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

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ENVIRONMENTAL NEWS

U.S. ARMY WAR COLLEGE REPORT ANALYZES CHALLENGES THE ARMY CAUSED BY THE ENVIRONMENTAL IMPACTS OF CLIMATE CHANGE

In a previous issue we reviewed a United States (U.S.) Department of Defense (DoD) report regarding the vulnerability of DoD infrastructure to climate-related events, including sea-level rise and wildfires. A recent report prepared by the U.S. Army War College, went one step further and looked specifically at the challenges to the U.S. Army (Army).

Background

The report, "Implications of Climate Change for the U.S. Army" (Report), was published summer 2019, but gained more recognition towards the end of the year when some news publications reviewed the Report and published articles about it with headlines warning about a potential Army collapse within 20 years.

The Report includes two parts with the first discussing the challenges posed by climate change and the second including the Report's recommendations.

Under the summary section of the Report, it states that:

> In light of these findings, the military must consider changes in doctrine, organization, equipping, and training to anticipate changing environmental requirements. Greater inter-governmental and inter-organizational co- operation, mandated through formal framework agreements, will allow the DoD to anticipate those areas where future conflict is more likely to occur and to implement a campaign-plan-like approach to proactively prepare for likely conflict and mitigate the impacts of mass migration.

The Report goes on to state in summary that:

> Finally, the DoD must begin now to promulgate a culture of environmental stewardship across the force. Lagging behind public and political demands for energy efficiency and minimal environmental footprint will significantly hamstring the Department's efforts to face national security challenges.

Part 1: The Challenge of Climate Change

In this first part, the Report highlights three challenges: 1) Climate Change and the Physical Environment, 2) Climate Change and the Social, Economic, and Political Environment, and 3) the Army and DoD – Organizational Confusion and Lack of Accountability for Climate Change.

Climate Change and the Physical Environment

In this section, the Report notes that climate change "affects the conditions in which people live, and the environment in which military organizations operate." According to the Report, many factors are putting more people in harm's way and thereby creating multi-dimensional stress on conventional military forces. Human migration and refugee relocation due to climate change also "create an environment ripe for conflict and large-scale humanitarian crises." The Report goes on to detail a number of potential climate change impacts including sea-level rise, the opening of the Arctic, the increased range of insect-borne diseases, decreased fresh water availability, decreased food security, and stress to the power grid.

Climate Change and the Social, Economic, and Political Environment

The Report notes that although climate change's potential impacts are likely familiar, the "social, political, and economic effects of human concerns about climate change" are not. The Report opines that the more the human population believes in climate change, its cause (human-induced), and its threat, this will lead to consequences that the Army will be unable to ignore. The Report proposes a framework to understand this challenge. The framework is composed of social, market, regulatory, and technological responses to climate change.

The Army and DoD—Organizational Confusion and Lack of Accountability for Climate Change

The Report is critical of the military's inattention to climate change. It opines that "we currently have no systemic view to assess and manage [climate change] risk." It compares China's actions to that of the U.S. and notes that the potential exists "to create very significant asymmetries in resilience between the U.S. and China to climate-induced effects and any other type of attack or disaster." The Report notes DoD's responsibility to create another climate change vulnerability assessment in the coming years, but questions whether the Army will do much beyond providing the answers required for DoD's report.

The Report also provides examples showing the Army's "environmentally oblivious culture," including jet fuel dumped overboard when turbine engines are shut off, the soil damage caused by armored vehicles and the "thousands of pages of PowerPoint presentations" that are printed every day and discarded after a briefing. The Report summarizes its position succinctly: "the Army is an environmental disaster."

Report Recommendations

The second part of the Report includes recommendations in four "areas": 1) the Army Operating Environment, 2) the Army Institution, 3) the Joint Force and DoD, and 4) the National Context.

The Army Operating Environment

In this section, the Report includes a number of recommendations to address the Army's hydration challenges in arid environments. It also recommends increased planning in order to prepare for an expanded role in Artic operations associated with global climate adaptation.

The Army Institution

The Report contends that the Army lacks a culture of environmental stewardship and recommends that its "norms and values must change." The Report notes that although the current administration may have backed out of the Paris Agreement, "the majority of the American people believe that climate change is a threat." The Report sees an opportunity for the Army to "lead the nation in preparedness and environmental awareness" or, alternatively, it can continue "hurtling through the night in the belief that it is as unsinkable as the Titanic."

The Joint Force and the Department of Defense

In this section, the Report details the type of inter-agency collaboration it believes is necessary to adequately address a lack of coordination and to consolidate climate-change related intelligence.

The National Context

In this section, the Report looks at potential power grid vulnerabilities and recommends "reverse infrastructure degradation around military installations" and the development of "cutting edge strategies for decentralized power generation and storage."

Conclusion and Implications

Although the Report is very technical, it also serves as an effective call to action. It will be interesting to see if the Army's leaders implement any of the Report's recommendations. In the end, the Report finds that the U.S. Army is "precariously unprepared" for the impacts of climate change. The Report is available online at: https://climateandsecurity.files.wordpress.com/2019/07/implications-of-climate-change-for-us-army_army-war-college_2019.pdf. (Kathryn Casey)

PACIFIC GAS AND ELECTRIC ANNOUNCES SETTLEMENT AGREEMENT WITH CALIFORNIA WILDFIRE VICTIMS, BUT HAS MORE WORK TO DO

On December 6, 2019, wildfire victims reached a $13.5 billion settlement with Pacific Gas & Electric, Company (PG&E) to resolve the nearly 700,000 legal claims stemming from the 2018 Camp Fire, the 2017 Northern California fires, the 2017 Tubbs Fire, the 2016 Ghost Ship warehouse fire in Oakland and the 2015 Butte Fire. The settlement proposal was approximately $23 billion less than the initial $36 billion estimate from counsel for wildfire victims, and the announcement of the settlement proposal sent PG&E's stock price up in the markets.

Background—The Settlement

As part of the settlement, PG&E would pay wildfire victims $5.4 billion in cash and $6.75 billion in PG&E stock. The settlement also includes a $1 billion payout to cities and counties that were affected by the fires.

Federal bankruptcy judge Dennis Montali approved the settlement agreement on December 17, 2019.

Simultaneously, PG&E announced a $1.68 billion settlement with the Safety and Enforcement Division of the California Public Utilities Commission, settling an investigation launched by the Division regarding safety violations made by PG&E in managing and operating its utility infrastructure, which led to some of the 2017 and 2018 wildfires. This settlement agreement, if approved and adopted by CPUC Commissioners, would be the largest fine in CPUC history, and would require PG&E to set aside $50 million to invest in measures that would strengthen its utility infrastructure and to engage with local communities, including by holding Town Hall meetings and providing quarterly reports on maintenance work.

Governor Newsom Disagrees with the Settlement

Notwithstanding the approvals from the federal bankruptcy judge, Governor Gavin Newsom issued a statement and a letter to PG&E CEO Bill Johnson noting that the bankruptcy reorganization plan "falls woefully short." Newsom stated that:

> In my judgment, the amended plan and the restructuring transactions do not result in a reogranized company positioned to provide safe, reliable and affordable service to its customers. The state remains focused on meeting the needs of Californians including fair treatment of victims—not on which Wall Street financial interests fund an exit from bankruptcy.

Newsom's office issued a statement further elaborating:

> The governor has been clear about the state's requirements—a new and totally transformed entity that is accountable and prioritizes safety. Critically important to that is ensuring that the new entity has the flexibility to fund this transformation. These points are not negotiable.

Newsom's letter was widely supported by state legislators and advocacy groups such as The Utility Reform Network (TURN), who would like and expect to see further term negotiation to ensure customer safety and reliability, rather than a quick exit that favors shareholders and the aim of qualifying for the state wildfire fund, before PG&E emerges from the bankruptcy dispute.

PG&E's stock fell 14 percent after the letter from Newsom, trading at $9.67. PG&E is operating under a June 2020 deadline to exit bankruptcy proceedings in order to qualify for California's recently enacted wildfire insurance fund under Assembly Bill 1054.

PG&E's Alleged Diversion of Undergrounding Funds

Meanwhile, a recent audit commissioned by the CPUC and conducted by the firm AzP Consulting found that from the period 2007 through 2016, PG&E diverted $123 million from funds allocated to the Commission's Rule 20 program, which is intended to increase the undergrounding of overhead electric lines.

The audit report concluded that its findings showed that:

> PG&E ratepayers not only paid more in rates than PG&E spent on the Rule 20A program, [but that] the project activity that was performed was done so in a manner that was inefficient and costlier than necessary.

The Rule 20A program was launched to facilitate undergrounding and to soften the high cost barrier associated with such work. For example, PG&E has estimated that it costs an average $2.3 million per mile to bury overhead power lines, whereas running the same lines above ground costs approximately $800,000 per mile.

The CPUC also recently rejected a request by both PG&E and SDG&E to increase its profit margins in a filing before the Commission.

Conclusion and Implications

Overall, PG&E still has a long road ahead in wrapping up its bankruptcy proceeding and numerous related investigations at the CPUC—and in planning for its future in supplying electricity, often above ground, in a California that increasingly burns.
(Lilly McKenna)

REGULATORY DEVELOPMENTS

EPA MEMORANDUM FINDS PHYSICAL PROXIMITY, NOT FUNCTIONAL RELATIONSHIP, RELEVANT TO 'ADJACENT' POLLUTANT-EMITTING ACTIVITIES UNDER THE CLEAN AIR ACT

On November 26, 2019, the U.S. Environmental Protection Agency (EPA) issued a memorandum interpreting "adjacent" for purposes of source determinations for stationary sources under the major New Source Review pre-construction permit programs in title I of the federal Clean Air Act (CAA) and for the title V operating permit program. EPA's memorandum provides that only physical proximity should be considered when determining if facilities located on different properties are "adjacent."

Background

Title V of the CAA requires "major stationary sources" and a small number of smaller sources to obtain operating permits, operate in compliance with the permits' pollution control requirements, and certify their compliance annually. Most title V permits are issued by state or local air pollution control agencies. A few are issued by EPA.

New Source Review (NSR) permits are required for the construction of new major stationary sources and major modifications to existing stationary sources. In areas that attain National Ambient Air Quality Standards (NAAQS), these permits are also referred to as Prevention of Significant Deterioration (PSD) permits. A PSD program requires installation of Best Available Control Technology (BAT) analysis of air quality and additional impacts, and public involvement. In areas that do not attain NAAQS, nonattainment NSR permits impose more stringent requirements, such as the installation of the lowest achievable emission rate and procurement of emission offsets. NSR permits are also required for certain new non-major sources that interfere with a NAAQS or control strategy in a nonattainment area. Most NSR permits are issued by state and local agencies.

Stationary Sources

Both permitting programs apply to "stationary sources," a term broadly defined by the Clean Air Act to mean "any source of an air pollutant" with the exception of emissions resulting from certain mobile sources or engines. EPA regulations define "stationary source" as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant" and provide further that a single stationary source may be made up of a group of emissions that meet a three-part test: the pollutant-emitting activities: 1) are "located on one or more contiguous or *adjacent* properties" (emphasis added), 2) are under the control of the same person or groups of persons under common control and 3) belong to the same major industrial grouping. The application of this three-part test is referred to as a "source determination." A stationary source is considered "major" if it emits or has the potential to emit air pollutants in excess of emissions levels enumerated by statute.

EPA's Recent Action

EPA's recent memorandum sets forth a new interpretation of the term "adjacent" as used in EPA's three-part test for "source determinations." In previous communications to state and local permitting authorities regarding adjacent properties, EPA looked beyond the physical proximity of the properties and took into consideration the functional relationship, or functional interrelatedness, that existed between those facilities. EPA has now revised its approach and encourages permitting authorities that administer EPA-approved title V and NSR programs to focus exclusively on proximity when considering whether properties are adjacent.

EPA first promulgated the three-part test for source determination in 1980 in response to a D.C. Circuit decision that held "source" should be understood to embody the "common sense notion of a plant." In crafting the regulation, EPA declined to specify a specific distance or to explicitly adopt "functional relationship" as a relevant criterion to adjacency. Instead, EPA maintained that the "adjacent" determination would be made on a case-by-case basis guided

by the D.C. Circuit's principle of the "common sense notion of a plant."

Since 1980, EPA's guidance on the term "adjacent" has vacillated. As early as 1981, EPA memoranda emphasized the functional relationship between facilities in finding them to be "adjacent." Then, in 2007, EPA issued a memorandum that emphasized proximity as the primary factor to be considered in the context of the oil and gas industry. In 2009, EPA withdrew the memorandum and again emphasized that an "adjacent" determination must be made on a case-by-case basis after considering of all of the relevant factors in all industries.

In 2012, the Sixth Circuit ruled that EPA's consideration of interrelatedness was contrary to the plain meaning of "adjacent" which it held relates only to physical proximity. In response, EPA issued a 2012 memorandum explaining that it would follow this decision only within the Sixth Circuit but would continue to consider interrelatedness in other jurisdictions. In 2014, the D.C. Circuit struck down the 2012 memorandum as conflicting with EPA regulations that promote uniform national regulatory policies.

The Most Recent Memorandum

In its most recent memorandum, EPA states that the perceived functional interrelatedness of pollutant-emitting activities is not a relevant consideration in the adjacent inquiry for industries other than oil and gas. Rather, emissions should only be considered "adjacent" if they are "nearby, side-by-side, or neighboring (with allowance being made for some limited separation by, for example, a right of way)." EPA notes, however, that the revised interpretation is not a regulation or final agency action and does not otherwise constitute a legal requirement that binds local permitting authorities. EPA also encourages permitting authorities that chose to apply its new interpretation to do so "prospectively and not retroactively."

EPA's memorandum does not apply to the oil and gas industry. EPA is concerned that considering physical proximity alone would result in grouping too many oil and gas emissions that do not otherwise have any operational ties. EPA explains that this result would not be consistent with the "common sense notion of a plant" principle.

Conclusion and Implications

If followed by permitting agencies, EPA's interpretation of "adjacent" may alter the scope and extent of the title V and NSR permitting schemes, sometimes broadening and sometimes narrowing their reach. This interpretation alters the criteria for grouping emissions into a single source, a determination that is often determinative of whether title V and NSR permitting programs apply. However, because local permitting agencies are not bound by EPA's interpretation and the majority of permitting determinations are made by local agencies, the practical impact of EPA's memorandum will not be clear for some time.

EPA's memorandum is available online at: https://www.epa.gov/sites/production/files/2019-12/documents/adjacent_guidance.pdf.
(Kira Johnson, Rebecca Andrews)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ISSUES DRAFT ENVIRONMENTAL IMPACT REPORT FOR STATE WATER PROJECT OPERATIONS

The California Department of Water Resources (DWR) recently released a draft Environmental Impact Report (DEIR) for the long-term operation of the California State Water Project, including in the Sacramento-San Joaquin Delta (Delta). According to DWR, the DEIR would strengthen safeguards for threatened and endangered fish species and expand science-based decision making for State Water Project operations in the Delta and upstream. The DEIR differs in several ways from the recently released Biological Opinions issued by two federal wildlife agencies for the operation of the federal Central Valley Project. Those Biological Opinions are now subject to litigation filed by environmental organizations alleging that they violate federal environmental and administrative laws.

Background

The California State Water Project (SWP) is the country's largest state-built water storage and delivery

project. The SWP is operated in close coordination with the federal Central Valley Project (CVP) operated by the U.S. Bureau of Reclamation (Bureau) under the Coordinated Operation Agreement between the federal government and California. For both projects, the California State Water Resources Control Board issues water rights permit and licenses, which allow for the appropriation of water by directly using or diverting water to storage for later use. Those water rights permits are conditioned on the bypass or withdrawal of water from storage to help satisfy specific water quality, quantity, and operations criteria affecting the Delta.

The federal Endangered Species Act (ESA) and California Endangered Species Act (CESA) impose requirements for the protection of endangered and threatened species and their ecosystems. In 2008 and 2009, the U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) determined, in documents called Biological Opinions, that the continued long-term operation of the CVP and SWP would jeopardize certain endangered or threatened species. The FWS and NMFS' Biological Opinions included alternative project operations (aka "reasonable and prudent alternatives") that effectively compelled the Bureau and DWR to operate many aspects of their water projects according to the direction of the federal wildlife agencies, rather than in compliance with the proposed operating plans offered by the Bureau and DWR. DWR has historically relied on federal biological opinions to provide "take" coverage under the ESA, with the California Department of Fish & Wildlife (CDFW) issuing a consistency determination for compliance with CESA.

On October 22, 2019, the FWS and NMFS each issued Biological Opinions concluding that newly proposed operation plans for the CVP and SWP would not jeopardize endangered and threatened species. The proposed operations plan contemplated significant investments in research and restoration actions for smelt and salmonid species, revised management plans for operations of river systems tributary to the Delta, and changes cold pool management at Lake Shasta (CVP) for the benefit of salmon. Earlier this year, DWR indicated that it would pursue its own environmental review and permit process under CESA out of a concern for a perceived lower level of scientific rigor employed in the federal process of developing the Biological Opinions.

The Environmental Impact Report

The DEIR is intended to support DWR's decision regarding ongoing SWP operations and CDFW's issuance of a CESA incidental take permit for a variety of aquatic species, including CESA-listed Delta smelt, Longfin smelt, Winter-run Chinook salmon, and Spring-run Chinook salmon. DWR's current incidental take permit, which provides legal protection for incidentally taking listed species during operation of the SWP, is limited to Longfin smelt and expires December 31, 2019. "Take" of the other CESA-listed species is accomplished through "consistency determinations" issued by CDFW. DWR is seeking a new incidental take permit from CDFW related to SWP operations, and CDFW will rely on the DEIR in assessing whether to issue the new permit.

From an operational standpoint, SWP exports would not increase under DWR's proposed operation of the SWP under the DEIR, and under some alternatives would decrease due to flow dedication for fish purposes at certain times of year. Moreover, the proposed operational changes in the DEIR would, according to the document, not result in any significant impacts, and thus no mitigation would be required. While DWR would continue to operate the SWP in accordance with state and federal permits and requirements to protect water quality for public, agricultural, environmental and other uses, the DEIR differs from the federal Biological Opinions in important ways.

First, the DEIR grants authority to CDFW to cease DWR operational changes if CDFW determines the changes will violate CESA. For instance, if CDFW does not agree with ongoing operational actions for Old and Middle River flows affecting Delta smelt entrainment or Longfin smelt spawning off-ramps, DWR will implement an operational action that is agreeable to CDFW, provided the agencies have attempted to timely resolve the disagreement and CDFW provides an explanation and supporting documentation.

Second, the DEIR includes alternatives that provide a quantity of water that can be used to offset pumping impacts in the Delta. For instance, Alternative 2B would provide for a 100,000 acre-foot "block" of water for summer or fall Delta outflow in wet or above-normal years. The additional water would be available for use from June through November, and

could be procured by water purchases or SWP project water. Similarly, Alternative 2A would provide increased spring flows from the Delta for the benefit of Longfin smelt, which would reduce the amount of water available for export through the SWP, although it is unclear what impact increased spring outflows would have on CVP operations, if any.

Third, the DEIR provides direction on when Delta pumping can be increased during storm events and caps export amounts during those events. For instance, under the DEIR, DWR may capture excess flows in the Delta for export as a result of storm-related events by operating to a more negative Old and Middle River flow, but not greater than -6,250 cfs. Water may only be captured if it exceeds that required to meet water quality control flow and salinity requirements set by law. DWR would not be able to capture excess flows if any fish protective restrictions have been triggered, certain species are present or exhibit behavioral changes, or additional flow restrictions are forecast.

Fourth, the DEIR includes updated modeling and quantitative analyses to support habitat actions in summer and fall to benefit Delta smelt. Environmental and biological goals for modeling and analysis include maintaining low-salinity habitat in Suisun Marsh and Grizzly Bay, managing the low salinity zone to overlap turbid water and available food supplies, and establishing a contiguous low-salinity habitat from Cache Slough Complex to Suisun Marsh.

Conclusion and Implications

DWR's Draft EIR appears to provide greater flows through the Delta as a means to protect listed fish species than the federal Biological Opinions, and the document at least partially developed in reaction to them. Public comments on the DEIR may be submitted to DWR by January 6, 2020. It is unclear whether DWR will modify the DEIR following the public comment period, but if the final EIR adopted largely mirrors the DEIR, it is likely that the SWP may be operated more restrictively with respect to water exports moving forward. The Draft Environmental Impact Report is available at: https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Files/Deliv-42DEIRv1-120519-Volume-I508.pdf.
(Miles B. H. Krieger, Steve Anderson)

IN AID OF ENDANGERED SALMONIDS, OREGON ENVIRONMENTAL QUALITY COMMISSION PROPOSES TEMPORARY MODIFICATION TO TOTAL DISSOLVED GAS STANDARD FOR MAINSTEM COLUMBIA RIVER

Pursuant to a request from the U.S. Army Corps of Engineers (Corps), Oregon's Environmental Quality Commission (EQC) issued an order proposing to temporarily modify the total dissolved gas water quality standard applicable to the four lower Columbia River dams to facilitate fish passage over the dams. The Oregon Department of Environmental Quality (DEQ) accepted public comment from November 6, 2019 to December 6, 2019, which the EQC will consider at its January 2020 meeting before rendering a final decision on the order.

The Spill Operation Agreement

The Corps' request arose from the 2019-2021 Spill Operation Agreement entered into by the State of Oregon, the State of Washington, the Nez Perce Tribe, the U.S. Army Corps of Engineers, the U.S. Bureau of Reclamation, and the Bonneville Power Administration (Agreement) in December 2018. The Agreement grew out of the litigation in *National Wildlife Federation v. National Marine Fisheries Service*, 184 F.Supp.3d 861 (D. Or. 2016). Among other rulings in that case, the United States District Court for the District of Oregon remanded back to the National Oceanic and Atmospheric Administration (NOAA) the Columbia River System Operations Environmental Impact Statement (EIS) completed pursuant to the federal National Environmental Policy Act (NEPA). The Agreement is intended to forestall further litigation until the remand process is completed. The spill operations described in the Agreement for 2020 were also incorporated into NOAA Fisheries' 2019 Biological Opinion for the Columbia River System, issued pursuant to the federal Endangered Species Act (ESA).

The Agreement authorizes additional voluntary spill over the four lower Columbia River dams (Bonneville, The Dalles, John Day, and McNary) to facilitate increased endangered and threatened juvenile salmonid (salmon and trout) passage during the fish passage season of April 10 to August 31. Additional spill will help more salmonids reach the ocean. It will also reduce passage through the turbines (powerhouse passage), which, while not directly associated with mortality, has been shown to negatively impact in-river and early ocean survival of juvenile salmonids. The Agreement is aimed at aiding, in particular, spring/summer Chinook salmon and summer steelhead, both of which have seen annual returns below recovery targets established by the Northwest Power and Conservation Council.

Total Dissolved Gas

Increased levels of dissolved gas occur below dams because water spilling over dams captures air and carries it to a depth where the pressure forces the gas to dissolve into the water. More spill leads to more dissolved gas. Total dissolved gas levels above 110 percent of saturation can cause gas bubble trauma in fish, which occurs when gas bubbles form in their cardiovascular systems and block blood flow and respiratory gas exchange. Accordingly, Oregon has set the water quality standard for total dissolved gas at 110 percent.

Since 1996, the EQC has approved total dissolved gas limits of up to 120 percent to allow for increased spill to facilitate fish passage, even though total dissolved gas of 120 percent carries with it an approximately 1 percent incidence of gas bubble trauma (that incidence increases to 15 percent with total dissolved gas of 130 percent). While greater total dissolved gas will lead to greater gas bubble trauma, improved passage is believed to increase survival rates overall.

The Proposed Modification

The current proposed modification would allow for up to 125 percent total dissolved gas during the spring (April 10 to mid-June) and up to 120 percent during the summer (mid-June to August 31). The limit will be calculated as the average of the 12 highest hourly readings in the tailrace in a calendar day. Spill must also be reduced if instantaneous total dissolved gas levels exceed 126 percent (calculated as the average of the two highest hourly total measurements in a calendar day) in the spring and 125 percent in the summer.

If spill is necessary outside the April 10 to August 31 period for the Spring Creek Hatchery fish release, benefit of ESA-listed fish, or other reasons, the Corps must request approval from DEQ in writing one week in advance.

Biological Monitoring

The Fish Passage Center will continue biological monitoring at McNary and Bonneville dams according to its 2009 "GBT Monitoring Program Protocol for Juvenile Salmonids." Biological monitoring involves physically examining a sample set of passing fish for symptoms of gas bubble trauma. If the incidence of trauma exceeds specified thresholds, the DEQ Director will reduce or halt voluntary spill.

Conclusion and Implications

This proposed modification will last through the 2021 fish passage season, in alignment with the duration of the Agreement. The Columbia River System Environmental Impact Statement is currently scheduled to be completed in September 2020. That decision will likely set off a new round of activity in the litigation, which has been ongoing since 2001.
(Alexa Shasteen)

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—Water Quality

•November 25, 2019 - The Hopi Tribe has agreed to pay a $3,800 penalty for failing to meet the terms of a 2016 agreement to reduce arsenic levels in drinking water at the Hopi Cultural Center. The Cultural Center supplies drinking water for approximately 25 people within the Hopi Reservation, 60 miles east of Tuba City. The 2016 agreement between the Hopi Tribe and the U.S. Environmental Protection Agency (EPA) outlined mitigation measures to reduce naturally occurring arsenic in drinking water at the Cultural Center. The Hopi Tribe failed to meet the agreement's deadline to implement a necessary treatment system to meet the federal Safe Drinking Water Act's (SDWA) arsenic standards of 10 micrograms per liter. In quarterly tests throughout 2018, the system failed to meet SDWA standards and to date is running an annual average of 13 micrograms of arsenic per liter. In addition to paying the penalty, the Hopi Tribe has informed EPA of its plans to complete an arsenic treatment system at the Cultural Center that was part of the 2016 settlement agreement. The Hopi Tribe has allocated funding and selected contractors to complete the work with a goal of finishing the project by early 2020. EPA's ongoing efforts with the Hopi Tribe and the Indian Health Service also includes a more comprehensive fix to address arsenic concerns on the Hopi Reservation, the Hopi Arsenic Mitigation Project (HAMP). The HAMP is a regional pipeline project intended to bring compliant source water to affected Hopi Villages and the Hopi Cultural Center by the end of 2023.

•December 3, 2019 - The U.S. Environmental Protection Agency has finalized an administrative order with Charles Miguel Sr., a property owner, over the unpermitted construction of a diversion channel in Southeast Molokai, Hawaii. Under the terms of the order, Mr. Miguel has agreed to submit and implement a mitigation plan that will remove the diversion channel and restore the quarter acre of wetlands impacted by his unauthorized activity. In October 2018, EPA, U.S. Army Corps of Engineers (the Corps), the Hawaii Department of Public Health (DOH), and the County of Maui conducted site inspections and found extensive soil disturbance. Afterward, the Corps referred the case to EPA for enforcement and EPA has coordinated with DOH on this important case. The unpermitted construction activity in the Waialua Stream wetlands created a linear channel through two adjacent neighbors' properties. Mr. Miguel then placed the excavated fill from the new channel in wetlands without authorization under a permit from the Corps, which regulates wetlands under § 404 of the Clean Water Act.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•November 15, 2019 - The U.S. Environmental Protection Agency announced a settlement with Thatcher Group, Inc. (Thatcher) of Salt Lake City, Utah, resolving alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in Nevada, New York and Utah. Under the terms of a Consent Agreement and Final Order filed on November 14, Thatcher will pay a civil penalty of $300,415 to resolve the alleged violations. This settlement resulted from an EPA-led investigation across several states and EPA regions. Between 2014 and 2018, inspections of Thatcher's production and distribution facilities in Nevada and Utah conducted by EPA, the Nevada Department of Agriculture (NDA), and the Utah Department of Agriculture and Food (UDAF) found Thatcher did not properly register pesticide products sold by its distributors and did not ensure its distributors used current labeling. Initial inspec-

tions conducted by EPA between 2014 and 2017 were followed up by state investigations, including a January 2018 UDAF inspection that found Thatcher was producing and distributing an unregistered disinfectant. NDA inspections completed in March 2018 also found the company's Nevada facility was distributing disinfectants with outdated labeling. Additionally, an EPA investigation found that Thatcher failed to register its pesticide facility in Williamson, New York, prior to producing pesticides in 2014 and did not report annual pesticide production data for 2015 and 2016 by the required due dates. An inspection conducted in October 2018 found the New York facility was distributing an unregistered sanitizer and an unregistered disinfectant.

•November 18, 2019 - The U.S. Environmental Protection Agency has entered into two separate administrative settlements to address alleged chemical accident prevention and preparedness violations under the Risk Management Program of the Clean Air Act. Both settlements are part of EPA's National Compliance Initiative to reduce accidental releases at industrial and chemical facilities. Catastrophic accidents at these facilities—historically about 150 each year—can result in fatalities and serious injuries, evacuations, and other harm to human health and the environment. The alleged violations and settlements relate to two companies' management of anhydrous ammonia at their separate fertilizer distribution facilities: New Cooperative Inc. and Manning Grain Company. Under the settlement agreements, each company will assure that its accident prevention program complies with all applicable Clean Air Act requirements. New Cooperative Inc. is a large agricultural retailer with 43 facilities in Iowa. It will pay a penalty of $20,000 to resolve cited violations at its Badger, Iowa, facility. Manning Grain Company owns and operates a single agricultural retail facility in Burress, Nebraska. It will pay a penalty of $45,796 to resolve the violations cited at its facility. In addition, each company will pay for and perform projects approved by EPA.

•November 18, 2019 - The U.S. Environmental Protection Agency announced a settlement with Decon7 Systems LLC (Decon7) related to two pesticides produced by the Scottsdale company that were not registered with the EPA and were labeled with false and misleading claims about their safety and efficacy. The company also exported the unregistered pesticides without the necessary notifications and failed to comply with reporting obligations following a Stop Sale, Use or Removal Order (SSURO) issued to the company in 2018. Decon7 has agreed to pay a $200,000 civil penalty and has corrected all identified compliance issues. Based on information collected during inspections by EPA, the Michigan Department of Environmental Quality and the Arizona Department of Agriculture, EPA asserted that Decon7 Systems had violated several sections of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which regulates the storage, labeling, distribution, sale and use of pesticides in the United States. Decon7 sold "D7 Part 1" and "D7 Part 2," pesticides that are combined to disinfect hard nonporous surfaces, with misleading efficacy claims to kill all bacteria, viruses and fungi. The products also had false and misleading safety claims, which created the incorrect impression that the products were noncorrosive and nontoxic. The products' formulations in fact could have caused skin burns and irreversible eye damage. The products' labeling also claimed the products were used by various federal government agencies to clean up buildings following anthrax attacks, implying that the federal government recommends or endorses their use. The products were produced in Ohio, offered for sale on the Internet, and widely distributed to customers in Arizona, California, Connecticut, Ohio, Minnesota and Texas. In addition to the illegal domestic sales, Decon7 exported these unregistered pesticides to customers outside of the United States without filing the required information about the foreign purchasers.

•November 20, 2019 - The U.S. Environmental Protection Agency has reached a settlement with a Connecticut electric cable manufacturing company, Marmon Utility LLC, that failed to report information about certain chemical compounds at its manufacturing facility in Seymour, Connecticut. Under the settlement, Marmon Utility has agreed to pay $75,000 to settle EPA allegations that the company failed to comply with federal right-to-know laws in 2018 when it failed to file and certify required reports describing certain chemical and chemical compounds processed at the facility. The reports, Toxics Release Inventory (TRI) forms, are required under

the federal Emergency Planning and Community Right-to-Know Act. In April 2019, Marmon filed and certified its missing TRI reports for lead, copper and zinc compounds after an inquiry from EPA's New England office. Marmon was cooperative during the inspection process and case settlement negotiations. At the Marmon Kerite facility, Marmon manufactures medium and high-voltage electric power cables. Copper, aluminum and steel wire are bound and braided, then coated with insulation that contains lead and zinc compounds, to make power cables. The facility also melts and extrudes metallic lead to coat power cables with lead insulation. In 2017, Marmon processed lead, copper, and zinc compounds in quantities that exceeded 10 times their threshold TRI reporting amounts. Because Marmon's TRI forms were not properly submitted and certified, the information for these chemicals was not available to the public. Both copper and zinc compounds are hazardous to aquatic life, and lead is a bioaccumulative material that is hazardous to both humans and wildlife.

•December 10, 2019 - The U.S. Environmental Protection Agency and the U.S. Department of Justice announced a settlement with Kern Oil & Refining Co. that resolves alleged violations at its petroleum refinery in Bakersfield. Kern Oil will pay a $500,000 penalty to address the refinery's failures to comply with flare emissions monitoring and leak inspection reporting requirements under the Clean Air Act and toxic chemical release reporting requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA). Kern Oil will spend an additional $200,000 to comply with the requirements of the settlement. Petroleum refineries process crude oil into products such as gasoline and diesel fuel and emit pollutants from many different sources. This settlement addresses sulfur dioxide emissions from the refinery's flare, as well as volatile organic compounds leaking from equipment such as valves, pumps, compressors, and wastewater drains. Kern Oil has already installed a required flare monitor and has begun submitting required monitoring and inspection reports.

Indictments, Convictions and Sentencing

•December 3, 2019 - In a settlement to resolve alleged violations of the Clean Air Act, Lehigh Cement Company LLC (Lehigh) and Lehigh White Cement Company, LLC (Lehigh White) have agreed to invest approximately $12 million in pollution control technology at their 11 portland cement manufacturing plants, announced the Department of Justice and the U.S. Environmental Protection Agency (EPA). The settlement will reduce more than 4,555 tons of harmful nitrogen oxides (NOx) and 989 tons of sulfur dioxide (SO2) pollution each year. Under this settlement, the companies will install and operate equipment to control NOx and meet emission limits that are consistent with controls at comparable cement kilns across the country. This settlement also requires the companies to operate existing pollution controls at four kilns and meet more stringent emission limits. For controlling SO2, Lehigh will install and operate pollution control equipment at several kilns, and will meet low SO2 emission limits at all kilns. Lehigh has agreed to mitigate the effects of past excess emissions from its facilities by replacing old diesel truck engines at its facilities in Union Bridge, MD, and Mason City, IA, at an estimated cost of approximately $650,000, which is expected to reduce smog-forming NOx by approximately 25 tons per year. Lehigh will also pay a civil penalty of $1.3 million to resolve Clean Air Act violations.

•December 11, 2019 - The U.S. Environmental Protection Agency, U.S. Department of Justice, the Kalamazoo River Natural Resource Trustee Council, and Michigan Department of Environment, Great Lakes, and Energy (EGLE) announced a proposed consent decree that would require NCR Corp. to clean up and fund future response actions at a significant portion of the Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site. The consent decree also includes payments related to natural resource damages and past cleanup efforts at the site. The consent decree is subject to a 30-day public comment period. This Superfund site has been listed on the EPA Administrator's Emphasis List of Superfund sites targeted for immediate, intense action. Each site on the list has a short-term milestone to provide the basis for tracking the site's progress. The Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site is in Allegan and Kalamazoo counties and is divided into six segments, or operable units (OUs), that require cleanup. According to the settlement terms, NCR Corporation has agreed to spend approximately $135.7 million cleaning up three areas of OU 5. OU

5 includes 80 miles of the Kalamazoo River and three miles of Portage Creek. In addition, NCR will pay: 1) $76.5 million to EPA for past and future costs in support of river cleanup activities; 2) $27 million to natural resource trustees of the Kalamazoo River Natural Resource Trustee Council for natural resources damage assessment and claims; and 3) $6 million to State of Michigan for past and future costs.

Historically, the Kalamazoo River was used as a power source for paper mills that were built along the river and a disposal site for the paper mills and the communities adjacent to the river. NCR arranged for disposal of carbonless copy paper contaminated with chemicals called polychlorinated biphenyls (PCBs) at the site. In the early 1970's, PCBs were identified as a problem in the Kalamazoo River. In 1990, in response to the nature and extent of PCB contamination, the site was added to the National Priorities List, which includes the nation's most serious uncontrolled or abandoned hazardous waste releases. EPA, working along with EGLE, has cleaned up three of the six operable units, removed nearly 450,000 cubic yards of contaminated material from the site, cleaned up and restored seven miles of the Kalamazoo River and banks, and capped 82 acres worth of contaminated material.

•December 16, 2019 - Sea Harvest Inc., operator of the fishing vessels Enterprise and Pacific Capes, along with Fishing Vessel Enterprises Inc., the vessels' owner, pleaded guilty to violating the Clean Water Act for both knowing and negligent discharges of oily bilge water from the vessels' engine rooms. The companies were sentenced to pay a $1 million criminal fine and serve a five-year term of probation. As a special condition of probation, the companies will be required to implement a robust environmental compliance plan at their own expense that will cover 36 commercial fishing vessels that are owned or operated by the defendants. According to court documents, the defendants owned and operated multiple vessels engaged in commercial fishing operations out of New Bedford, Massachusetts. From at least early 2017 until late 2018, as a result of insufficient supervision, fishing vessels owned and operated by the defendants discharged oily bilge waste from the vessels into the sea on multiple occasions. Count one of the information charged that, on Sept. 20, 2017, the New Bedford Massachusetts Police Port Security Unit traced an oil sheen in the Acushnet River to the F/V Enterprise, which was owned and operated by the defendants. When questioned about the sheen, the vessel's manager confirmed that he had illegally pumped oily bilge water from the Enterprise's engine room bilge overboard into the Acushnet River. Previously, the vessel had been subject to several enforcement actions related to their improper management of oily bilge waste on the vessel. On Nov. 19, 2016, the U.S. Coast Guard issued a Letter of Warning to the vessel for pumping oily bilge waste into the Acushnet River. In addition, on or about Jan. 26, 2017, the Coast Guard issued a Captain of the Port Order requiring the vessel to return to port and discharge oily bilge water to a shore side facility. On Aug. 22, 2017, the U.S. Coast Guard held a community outreach meeting aimed at informing the commercial fishing community about the problem of discharging oily bilge water into New Bedford Harbor. Defendant's representatives did not attend this meeting. Nevertheless, U.S. Coast Guard representatives went to the vessel to meet with the defendant's representative after the meeting and provided handouts and information that detailed the prohibition of discharging oily bilge water into the sea. Less than a month later, the vessel made the illegal discharge that forms the basis of count one. In a second incident that forms the basis of count two, on July 3, 2018, the Captain of the F/V Pacific Capes attempted to discharge water from a fish hold into New Bedford Harbor in Fairhaven, Massachusetts. In doing so, the Captain negligently failed to ensure that the valve alignment on the vessel's bilge manifold was in the proper configuration to prevent the bilge pump from pumping oily bilge water overboard. Oil contamination was discovered alongside the Pacific Capes, as well as approximately 1,000 yards north of the vessel along the beach. Commercial fishing vessels, such as the F/V Enterprise and F/V Pacific Capes, generate oily bilge water in their machinery spaces. This oily bilge water is the result of fuel, lubrication oil, fresh water, and sea water entering the bilge of the vessel and comingling. These leakages may originate from the main engines, generators, fuel lines, stern-tube packing glands and other piping, valves and machinery in the vessel. There are two lawful means of disposing of oily bilge water from commercial fishing vessels such as the F/V Enterprise and F/V Pacific Capes. First, the oily bilge water may be retained onboard the vessel and then

discharged ashore to a properly licensed reception facility. Second, the oily bilge water may be discharged offshore if it has been processed through an Oily Water Separator (OWS) that ensures that the oily bilge water discharged contains no more than 15 parts per million of oil to water. At all times relevant to the information, neither the F/V Enterprise nor the F/V Pacific Capes had onboard an OWS. Therefore, the only lawful manner in which oily bilge water could have been discharged from either vessel was to land the oily bilge water ashore and dispose of it through a properly licensed reception facility.

•December 20, 2019 - Nikolaos Vastardis, Evridiki Navigation Inc., and Liquimar Tankers Management Services Inc., were convicted by a federal jury in Wilmington, Delaware, of violating the Act to Prevent Pollution from Ships, falsifying ship's documents, obstructing a U.S. Coast Guard inspection, and making false statements to U.S. Coast Guard inspectors. The crimes were committed in order to conceal Vastardis' deliberate bypassing of required pollution prevention equipment in order to illegally discharge oil-contaminated bilge waste overboard from the foreign-flagged oil tanker Motor Tanker (M/T) Evridiki. The M/T Evridiki was an 899 foot Liberian-flagged oil tanker owned by Evridiki Navigation and operated by Liqumar Tankers Management Services. Vastardis was the Chief Engineer of the M/T Evridiki. On March 10, 2019, the ship arrived in the Big Stone Anchorage, within Delaware Bay, for the purpose of delivering a cargo of crude oil. The following day, the ship underwent a U.S. Coast Guard inspection to determine, among other things, the vessel's compliance with international environmental pollution prevention requirements. The jury found that during the inspection, Evridiki, Liquimar, and Vastardis tried to deceive Coast Guard inspectors regarding the use of the ship's oily water separator (OWS), a required pollution prevention device. Under the International Convention for the Prevention of Pollution from Ships (MARPOL), an international treaty to which the U.S. is a party, only bilge waste containing less than 15 parts per million (ppm) oil can be discharged overboard and must be first run through an OWS and oil content meter (OCM) to ensure that no waste containing more than 15 ppm oil is discharged. During the Coast Guard inspection, Vastardis operated the equipment with unmonitored valves that trapped fresh water inside the OCM's sample line so that its oil sensor registered zero ppm instead of what was really being discharged overboard. However, historic OCM data recovered during the inspection proved that the OCM was being tricked and bypassed. When the Coast Guard opened the Evridiki's OWS, they found it was fouled with copious amounts of oil and soot. Each defendant was convicted of all four felony counts including knowingly failing to maintain an accurate oil record book, in violation of the Act to Prevent Pollution from Ships; obstruction of justice; obstruction of the Coast Guard's inspection; and making a materially false statement to the Coast Guard concerning how the OWS was operated at sea.
(Andre Monette)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT HOLDS MARKED INCREASE IN EPA RENEWABLE FUEL STANDARD EXEMPTIONS ISSUED IS NOT SUBJECT TO JUDICIAL REVIEW AS A 'FINAL AGENCY ACTION'

Advanced Biofuels Association v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 18-1115 (D.C. Cir. Nov. 12, 2019).

Beginning in 2016, approvals by the U.S. Environmental Protection Agency (EPA) of small oil refinery exemptions from requirements to incorporate a minimum amount of renewables in transportation fuels increased dramatically—from a low of seven under the prior administration to a high of 35. A trade group representing suppliers of renewable fuels filed a petition challenging the increase itself as a final agency action. The D.C. Circuit Court of Appeals dismissed the petition on the grounds that an evidentiary trend, alone, is not judicially reviewable. Nonetheless, the litigation appears to have, directly and indirectly, caused sufficient public disclosures of the policy changes driving the increase to support a viable action.

Background

In 2005 Congress amended the federal Clean Air Act by adopting the Renewable Fuel Program (Program), requiring transportation fuel sold in the United States to meet "annual benchmarks" for the incorporation of renewable fuel. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501; 42 U.S.C. § 7545(o)(2)(A)(1). From the initial benchmark set, the proportion of renewable fuel required increases each year. 42 U.S.C. § 7545(o)(2)(B)(1). The Program imposes obligations on both fuel importers and domestic refineries. 42 U.S.C. § 7545(o)(3)(B)(ii)(I).

Congress statutorily exempted "small refineries," defined as those "for which the average aggregate daily crude throughput for a calendar year … does not exceed 75,000 barrels" (42 U.S.C. § 7545(o)(1)(K), from compliance with the Renewable Fuel Program for the first year, and thereafter "established a framework for granting individual exemptions when compliance would impose a 'disproportionate economic hardship' on a small refinery." 42 U.S.C. § 7545(o)(9)(A)(ii).

Implementation of the Program is shared among the U.S. Department of Energy (DOE) and the EPA: Energy, specific to the small refinery exemption, is charged with studying whether the benchmarks "impose a disproportionate economic hardship on small refineries" (42 U.S.C. § 7545(o)(9)(A)(ii)(1)), while EPA is charged generally with "ensur[ing]" compliance across the Program, including granting small refinery exemptions. 42 U.S.C. § 7545(o)(2)(A)(i)).

DOE initially:

> . . .developed two scoring matrices, designed to assess 1) disproportionate structural and economic effects of statutory compliance, and 2) the impact of compliance on a refinery's viability.

Using these matrices, EPA granted two-year extensions to 24 refineries, and for subsequent years evaluated extension applications using the Energy matrices "and other economic factors." 42 U.S.C. § 7545(o)(9)(B)(ii).

Beginning in 2016, "the number of exceptions granted increased dramatically"—from a low of seven granted in 2015 to 35 granted in 2017. This radical increase in the granting of exemptions did not become known, however, until it began to be reported in the media in April 2018, because:

> . . .those extension decisions were neither published nor even publicly acknowledged. Instead, the EPA designated the decisions, in full, as confidential business information. As a result, the identities of the applicants, the decisions, and the decisions' rationales were kept completely confidential, unless the refinery itself chose to make the decision or conclusions public.

Petitioner Advanced Biofuels Association, whose members were adversely affected by the granting of exemptions, was therefore "unable to identify, let alone seek judicial review of, the relevant exemption decisions in individual refinery cases." Nor did the EPA issue any public document acknowledging or explaining the sudden uptick in exemptions.

The Advanced Biofuels Association (Association) brought its petition in May 2018, challenging what it described as EPA's "decision to modify the criteria or lower the threshold by which [it] determines whether to grant small refineries an exemption[.]" On the Association's motion, EPA "provid[ed] copies of decision documents, issued in 2017 and 2018, under a protective order." Separately, EPA posted to its website a "dashboard" listing "the total number of [exemption] petitions received, granted, denied, and withdrawn for each compliance year."

In separate litigation filed by a small refinery whose exemption petition was denied, EPA described its new rule for implementing the exemption:

> In prior decisions, EPA considered that a small refinery could not show disproportionate economic hardship without showing an effect on "viability," but we are changing our approach. While a showing of a significant impairment of refinery operations may help establish disproportionate economic hardship, compliance with [renewable fuel] obligations may impose a disproportionate economic hardship when it is disproportionately difficult for a refinery to comply with its [renewable fuel] obligations—even if the refinery's operations are not significantly impaired.

Lastly, in August 2019 EPA publicly released a formal memorandum documenting its new test for and ultimate rulings addressing forty-two small refinery exemptions for compliance year 2018." EPA explained that:

> . . .while it '[p]reviously. . .considered that [disproportionate economic hardship] exist[ed] only when a small refinery experience[d] *both* disproportionate impacts *and* viability impairment,' the agency had now changed its approach and only requires a refinery to meet one of those prongs.

The 2019 Memorandum also announced that EPA would henceforth grant only "full waivers," even where Energy recommended "partial waivers," as "Congress intended the extension to be a full, and not a partial, exemption."

The D.C. Circuit's Decision

EPA moved for dismissal on the basis that no "final agency action" was identified in the petition, as required under the Clean Air Act. 42 U.S.C. § 7607(b)(1). The final action challenged "must exist at the time the petition is filed." *City of New Orleans v. SEC*, 137 F.3d 638, 639 (D.C. Cir. 1998).

Final agency action subject to judicial review can take a variety of forms. The most common are notice and comment rulemaking and case-by-case formal or informal adjudications. 5 U.S.C. §§ 553, 554. Agencies may use informal adjudications "when they are not statutorily required 'to engage in the notice and comment process' or to 'hold proceedings on the record.' " *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017) (quoting *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007)). Within those adjudications, agencies may announce decisional principles that affect similarly situated non-parties in future adjudications. *Conference Group, LLC v. FCC*, 720 F.3d 957, 965–966 (D.C. Cir. 2013).

Here, EPA granted exemptions via informal adjudications, so that "[t]he rules of decision governing the grant or denial of exemption extensions were manifested through rulings on individual refineries' applications." But the petition challenged neither any particular informal adjudication of an exemption application, nor any "agency action announcing the adoption of a new methodological basis for decisions." *Cf. Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (judicially reviewable final action existed where EPA issued a guidance document that reflected "the agency's settled position," and that "EPA officials in the field [were] bound to apply"). Rather, the petition challenged the increase in the number of exemptions granted, which it argued "could 'only be attributable to a decision by EPA to modify the criteria or lower the threshold by which it evaluates and grants exemptions,'" asserting "that perceived trend in agency decisionmaking as itself unlawful."

A Pattern of Action Isn't Necessarily Final Agency Action

The Court of Appeals rejected "identification of a pattern across myriad circumstances" as itself "a final agency action," while noting that it could be "*evidence* of a final agency action." Thus, the petition was dismissed, despite the court noting very serious reservations with EPA's actions:

> To be sure, the EPA's briefing and oral argument paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency's actions without a viable avenue for judicial review.

In this instance, however, the apparent "ongoing pattern of genuinely secret law" disclosed over the course of this litigation may, as a result of the various disclosures triggered, directly or indirectly, by the petition, may ultimately be subject to judicial review via challenge to "the August 2019 formal and public memorandum announcing the EPA's new decisional framework and applying it to forty-two refineries."

Conclusion and Implications

Several years into the transition to a new executive's administration, the cumulative effects of pressure for public disclosure is providing a clearer and broader picture of where implementation of environmental law has been radically transformed. It remains to be seen whether the administration's increasingly sophisticated documentation of its processes will withstand substantive scrutiny.
(Deborah Quick)

DISTRICT COURT AFFIRMS MARYLAND'S CLEAN WATER ACT SECTION 303D INTEGRATED REPORT

Blue Water Baltimore v. Wheeler, ___F.Supp.3d___, Case No. 16-452 (D.C. Dist. Dec. 2, 2019).

On December 2, 2019, the U.S. District Court for the District of Columbia affirmed the U.S. Environmental Protection Agency's (EPA) approval of the Maryland 2018 Integrated Report of Surface Water Quality under the federal Clean Water Act (CWA).

Factual and Procedural Background

The Clean Water Act requires states to identify waters within their jurisdictions for which effluent limitations are not stringent enough to implement water quality standards applicable to such waters and to establish the Total Maximum Daily Load (TMDL) of pollutants at a level necessary to implement the applicable water quality standards. The list of impaired waters is often known as a 303d list. The CWA requires states to submit their 303d lists and TMDLs to the EPA periodically for approval. A 303d list often contains categories of impaired waterbodies. Relevant to this decision are Category 5 waters, which are impaired waters requiring a TMDL, and Category 4a, which are impaired waters that already have a TMDL. A 303d list with multiple categories of impaired waters is often known as an Integrated Report.

In 2012, Maryland produced a draft Integrated Report, which moved 139 impaired waters from Category 5 to Category 4a. Maryland determined this reclassification was appropriate because the 139 waterbodies were part of the 53 watersheds which drained into the Chesapeake Bay and were subject to the existing Chesapeake Bay TMDL.

EPA approved Maryland's 2012 Integrated Report on November 9, 2012. On April 16, 2015, Maryland submitted the 2014 Integrated Report, a document with the same language regarding the 139 impaired waters as the 2012 Integrated Report. This was approved by the EPA on October 16, 2015.

Plaintiffs filed their complaint challenging the 2012 Integrated Report on March 8, 2016. On October 7, 2016, EPA filed a motion to dismiss the Complaint as moot because the 2012 Integrated Report was no longer effective with the approval of the 2014 Integrated Report. Plaintiffs filed a Motion to Leave to Amend the Complaint to challenge the 2014 Integrated Report. While this was pending, the EPA approved the 2016 Integrated Report and the court allowed the Plaintiffs to file an amended complaint challenging the 2016 Integrated Report. On January

19, 2018, the defendant filed a motion for judgement on the pleadings because the claims regarding the 2012 and 2014 Integrated Reports were moot. The court granted that motion on June 28, 2018. The parties then moved for summary judgment. After the summary judgement motions were briefed, Maryland's 2016 Integrated Report was superseded by the 2018 Integrated Report. Plaintiffs amended their complaint again to include the 2018 Integrated Report.

In all claims regarding the 2012, 2014, 2016, and 2018 Integrated Reports, plaintiffs argued the approval of the Integrated Report was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law because the approval was not supported by evidence that the Chesapeake Bay TMDL would actually resolve localized water quality impairments in the 53 segments.

The District Court's Decision

Scope of Authority

Plaintiffs first argued the EPA exceeded the scope of its authority under the CWA when it approved Maryland's Integrated Report without any evidence that the Chesapeake Bay TMDL ensures localized attainment of the applicable water quality standards within Maryland's 53 impaired segments. According to the plaintiffs, because Maryland made no finding specific to the impaired segments themselves, as required by the CWA, EPA could not lawfully approve Maryland's reclassification of the segments.

The court rejected plaintiff's argument. It reasoned that although plaintiffs correctly noted that a state must establish a TMDL for impaired waterbodies, this requirement applies to a state's obligation—not the EPA's obligation to approve or disapprove a state's list of impaired waters, which was the action challenged by the plaintiffs in this case. As a result, the court concluded the EPA acted within the scope of the CWA.

Reclassification of Impaired Upstream Water Body

Plaintiffs next argued the EPA acted arbitrarily by allowing Maryland to reclassify an impaired upstream water body based solely on the fact that there is a TMDL in a different, downstream water body. The court rejected this argument as well, noting that plaintiffs' position misconstrued the scope of the Chesapeake Bay TMDL. It reasoned that Maryland did not reclassify the 139 impairment listings because total maximum daily loads were established for different, downstream water bodies. To the contrary, the court noted that the Chesapeake Bay TMDL included TMDLs for those particular waterbody listings.

Approval of the Integrated Report

Finally, plaintiffs argued EPA's approval of the Integrated Report was arbitrary and capricious because there was no evidence that the Chesapeake Bay TMDL addressed the localized impairments in Maryland's impaired waterbodies and the local TMDL development process differs greatly from the development of the Chesapeake Bay TMDL development process.

The court rejected this final argument as unsupported by the record. First, the court determined the water bodies at issue were connected and the pollutants in the local waterbodies were of the same type identified in the Chesapeake Bay TMDL. Thus, the Chesapeake Bay TMDL included TMDLs of all the connected water bodies. Second, the court reasoned that the 303d listing process only requires a rational connection between the EPA's determination and the facts. The court was not required to perform a detailed evaluation of the scientific data supporting a TMDL as part of a challenge to a 303d listing process. The court concluded that EPA's explanation of the approval of the Integrated Report contained a rational connection between the facts found and the choice made.

Conclusion and Implications

This decision supports a reclassification of an impaired waterbody from Category 5 to Category 4a where an existing TMDL already addresses pollutant loadings in that waterbody, even if the existing TMDL is primarily focused on a different waterbody. The court's decision is available online at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2016cv0452-69.
(Anya Kwan, Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL FINDS CALIFORNIA DEPARTMENT OF TRANSPORTATION'S ENVIRONMENTAL ANALYSIS FOR HIGHWAY PROJECT ADEQUATE

Jamulians Against the Casino v. The California Department of Transportation, *Unpub.*, Case No. C086184 (3rd Dist. Dec. 3, 2019).

In an *unpublished* decision, the California Court of Appeal, Third Appellate District, upheld a decision of the trial court denying the petition for writ of mandate and injunctive relief and complaint for declaratory and injunctive relief relief against the California Department of Transportation (Caltrans). The petition alleged that Caltrans failed to certify a legally adequate Environmental Impact Report (EIR) prior to approval of highway improvements on State Route 94 (Project) designed to mitigate traffic impacts resulting from operation of a casino on tribal land in unincorporated San Diego County.

Factual and Procedural History

In 1999, the Jamul Indian Village (JIV) entered into a compact with the State for the construction and operation of a casino. Despite being exempt from California Environmental Quality Act (CEQA) review, JIV nevertheless agreed to take appropriate actions to determine whether the casino would have any significant adverse impacts on off-tribal lands and to make good faith efforts to mitigate those impacts.

In 2012, JIV prepared an environmental document assessing the potential off-reservation environmental impacts associated with the proposed casino. Among other things, the study concluded that the operation of the casino would have significant off-reservation traffic impacts at six intersections on State Route 94 (SR-94) and identified various improvements to mitigate those impacts. In order to implement the traffic mitigation measures, JIV needed Caltrans approval and an encroachment permit.

Caltrans prepared an EIR analyzing the highway improvements along SR-94. The draft EIR identified four proposed project alternatives, identified and compared the impacts of each alternative in detail, and discussed the proposed avoidance, minimization, and/or mitigation measures. The document indicated that Caltrans would select a preferred alternative after fully analyzing and considering the project alternatives. In March 2016, Caltrans certified the EIR.

Jamulians Against the Casino (JAC) filed suit alleging multiple CEQA violations including failure to provide an adequate project description and failure to consider a reasonable range of project alternatives. The trial court denied JAC's petition. This appeal followed.

The Court of Appeal's Decision

Project Description

On appeal, JAC contended that the EIR failed to provide an accurate, stable, and finite description of the Project. Specifically, JAC asserted that the EIR did not identify any specific and proposed project and instead listed numerous potential roadway improvements as possible projects giving conflicting signals to decisionmakers and the public about the nature and scope of the Project. The court disagreed.

The Third District distinguished this case from *Washoe Meadows Community v. Dept. of Parks & Recreation*, 17 Cal.App.5th 277 (2017) where the court concluded that the draft EIR violated CEQA because it did not describe a project on which the public could comment because it set forth a range of five alternatives and declined to identify a preferred alternative. In contrast, here, the court found that the draft EIR clearly identified a highway improvement project that involved improvements to five specific intersections—not a broad range of possible projects. Moreover, the draft EIR did not require a commenter to offer input on "vastly different" alternatives as the

small number of alternatives presented in the draft EIR were closely-related and did not result in an undue burden on members of the public wishing to comment. Viewing the draft EIR as an informational document, the court held that it included enough detail about the Project to enable members of the public to understand and meaningfully consider the environmental impacts of the proposed project.

The court further rejected JAC's related claim that the project description precluded informed decision making by impeding the public's comparison of the Project with its alternatives because the draft EIR identified and compared the environmental impacts of each project alternative, which were analyzed at an equal level of detail, and discussed proposed mitigation measures.

Project Alternatives

JAC also alleged that Caltrans failed to consider a reasonable range of alternatives because it did not evaluate project alternatives proposed by the public during the public comment period—in particular alternatives that would reduce traffic-related impacts south of the casino.

The court articulated that an agency's selection of alternatives is afforded great deference, which is only overcome if petitioners demonstrate that the chosen alternatives are "manifestly unreasonable"—and concluded that JAC's claim lacked merit.

As a threshold matter, the court found that JAC (or any member of the public) failed to exhaust their administrative remedies as to this issue therefore forfeiting the claim. Although various commenters pointed out the need for roadway improvements south of the casino, the remarks reflected only general concerns about traffic impacts, not that the alternatives analysis was lacking.

Regardless, the court found that the claim failed on the merits as well. The court noted that the Project is not intended to mitigate all casino-related traffic impacts. Rather it seeks to mitigate only those direct traffic impacts caused solely by the casino. The court further noted that it is the casino, not the Project that would cause traffic-related impacts south of the casino and therefore Caltrans was not required to consider alternatives involving those impacts.

Conclusion and Implications

While the opinion is unpublished, it reinforces the scope of the California Environmental Quality Act. For example, the impacts related to the casino were not at issue. Rather, only the impacts of the SR-94 improvements were subject to CEQA. Interesting, was the court's distinction between this case and *Washoe Meadows* with respect to the project description—which if published could have been the source of confusion with respect to this issue. Finally, the opinion reiterates CEQA's strict exhaustion requirement and the considerable deference given to agencies with respect to alternatives analyses.

The court's decision is available online at: https://www.courts.ca.gov/opinions/nonpub/C086184.PDF.
(Christina Berglund)

FLORIDA SUPREME COURT DETERMINES THAT PERSONAL INJURY DAMAGES ARE RECOVERABLE UNDER THE STATE'S WATER QUALITY ACT

Charles L. Lieupo, v. Simon's Trucking, Inc.,
Case No. SC18-567; 44 Fla. L. Weekly S 298 (Fl. Dec. 19, 2019).

In *Charles L. Lieupo, Petitioner, vs. Simon's Trucking, Inc., Respondent* the Florida Supreme Court has made an important ruling about the scope of damages available for personal injury under Florida statutory water law.

Background

Florida has had a statute regulating discharges to waters since at least 1970. Florida Statutes, chapter 376 regulates the discharge and removal of certain pollutants. There is a rather robust means of recovery

of damages to the waters and affected lands in that statute. However, a 1990 amendment to the 1970 law carefully and expressly excluded injuries to human beings from the scope of recovery for violations. This language had resulted in a decision by the Florida Supreme Court in 2010 barring personal injury claims under the 1970 law and also a 1983 act in the same chapter.

The two portions of chapter 376 at issue in this case are the Pollutant Discharge Prevention and Control Act, passed in 1970 and codified at §§ *376.011-376.21, Fla. Stat.* (1970 act), and the Water Quality Assurance Act, passed in 1983 and codified at §§ *376.30-376.317,* Fla. Stat. (the 1983 act).

The 1970 act is intended to protect coastal waters and adjoining lands, whereas the 1983 act is intended to combat pollution to surface and ground waters. §§ *376.021*, 376.041, 376.30(1)(b), and (2)(b), Fla. Stat. Section 376.021, Fla. Stat. (2011), is entitled legislative intent with respect to pollution of coastal waters and lands. Section 376.041, Fla. Stat. (2011), provides that the discharge of pollutants into or upon any coastal waters, beaches, beaches, and lands adjoining the seacoast of the state in the manner defined by §§ *376.011-376.21, Fla. Stat.*, is prohibited.

The *Curd v. Mosaic Fertilizer* Decision

In *Curd v. Mosaic Fertilizer, LLC,* 39 So. 3d 1216 (Fla. 2010), the Florida Supreme Court's majority applied the 1970 Pollutant Discharge Prevention and Control Act's (the 1970 act) definition of "damage" to a claim for economic loss brought by commercial fishermen under the 1983 Water Quality Assurance Act (the 1983 act). The 1970 act was amended in 1990 and defines "damage" as "destruction to or loss of any real or personal property . . . or . . . any destruction of the environment and natural resources, including all living things *except human beings*, as the direct result of the discharge of a pollutant."

The Damages Claim at Trial

A tow truck driver, Mr. Lieupo, responding to an accident involving an overturned truck on a highway encountered and came in contact with battery acid which came from the truck's cargo. He suffered very serious injuries. Although the defendant trucking company argued that the Florida statute prohibited personal injury recovery, that argument was rejected by the trial court. A jury then found damages for the plaintiff's injuries exceeded 5 million dollars.

At the Court of Appeals

The First Appellate court heard an appeal of the trial court result in the *Lieupo* case and issued an opinion that held no personal injury damage should have been awarded because of the precedent effect of the Florida Supreme Court's decision in the *Curd* case. It nevertheless certified a question of great public importance to the Supreme Court asking whether the definition of damages under the 1983 Water Quality Act should be held to include personal injury.

The Supreme Court's Decision

The Supreme Court accepted the question, and its opinion goes into detail on the statutory history and differences in language governing damages between sections passed with the different 1970 and 1983 laws. The opinion points out that the 1983 statute expressly includes language stating that nothing in the law shall preclude a person from seeking "all damages resulting from a discharge or other condition of pollution." The opinion then explains that the Supreme Court majority was wrong to include the restriction on human injury recovery in its opinion in *Curd* in a way that made it applicable to the 1983 Act. It recedes from *the Curd* majority's apparent, incorrect application of the 1970 act's definition of "damage" to a claim brought under the 1983 act:

> . . . In this case, because Lieupo filed his cause of action under section 376.313(3) of the 1983 act, the "all damages" language of the 1983 act applies, not the more restrictive definition of the 1970 act that expressly only applies to the 1970 act. The plain meaning of "all damages" includes personal injury damages.

The Court of Appeals opinion was then reversed on the point at issue and the case is remanded for correction in accord with the new opinion.

Conclusion and Implications

At this writing the Supreme Court decision is not yet official. If a rehearing is timely sought there is a chance of an altered result. Assuming no alteration occurs, one can foresee a growing number of personal

injuries claims from discharges of hazardous products to coastal waters, other water bodies and lands adjoining them and to the considerable amount of Florida lands underlain with groundwater resources.

The Court's decision is available online at: https://www.floridasupremecourt.org/content/download/545397/6145300/file/sc18-657.pdf.
(Harvey M. Sheldon)

EXXON PREVAILS AT TRIAL, BUT ITS STRUGGLES AGAINST CLIMATE CHANGE LAWSUITS HARKEN A NEW ERA OF PUBLIC NUISANCE CLAIMS

People of the State of New York v. Exxon Mobil Corporation,
Case No. 452044/2018 (N.Y. Supr. Ct., N.Y. County, Dec. 10, 2019).

In November 2019, Exxon Mobil was taken to court in what legal experts refer to as only the second ever climate-change case to reach trial in the United States. The case, *People of the State of New York v. Exxon Mobil Corp.*, had its trial in the New York State Supreme Court (a court of general jurisdiction in the state). The court ruled in favor of Exxon, finding that it had not violated New York's provisions against shareholder fraud. While the case was not explicitly about the blame fossil fuel companies bear for climate change, it may lay the groundwork for future legal claims against the industry.

Background

While the headlines mostly focus on the possibility of Exxon Mobil's culpability for some effects of climate change, the case is not strictly about the climate crisis. Rather, the suit arose due to representations Exxon made to shareholders about potential future costs related to the crisis. New York Attorney General Letitia James asserted that those representations were false and amounted to an enormous instance of securities fraud.

The state argued that Exxon had erected:

> . . .a Potemkin village to create the illusion that it had fully considered the risks of climate change regulation and it had factored those risks into its business operations.

In essence, the Attorney General asserted that Exxon was keeping two sets of books with respect to climate change—one public facing, which accounted for the potential future costs of climate change, and one private, in which those costs were ignored. The state asked for as much as $1.6 billion in restitution to shareholders.

Exxon asserted that the company had developed a "robust" system for addressing climate costs, and that its statements as to its accounting were in no way misleading.

The Supreme Court's Ruling

On December 10, the court ruled that the Attorney General "failed to establish by a preponderance of the evidence" that Exxon violated the Martin Act, New York's law against shareholder fraud. The court called the Attorney General's suit "hyperbolic," ruling that Exxon's internal practices to evaluate potential costs of future regulations on future projects should not impact the company's financial statements with respect to shareholder fraud.

However, the judge was careful about the limits of the ruling, writing:

> . . .nothing in this opinion is intended to absolve Exxon Mobil from responsibility for contributing to climate change in the production of fossil fuel products.

The court concluded its ruling was on the narrow issue of securities fraud, not the broader question of culpability for climate change.

A Trend in Litigation

People v. Exxon Mobil is only one of numerous lawsuits against energy companies. The City of Baltimore filed a suit seeking to hold two dozen energy companies accountable for their role in climate change,

and the United States Supreme Court allowed the suit to proceed in state court. Over the past few years, several states, including New York, Rhode Island, and Massachusetts, and a growing number of cities and counties, have sued fossil fuel companies seeking compensation for damages caused by the effects of climate change. Many of these suits, including a similar case by the Massachusetts Attorney General asserting Exxon committed fraud, are still pending.

These suits form a pattern of public nuisance cases with the potential to create massive liability for the fossil fuel industry, if they are found responsible for the effects of climate change. While a previous wave of cases filed between 2008 and 2012 were all dismissed, the new suits are based in part on the revelation in 2015 of a trove of internal documents describing how Exxon conducted climate research decades ago and then ignored the results to propagate climate denial theories, manufacturing doubt about the scientific consensus even its own scientists had confirmed.

Conclusion and Implications

The growing number of lawsuits may have a broad impact if they succeed in holding fossil fuel companies accountable for damages they foresaw decades ago and did not act to prevent. While *People v. Exxon Mobil* resolved in favor of the corporation, its scope is far narrower than much of the pending litigation, which seeks to directly impose liability on fossil fuel companies for the adverse environmental impacts of their businesses. The question of whether energy companies can be held liable for climate impacts may come to define climate litigation in the coming decades. Comparisons to suits against "Big Tobacco" abound, yet the costs of combating climate change are far higher—estimated in the tens of trillions—meaning the stakes of existing and future litigation may in large part define how the fight against climate change is ultimately funded: by taxpayers or by corporations. The court's ruling in this matter is available online at: https://www.eenews.net/assets/2019/12/10/document_gw_08.pdf.
(Jordan Ferguson)

TEXAS STATE COURT GRANTS TEMPORARY RESTRAINING ORDER PREVENTING CONSTRUCTION OF PRIVATE BORDER WALL

North American Butterfly Association v. Neuhaus & Sons, LLC,
Case No. C-5049-19-I (Tex. Dist. Ct. Dec. 3, 2019).

The Texas state court for Hidalgo County granted a temporary restraining order, preventing excavation and continuing construction of a private border wall along the United States-Mexico border. In granting the order, the court found that the construction of the wall would likely result in significant damage to plaintiffs' property caused by increased water and debris flows, proving an imminent and irreparable harm. Because plaintiffs' property serves as a butterfly sanctuary, a unique use of the land, the court also found that there was no adequate remedy at law if the plaintiffs' property was damaged before the matter reached judicial resolution.

Background

Defendant, We Build the Wall, Inc., is a non-profit organization that seeks to build border walls along the United States-Mexico border at a lower cost and faster rate than the federal government. In order to construct these walls, We Build the Wall contracts for building rights with private landowners located along the border. In 2019, We Build the Wall entered into an agreement with co-defendant Neuhaus to build a border wall on his property, located on the banks of the Rio Grande River. Beginning on or about November 15, 2019, development began to clear the banks of the Neuhaus property along the riverbank as the initial step to build a private border wall.

Around the time construction began, the contractors hired by the defendants received an official request from the United States Section of the International Boundary and Water Commission (IBWC) to cease construction of the proposed private border wall. The IBWC stated that defendants failed to file the necessary permits which would allow the IBWC

to measure the project's compliance with international treaties. The plaintiffs allege that defendants subsequently further failed to file the necessary permit applications, despite receiving notice from the IBWC. It is also alleged that despite this notice, defendants stated publicly on social media that construction was going to continue and quickly be completed.

The Butterfly Sanctuary and the Alleged Redirection of Surface Water

Plaintiffs own a butterfly sanctuary, bordering the Rio Grande River, located directly adjacent to the Neuhaus property. Plaintiffs claim that building a permanent wall on the banks of the Rio Grande River and within the floodplain would cause a redirection and buildup of surface water during flood events. This redirection of surface water and accompanying debris would cause permanent damage to plaintiff's property, potentially destroying portions of the land. Plaintiffs also claim that defendants' actions would result in topographic and vegetative changes detrimental to the ecological value of the land as a butterfly sanctuary. In response to plaintiffs' opposition to the construction of the wall, it is alleged that defendants carried out a number of acts designed to discredit and vilify the plaintiffs. Plaintiff's claims that defendants falsely claimed the North American Butterfly Association was engaged in human trafficking and drug smuggling. Based on the social media comments and potential irreparable damage to their property, plaintiffs sought a temporary restraining order (TRO) that barred defendants from the continued excavation and construction of a permanent steel wall on a cleared portion of the banks of the Rio Grande River.

The District Court's Ruling

Under Texas law a temporary restraining order must not be granted without notice unless it clearly appears that immediate and irreparable injury will result before notice can be served and a hearing held on the matter. Here, the court found that the plaintiffs clearly demonstrated they will suffer an imminent and irreparable harm if the status quo of the matter is not preserved. Specifically, the court found that the characteristics and subsequent rights of the butterfly sanctuary at issue were unique and irreplaceable. The potential flooding and debris that could be caused by the installation of the wall would make it difficult, if not impossible, to accurately measure, the damage caused by defendants' conduct in monetary terms.

The court also found that defendants' inflammatory public responses concerning the plaintiff coupled with the conscious indifference of the risk involved with the construction of the wall showcased the defendants' intent to commit great harm to the plaintiffs. Based on these facts, the court found that the temporary restraining order should be granted without notice because the previous actions and public comments made by the defendants demonstrated an immediate need to preserve the status quo until a ruling could be made to issue a temporary injunction.

Conclusion and Implications

A temporary restraining order is preliminary step in the eventual resolution of this matter. The matter is set for a temporary injunction hearing which may further be followed with an eventual trial on the merits. If the eventual outcome is similar to the granting of this temporary restraining order, it may pave a way to prevent construction of private border walls along the Rio Grande River. The court's order is available online at: http://cdn.cnn.com/cnn/2019/images/12/04/tro.signed.pdf.
(Geremy Holm, Rebecca Andrews)

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