

# CLIMATE CHANGE™

## LAW & POLICY REPORTER

### C O N T E N T S

#### CLIMATE CHANGE NEWS

U.S. Geological Survey Releases Study Suggesting Colorado River Stream-flow Reductions Are Associated with Atmospheric Warming ..... 319

Southern Nevada Water Authority Does Not Appeal Denial of Groundwater Pipeline Applications for Climate-Parched Las Vegas ..... 320

#### CLIMATE CHANGE SCIENCE

Recent Scientific Studies on Climate Change ..... 322

#### REGULATORY DEVELOPMENTS

U.S. Bureau of Reclamation Releases Klamath River Project Interim Plan, Which Provides Additional Water for Endangered Species ..... 325

California Department of Water Resources Reports Groundwater Levels Rebounding, But Not Yet at Pre-Drought Conditions ..... 327

#### PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties, and Sanctions ..... 329

#### JUDICIAL DEVELOPMENTS

##### *Federal:*

D.C. Circuit Holds Clean Air Act Rulemaking Reconsideration Petition Is Proper Where Final Rule Was Not a 'Logical Outgrowth of Proposed Rule' ..... 334

*Chesapeake Climate Action Network v. U.S. Environmental Protection Agency*, 952 F.3d 310 (D.C. Cir. Mar. 13, 2020).

Ninth Circuit Makes Clear that the Administrative 'Finality' Requirement under *Williamson County* for Federal Land Use Takings Claims Remains Intact ..... 336

*Pakdel v City and County of San Francisco*, 952 F.3d 1157 (9th Cir. 2020).

*Continued on next page*

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## Allegations of RICO Violations in ‘Clean Diesel’ Litigation Survive Motion to Dismiss at the District Court . . . . . 338

*Albers v. Mercedes-Benz USA, LLC, et al.*, \_\_\_F.  
Supp.3d\_\_\_, Case No. 16-881 (D. N.J. Mar. 25,  
2020).

## State:

## Protecting Sensitive Coast Lines: California Court Upholds Coastal Commission’s Certification of a Local Coastal Program. . . . . 340

*Mountainlands Conservancy, LLC v. California Coastal  
Commission*, \_\_\_Cal.App.5th\_\_\_, Case No. B287079  
(2nd Dist. Apr. 1, 2020).

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## CLIMATE CHANGE NEWS

U.S. GEOLOGICAL SURVEY RELEASES STUDY SUGGESTING  
COLORADO RIVER STREAMFLOW REDUCTIONS  
ARE ASSOCIATED WITH ATMOSPHERIC WARMING

In March 2020, the U.S. Geological Survey (USGS) released a study seeking to explain the physical mechanism behind the correlation between temperature increase and reduced streamflow in the Upper Colorado River Basin. Using a new model and satellite-based observations, the study found that melting snowfall caused by atmospheric warming was the driving force behind streamflow reduction in the Colorado River. The study was able to project a streamflow reduction rate of about 5 percent for every degree of temperature increase. Such information may be useful in developing management programs that account for potential reductions in Colorado River streamflow in the future.

**Background**

Approximately 1,450-miles-long, the Colorado River is one of the principal water sources in the Western United States. The Colorado River drains an expansive watershed that encompasses parts of seven U.S. states and two Mexican states. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. The Upper Colorado River Basin (Upper Basin) accounts for approximately 90 percent of the water flowing in the river. Water from the Upper Basin is currently used for services provided to approximately 40 million people and supports economic activity in the United States Southwest, estimated at \$1.4 trillion each year.

Water in the Upper Basin originates as precipitation and snowmelt in the Rocky and Wasatch Mountains. Due to year-to-year differences in precipitation and snowmelt, the natural water supply of the Upper Basin is highly variable. Since the early 1900s, water demand in the Upper Basin has increased while water supply has, on average, decreased. The Upper Basin is susceptible to long-term drought, demonstrated by the impacts of the ongoing drought that began in

2000. While previous studies have generally established a link between global temperature increase and streamflow reduction in the Upper Basin, with varying estimates of its impact, the USGS's recent study incorporates more than two-decades worth of satellite imagery and information that other studies have not significantly incorporated.

**The USGS Study**

The recent study conducted by the U.S. Geological Survey used a new model and updated satellite-based observations to explain the mechanism behind flow reduction and shortages in the Upper Basin. The primary focus of this study was to measure surface net radiation rather than focusing only on temperature measurements to explain flow reduction. Surface albedo, also known as reflectivity, determines the amount of solar radiation that is absorbed by land surface, which can drive the process of evapotranspiration. Evapotranspiration is the sum of evaporation and plant transpiration from the Earth's land and ocean surface to the atmosphere. This process accounts for the movement of water to the air from sources such as the soil, canopy interception, and waterbodies. As a result, an increase in evapotranspiration increases the movement of water to the air and reduces the amount of water remaining in waterbodies.

The USGS study revealed that the reduction of snow cover largely accounted for the decrease of streamflow in the Upper Basin. Surface albedo is highly sensitive to snow cover, which is an efficient reflector of solar radiation. As temperatures rise, more precipitation falls as rain instead of snow, and what snow does fall melts earlier in the year. The loss of snow exposes the land to increased solar radiation. The absorbed radiative energy is dissipated by further heating of the lower atmosphere and increased evaporative cooling. The increased evaporation consumes water that would otherwise run off into the river, reducing the amount of streamflow. This results in

a chain reaction, where the increase in temperature starts a process which ultimately leads to a further increase in temperature.

Due to the reduced snow cover, streamflow in the Upper Basin is decreasing by about 5 percent per degree Fahrenheit as a consequence of atmospheric warming, causing a 20 percent reduction over the past century. There is the possibility that precipitation levels may change as a result of climate change, but this remains highly uncertain. While increased precipitation may partially offset the impacts of atmospheric warming, precipitation decreases would likely exacerbate warming impacts. Until now, the inability to identify a physical mechanism that accounts for the sensitivity of streamflow to atmospheric warming has made the translation of climate-change temperature projections into flow projections highly uncertain. The identification of these physical mechanisms may enable more robust projections of future streamflow, which in turn may allow for more precise planning and management of Upper Basin water resources.

## Conclusion and Implications

Because Colorado River water supplies millions of people, businesses, and farms with water, the projected future reduction of Colorado River streamflow due to atmospheric warming poses a significant concern. The Upper Basin continues to experience streamflow reductions that may increase over time. However, the identification of the physical mechanisms behind streamflow reduction, as well as the corresponding reduction rate of 5 percent per degree Fahrenheit, may help future planning by water agencies, industry, and agricultural interests in the future. The U.S. Geological Survey study is available online at: *Colorado River Flow Dwindles as Warming-Driven Loss of Reflective Snow Energizes Evaporation*, available at [https://www.usgs.gov/center-news/colorado-river-flow-dwindles-warming-driven-loss-reflective-snow-energizes-evaporation?qt-news\\_science\\_products=1#qt-news\\_science\\_products](https://www.usgs.gov/center-news/colorado-river-flow-dwindles-warming-driven-loss-reflective-snow-energizes-evaporation?qt-news_science_products=1#qt-news_science_products)

(Jeremy Holm, Steve Anderson)

## SOUTHERN NEVADA WATER AUTHORITY DOES NOT APPEAL DENIAL OF GROUNDWATER PIPELINE APPLICATIONS FOR CLIMATE PARCHED LAS VEGAS

The Las Vegas metropolitan area relies largely on Colorado River water to serve its needs. Starting in 1989, Southern Nevada Water Authority (SNWA) filed applications to import groundwater from numerous eastern Nevada basins to support increasing demands. In the ensuing decades, contested administrative proceedings and wide-reaching litigation pitted environmental groups, Native American tribes and farmers against the state's municipal power center. In the face of a denial by the Nevada State Engineer and the courts, to SNWA's applications to import water from outlying groundwater basins, the authority has apparently decided not to appeal those denials.

### Background

For over 30 years, various issues bounced back and forth between the State Engineer, the Nevada state District Court and the Nevada Supreme Court. As recently reported here, in March, the District Court in White Pine County issued an order that required all of SNWA's applications in Spring, Cave, Delamar

and Dry Lake Valleys to be denied (2020 Order). "Nevada District Court Orders the Denial of Southern Nevada Water Authority's Groundwater Applications for Las Vegas Pipeline," 24 *Western Water L. & Pol'y Rptr.* 179, (April 2020). That order revealed heightened tensions between the court and the State Engineer regarding the level of deference owed the state's top water manager under Nevada's water statutes to determine whether water was available for appropriation.

As it turns out, that matter will not be resolved because the appeal deadline passed without SNWA or the State Engineer filing appeals to the Nevada Supreme Court. Absent an appeal, SNWA has foregone any opportunity to pursue these specific applications—which south 84,000 acre-feet per year—in the future.

### The Prospect of SNWA's Importation Plans

In addition to the applications in Delamar, Dry Lake, Cave and Spring Valleys denied in the 2020

Order, SNWA also has permitted rights to 21,000 acre-feet per year in five hydrographic basins and applications for another 162,000 acre-feet per year in three others. Because of these water holdings, SNWA's decision to not appeal the 2020 Order does not necessarily jettison the 300-mile-long pipeline project.

But it remains unclear whether water importation will remain on SNWA's radar. In a statement regarding its decision not to appeal, SNWA said:

After the current pandemic passes and normal operations are restored, SNWA management will present an update to its 50-year Water Resources Plan for its Board of Directors to consider that focuses on strengthening beneficial partnerships with other Colorado River states as well as further advancing Southern Nevada's world-recognized water conservation efforts.

This suggests that SNWA may have litigation fatigue and wants to turn its attention to enhancing existing sources rather than pursuing new ones. In its 2019 Water Resource Plan, the importation of eastern Nevada groundwater was just one component of SNWA's future water resource portfolio. Other potential sources identified by SNWA included desalination and augmentation/increased efficiencies of Colorado and Virgin River water.

SNWA is engaged with other Colorado River Basin states and water users, the U.S. Bureau of

Reclamation and Mexico to actively explore and investigate potential seawater and brackish water desalination projects. SNWA also has agreed with other Colorado River Basin states to suspend development of Virgin River water rights that it owns in exchange for the development of an additional 75,000 acre-feet per year of Colorado River supply for Nevada. These types of collaborative efforts among Colorado River users appear to be where SNWA plans to focus its attention.

### Conclusion and Implications

For anyone who has been observing the epic fight over SNWA's pipeline project, it is hard to imagine that the agency responsible for serving Southern Nevada's urban water needs plans to walk away from its water importation efforts completely. Although its board members may not now have the desire to press on with the applications in Delamar, Dry Lake, Cave and Spring Valleys, SNWA has given no indication that it is withdrawing its pending applications in other basins or disposing of the eastern Nevada ranches and associated water rights it already owns.

Political winds shift, drought conditions may worsen and relationships with other Colorado Basin states may sour. As a result, we likely have not seen the end of the SNWA's desire to tap rural groundwater sources to quench the thirst of Las Vegas and its environs. (Debbie Leonard)



**CLIMATE CHANGE SCIENCE****RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE****Climate Change Puts Shorelines at Risk**

Around the world, coastlines are important hubs of culture, industry, development, and ecology. Many major cities and ecosystems are along coastlines, and population density tends to be higher along or near the coast. “Sandy” shorelines, a subset of coastlines, are the most highly trafficked and the most variable, with complex geomorphological changes happening daily through natural tidal patterns as well as through wear from tourism and development. As the global mean sea level rises as a result of climate change, shoreline retreat, the phenomenon by which the shoreline gets reduced due to erosion, is anticipated to increase.

A group led out of the European Commission Joint Research Centre (JRC) in Italy performed a study of sandy shorelines to project what they may look like under anticipated sea level rise. To do this, they began by studying 32 years of shoreline dynamic data to understand the historic influences associated with shoreline retreat. From these data, they show a direct relationship between greenhouse gas (GHG) emissions and shoreline retreat. They then run statistical models forward in time to predict what shorelines will look like under various GHG emissions scenarios. Here, they find two critical results. First, sea level rise is responsible for over 70 percent of projected shoreline change in 2050. Second, moderate GHG mitigation strategies could prevent approximately 40 percent of sandy shoreline retreat. It is critical to consider, however, that different regions will undergo different levels of shoreline retreat. For example, the study shows that Australia will potentially be the most affected country in the world, with approximately half of their sandy shorelines eroded by 2100.

As shown in this study, sea level rise could contribute to huge losses in sandy shorelines, which could lead to ecological, economic, industrial and cultural losses. Given that moderate GHG mitigation strategies are so effective at protecting sandy shorelines, this study further highlights the critical importance of implementing GHG mitigation strategies.

See: Voudoukas, M. I., *et al.* Sandy coastlines under threat of erosion. *Nature Climate Change*, 2020; <https://doi.org/10.1038/s41558-020-0697-0>

**Relationship between Anthropogenic Climate Change and the Australian Bushfires of 2019-2020**

While southern Australia typically experiences bushfire season in the summer months of December through February, this past 2019-2020 season was so devastating that it attracted global attention. According to the BBC, an estimated 13 million hectares of land were burnt (an area similar to that of the UK), with most of the damage in the territories of New South Wales (NSW) and Victoria. In addition to human fatalities, it was estimated that between 500 million and 1.5 billion wild animals were lost. Millions of people have been exposed to hazardous air quality conditions, which will have long term effects. Many have been trying to understand why this bushfire season was so devastating.

In a recent study by van Oldenborgh *et al.* of Royal Netherlands Meteorological Institute and a team of international researchers, they analyzed the relationship between the severity of Australia’s 2019-2020 bushfire season and anthropogenic climate change, specifically focusing on the hardest hit areas of NSW and Victoria. Using a range of data sets and climate models, they conducted attribution studies to determine the effects of climate change on the following parameters: heat extremes, drought, and the Fire Weather Index. The Fire Weather Index (FWI) is a parameter that takes into account temperature, humidity, wind speed, and wind direction. It is used to indicate the severity of weather conditions that can lead to bushfires and as a proxy for burnt area.

2019 was Australia’s warmest and driest year on record since continuous observations for these parameters began in 1910 and 1900, respectively. The researchers concluded that anthropogenic climate change specifically has led to extreme heat events of the magnitude seen in December 2019 becoming

ing twice as likely. On the other hand, while 2019 was the driest year on record, the researchers were unable to attribute any significant trend in drought to climate change. The drought conditions of 2019 could be mostly attributed to the naturally occurring phenomena known as Indian Ocean Dipole and Southern Annual Mode. Finally, the researchers analyzed the trends in the FWI. It was determined that at present, climate change has increased the probability of having an FWI as high as the 2019 season FWI by at least 30 percent since 1900. Most of the increase can be attributed to increasing temperatures. Models estimate that once the climate reaches 2°C warming above pre-industrial temperatures, severe bushfire events will become four to eight times more likely.

While this study was able to link increased Fire Weather Index (and bushfire activity) to temperature extremes driven by anthropogenic climate change, it also acknowledged the complexity of wildfires and the inability to fully capture all involved factors. For example, the availability of fuel to burn is a function of numerous factors that can take shape over years but was out of scope for the study. Furthermore, the researchers stated that the climate models used in this study were unable to capture the full extent of heat trends, and thus called for a better understanding of these models in order to avoid underestimation of heat events and bushfire activity going forward.

See: van Oldenborgh, G. J., Krikken, F., Lewis, S., Leach, N. J., Lehner, F., Saunders, K. R., van Weele, M., Haustein, K., Li, S., Wallom, D., Sparrow, S., Arrighi, J., Singh, R. P., van Aalst, M. K., Philip, S. Y., Vautard, R., and Otto, F. E. L.: Attribution of the Australian bushfire risk to anthropogenic climate change, *Nat. Hazards Earth Syst. Sci. Discuss.*, <https://doi.org/10.5194/nhess-2020-69>, in review, 2020.

See: Australia fires: A visual guide to the bushfire crisis, BBC News, <https://www.bbc.com/news/world-australia-50951043>, 2020

### Estimating the Environmental Footprints of Renewable Energy-Fueled Vehicles

As climate change continues to pose greater risks to human health and the environment, a variety of sectors around the globe are working to identify strategies to reduce greenhouse gas emissions. When looking at global greenhouse gas emissions produced by sector, the transportation sector alone generates roughly 8 gigatons of CO<sub>2</sub> emissions each year.

These emissions comprise nearly one quarter of the global total. Of the 8 gigatons of CO<sub>2</sub> produced by the transportation sector, on-road transportation emissions alone make up roughly 74 percent of the sector's emissions. Addressing greenhouse gas emissions within the on-road transportation sector will be imperative for developing mitigation strategies, and transitions to cleaner energy sources will be necessary.

In today's market, buyers have access to a wide range of choices when it comes to buying a vehicle that is fueled by renewable energy. Understanding the greenhouse gas emissions and, more broadly, the overall environmental footprint associated with each vehicle type is essential to make an informed decision. In a study prepared for the American Geophysical Union, Holmatov *et al.* aim to quantify the environmental footprint per kilometer driven in six different vehicles fueled by a variety of energy sources. The energy sources analyzed in this study are conventional gasoline, 20 percent biodiesel blend (B20), 85 percent bioethanol blend (E85), electricity generated from burning sugarcane, electricity generated from photovoltaic (PV) solar panels, and solar-based hydrogen. The environmental footprint analyzed in this study is comprised of three components: carbon footprint, land footprint, and water footprint.

Of the six energy sources analyzed, the solar powered battery-electric vehicles had the smallest environmental footprint per kilometer. Since solar powered electricity has zero greenhouse gas emissions associated with its operation, the environmental footprint is a result of the land and water footprints. The energy source responsible for the largest environmental footprint per kilometer is biofuel-driven vehicles, specifically the B20 biodiesel blend, which exceeded the environmental footprint of gasoline-fueled vehicles. The B20 biodiesel blend is composed of 20 percent biodiesel from rapeseed and 80 percent conventional diesel, and assumes a circular production in which bioenergy is used to produce bioenergy. While conventional gasoline has the second-largest carbon footprint, its land and water footprint are minimal compared to other energy sources. Primarily due to its carbon footprint, gasoline ranks as the third largest environmental footprint (behind B20 biodiesel blend and E85 bioethanol blend).

Based on this analysis of environmental footprint, Holmatov *et al.* found that per kilometer, solar powered battery electric vehicles are the most resource

efficient, followed by solar based hydrogen vehicles, electricity generated from burning sugarcane, gasoline, 85 percent bioethanol blend (E85), and lastly 20 percent biodiesel blend (B20). This finding helps to inform future buyers who are motivated by the environmental impacts of the transportation sector.

See: Holmatov, B., & Hoekstra, A. Y. (2020). The environmental footprint of transport by car using renewable energy. *Earth's Future*, 8, e2019EF001428. <https://doi.org/10.1029/2019EF001428>

## Experimental Evidence of the Climate Benefits of Ethanol from Grasses

Cellulosic ethanol is known for its climate change advantages over corn ethanol due to higher yields and increased carbon storage potential. There are also social benefits associated with using non-food sources to produce biofuels.

Researchers at the U.S. Department of Energy's Great Lakes Bioenergy Research Center (GLBRC) created an experiment to measure the greenhouse gas (GHG) emissions from producing ethanol fuel and electricity from cellulosic biomass. Specifically, corn stover, switchgrass, miscanthus, poplar trees, native grasses, early vegetation, and restored prairie were studied at low and high fertility sites. The researchers measured GHG emissions from above-ground biomass production, soil nitrous oxide (N<sub>2</sub>O), methane (CH<sub>4</sub>) fluxes, soil carbon, farming inputs, and end use scenarios. End use scenarios included GHG emissions from the biorefinery, and electricity production from biorefinery residues.

The goal of the study was to provide experimental evidence that energy generated from cellulosic biomass is environmentally preferable to producing energy from fossil fuels. The researchers found GHG emissions reductions from ethanol fuel were 80 percent to 290 percent greater than petroleum fuels with restored prairie having the most potential benefits and corn stover having the least benefits. They also noted that most of the cropping systems were carbon neutral by year two due to an increase in soil organic carbon storage. The cellulosic biomass was best for restored prairie, then early vegetation, poplar trees, native grasses, switchgrass, miscanthus, and finally corn stover.

The study notes several limitations including assuming future crops will be established on abandoned crop land and would not displace food production elsewhere and would not displace forests, which would result in a much slower carbon payback. In addition, the study assumed the technology will not have future advances and the energy mix will not change, which could decrease the benefits of electricity and fuel production from biomass.

See: Ilya Gelfand, Stephen K. Hamilton, Alexandra N. Kravchenko, Randall D. Jackson, Kurt D. Thelen, G. Philip Robertson. Empirical Evidence for the Potential Climate Benefits of Decarbonizing Light Vehicle Transport in the U.S. with Bioenergy from Purpose-Grown Biomass with and without BECCS. *Environmental Science & Technology*, 2020; 54 (5): 2961, <https://doi.org/10.1021/acs.est.9b07019> (Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)



## REGULATORY DEVELOPMENTS

## U.S. BUREAU OF RECLAMATION RELEASES KLAMATH RIVER PROJECT INTERIM PLAN, WHICH PROVIDES ADDITIONAL WATER FOR ENDANGERED SPECIES

In late March 2020, the U.S. Bureau of Reclamation (Bureau) released a proposed Interim Plan to operate the Klamath River Project for a three-year period, with up to an additional 40,000 acre-feet per year made available for the benefit of endangered species and their critical habitats. The Interim Plan would govern the project's operations while the Bureau, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) complete consultation on the Bureau's proposed longer-term operations plan. The Bureau's long-term operations plan is the subject of a federal Endangered Species Act lawsuit filed by the Yurok Tribe and environmental groups.

### Background

The Klamath River Project (Project) is located in Klamath County, Oregon, and Siskiyou and Modoc counties in California. The Project, which is operated by the Bureau of Reclamation, supplies irrigation water for approximately 230,000 acres of farmed land. Project water is stored and released from three reservoirs: Upper Klamath Lake, Clear Lake, and Gerber Reservoir. Additional water is available to the Project from the Klamath and Lost rivers, which is delivered through a network of diversion structures, canals, and pumps. Approximately 200,000 acres are served from Upper Klamath Lake and the Klamath River, and 30,000 acres are served from the Lost River, Clear Lake, and Gerber Reservoir. Several federally endangered species, such as coho salmon, and their critical habitats are dependent on the waters of the Klamath River.

The federal Endangered Species Act imposes requirements for protection of endangered and threatened species and their ecosystems, and makes endangered species protection a governmental priority. For marine and anadromous species (like salmon), the Secretary of Commerce, acting through the National Marine Fisheries Service, may list any species, subspe-

cies, or geographically isolated populations of species as endangered or threatened. In addition to listing a species as endangered or threatened, the Secretary of the Interior must also designate "critical habitat" for each species, to the maximum extent prudent and determinable. For species other than marine or anadromous species, such as for terrestrial species, the Secretary, acting through Fish and Wildlife Service (FWS) may list and otherwise regulate the take of such species.

### The Biological Opinions

At its most basic level, a Biological Opinion (BiOp) evaluates whether an agency action is likely to either jeopardize the continued existence of a listed species or result in the destruction or adverse modification of such species' designated critical habitat. Opinions concluding that the proposed action is likely to jeopardize a species' continued existence or adversely modify its critical habitat are called "jeopardy opinions," and must suggest "reasonable and prudent alternatives" that the Secretary believes will minimize the subject action's adverse effects. However, "no jeopardy" opinions do not require reasonable and prudent alternatives, but may still set forth reasonable and prudent measures that the action agency must follow if it is to obtain "incidental take" coverage, i.e. legal protection for incidentally taking a protected species.

On March 29, 2019, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (collectively: the Services) submitted to the Bureau their coordinated Biological Opinions evaluating the Bureau's 2018 Biological Assessment for proposed operations of the project, as modified (2018 Operations Plan). In evaluating the Bureau's 2018 Operations Plan, the Services each prepared Biological Opinions in 2019, concluding that the 2018 Operations Plan would not jeopardize the continued existence of Southern Oregon/Northern California

Coast (SONCC) coho salmon, Southern Resident Killer Whale (SRKW), and Lost River sucker (LRS) and shortnose suckers (SNS), nor would it destroy or adversely modify their designated critical habitat.

Subsequently, the Bureau analyzed the 2018 Operations Plan under the National Environmental Policy Act (NEPA), resulting in an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), which was finalized on April 1, 2019. Thereafter, the Bureau began operating the Project pursuant to both Services BiOps and the EA. However, in late summer 2019, Earth Justice on behalf of the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a lawsuit, Case No. 3:19-cv-04405-WHO, in the U.S. District Court for the Northern District of California, challenging, among other things, the "no jeopardy" and "no adverse modification" conclusions in NMFS' BiOp, as well as the Bureau's associated EA.

In August 2019, it was discovered that "computer modeling input files" used to evaluate the amount of available habitat for SONCC coho fry in the Bureau's 2018 Operations Plan and NMFS' 2019 BiOp, contained erroneous information related to the BiOp's "Weighted Usable Area habitat curves" for SONCC coho salmon. Accordingly, the files revealed effects of the 2018 Operations Plan on listed species or their critical habitats that were not previously considered in the BiOp or EA. In particular, the Bureau has expressed concerns related to the amount of habitat available for juvenile coho salmon, in addition to disease mitigation as had previously been the focal point of the Bureau's consultation with NMFS. The Bureau requested re-initiation of formal consultation with both Services on November 13, 2019.

Prior to the Bureau's request to reinitiate consultation with the Services, plaintiffs in the federal lawsuit filed a motion seeking a preliminary injunction to force the Project to operate under a 2012 operations plan in compliance with a corresponding BiOp from 2013, and which would require the Bureau to increase Klamath River flows to address coho salmon disease and habitat concerns. In late January, plaintiffs modified their motion for preliminary injunction, requesting an additional 50,000 acre-feet (AF) of water allocated for Klamath River flows for the benefit of endangered species and their critical habitats.

## **The New Environmental Assessment and the Proposed Action Alternative**

On February 7, 2020, as part of the reinitiated consultation process, the Bureau transmitted a new Environmental Assessment to both Services for Project operations from April 1, 2020, through March 31, 2024. However, the Bureau and the Services subsequently agreed that additional time would be required to complete the consultations. Accordingly, the Bureau proposes to operate the Project pursuant to the Interim Plan for the period of April 2020 to March 2023 while the Bureau and the Services continue the formal consultation process. Litigation over the 2018 Operations Plan and NMFS' 2019 BiOp will be stayed pending the consultation process, provided the Project is operated in accordance with the Interim Plan.

The Interim Plan constitutes the Bureau's Environmental Assessment for Project operations during the three-year period to which it applies, and analyzes two water management approaches: A No-Action Alternative, and a Proposed Action Alternative. The EA adopts the "Proposed Action Alternative."

The Proposed Action Alternative consists of water supply and water management approaches for Upper Klamath Lake, and the Klamath and Lost rivers. These approaches attempt to replicate natural hydrologic conditions observed in the Upper Klamath Basin. The EA reflects the Bureau's effort to comply with the ESA, while also maintaining reliable water deliveries to agricultural water users during the agricultural season. The Proposed Action Alternative generally includes: 1) storing waters of the Klamath and Lost rivers; 2) operating the Project to deliver water for irrigation purposes subject to water availability; and 3) maintaining conditions in Upper Klamath Lake and the Klamath River that comply with ESA requirements.

Under the Proposed Action Alternative, Project operations conducted after the agricultural season would be oriented toward filling Upper Klamath Lake during the fall/winter in order to bolster the ecologic benefit of the volumes available for the Environmental Water Account, which includes habitat and disease mitigation flows. The Proposed Action Alternative provides an additional 40,000 acre-feet of water for the Environmental Water Account, which

is 20,000 acre-feet more than a proposed but rejected alternative in the 2018 Operations Plan and 10,000 acre-feet less than the amount plaintiffs requested in their motion for preliminary injunction.

Notably, 17,000 acre-feet of the additional water for the Environmental Water Account would come from Upper Klamath Lake, while the rest would be supplied by other Project facilities. As analyzed in the EA, Upper Klamath Lake levels are not anticipated to decline significantly due to the additional water releases. In particular, the Proposed Action Alternative would maintain Upper Klamath Lake levels deemed to be protective of ESA-listed suckers, because it includes spring and annual Upper Klamath Lake minimums deemed important to sucker spawning and survival. The remaining 23,000 acre-feet from the Project's other supplies would be largely consistent with what the Bureau proposed in its 2018 Operations Plan. Following the winter months, when Upper Klamath Lake increases would be stored for the benefit of species and habitat, the Project would be operated to provide the Project's irrigation supply during the following spring/summer operational period.

## Conclusion and Implications

While parties on both sides of the litigation involving the 2018 Operations Plans and NMFS' 2019 Biological Opinion generally perceive the Interim Plan as an acceptable compromise during the Bureau of Reclamation and the Services' continuing consultation process, it is unclear what longer-term operations plan will be developed. Potentially, the three-year Interim Plan may influence longer-term project operations by providing a test case weighing additional Environmental Water Account supplies with irrigation supplies and needs. It also remains to be seen whether there will be any deviation from the Interim Plan operations and whether plaintiffs will challenge any such deviations for purposes of lifting the stay on litigation. Finally, whether increased flows from the Environmental Water Account will provide the hoped-for ecological benefits remains to be seen, and could play an important role in future negotiations. For more information, see:

U.S. Bureau of Reclamation, *Environmental Assessment—Klamath Project Operating Procedures 2020-2023*, available at: [https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=42944](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=42944) (Miles B.H. Krieger, Steve Anderson)

## CALIFORNIA DEPARTMENT OF WATER RESOURCES REPORTS GROUNDWATER LEVELS REBOUNDED, BUT NOT YET AT PRE-DROUGHT CONDITIONS

The California Department of Water Resources (DWR) recently issued a report indicating the state has seen a modest rebound in precipitation and groundwater levels since 2016 when historic drought conditions prevailed. Three of the past four water years have been above average, with 2017 and 2019 being among the wettest years on record in California.

### Background

California experienced one of its most severe droughts on record in the past decade. The resulting impact on the health of the State's underground aquifers was significant. On average, California derives approximately 30 percent of its water supply from groundwater in normal years and up to 60 percent in drought years. Restoring and maintaining healthy

groundwater basins has become a top statewide and local priority.

Each year, DWR monitors the state's groundwater levels, primarily based upon data obtained in the spring prior to crop irrigation season. Reporting includes water level data from wells for at least five years reporting to DWR by the California Statewide Groundwater Level Monitoring Entities, local agencies, and well owners. DWR recently completed its annual assessment and issued its report showing 2019 as one of the wettest years on record.

The Statewide Annual Precipitation chart (NOAA National Centers for Environmental Information, Climate at Glance: U.S. Time Series, Precipitation) monitors precipitation dating back to 1970. It indicates that since 2009, there have been five below-average water years, three average water

years, and three above-average water years. Following the 2012 to 2016 drought period, 2017 and 2019 were reported as above average water years.

The groundwater level change maps referenced in the DWR report provide one-year changes from Spring 2018 to Spring 2019 and three-year changes from Spring 2016 to Spring 2019.

### **One-Year Change Map Spring 2018 to Spring 2019**

According to DWR, the one-year change map shows that approximately 50 percent of recorded well measurements statewide indicate net water level changes of less than five feet and that 25 percent of the remaining statewide well measurements show an increase in water levels.

For the San Francisco Bay Hydrologic Region (281 wells), 23 percent of wells showed an increase of five to 25 feet in groundwater levels from Spring 2018 to Spring 2019, while approximately six percent (6 percent) of wells saw a decrease of that same amount. In the San Joaquin River Hydrologic Region (734 wells), approximately 17 percent of wells showed an increase of five to 25 feet during the past year and approximately 8 percent of wells saw a decrease of that amount. The South Coast Hydrologic Region (southern California coastal and inland populated areas, with 995 wells) reported approximately 26 percent of its wells increasing by five to 25 feet, while less than 10 percent showed decreases in that range. Geographically, groundwater level declines in amount greater than 25 feet occurred primarily in the Tulare Lake Hydrologic Region, and more specifically in the San Joaquin Valley.

### **Three-Year Change Map Spring 2016 to 2019**

Turning to the three-year change map, approximately 65 percent of well measurements reported net water level changes of less than five feet. The Sacramento Hydrologic Region noted considerable groundwater level increases, indicating 49 percent of the reporting wells increased more than five feet, and even higher increases specifically in Yolo and Sutter counties. In particular, the San Francisco Bay Hydro-

logic Region reported approximately 24 percent of its wells experienced five to 25-foot groundwater level increases and less than 5 percent seeing a comparable decrease over the three-year period from Spring 2016 to Spring 2019. The San Joaquin River Hydrologic Region reported nearly 40 percent of its wells experiencing five to 25-foot increases in water levels and approximately 11 percent experiencing decreases in that range. Finally, the South Coast Hydrologic Region reported nearly 31 percent of its wells experiencing five to 25-foot increases in water levels and approximately, and less than 12 percent experiencing decreases in that range during the same three-year timeframe.

### **Five-Year and Ten-Year Change Maps Show Only Partial Recovery to Pre-Drought Conditions**

Despite the generally positive recent data, the five- and ten-year maps paint a different picture. These figures illustrate that many groundwater basins have not recovered to pre-drought conditions. In the San Joaquin, Tulare Lake, and South Coast Hydrologic Regions, 30 - 70 percent of well measurements report water level decreases over the last five- and ten-year periods. The five-year change map does show groundwater level increases in the Sacramento Hydrologic Region in Tehama, Yolo, and Sutter Counties and throughout the San Francisco Bay Hydrologic Region.

### **Conclusion and Implications**

Although California's Spring 2019 groundwater levels have widely improved over the past one to three years with 2017 and 2019 as some of the wettest years on record, groundwater levels have not fully recovered to pre-drought conditions, as shown by the five- and ten-year data. The results demonstrate not only California's wild and unpredictable swings in precipitation levels since the onset of the recent drought, but also the severity of the drought's impact and the efforts and conditions that will be needed to return to pre-drought levels.  
(Chris Carrillo, Derek R. Hoffman)



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**PENALTIES & SANCTIONS**

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**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. Due to COVID-19, there were significantly fewer items to report on this month.*

**Civil Enforcement Actions and Settlements—  
Air Quality**

•On March 12, 2020, the U.S. Environmental Protection Agency (EPA) announced settlements with two interstate trucking companies, FL Transportation, Inc., headquartered in Plano, Texas, and New Bern Transport Corporation, headquartered in Somers, New York, for violating the California Truck and Bus Regulation. Each company will pay a \$24,375 penalty. The companies, subsidiaries of PepsiCo, Inc., failed to verify that trucks they hired for use in California complied with the Truck and Bus Regulation. Together, the companies failed to verify a total of 104 different fleets of trucks. As part of the settlement, the companies will spend at least \$146,250 to install air filtration systems at one or more schools in the South Coast Air Basin.

•On March 13, 2020, EPA announced a settlement with Boro Sand and Stone Corp., a concrete and stone producer in North Attleborough, Massachusetts, for violations of Clean Air Act (CAA) regulations. Boro used diesel engines to generate electricity to power two rock crushers at its North Attleborough facility, in violation of National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines. Boro's rock crushing equipment at the facility's recycle plant operations is also subject to federal New Source Performance Standards for Nonmetallic Mineral Processing Plants. In November 2019, Boro shut down both rock crushers and stopped using the diesel generators after receiving a notice from EPA regarding its CAA violations. Boro has since invested in a new utility

line to supply electric grid power to its rock crushing operations instead. Boro also conducted the required visible emissions testing of its rock crushing equipment. Boro agreed to pay a total penalty of \$90,300 for the violations.

•On March 18, 2020, EPA announced that ASARCO LLC had paid \$33,000 in stipulated penalties for not complying with a 2015 settlement agreement. A central part of the settlement was a fugitive dust plan designed to address the release of lead, coarse dust, and other hazardous air pollutants at ASARCO's copper ore processing, concentrating, and smelter facility in Hayden, Arizona. Wind-blown dust from the facility has been found to contain lead and other hazardous pollutants. Under the settlement's dust plan, ASARCO is required to operate water sprayer systems at various sites to abate fugitive dust emissions. After reviewing ASARCO's records, EPA identified 33 days during which water was not sprayed on certain required fugitive dust sources. Under the terms of the 2015 settlement, ASARCO is liable for \$1,000 each day the water sprayers were not operating, resulting in \$33,000 in stipulated penalties.

•On February 18, 2020, EPA announced that US Development Group, LLC, and its subsidiaries USD, LLC and CBRH Holdings, LLC, will collectively pay \$2.4 million in penalties to resolve violations of the CAA associated with the Van Hook Crude Terminal crude oil transloading facility that the companies formerly owned and operated in Mountrail County, North Dakota on the Fort Berthold Indian Reservation. EPA's enforcement action arose as a result of the companies' constructing and operating the terminal before receiving a permit to construct and operate. The companies submitted a Clean Air Act Tribal Minor New Source Review permit application to EPA on October 5, 2011 and the permit was issued by EPA on August 2, 2012, with an effective date of September 1, 2012. The companies began constructing the termination around October 2011 and began



operations in early February 2012, six months before the permit was issued and became effective. The companies also violated several New Source Performance Standard requirements that applied to the facility's storage tanks, including failing to notify EPA prior to commencement of construction of, and subsequent filling of, the tanks so that EPA could inspect the tanks to ensure their proper construction and suitability for use. The companies sold the terminal to Plains All American Pipeline, L.P. in December 2012. Plains has ceased operating the terminal since that time and sold its interest to another party that now transports fracking sand in and out of the facility. The storage tanks and related equipment have been dismantled.

•On March 5, 2020, EPA announced that it had reached settlements with three sellers and manufacturers of aftermarket automotive parts specializing in heavy duty diesel pickup trucks to resolve alleged violations of the CAA. Diesel Power Products, Alligator Diesel Performance, and Deviant Race Parts allegedly manufactured and sold aftermarket products that defeat the emissions control systems of heavy-duty diesel engines. The parts and components manufactured and sold by the companies were designed and marketed by entities such as Cummins Inc., FCA US LLC, General Motors Company, and Ford Motor Company. EPA alleges that from January 1, 2017 through December 31, 2017, Diesel Power Products sold at least 5,663 aftermarket products that defeat the emissions control systems of heavy-duty diesel engines in violation of the CAA. Diesel Power Products has paid a civil penalty of \$50,800. EPA alleges that from January 1, 2016 through May 17, 2018, Alligator Diesel Performance sold at least 31,543 aftermarket products that defeat the emissions control systems of heavy-duty diesel engines in violation of the CAA. Alligator's products allowed the customer to reprogram the on-board diagnostic systems in such a way that it allowed for the removal of factory-installed emission control systems. Alligator paid a civil penalty of \$90,000. With regard to Diesel Race Parts, LLC, d.b.a. Deviant Race Parts, EPA alleges that from January 1, 2016 through May 17, 2018, Deviant manufactured and sold at least 34,915 aftermarket products that defeat the emissions control systems of heavy-duty diesel engines in violation of the CAA. Deviant's products allowed customers to remove the factory-installed exhaust gas

recirculation systems. Deviant has paid a civil penalty of \$40,000. Deviant and Alligator, though two separate companies, are owned by the same individuals and operated at the same location. The penalty for each company was reduced due to limited financial ability to pay a higher penalty and stay in business. As part of the settlement, the companies have agreed to stop the manufacture and sale of all products the government alleges violate the CAA. The companies also paid civil penalties totaling \$180,800.

•April 9, 2020 - The U.S. Environmental Protection Agency (EPA) is taking corrective action to provide stability in the Pennsylvania and West Virginia economies. Specifically, the agency has established an emissions standard for a new sub-category of six small coal-refuse power plants under the Mercury and Air Toxics Standards (MATS). These coal-refuse power plants are an important source of reliable energy, a key economic driver in the rural communities where they are located, and a proven method for turning waste into a usable source of power while at the same time remediating a longstanding environmental threat. By taking this action, EPA is addressing a matter left unresolved by the last administration that threatened to put the coal-refuse industry and the surrounding communities out of business. "Coal refuse" refers to legacy material from mining operations, some of which can date back almost a century. Antiquated mining practices from past decades resulted in piles of low-quality coal, mixed with rock, clay and other material, being effectively abandoned near coal mines. This action will help landowners reclaim land in these legacy coal mining areas. This reclaimed land is often redeveloped into park land, nature areas, or put to other beneficial uses. The new emission standards apply to a subcategory that includes six existing electric generating units that burn eastern bituminous coal refuse (EBCR). All are small units operating in Pennsylvania or West Virginia. As a result of this final rule, EPA does not expect emissions to increase above current levels.

•April 13, 2020 - EPA has reached an administrative settlement agreement with Peco Foods, Inc. resolving allegations that the company violated § 112(r)(7) of the federal Clean Air Act (CAA), Chemical Accident Prevention Provisions, and the regulations codified at 40 C.F.R. Part 68, commonly

referred to as the Risk Management Program (RMP) at five of its facilities located in Alabama (Tuscaloosa) and Mississippi (Bay Springs, Brooksville, Canton, and Sebastopol). The objective of the CAA 112(r) (7) and RMP is to prevent accidental releases of extremely hazardous substances and to minimize the consequences of those releases that do occur. Accidental releases of extremely hazardous chemicals can have serious consequences on public health, safety, and the environment. Peco Foods produces poultry products and uses anhydrous ammonia in their ammonia refrigeration process. Ammonia is regulated as an extremely hazardous substance. EPA alleges that Peco Foods failed to identify hazards associated with its ammonia refrigeration systems and failed to design and maintain a safe facility by not compiling process safety information documentation for the technology of the process, by not developing operating procedures for the safe operation of the facility, by not adequately training employees, and by not conducting inspections and testing operating equipment. The Consent Agreement and Final Order was filed on February 25, 2020. Under the terms of the agreement, Peco Foods took steps to return the five facilities to compliance, will pay a penalty of \$106,250 and will donate emergency response equipment valued at \$398,438, to the local fire departments.

### **Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste**

•On January 31, 2020, the U.S. Department of Justice announced that Harcros Chemicals, Inc. pled guilty in U.S. District Court for the District of Kansas to negligently violating the CAA. Harcros is expected to pay a \$1 million fine. In its plea, Harcros admitted that on October 21, 2016, a greenish-yellow chlorine gas cloud formed when 4,000 gallons of sulfuric acid were mistakenly combined with 5,800 gallons of sodium hypochlorite at its facility in Atchison, Kansas. The Atchison County Department of Emergency Management ordered community members to shelter in place and to evacuate in some areas. Approximately 140 individuals, including members of the public, first responders, employees of MGP Ingredients and Harcros Chemicals sought medical attention. Harcros is set for sentencing May 27, 2020. The co-defendant in the case, MGP Ingredients, Inc., pled guilty in November 2019 in the same case. MGP is also expected to pay a \$1 million fine.

•On March 6, 2020, EPA announced a settlement with The Uni-Kool Partners corporation to resolve alleged violations of the CAA. The violations pertain to chemical accident prevention requirements at Uni-Kool's produce storage and distribution facility in Yuma, Arizona. Uni-Kool will pay a \$26,250 civil penalty and spend at least \$98,438 to improve environmental, health, and safety conditions at the facility. Uni-Kool's industrial refrigeration system uses anhydrous ammonia. A 2018 EPA inspection of the 42-acre facility found Uni-Kool violated CAA regulations by failing to safely manage anhydrous ammonia. The company also failed to timely and accurately submit chemical inventory information regarding the ammonia at the facility to the State of Arizona and local emergency response agencies, in violation of the Emergency Planning and Community Right-to-Know Act. In addition, the inspection found several deficiencies in the facility's compliance with requirements relating to hazard assessment, pipe and instrument labeling, training, operation, safety information reporting, and mechanical integrity. Uni-Kool has addressed the identified violations. As part of the settlement, the company agreed to complete a supplemental environmental project valued at \$98,438 to enhance safety equipment and procedures at the Yuma facility. The project includes installing a new alarm system with sensors to detect ammonia leaks that will automatically shut down the ammonia system, trigger ventilation, and notify workers within the facility of an emergency through strobe lights and horns.

•April 15, 2020 - EPA announced that Tangier Oil Company, Inc. has agreed to take actions to reduce the risks of spills of fuel oils into the Chesapeake Bay. These actions will address the company's alleged environmental violations at a fuel storage distribution facility that the company operates in the Tangier Harbor in Virginia. The Tangier Oil facility, which transfers oil to and from docked vessels, has an aboveground oil storage capacity of 150,360 gallons -- including six 20,000-gallon and three 10,000-gallon storage tanks for diesel fuel, gasoline, and kerosene. EPA's Administrative Order on Consent with the company addresses violations of the Clean Water Act's Spill Prevention, Control, and Countermeasure (SPCC) and the Facility Response Plan (FRP) requirements. The alleged violations included:

1) Failure to have secondary containment around bulk storage tanks that is adequate to contain oil leaks; 2) Failure to comply with inspection requirements; 3) Failure to develop and implement oil spill preparedness and response training; and, 4) Failure to develop and fully implement a program of facility response drills and exercises.

In entering into this consent order, the Tangier Oil Company neither admitted or denied these violations but agreed to take actions on a specified timetable including: submitting a revised SPCC plan and FRP; remedying deficiencies in the facility's secondary containment; hiring an independent consultant to evaluate and remedy any deficiencies associated with the integrity of oil storage tanks/equipment; and implementing mandatory employee training, drills and exercises.

• April 16, 2020 - In a settlement with the EPA, Texas-based Raven Power LLC recently paid a \$105,000 penalty for allegedly failing to timely report a 2017 release of a hazardous substance from the H.A. Wagner Generating Plant in Baltimore. EPA cited the company for violating two federal laws requiring immediate reporting of releases of hazardous substances -- the Emergency Planning and Community Right-to-Know Act (EPCRA); and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. EPCRA requires notification to the state and local emergency officials, and CERCLA requires notification to the National Response Center (NRC), the national point of contact for reporting oil and hazardous chemical spills. According to EPA, the company did not provide required immediate notices to federal, state and local emergency response officials immediately after facility personnel became aware at approximately 8 a.m., Sept. 11, 2017, of a release of approximately 1,126 pounds of sodium hypochlorite directly into the adjacent Patapsco River. EPA alleged that the company did not notify the NRC until 12:20 p.m., more than four hours after learning of the release, did not notify Maryland emergency officials until after 1 p.m., and failed to notify local officials at the Anne Arundel County Office of Emergency Management. EPA also cited the company for failing to provide required written follow-up notification to state and local officials.

## Indictments, Convictions, and Sentencing

• On March 16, 2020, a federal jury in Salt Lake City, Utah convicted California businessman Lev Aslan Dermen, also known as Levon Termendzhyan, of criminal charges Monday afternoon relating to a \$1 billion renewable fuel tax credit fraud scheme. According to evidence presented at a seven-week trial, Dermen was the owner and operator of Noil Energy Group, a California-based fuel company; SBK Holdings USA, a Beverly Hills real estate investment company; and Viscon International, a Nevada fuel additive corporation. From 2010 to 2016, Dermen conspired with the owners and operators of Washakie Renewable Energy, a Utah-based biodiesel company, including its Chief Executive Officer Jacob Kingston, his brother, Chief Financial Officer Isaiah Kingston, and others, including their mother, Rachel Kingston, and Jacob Kingston's wife, Sally, to fraudulently claim more than \$1 billion in renewable fuel tax credits from the IRS. As part of their scheme, Dermen and Jacob Kingston shipped millions of gallons of biodiesel within the U.S. and from the U.S. to foreign countries and back again to create the appearance that qualifying renewable fuel was being produced and sold. They also doctored production and transportation records to substantiate Washakie's fraudulent claims for more than \$1 billion in IRS renewable fuel tax credits and credits relating to EPA's renewable fuel standard. To further create the appearance they were buying and selling qualifying fuel, the co-conspirators cycled more than \$3 billion through multiple bank accounts. As a result of the fraudulent claims, the IRS paid more than \$511 million to Washakie and the Kingstons that was distributed between them and Dermen. Jacob and Isaiah Kingston sent more than \$21 million in fraudulent proceeds to SBK Holdings USA, Inc., Dermen's California-based company, and sent \$11 million to an associate of Dermen's at his request. Jacob Kingston used \$1.8 million of the fraud proceeds to buy Dermen a 2010 Bugatti Veyron, and they exchanged gifts including a Lamborghini and a Ferrari. Dermen and Jacob Kingston laundered \$3 million through Dermen's company, Noil Energy Group, to purchase a mansion in Sandy, Utah for Jacob Kingston and his wife Sally. Dermen also laundered \$3.5 million through his California company SBK Holdings USA, Inc. to purchase a mansion in Huntington Beach, California. Throughout the scheme, Dermen assured Jacob Kingston that

he and the Kingstons would be immune from criminal prosecution because they would be protected by Dermen's umbrella of corrupt law enforcement personnel. Jacob and Isaiah Kingston transferred over \$134 million in fraudulent proceeds to companies in Turkey and Luxembourg at Dermen's direction, in purported payment for protection. The jury found Dermen guilty of conspiracy to commit mail fraud, conspiracy to commit money laundering, and money laundering concealment, money laundering, and expenditure money laundering. The Kingstons each pled guilty on July 19, 2019 for their role in the scheme. The Kingstons are members of the Davis County Cooperative Society, also known as the "Order." Jacob Kingston pled guilty to crimes relating to the \$1 billion biofuel fraud, including conspiracy to commit mail fraud, aiding and assisting in the filing of false claims with the IRS, conspiracy to commit money laundering, and conspiracy to obstruct justice. In his plea agreement, he admitted to laundering fraudulent proceeds through Order-related entities and transferring millions in fraudulent proceeds to Order-related entities. Jacob Kingston admitted to conspiring to obstruct justice for attempting to bribe government officials, tamper with witnesses, and destroy evidence based on his agreeing with his family to hide evidence and replace computer hard drives once they learned of an impending search warrant. Under the terms of his plea agreement, Jacob Kingston faces a maximum of thirty years in prison. He also faces a period of supervised release and other monetary penalties. Sentencing has not yet been scheduled. Isaiah Kingston pled guilty to his role in the scheme, including conspiracy to commit mail fraud, aiding and assisting in filing false claims with the IRS, conspiracy to commit money laundering, and conspiracy to obstruct justice. Under the terms of his plea agreement, he faces a maximum of 20 years in prison. Rachel Kingston pled guilty to conspiracy to commit mail fraud, conspiracy to commit money laundering, money laundering, and obstruction of justice. In her plea agreement, she admitted to creating false invoices, backdating documents, and concealing records in advance of a federal search warrant. She faces a maximum of 15 years in prison. Sally Kingston pled guilty to conspiracy to commit mail fraud and conspiracy to commit money laundering; she faces a maximum of 15 years in prison. They each also face a period of supervised release. As part of their plea agreements, the Kingstons

will be ordered to pay \$511 million in restitution to the United States and to forfeit the proceeds of their crimes. Jacob and Isaiah Kingston both testified at Dermen's trial. Dermen's sentencing will be set at a later date. At sentencing, he faces a maximum sentence of 20 years in prison for conspiracy to commit mail fraud, conspiracy to commit money laundering and concealment money laundering, and ten years in prison for expenditure money laundering. He also faces a period of supervised release, restitution, and monetary penalties.

- March 21, 2020 - Unix Line PTE Ltd., a Singapore-based shipping company, was sentenced in federal court before U.S. District Court Judge Jon S. Tigar in Oakland, California, after previously pleading guilty to a violation of the Act to Prevent Pollution from Ships. Unix Line PTE Ltd. was sentenced to pay a fine of \$1,650,000.00, placed on probation for a period of four years, and ordered to implement a comprehensive Environmental Compliance Plan as a special condition of probation. In pleading guilty, Unix Line admitted that its crew members onboard the Zao Galaxy, a 16,408 gross-ton, ocean-going motor tanker, knowingly failed to record in the vessel's oil record book the overboard discharge of oily bilge water without the use of required pollution-prevention equipment, during the vessel's voyage from the Philippines to Richmond, California. On Oct. 24, 2019, Unix Line was indicted by a federal Grand Jury of obstruction of justice and a violation of the Act to Prevent Pollution from Ships. Under the plea agreement, Unix Line pled guilty to one count of a violation of the Act to Prevent Pollution from Ships. According to the plea agreement, Unix Line is the operator of the Zao Galaxy, which set sail from the Philippines on Jan. 21, 2019, heading toward Richmond, California, carrying a cargo of palm oil. On Feb. 11, 2019, the Zao Galaxy arrived in Richmond, where it underwent a U.S. Coast Guard inspection and examination. Examiners discovered that during the voyage, a Unix Line-affiliated ship officer directed crew members to discharge oily bilge water overboard, using a configuration of drums, flexible pipes, and flanges to bypass the vessel's oil water separator. The discharges were knowingly not recorded in the Zao Galaxy's oil record book when it was presented to the U.S. Coast Guard during the vessel's inspection. (Allison Smith, Andre Monette)



## JUDICIAL DEVELOPMENTS

### D.C. CIRCUIT HOLDS CLEAN AIR ACT RULEMAKING RECONSIDERATION PETITION IS PROPER WHERE FINAL RULE WAS NOT A ‘LOGICAL OUTGROWTH OF PROPOSED RULE’

*Chesapeake Climate Action Network v. U.S. Environmental Protection Agency*,  
952 F.3d 310 (D.C. Cir. Mar. 13, 2020).

The U.S. Environmental Protection Agency (EPA) adopted a final rule, governing pollutant emissions from coal- and gas-fired utility boilers. The rule set non-numerical standards for operation of the boilers during start-up and shut-down, as opposed to numerical limits during production. Environmental requested reconsideration of the rule, objecting both on the substance of the non-production rule, and that the agency’s support for the rule was not disclosed prior to the comment period. The D.C. Circuit Court of Appeals held that reconsideration was required on procedural grounds.

#### Background

The federal Clean Air Act (42 U.S.C. § 7401 *et seq.*, CAA) regulates the emission of hazardous air pollutants (HAP) by, *inter alia*, existing “major sources” including utility boilers at coal-fired and oil-fired power plants. See § 7412(a)(10).

EPA must set HAP emission limits in the form of numerical limits whenever “feasible,” § 7412(d)(2), (h)(4), and limits for major sources must be capped at the “the maximum degree of reduction in emissions” that EPA deems “achievable,” § 7412(d)(2). EPA’s determination of what is “achievable” is often referred to as a “MACT” standard, as in “maximum achievable control technology.”

Quoting *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 594 (D.C. Cir. 2016). MACT standards are established in a two-step process. First, EPA must set a “MACT floor” defining for each source at a level that “ensures that all HAP sources at least clean up their emissions to the level that their best performing peers have shown can be achieved.” *Ibid.* For the utility boilers at issue in this case:

...the MACT floor cannot be less stringent than the average emissions limits achieved by the best performing 12 percent of existing

sources in that category or subcategory. *Ibid.*, citing 42 U.S.C. § 7412(d)(3)(A). . . .Second, EPA may exercise its discretion ‘to require an even greater reduction in emissions, taking into account costs, health effects, environmental effects, and energy requirements.’ *Nat. Res. Def. Council v. EPA*, 529 F.3d 1077, 1079 (D.C. Cir. 2008) (citing § 7412(d)(2)).

Congress provided, however, that where numerical MACT standards are not “feasible,” EPA may instead impose “work practice” standards. 42 U.S.C. § 7412(h):

[N]umerical MACT standards are not feasible (and thus ‘work practice’ standards may be used) when ‘the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.’ § 7412(h)(2)(B). However, work practice standards must be, ‘in the Administrator’s judgment,’ consistent with numerical MACT requirements, § 7412(h)(1), *i.e.*, ‘the maximum degree of reduction in emissions’ that EPA deems ‘achievable,’ § 7412(d)(2).

In addition, the D.C. Circuit has previously held that EPA has the “flexibility” to:

...regulate a HAP indirectly, by controlling a proxy, or ‘surrogate,’ instead of the pollutant itself. . . . so long as the resulting rules are reasonably calculated to control the relevant HAPs to the extent the statute demands. Citing *Sierra Club v. EPA*, 884 F.3d 1185, 1190 (D.C. Cir. 2018).

Procedurally, EPA’s adoption of MACT standards, whether of the numeric or work standard variety follows a familiar path. Following Federal Register notice of the proposed rule and a public comment



period, reconsideration of the rule on showing by the commenter that:

(1) ‘it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review),’ and (2) ‘such objection is of central relevance to the outcome of the rule.’ 42 U.S.C. § 7607(d)(7)(B).

In this case, EPA’s initial final rule included work standards MACT for utility boiler start-up and shut-down periods. EPA re-opened a public comment period in response to a petition for reconsideration, and eventually made some amendments to its work standards non-production MACT before adopting it as a final rule. Plaintiffs again requested reconsideration, EPA refused, and plaintiffs brought this judicial challenge.

### The D.C. Circuit’s Decision

EPA distinguishes between when utility boilers are starting-up or shutting-down (*i.e.*, non-production operation), and when they are producing energy, and set separate MACT standards for each period. EPA initially proposed numerical MACTs for both production and non-production periods. However, numerous commenters criticized the basis for the non-production period numerical MACTs. EPA’s final rule, therefore, established work practice standards for non-production periods. As EPA explained:

...there were almost no HAP data for startup and shutdown periods and almost all of the data failed to meet our data quality requirements. Thus, we do not have sufficient data on emissions that occur during startup and shutdown on which to set emission standards.

Plaintiffs pointed out that EPA had failed to provide adequate support for the impracticability of numerical standards as required by 42 U.S.C. section 7412(h)(2)(B). In addition, per the commenters the non-production work practice standards were not “consistent with numerical MACT requirements, § 7412(h)(1),” and EPA failed to provide evidence they would match “the maximum degree of reduction in emissions” that EPA deems “achievable” via numerical standards. 42 U.S.C. section 7412(d)(2).

### Issue of Reconsideration under Section 7607

The D.C. Circuit focused on whether petitioners were entitled to reconsideration under section 7607(d)(7)(B), *i.e.*:

(1) ‘it was impracticable to raise such objection within [the public comment period] (but within the time specified for judicial review),’ and (2) ‘such objection is of central relevance to the outcome of the rule.’ 42 U.S.C. §.

As for the first element, the court found that it was not possible for petitioners to have earlier-commented on the non-production MACT standards final rule because the regulations in that final rule were not a “logical outgrowth” of the proposed rule, quoting *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017):

A final rule is the ‘logical outgrowth’ of a proposed rule if ‘interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.’ A final rule ‘fails the logical outgrowth test’ if ‘interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.’

Principally, the court criticized EPA’s reliance on a list of “best performing power plants” to support the final rule, including its failure to disclose prior to the comment period that it would do so or its criteria for compiling the list.

Even if reliance on any “best performing sources” could be considered a logical outgrowth, EPA’s process for identifying those best performing sources was certainly not. To hold otherwise would place the unreasonable burden on commenters not only to identify errors in a proposed rule but also to contemplate why every theoretical course of correction the agency might pursue would be inappropriate or incorrect. It was simply impracticable for Petitioners to predict how EPA would cure the missing “best performer” component and then submit preemptive attacks on such hypothetical solutions.

Further, the issue of whether numerical standards could feasibly be imposed during non-production

hours easily meets the test of being “of central relevance to the outcome of the rule.” 42 U.S.C. § 7607(d)(7)(B).

## Conclusion and Implications

Timing matters in administrative law. An agency

detour or deviation from the previously-controlling logic of a regulatory regime presented late in the agency decision-making process inevitably undermines the defensibility of the resulting agency action. (Deborah Quick)

## NINTH CIRCUIT MAKES CLEAR THAT THE ADMINISTRATIVE ‘FINALITY’ REQUIREMENT UNDER WILLIAMSON COUNTY FOR FEDERAL LAND USE TAKINGS CLAIMS REMAINS INTACT

*Pakdel v City and County of San Francisco*, 952 F.3d 1157 (9th Cir. 2020).

In one of the first federal “takings” cases after last year’s U.S. Supreme Court decision in *Knick v. Township of Scott*, Case No. 17-647, 588 U.S. \_\_\_\_ (2019), the U.S. Court of Appeals for the Ninth District, in a March 18, 2020 decision, made clear that the administrative “finality requirement” elaborated in the 1985 decision *Williamson County Regional Planning Commission v. Hamilton Back*, 473 U.S. 172 (1985), still remains in place. As part of this finality requirement, a prospective federal takings plaintiff must pursue the procedurally available avenues, within the timelines prescribed by local agencies, to seek relief from a challenged land use decision before bringing a federal action.

### Factual and Procedural Background

Plaintiffs owned a tenancy-in-common interest in a multi-unit building in the City of San Francisco (City). Under a fairly common ownership arrangement in the city, several tenants-in-common share ownership over an entire building and then enter into agreements among themselves to give each owner an exclusive right to occupy a particular unit. Plaintiffs leased their tenant-in-common unit to a tenant but planned on occupying the unit upon their retirement.

Until recently, the City conducted a lottery to determine which tenant-in-common buildings could be converted into condominium units and the lottery faced a severe backlog. In 2013, to clear the backlog, the city temporarily suspended the lottery and replaced it with the Expedited Conversion Program (ECP) which allowed tenancy-in-common property to be converted into condominium property on the

condition that its owner agreed to offer any existing tenants in affected units with lifetime leases within the converted property. The City also had procedures to request exemptions to the lifetime lease offer requirement.

Plaintiffs purchased their property in 2009. In 2015, plaintiffs, along with their co-owners, applied to convert the building into a condominium building under the ECP. While advancing through the application process, plaintiffs had several opportunities to seek a waiver from the lifetime lease requirement. They never did so and in January 2016, the San Francisco department of public works approved plaintiffs’ “tentative conversion map.” In November of 2016, plaintiffs signed an agreement with the city to offer a lifetime lease to their tenants and even offered their tenants such a lease. At the last minute, before signing executing the lifetime lease they offered to their tenant, tenants refused to sign the lease and instead sued the City in the U.S. District Court for the Northern District of California. Plaintiffs contend under various theories that the City’s lifetime lease requirement violated the Takings Clause of the Fifth Amendment of the U.S. Constitution.

### The *Knick v. Township of Scott* Decision

Plaintiffs case reached the U.S. District Court before the U.S. Supreme Court’s decision in *Knick v. Township of Scott*. Before *Knick*, regulatory takings plaintiffs had to clear two hurdles in local and state venues before seeking relief in federal court. Such plaintiffs needed to: 1) obtain a final decision through whatever administrative procedures were available

to challenge the alleged taking in the local jurisdiction (Finality Requirement), and 2) exhaust all state court remedies available to obtain compensation for regulatory takings (Exhaustion Requirement). The U.S. Supreme Court's decision in *Knick* eliminated the exhaustion requirement.

Because plaintiffs filed their lawsuit before the *Knick* decision, the U.S. District Court dismissed plaintiffs' suit for failure to exhaust all available state remedies to obtain compensation. Plaintiffs appealed to the Ninth Circuit.

### The Ninth Circuit's Decision

The Ninth Circuit began by noting that constitutional challenges to local land use decisions are not considered by federal courts until the posture of such challenges are considered "ripe." Before *Knick* a case needed to meet the two requirements above before it was "ripe" for federal review:

First, under the finality requirement, a takings claim challenging the application of land-use regulations was not ripe until the government entity charged with implementing the regulations ha[d] reached a final decision regarding the application of the regulations to the property at issue... Second, under the state-litigation requirement, a claim was not ripe if the plaintiff did not seek compensation [for the alleged taking] through the procedures the State ha[d] provided for doing so.

The Ninth Circuit acknowledged that the U.S. Supreme Court's *Knick* decision removed the second requirement above, and as a result, plaintiffs' failure to seek just compensation in state court no longer barred them from bringing their takings claim in federal court. The Court of Appeals then analyzed whether plaintiffs takings claims were ripe under the first pre-*Knick*, "finality" requirement.

### Ripeness and the 'Finality' Requirement

First the court recognized that the *Knick* decision left the first or "finality" pre-*Knick* requirement intact. Plaintiffs did not argue this, but instead argued that they satisfied the "finality" requirement by refusing to sign the lifetime lease that it agreed with the City of San Francisco to sign, after failing to attempt to seek a waiver of the lifetime lease requirement through

the procedures made available by the City. The court disagreed.

In doing so, the court analyzed the rationale behind the "finality" requirement that was articulated by the Supreme Court in the 1985 case *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. As the court in *Williamson County* noted, the finality requirement exists in constitutional land use challenges because many of the factors essential to determining whether a taking has occurred (economic impact of the action, and extent to which it interferes with investment backed expectations):

... simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land use question.

The finality requirement addresses the high degree of discretion that local land use boards have in granting variances from their general regulations with respect to individual properties. In light of this discretion, federal courts simply cannot "make a sound judgment about what use will be allowed by a local land use authority merely by asking whether a development proposal" facially conforms to the land use regulations at issue. As the court noted, a federal court cannot decide whether a regulation:

... has gone too far until it knows how far the regulation goes which requires a final and authoritative determination of how the regulation will be applied to the property in question.

### Applying 'Finality' under *Williamson County*

The court went on to articulate that the *Williamson County* "finality" rule requires a plaintiff:

to meaningfully request and be denied a variance from the challenged regulation before bringing a regulatory takings claim... but the term variance is not definitive of talismatic; if other types or permits are available and could provide similar relief, they must be sought.

The court then analyzed the various avenues that the San Francisco department of public works made available to plaintiffs during the ECP application.

Public works staff had discretion to authorize exceptions to the lifetime lease requirements. Plaintiffs could have sought an exception at the January 7, 2016 hearing on the ECP application's tentative map. The City also notified plaintiffs that before the City approved a final conversion map, plaintiffs could raise any objections to the conditions of the tentative conversion map approval, including the lifetime lease requirements. Plaintiffs also could have raised an objection to the lifetime lease requirement to the City board of supervisors and were notified of this in a letter that followed initial approval of the conversion map. At each of these opportunities, plaintiffs failed to seek an exception to the lifetime lease requirement, until all available procedural methods had expired.

Plaintiffs nonetheless alleged that they met the finality requirement by refusing to execute the finality lease. The court disagreed. The finality requirement requires plaintiffs to timely avail themselves of the administrative avenues available to seek a variance or exception from a challenged land use regulation:

Plaintiffs cannot make an end run around the finality requirement by sitting on their hands until every applicable deadline has expired

before lodging a token exemption request that they know the relevant agency can no longer grant. . . .

The court also recognized that although there is no exhaustion requirement for actions brought under § 1983, in the land use takings context, a property owner's failure to seek a variance (or similar exception) through procedures made available by the local land use authority, means that the authority had not reached a final decision.

### Conclusion and Implications

The U.S. Supreme Court's recent decision in *Knick* was a boon for federal regulatory takings plaintiffs who want to avoid the need to pursue state court actions. However, the Ninth Circuit's decision in *Pakdel* makes clear that such plaintiffs still need to pursue the procedurally available avenues, within the timelines prescribed by local agencies, to seek relief from a challenged land use decision. *Williamson County*'s finality requirement remains firmly intact, for now, within the Ninth Circuit. The court's decision is available online at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/17/17-17504.pdf> (Travis Brooks)

## ALLEGATIONS OF RICO VIOLATIONS IN 'CLEAN DIESEL' LITIGATION SURVIVE MOTION TO DISMISS AT THE DISTRICT COURT

*Albers v. Mercedes-Benz USA, LLC, et al.*, \_\_\_F.Supp.3d\_\_\_, Case No. 16-881 (D. N.J. Mar. 25, 2020).

A third U.S. District Court has rejected a motion to dismiss Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962, RICO) allegations in a "clean-diesel" case, holding that allegations a car manufacturer and parts supplier committed mail fraud when they worked together to deceive the U.S. Environmental Protection Agency (EPA) with respect to federal Clean Air Act (CAA) compliance were not an attempt to repackage a Clean Air Act violation as a RICO-predicate act. Further, the court rejected the argument that private-plaintiffs were barred from alleging fraud on the EPA as a RICO-predicate act; rather, the alleged deception of consumers was the illegal act alleged, although that deception may have involved also deceiving EPA.

### Background

The putative class representatives allege that, from 2007 through the beginning of 2016, German car manufacturer Mercedes sold diesel cars (Subject Vehicles) in the United States that they advertised as:

... 'the world's cleanest and most advanced diesel' with 'ultra-low emissions, high fuel economy and responsive performance,' representing that they emit 'up to 30 percent lower greenhouse-gas emissions than gasoline.'

However, per the class allegations, Mercedes and its parts-supplier Bosch:



... installed an electronic control unit in the Subject Vehicles known as electronic diesel control unit or 'EDC' 17[, which] allegedly functioned as a defeat device, *i.e.*, turned off or limited emissions reductions during real-world driving conditions as compared to lab testing.

The purpose of the defeat device was to persuade regulators and consumers that the Subject Vehicles met emissions standards, including those limiting allowable emissions of NOx (nitrous oxide), a pollutant regulated under the Clean Air Act (42 U.S.C. § 7401 *et seq.*) The defeat devices accomplished this sleight of hand by detecting when the Subject Vehicles' emissions were being measured under laboratory conditions, when emissions limitations functions would be enabled. Conversely, when the defeat devices sensed that the Subject Vehicles were being driven under normal conditions, emissions controls were disabled and performance—as well as emissions—were thereby enhanced.

The putative class representatives alleged that they paid a premium for their "green diesel" cars. Their complaint stated claims under various state consumer protection laws as well as violation of the federal RICO, pursuant to which they seek civil penalties:

The RICO enterprise is alleged to be one by which the Mercedes and Bosch defendants coordinated their operations through the design, manufacturing, distributing, testing, and sale of the Subject Vehicles.

The elements of a RICO violation are: 1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity. *See, Boyle v. U.S.*, 556 U.S. 938, 944 (2009). "Enterprise" is defined "exceedingly broadly" to include both corporate entities and informal associations. *Ibid.* With respect to the pattern of racketeering activity, the statute "requires at least two acts of racketeering activity within a ten-year period," which may include federal mail fraud under 18 U.S.C. § 1341 or federal wire fraud under 18 U.S.C. § 1343. ... In addition:

... the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

Bosch sought to dismiss the RICO claim, arguing, *inter alia*, that:

... [p]laintiffs should not be allowed to convert their [CAA] claim into a RICO claim," and that they "may not base their RICO claim on a 'fraud on the regulator theory. 18 U.S.C. § 1962(c).

### The District Court's Decision

Defendants argued that plaintiffs' allegations of racketeering involved violations of federal emissions standards, and therefore their RICO claim is "simply a disguise for a private CAA claim." Plaintiffs countered that the CAA's savings clause—"Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief ....," 42 U.S.C. § 7604(e)—preserves their claim. The U.S. District Court adopted a third analytical lens: that plaintiffs' RICO claim:

... is not premised on a violation of the CAA; rather, it alleges a pattern of deceptive marketing practices that amount to mail and wire fraud. These claims, while surely related to the concerns of the CAA, do not adopt the CAA as a predicate or rest on a violation of the CAA.

This result echoes that of other District Courts that have considered similar attacks on RICO claims arising from similar facts. *Counts v. Gen. Motors, LLC*, No. 16-CV-12541, 2018 WL 5264194, at \*12 (E.D. Mich. Oct. 23, 2018), and *In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1088 (E.D. Mich. 2018).

Separately, Bosch attached the RICO claims against itself—a parts supplier—to the extent that those claims relied on allegations that Bosch assisted Mercedes with false applications to EPA as RICO-predicate acts, relying on *Cleveland v. U.S.*, 531 U.S. 12 (2000). In *Cleveland*, the defendant was accused of having submitted "false statements in an application for a state gambling license" as the basis of a mail fraud claim, the RICO-predicate act.

The Supreme Court held that the mail fraud statute aims at the deprivation of a victim's property. It requires "the object of the fraud to be "property" in the victim's hands [but ...] a Loui-



siana video poker license in the State's hands is not "property." *Id.* at 26-27.

Here, however, the gravamen of plaintiffs' complaint is not that that Bosch and Mercedes acted together to deceive EPA, but rather Mercedes and Bosch "made material misrepresentations that induced [plaintiffs] to purchase vehicles" they would not otherwise have purchased, or to have paid higher prices than they otherwise would have paid.

In short, the alleged scheme to defraud buyers included misrepresentations to the EPA, but

EPA is not alleged to be the mail or wire fraud victim.

Plaintiffs' RICO claims thus survived the motion to dismiss.

### Conclusion and Implications

Class-action plaintiffs' RICO claims against various auto manufacturers have survived motions to dismiss in various jurisdictions, but it remains to be seen whether plaintiffs can succeed in proving notoriously difficult to prosecute RICO claims. (Deborah Quick)

## PROTECTING SENSITIVE COAST LINES: CALIFORNIA COURT UPHOLDS COASTAL COMMISSION'S CERTIFICATION OF A LOCAL COASTAL PROGRAM

*Mountainlands Conservancy, LLC v. California Coastal Commission*, \_\_\_Cal.App.5th\_\_\_, Case No. B287079 (2nd Dist. Apr. 1, 2020).

A group of landowners brought suit challenging the California Coastal Commission's certification of a local coastal program for the Santa Monica Mountains, which, among other things, prohibited new vineyards in the Santa Monica Mountains coastal zone. The Superior Court denied the petition, and the landowners appealed. The Court of Appeal for the Second Judicial District affirmed, finding that the Coastal Commission had followed proper procedures and that its actions with respect to vineyards were supported by substantial evidence in the record.

### Factual and Procedural Background

In early 2014, Los Angeles County (County) initiated a process to amend the land use plan for the Santa Monica Mountains coastal zone and to adopt an implementation plan for the area. Compared to the previous plan (which was certified by the Coastal Commission in 1986), the County explained that agricultural uses would be restricted: while vineyards and crop areas already in existence would be allowed to continue, further establishment of such uses would be prohibited. Another significant difference involved critical habitat—the updated land use plan would designate considerably more habitat as critical.

Following action by the County board of supervisors, the program was submitted to the Coastal Com-

mission. In advance of a public hearing, the Coastal Commission released a staff report recommending denial of the land use plan amendment as submitted, but approval subject to certain modifications. These included, among other things, clarifications to the provisions regarding agricultural uses, adding that existing uses may not be expanded. They also included a new policy stating that existing crop-based agricultural uses on lands suitable for agricultural use shall not be converted to non-agricultural use unless certain requirements are met. The staff report also addressed Coastal Act, §§ 30241 and 30242, which pertain to agricultural uses, and found that they generally did not apply and that, overall, areas suitable for agricultural uses within the plan area were limited.

In response, the plaintiffs (three limited liability companies that own land within the Santa Monica Mountains coastal zone) submitted comments challenging staff's findings in connection with §§ 30241 and 30242, in particular the conclusion that the vast majority of land in the Santa Monica Mountains was unsuitable for agricultural use. The Coastal Commission then issued an addendum to its staff report, recommending a modification to allow new agricultural uses meeting certain criteria: 1) the uses are limited to specific areas on natural slopes of 3:1 or less steep, or areas currently in agricultural use; 2) new vine-

yards are prohibited; and 3) organic or biodynamic farming practices are followed. Staff also removed the prohibition on expanding agricultural uses and recommended that existing uses may be expanded with the same three criteria. The staff report justified the prohibition on new vineyards due to a number of identified adverse impacts, including increased erosion, use of pesticides, large amounts of water use, their invasive nature, and adverse impacts on scenic views.

Plaintiffs responded, stating that: they had not been given them enough time to respond; even as revised, the proposed plan raised substantial issues with the Coastal Act; and the plan would still exclude new agricultural uses from the vast majority of the plan area, particularly because new agriculture would be allowed only within certain habitat areas, which were limited in designation. They also challenged the justification to prohibit new vineyards, in connection with which they submitted a UCLA study.

At its public hearing, the Coastal Commission adopted the land use plan with the modifications suggested by staff. A few months later, it also approved the County's proposed local implementation plan, with modifications. It then issued a resolution adopting the local coastal program, consisting of the land use plan and the implementation plan. Final certification by the Commission took place in October 2014, after which it became final.

### At the Superior Court

Plaintiffs then filed a petition for writ of mandate seeking to set aside the Coastal Commission's actions. The Superior Court denied the petition, issuing two rulings. In its first ruling, the court: rejected them claim that the addendum to the staff report was required to be distributed at least seven days before the public hearing; found the Coastal Commission was not required to hold a separate hearing on matters deemed by plaintiffs to raise "substantial issues"; and determined that the Commission's findings in connection with Coastal Act §§ 30241 and 30242 were supported by substantial evidence.

In a second ruling, the court addressed the question of whether the ban on vineyards was supported by substantial evidence. The court found that there was substantial evidence that vineyards are harmful to the Santa Monica Mountains ecology because they require clearing and scarification, increase erosion

and sedimentation, require pesticide use, and constitute an invasive monoculture. Further, the court found, of these harms, many are inherent to the nature of viticulture, and there is no evidence that they could be mitigated. The court then entered judgment and plaintiffs appealed.

### The Court of Appeal's Decision

#### Holding of a Separate Hearing

The Court of Appeal first addressed the claim that the Coastal Commission was required to hold a separate hearing pursuant to Coastal Act § 30512, which generally requires the Coastal Commission to determine, after a public hearing, whether the land use plan of a proposed local coastal program "raises no substantial issue as to conformity with" Coastal Act policies. If the plan does raise a substantial issue, the Commission must identify the issues and hold at least one public hearing on the matters identified. The Coastal Commission, on the other hand, contended that it properly proceeded under § 30514, which pertains to amendments to certified local coastal programs and does not have the same requirement. The Court of Appeal agreed with the Coastal Commission, finding that the commission properly proceeded under § 30514 and therefore was not required to make the "substantial issue" determination otherwise required by § 30512.

#### Coastal Act Sections 30241 and 30242

The Court of Appeal next addressed the claim that the Coastal Commission failed to proceed in the manner required by law because it supposedly made a blanket determination that the Santa Monica Mountains are not suitable for agriculture. In particular, plaintiffs argued that Coastal Act §§ 30241 and 30242 contemplate a determination of the feasibility of agriculture in relation to a specific parcel of property, on a case-by-case basis.

In rejecting these claims, the Court of Appeal first found that plaintiffs did not cite any authority for their "case-by-case" claim. Instead, it agreed with the Coastal Commission that the point of a local coastal program is to allow local governments to do area-wide planning in conformity with the policies of the Coastal Act. Specifically in regards to §§ 30241 and 30242, the Court of Appeal found that these sec-

tions likewise do not “contemplate” a case-by-case or parcel-by-parcel determination of the feasibility of agriculture, and that the Commission’s finding that the majority of land in the Santa Monica Mountains was unsuitable for agricultural use was supported by substantial evidence.

## Due Process Claim

The Court of Appeal next addressed plaintiffs’ claim that the public hearing was unfair and denied them due process because the Coastal Commission gave them less than 24-hours’ notice of a “new” land use plan (in an addendum to a staff report) that would completely ban vineyards. The Court of Appeal first found that the addendum, which was issued the day before the public hearing, complied with the pertinent regulations, as did the earlier staff report. The Court further observed that nothing about the proposed modifications included in the addendum (which themselves were made in response to public comment) altered the land use plan’s original objective, that is, to restrict agricultural uses. The modification merely eased the categorical restriction on new agriculture. While plaintiffs claimed they had no time to refute the prohibition of new vineyards, that item never changed from the original staff report. Moreover, the Court observed, plaintiffs in fact responded

to the supposedly “new” ban, both in writing and at the hearing.

## Substantial Evidence Claim

Finally, the Court of Appeal addressed plaintiffs’ claim that the decision to specifically prohibit new vineyards was not supported by substantial evidence. The court disagreed, finding that there was evidence that vineyards cause particular environmental harm, including testimony from the Coastal Commission’s staff ecologist. By contrast, the court found, evidence cited by plaintiffs only spoke to the suitability of lands for vineyards and did nothing to counter the evidence of environmental harm caused by vineyards. In fact, the Court of Appeal found, there was nothing in the record that countered the evidence that vineyards are harmful to the ecosystem and coastal resources.

## Conclusion and Implications

The case is significant because it involves a substantive discussion of local coastal programs and related Chapter 3 policies under the Coastal Act. The decision is available online at: <https://www.courts.ca.gov/opinions/documents/B287079.PDF> (James Purvis)



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