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CLIMATE CHANGE™

LAW & POLICY REPORTER

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CLIMATE CHANGE™
LAW & POLICY REPORTER

JUDICIAL DEVELOPMENTS

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CLIMATE CHANGE NEWS

PRESIDENT TRUMP'S IDEA TO BUY GREENLAND SHINES A LIGHT ON CLIMATE CHANGE'S POTENTIAL TO IMPACT OVERSEAS MILITARY OPERATIONS

After some rumors emerged this summer, on August 18, 2019, President Donald Trump confirmed his interest in buying an island—Greenland, an autonomous territory within the Kingdom of Denmark. President Trump stated:

> Strategically it's interesting and we'd be interested, but we'll talk to them a little bit. It's not No. 1 on the burner, I can tell you that.

President Trump followed his statement with a tweet showing a golden Trump Tower on Greenland's shores with the caption "I promise not to do this to Greenland"!

While President Trump's comments were largely ridiculed—Denmark's prime minister called the idea "absurd"—the United States does have a history in Greenland. In the news cycle, one particular story caught our attention: the potential environmental and political consequences awaiting Greenland, the United States and others due to the United States' use of Greenland as a potential nuclear missile launch site in the 1960s.

Artic Military Site Vulnerability

In previous articles we have discussed how the United States military has started to look at potential climate change impacts to its military sites. For example, in early 2019, the United States Department of Defense published its "Report on Effects of a Changing Climate to the Department of Defense" looking at the potential effects from five climate-related events on 79 military installations. One of the five climate-related events was thawing permafrost, but the report focused mainly on its operational impacts.

The United States Military and Greenland

Thule Air Base is a United States Air Force Base located on Greenland's northwest coast. A brief history of Thule Air Base is contained on a website maintained by the Woods Hole Oceanographic Institution (WHOI), the largest private nonprofit ocean research, engineering, and education organization in the world. Although Thule Air Base traces its origins to World War II, according to the WHOI, the Thule Air Base:

> . . .was constructed in total secrecy by the US military. . . [and]. . .[b]esides supporting military objectives, [it] has also been used as the staging point for scientific ventures, most notably, the construction of Camp Century, an entire city for 85-200 residents carved 200 feet into the ice, 150 miles from Thule.

Although the above was the official United States position regarding Camp Century, it was discovered in the mid-1990s that Camp Century's scientific activities were largely a cover for a United States' military project to place mobile nuclear missile launch sites under Greenland. The project, known as Operation Iceworm or Project Iceworm, was abandoned in the 1960s due to operational constraints. When the United States military abandoned the project, Camp Century's infrastructure and waste were also abandoned in place under the premise that all would be covered and the environment would be protected by Greenland's ice sheet and years of snowfall. Unfortunately, due to the effects of climate change, scientists now believe that Camp Century's waste may seep into the environment by the end of the century.

Broad Impacts from Camp Century Due to Climate Change

In two studies in 2016 and 2018, scientists looked at the potential environmental impacts from Camp Century caused by the changing weather patterns in Greenland. The 2016 study, "The abandoned ice sheet base at Camp Century, Greenland, in a warming climate" (2016 Study), provided background on Camp Century, Project Iceworm and the abandoned wastes. According to the 2016 Study, the biggest concern is polychlorinated biphenyls, which are

persistent organic pollutants (POPs), one of the three broad classes of chemical toxins of global significance. As further explained in the 2016 Study, the "Artic has so far been a global sink for POPs released at lower latitudes," but a warming climate will remobilize POPs "that have been stored in the cryosphere [the frozen part of the earth]."

'Climate Change and the Politics of Military Bases'

In the 2018 study, "Climate Change and the Politics of Military Bases," written by Jeff Colgan, one of the 2016 Study authors, Mr. Colgan focused on how climate change can affect the politics of military bases, arguing "that climate change can create knock-on environmental problems" that raise "the political costs of overseas bases and could even rupture an international relationship." For example, Mr. Colgan notes that "in 2016, Greenland's foreign minister accused his Danish counterpart of lying on the issue of Camp Century" and that Greenland has filed a complaint on the issue with the United Nations. Greenland is also linking Project Iceworm's pollution to its "ever-evolving bargain with the US over Thule Air Base" with Greenland's foreign minister already identifying a United States admission of environmental liability as a condition for Thule Air Base's continued operation.

Mr. Colgan opines that the situation in Camp Century "indicates that climate change could impose additional costs on overseas military operations, beyond those already identified by the" United States Department of Defense's climate change vulnerability assessments. Those costs, however, may depend on the nature of the specific overseas military operation with Mr. Colgan noting that:

> . . .[w]hen no immediate security threat is present…it does seem that environmental politics can harm the political relationship that allows overseas military bases to function.

Conclusion and Implications

Although President Trump's idea to buy Greenland may have been a long-shot, it did shine a light on new problems that could be caused by climate change. Specifically, past international actions by the United States that have the potential to cause environmental harm could also damage political relationships. This could then affect the United States' ability to maintain military bases in areas where the United States' presence is tenuous. As opined by Mr. Colgan, the situation in Camp Century "could be the proverbial canary in the coal mine for future politics surrounding overseas military sites."
(Kathryn Casey)

CALIFORNIA'S ENVIRONMENTAL BATTLE AGAINST THE TRUMP ADMINISTRATION RAGES ON AMIDST CLASH BETWEEN THE FEDERAL AND STATE ENVIRONMENTAL PROTECTION AGENCIES

Recently, California Governor Gavin Newsom received quite the letter from the Administrator of the U.S. Environmental Protection Agency (EPA), Andrew Wheeler. Alleging numerous failures by the state to properly implement the federal Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA), the letter gave an ultimatum for California to fix its water troubles: Either California is to take immediate action or the EPA will.

Concerns Addressed in the Letter

From the outset of the letter, Mr. Wheeler alleges a failure by California to fulfill its obligations in implementing the CWA and the SDWA as delegated by the federal government. Beginning with what he refers to as the "homelessness crisis," Wheeler takes specific aim at the City of San Francisco throughout the letter. Citing a 2018 article from *NPR*, Wheeler expresses the concern of the EPA that pathogens and other contaminants from untreated human waste might have potential water quality impacts by entering nearby waters. Reiterating that California's responsibility to implement proper municipal storm water management and waste treatment requirements, the letter's first allegation is a failure by California to adhere to this responsibility. Ending this first complaint, Wheeler asserts that the City of San Francisco and the state:

> . . .do not appear to be acting with urgency to mitigate the risks to human health and the environment that may result from the homelessness crisis.

In another allegation targeting San Francisco, Wheeler continues by discussing the city's discharge of more than 1 billion gallons of combined storm water and sewage into San Francisco Bay and the Pacific Ocean annually. The CWA demands that municipal waste be treated to certain levels, but in the letter Wheeler asserts that the city lacks biological treatment of this sewage and storm water, instead opting to remove only "floatables and settleable solids" in violation of the CWA. Additionally, the letter alleges the city's failure to maintain its sewage infrastructure. In quite the critical manner, Wheeler writes that:

> San Francisco must invest billions of dollars to modernize its sewer system to meet CWA standards . . . and keep raw sewage inside pipes instead of in homes and businesses.

Citing further alleged violations of the CWA, Wheeler asserts that the EPA found 23 significant exceedances of the Clean Water Act's National Pollutant Discharge Elimination System permits throughout the state (including exceedances of copper by 420 percent and the County of Marin's exceedances of cyanide by 5,194 percent).

Lastly, Wheeler turns to recent reports of health-based exceedances under the SDWA, totaling 665 health-based exceedances in 202 Community Water Systems, serving a population of nearly 800,000. Among the various instances cited here in the letter, Wheeler claims exceedances of arsenic, Ground Water Rule compliance issues, and violations of radiological standards.

Administrator Wheeler's Demands

In response to the problems pointed out in the letter, Wheeler concluded his letter to Governor Newsom by requesting a written response from the state, within 30 days, that details how the state intends to resolve the problems addressed in the letter—providing "specific anticipated milestones"—and how the state has the authority to accomplish the resolutions required.

In a similar fashion to the recent EPA/California EPA run-in regarding air quality, Wheeler's letter alluded to federal intervention should California fail to correct the problems alleged in the letter.

Governor Newsom Responds

While reports have stated that staff at the EPA have claimed that the letter was a part of "routine monitoring," California officials have had other thoughts. In a statement following receipt of the letter, Governor Newsom's Chief Spokesman, Nathan Click, called the letter "political retribution," proclaiming that "this is not about clean air, clean water, or helping our state with homelessness." Providing more powerful words about the matter, Mr. Click described the letter as a way for President Trump's administration to "weaponize" a government agency.

Conclusion and Implications

With the 30-day mark fast approaching, it will certainly be interesting to see the state's response to Wheeler's demands—if any response is provided. October 10 represented the deadline set by the EPA regarding the previous conflict between it and the state, so California has certainly had an eventful month between the two demands put forth by Andrew Wheeler and the EPA. In any case, this clash represents yet another point of contention in the collision course between the Trump administration and the Golden State. While the California policy pendulum has been increasingly swinging to correct for rollback efforts by the federal administration of environmental protections, to have the federal administration calling foul on the state for not doing enough is an irony and a storyline with much more to be written.
(Wesley A. Miliband, Kristopher T. Strouse)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Wildfires in Portugal as a Climate Case Study

Devastating wildfires occur every year across the world, with particularly significant fires making the news in recent years. The summer of 2018 saw some of the deadliest wildfires ever recorded, with over 150 casualties in Greece and California alone. Fires of similar scale yet marginally less deadly, burned through 2017 as well. Concerned that this trend will continue to grow, scientists are investigating a link between climate change and wildfires, in hopes of discovering why these fires are getting worse and how much worse we expect them to get over time.

The Mediterranean provides a case study region for wildfires, as it has many climate conditions thought to increase likelihood of wildfires: the foliage of the Mediterranean is particularly flammable and the region is prone to heatwaves and droughts. In 2017, for example, over 1.2 million acres of Portugal burned, killing over 120 people. In studying the Portugal, we see how these climate conditions are related to wildfire extent and then extrapolate those results to places in the world that would have similar conditions under a warmer climate.

A team of researchers led out of the Barcelona Supercomputing Center performed a statistical analysis of climate factors and wildfires in Portugal between 1980 and 2017 to refine our understanding of the climate factors that influence wildfires. The researchers found that burned area, a measure of how widespread a fire is, was correlated with high temperatures and low soil moisture in Portugal. This indicates that drier and warmer conditions are likely to result in larger wildfires over time. One factor controlling the extent of burned areas, however, is the extent of Portugal's overall forested areas. The team of scientists projected how much larger wildfires should be in the presence of climate change—assuming that temperature and soil moisture were the sole factors responsible—and discovered that the burned areas of Portugal should have been larger in 2017. The main reason cited for the restriction to areas burned is that Portugal has been losing forest surface over time, providing less fuel for the wildfires to consume.

Understanding and managing wildfires is critical since forests provide important carbon storage, wildfires cause harmful air toxics, and wildfires destroy infrastructure and harm people. By understanding the factors that control the size and scale of wildfires, we can better understand how to manage and protect ourselves and our environment.

See: Turco, M., et al. Climate drivers of the 2017 devastating fires in Portugal. *Nature Scientific Reports*, 2019; DOI: 10.1038/s41598-019-50281-2.

Global Increases in Phytoplankton Bloom Intensity

Climate change is responsible for significant change and disruption to ecosystems worldwide. Changes to the earth's water systems, for example, extend beyond rising sea-levels and increasing flood risks. In recent decades, freshwater toxic phytoplankton blooms, which occur when the quantity of sunlight and nutrients available leads to rapid growth and reproduction, have also increased significantly. These blooms create noticeable changes in water color and quality. The blooms can impact drinking-water supplies, creating a public health crisis, as well as various sectors of the economy such as fishing and food supply, and tourism. It is estimated that the impacts of freshwater blooms in the United States lead to $4 billion in losses each year.

A recent study by Jeff Ho and Ann Michalak of the Carnegie Institution for Science and Nima Pahlevan of NASA analyzed satellite data from the past three decades looking for global trends in near-surface summertime bloom formation. The study specifically focused on Landsat 5 satellite imagery from 1984 through 2012 for 71 large lakes located in 33 different countries (and six different continents) around the world. The global nature of the study ensured that a diverse set of ecological conditions was represented in the data, allowing the researchers to develop conclusions on how global environmental trends may be related to global phytoplankton bloom trends. Prior to this study, research on phytoplankton bloom trends had been limited to single lakes or small regions. The

study concluded that peak summertime bloom intensity has increased globally since 1984 (the earliest data used). Specifically, the peak summertime bloom intensity increased in over half of the lakes studied, and these lakes varied by area, volume, depth, and location, confirming a widespread trend. Only six of the lakes displayed statistically significant decreases in bloom intensity.

The study recognized its own limitations in understanding the reasons for the global bloom intensity increase, explaining that the bloom trends do not correlate consistently with temperature, precipitation, or fertilizer use trends. However, the study explained that the lakes with decreased bloom intensity happened to also warm the least over the years of the study. The researchers suggested that more studies be conducted to understand the reasons why some lakes are more resistant to warming than others and how this decreased warming relates to an increased ability to regulate phytoplankton blooms. It is crucial to develop a better understanding of the factors that contribute to the increasingly intense phytoplankton blooms, in hopes of determining methods of controlling them. As bloom intensities continue to increase in lakes worldwide, the public health and economic consequences will only become more detrimental.

See: Ho, J. et al. Widespread global increase in intense lake phytoplankton blooms since the 1980s. *Nature*, https://doi.org/10.1038/s41586-019-1648-7 (2019).

Widespread Bird Population Declines Since 1970s

Protecting biodiversity has become a key challenge for humanity. Climate change and habitat loss contribute to increased rates of global environmental change, which threatens individual species and entire ecosystems. While much academic, government and public attention has focused on species extinction, declines in abundance of still-common species and families of species can impact ecosystem integrity and signal degrading ecosystem health. Research to quantify and monitor changes in species abundance is needed to monitor environmental change and assess ecosystem health.

A recent study led by Kenneth Rosenberg of the Cornell Lab of Ornithology and American Bird Conservancy and published in the journal *Science* shows massive losses of birds spanning hundreds of species and diverse habitats. The researchers rely on multiple independent monitoring networks that have gathered bird population records for numerous species in various habitats over many decades. Citizen-science contributions such as the North American Breeding Bird Survey, coordinated by the U. S. Geological Survey and the Canadian Wildlife Service, provided key long-term, large-scale population data. The authors supplement the bird population data with radar data on the biomass passage of migrating birds from a continent-wide weather radar network.

Rosenberg et al. find that North America has lost nearly 3 billion birds (29 percent) over the past 48 years. The reduction in birds spans hundreds of species, including migratory birds and songbirds commonly found in backyards. For instance, radar measurements show that spring migratory volumes have declined by 14 percent in the past decade. The vast majority (90 percent) of the nearly 3 billion birds lost belong to 12 bird families that play key roles in ecosystem functioning, including finches, sparrows, swallows and warblers. Widespread species such as these provide numerous ecosystem services, including pest control and seed dispersal.

While the study did not investigate causes of the massive declines in bird populations, the authors findings are consistent with steep declines in bird populations in other regions. The authors note that the declines are likely driven primarily by widespread degradation and loss of habitat, and are consistent with population declines in other animals such as amphibians and insects. As illustrated by the canary in the coal mine idiom, birds have long been recognized as indicators of environmental health. The authors conclude, "Our results signal an urgent need to address the ongoing threats of habitat loss, agricultural intensification, coastal disturbance, and direct anthropogenic mortality, all exacerbated by climate change, to avert continued biodiversity loss and potential collapse of the continental avifauna."

See: Rosenberg, K. V. et al. Decline of the North American avifauna. *Science*, 2019; DOI: 10.1126/science.aaw1313.

Using Nature to Mitigate Physical Climate Change Hazards

One of the most visible outcomes of Climate Change are the physical hazards. Physical hazards include severe short-term extreme weather events,

such as cyclones, hurricanes, or floods and longer-term shifts in climate patterns (*e.g.*, sustained higher temperatures) that may cause sea level rise or chronic heat waves. One of the ways researchers and engineers are mitigating short-term and long-term impacts of climate change is by using nature-based solutions.

A recent literature search by researchers at the University of Surrey's Global Centre for Clean Air Research (GCARE), summarized the driving mechanisms and trends of physical hazards, potential nature-based solutions for climate change mitigation, and existing resources and databases. To do this they reviewed over 1,500 papers on climate risk, physical hazards, and nature-based solutions. From these papers, they filtered out any non-relevant papers and further refined the scope to focus on the physical hazards deemed to have the most potential risk: flood, storm surges, landslides, heatwaves and droughts. These risks are estimated to contribute to 43.5 percent of loss of life and 74.5 percent of economic losses across world. They did not consider hazards with a weak relationship to climate change such as earthquakes, mass movement dry (deep-seated landslides) and volcanic eruption.

The goal of the literature review was to harmonize the published literature and databases to summarize the cause of physical hazards, predict future impacts of hazards, create a system to classify nature-based solutions, compare nature-based and traditional engineering solutions, and highlight gaps, future work and challenges. In doing so, the researchers found that: 1) physical hazards are increasing with flooding being the most common risk worldwide (43.5 percent) and the impacts from drought being the most uncertain; 2) the most successful nature-based solutions at mitigating physical hazards were the green approach or reforestation/revegetation (49 percent), then the hybrid approach (green and blue combined), and finally the blue approach or water body restoration (14 percent); 3) existing physical hazard and nature-based solution databases need more quality control standards; and 4) the adoption of nature-based solutions is limited by social and political barriers and knowledge gaps from improper documentation and barriers to on-site monitoring.

The authors note that gaps exist, and future research is needed to characterize the economic costs and benefits and uncertainty of using nature-based solutions, traditional engineering approaches, or a combination of approaches for resilience against physical hazards. They believe filling this gap will lead to wider adoption of these approaches and a better chance at preparing for and mitigating climate change impacts.

See: *Sisay E. Debele, Prashant Kumar, Jeetendra Sahani, Belen Marti-Cardona, Slobodan B. Mickovski, Laura S. Leo, Federico Porcù, Flavio Bertini, Danilo Montesi, Zoran Vojinovic, Silvana Di Sabatino*. Nature-based solutions for hydro-meteorological hazards: Revised concepts, classification schemes and databases. *Environmental Research*, 2019; 108799 DOI: 10.1016/j.envres.2019.108799

(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

OBAMA ADMINISTRATION-ERA CLEAN WATER RULE REPEALED, ADDITIONAL CHANGES TO WATERS OF THE UNITED STATES DEFINITION IN STORE

On September 12, 2019, the U.S. Environmental Protection Agency (EPA) announced the formal repeal of the Obama administration's 2015 Clean Water Rule (2015 Rule). The 2015 Rule was one step in an ongoing series of efforts to clarify the reach of the United States' jurisdiction under the federal Clean Water Act (CWA) by defining the jurisdictional waters of the United States (WOTUS) to which that jurisdiction extended. The repeal takes effect on December 23, 2019, and a new rule revising the definition of WOTUS is expected to be adopted in the same timeframe.

The Clean Water Act, Rapanos, and the 2015 Clean Water Rule

The jurisdiction of the federal government under the Clean Water Act is limited to the "navigable waters" of the United States, or WOTUS. In its 2006 Rapanos v. Unites States decision, the U.S. Supreme Court grappled with the scope of this definition, but was unable to reach a majority opinion. In a concurring opinion, Justice Kennedy opined that a non-navigable waterway falls within the United States' jurisdiction if it bears a "significant nexus" to a traditional navigable waterway. Justice Scalia's plurality opinion articulated a different standard: The United States only has jurisdiction over non-navigable waters where the waters have a somewhat permanent flow. That standard also would limit federal jurisdiction to those wetlands that had a continuous surface connection to a relative permanent water body. In the absence of a majority opinion, the scope of federal jurisdiction remained unclear.

In 2015, the Obama administration introduced new EPA regulations intended to address this lack of clarity. The 2015 Rule applied Justice Kennedy's "significant nexus" standard, and explicitly defined WOTUS to include headwaters, perennial streams, and seasonal wetlands. Under this rule, WOTUS included any water body within 4,000 feet of a traditional navigable water or tributary if the water body had a "significant nexus" to a traditional jurisdictional water. Per the 2015 Rule, a "significant nexus" exists where the water body, by itself or with another body of water, has a significant effect on the chemical, physical, and biological integrity of a traditional jurisdictional water. Headwaters, perennial streams, and seasonal wetlands were included within the scope of WOTUS under the 2015 rule.

However, legal challenges to the 2015 Rule resulted in patchwork enforcement and application of the rule. At the time of its repeal, 23 states were operating under the pre-2015 Rule definitions and guidance for the scope of federal jurisdiction under the Clean Water Act, while the remaining 27 operated under 2015 Rule definitions.

The Trump Administration Suspends and Repeals the 2015 Rule

President Trump campaigned on the issue of repealing the 2015 Rule, and almost immediately after assuming office began work on repealing the 2015 Rule. The Trump administration adopted a two-phased approach: it would first repeal the 2015 Rule and then implement a new rule applying a narrower definition of WOTUS. The Trump administration adopted a rule to delay the implementation of the 2015 Rule for a period of two years on February 6, 2018, but two separate federal District Courts in Washington and South Carolina vacated this rule nationwide in the end of 2018. Unlike the 2018 delayed-implementation rule, the new rule repeals the 2015 Rule entirely.

EPA stated four reasons for repealing the 2015 Rule. First, the EPA and the U.S. Department of the Army determined that the prior rule extended WOTUS beyond the scope permitted by the Clean Water Act and Justice Kennedy's significant nexus test in Rapanos. Second, the 2015 Rule did not adequately consider the primary role of the states in pollution control and the development and use of water resources. Third, the 2015 Rule's extension of jurisdic-

tion into realms traditionally regulated by states did not have express approval from Congress. Fourth, the adoption of the 2015 Rule was procedurally flawed and the rule lacked adequate support in the record.

On September 12, 2019, EPA formally adopted the rule repealing the Obama administration's 2015 Rule.

Redefining Waters of the United States

On December 11, 2018, the EPA and the United States Department of the Army, Army Corps of Engineers (Corps) released a proposed rule adopting a narrower WOTUS definition. The Trump administration has promulgated a rule that would replace the pre-2015 regulations and implement a narrower WOTUS definition. Instead of the case-by-case approach of the 2015 Rule, the new rule would apply blanket categories of waterways that would qualify as WOTUS, in line with Justice Scalia's plurality opinion in Rapanos. Categories include traditional navigable waters, tributaries to navigable waters, ditches that operate as traditional navigable waters or were constructed as navigable waters, lakes or ponds that act as navigable waters, impoundments on navigable waters, and wetlands adjacent to navigable waters. The new rule also includes a number of express exemptions from the definition of WOTUS. This would include ephemeral waters, groundwater, certain wastewater and recycled water facilities, waste treatment systems, and certain commercial and agricultural ponds and ditches.

Restores Pre-2015 Regulations

In addition to repealing the 2015 Clean Water Rule, the new rule restores the regulations defining the scope of WOTUS that were in effect prior to the 2015 Clean Water Rule. The comment period on the proposed rule closed on April 15, 2019, and the final rule is expected to be adopted this winter. If the new rule is not adopted, the pre-2015 rules will remain in effect, leaving stakeholders with an imprecise WOTUS definition that spurred the adoption of the 2015 Rule and the Trump administration's proposed rule.

Conclusions and Implications

The return to a pre-2015 definition of WOTUS is only the first step in a two-step process by the Trump administration to more narrowly and precisely define WOTUS, and additional changes are anticipated with the adoption of the new rule this winter. Proponents look forward to the clarity and new land development opportunities that will be afforded by the new rule, while opponents express alarm at the significant reduction in federal protection of waterways that would likely result. Additional information on the status of the WOTUS rule, as well as comments submitted on the new rule, can be found at: https://www.epa.gov/wotus-rule/step-two-revise
(Brian Hamilton, Meredith Nikkel)

FEDERAL ENERGY REGULATORY COMMISSION ADOPTS RULEMAKING TO OVERHAUL RENEWABLE ENERGY RESOURCES PUBLIC UTILITIES REGULATORY POLICIES ACT OF 1987

On September 19, 2019, the Federal Energy Regulatory Commission (FERC or the Commission) issued a Notice of Proposed Rulemaking (NOPR) to "modernize" historic legislation responsible for accelerating the investment in and development of renewable energy resources—the Public Utilities Regulatory Policies Act of 1987 (PURPA). The NOPR was announced at the Commission's first meeting after the departure of Democratic Commissioner Cheryl LaFleur, under which the Commission now operates within a 2-1 Republic majority. In a press release issued with the decision, FERC explained that the NOPR is being undertaken "to better sync its regulations with the modern energy landscape."

The announcement was controversial within the FERC, wherein dissenting Democratic Commissioner Glick stated that the rulemaking would "gut" PURPA, and has similarly divided the energy community. While some fear the rollback of continued renewable energy investment and uncertainty for renewable energy developers, others have noted the adverse impact the legislation has had in other areas, such as increasing interconnection queues, utility customer costs, and further claim that the legislation is outdated in today's developed renewable energy landscape. For example, solar industry representative Katherine Gensler, vice president of regulatory affairs for the Solar Energy Industries Association (SEIA) stated that:

> . . .rather than focusing on PURPA's goal of ensuring competition, this proposed rule will have the effect of dampening competition and allowing utilities to strengthen their monopoly status.

However, Commissioner Chatterjee has defended the rulemaking stating:

> It's clearly time for FERC to revisit its PURPA policies. Congress told us to review our policies from time to time to ensure that our regulations continue both to protect consumers and to encourage the development of QFs. That is precisely what we are doing here.

Further explaining his rationale for the PURPA overhaul, Commissioner Chatterjee explained: PURPA "did its job" in fostering the development of renewable energy market and observing "I think renewables can compete in today's energy market without subsidies, without regulations."

Background

The Public Utilities Regulatory Policies Act of 1978 was enacted in the wake of the energy crisis to encourage energy independence from fossil fuels by enacting regulatory incentives to encourage investment in renewable energy technologies. The legislation exempts qualifying facilities (known as QFs) from certain obligations under the Federal Power Act and requires utilities to pay them a set rate for the avoided cost of the power each generates, effectively creating a "must take" requirement for utilities to purchase qualifying power. Qualifying facilities are defined to include cogeneration facilities and certain small power production facilities, which is a generating facility of 80 MW or less whose primary energy source is renewable (hydro, wind or solar), biomass, waste, or geothermal resources.

In 2005, Congress updated PURPA by its enactment of the Energy Policy Act, which allowed for utility purchase exemptions so long as they procured alternative renewable energy generation in the wholesale markets.

FERC Rulemaking

Broadly, the rulemaking proposes several changes that would increase state control over setting a utility's obligations to purchase power from qualifying facilities. The rulemaking proposes new regulations that would work to change: 1) the definition of a QF, 2) the "must take" purchase obligation of electric utilities under the existing law, 3) the rate at which electric utilities compensate QFs under the avoided cost and must take provisions, and 4) the procedures by which QFs are certified before FERC. The proposed rulemaking would redefine a QF to allow for a rebuttable presumption in certain situations showing why the qualifying facility would not qualify for the "must take" provision. Currently, in order to make an exception to the "must take" purchase obligation a utility must apply to FERC and make a showing that the QF has non-discriminatory market access were the QF generates 20 MW of power. The proposal would also lower the capacity level at which the rebuttable presumption would apply, decreasing it from 20 MW to 1 MW.

Under the proposal, utilities would also have greater avenues of flexibility in determining the "avoided cost" rate at which it must compensate a QF. The rulemaking also proposes procedural changes to the existing process whereby a qualifying facility may, upon a fairly generic filing to the commission, obtain QF status, and would create additional opportunities for a utility to rebut this status, including eliminating the hefty fee to do so (nearly $30,000).

Conclusion and Implications

In the 40 years since PURPA's enactment the renewable energy landscape has changed dramatically. Some argue that PURPA is due for an update and the legislation maintains a diminished impact on renewable energy investment in today's marketplace, where state regulations have developed in the marketplace and even surpassed the federal regulation.

Interested parties have the opportunity to submit comments on the proposed rulemaking sixty days after the NOPR is published in the federal registrar, and it is likely to be an active docket.
(Lilly McKenna)

CALIFORNIA DEPARTMENT OF TRANSPORTATION PUBLISHES CLIMATE CHANGE VULNERABILITY ASSESSMENTS FOR SEVERAL OF ITS DISTRICTS

California's Department of Transportation (Caltrans) recently published climate change vulnerability assessments for three of its districts in southern California (District 7—covering Los Angeles and Ventura counties, District 8—covering Riverside and San Bernardino counties and District 11—covering San Diego and Imperial counties).

Each vulnerability assessment includes a summary report which provides a high-level review of potential climate change impacts and a technical report which details the technical processes used to identify each impact.

Vulnerability Assessment—Setup and Goals

The setup for each district's vulnerability assessment is similar. The assessment begins with an analysis of the district's characteristics and a discussion of the state's key policies on climate change. The assessment then describes some recent extreme storm events in the district and details the type of climate change impacts that could impact Caltrans' State Highway System (SHS) in the district. Although the intent of each assessment is to identify climate change impacts, it does not identify projects to be implemented, nor does it present the cost associated with such projects, reserving those next steps to future studies.

To date, Caltrans has completed vulnerability assessments for six of its twelve districts. Caltrans notes that it has initiated the assessments to better understand the vulnerability of Caltrans' SHS and other Caltrans assets. Caltrans' goals are to:

- Understand the types of weather-related and longer-term climate change events that will likely occur with greater frequency and intensity in future years,

- Conduct a vulnerability assessment to determine those Caltrans assets vulnerable to various climate-influenced natural hazards, and

- Develop a method to prioritize candidate projects for actions that are responsive to climate change concerns, when financial resources become available.

Using the assessment for District 7 as an example, Caltrans notes that the vulnerabilities identified in the assessment will guide Caltrans to primarily implement projects to address sea level rise, storm surge, coastal erosion, and wildfire events, using the following potential strategies:

- Raising roadways, increasing drainage, and installing pumping systems to prevent inundation of highway from sea level rise.

- Realigning and siting new roadways to avoid areas affected by sea level rise, storm surge, and coastal erosion.

- Natural infrastructure and living shoreline strategies should be considered where they will be effective (not in areas with high wave action).

- Keeping landscaping "fire-safe" in wildfire risk areas by using fire-resistant plants that are high-moisture, grow close to the ground, and have low sap content.

Vulnerability Assessment—'What Does This Mean to Caltrans?'

Each assessment ends with a "What Does This Mean To Caltrans"? section that summarizes the assessment. Again, using District 7's assessment as an example, the "What Does This Mean To Caltrans?" section includes, in part, the following:

General Conclusions

General conclusions include the following:

- When building or repairing District 7 facilities, consider future conditions as opposed to relying on historical conditions.

- Consequence costs should factor into redesign to assess broader economic measures and the potential cost savings from adaptation.

• As a part of event response, include best available climate data from state resource agencies when developing updated design approaches.

Integration into Caltrans Program Delivery

Integration into the Caltrans Program Delivery includes:

Caltrans programs (including policies, planning, design, operations, and maintenance) should be redesigned to consider long-term climate risks. They should also consider uncertainties inherent in climate data by adopting a climate scenario-based decision-making process based on the full range of climate predictions. Caltrans is now evaluating internal processes to understand how to best incorporate climate change into decision-making.

Leadership Goals

Leadership goals include:

Leadership at the state government and transportation agency levels will be required. The broader economic implications of transportation system damage, failure, or loss are often not adequately considered, causing them to be undervalued—so avoiding the possible impacts of extreme weather events and climate change on the SHS should be policy and capital programming priorities.

Communication and Collaboration

Communication and collaboration goals include:

Adapting to climate change challenges will require a collaborative and proactive approach. Caltrans recognizes that stakeholder input and coordination are necessary to develop analyses and adaptation strategies that support and build upon the state's current body of work. Collaboration with other state agencies and local communities on adaptation strategies can lead to better decisions and a collective, stronger response.

A State Highway System Resilient to Climate Change

Finally, Caltrans is aiming towards a system resilient to climate change by:

Systematically and comprehensively considering climate change will lead to a SHS that is more resilient to extreme events and climate change.

Conclusion and Implications

The California Department of Transportation's climate vulnerability assessments appear to be a good first step to analyzing the potential climate change impacts to Caltrans' SHS. One of the biggest takeaways is the following statement found in the assessments: "All decisions should be forward-looking instead of based on historic trends, because all future scenarios show changing conditions. These future conditions must be considered when designing new transportation assets to ensure that they achieve their full design life."
(Kathryn Casey)

CALIFORNIA PUBLIC UTILITIES COMMISSION HOSTS WORKSHOP TO EVALUATE AUTONOMOUS VEHICLE PILOTS

The California Public Utilities Commission (CPUC or the Commission) hosted a workshop recently to review and invite comment on the Commission's launch of, and possible next steps for, its relatively new pilot program allowing for the deployment of autonomous vehicle passenger carrier service in select closed loop areas pursuant to Commission Decision D 18-05-043.

Under this program, the Commission has issued four permits to date for the following companies to participate in this program: AutoX, Pony.ai, Waymo and Zoox. Each company presented at the October 22 workshop to respond to specific inquiries posed by the Commission, including analysis of any data reported to the Commission thus far in the pilot program, explanations of how the companies could make the technology more accessible, and other aspects of the service that should be evaluated for further review and regulation.

Background

In addition to its more widely-seen role as utility regulator in the energy industry, the CPUC is also charged with oversight of the transportation industry and passenger carrier service in particular. The Commission licenses and regulates taxi carriers, transportation network carriers (TNCs) such as Lyft® and Uber®, and vessel common carriers such as the fleet of San Francisco Bay ferries.

Under this role, the Commission issued decision 18-05-043 in May of 2018 to create a pathway for transportation companies to deploy autonomous vehicles in passenger carrier service. By statute, the CPUC is working in concert with the California Department of Motor Vehicles (DMV) to oversee the launch of this pilot program and companies are required to receive licensing approvals from each agency. Among the requirements that the CPUC and DMV have established is that each carrier must:

- Provide a preventive maintenance program for all permitted vehicles;
- Enroll in the DMV's Employment Pull Notice Program;
- Maintain a safety education and training program for all drivers and subcarriers;
- File with the Commission a certificate of workers' compensation insurance;
- Enroll in a mandatory controlled substance and alcohol testing program;
- Maintain an adequate level of liability and property damage insurance;
- Maintain a passenger carrier equipment list with the Commission of all vehicles in use that includes the manufacturer, model, year, vehicle identification number, seating capacity, whether the vehicle is leased or owned, handicap accessible status, and license plate number, and
- Comply with the Vehicle Code.

The pilot program established under D.18-05-043 is divided into two groups, those carriers that are permitted to allow passenger carrier service with a safety driver, and those which are allowed to operate fully autonomous service. Under either scenario, the transportation service providers are prohibited from collecting fares for the passenger service during the pilot program.

The pilot programs are limited closed loop services that operate by pre-registering a customer base depending on certain geographic variables along a predetermined, "geo-fenced" route along which passengers are picked up and dropped-off. The purpose of the pilot is to test the autonomous vehicle program and gather data that can inform the development of the industry and regulations that may be needed as the service develops. Companies are required to report certain data, including crash reports, usage data, disengagement data (*i.e.*, instances in which a passenger chooses to end the ride), and other relevant information.

Workshop to Gauge Pilots and Next Steps

The CPUC workshop was run by Commission and DMV staff and included presentations by each of the

four piloted companies to present on their service, and then posed a number of issues and questions for further evaluation and development by the Commission. For example, Commission staff asked what accessibility measures the companies were undertaking to allow for accessible ridership, what sort of clean energy policies were companies considering or should the Commission enforce, what first responder communications and coordination should be in place to assist the fleet of autonomous vehicles, and other issues that may be developed as the Commission continues its rulemaking proceeding to address autonomous vehicle transportation service. Representatives from various disability advocacy groups also appeared and asked the Commission and company representatives to consider what sorts of technologies could be developed to improve vehicle accessibility, and also expressed a strong desire to see autonomous vehicles be deployed on a wider scale as a beneficial and needed mode of transportation. Overwhelmingly, however, stakeholder comment focused on the need to move towards customer fare collection for the services.

The permits issued for the pilot programs are of indefinite duration and will therefore likely run until the transportation companies change course, or until the Commission acts to establish a clearer pathway towards wide-scale deployment of the technology and allows for fare collection.

Conclusion and Implications

Comments made at the California Public Utilities Commission workshop made clear that there is significant pressure among a variety of stakeholders to quickly move towards fare collection for the autonomous vehicle programs. The California Public Utilities Commission will likely issue further guidelines and establish next steps for moving towards wider deployment of autonomous vehicle services throughout the state.
(Lilly McKenna)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

•On September 24, 2019, the U.S. Department of Justice announced that Emanuele Palma, a senior manager of diesel drivability and emissions at Fiat Chrysler Automobiles, was charged in an indictment for his alleged role in a conspiracy to mislead U.S. regulators, customers, and the public by making false and misleading statements about the emissions control software used in more than 100,000 Fiat Chrysler diesel vehicles. The software increased the vehicles' emissions when they were not running on federal emissions test cycles. Palma is charged with one count of conspiracy to defraud the United States, to violate the Clean Air Act (CAA), and to commit wire fraud. Palma is also charged with six counts of violating the CAA, four counts of wire fraud, and two counts of making false statements to representatives of the FBI and the U.S. Environmental Protection Agency's (EPA) Criminal Investigation Division. As alleged in the indictment, Palma led a team of engineers in the United States responsible for developing and calibrating the 3.0-liter diesel engine used in certain Fiat Chrysler diesel vehicles. Palma supervised the calibration of several software features in the vehicles' emissions control systems to meet emissions standards for nitrogen oxides. The indictment alleges that Palma and his co-conspirators calibrated the emissions control functions to produce lower NOx emissions under conditions when the subject vehicles would be undergoing federal testing procedures or "driving cycles" and higher NOx emissions under conditions when the vehicles would be driven in the real world. Palma and his co-conspirators allegedly referred to the manner in which they manipulated one method of emissions control as "cycle detection." The indictment alleges that by calibrating the emissions control functions on the subject vehicles to produce lower NOx emissions while the vehicles were on the firing "cycle," and higher NOx emissions when the vehicles were off the driving "cycle," or "off cycle," Palma and his co-conspirators purposefully misled Fiat Chrysler's regulations by making it appear that the subject vehicles were producing less NOx emissions than they were in real world driving conditions. Palma and his co-conspirators allegedly calibrated the subject vehicles' emission control systems to make them more attractive to Fiat Chrysler's potential customers, by increasing fuel economy and reducing the frequency of a required emissions control system service interval, rather than to maximize the reduction of NOx emissions. Palma and his co-conspirators made and caused others to make false and misleading representations to regulators about the emissions control functions of the vehicles in order to ensure that Fiat Chrysler obtained regulatory approval to sell the subject vehicles in the United States.

•On October 23, 2019, the United States filed a law suit against the State of California for unlawfully entering a cap and trade agreement with the Canadian Province of Quebec. The civil complaint also names several State officers, the California Air Resources Board, and the Western Climate Initiative, Inc. According to the complaint filed in the Eastern District of California, the defendants have pursued or are attempting to pursue an independent foreign policy in the area of greenhouse gas regulation. The Constitution prohibits states from making treaties or compacts with foreign powers, though the complaint alleges that California entered into a complex, integrated cap-and-trade program with Quebec in 2013 without congressional approval. U.S. Supreme Court precedent has recognized that the interest of cities, counties, and states requires the federal power in foreign relations to be reposed exclusively in the federal government, keeping it free from local interference. The United States alleges that the agreement, which the Western Climate Initiative facilitates, interferes with the proper execution of these federal responsibilities. The complaint asks the court to uphold the exclusive role of the federal government in conducting foreign policy by declaring the agreement, and the related statutes and regulations, unconstitutional and enjoining their operation.

•On October 18, 2019, EPA announced that it had settled alleged CAA violations at the American Refining Group, Inc. (ARG) petroleum refinery in Bradford, Pennsylvania. ARG has agreed to pay a $350,000 penalty, along with $4.5 million in equipment improvements, including the replacement of a coal-fired boiler and the associated fuel gas recovery system. EPA cited ARG for several violations, including noncompliance with several terms of the refinery's operating permit issued by the Pennsylvania Department of Environmental Protection. The alleged violations include failure to install a fuel gas recovery unit within the required compliance period, exceedances of NOx and particulate matter emission limits, failure to properly operate an emission-reducing flare, failure to comply with equipment leak detection and repair safeguards, failure to comply with performance requirements for petroleum storage vessels, and failure to comply with national emission standards for hazardous air pollutants for industrial boilers.

•On October 16, 2019, EPA settled with the Vons Companies, Inc. over violations of federal chemical-release prevention and reporting requirements at its dairy processing facility located in Commerce, California. The company will pay a $168,043 civil penalty. In 2017, EPA inspectors found violations of the CAA's Risk Management Plan regulations at Von's facility, Jerseymaid Milk Products, which uses large quantities of anhydrous ammonia in its industrial refrigeration system. The violations included deficiencies in the facility's process safety requirements, mechanical integrity program, documentation of personnel training, and follow-up on compliance audit findings. The facility also lacked necessary signs and labels, lacked auditory or visual alarms to alert employees of an ammonia release, and had inadequate emergency response measures, such as ammonia detectors and emergency ventilation override switches.

•On October 10, 2019, EPA announced a settlement with Starkist Samoa Co. to resolve alleged violations of the federal CAA chemical safety requirements at the Starkist-leased Samoa Tuna Processors facility. The facility is used to refrigerate tuna in Pago Pago. A 2016 EPA inspection found Starkist violated the CAA General Duty Clause by failing to safely manage anhydrous ammonia. At the time of the inspections, EPA found that the ammonia refrigeration system was not designed to meet safety standards. Reported deficiencies included: 1) failure to identify hazards that could cause accidental releases of anhydrous ammonia, 2) inadequate documentation that the facility's refrigeration system was designed to prevent releases of anhydrous ammonia, 3) failure to develop an emergency plan to minimize the consequences of accidental release, and 4) an insufficient operation and maintenance program for the refrigeration system. The settlement agreement requires Starkist to implement a series of corrective actions to bring the facility into compliance with safety standards to prevent releases of anhydrous ammonia.

•On September 24, 2019, EPA and U.S. Customs and Border Protection announced the imposition of $11,775 in civil fines on companies that illegally imported more than 500 vehicles and engines from China into the Ports of Los Angeles and Long Beach, including fork lifts, bicycle engine kits, loose engines and chainsaws. Most of the equipment was seized, exported, and prevented from being sold in the United States. Under the EPA and Customs joint operation, seven companies have been found to have imported vehicles and engines without certification or proper emissions controls required under the federal CAA: Birnstengel Investments, Inc., Lawrence Group, Chongwei He, dba Sonic Technology Co., Ltd., Dynasty Shipping Inc., Luck Yong, Long Time Trading Co., and Yae First Trading.

•On October 2, 2019, EPA announced recent settlements with six companies for violating the California Truck and Bus Regulation and Drayage Truck Regulation. The companies failed to install particulate filters on their own heavy-duty diesel trucks, failed to verify that trucks they hired for use in California complied with the state rules, or failed to maintain required records. The companies will pay a combined total of over $450,000 in civil penalties for the violations. The Coca-Cola Company failed to verify that 63 of the carriers it hired in California from 2015 to 2017 complied with the Truck and Bus rule. In addition, the Coca-Cola Company dispatched drayage trucks that did not meet emission standards and failed to verify that its contracted truck owners were registered with the California Air Resources Board's (CARB) Drayage Truck Registry. The com-

pany will pay a $46,787 penalty. Mercer Transportation Company Inc., headquartered in Louisville, Kentucky, will pay a $46,787 penalty for failure to verify that its contracted truck owners were registered with CARB's Drayage Truck Registry and failure to maintain records. Liquid Transport LLC and Liquid Transport Corp. operated heavy-duty diesel trucks in California from 2014 to 2017 without the required diesel particulate filters. The companies also failed to verify that 122 of the carriers it hired to transport goods in California complied with the Truck and Bus rule. In addition, the firms owned and dispatched 22 drayage trucks that did not meet emission standards and were not registered with the Drayage Truck Registry. The companies, headquartered in Indianapolis, Indiana, agreed to pay a $150,000 penalty. Dean Foods Company operated 14 heavy-duty diesel trucks from 2014 to 2017 without the required diesel particulate filters and failed to maintain records for 40 vehicles. The company, headquartered in Dallas, Texas, agreed to pay a $30,000 civil penalty and will spend $90,000 on a supplemental environmental project to install an air filtration system to reduce harmful air pollutants in classrooms in one or more schools in the South Coast Air Basin. D&E Transport LLC operated 26 heavy-duty diesel trucks in California from 2014 to 2017 without the required diesel particulate filters. The company also failed to verify that 104 of the carriers it hired to transport goods in California complied with the Truck and Bus rule. The company, headquartered in Clearwater, Minnesota, agreed to pay a $55,000 penalty. Flat Creek Transportation LLC, headquartered in Kinston, Alabama, operated 24 heavy-duty diesel trucks in California from 2014 to 2018 without the required diesel particulate filters and failed to maintain records for 63 vehicles. Flat Creek will pay a $71,250 penalty.
(Allison Smith)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT HOLDS 'ANTI-BACKSLIDING' PROVISION IN ENERGY CONSERVATION LAW REQUIRES DEPARTMENT OF ENERGY TO SUBMIT OBAMA-ERA REGULATIONS FOR FINAL PUBLICATION

National Resources Defense Council v. Perry, ___F.3d___, Case No. 18-15380 (9th Cir. Oct. 10, 2019).

A statute directing the U.S. Department of Energy (DOE) to establish energy conservation standards includes an "anti-backsliding provision" preventing any alteration to standards other than those intended to correct non-substantive, inadvertent errors. The Ninth Circuit has held that DOE's regulations implementing the rule impose a mandatory duty on the agency to submit rules for final publication, even if that duty must be carried out when control of the agency has transferred between the time the standards were proposed and when the public review-and-comment period has ended.

Background

In adopting the Energy Policy and Conservation Act (EPCA, 42 U.S.C. §§ 6291–6317), Congress directed DOE to "establish energy-conservation standards for certain consumer products and industrial equipment … through formal notice-and-comment rulemaking proceedings," culminating in promulgation of standards by publication of final rules in the Federal Register. 42 U.S.C §§ 6306(a) and 6316(a):

> A somewhat unusual provision of EPCA, known as the 'anti-backsliding' provision, prohibits DOE from promulgating an amended standard that is less stringent than the preexisting standard. 42 U.S.C §§ 6295(o)(1) and 6313(a)(6)(B)(iii)(I).

To give itself some leeway to address inadvertent errors by adopting "the error-correction rule," which creates a brief, 45-day window between DOE's issuance of a final rule:

> . . .and the rule's publication in the Federal Register. During that 45-day period, DOE posts the rule on its website and invites members of the public to identify any errors that should be corrected before the standard is promulgated. 10 C.F.R. § 430.5(c)(1), (d)(1).

The error-correction rule defines the term "error" narrowly as "an aspect of the regulatory text of a rule that is inconsistent with what the Secretary intended regarding the rule at the time of posting," and gives as examples typographical, calculation, or numbering mistakes. § 430.5(b). Requests for correction may not be premised on "disagreement with a policy choice that the Secretary has made," and DOE will not consider any new evidence submitted in connection with a correction request. § 430.5(d)(2)–(3). As DOE explained, the error-correction process is not an opportunity to:

> . . .seek to reopen issues that DOE has already addressed or argue for policy choices different from those reflected in the final rule.

At the conclusion of the 45-day error-correction period, DOE has three options: 1) to reject any comments received, after which DOE "*will submit the rule for publication*"; 2) if no comments are received, DOE "*will in due course submit the rule. . .to the Office of the Federal Register for publication*"; or 3) if comments pointing out errors are determined to be well-taken, DOE "*will, absent extenuating circumstances, submit a corrected rule for publication in the Federal Register*." 42 U.S.C. § 430.5(f)(1)–(3) (emphasis in Opinion).

In the waning days of the Obama administration, DOE issued final approval of four energy conservation standards. Three attracted no comments during the error-correction period; a single comment was received regarding the fourth. DOE has nonetheless not yet submitted any of the rules for publication, stating that the agency "is continuing to review" them.

EPCA has a citizen-suit provision authorizing:

> . . .any person to bring a civil action against an agency such as DOE 'where there is an alleged failure of such agency to perform an act or duty under this part which is not discretionary.' 42 U.S.C. § 6305(a)(2).

Environmental group plaintiffs relied on EPCA's citizen-suit provision in asserting that the error-correction rule imposes upon DOE a non-discretionary duty to publish the four rules at issue in the Federal Register. The U.S. District Court agreed and ordered DOE to submit the rules for publication.

The Ninth Circuit's Decision

On appeal, DOE argued for application of the default rule that:

> . . .agencies are free to withdraw a proposed rule before it has been published in the Federal Register, even if the rule has received final agency approval. *See Kennecott Utah Copper Corp. v. U.S. Department of Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996).

Generally-applicable regulations governing the Office of the Federal Register permit an agency to withdraw a final rule even after it has been submitted to the Office for publication, so long as the rule has not yet been published. 1 C.F.R. § 18.13(a). "But," the Ninth Circuit observed "the regulations at issue in *Kennecott* were never made available for public inspection with the expectation that they would become final," as is required under the EPCA. Further distinguishing *Kennecott*, the agency at issue in that case did not have a statutorily-imposed "mandatory duty to publish the regulations due to anything similar to the error-correction rule."

The Ninth Circuit agreed with the District Court that:

> the plain language of the error-correction rule supports that reading, and that the absence of genuine ambiguity in the rule's meaning precludes us from deferring to DOE's contrary interpretation, citing the U.S. Supreme Court's recent decision in *Kisor v. Wilkie*, ___U.S.___, 139 S. Ct. 2400, 2415 (2019).

Following Supreme Court guidance, the Ninth Circuit relied on § 430.5(f), which lays out only three courses of action for DOE to take at the conclusion of the 45-day error correction period, each of which imposes a mandatory duty on DOE to submit the rule—whether corrected or not—for publication in the Federal Register. The court rejected DOE's argument that "will" as used in § 430.5(f) "was intended to be merely descriptive rather than prescriptive," in other words should be understood to mean DOE "will *ordinarily*" submit the rule for publication. Drawing on the use of "will" in its mandatory sense elsewhere in the EPCA, as well as the Ninth Circuit's rejection of a "similar argument" in *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764 (9th Cir. 2006), the court concluded:

> . . .the rule's use of the word 'will' unambiguously imposes a mandatory duty that constrains whatever discretion the Secretary might otherwise have possessed.

The Ninth Circuit also rejected DOE's argument that EPCA's citizen-suit provision is limited to enforcement of statutorily-imposed mandatory duties, and does not extend to regulatorily-imposed mandatory duties, relying in part on *Sierra Club v. Leavitt*, 355 F.Supp.2d 544, 556–57 (D. D.C. 2005), in which the district court of the District of Columbia:

> . . .reach[ed] the same conclusion with respect to the Clean Air Act's materially identical citizen-suit provision.

Conclusion and Implications

Disputes arising from several years of agency intransigence are beginning to filter up through the Circuit Courts of Appeal, resulting in a range of rulings regarding the extent of both mandatory duties imposed on agencies and enforcement mechanisms available to citizens and states. This body of law may well inform future Congressional actions in anticipation of future alternations of control over the executive branch.
(Deborah Quick)

D.C. CIRCUIT HOLDS EPA IS REQUIRED TO SET CLEAN AIR ACT EMISSION REDUCTION DEADLINES FOR UPWIND STATES

State of Wisconsin et al. v. U.S. Environmental Protection Agency, et al., 938 F.3d 303 (D.C. Cir. 2019).

The U.S. Court of Appeals for the District of Columbia Circuit held in September 2019 that the U.S. Environmental Protection Agency (EPA) must impose pollution emission deadlines for states that contribute to pollution in neighboring states. The holding comes after the finding that a lack of deadlines makes it impossible for states affected by pollution to comply with the federal Clean Air Act (CAA).

Factual and Procedural Background

The Clean Air Act tasks the EPA with setting National Ambient Air Quality Standards (NAAQS) that individual states must abide by. Accordingly, the CAA requires states to adopt State Implementation Plans (SIPs) to provide for implementation, maintenance, and enforcement of the NAAQS. If states fail to submit a SIP or if the EPA disapproves of the submitted plan, the EPA must issue a Federal Implementation Plan (FIP).

To address air pollution that drifts with the wind, the CAA includes a Good Neighbor Provision. This provision prohibits upwind states from emitting air pollutant in quantities that interfere with maintenance of air quality in downwind states. The Good Neighbor Provision requires states to submit SIPs that demonstrate the state is refraining from emitting air pollutants in quantities that will significantly contribute to nonattainment in another state. If the SIP is inadequate, EPA will prepare an FIP which satisfies the Good Neighbor Provision.

In addition to addressing harms between states, the CAA also tasks EPA with designating nonattainment areas, which are locations that do not comply with NAAQS. If a state is in nonattainment, the CAA requires it to secure compliance "as expeditiously as practicable."

In 2008, EPA reduced ozone NAAQS from 80 parts per billion (ppb) to 75 ppb, with the deadline for attainment of July 20, 2018. The EPA updated the NAAQS in 2016 to allow the upwind states to postpone eliminating their contributions to downwind ozone pollution. The update did not include *any* deadline for upwind states to eliminate their significant contributions. Environmental groups and the State of Delaware (petitioners) sued the EPA, arguing that the update infringes on the Good Neighbor Provision by allowing upwind states to continue their contributions to downwind air quality problems for too long.

The D.C. Circuit's Decision

The court considered whether the update was inconsistent with the CAA's attainment deadlines. More specifically, the dispute centered on whether the Good Neighbor Provision required upwind states to eliminate their significant contributions before the 2008 NAAQS deadline for compliance.

While reviewing petitioner's argument, the court looked to its decision in the analogous case, *North Carolina v. U.S. EPA*, 531 F.3d 896 (D.C. Cir. 2008). In *North Carolina*, the EPA promulgated a rule that was inconsistent with a NAAQS deadline. There, the inconsistent deadlines made it impossible for downwind states to comply with the CAA's deadlines because the EPA granted upwind states an extension on the deadline to reduce emissions. The court determined that the EPA ignored its statutory mandate to force downwind states to comply with the deadlines. Central to that holding was the fact that downwind areas were required to attain certain levels of pollution by 2010. Without prior compliance from upwind states, downwind states would likely have to make greater reductions than the Good Neighbor Provision required.

Similarly, the D.C. Circuit here determined EPA was interpreting the Good Neighbor Provision in a manner that subverted the CAA. Because of Congress' regulatory scheme, downwind states had a deadline to secure attainment of the NAAQS by 2018. At the same time, the upwind states did not face an explicit obligation to eliminate their significant contributions to downwind nonattainment. The update would force downwind states to either ignore the attainment deadlines or make greater reductions than the Good Neighbor Provision requires. Ultimately, the court held that the choice was incompatible with Congress' regulatory scheme.

The court emphasized the fact that:

> . . .the statutorily designed relationship between the Good Neighbor Provision's obligation for upwind States and the attainment deadlines for downwind areas generally calls for parallel timeframes.

The court then applied a reasonable statutory interpretation of the Good Neighbor Provision to determine that in accounting for a broader context of the statute as a whole, the attainment deadlines were the heart of the CAA. Therefore, the update was unlawful because it prevented states from reaching the goal.

Conclusion and Implications

This case highlights the importance of attainment of NAAQS under the Clean Air Act. This case provides a solid example of how to reconcile agency regulations that are inconsistent with congressionally set deadlines. While the EPA holds significant authority in implementing rules to achieve the attainment of NAAQS, Congress' deadlines are not discretionary. (Marco Antonio Ornelas)

https://www.cadc.uscourts.gov/internet/opinions.nsf/AB56D2429DBDBE3B8525847400512A0D/$file/16-1406.pdf
(Rebecca Andrews)

CALIFORNIA'S FOURTH DISTRICT COURT UPHOLDS CONDITIONS IMPOSED BY CALIFORNIA COASTAL COMMISSION ON COASTAL DEVELOPMENT PERMIT

Lindstrom v. California Coastal Commission, ___Cal.App.5th___, Case No. D074132 (4th Dist. Sept. 19, 2019).

California's Fourth District Court of Appeal found the California Coastal Commission (Commission) did not abuse its discretion when it imposed special conditions on a coastal development permit. The court found three of four conditions were consistent with the City of Encinitas' (City) local coastal program and within the Commission's authority. The court, however, rejected one condition because it was overbroad, unreasonable, and did not achieve the Commission's purpose for imposing it.

Factual and Procedural Background

In 2012, petitioner applied for a coastal development permit with the City of Encinitas to build a 3,553 square-foot home atop a 70-foot high ocean-top bluff. Petitioner submitted a permit application pursuant to the City's Local Coastal Program (LCP) and hired an engineering firm to prepare a geotechnical report. The LCP required the report to: 1) certify that the development would not require coastal armoring in 75 years based on current erosion rates; and 2) calculate the project's setback distance, of no less than 40-feet, based off a 1.5 safety level. The report concluded the project would be safe from bluff failure with a 40-foot setback and no protective armoring in 75 years would be required.

In May 2013, the City's planning commission approved the development permit with conditions. One month later, two commissioners appealed the City's approval claiming it conflicted with the LCP. Petitioner requested the Commission delay its decision, and retained a new engineering firm to prepare a revised geotechnical report. The report was completed in October 2015 and concluded the slope would be safe with a 40-foot setback at a 1.29 safety level.

The Commission heard the appeal in July 2016. A staff geologist claimed the proper setback should be 60 to 62 feet because the report's analysis relied on an improper safety level. Counsel for petitioners claimed the LCP's statutory language did not explicitly require a safety level of 1.5 over the course of the entire 75-year projection. The Commission rejected the report's calculations and approved the permit with four conditions. The first condition (Condition 1.a) imposed a 60- to 62-foot setback. The second condition (Condition 3.a) prohibited all use of coastal armoring devices. The third condition (Condition 3.b) required removal of the home in the event a government agency deems occupancy unsafe due to natural hazards. The fourth condition (Condition 3.c) imposed mandatory remediation measures that the landowners must take in the event hazardous bluff conditions threaten the structure.

Petitioner filed for a writ of mandate challenging these conditions. The trial court partially granted the petition and found in favor of petitioner as to the first and second conditions (Conditions 1.a and 3.a), but found the Commission did not abuse its discretion in imposing the third and fourth conditions (Conditions 3.b and 3.c). The parties cross-appealed.

The Court of Appeal's Decision

The Court of Appeal for the Fourth Judicial District partially reversed the trial court's holding. Under a substantial evidence standard of review, the court found the Commission did not abuse its discretion by imposing the first, second, and fourth conditions (Conditions 1.a, 3.a, and 3.c), but held the third condition (Condition 3.b) was improperly broad and not reasonably related to achieving the LCP's purpose.

The Minimum Setback Requirement

As to Condition 1.a, which imposed a 60- to 62-foot development setback, the court found that the plain language of the statute supported the Commission's decision. Petitioner urged the court to defer to the City planning commission's interpretation of the statute because it was the agency charged with initially issuing the permit. The Commission urged the court to defer to its analysis because it certified the LCP and case law requires deference to the Commission's interpretation of local programs. The court declined deferring to either interpretation, instead finding that a reasonable person could interpret the statute's plain language as requiring a safety factor of 1.5 from failure and erosion over 75 years. As such, the Commission's condition was proper because the geologist's 60- to 62-foot setback calculation conformed to the statute's methodology.

Waiver of Future Coastal Armoring

The court found the Commission properly imposed Condition 3.a because the agency may impose reasonable terms and conditions on permits, so long as they comport with the Coastal Act and local LCP. The condition, which waived the petitioner's future right to build a seawall, was consistent with the City's LCP and implemented a provision of the City's General Plan that banned coastal armoring structures on new developments. The court also petitioner's related takings claims, finding that the condition simply restricted use of the property, rather than exacting a fee or demanding conveyance of a property interest. Petitioner would not be deprived of all economically beneficial use of their land because they would continue to hold title to their property. Lastly, petitioner would not suffer a physical taking because future bluff rescission on their property would be caused by forces of nature, not an unconstitutional government invasion.

Mandatory Structure Removal

The court held the Commission abused its discretion in imposing Condition 3.b, which would require petitioner to remove the home in the event a government agency deems it at risk of a natural hazard. Contrary to petitioner's argument, the court found that the Commission may impose permit conditions not expressly authorized by the LCP, so long as they are reasonable. Here, however, Condition 3.b was not reasonable because it was overly broad. As drafted, the condition's language could be interpreted to require petitioner to remove their home under unreasonable circumstances, including natural hazards that have nothing to do with blufftop instability. Because this failed to reasonably relate to the LCP, the court issued a writ of mandate requiring the Commission to delete or revise and clarify the condition.

Bluff Rescission Management

Finally, the court rejected petitioner's argument that Condition 3.c unconstitutionally infringed on their substantive and procedural due process rights. The condition required petitioner to prepare a geotechnical report if the bluff erodes to within ten feet of the development and obtain an amended coastal development permit or remove any structures that are deemed unsafe. The court found the condition properly comported with the Commission's inherent authority because it aligned with the LCP and Coastal Act and did not unreasonably restrict use of the land.

Conclusion and Implications

The Court of Appeal's decision reiterates the Coastal Commission's inherent authority to impose special conditions on coastal development permits. The Coastal Act grants the Commission with oversight over local coastal programs and permitting. As

such, the Commission may impose additional conditions of approval to protect bluff stability, including mandatory setback requirements, waivers on coastal armoring, and future retreat management measures. Mere restrictions on land use that do not exact a fee or deprive owners of all use do not violate the unconstitutional conditions doctrine. However, conditional language should not be so expansive that it could be interpreted in a manner that yields unreasonable results. Thus, conditions that are overly broad or inconsistent with a city's local coastal program are impermissible.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/D074132.PDF
(Bridget McDonald, Christina L. Berglund)

CALIFORNIA'S FIFTH DISTRICT COURT FINDS CEQA CHALLENGE TO HYDROELECTRIC DAM RELICENSING PROCESS IS PREEMPTED BY FEDERAL POWER ACT

County of Butte v. Department of Water Resources, 39 Cal.App.5th 708 (5th Dist. 2019).

Plaintiffs filed suit against the California Department of Water Resources (DWR) and others, alleging a failure to comply with the California Environmental Quality Act (CEQA) as part of a federal relicensing application to operate a hydroelectric dam. The Superior Court dismissed the complaint and the Court of Appeal affirmed. After the California Supreme Court granted the petition and transferred the case to the Court of Appeal with directions to reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017), the Court of Appeal found *Friends of the Eel River* to be distinguishable and re-affirmed.

Factual and Procedural Background

DWR applied to the Federal Energy Regulatory Commission (FERC) to extend its federal license to operate the Oroville Dam and related facilities as a hydroelectric dam. The Oroville hydroelectric facilities are operated for power generation, water quality improvement in the Sacramento–San Joaquin Delta, recreation, fish and wildlife enhancement, and flood management. In connection with this process, DWR filed a programmatic Environmental Impact Report (EIR) as the lead agency pursuant to CEQA.

Under the Federal Power Act (FPA), federal and state licensing procedures are merged into a single procedure called an "alternative license process" (ALP), which combines the federal and state environmental review processes into a single process by which affected parties, federal and state agencies, local entities, and affected private parties agree to the terms of relicensing in a final "settlement agreement." The purpose of this process is to resolve all issues that have or could have been raised by the various participating parties in connection with FERC's order issuing a new project license. The settlement agreement then incorporates these requirements in to the license as condition of the license.

Here, some 52 parties including the plaintiffs and the Department of the Interior, representing all interested federal agencies, participated in the alternative license process. Plaintiffs, however, withdrew as parties and instead challenged the sufficiency of the EIR in state court, seeking to enjoin the issuance of an extended license until their environmental claims were reviewed. The Superior Court denied the petition on grounds that the environmental claims were speculative, and the Court of Appeal then held that the authority to review the EIR was preempted by the FPA, and that the superior court therefore lacked subject matter jurisdiction.

Plaintiffs petitioned for review to the California Supreme Court. Review was granted, and the matter ultimately was transferred back to the Court of Appeal with directions to reconsider the case in light of the Supreme Court's recent opinion in *Friends of the Eel River*. This opinion then followed.

The Court of Appeal's Decision

Federal Preemption

The Fifth District Court of Appeal began its analysis with a discussion of federal preemption principles.

Generally, the FPA occupies the field of licensing a hydroelectric dam and bars environmental review of the federal licensing procedure in the state courts. The reason is that "a dual final authority with a duplicate system of state permits and federal licenses required for each project would be unworkable."

The only relevant exception is § 401 of the federal Clean Water Act, which requires the State Water Resources Control Board to issue a water quality certificate pursuant to § 401 of the Clean Water Act and the state Porter-Cologne Act before a FERC can issue a license to DWR. Preparation and certification of an EIR is required in connection with this process, although the FPA places various time limits and constraints on the state's power under § 401. However, any disputes regarding the FERC licensing process or the adequacy of "required studies" are generally subject to FERC's jurisdiction and review.

Federal Court Jurisdiction

After analyzing preemption, the Court of Appeal concluded that plaintiffs could not challenge the environmental sufficiency of the environmental review studies for the relicensing in state court because jurisdiction to review the matter lies with FERC, and plaintiffs did not seek federal review as required by 18 Code of Federal Regulations part 4.34(i)(6)(vii). Further, the plaintiffs did not challenge and could not have challenged the State Water Resources Control Board's certification in their pleadings because it did not exist at the time that the complaint was filed.

Analysis under *Friends of the Eel River*

As directed, the Court of Appeal then reviewed *Friends of the Eel River* and found that the Interstate Commerce Commission Termination Act (ICCTA), which was at issue in that case, is materially distinguishable from the FPA. The specific question in *Friends of the Eel River* was whether ICCTA preempted application of CEQA to a project to resume freight service on a stretch of rail line owned by the North Coast Railroad Authority. The California Legislature had created the North Coast Railroad Authority and gave it power to acquire property and operate a railroad, to be owned by a subsidiary of the state. For this reason, the California Supreme Court found that the purpose of the federal law was deregulatory, and the state as the owner of the railroad was granted autonomy to apply its environmental law.

Conclusion and Implications

The case is significant because it is an example of federal preemption being applied in the context of CEQA and it distinguishes the California's Supreme Court's recent decision in *Friends of the Eel River v. North Coast Railroad Authority*. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C071785A.PDF.
(James Purvis)

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