (which is limited by questions of isolation and navigability at issue in *SWANCC*, *Rapanos* and both the Obama-era and Trump's newly proposed regulations). Given that the Procedures establish a permitting program for all waters of the State, and not just wetlands, one might reasonably ask whether the parameter wetlands definition really makes that much difference. In fact, there are only a couple of places in the Procedures where wetlands are treated more strictly than are

other waters (one of which is a minimum 1:1 replacement mitigation ratio, which in most cases will be fairly meaningless given the Procedures' overall "no net loss" mitigation standard).

Permitting Standards and Procedures

As described above, the Procedures establish permitting requirements that will be implemented through the state's existing § 401 certification and WDR processes, and do not supplant those regulations. They will, however, make things more challenging from an applicant's perspective. A few examples follow.

Alternatives Analyses

Under federal regulations known as the "Section 404(b)(1) Guidelines," an applicant has the burden of demonstrating that his or her proposed project is the "least environmentally damaging practicable alternative," or "LEDPA." For most projects, the Guidelines presume that a proposed project is not the LEDPA. That is, the Guidelines presume that there are available and practicable alternatives to the project with less impact on the aquatic environment. To rebut this presumption and obtain a permit, an applicant may have to prepare a very detailed and complex "LEDPA analysis" relying on the services of biologists, civil engineers, attorneys and, in some circumstances, land economists. These analyses, and subsequent negotiations with the agencies, often take years to complete even for small to moderately-sized projects. Typically, the LEDPA requirement is the biggest hurdle to permit issuance.

The Procedures adopt the § 404(b)(1) Guidelines, with modifications, for covered projects. The thresholds triggering preparation of a LEDPA analysis under the Procedures are quite low. Any project filling more than 1/10 acre or 300 lineal feet of waters must prepare an on-site alternatives analysis. Any project filling more than 2/10 acre or 300 lineal feet of waters must prepare both an on-site and off-site LEDPA analysis. This is in contrast to the Corps and its permitting requirements, which in most cases does not require a LEDPA analysis for small projects falling within the scope of its nationwide permit program, including its nationwide permits for Residential Development (NWP 29) and for Commercial and Institutional Developments (NWP 39). The Procedures contain a nominal exemption for such projects, but the exemption is not available for projects affecting wetlands or rare, threatened or endangered species habitat, making it almost meaningless.

The San Francisco RWQCB has been requiring LEDPA analyses for some time now, so applicants in the San Francisco Bay Area may not see much change as a result of this requirement. In other regions of the state, the RWQCBs will have a significant learning curve with respect to LEDPA analyses as the Procedures begin to kick in. Although the SWRCB intends to provide additional guidance and training for the Regions, given the already understaffed status of the Regions, this new LEDPA requirement likely will result in some agency growing pains that project applicants may suffer.

Compensatory Mitigation

The Procedures require a mitigation plan to demonstrate that project-related impacts, together with mitigation, will not "cause a net loss of the overall abundance, diversity, and condition of aquatic resources" on a watershed basis. This determination must be made based upon a potentially very complex "watershed profile" prepared by the applicant. This watershed profile must include, for example:

> . . .information sufficient to direct, secondary (indirect) and cumulative impacts of [the] project and factors that may favor or hinder the success of compensatory mitigation projects and help define watershed goals. It may include such things as current trends in habitat loss or conservation, cumulative impacts of past development activities, current development trends, the presence and need of sensitive species, and chronic environmental problems and site conditions such as flooding or poor water quality.

Generally speaking, projects whose watershed profiles are developed from an existing watershed plan will be subject to more favorable mitigation ratios. Fortunately, during final negotiations, water board staff agreed to language making clear that regional habitat conservation plans meeting certain criteria may serve as a watershed plan for the purpose of determining compensatory mitigation.

Although the Procedures' no net loss requirement will drive the amount, type and location of

compensatory mitigation in most circumstances, the environmental community was successful in lobbying the SWRCB to include a minimum 1:1 mitigation requirement for streams and wetlands, measured in length or area. This 1:1 requirement may be satisfied by any form of mitigation (*e.g.*, preservation, enhancement, restoration, creation), although restoration is preferred. To the extent that the 1:1 mitigation provided does not meet the "no net loss" standard, additional mitigation will be required.

Application Requirements

The Procedures' application requirements request much detailed information, which will make it difficult to secure "deemed complete" application status under the Permit Streamlining Act. In addition to the material already required under the RWQCB's Title 23 regulations, applicants must supply: 1) state and federal (if any) delineation materials, 2) a detailed project description and an impact assessment down to the nearest hundredth of an acre and lineal foot, and 3) a complete LEDPA analysis. The RWQCBs may also require, among other things, a detailed compensatory mitigation plan and water quality monitoring plan.

A Note on Agriculture

Agricultural interests were heavily involved in development of the Procedures and, in the final few months, were able gain some concessions. These included a procedural exemption for prior converted cropland consistent with federal law and procedural exemptions for certain agricultural features as described in (and roughly paraphrased from) the Obama-era WOTUS regulations, including exemptions for ditches; artificially irrigated areas that would revert to dry land should irrigation cease; and features such as farm and stock watering ponds, irrigation ponds, and settling basins. The rice growers secured additional protective language to limit the potential for unnecessary regulation arising out of the fact that rice farms may exhibit wetland features for substantial parts of the year. Although agricultural interests obtained these procedural exemptions, they were unable to obtain the SWRCB's agreement to exempt farmed areas from the definition of waters of the State. They did stave off, however, rigorous efforts by the environmental community to secure permit requirements for crop conversions in agricultural areas.

Conclusion and Implications

The authors were heavily involved in the final stakeholder negotiations in late 2018 and early 2019, during which the regulated community was able to secure numerous improvements to the Procedures, adding some clarity and filing down a few of the program's pointier teeth. As a result of hard work by staff at the State Water Resources Control Board and stakeholders—particularly the building industry, agricultural and mining interests, water agencies and the environmental community—and despite the frustrations (and occasionally tempers) that arose during those negotiations, the final product was measurably better than the draft circulated in 2017.

Nonetheless, the program will present numerous challenges to the Regional Water Quality Control Boards and project applicants as the Procedures are phased in. Most notable of these are: 1) the potential for inconsistencies between the state and federal wetland programs arising out of their different jurisdictional reaches and the agencies' likely differing interpretations of regulatory requirements, even where state and federal regulations have been coordinated; and 2) the lack of resources and training for the RWQCBs to implement the program. Although the SWRCB has promised both additional resources and training, it is the authors' view that the board is vastly underestimating the complexities associated with this new program.

The water agencies and regulated community will have some time to prepare for the "watershed" moment when the Procedures become law. As noted above, the Procedures will not become effective until nine months following review by the Office of Administrative Law. Even then, the SWRCB agreed to language requested by the building industry grandfathering in legitimate (*i.e.*, non-sham) § 401 certification and WDR applications submitted before the effective date, even if those applications are not yet complete. In the meantime, the SWRCB's final resolution directed staff to 1) develop (in coordination with stakeholders) implementation guidance for potential applicants and conduct staff training prior to the Procedures; effective date; and 2) work with stakeholders, other agencies and scientific organizations to develop best practices for preparation of

certain climate change analyses required by the Procedures. The resolution also directs staff to provide periodic progress reports to the State Water Resources Control Board regarding implementation issues, including updates regarding application processing timelines and environmental performance measures.

For more information on the Procedures, *see*, https://www.waterboards.ca.gov/press_room/press_releases/2019/pr04022019_swrcb_dredge_fill.pdf

Postscript: On May 1, 2019, the San Joaquin Tributaries Authority, a coalition of water agencies whose members include the Modesto Irrigation District, Turlock Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, and the City and County of San Francisco, filed suit in the Sacramento Superior Court, against the Procedures, alleging among other things that the Procedures improperly expand the SWRCB's jurisdictional reach. It remains to be seen whether and how this litigation will affect the ultimate implementation of the Procedures.

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ENVIRONMENTAL NEWS

FLORIDA MAKES SCIENCE PARAMOUNT IN WATER RESOURCES, WATER QUALITY AND SEA LEVEL RISE CONCERNS

Florida's Governor Ron DeSantis, on the campaign trail, has been pushing for improvements to water resources and water quality improvements throughout the state. The Governor has now, via Executive Order, created a "Science Officer" who will be charged with these tasks. He also will soon create the position of Chief Resilience Officer to address other related issues like sea level rise from climate change.

Background

In the six months since he took office Florida's Governor, Ron DeSantis, has surprised many Floridians by backing his campaign expressions of concern about the importance of environmental protection with pledges to expend upwards of $2.5 billion on projects to preserve Lake Okeechobee and improve the state's water quality and water resources.

The Office of Environmental Accountability

The Governor had spoken of putting science as the basis on which program decisions would be made. In April he appointed the first-ever Science Officer for the state. The man he chose for the role is Dr. Thomas K. Frazer. Dr. Frazer will lead the newly established Office of Environmental Accountability and Transparency within the State's Department of Environmental Protection.

According to the DeSantis administration:

> Dr. Frazer will guide funding and strategies to address priority environmental issues, as well as, but not limited to, making recommendations for increased enforcement of environmental laws necessary to improve water quality within key waterbodies.

Dr. Frazer, a water ecologist, formerly was the Director of the University of Florida's School of Natural Resources and Environment. And formerly served as Acting Director of the UF Water Institute. Before this position, he served as Associate Director of the School of Forest Resources and Conservation and the Leader of the Fisheries and Aquatic Sciences Program. At UF, his research focused on the effects of anthropogenic activities on the ecology of both freshwater and marine ecosystems.

On May 17, the DEP invited Florida journalists to a press briefing in order to ask questions of Dr. Frazer. Together with Noah Valenstein, the Director of Department of Environmental Protection, Frazer indicated that one of the most important priorities for him is mitigating the problem of algae in Florida's waters. He noted the Governor's program establishes a Blue-Green Algae Task Force, charged with focusing on expediting reduction of the adverse impacts of blue-green algae blooms. This task force of a half dozen or so experts will identify priority projects for funding that are based on scientific-data. There will be a push to acquire more data immediately through existing restoration programs in order to facilitate informed decision-making by the Task Force in formulating an effective plan.

Clean Air and Climate Change-Related Sea Level Rise

When asked whether greenhouse gases are a priority, both Dr. Frazer and Director Valenstein responded that sea level rise is a priority, but that the main focus of the Department of Environmental Protection is on nitty-gritty clean air and clean water issues. Valenstein noted that a separate position, "Chief Resilience Officer," will be filled soon by the Governor once applications for it are fully reviewed. That position, through a beefed-up Division of Coastal Protection will focus on improving coastal resilience.

Small Strategic Projects

Dr. Frazer indicated that the $680 million available this year from the legislative session just ended will help jump-start a number of small but strategically important projects around the state, to begin the restoration process for water bodies affected by the blue-

green algae. The Task Force is expected to convene in June. It will formulate longer term strategy recommendations. It will be meeting in a venue where the public is able to attend.

Conclusion and Implications

Dr. Frazer and the DeSantis administration will have to deal with resistance from Florida's water management districts. These regional districts throughout the state have the direct authority to manage the flow of water and its availability. The Governor has already clashed with some district officials regarding the need to immediately build additional reservoir capacity near Lake Okeechobee to assure freshwater availability for future drinking water needs of the population. The administration wishes to see two new reservoirs constructed, but actions of the South Florida Water Management District have, so far, been contrary to that vision. The Governor has asked for resignations of some commissioners, including a number appointed by his predecessor, Rick Scott. His Executive Order urged better transparency and accountability from the Water Districts. A copy of the DeSantis Executive Order on the priority of water quality efforts can be found at https://www.flgov.com/wp-content/uploads/orders/2019/EO_19-12.pdf
(Harvey M. Sheldon)

REGULATORY DEVELOPMENTS

EPA ISSUES INTERPRETIVE STATEMENT ON APPLICATION OF THE CLEAN WATER ACT TO POINT SOURCE DISCHARGES TO GROUNDWATER

The U.S. Environmental Protection Agency (EPA) issued a statement (Statement) interpreting the application of the federal Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permit requirements to point sources that discharge through hydrologically connected groundwater. The Statement repudiates the "direct hydrologic connection" theory EPA advanced fewer than three years earlier in the Ninth Circuit in *County of Maui v. Hawaii Wildlife Fund et al.*, 886 F.3d 737 (9th Cir. 2018), petition granted Case No. 18-260 (Feb. 19, 2019) (*Maui*). [84 Fed. Reg. 16,810 (Apr. 23, 2019).]

Background

Relevant to EPA's Interpretive Statement, § 301 of the CWA prohibits the discharge of any pollutant by any person except pursuant to an NPDES permit. "Discharge of a pollutant" means:

> (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft . . . [and] . . .navigable waters. . .[as]. . .the waters of the United States, including the territorial seas. *Id.* § 1362(7), (12).

Historically, NPDES permit programs have not applied to most discharges to groundwater. In *Maui*, however, the Ninth Circuit determined the County of Maui was required to obtain an NPDES permit for injection wells that discharged to groundwater where the groundwater had a direct hydrologic connection to the Pacific Ocean and the pollutants were "fairly traceable" from the wells to the ocean "such that the discharge [was] the functional equivalent of a discharge into the navigable water." In its *amicus* brief in *Maui*, EPA urged the Ninth Circuit to reach this ruling, reiterating its "longstanding position" that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements.

In February 2018, only 20 days after the Ninth Circuit issued its opinion in *Maui*, EPA solicited comments on whether it should consider clarifying or revising its position on the direct hydrologic connection theory of liability. Later in 2018, the Fourth Circuit Court of Appeals issued a decision aligned with *Maui*, and the Sixth Circuit issued two decisions rejecting the Fourth and Ninth circuits' analysis.

On February 19, 2019, the U.S. Supreme Court granted the County's petition for *certiorari* in *Maui* on the question of:

> . . .[w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

EPA's Interpretative Statement

On April 23, 2019, the EPA released its Interpretive Statement concluding that the CWA does not regulate the discharge of pollutants to groundwater. In explaining this conclusion, EPA reviewed the CWA's structure, text, legislative history, case law, and public policy, finding that each supports its interpretation.

On structure, EPA noted that:

> . . .[t]he CWA approaches restoration and protection of the Nation's waters as a partnership between states and the federal government, assigning certain functions to each in striking the balance of the statute's overall regulatory scheme.

Specifically, the CWA governs discharges from a

point source, defined as "any discernible, confined and discrete conveyance," while Congress reserved the regulation of nonpoint source pollution exclusively to the states.

Holistic Approach in Reading Section 301

As to text, EPA explained that a "holistic approach" is necessary, and § 301's broad prohibition against the discharge of pollutants to jurisdictional waters must be read in the context of the specific provisions dealing with groundwater. The CWA generally describes four categories of waters: navigable waters, waters of the contiguous zone, the ocean, and groundwater, and that the CWA's operative NPDES regulatory provisions only apply to the first three. In contrast, the CWA's provisions related to groundwater pertain to EPA providing information, guidance, and funding to states in order to enable states to regulate groundwater pollution. EPA also relied on the fact that Congress left groundwater out of the definition of "effluent limitations," and the important role effluent limitations occupy in NPDES permit programs.

In discussing the CWA's legislative history, EPA focused on the numerous instances in which Congressmen and Senators acknowledged the hydrological connection between surface water and groundwater, but nonetheless rejected amendments that would have explicitly brought discharges to groundwater under the NPDES program.

Case Law

Regarding relevant case law, EPA acknowledged the view expressed in the Interpretive Statement is difficult, if not impossible, to reconcile with its previous positions. Addressing its earlier support for the direct hydrologic connection theory in *Maui*, EPA explained that its amicus brief failed to take into account Congress' unique treatment of groundwater in the CWA when interpreting the definition of discharge of a pollutant and improperly equated releases of pollutants to groundwater with releases of pollutants from a point source to surface water that occur above ground. EPA further reasoned that the CWA and its legislative history indicate Congress intended all discharges to groundwater to be left to state regulation and control, regardless of any future contribution of pollutants to jurisdictional surface waters.

EPA also relied on cases from the Fifth and Seventh circuits that, in its view, took the necessary "holistic" approach in interpreting the statute and legislative history to hold that the CWA's coverage does not include groundwater pollution.

A 'Mosaic of Laws and Regulations'

Finally, responding to comments and criticism that its interpretation creates a massive enforcement loophole that could eviscerate the CWA's explicit purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," EPA explained that its position "does not preclude states from regulating these releases under state law," and that other federal environmental protection laws govern discharges to groundwater omitted from the CWA, including the Safe Drinking Water Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act. Thus, EPA concluded these statutes and state programs "form a mosaic of laws and regulations that provide mechanisms and tools for EPA, states, and the public to ensure the protection of groundwater quality, and to minimize related impacts to surface waters."

Conclusion and Implications

EPA's course reversal reflected in the Interpretive Statement comes as the U.S. Supreme Court considers a Circuit split on the issue of point source discharges through groundwater. It remains to be seen whether the Supreme Court adopts one of the EPA's positions. For more information, *see*, https://www.govinfo.gov/content/pkg/FR-2019-04-23/pdf/2019-08063.pdf

(Dakotah Benjamin, Rebecca Andrews)

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.

Civil Enforcement Actions and Settlements—Air Quality

•April 16, 2019—The EPA announced a settlement with Advance Manufacturing Group U.S.A. Inc., an automotive parts manufacturer and distributor doing business as OBX Racing Sports, for violating the federal Clean Air Act. EPA alleges the company manufactured and sold auto aftermarket parts known as defeat devices, which bypass or render inoperative required emissions control systems. OBX Racing Sports, based in Union City, California, will pay a penalty of $25,000. Between 2015 and 2017, OBX Racing Sports sold 1,551 aftermarket products designed to defeat the emissions control systems of gasoline-powered cars. These systems increase emissions of harmful pollutants, including nitrogen oxides (NOx), which are associated with health problems, including heart and lung ailments like chronic bronchitis and asthma. Cars and trucks manufactured today emit far less pollution than older vehicles. This is made possible through careful engine calibrations and the use of catalytic converters in the exhaust system. Aftermarket defeat devices bypass these controls and cause vehicles to emit higher levels of emissions. EPA testing has shown that defeat devices can increase a vehicle's NOx emissions substantially. NOx pollution contributes to the formation of harmful smog and soot.

•May 13, 2019—The U.S. Environmental Protection Agency (EPA) has reached a settlement with Producers Dairy Foods Inc. over chemical safety and risk management violations at its facility in Fresno, California, Producers Dairy Foods, one of the largest family-owned and operated dairies in the West, has agreed to pay a $89,960 civil penalty and make improvements to its risk management practices. In addition, the company will purchase more than $26,000 in emergency response equipment for the Fresno City Fire Department. This case is part of EPA's National Compliance Initiative to reduce risks of accidental releases at anhydrous ammonia refrigeration facilities. Producers Dairy Foods' industrial refrigeration system uses large quantities of anhydrous ammonia, a toxic chemical highly corrosive to skin, eyes and lungs. In 2018, EPA inspectors found violations of the Clean Air Act's Risk Management Plan regulations at the Fresno facility. The violations included deficiencies in the plant's process safety information, pipe labeling, operating procedures, mechanical integrity program, and follow-up on compliance audits findings. The company also failed to submit annual chemical inventory on the amount of ammonia at the facility, in violation of the Emergency Planning and Community Right-to-Know Act. In addition to the penalty, Producers Dairy Foods is required to complete a supplemental environmental project to purchase and provide approximately $26,300 worth of emergency response instruments, including protective, communications, and rescue equipment to the Fresno City Fire Department. This equipment will improve the department's ability to respond to a hazardous materials emergency such as an ammonia release. The Clean Air Act's Risk Management Program requires facilities with regulated hazardous substances to document hazard assessments detailing the potential effects of an accidental release and a prevention program that includes safety precautions and maintenance, monitoring, and employee training measures.

Civil Enforcement Actions and Settlements—Water Quality

•April 15, 2019—The U.S. Environmental Protection Agency (EPA) announced that StarKist Co.

and its subsidiary, Starkist Samoa Co., will be assessed $84,500 in penalties for violating the terms of a 2018 settlement designed to remedy deficiencies at their tuna processing facility in American Samoa to achieve environmental compliance. StarKist violated the 2018 settlement on multiple occasions when it made unauthorized discharges from the facility to Pago Pago Harbor, including one incident where StarKist discharged 80,000 gallons of wastewater to the inner harbor. The company also violated the consent decree terms on 27 days when wastewater was routed around one of the required treatment measures to bypass a step in the wastewater treatment process. Under the 2018 settlement, StarKist paid a $6.5 million penalty to resolve violations of federal environmental laws. The company was also required to make upgrades to reduce water pollution and the risk of releases of hazardous substances. In addition, StarKist agreed to provide American Samoa with $88,000 in emergency equipment for responding to chemical releases. Starkist Samoa Co. owns and operates the tuna processing facility, located on Route 1 on the Island of Tutuila in American Samoa. Starkist Samoa Co. is a subsidiary of StarKist Co., which is owned by Korean company Dongwon Industries. StarKist Co. is the world's largest supplier of canned tuna. Its American Samoa facility processes and cans tuna for human consumption and processes fish byproducts into fishmeal and fish oil.

• April 29, 2019—The U.S. Environmental Protection Agency (EPA) has reached an agreement with Asanuma Kokuba Joint Venture and Nippo USA Inc. to resolve stormwater violations from their Hotel Nikko expansion—the Tsubaki Tower project—which lacked controls to prevent discharge of pollutants into Tumon Bay and the Pacific Ocean in Guam. An EPA inspection found the project's construction companies were operating without the required Clean Water Act Stormwater Construction General Permit and had an unauthorized non-stormwater discharge from the construction site at the time of inspection. EPA also found that the best management practices that were in place to control the discharge of stormwater were not properly implemented. The companies will pay a settlement of $129,048 and have already obtained the proper permit and corrected the site's stormwater controls. Many construction sites have operations that disturb soil and include areas for maintenance and cleaning of equipment. Rainfall runoff flowing through such sites can pick up pollutants, such as sediment, metals from exposed steel, and other chemicals found in construction products, and transport them directly to nearby waterways, degrading water quality and damaging coral reefs. Federal regulations require construction sites to obtain coverage under EPA's Stormwater Construction General Permit by implementing best management practices to keep pollutants out of stormwater, preventing non-stormwater discharges from the site, and following a site-specific stormwater pollution control plan. The settlement is subject to a 30-day comment period before becoming final.

• April 25, 2019—The U.S. Environmental Protection Agency (EPA) reached a settlement agreement with Denbury Onshore, LLC to resolve federal Clean Water Act (CWA) and Oil Pollution Act (OPA) violations in Alabama and Mississippi. The State of Mississippi is a co-plaintiff under the consent decree in which Denbury has agreed to implement an extensive injunctive relief package, including a risk-based program designed to prevent future oil spills, and pay a civil penalty of $3.5 million. Denbury is the owner and operator of onshore oil production facilities located in the Gulf Coast and Rocky Mountain regions of the United States. Denbury's facilities in Region 4 are in Alabama and Mississippi. The company's business model involves acquiring older oil fields and extending the life of the fields using advanced engineering extraction techniques. EPA is pursuing penalties for 26 CWA discharges that occurred between August 8, 2008 and November 11, 2015 and resulted in approximately 7,000 barrels of oil and produced water discharged to the environment. The 26 violations took place at ten different Denbury facilities in Region 4—one facility in Alabama and nine facilities in Mississippi. Most of the discharges were the result of internal corrosion of pipes and flow lines, breaks in old lines, and failed equipment.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

• April 18, 2019— The U.S. Environmental Protection Agency (EPA) and the Department of Justice announced a settlement with Honeywell International Inc. and International Paper Co. for

cleanup of contaminated soils and sediments at the LCP-Holtrachem plant in Riegelwood, Columbus County, North Carolina. The United States brought its action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund Law, and the Resource Conservation and Recovery Act (RCRA). The LCP-Holtrachem Superfund Site is about 24 acres adjacent to the Cape Fear River at 636 John Riegel Road. From 1963 to 2000, the LCP-Holtrachem plant made chemicals such as sodium hydroxide, liquid chlorine, hydrogen gas, liquid bleach and hydrochloric acid using a mercury cell process. According to the complaint filed simultaneously with the settlement today in the Eastern District of North Carolina, the Honeywell and International Paper are liable for historic industrial discharges of metals, including mercury, and polychlorinated biphenyls (PCBs) at the site. Under the proposed settlement, Honeywell and International Paper will address contaminated soils and sediments through a combination of in-situ treatment, on-site storage, and off-site treatment and disposal. The two companies will also reimburse the United States for all past and future costs associated with the cleanup. In exchange, the two companies will receive a covenant not to sue and protection from suit by third parties. The two companies previously performed investigations and preliminary cleanup work under prior agreements with EPA. EPA uses the Superfund Alternative Approach (SAA) for the site, so it has not been proposed for addition to the National Priorities List (NPL). Under the SAA, EPA uses the same investigation and cleanup process and standards it uses for NPL sites, and saves the time and resources associated with NPL listing. Honeywell is the current owner of the site, which is contiguous to about 1,300 acres of land owned by International Paper. Since 1951, International Paper has operated a bleached kraft paper mill there, which manufactures paperboard from wood fiber. International Paper used many of the chemicals manufactured at the LCP-Holtrachem plant. Hazardous substances from the LCP-Holtrachem plant were disposed of at the International Paper property and are being addressed under the settlement. The consent decree is subject to a 30-day public comment period and final approval by the court.

•May 15, 2019—the U.S. Environmental Protection Agency (EPA) announced an agreement with TFL, Inc., also known as Mega Saver and Tobacco and Phones 4 Less, to pay a civil penalty and upgrade spill monitoring and alarm systems at its gas stations in the Omaha, Nebraska, and Council Bluffs, Iowa, area for violations of the Underground Storage Tank provisions of the Resource Conservation and Recovery Act. TFL, Inc., will pay a penalty of $16,448. In addition to the penalty, the company also agreed to spend $133,000 to upgrade the monitoring and alarm systems at each of its 23 gas stations in the greater Omaha and Council Bluffs area. The new systems will enable fuel leaks at any of these facilities to be reported directly to a central location so an immediate response to the release can be directed. Inspections conducted in 2016 by EPA revealed that at nine gas stations owned by TFL, Inc., the company failed to conduct required inspections or keep records concerning equipment designed to detect leaks from underground storage tanks (USTs) containing gasoline and other petroleum products. The inspections also revealed that TFL, Inc., failed to properly maintain overfill protection at two facilities. Overfill protection is designed to prevent gasoline spills when being pumped into USTs at a gas station. This enforcement action is the result of repeated violations over several years. TFL, Inc., has until March 21, 2020, to complete the upgrade to the monitoring and alarm systems.

Indictments, Convictions and Sentencing

•April 15, 2019— A judgement was entered holding Lawrence Aviation Industries, Inc. (LAI), a former defense contractor, and its long-time owner and CEO, Gerald Cohen, for environmental cleanup costs and penalties under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. As proven at trial, LAI and Cohen, in violation of several environmental laws and regulations, discharged a number of hazardous substances at LAI's Port Jefferson facility on Long Island that could pose threats to human health and the environment. The court found that, in addition to contaminating the LAI facility itself, LAI and Cohen were responsible for a mile-long contaminant plume in the groundwater beneath Port Jefferson. The court's judgment found LAI and Cohen jointly liable for $48,116,024.31 in costs incurred by the U.S. Environmental Protection Agency (EPA) in cleaning

up the site, and imposed civil penalties of $750,000 against both LAI and Cohen, individually, for their failure to comply with requests for information issued by EPA. In a separate, 37-page Memorandum and Order, the court detailed the evidence establishing LAI's and Cohen's long history of disregard for federal, state and county environmental laws. In the early 1980s, for example, after the Suffolk County Department of Health issued a series of recommendations for LAI to come into compliance with various pollution control laws, LAI used a front-end loader to crush 55-gallon drums containing hazardous substances (among more than 1,600 of such drums identified on the property), resulting in a massive discharge of waste directly onto the ground. Samples taken from those drums revealed impermissibly high levels of trichloroethylene (TCE), among other pollutants. Nearly two decades later, in 1999, testing performed by the New York State Department of Environmental Conservation revealed contamination of groundwater and surface water at the site. Thereafter, in March 2000, the site was placed on the National Priorities List. For these and other reasons, the groundwater in the vicinity of the site is not currently used for drinking water. EPA's clean-up of the site, now into its 19th year, has included an exhaustive remedial investigation into the nature and scope of the contamination, various hazardous waste removal and stabilization activities, and the implementation and maintenance of two groundwater treatment systems designed to capture and treat contaminated groundwater. Cohen and LAI were ordered to pay restitution to the EPA of $105,816.

• April 19, 2019—The Department of Justice, the U.S. Environmental Protection Agency (EPA), and the state of Colorado today announced a settlement with Denver-based HighPoint Operating Corporation resolving alleged Clean Air Act violations. The settlement resolves alleged claims that HighPoint violated requirements to reduce volatile organic compounds (VOCs) emissions from its oil and natural gas production operations in the Denver-Julesburg Basin. VOCs are a key component in the formation of ground-level ozone, a pollutant that irritates the lungs, exacerbates diseases such as asthma, and can increase susceptibility to respiratory illnesses, such as pneumonia and bronchitis. As part of the settlement, HighPoint will spend an estimated $3 million to implement measures that will ensure the vapor control systems on its condensate storage tanks are adequately designed and sized and will improve its operation and maintenance practices, monitoring, and inspections. These improvements, including monthly inspections using infrared cameras to better detect and respond in real time to emissions, will significantly reduce VOC emissions. EPA and the state of Colorado estimate that HighPoint's modifications of vapor control system design, improvements to operations and maintenance practices, and increased monitoring will reduce VOC emissions from HighPoint's operations by approximately 350 tons per year. HighPoint will also implement an environmental mitigation project to reduce VOC emissions in the Denver area. HighPoint will install and operate vapor balancing controls to minimize emissions associated with loading of condensate into tank trucks at ten HighPoint well pads. This project will reduce HighPoint's VOC emissions from tank truck load-out by an estimated 50 tons per year. HighPoint will pay the United States a $275,000 civil penalty, and will pay a civil penalty to Colorado and perform a State supplemental environmental project, with a combined value of $275,000. HighPoint will apply $220,000 of the State's portion of the penalty to a supplemental environmental project. This action arose when inspections of HighPoint operations conducted from 2014 to 2017 by EPA and Colorado found VOC emissions from HighPoint's condensate storage tanks. Through these inspections and information requests, EPA and the State of Colorado identified alleged violations of the Colorado State Implementation Plan, Regulation Number 7, due to undersized vapor control systems and inadequate operations and maintenance practices. This settlement covers 50 HighPoint tank systems in Colorado's Denver-Julesburg Basin. The tank systems covered by the settlement are located in an ozone nonattainment area, which means the area does not meet the National Ambient Air Quality Standard set for ozone.

• April 23, 2019—A federal grand jury in Wilmington, Delaware, returned a six-count indictment today charging Chartworld Shipping Corporation, Nederland Shipping Corporation, and Chief Engineer Vasileios Mazarakis with failing to keep accurate pollution control records, falsifying records, obstruction of justice, and witness tampering, the Justice Depart-

ment announced. The charges stem from the falsification of records and other acts designed to cover up from the Coast Guard the overboard discharges of oily mixtures and machinery space bilge water from the Bahamian-flagged cargo vessel, M/V Nederland Reefer. According to the indictment, on Feb. 21, 2019, the M/V Nederland Reefer entered the Port of Delaware Bay with a false and misleading Oil Record Book available for inspection by the U.S. Coast Guard. The Oil Record Book failed to accurately record transfers and discharges of oily wastewater on the vessel. The vessel's management company, Chartworld Shipping Corporation, the vessel's owner, Nederland Shipping Corporation, and the Chief Engineer of the vessel, Greek national Vasileios Mazarakis, are all charged with failing to maintain an accurate oil record book as required by the Act to Prevent Pollution from Ships, a U.S. law which implements the International Convention for the Prevention of Pollution from Ships, commonly known as MARPOL. The defendants were also charged with falsification of records, obstruction of justice, and witness tampering for destroying evidence of the illegal discharges and directing lower level crew members to withhold evidence from the Coast Guard. Finally, the corporate defendants are charged with the failure to report a hazardous condition to the Coast Guard, namely a breach in the hull of the vessel and resulting incursion of seawater into tanks on board the vessel that occurred before the vessel came to port in Delaware.

• April 23, 2019—Following a 14-day jury trial in Harrisburg, Pennsylvania, Ben T. Wootton, of Enola, Pennsylvania, and Race A. Miner, of Buena Vista, Colorado, were found guilty of one count of conspiracy to make false statements to the Environmental Protection Agency (EPA), six counts of making false statements to the EPA, one count of conspiracy to defraud the Internal Revenue Service (IRS), and one count of aiding and assisting in the filing of a false claim with the IRS, announced Assistant Attorney General Jeffrey Bossert Clark of the Justice Department's Environmental and Natural Resources Division (ENRD), Principal Deputy Assistant Attorney General Richard E. Zuckerman of the Justice Department's Tax Division, U.S. Attorney David J. Freed for the Middle District of Pennsylvania, EPA Assistant Administrator for Enforcement and Compliance Assurance Susan Bodine, and IRS-CI Special Agent in Charge Kelly Jackson. The jury also found the corporation, Keystone Biofuels Inc. (Keystone), guilty of conspiring to make false statements to the EPA and six counts of making false statements to the EPA. According to the evidence presented at trial, Wootton and Miner co-owned and operated Keystone, originally in Shiremanstown, Pennsylvania, and later in Camp Hill, Pennsylvania. Keystone purported to be a producer and seller of biodiesel, a type of renewable fuel. From August 2009 through September 2013, Wootton and Miner participated in a conspiracy to fraudulently generate renewable fuel credits, identified by renewable identification numbers (RINs) on Keystone fuel and, through January 2012, to fraudulently claim tax refunds based on the Biodiesel Mixture Tax Credit, a federal excise tax credit for persons or businesses who mix biodiesel with petroleum and use or sell the mixture as a fuel. According to evidence presented at trial, as part of the conspiracy, Wootton and Miner caused inflated fuel amounts to be reported to the IRS. The inflated fuel numbers supported their fraudulent claims for tax refunds on fuel Keystone was not producing. To account for the inflated fuel amounts, Wootton and Miner created false books and records and engaged in a series of sham financial transactions intended to mirror the false books and records. In addition, Miner doctored fuel samples and test results to fraudulently claim tax refunds and RINs on fuel that did not meet the requisite quality standards to qualify for the tax refunds and RINs. It is estimated that over $10 million was generated from the fraudulent RIN sales, and the total tax loss to the government resulting from the defendants' conduct is approximately $4,149,983.41. Wootton and Miner face a statutory maximum sentence of five years in prison on each conspiracy count, each false statement to the EPA count, and three years in prison on the count of filing a false tax claim with the IRS, as well as periods of supervised release, restitution, and monetary penalties.

• May 1, 2019—A federal jury in Reading, Pennsylvania, convicted David M. Dunham Jr. of the following crimes: conspiracy to commit wire fraud and defraud the United States; wire fraud; filing false tax documents; and obstruction of justice. The conviction stemmed from Dunham hatching and executing a scheme to defraud the Environmental Protection Agency, the Internal Revenue Service, and his cus-

tomers to obtain renewable fuel credits in his "green energy" business. The government is also seeking forfeiture of approximately $1.7 million in fraudulently obtained revenue and several parcels of real estate. The trial lasted four weeks before United States District Judge Jeffrey L. Schmehl. In Dunham's green energy scam, he fraudulently applied for, received, and sold "credits" for selling renewable biofuels that he, in fact, did not sell and, in many instances, had never possessed in the first place. He obtained these credits from government agencies, which resulted in Dunham obtaining $50 million in fraudulent revenue. Dunham ran the scam from approximately 2010 to 2015, using his business, Smarter Fuels, and that of his co-defendant, Ralph Tomasso, who previously pleaded guilty to conspiracy to defraud federal programs. The case was investigated by the Environmental Protection Agency's Criminal Investigation Division, the Internal Revenue Service's Criminal Investigation Division, and the United States Department of Agriculture's Office of Inspector General.

•May 3, 2019— Two Greek shipping companies, Avin International LTD and Nicos I.V. Special Maritime Enterprises, were sentenced in the Eastern District of Texas on charges stemming from several discharges of oil into the waters of Texas ports by the oil into the waters of Texas ports by the oil tanker *M/T Nicos I.V.* Avis International was the operator and Nicos I.V. Special Maritime Enterprises was the owner of the *Nicos I.V.*, Which is a Greek-flagged vessel. The Master of the *Nicos I.V.*, Rafail-Thomas Tsoumakos, and the vessel's Chief Officer Alexios Thompopoulos, also pleaded guilty to making material false statements to members of the United States Coast Guard during the investigation into the discharges. Both companies pleaded guilty to one count of obstruction of an agency proceeding, one count of failure to report discharge of oil under the Clean Water Act, and three counts of negligent discharge of oil under the Clean Water Act on November 26, 2018. Under the plea agreement, the companies will pay a $4 million criminal fine and serve a four-year term probation, during which vessels operated by the companies will be required to implement an environmental compliance plan, including inspections by an independent auditor. The Master and Chief Officer both pleaded guilty to one county of making a material false statement and were sentenced to pay fines of $10,000 each. According to documents filed in court, the Nicos I.V. was equipped with a segregated ballast system, a connected series of tanks used to control the trim and list of the vessel by taking on or discharging water, the latter involving an operation called deballasting. At some point prior to July 6, 2017, the ballast system of the Nicos I.V. became contaminated with oil and that oil was discharged twice from the vessel into the Port of Houston on July 6 and July 7, 2017, during deballasting operations. Both Tsoumakos and Thomopoulos were informed of the discharges of oil in the Port of Houston. Tsoumakos failed to report the discharges, which, as the person in charge of the vessel, he was required to do under the Clean Water Act. Neither discharge was recorded in the vessel's oil record book, as required under MARPOL and the Act to Prevent Pollution from Ships. After leaving the Port of Houston, en route to Port Arthur, Texas, oil was observed in several of the ballast tanks. After arriving in Port Arthur, additional oil began bubbling up next to the vessel, which was then reported to the U.S. Coast Guard. During the ensuing investigation, both Tsoumakos and Thomopoulos lied to the Coast Guard, stating, among other things, that they had not been aware of the oil in the ballast system until after the discharge in Port Arthur, and that they believed that the oil in the ballast tanks had entered them when the vessel took on ballast water in Port Arthur. (Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HALTS MOTORIZED TRAFFIC IN SOUTHEASTERN OREGON'S HIGH DESERT IN THE FACE OF NEPA, FLPMA AND WILDERNESS ACT CHALLENGES

Oregon Natural Desert Association v. Rose, 921 F.3d 1185 (9th Cir. 2019).

The Oregon Natural Desert Association (ONDA) brought an action alleging that the United States Bureau of Land Management's (BLM) travel management plan and comprehensive recreation plan for a wilderness area violated the Steens Mountain Cooperative Management and Protection Act (Steens Act), the Federal Land Policy and Management Act (FLPMA), the Wilderness Act, and the National Environmental Policy Act (NEPA). The District Court granted the government's motion for summary judgment and plaintiff appealed. The Ninth Circuit affirmed in part, reversed in part, and remanded for further proceedings.

Factual and Procedural Background

This case arose from the BLM's decisions regarding the route network for motorized vehicles in the Steens Mountain Cooperative Management and Protection Area (Steens Mountain Area). The BLM issued two plans: the Steens Mountain Travel Management Plan (Travel Plan) and the Steens Mountain Comprehensive Recreation Plan (Recreation Plan). Plaintiff ONDA challenged the Recreation Plan and the Interior Board of Land Appeals' (IBLA) approval of the Travel Plan under NEPA, FLPMA, and the Steens Act. Harney County intervened to defend the IBLA's approval of the Travel Plan but also cross-claimed against the BLM to challenge the Recreation Plan as arbitrary and capricious. The U.S. District Court upheld both agency actions and an appeal to the Ninth Circuit then followed.

The Ninth Circuit's Decision

Consultation with the Steens Mountain Advisory Council

The Ninth Circuit first addressed the claim that the BLM had failed to satisfy its obligation to consult the Steens Mountain Advisory Council before issuing the Recreation Plan. Although the BLM must make any decision "to permanently close an existing road" or "restrict the access of motorized or mechanized vehicles on certain roads" in the Steens Mountain Area "in consultation with the advisory council," the Steens Act does not specify how such consultation must occur. Here, the Ninth Circuit found it sufficient that the BLM had: 1) opened the public comment period on the revised Recreation Plan Environmental Assessment in January 2015; 2) formally briefed the advisory council two weeks later and provided information regarding route analysis; and 3) been directed by the advisory council to "use the information" from the meetings and act as the BLM saw fit. Further, the Ninth Circuit concluded that, even if the consultation had been insufficient, any error was harmless to Harney County.

Definition of 'Roads and Trails'

The Ninth Circuit next found that the IBLA acted arbitrarily and capriciously by changing its definition of "roads and trails" without providing a reasonable explanation for the change. The Steens Act prohibits the use of motorized vehicles "off road" but also authorizes the use of motorized vehicles on "roads and trails," without defining those terms. The IBLA has reconciled this seeming contradiction by concluding that since the statute:

> . . .clearly meant to allow [the BLM] to designate roads and trails as open to motorized travel, the prohibition against motorized off-road travel logically can only mean that motorized travel that does not occur on either a road or a trail is prohibited.

In a 2009 decision on the Travel Plan, the IBLA had decided that a route that is now "difficult or impossible to identify on the ground" is neither a road nor a trail under the Steens Act. Based on this logic, the IBLA reversed the BLM's decision to allow motorized travel on certain "obscure routes." In its 2014 remand decision on the Travel Plan, however, the IBLA reversed course and overturned its own decision to close these routes. For the first time, the IBLA defined a "road" or "trail" to encompass something that "existed as a matter of record" in October 2000 (when Congress enacted the Steens Act) "and that might again be used in the future, despite a present difficulty in tracing [it] on the ground." Because the IBLA failed to "display awareness" that it was changing position and did not "show that there are good reasons for the new policy," the Ninth Circuit found that the IBLA had acted arbitrarily and capriciously.

The Travel Plan

The Ninth Circuit next held that the IBLA had acted arbitrarily and capriciously by affirming the BLM's issuance of the Travel Plan. Specifically, it concluded that the BLM had failed to establish the baseline environmental conditions necessary for a procedurally adequate assessment of the Travel Plan's environmental impacts. Nothing in the Travel Plan Environmental Assessment, for example, established the physical condition of the routes, such as whether they were overgrown with vegetation or had become impassable in certain spots. Despite this lack of information, the Environmental Assessment authorized most routes for "Level 2" maintenance, which involves mechanically grading a route and removing roadside vegetation. Without understanding the actual condition of the routes on the ground, however, the Ninth Circuit found that the BLM could not properly assess the environmental impact of allowing motorized travel on more than 500 miles of routes or of carrying out mechanical maintenance on these routes.

The Recreation Plan

Finally, the Ninth Circuit found that the BLM had acted arbitrarily and capriciously in issuing the Recreation Plan. Again, the court held that the BLM had failed to establish the baseline conditions necessary for it to consider information about significant environmental impacts. In particular, it had failed to provide baseline conditions for the "obscure routes," at least until after the public comment period had closed.

Conclusion and Implications

The case is notable for its application of the "arbitrary and capricious" standard of review for agency actions. In the end, the court found the Bureau of Land Management's actions, especially its failure to establish baseline conditions necessary for it to consider environmental impacts, deficient. The Ninth Circuit's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/04/25/18-35258.pdf
(James M. Purvis)

SIXTH CIRCUIT HOLDS PUBLIC COMMENTS IN ADMINISTRATIVE PROCEEDINGS ARE INSUFFICIENT TO ESTABLISH 'INJURY' FOR STANDING IN CHALLENGING AGENCY ACTION

Protecting Air for Waterville v. Ohio Environmental Protection Agency, ___F.3d___, Case No. 18-3025 (6th Cir. Feb. 21, 2019).

Citizen groups brought a petition directly in the Sixth Circuit Court of Appeals challenging the issuance of air quality permits by the Ohio Environmental Protection Agency pursuant to delegated federal Clean Air Act the authority. To establish standing, the groups cited in sworn statements regarding individual harms submitted in the Ohio administrative proceedings. The Circuit Court rejected these as sufficient to support Article III standing, requiring, at a minimum, affidavits attesting to feared or actual harms.

Background

Three citizens groups representing owners of property along a "257-mile natural gas pipeline system originating in Ohio and running into Michigan" challenged issuance of air quality permits issued for two natural gas compressor stations proposed in Ohio as part of the pipeline system.

In August 2017 the Federal Energy Regulatory Commission (FERC) granted a certificate of public convenience and necessity for the pipeline pursuant to the Natural Gas Act, 15 U.S.C. § 717f(c), conditioned "on the pipeline proponent obtaining air pollution-control permits required by the federal Clean Air Act." As it happened:

> . . .[t]he Ohio EPA Director had issued the permits in September 2016 pursuant to chapter 3745-31 of the Ohio Administrative Code, part of Ohio's implementation of the federal Clean Air Act. See 40 C.F.R. § 52.1870.

Prior to issuing the permits, the Ohio EPA had held public hearings, publicized in local papers, and provided the public with an opportunity to submit written comments, which were in turn responded to in writing by the agency. The three citizen groups challenged the Ohio EPA's issuance of the permits including by appeal to the Ohio Environmental Review Appeals Commission (ERAC):

> In August 2017, while discovery was ongoing, NEXUS filed motions to dismiss the ERAC proceedings for lack of subject-matter jurisdiction, claiming that the Natural Gas Act, 15 U.S.C. § 717r(d)(1), vests jurisdiction over such appeals exclusively with the United States Courts of Appeal. ERAC agreed and dismissed the appeals.

The citizens groups filed a petition for review of the ERAC dismissal directly in the Sixth Circuit, arguing that ERAC had jurisdiction to hear their challenge and the dismissal violated their due process rights, and that the Ohio EPA issued the permits in violation of its own *de minimis* exemption.

The Sixth Circuit's Decision

As an initial matter, the Sixth Circuit declined to resolve the jurisdictional issue because the citizens groups had failed to name ERAC as a respondent to their petition, did not serve ERAC, and the record of the proceedings before ERAC was not before the Circuit Court. The groups failed to timely address these deficiencies once they were pointed out by the pipeline proponent and Ohio EPA, and therefore the Circuit Court declined to reach their jurisdictional and due process claims.

Standing

Turning to the claim that the Ohio EPA improperly relied on its *de minimis* exception in issuing the air quality permits for the compressors, the Sixth Circuit again identified a preliminary impediment to reaching the merits: whether the citizens groups had established standing to bring their petition, *i.e.*, that they:

> . . .(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).

The Sixth Circuit requires, in seeking direct appellate review of agency decisions, that petitioners establish standing by presenting:

> . . .specific facts supporting standing through citations to the administrative record or 'affidavits or other evidence' attached to its opening brief, unless standing is self-evident. *Tenn. Republican Party v. SEC*, 863 F.3d 507, 517 (6th Cir. 2017).

Here, the citizens groups failed to address standing in their opening brief, so that "[e]ven the first element of standing—injury in fact—was far from self-evident in this case." The groups failed to identify any harms they themselves, or their members, would suffer:

> We cannot simply assume that petitioners have members who would be affected by the compressor stations' emissions; petitioners were required to 'present specific facts ... through citations to the administrative record or 'affidavits or other evidence' attached to its opening brief,' *Tenn.*

Republican Party, 863 F.3d at 517, demonstrating that identified members of their organizations had, or would imminently, suffer a sufficiently concrete injury.

The court rejected the argument that the dismissal of the groups' administrative appeal by ERAC had deprived them of the opportunity to, in an adversarial setting, develop a record supporting standing:

> But petitioners did not need to utilize an intensive fact-finding process to establish an injury sufficient for Article III purposes. There were many ways petitioners could have established injury without resort to the factfinding proceedings available in ERAC. While we will not decide the hypothetical question of precisely what would have sufficed, we note that courts have accepted, for example, affidavits from individual members attesting to fear of health concerns in combination with expert reports detailing the injuries that could follow from exposure.

Here, however, the groups did not file any affidavits of their members attesting to any concrete or feared health-related harms, and the Court rejected reliance on unsworn statements submitted as public comments in the Ohio EPA public review proceedings. Accordingly, the petition was dismissed.

Conclusion and Implications

The seemingly low bar to establish Article III standing does nonetheless require sworn affidavits. Even had these petitioners lodged a complete administrative record of the state agency proceedings with the Circuit Court, they would nonetheless have had to supplement that record with separate, attested statements regarding individual, particularized harms. The court's opinion, which was *partially published*, appears online at: http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0088n-06.pdf
(Deborah Quick)

"MULTI-STATE" POLLUTION—D.C. CIRCUIT ADDRESSES THE ROLE OF EPA AND STATES IN ENFORCING THE CLEAN AIR ACT'S PROTECTION AGAINST OZONE POLLUTION

State of New York v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 17-1273 (D.C. Cir. 2019).

Ozone pollution creates a unique set of regulatory issues because of the way it is formed and transmitted. Ozone pollution is formed through the mixture of chemicals emitted into the air mostly by automobiles and industrial emissions that essentially combine in the air and then cook in the sun to form air pollutants. Once created, ozone pollution travels through the air and therefore can affect areas hundreds of miles downwind from the pollution sources. *Virginia v. EPA* 108 F.3d 1397, 1399-1400 (D.C. Cir.). Thus, ozone pollution created in one state can severely affect the air pollution levels of neighboring states. The federal Clean Air Act provides the U.S. Environmental Protection Agency (EPA) as well as states with several mechanisms to address this "multi-state" ozone pollution issue. However, many states see the protection mechanisms available to states inadequate and therefore, have pushed to compel the EPA to enact the enforcement mechanisms exclusively granted to the EPA by the Clean Air Act. In *State of New York v. U.S. EPA*, the U.S. Court of Appeals for the District of Columbia Circuit provided further clarity regarding these mechanisms and the responsibilities and rights that the EPA and states have in enforcing them. The court's decision suggests that the EPA retains significant discretion in this area, despite growing concerns from effected states.

Multi-State Ozone Pollution Protection Mechanisms

The Clean Air Act generally establishes three mechanisms to address multi-state ozone pollution: 1) the Northeast Ozone Transport Region, 2) the "Good Neighbor" Provision, and 3) "Section 126 Petitions." The Northeast Ozone Transport Region (NOTR) is perhaps the most stringent mechanism because it

subjects any state included in the region to mandatory ozone controls. 42 USC 7511c(b).

The Clean Air Act grants the EPA the authority to identify the states that are subject to the NOTR:

> . . .whenever the Administrator has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the [air-quality] standard in the transport region. 42 U.S.C. § 7506a(a)(1).

The other mechanisms do not create mandatory requirements and rely on specific assessments. The good-neighbor provision puts the onus on states by requiring each state to develop a plan to prohibit pollutants that significantly affect another state's ability to meet air-quality standards. 42 USC § 7410(a)(2)(D)(i)(I). If a state fails to develop a sufficient "good-neighbor" plan, the EPA has the authority to impose a federal plan on the state. 42 USC § 7410(c)(1), (k). Finally, the Section 126 Petition mechanism allows states to submit a petition asking EPA to investigate an air pollutant in another State that violates the good-neighbor provision. The EPA must then require the subject of the petition to come into compliance or cease operations. 42 U.S.C. § 7426(b).

State Action to Expand the NOTR

The NOTR currently consists of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, the District of Columbia, and a portion of Virginia. 42 U.S.C. § 7511c(a). Several of these "NOTR Member States" asked the EPA to expand the NOTR to include several states that they alleged to be "upwind States" or states that created significant ozone pollution effecting NOTR States due to their location and the flow of air. The proposed "Proposed New States" are Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, West Virginia, and the remaining portions of Virginia. The EPA denied this request, claiming that the other ozone pollution enforcement mechanisms of the Clean Air Act were sufficient and better suited to address the potential pollution of the Proposed New States. Thus, the NOTR Member States filed court action against EPA, claiming its refusal to include the New States violated the Clean Air Act.

The D.C. Circuit's Decision

In court, the NOTR Member States made three arguments to support their contention that the EPA violated the Clean Air Act by refusing to include the Proposed New States into the NOTR. First, the NOTR Member States focused on the EPA's claim that expanding NOTR was unnecessary because the other enforcement mechanisms were sufficient to address the Proposed New States' pollution. The NOTR Member States acknowledged that the Clean Air Act gave the EPA discretion to identify the states subject to the NOTR. However, the NOTR Member States claimed that the EPA could not refrain from expanding NOTR based on a preference to rely on other enforcement mechanisms.

Second, the NOTR Member States claimed that the Clean Air Act required the EPA to expand membership if it determined that a nonmember state contributed to air pollution in other states. Since EPA acknowledged that the New Proposed States may contribute to air quality violation in other states, the NOTR Member States argued that the Clean Air Act required the EPA to expand the NOTR to include the New Proposed States.

The Circuit Court found nothing in the Clean Air Act to support either of NOTR Member State's first two contentions. In sum, the Clean Air Act states that the EPA may expand the NOTR if it determines that other areas are significantly contributing to violations of air quality standards in the existing NOTR region. 42 U.S.C. § 7506a(a)(1).

The court focused on the specific language of the Clean Air Act, noting that the EPA "may" expand the NOTR under these circumstances but is not required to do so. Thus, the Court concluded that the Clean Air Act allowed EPA to refrain from expanding the NOTR to other regions that may cause air pollution in other states if it decided that the other ozone pollution protection mechanisms were sufficient or better suited to address the specific issues.

Finally, the NOTR Member States argued that, even if the Clean Air Act grants EPA discretion to determine if the NOTR should be expanded, EPA's decision regarding the New Proposed States was an abuse of this discretion. The court similarly rejected this argument, citing to case law establishing that the EPA is entitled to an extremely deferential review of its decision. The court noted that the other enforce-

ment mechanisms support the policy of granting the EPA deference with respect to the NOTR because the Clean Air Act generally creates a system of multiple protections options. Specifically, states can seek protection pursuant to the Section 126 Petition and the EPA can use the good-neighbor policy to protect against ozone pollution if it deems that expansion of the NOTR is not the best course of action based on the specifics of the situation.

Conclusion and Implications

The D.C. Circuit's decision provides further clarity regarding the role of the EPA and states in enforcement of the Clean Air Act's ozone pollution protections. While the Clean Air Act provides mechanisms to states to call attention to multi-state ozone pollution, the EPA retains discretion to determine how best to address specific pollution concerns. Thus, if states believe the EPA is failing to adequately address ozone pollution, the D.C. Circuit here suggests that they may have limited avenues to compel the EPA to act. However, the court also noted that several states have found recent success in utilizing the other enforcement mechanisms available to them, including the "Section 126 Petitions." Thus, states may now start focusing on these measures to address multi-state ozone pollution when the EPA fails to take action. (David Boyer)

EIGHTH CIRCUIT AFFIRMS JOINT AND SEVERAL LIABILITY FOR PUNITIVE DAMAGES UNDER CERCLA FOR 'ARRANGERS' FOR PCB CONTAMINATION

U.S. v. Dico, Inc., ___F.3d___, Case No. 17-3462, (8th Cir. Apr. 11, 2019).

The U.S. Court of Appeals for the Eighth Circuit found that corporate defendants intentionally sold buildings contaminated with polychlorinated bipehnyls (PCBs) to a third party in order to dispose of a hazardous substance and were liable as arrangers to the government for punitive damages.

Factual and Procedural Background

In 1984, Dico, Inc. owned property in Des Moines, Iowa (Dico site) designated a Superfund Site based on volatile organic compounds that had polluted the water supply and PCBs in the insulation of several buildings. Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the U.S. Environmental Protection Agency (EPA) initiated a removal action and issued a unilateral administrative order (1994 Order) that required Dico to address the contamination and repair and seal the exposed insulation to prevent further release of PCBs. Dico completed the remediation work. In 1997, the EPA issued a Notice of Completion and expressly stated that Dico had continuing obligations under the 1994 Order, including post-removal activities and annual reporting in an operation and maintenance plan. In 2003, the EPA approved a revised work plan that reduced Dico's inspection and testing requirements and required Dico to coordinate any plans for demolition of the buildings with the EPA.

In May 2007, Dico sold the contaminated buildings to Southern Iowa Mechanical, L.L.C. (SIM). SIM intended to dismantle the buildings, dispose of the materials except the steel beams, and relocate the beams for reuse to its property (SIM Site). Dico signed a bid proposal from SIM to "demo and remove" the buildings, but did not disclose to SIM that the buildings were contaminated. In addition, Dico did not inform the EPA of the building sale or proposed demolition. At a Dico site visit in September 2007, the EPA learned for the first time that buildings subject to the 1994 Order had been or were being dismantled. The EPA tested the steel beams and determined the levels of PCBs posed a direct threat to SIM workers, visitors and trespassers. In December 2008, the EPA issued a unilateral administrative order requiring Dico and its affiliate, Titan Tire Corporation (collectively: defendants) to perform a removal action at the SIM Site. The EPA sued to recover damages for its cleanup costs.

The U.S. District Court granted summary judgment to the government on its arranger liability claim, found Dico had violated the 1994 Order, and awarded civil penalties and punitive damages.

The Eighth Circuit Court of Appeals affirmed in part and reversed in part. It affirmed summary judgment on Dico's violation of the 1994 Order and civil penalties, but vacated summary judgment on arranger liability and punitive damages because there were questions of fact.

On remand, the District Court found that defendants violated CERCLA by arranging to dispose of hazardous substances, and were jointly and severally liable for $5.45 million in past response costs, all future costs, all enforcement costs and attorney's fees. The District Court also held Dico liable for punitive damages.

On this appeal, defendants argued the District Court erred in finding defendants liable as arrangers. Dico argued that the District Court erred in awarding punitive damages against Dico.

The Eighth Circuit's Decision

The issue on remand was whether the District Court erred in finding defendants liable as arrangers for the disposal of a hazardous substance when they sold the contaminated buildings to SIM. When the requisite intent for arranger liability exists, a defendant is liable for all response costs of removal or remedial action incurred by the government resulting from the release of a hazardous substance.

Arranger Liability

The Court of Appeals upheld the District Court's determination that defendants had arranged for the disposal of a hazardous substance in violation of CERCLA when the buildings were sold. The District Court concluded Dico avoided paying costs to remove and dispose of the contaminated insulation when it sold the property. Removal and disposal costs were $988,567, which exceeded the value of $117,000 Dico received from SIM for the sale of the buildings. The difference in value constituted strong evidence that defendants intended to avoid environmental liability through the sale of the contaminated buildings. The District Court also found that the buildings were no longer commercially useful and represented ongoing liabilities to defendants. In addition, defendants failed to disclose that the buildings were contaminated to SIM and had reason to believe that SIM would not discover the contamination prior to purchase. Thus, the District Court's findings were sufficient to conclude to that defendants had arranged for the disposal of a hazardous substance in violation of CERCLA.

Award of Punitive Damages

The Court of Appeals also affirmed the award of punitive damages against Dico. CERCLA authorizes punitive damages against a person who is liable for a release of a hazardous substance and the EPA incurred cleanup costs at the SIM site as a result of Dico's failure to take proper action. The Court of Appeals previously reversed the punitive damages award because it "could not say as a matter of law" that the sale of contaminated buildings caused the cleanup costs. In affirming the District Court's finding on remand that the sale violated CERCLA, the Court of Appeals also affirmed the punitive damages award.

The Court of Appeals also determined that the arranger liability award included enforcement costs. Defendants were jointly and severally liable for enforcement costs because they failed to satisfy their burden of proving that a reasonable apportionment exists.

Conclusion and Implications

This case demonstrates that a lower court's findings regarding arranger liability will not be disturbed unless there is clear error. Financial benefit from failure to disclose may establish a causal connection between response costs and the CERCLA violation. Once a causal connection established, punitive damages can follow under CERCLA's strict liability regime. In addition, arranger liability includes past and future response costs, enforcement costs, and attorney's fees. The Eighth Circuit's decision is available online at: https://ecf.ca8.uscourts.gov/opndir/19/04/173462P.pdf (Joanna Gin, Rebecca Andrews)

NINTH CIRCUIT REVIVES ENVIRONMENTAL GROUPS' NEPA CHALLENGE TO DEPARTMENT OF AGRICULTURE'S GRAY WOLF KILLING POLICY

Western Watersheds Project et al. v. Todd Grimm et al., ___F.3d___, Case No. 18-35075 (9th Cir. Apr. 23, 2019).

On April 23, 2019, the Ninth Circuit Court of Appeals overturned a U.S. District Judge's January 2018 dismissal of an action brought by plaintiffs Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense (plaintiffs) to enjoin the federal government's participation in the elimination of gray wolves in Idaho, pending additional National Environmental Policy Act (NEPA) analysis. The U.S. District Court originally dismissed the suit based on the plaintiffs' lack of Article III standing.

Factual Background

In 1973, the U.S. Fish and Wildlife Service (FWS) listed the Northern Rocky Mountain gray wolf (*Canis lupus irremotus*) as endangered under the federal Endangered Species Act (ESA). This subspecies of gray wolf is native to the northern Rocky Mountains and preys on bison, elk, the Rocky Mountain mule deer, and the beaver. However, the gray wolves are known to prey upon many other species of animals given the opportunity. In 1994, FWS' goal was to assist the gray wolf reach a population of thirty breeding pairs by reintroducing them into central Ohio. In anticipation of conflict between the wolves, and humans and their livestock and animals, the FWS authorized the killing of those wolves that preyed on livestock, domestic animals, and ungulates in the area. FWS reached its wolf breeding goal and in 2011, the gray wolf was successfully delisted.

Back in 2002, the Idaho Department of Fish and Game (IDFG) prepared a plan to be executed upon the gray wolves' delisting under the ESA. IDFG would maintain responsibility for managing the wolves in Idaho with the goal of addressing these issues of predation by way of sport hunting as its primary method. Ever since its delisting, FWS supported IDFG's wolf management activities through both legal and non-legal methods, including aerial hunting.

In June 2017, plaintiffs sued the USDA alleging that the agency violated NEPA for its wolf killing policy. The USDA said that NEPA's law did not constitute a major federal action significantly affecting, individually or cumulatively, the quality of the human and natural environment."

Procedural History

In June 2016, plaintiffs brought the following NEPA-based claims against the U.S. Department of Agriculture, Wildlife Services (Wildlife Services) in District Court: 1) Failure to prepare an Environmental Impact Statement (EIS); 2) Failure to take a hard look at the effects of actions and alternatives; 3) Violations under 5 U.S.C. §706 (2)(A) for decisions not to supplement NEPA analysis as arbitrary and capricious; and 4) Violations under U.S.C. §706 (1) for failure to supplement the 2011 Environmental Assessment as an action unlawfully withheld or reasonably delayed.

Specifically, plaintiffs alleged that NEPA requires Wildlife Services to prepare an EIS and supplement the Environmental Assessment for the agency's killing of the gray wolf. The District Court held that plaintiffs failed to show that Article III standing because plaintiffs failed to show redressability. The District Court explained that plaintiffs failed to show that eliminating the USDA's rule would actually result in fewer wolf killings therefore, making their injury not redressable.

The Ninth Circuit's Decision

NEPA violations constitute procedural injuries. To prevail on a cause of action involving procedural injuries, plaintiffs are required to:

> . . .show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.

Further, to establish injury in fact, the plaintiffs may demonstrate that they:

> . . .use the affected area and are persons or who the aesthetic and recreational values of the area will be lessened by the challenged activity.

Standing: Injury in Fact

In order to prevail, plaintiffs needed to establish injury in fact:

> Environmental plaintiffs may establish injury-in-fact by demonstrating that "they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000)).

In this case, plaintiffs submitted declarations from their members stating that the wolf-killing threatened the aesthetic and recreational interests in tracking and observing wolves in the wild, often in specific regions. The Court of Appeals deemed those interests to fall under the scope of NEPA's protections. Thus, plaintiffs successfully established injury-in-fact.

Standing: Redressability

Next, the Ninth Circuit reviewed the District Court's ruling that the plaintiffs' injuries were not redressable:

> To establish redressability, '[p]laintiffs alleging procedural injury 'must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.' *Salmon Spawning*, 545 F.3d at 1226 (quoting *Defs. of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *overruled on other grounds by Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007)). Thus, the proper inquiry here is whether Plaintiffs have shown that halting Wildlife Services' wolf-killing activities pending additional NEPA analysis could protect their aesthetic and recreational interests in gray wolves in Idaho. We hold that they have.

The Ninth Circuit overturned the District Court's conclusion and emphasized that the court erred because it relied on an incorrect standard by relying on an unpublished case that lacks precedential effect. Additionally, to properly establish redressability, plaintiffs must show that they have a procedural right and if exercised, *could* protect their concrete interests—a more relaxed standard applied to procedural injury cases. Under this standard of redressability, plaintiffs need only show that merely halting Wildlife Services' wolf-killing activities pending additional NEPA analysis would have the potential to protect their aesthetic and recreational interests in gray wolves in Idaho. This differs from the District Court's heightened standard which ruled the plaintiffs must show that fewer wolves would be killed.

Wildlife also argued that based on its current wolf-maintenance responsibilities, IDFG would exercise its independent authority and continue wolf-hunting to address the predation issues thus, defeating redressability. The Ninth Circuit quickly held that IDFG has not expressed an intent or ability to replace Wildlife Services' lethal wolf-management operations. Therefore, whether IDGF would implement an identical program as such is a matter of speculation.

Conclusion and Implications

In a win for the conservation groups, the Ninth Circuit Court of Appeals reversed the U.S. District Court's ruling and held that the plaintiffs' procedural injuries were indeed redressable. Though courts generally grant a high level of deference to oversight agencies such as the Fish and Wildlife Service, a win on a procedural challenge, like Article III standing, may be a new avenue for conservation groups to challenge controversial laws to better protect endangered species. Interestingly the court pointed out in a footnote why it did not directly address the additional issue of demonstrating causation: "Causation is not at issue here. However, because standing is a constitutional requirement, we note that Plaintiffs' injury—reduced aesthetic and recreational enjoyment of wolves in Idaho—is 'not too tenuously connected' to Wildlife Services' alleged NEPA violation, thus establishing causation under the relaxed standard for procedural injuries. *Salmon Spawning*, 545 F.3d at 1229." The Ninth Circuit's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/04/23/18-35075.pdf
(Rachel S. Cheong; David D. Boyer)

DISTRICT COURT FINDS FEDERAL GOVERNMENT WAIVED SOVEREIGN IMMUNITY FOR NEGLIGENT RESPONSES TO FLINT WATER CRISIS

Burgess v. United States, ___F.Supp.3d___, Case Nos. 17-11218, 18-10243 (E.D. Mich. Apr. 18, 2019).

The U.S. District Court for the Eastern District of Michigan denied the federal government's motions to dismiss residents' suit against the United States under the Federal Tort Claims Act (FTCA) for the U.S. Environmental Protection Agency's (EPA) role in the Flint water crisis. A group of Flint residents alleged that EPA officials were negligent in carrying out the agency's oversight authority under the federal Safe Drinking Water Act (SDWA). The federal government moved to dismiss plaintiffs' action for lack of subject matter jurisdiction, contending sovereign immunity had not been waived because: 1) state law would not impose liability in similar circumstances (the premise for waiving immunity under the FTCA), and 2) the discretionary function exception to liability would apply. The District Court rejected both contentions.

Factual and Procedural Background

Plaintiffs' suit against the United States, arising from what is now known as the Flint Water Crisis, follows earlier actions brought against the City of Flint, the State of Michigan, and related officials.

The Safe Drinking Water Act

Section 1414 of the SDWA requires the EPA to notify a state and provide technical assistance when a public water system does not comply with the act. If the state fails to take timely enforcement action, the EPA is required to issue an administrative order requiring compliance or commence a civil action. Section 1431 of the SDWA further grants the EPA emergency powers when it has information that (i) a contaminant has entered or is likely to enter a public water system, (ii) which may present "an imminent and substantial endangerment to the health of persons," and (iii) state or local authorities have not acted to protect the public health.

The Flint Water Crisis

In April 2014, the City of Flint (City), Michigan changed the source of its water supply, suspending the purchase of finished drinking water from Detroit to draw on raw water from the Flint River processed through Flint's outdated water treatment plant.

Within weeks after the switch, EPA received a record number of resident complaints about skin rashes, hair loss, and foul smelling and tasting water. After some investigation, EPA determined that: 1) the water service lines in Flint were galvanized iron, 2) water drawn from the Flint River was highly corrosive and lead-based service lines posed a significant danger of lead leaching out of pipes, 3) Michigan was not requiring corrosion control treatment in Flint (despite communications from EPA staff urging otherwise), 4) the City was distorting its water samples to give residents false assurances about water lead levels, and 5) water samples from residents' homes showed noncompliant lead levels. The EPA was also aware of the health risks posed by lead exposure, particularly to children and pregnant women.

Internal reports established that EPA had the authority and sufficient information to issue an SDWA § 1431 emergency order to protect Flint residents from lead-contaminated water as early as June 2015. The EPA did not issue an emergency order until January 2016. In at least some of its communications with Flint residents, EPA also indicated that the City's drinking water met applicable health standards.

The District Court's Decision

The United States must waive its sovereign immunity in order for a court to have jurisdiction over a claim against the federal government. Through the FTCA, Congress waived the federal government's immunity from claims of injury arising from an act or omission of an employee, if state law imposes liability on a private person under similar circumstances. The FTCA excludes from its waiver of immunity any claim based on a discretionary function.

Liability under State Law

Rejecting the federal government's contention that Michigan law would not impose liability on pri-

vate individuals in similar circumstances, the District Court found plaintiffs stated a cause of action under Michigan's Good Samaritan doctrine. The doctrine provides that undertaking services to protect another person creates a duty of care and liability for negligent performance, if the negligence increases the risk of harm. The court found that EPA had undertaken to render services to plaintiffs by engaging in the oversight of state and local actors under the SDWA. By alleging EPA's negligent oversight increased the risk of harm to Flint's residents, plaintiffs' stated a claim for liability under state law sufficient to proceed under the FTCA.

The Discretionary Function Exception

To determine whether plaintiffs' suit was barred by the discretionary function exception, the District Court applied a two-step analysis. The court first determined whether the challenged act or omission was discretionary in nature, and second, if so, whether the challenged discretionary conduct was susceptible to policy analysis. The discretionary function exception applies only to judgments based on policy.

Plaintiffs alleged that EPA was negligent in failing to timely respond to the crisis as mandated by §§ 1414 and 1431 of the SDWA, including failing to warn residents of the health risks posed by Flint water. Plaintiffs also alleged the EPA was negligent when responding to residents' complaints by misleading them about the safety of the water and the character of state and local management.

On plaintiffs' first claim, the District Court found that EPA had discretion to issue warnings under the SDWA, but that the agency's failure to warn residents could not be justified by any permissible exercise of policy judgment. While regulatory decisions are generally presumed to be based in policy, the court found that the SDWA authorized EPA to exercise discretion in oversight based only on objective scientific and professional standards. Moreover, the facts of the crisis presented:

> . . .a safety hazard so blatant that [officials'] failure to warn the public could not reasonably be said to involve policy considerations.

Given the "obvious danger" to the community and EPA's knowledge of the facts, the court concluded "this is an instance where decisions by government actors, even if discretionary, may pass a threshold of objective unreasonableness" that bars exemption from liability.

On plaintiffs' second claim, the court again found EPA's decision regarding whether and how to respond to residents' complaints was discretionary, but that once the government decided to act, "it was required to do so without negligence." Exemption from liability was thus denied.

Conclusion and Implications

The exercise of administrative discretion is presumed to be grounded in considerations of public policy, and thus beyond the reach of tort liability. This case provides a rare example of discretionary conduct that falls outside the presumption of regulatory immunity. The court's decision is available online at: https://www.courthousenews.com/wp-content/uploads/2019/04/burgess-flint.pdf
(Kathy Shin, Rebecca Andrews)

DISTRICT COURT GRANTS MOTIONS FOR SUMMARY JUDGMENT CHALLENGING TRUMP ADMINISTRATION'S LIFT OF COAL LEASING STAY

Citizens for Clean Energy, et al. v. U.S. Department of the Interior, et al.,
___F.Supp.3d ___, Case No. 4:17-cv-00030-BMM (D. Mt. Apr. 19, 2019).

The U.S. District Court for Montana granted in part and denied in part motions for summary judgment filed on behalf of several state plaintiffs, including the State of California, and other plaintiff environmental groups. The District Court held that the Department of the Interior (Interior) and Bureau of Land Management (BLM) acted arbitrarily and capriciously by failing to initiate an environmental review,

pursuant to the National Environmental Policy Act (NEPA), when ending the moratorium on the coal leasing program throughout the United States. The court denied, in part, the motions for summary judgment based on precedent that the District Court cannot compel federal agencies to act.

Factual Background

The federal government owns approximately 570 million acres of coal mineral estate. This land is administered through federal coal mining leases with BLM, pursuant to the Federal Lands Policy and Management Act (FLPMA) and the Mineral Leasing Act of 1920 (MLA). Over 40 percent of the coal produced in the United States comes from federal land.

The original environmental review of the federal coal program, including the lease of federal lands for coal mining purposes, occurred in the late 1970s. These initial studies contained little to no discussion of the impacts of coal mining on climate change and greenhouse gas emissions. By 2013, the Office of the Inspector General and the Government Accountability Office identified several shortfalls concerning the federal coal program, including the failure of BLM to receive fair market value for such leases and the lack of discussion related to increased concerns and impacts on climate change.

In January 2016, under the Obama administration, former Secretary of the Interior Sally Jewell issued an order (Jewell Order), directing BLM to prepare a programmatic Environmental Impact Statement (PEIS) relating to a review of the federal coal program. The Jewell Order placed a stay on new coal leasing activity in federal mineral estates. The purpose of the Jewell Order was:

> . . .to ensure conservation of public lands, the protection of their scientific, historic, and environmental values, and compliance with applicable environmental laws.

Secretary Jewell also acknowledged several concerns in the study of greenhouse emissions from coal use that needed to be addressed in the federal coal program.

On March 28, 2017, about a year and a half into the Jewell Order, President Trump issued Executive Order 13783, entitled, "Promoting Energy Independence and Economic Growth." Specific to the federal coal program, President Trump ordered the Secretary of the Interior Ryan Zinke to:

> . . .take all steps necessary and appropriate to amend or withdraw [the Jewell Order], and to lift any and all moratoria on Federal land coal leasing activities.

A day after the Executive Order, Secretary Zinke issued an order that revoked the Jewell Order, restarted the federal coal program, and terminated the environmental review process under NEPA (Zinke Order). Secretary Zinke justified such actions by alleging that the completion of a PEIS and environmental review would cost millions of dollars, and that the public interest would not be served by staying the federal coal program. The Zinke Order directed BLM to process coal lease applications of federal lands expeditiously and ceased all activities related to the completion of a PEIS.

Relevant Federal Statutes

The plaintiffs argued that Secretary Zinke failed to consider the environmental impacts of restarting the coal leasing program, which violates the government's obligations under NEPA, the MLA, and the FLPMA.

NEPA's goals are to ensure that:

> . . .environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . [and that]. . .public officials make decisions that are based on understanding the environmental consequences, and take actions that protect, restore, and enhance the environment. 40 C.F.R. § 1500.1(b)-(c).

In order to align with its goals, NEPA requires the preparation of a detailed Environmental Impact Statement (*i.e.*, PEIS) for any "major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). Any "major federal action" is defined to include "new and continuing activities," such as "new or revised agency rules, regulations, plans, policies, or procedures," and:

> . . .official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which

future agency actions will be based. 50 C.F.R. § 1508.18.

The Mineral Leasing Act authorizes and governs the leasing of public lands for the production of coal and other minerals. 30 U.S.C. § 181 *et seq*. Under the MLA, the Secretary of the Interior is authorized to lease coal on public lands "as he finds appropriate and in the public interest," provided that every sale is made by competitive bid and provides the public with fair market value.

The Federal Lands Policy and Management Act establishes the framework in which BLM manages public lands for multiple uses in a way that "will best meet the present and future needs of the American people." 43 U.S.C. § 1702(c). Congress intended that:

> . . .public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values. 43 U.S.C. § 1701(a)(8).

Lastly, the Administrative Procedure Act (APA) provides the standards for review of plaintiffs' claims. The APA provides that a court must "hold unlawful and set aside" a final agency action that is deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The District Court's Decision

The Zink Order Not Merely Procedural

Generally, plaintiffs argued that the decision of the Trump administration, specifically BLM and the Interior, to lift the stay on the federal coal lease program amounted to major federal action subject to NEPA review. Plaintiffs further alleged that the defendants' decision not to prepare an EIS is a decision that is reviewable under the APA. Defendants contend that the Zinke Order was simply an agency policy to proceed with coal lease applications and that no major federal or final agency action occurred.

The District Court closely examined the facts of this case against *Cal. Ex rel Lockyer v. U.S. Dept. of Agriculture*, 575 F.3d 999 (9th Cir. 2009) to determine whether the Zinke Order constituted major federal action. In *Lockyer*, President Clinton created a nationwide plan to protect roadless areas in the national forests. *Id.* at 1006. The Forest Service established a rule that prohibited road construction, reconstruction, and timber harvest in such roadless areas (Roadless Rule). *Id.* Due to a change in the executive administration, the Bush administration began work on a new rule to replace the Roadless Rule. *Id.* The Bush Administration excluded the new rule from NEPA considerations because it was "categorically exempt," and the decision to replace the Roadless Rule was:

> . . .merely procedural in nature and scope and, as such, has no direct, indirect, or cumulative effect on the environment. *Id.* at 1008.

The Ninth Circuit determined that the repeal of the Roadless Rule and its protections could not be characterized as "merely procedural" because of the significant environmental protections that were afforded by the Roadless Rule. *Id.* at 1018.

The facts and analysis in *Lockyer* were applied by the District Court in the instant case. The Jewell Order, like the Roadless Rule, involved a nationwide programmatic plan to reevaluate a federal program. Similar to the new Bush administration rule replacing the Roadless Rule, the Zinke Order replaced the Jewell Order approximately a year and a half after its implementation. The one major distinction between *Lockyer* and the instant case was that the defendants in *Lockyer* determined that the replacement rule of the Roadless Rule was categorically exempt. In the instant case, defendants did not participate in NEPA at all. Defendants did not find an exemption for the Zinke Order replacing the Jewell Order, nor did defendants prepare any environmental review study.

The District Court was convinced that plaintiffs provided enough evidence to prove that the Zinke Order was not "merely procedural," and that substantial questions were raised once the moratorium on the federal coal program was lifted. Plaintiffs evidenced that ending the moratorium of the coal leasing program caused expedited coal mining on public lands that may result in environmental impacts. The potential of these impacts was so significant that NEPA should have been triggered and defendants failed its environmental obligations.

NEPA and the Need for an EIS

Plaintiffs also requested that the District Court issue an order to defendants to complete the preparation of the PEIS under the Jewell Order. However, the District Court found that "federal courts cannot compel an agency to take specific actions." *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1221 (9th Cir. 2011). The courts can only compel an agency to act upon its legislative command. *Id.* Thus, it is up to the defendants to decide to prepare a PEIS or, at the very least, supply a "convincing statement of reasons" to explain why the Zinke Order's impacts would be insignificant. The District Court might defer to a federal agency to determine the extent of its environmental analysis pursuant to NEPA but the court found that NEPA compels defendants to take the initial step of determining the extent of the environmental analysis that the Zinke Order must endure.

Conclusion and Implications

The District Court's decision to compel the Trump administration and federal agencies engage in the requirements of NEPA is a success for environmentalist groups. The demand for an environmental review will not necessarily bring forth an exhaustive analysis and summary of critical impacts of coal mining on climate change, as the federal agencies may find that the Zinke Order does not have a significant environmental impact. Nevertheless, any level of review will require the federal government and the coal mining industry to, at the very least, become more transparent in its decisions relating to the lease of federal lands for mining purposes. The District Court's opinion is available online at: https://www.eenews.net/assets/2019/04/22/document_ew_02.pdf
(Nicolle A. Falcis, David D. Boyer)

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