ENVIRONMENTAL LIABILITY, ENFORCEMENT & PENALTIES REPORTER™

Volume 30, Number 7
June 2020

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

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

RECENT FEDERAL DECISIONS

RECENT STATE DECISIONS

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222, schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135; Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

FEATURE ARTICLE

U.S. SUPREME COURT ISSUES *COUNTY OF MAUI* DECISION—FINDS 'FUNCTIONALLY EQUIVALENT' TEST GUIDES THE INQUIRY WHETHER AN NPDES PERMIT IS REQUIRED FOR GROUNDWATER POINT SOURCES THAT LINK TO WATERS OF THE U.S.

By Travis Brooks, Esq.

On April 23, in *County of Maui v. Hawaii Wildlife Fund,* the U.S. Supreme Court provided an answer to a question that long divided lower courts interpreting the federal Clean Water Act (CWA). There has never been any doubt that the CWA requires National Pollutant Discharge Elimination System permits (NPDES) for discharges of pollutants from point sources into waters of the United States (WOTUS). There has also never been any doubt that the CWA does *not* require a NPDES for discharges of pollutants from point sources into groundwater—states are primarily responsible to regulate such discharges. However, until recently, it was unclear if NPDES permits are required for discharges of pollutants from point sources that enter into groundwater and then migrate into WOTUS.

Background

In a 6-3 decision, the Supreme Court answered this question with a reasonable, but possibly difficult to apply "sometimes." The decision, authored by Justice Breyer can be distilled into what seems like a straightforward rule:

> . . .we conclude that the [CWA provisions requiring a NPDES permit] require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from a point source into navigable waters.

However, determining just what the "functional equivalent of a direct discharge" is under the Court's decision will likely vex courts, practitioners, and the regulated community for some time. To determine what discharges are "functionally equivalent" to a direct discharge into WOTUS, the Court created a murky test that depends on the application of at least seven, and maybe more, factors with little clear direction provided as to how to apply those factors. Ultimately it will be up to courts and perhaps the U.S. Environmental Protection Agency (EPA) to further hone and implement the Court's decision.

The Clean Water Act

In 1972, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The CWA had ambitious goals to eliminate the discharge of pollutants into navigable waters by 1985, and to ensure water quality in national waters so that all were "fishable" and "swimmable" by 1983. Although these goals were not met, federal and state efforts to improve nationwide water quality under the CWA continue. The CWA defines "navigable waters" as WOTUS, which can otherwise be understood as all "jurisdictional waters" over which the federal government has power to regulate under the CWA. Just what constitutes WOTUS subject to CWA regulation has itself been subject to much dispute, with the EPA promulgating multiple definitions of regulated waters in the last decade alone.

The CWA embodies the idea of a federal-state partnership where the federal government sets the agenda and standards for water pollution abatement,

while states are primarily responsible to carry out day-to-day implementation and enforcement activities. Moreover, while the CWA gives the federal government power to regulate discharges into WOTUS, states have generally been left to regulate and control discharges of pollution into groundwater.

In its relevant part, the CWA prohibits: "any addition of any pollutant to navigable waters from any point source" without a permit. The CWA defines the term "pollutant" broadly, as including a wide range of deposited materials including sewage, dredged materials, solid waste, chemical equipment, rock, dirt, sand, and so on. Point sources are defined as "any discernible, confined and discrete conveyance… from which pollutants are or may be discharged." As an example, these include "any container, pipe, ditch, channel, tunnel, conduit, or well." "Discharge of pollutant" is defined as "any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean or coastal waters] from any point source."

In the years preceding the *County of Maui* decision, lower federal courts were divided on one crucial point—how pollution discharges from a point source into groundwater that eventually reach WOTUS should be regulated. Leading up to the decision, courts had adopted three different methods of interpreting when discharges from point sources into groundwater discharge into navigable waters thus requiring a NPDES permit: 1) pollutants are added to navigable waters, thus requiring a NPDES permit only if they are discharged directly from a point source into jurisdictional waters, (*i.e.*, never when added into groundwater first), 2) pollutants are regulated where there is a direct hydrological connection between groundwater pollution and jurisdictional waters (*i.e.*, sometimes when added into groundwater first), and 3) pollutants into groundwater are regulated whenever a discharge of pollution into jurisdictional waters can be traced to what came out of a point source (*i.e.*, often when added into groundwater first). This split of authorities teed up the issue for the Court in *County of Maui*.

Factual and Procedural History of *County of Maui*

In the 1970s, the County of Maui (County) constructed the Lahaina Wastewater Reclamation Facility. The facility collects sewage from the surrounding area, partially treats it, and then pumps the treated water into four wells 200 or more feet below ground level. Very much of this partially treated water, or approximately 4 million gallons a day, enters a groundwater aquifer and then makes its way, over approximately half a mile or so, to the ocean.

In 2012, a number of environmental groups brought a citizen CWA lawsuit alleging that the County was discharging a pollutant into navigable waters (*i.e.* the Pacific Ocean) without having first obtained a NPDES permit. The U.S. District Court for Hawaii reviewed a detailed study of discharges from the sewer facility and found that a considerable amount of tainted water, pumped into the facility's wells, ended up into the ocean. Ultimately the District Court sided with the environmental groups, holding that because "the path [from the facility] to the ocean is clearly ascertainable…," the discharge into the wells was "functionally one into a navigable water." The District Court then granted summary judgment in favor of the environmental groups.

The County appealed the decision to the Ninth Circuit Court of Appeals, which affirmed the District Court, but articulated a *slightly different* standard for determining when a NPDES permit is required for discharges into groundwater. Under this standard, a NPDES permit is required when "pollutants are *fairly* traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into navigable water." The Ninth Circuit did not undergo any type of analysis of determining when, if ever, the connection of a point source and a navigable water is too tenuous or remote to give rise to liability, thus creating a very broad extension of the CWA's applicability.

The County petitioned for *certiorari* and the U.S. Supreme Court granted the petition.

The U.S. Supreme Court's Decision

The majority's 6-3 decision authored by Justice Breyer began by noting that the key question presented in the case concerned the statutory word "from." Breyer noted that at bottom, the parties disagreed "dramatically about the scope of the word 'from'" in the context of the CWA.

On one hand, the County argued that in order for a pollutant to be placed in national waters "from a point source," a point source must place pollutants directly into WOTUS without passing through intermediate conveyance such as groundwater or isolated

surface water. On the other hand, the environmental groups argued that the permitting requirement applies as long as a pollutant is "fairly traceable" to a point source, even if it traveled for a significant amount of time over a significant distance through groundwater to reach WOTUS.

The Majority Rejects the County and U.S. Solicitor General's Highly Restrictive Interpretation of the Clean Water Act

The County and the U.S. Solicitor General for the United States argued for a clear, "bright-line" test for point source pollution. Essentially in order to be liable, a point source must be "the means of delivering pollutants to a navigable water." Therefore, if "at least one nonpoint source (*e.g.*, unconfined rainwater runoff or groundwater" exists between the point source and the jurisdictional water, then the permit requirement does not apply. Put another way, a pollutant is "from" a point source, only if a point source is the last conveyance that conducted the pollutant to jurisdictional waters.

It is interesting to note that before supporting the County's arguments, the federal administration originally supported parts of the environmental group's arguments at the District Court level. Thus before the case reached the Supreme Court, the EPA maintained that the CWA's permitting requirement applies whenever discharges migrate into Waters of the United States with a "direct hydrological connection" to surface water. However, after seeking public comments in 2018 on whether it should change its interpretation, the EPA essentially "did a 180," issuing an interpretive statement in April of 2019 that "the best, if not the only" interpretation of the CWA was to exclude all releases of pollutants into groundwater from the NPDES requirement.

The majority took issue with this interpretation, and found that it would create a giant loophole in the CWA's regulations on point source pollution. To accept the County and the Solicitor General's interpretation of the CWA, a NPDES permit would not be required if there was any amount of groundwater between the end of a polluting pipe and jurisdictional waters. As the majority noted:

> . . .[i]f that is the correct interpretation of the [CWA], then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea?

What about *Chevron* Deference?

Neither the EPA nor the Solicitor general asked the court to apply *Chevron* deference to the EPA's interpretation of the EPA. In any event, the Court noted that though it will typically pay "particular attention to an agency's views" when interpreting a statute that the agency enforces, the Court simply would not follow the EPA's proposed interpretation which would create a loophole that would effectively eviscerate the basic purposes of the CWA. In other words: "to follow EPA's reading would open up a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable."

Did Congress Intend to Exclude Discharges into Groundwater?

The Court looked to the structure of the CWA as a further basis to reject the County and Solicitor General's interpretation. Just because the CWA does not subject all pollution into groundwater to its permitting requirement, this *does not* indicate a clear congressional intent to exclude all discharges into groundwater from the CWA's permit requirement. If Congress intended to exclude all discharges into groundwater from the NPDES permitting requirement, it could have easily excluded point source pollution into groundwater as an one of the enumerated exemptions to permitting requirements, it did not do so. Moreover, the CWA expressly includes "wells" in its definition of "point source." As the court noted, in instances where wells were regulated point sources, such wells "most ordinarily would discharge pollutants through groundwater."

The Majority Rejects the Very Broad Reading of the CWA Argued by the Environmental Groups

Regarding the broad interpretation of the CWA pushed by the environmental groups, the Court noted that with modern science the CWA could have unreasonably wide reach. Under this interpretation, the EPA could likely assert permitting authority over the release of pollutants "many years after the release

of pollutants that reach navigable waters many years after their release….and in highly diluted forms." In the Court's view, Congress did not intend to require point source permitting if subject pollution was merely traceable to a point source. This could create circumstances where a permit was required in:

> . . .bizarre circumstances, such as for pollutants carried to navigable waters on a bird's feathers or,. . . .the 100-year migration of pollutants through 250 miles of groundwater to a river.

The environmental groups sought to address concerns that their standards extended the CWA permit requirement too broadly by proposing a "proximate cause" basis for determining when a permit is required. Under this test a polluter would be required to secure a permit that polluter's discharge from a point source proximately caused a resulting discharge into jurisdictional waters. The Court rejected the environmental groups' proposed proximate cause test noting that proximate cause derives from general tort law and is based primarily on its own policy considerations that would not significantly narrow the environmental groups broad reading of the CWA .

Perhaps most important, the Court noted that the environmental groups' broad reading of the CWA would essentially override Congress' clear intention to leave substantial authority and responsibility to the states to regulate groundwater and nonpoint source pollution. States, with federal encouragement, have already developed methods of regulating nonpoint source and groundwater pollution through water quality standards and otherwise. The environmental groups' interpretation of the CWA also conflicted with the legislative history related to CWA's adoption, which clearly indicated that Congress rejected an extension of the EPA's authority to regulate all discharges into groundwater.

The Court Adopts a Reasonable, Albeit Murky, Middle Ground Interpretation of the CWA

Finding problems with both of the above interpretations, the Court's majority landed at a third option that amounts to a reasonable, albeit murky middle ground. Justice Breyer fairly thoroughly examined the meaning of the word "from" within the context of the CWA with reference to everyday use of the word in how we refer to immigrants and travelers from Europe and even how meat drippings from a pan or cutting board into gravy. Ultimately, the standard the Court adopted was "significantly broader" than the "total exclusion of all discharges through groundwater" pushed by the County and the Solicitor General, but also meaningfully more narrow than that pushed by the environmental groups.

As noted above, the Court described its rule as follows:

> . . .[w]e hold that the [CWA] requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.

This means that the addition of a pollutant falls within the CWA's regulation:

> When a point source directly deposits pollutants into navigable waters or when the discharge reaches the same result through roughly similar means.

The majority opinion makes clear that "time and distance" will typically be the most important factors when determining whether a discharge into groundwater or another receptor is the "functional equivalent" of a discharge into jurisdictional waters.

Justice Breyer noted that there were some difficulties in applying its rule because it does not provide a clear direction to courts and agencies as to how to deal with "middle instances" where the facts do not clearly indicate a discharge is or is not "functionally equivalent" to a direct discharge. However Justice Breyer noted that "there are too many potentially relevant factors applicable to factually different case for the Court now to use more specific language."

The majority then provided a non-exclusive list of seven factors that may be relevant depending on the circumstances of a particular case:

- Transit time of the pollutant;
- Distance traveled;
- The nature of the material through which the pollutant travels;

- The extent to which the pollutant is diluted or chemically changed as it travels;

- The amount of pollutant entering the navigable waters relative to the amount of pollutant that leaves the point source;

- The manner by or area in which the pollutant enters the navigable waters, and;

- The degree to which the pollution has maintained a specific identity.

Importantly, the Supreme Court's opinion did *not* provide much guidance as to how to balance and apply the above factors except that "[t]ime and distance will be the most important factors in most cases, but not necessarily every case."

Ultimately, the majority opinion reflects a concern that a rule categorically excluding application of the CWA in instances where point sources pollute groundwater, would result in potentially widespread evasion of CWA permitting requirements. If the Court were to adopt the County's interpretation of the CWA, what would stop polluters from simply adjusting their point source pipes so that they drained onto the beach or other area so that it enters groundwater instead of directly into WOTUS, thus averting federal regulation? On the other hand, accepting the environmental group's broad interpretation of the CWA would expand the NPDES permitting program to many, if not most instances where point source pollution enters groundwater. This would clearly upset the framework of federal *and* state regulation of water pollution depending on where it is deposited.

Ultimately, the opinion reflects a practical view of the CWA and its incorporation of the word "from" with reference to point sources and jurisdictional waters. Here, although most sewage treatment facilities in the country that discharge effluent into jurisdictional waters require a NPDES permit up to CWA standards, the County was effectively adding 4 million gallons a day of pollutants into the Pacific Ocean without a NPDES permit. In the Court's view, those additions of such pollutants into waters of the United States that look and feel like the addition of pollutants into waters of the United States, even if they must pass through some groundwater over a short distance and time to get there, must require an NPDES permit. The wells below the Lahaina Wastewater Reclamation Facility were one of those instances.

Justice Thomas' Dissent

Justice Thomas penned a dissent to the opinion to which Justice Gorsuch joined. Justice Alito filed his own dissent. Both dissenting opinions included their own esoteric arguments about the meaning of the word "from," but ultimately came down to the justices' restrictive reading of federal regulatory authority under the CWA and an emphasis on the CWA's intent to leave regulation of groundwater pollution to the states.

The Thomas and Gorsuch dissent focused on the CWA's use of the word "addition" to reference the regulated pollutants "from" a point source into navigable waters. After reviewing various definitions of the word "addition" which Thomas noted means to "augment" or "increase" or to "join or unite," Thomas concluded that "[t]he inclusion of the term 'addition' to the CEWA indicates that the statute excludes anything other than a direct discharge."

In other words, the only point source pollution that requires an NPDES permit is that pollution that discharges *directly* from the point source to Waters of the United States. Justice Thomas also highlighted the uncertainty that the Court's functional equivalent test would create, with seven non-exhaustive factors, and no clear rule when or how to apply them. Moreover, Thomas was persuaded by CWA's underlying state and federal delegation of authority.

Justice Alito's Dissent

Justice Alito posited a similar position to Justice Thomas, stating that the CWA only required NPDES permits for direct additions of pollutants into federal waters. However, Alito pointed out that given the CWA's broad definition of a "point source" which includes ditches and channels, and any "discernable, confined and discrete conveyance… from which pollution may be discharged," a shortened pipe that added pollution to a beach, would then likely enter into some discrete channel on the beach that would meet the definition of a "point source" subject to regulation under the CWA. This reading of the CWA in Justice Alito's opinion was more manageable and ready for uniform application throughout the country than the one promulgated by the Court. Justice Alito

also referenced the CWA's delegation of state and federal authority to regulate different types of pollution. He also took issue what he thought was an overly complicated and less workable standard enunciated by the majority.

Conclusion and Implications

What do we make of all this? If courts, practitioners, or the regulated community were looking for a clear answer as to which discharges from point sources that migrate through groundwater into WOTUS require an NPDES permit, the *County of Maui* decision likely left them disappointed. There is no question the fact-dependent and purpose driven test enunciated by the Court will result in some uncertainty as the decision is refined and clarified by lower courts. However, as the Supreme Court noted, the "functionally equivalent" test is not altogether different than the standard the EPA has tried to apply for more than 30 years by seeking to require NPDES permits for "some (but not all) discharges through groundwater." Ultimately, the Court's decision may have been the most appropriate "middle-ground" interpretation of CWA language that is fundamentally ambiguous and difficult to apply in the real world.

Time will tell whether or not the EPA tries to add some clarity to the Supreme Court's standard by adopting a rule defining "functional equivalency." In this regard, the results of the 2020 presidential election may have a meaningful impact on the way the "functionally equivalent" test is formulated and applied.

In any event, the regulated community should consider the implications of this decision. If entities own facilities that deposit pollutants into groundwater or other areas that may ultimately reach Waters of the U.S., such entities should consider whether it makes sense to pre-emptively seek an National Pollutant Discharge Elimination System permit and thus avoid liability concerns going forward.

Travis Brooks is an associate at Miller Starr Regalia, Walnut Creek, California. Travis represents private and public entity clients in a wide range of land use and environmental matters throughout the State of California. Travis sits on the Editorial Board of the *California Land Use Law & Policy Reporter*.

ENVIRONMENTAL NEWS

GOVERNOR NEWSOM ISSUES EXECUTIVE ORDER THAT SUSPENDS CERTAIN NOTICING DEADLINES UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Recently, California Governor Gavin Newsom issued an Executive Order suspending various timeline aspects of the California Environmental Quality Act (CEQA). This will be relevant to all CEQA practitioners in the areas of land use and water law.

Background

The COVID-19 global pandemic has resulted in extensive federal, state and local legislation touching various topics, from government relief to eviction moratoriums. In California, these mandates have also impacted some of the rules that would typically apply to matters governed by the California Environmental Quality Act. On April 22, 2020, Governor Gavin Newsom issued Executive Order N-54-20, which includes provisions that *suspend* the filing, posting, notice, and public access requirements related to certain notices under CEQA for a period of 60 days. This suspension does not apply to provisions governing the time for public review.

CEQA Provisions Suspended

The specific CEQA provisions that are subject to Executive Order N-54-20's 60-day suspension are below.

- Public Resources Code § 21092.3—requiring that notices relating to the preparation and availability of an Environmental Impact Report (EIR) to be posted by the county clerk for 30 days, and requiring a notice of intent to adopt a negative declaration to be posted for 20 days.

- Public Resources Code § 21152—governing local agency requirements for filing notices of determination and notices of exemption.

- CEQA Guidelines § 15062, subds. (c)(2) and (c)(4)—governing a public agency's filing of a notice of exemption for projects that are exempt from CEQA.

- CEQA Guidelines § 15072, subd. (d)—requiring notice of intent to adopt a negative declaration or mitigated negative declaration to be posted at the office of the county clerk for at least 20 days.

- CEQA Guidelines § 15075, subds. (a),(d), and (e)—requiring the lead agency to file a notice of determination within five days of deciding to approve a project for which there has been a negative declaration or mitigated negative declaration prepared. This section also requires the notice of determination to be posted by the county clerk for at least 30 days.

- CEQA Guidelines § 15087, subd. (d)—requiring that a notice of availability of a draft environmental impact report for public review be posted at the office of the county clerk for at least 30 days.

- CEQA Guidelines § 15094, subds. (a), (d), and (e)—requiring the lead agency to file a notice of determination within five days of deciding to approve a project for which an environmental impact report was approved. This section also requires the notice of determination to be posted by the county clerk for at least 30 days.

Use of Electronic Means

Section 8 of Executive Order N-54-20 will also allow certain notice requirements under CEQA to be satisfied through electronic means in order to allow public access and involvement consistent with COVID-19 public health concerns. The order's electronic noticing provisions are as follows:

> In the event that any lead agency, responsible agency, or project applicant is operating under

any of these suspensions, and the lead agency, responsible agency, or project applicant would otherwise have been required to publicly post or file materials concerning the project with any county clerk, or otherwise make such materials available to the public, the lead agency, responsible agency, or project applicant (as applicable) shall do all of the following:

a) Post such materials on the relevant agency's or applicant's public-facing website for the same period of time that physical posting would otherwise be required;

b) Submit all materials electronically to the State Clearinghouse CEQAnet Web Portal; and

c) Engage in outreach to any individuals and entities known by the lead agency, responsible agency, or project applicant to be parties interested in the project in the manner contemplated by the Public Resources Code § 21100 *et seq*. and California Code of Regulations, Title 14, § 15000 *et seq*.

Tribal Consultations

Executive Order N-54-20 also has a provision regarding CEQA's tribal consultation process. Under the § 9 of the order, the timeframes set forth in Public Resources Code §s 21080.3.1 and 21082.3, within which a California Native American tribe must request consultation and the lead agency must begin the consultation process relating to an Environmental Impact Report, Negative Declaration, or Mitigated Negative Declaration under CEQA, are suspended for 60 days.

Conclusion and Implications

In addition, Executive Order N-54-20 encourages lead agencies, responsible agencies, and project applicants to pursue additional methods of public notice and outreach as appropriate for particular projects and communities.

Governor Newsom's Executive Order of April 22, 2020 predominantly suspends certain important deadlines. This 60-day suspension periods imposed by Executive Order N-54-20 are set to expire on June 22, 2020. It will be important for CEQA practitioners to review all the temporary changes made as deadlines and notice requirements play a crucial role in compliance. Executive Order N-54-20 may be accessed online at the following link: https://www.gov.ca.gov/wp-content/uploads/2020/04/N-54-20-COVID-19-4.22.20.pdf
(Nedda Mahrou)

REGULATORY DEVELOPMENTS

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY PROPOSES TO APPROVE WATER QUALITY CERTIFICATION FOR THE STATE UNIVERSITY'S PACWAVE SOUTH WAVE ENERGY FACILITY

On April 28, 2020, the Oregon Department of Environmental Quality (DEQ) issued for public comment a proposed federal Clean Water Act (CWA) § 401 Water Quality Certification for Oregon State University's PacWave South wave energy test site. DEQ accepted public comments through June 3, 2020.

PacWave South Hydrokinetic Project

The PacWave South project is designed to provide a facility for offshore wave energy developers to test their designs without the significant expense and time commitment associated with individualized permitting processes. The project is funded by a $35 million grant from the U.S. Department of Energy and a $3.8 million grant from the state of Oregon.

The facility will be located in 213-256 feet of water and will feature 20 wave energy converters in four berths, allowing for the testing of four different wave energy technologies simultaneously. The facility will have a total maximum output of 20 MW. Testing of most types of wave energy converters will be permitted at PacWave South, including point adsorbers, attenuators, oscillating water columns, and hybrid devices.

The testing array will be located about seven miles offshore, near Newport, Oregon. PacWave South will be located a few miles from PacWave North, a test site OSU established in 2012. PacWave North is located in state waters and operates with a streamlined permitting process, but unlike PacWave South, it is not connected to the electrical grid. PacWave South will feature five undersea cables connected to a landfall site at the Driftwood Beach State Recreation Site near Seal Rock. PacWave South will interconnect with the Central Lincoln People's Utility District distribution system.

The Permitting Process

On May 31, 2019, OSU applied for a 25-year license from the Federal Energy Regulatory Commission (FERC) to construct and operate PacWave South. On September 9, 2019, OSU applied to the U.S. Army Corps of Engineers (Corps) for a CWA § 404 removal-fill permit to discharge material to waters of the state during construction. That application also constituted an application to DEQ for § 401 Water Quality Certification relating to the § 404 permit. However, the FERC license application triggered review under § 401 as well. Due to the longer duration of the FERC license, DEQ determined that additional conditions were necessary to ensure compliance with water quality standards for the duration of the FERC license.

Water Quality Certification

The CWA directs states to adopt water quality standards for waters within the state. Water quality standards consist of a designated use or uses for the water body, numeric and narrative water quality criteria for the waterbody, and an antidegradation policy. These standards are enforced through § 401 of the CWA, which applies when an applicant seeks a federal permit for an activity that may result in any discharge into navigable waters. The state must certify that the applicant has provided "reasonable assurance" that water quality standards will be met.

DEQ's Proposed Certification with Conditions

Under Oregon's Territorial Sea Plan, Oregon's regulatory responsibility for administering state law extends to Oregon's Territorial Sea, which includes the waters and seabed extending three geographical miles seaward from the coastline. Because the test site will be about six miles offshore, the only project action proposed within Oregon's Territorial Sea is the installation of the five subsea cables, which will be installed one to two meters below the seafloor. At landfall, the cables will enter conduits installed by horizontal directional drilling.

DEQ found that PacWave South provided reasonable assurance that the project will meet water quality standards. DEQ proposes to issue PacWave South's certification with routine conditions, such as a requirement to obtain from DEQ a National Pollutant Discharge Elimination System 1200-C construction stormwater permit for any disturbances of more than one acre. PacWave South will also be required to follow best management practices to ensure protection of water quality.

Conclusion and Implications

If the remainder of the permitting process for PacWave South proceeds smoothly, construction could begin as early as late summer 2020 with undersea cable installation in 2022. The project could be a big step forward in assessing the commercial viability of new wave energy technologies, but its success will depend on wave-energy developers contracting with OSU to use the facility.
(Alexa Shasteen)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period. Due to COVID-19, there were significantly less items to report on this month.

Civil Enforcement Actions and Settlements—Air Quality

•April 23, 2020 - The U.S. Environmental Protection Agency (EPA) announced that TAPI Puerto Rico, Inc. (TAPI) has agreed to pay a penalty of $539,784 for alleged Clean Air Act and other environmental violations at its pharmaceutical manufacturing plant in Guayama, Puerto Rico. On April 13, 2020, the Department of Justice filed in federal district court in Puerto Rico a complaint against and a Stipulation and Settlement Agreement with TAPI to settle alleged violations of the Clean Air Act, the Resource Conservation and Recovery Act (RCRA), the Clean Water Act, and the Emergency Planning and Community Right-to-Know Act. The EPA identified several areas of the facility's operations that were in violation of environmental regulations. A few of the numerous alleged violations include the following. Since TAPI had the potential to emit over 10 tons/year of acetonitrile, a hazardous air pollutant, TAPI was subject to the Clean Air Act's Pharmaceutical Maximum Achievable Control Technology Standards (MACT) and it should have amended its Title V permit application to include the Pharmaceutical MACT requirements. TAPI failed to comply with the hazardous waste regulatory requirements that would have allowed it to store hazardous waste for under 90 days without a permit, and therefore did not qualify for the permit exemption; TAPI stored and/or treated hazardous waste in a surface impoundment without a permit; TAPI failed to maintain and operate the Facility in a manner that would minimize the possibility of fire, explosion or any unplanned sudden or non-sudden release of hazardous waste that could threaten human health or the environment as required by its RCRA permit. The company also failed to timely submit to EPA annual toxic chemical release inventory reporting for its use of naphthalene in its operations as required by the Emergency Planning and Community Right-to-Know Act. The company also failed to submit timely reports to EPA's annual Toxics Release Inventory, as required by the Emergency Planning and Community Right-to-Know Act, for its use of naphthalene in its operations. TAPI violated its Puerto Rico wastewater pretreatment permit by failing to operate and maintain its pretreatment systems to ensure permit compliance. This included, among other violations, wastewater leaking from a corroded tank, large cracks in three tanks and an overflow of an equalization tank. TAPI's parent company, Teva Pharmaceuticals Industries Ltd, is a multinational pharmaceutical company and one of the largest generic drug manufacturers in the world. EPA will continue to monitor developments associated with the parties. However, the violations are no longer occurring as the facility ceased operating.

•April 29, 2020 - EPA announced a settlement with American Zinc Recyling for alleged violations of the Clean Air Act from its zinc metal refining facility in Chicago. American Zinc Recycling, at 2701 E 114th St. in Chicago, recycles metal-bearing wastes from steel production to reclaim zinc and other metals. EPA observed particulate emissions and fugitive dust from American Zinc Recycling's operations during inspections of the facility in alleged violation of particulate matter limits in the Illinois' State Implementation Plan, the Clean Air Act and American Zinc Recycling's Title V permit issued by the State of Illinois. The facility is located on the Calumet River in the Southeast Side of Chicago, where the federal, state, and local government have worked with community groups to reduce pollution from other facilities. Under the terms of the settlement, American Zinc Recycling will invest approximately $8 million to bring the facility back into compliance with its

emissions limits, with improved capture and collection systems for particulate matter and dust. The company will also pay a $530,000 penalty. Particulate matter is defined as a mixture of solid particles and liquid droplets found in the air. Breathing air with high levels of particulate matter has been linked to heart and respiratory problems. Reducing particulate matter means cleaner, healthier air for all Chicagoans. The settlement terms are included in a proposed consent decree that U.S. Department of Justice filed.

•April 30, 2020 - EPA has identified numerous companies and individuals who have manufactured and sold both hardware and software specifically designed to defeat required emissions controls on vehicles and engines used on public roads as well as on nonroad vehicles and engines. Cars and trucks manufactured today emit far less pollution than older vehicles. This occurs through careful engine calibrations and emissions controls in exhaust systems such as catalytic converters and diesel oxidation catalysts. Aftermarket defeat devices bypass these controls and cause higher emissions. EPA testing has shown that these devices can increase vehicle emissions substantially. Illegally modified vehicles and engines contribute substantial excess pollution that harms public health and impedes efforts by EPA, tribes, states, and local agencies to plan for and attain air quality standards. In an on-going effort to address this air quality problem, EPA has resolved more than 50 cases addressing these types of violations since 2015. The announcement highlights three such cases that have been resolved administratively:

Freedom Performance, LLC was a major web-based distributor of diesel defeat device products. On February 24, 2020, EPA's Chief Administrative Law Judge (ALJ) issued a default judgment against Freedom Performance, LLC, ordering a $7.058 million penalty for 13,928 violations of the aftermarket defeat device prohibition of the Clean Air Act (CAA).

Spartan Diesel was ordered to pay a $4.1 million penalty for 5,000 violations of the aftermarket defeat device prohibition of the CAA on October 30, 2018, by the ALJ.

KT Performance is a Florida-based company that sold and installed approximately 2,833 delete products for diesel-powered trucks between January 2013 and April 2018. EPA filed an administrative complaint against KT Performance for violations of the aftermarket defeat device and tampering prohibitions of the CAA on April 30, 2018. The parties resolved the matter on July 3, 2018. The company was assessed a civil penalty of $52,284 that was calculated based on a demonstrated inability to pay a higher amount.

•May 14, 2020—EPA announced that DTE Energy will reduce pollution at five coal-fired power plants in southeast Michigan in a settlement. The settlement also requires DTE Energy to pay a $1.8 million civil penalty and to undertake a $5.5 million mitigation project to improve air quality in the region by replacing old buses in the area with newer, cleaner ones. The settlement resolves a lawsuit filed by the United States against DTE Energy in 2010, alleging that the company violated the New Source Review requirements of the Clean Air Act. Under the settlement with EPA, DTE Energy will install pollution controls or convert to natural gas all coal-fired units at its Belle River, River Rouge, St. Clair and Trenton Channel generating stations. DTE must also meet enforceable emission limits for sulfur dioxide and nitrogen oxide at its Monroe Generation Station. Upon completion of all requirements under this settlement, sulfur dioxide and nitrogen oxide emissions at all of DTE's facilities in Southeast Michigan will be reduced by an estimated 138,000 total tons per year when compared to the year 2010. The settlement also requires DTE to develop and implement a mitigation project to replace school buses or municipal transit buses in Southeast Michigan with new, more energy-efficient buses to reduce the public exposure to harmful particulate matter and nitrogen oxide. This settlement will help protect human health and the environment while also ensuring that Detroit-area residents continue to have access to affordable electricity. Sulfur dioxide and nitrogen oxides, two key pollutants emitted from coal-fired power plants, can harm human health and are significant contributors to acid rain, smog, and haze. These pollutants are converted in the air into fine particles that can cause severe respiratory and cardiovascular impacts and premature death. Reducing these harmful air pollutants will benefit communities in southeast Michigan and beyond.

•May 14, 2020—EPA has reached settlements with two agricultural storage and supply businesses to resolve alleged violations of federal Clean Air

Act regulations. EPA inspected both companies in response to accidental releases of anhydrous ammonia that resulted in injuries to their employees. EPA inspections determined that the companies failed to design their processes for handling anhydrous ammonia in compliance with good engineering practices, and failed to meet other requirements intended to ensure adequate measures are in place to prevent and respond to an accidental release from the facilities. Anhydrous ammonia presents a significant health hazard because it is corrosive to the skin, eyes and lungs. Exposure may result in injury or death. Midland Marketing Co-op Inc. owns one facility in Palco, Kansas; and Troy Elevator Inc. owns two facilities in Bloomfield and Blakesburg, Iowa. Each of the three facilities contain over 10,000 pounds of anhydrous ammonia, making them subject to Risk Management Program regulations intended to protect communities from accidental releases of certain toxic or flammable substances. In response to the EPA inspection findings, both companies took the necessary steps to bring all three facilities into compliance. As part of its settlement, Midland Marketing Co-op agreed to pay a civil penalty of $19,999. The company also agreed to purchase emergency response and preparedness equipment for three local fire departments at an estimated cost of $25,569. Troy Elevator agreed to pay a civil penalty of $37,063 to resolve the alleged violations. EPA has found that many regulated facilities are not adequately managing the risks they pose or ensuring the safety of their facilities in a way that is sufficient to protect surrounding communities. Approximately 150 catastrophic accidents occur each year at regulated facilities. These accidents result in fatalities, injuries, significant property damage, evacuations, sheltering in place, or environmental damage. Many more accidents with lesser effects also occur, demonstrating a clear risk posed by these facilities.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

• April 24, 2020—The EPA issued a Stop Sale, Use or Removal Order (SSURO) to Seal Shield, LLC (Seal Shield) in Orlando, Florida, requiring the company to immediately halt the sale/distribution of unregistered pesticides and a misbranded pesticide device. The SSURO is being issued to Seal Shield because it is selling products to hospitals and other healthcare providers using public health claims for protection against viruses and reduction of microbial growth leading to hospital acquired infections. In order for Seal Shield to make these claims, the products would need to be registered under Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). These products include, but are not limited to, computer external equipment, mobile devices and TV accessories. The SSURO further requires Seal Shield to stop the sale and distribution of the pesticide device ElectroClave UV Disinfection/Device Manager, because Seal Shield has made false or misleading claims that the device kills pathogens and is effective against the novel coronavirus, SARS-CoV-2, the cause of COVID-19. Under FIFRA, products that claim to kill or repel bacteria or viruses on surfaces are considered pesticides and must be registered by EPA prior to distribution or sale. Public health claims can only be made for products that have been properly tested and are registered with EPA. The agency will not register a pesticide until it has been determined that it will not pose an unreasonable risk when used according to the label directions. Products not registered by EPA may be harmful to human health, cause adverse health effects, and may not be effective against the spread of viruses or other pathogens. While pesticide devices are not required to be registered, any efficacy claims made about devices must be supported by reliable scientific studies.

• April 27, 2020 - EPA announced a settlement with ProBuild Company LLC, for failing to comply with federal lead-based paint requirements. The firm, based in Dallas, Texas, will pay a $48,060 penalty for residential remodeling work in San Diego, California. The subcontractors hired to perform the work failed to comply with the Renovation, Repair and Painting (RRP) Rule, which requires them to take steps to protect the public from exposure to lead. The violations pertained to work performed by ProBuild Company LLC and its subcontractors at multiple homes in the San Diego area. An EPA inspection found that ProBuild did not ensure the subcontractors it hired were EPA-certified to perform such work in pre-1978 housing where lead-based paint is assumed to be present. The company also failed to keep records indicating compliance with lead-safe work practices, failed to actually comply with some of those work practices,

failed to provide owners with the required "Renovate Right" pamphlet, and failed to ensure that a certified renovator was involved in the lead-based paint renovations. These enforcement actions reinforce EPA's commitment to address childhood lead exposure. Though harmful at any age, lead exposure is most dangerous to children below the age of six. Lead exposure can cause behavioral and learning problems, slowed growth, hearing problems and diminished IQ. Although the federal government banned consumer use of lead-containing paint in 1978, it is still present in millions of older homes, sometimes under layers of new paint. The Renovation, Repair and Painting Rule was created to protect the public from lead-based paint hazards that occur during repair or remodeling activities in homes and child-occupied facilities, such as schools, that were built before 1978. The rule requires that individuals performing renovations be properly trained and certified and follow lead-safe work practices.
(Andre Monette)

LAWSUITS FILED OR PENDING

CALIFORNIA OBTAINS TEMPORARY HALT, UNDER THE ENDANGERED SPECIES ACT, TO CURRENT CENTRAL VALLEY PROJECT OPERATIONS TO PROTECT STEELHEAD

On April 21, the State of California filed a preliminary injunction in the U.S. District Court for the Eastern District of California requesting that the District Court enjoin the U.S. Bureau of Reclamation's current operation of the federal Central Valley Project (CVP). The court granted the preliminary injunction in part on May 12 to protect steelhead populations through May 31, 2020. Current CVP operations were evaluated by recently adopted Biological Opinions that determined the Bureau's proposed CVP operations would not jeopardize the existence of legally protected species. California legally challenged those Biological Opinions as violating state and federal law. Therefore, California requested in its preliminary injunction that the CVP be operated pursuant to Biological Opinions adopted in 2009 until the merits of its underlying challenge to the recently adopted Biological Opinions was resolved. The 2009 Biological Opinions concluded that CVP operations, as then proposed, would jeopardize the existence of protected species, and provided reasonable and prudent alternatives for CVP operations that would not jeopardize protected species. [*California Natural Resources Agency v. Ross*, Case No. 1:20-cv-00426 (E.D. Cal.).]

Background

The federally operated Central Valley Project, which is operated by the U.S. Bureau of Reclamation (Bureau) in conjunction with the California State Water Project (SWP), is the nation's largest water conveyance network. The CVP and SWP move water from Northern California through the Sacramento-San Joaquin Delta (Delta) south through the Central Valley and into southern California.

The CVP is operated pursuant to federally adopted Biological Opinions which are issued by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). A Biological Opinion indicates whether a proposed federal action, such as the operation of the CVP, will likely jeopardize the continued existence of flora and fauna protected by the federal Endangered Species Act (ESA) or adversely modify designated critical habitat. The ESA establishes liability for the "taking" of listed species, unless a permit or authorization for incidentally taking species is obtained. If a Biological Opinion determines that a proposed action would jeopardize the existence of a protected species, the Biological Opinion is deemed to be a "jeopardy" opinion. If not, a Biological Opinion is deemed a "no jeopardy" opinion. For jeopardy opinions, the federal agency responsible for the project must comply with reasonable and prudent alternatives identified in a Biological Opinion to avoid liability under the ESA. Even for "no jeopardy" opinions, a federal agency may operate a project pursuant to a reasonable and prudent measures. Separate from the ESA, California has also enacted environmental protections for species of *flora* and *fauna* through the California Endangered Species Act (CESA).

In late 2019, FWS and NMFS each issued no jeopardy Biological Opinions for proposed CVP operations, determining that the long-term operation of the CVP was not likely to threaten the continued existence of endangered species listed under the ESA. In reaching these conclusions, FWS and NMFS considered funding, habitat restoration, and rearing measures for endangered species proposed as part of CVP operations. These Biological Opinions replaced those issued in 2009 for CVP and State Water Project operations, which were "jeopardy" opinions and imposed reasonable and prudent alternatives for operating the CVP. Additionally, while FWS and NFMS were preparing the new Biological Opinions, the Bureau adopted an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) for the long-term operation of the CVP, as identified in a Biological Assessment that the Bureau prepared under NEPA.

Concerned about the potential impacts CVP operations may have on endangered species, California

filed suit in February 2020, alleging that the Biological Opinions violated the federal ESA, CESA, and the federal Administrative Procedure Act (APA). California's lawsuit also included alleged violations of NEPA, namely, that the Bureau's EIS failed to take a "hard look" at the environmental consequences of its proposed action, as required by NEPA.

The District Court's Ruling

The purpose of a preliminary injunction is to preserve the relative position of the parties until the merits of a lawsuit can be resolved. California's preliminary injunction sought to halt CVP operations pursuant to the recently adopted Biological Opinions—which California legally challenged under state and federal law—and asked the court to order that the Bureau operate the CVP in accordance with the 2009 Biological Opinions until the court resolved the merits of California's claims. To obtain a preliminary injunction, California was required to show that it: 1) was likely to succeed on the merits; 2) would likely suffer irreparable harm if the preliminary injunction was not granted; (3) prevailed in a balancing of the equities; and 4) showed that the injunction is in the public interest.

Likelihood of Success on the Merits

First, California contended that it was likely to prevail on the merits of its claims, because the Bureau's operation of the CVP violated the ESA and CESA. In particular, California argued that the 2019 Biological Opinions failed to include sufficiently detailed "guardrails" for federal operations or definite measures to enhance a species' health. Accordingly, California argued that the "no jeopardy" conclusion in both Biological Opinions was unsupported, and therefore was arbitrary and capricious under the APA.

Similarly, California argued that CESA, which is state law, applied to the Bureau because federal statutes require that the Bureau comply with state water laws. In particular, California contended that CESA applied to the use of water in California as it affects species, including pursuant to permits issued by the California State Water Resources Control Board for the operation of the CVP. Because CVP operations under the Biological Opinions impact species protected by CESA, California argued that the Bureau was "taking" protected species without authorization and was therefore violating CESA.

Finally, California argued that the Bureau was violating NEPA because its EIS failed to take a "hard look" at the environmental consequences of its proposed action. Specifically, California alleged that the Bureau's EIS was "tainted" by the inclusion of protective measures that are disallowed by NEPA, such as conservation hatchery programs assessed by the EIS. California also contended that the Bureau did not adequately analyze the impact on salmonid species during high flow events that would correspond with higher pumping rates by the CVP, because it did not model the impact of maximum pumping rates during such events and assumed that such pumping would only occur for limited periods of time during certain years. Finally, California argued that the Bureau's EIS did not provide for mitigation measures on species impacts from CVP operations, as required by NEPA. For instance, California asserted that the Bureau only proposed to monitor longfin smelt populations during certain operational stages, which did not itself qualify as a mitigation measure. For these and related reasons, California argued that the Bureau's EIS violated NEPA, and that California would prevail on this claim for purposes of obtaining a preliminary injunction.

Irreparable Harm

To satisfy the second prong of the preliminary injunction requirements, California argued that it would suffer irreparable harm, primarily in the form of increased mortality of endangered species and the loss of their habitat. In particular, California cautioned that Delta smelt, longfin smelt, and Central Valley steelhead would suffer population and habitat declines as a result of CVP operations, particularly during dry years. For instance, under critically dry conditions in the Delta, California warned that Delta smelt habitat would be reduced, including rearing habitat, and that the already reduced Delta smelt population would be further imperiled. Similarly, longfin smelt and Central Valley steelhead could be increasingly entrained by CVP operations given greater water exports from the Delta under current CVP operations, thus leading to greater population declines that, according to California, might not be remedied. Accordingly, California contended that it had satisfied the irreparable harm standard required to obtain a preliminary injunction.

Balancing the Equities and the Public Interest

California also argued that the balance of the equities and the public interest support issuing a preliminary injunction. California argued that current CVP operations will result in permanent environmental harms, and thus tipped the balance of the equities as well as the public interest in favor of its position. Because environmental impacts could be permanent—such as the extinction of the Delta smelt—and would otherwise be significant, California contended that any economic harm incurred by defendants in the lawsuit could not outweigh the equities and public interest favoring California's position.

Conclusion and Implications

On May 12, the court granted California's preliminary injunction in part, and denied the remainder as moot. Specifically, the court enjoined current CVP export operations in the South Delta and reinstated a specific action with the reasonable and prudent alternative from the 2009 NMFS Biological Opinion from May 12 through May 31, 2020, on the ground that operations carried out pursuant to current CVP operations would irreparably harm threatened Central Valley steelhead. Because the remainder of California's motion was denied as moot, the impact of the court's order was limited to the month of May, and the limited injunction would not apply to the duration of California's underlying lawsuit. Whether the State of California or other parties will file further applications for preliminary injunction during the pendency of the action is not yet known. Plaintiffs motion for preliminary injunction is available online *at*: https://oag.ca.gov/system/files/attachments/press-docs/Memorandum%20in%20support%20of%20Preliminary%20Injunction.pdf.
(Miles Krieger, Steve Anderson)

NEW LAWSUIT FILED IN MONTANA STATE COURT CLAIMING STATE'S ENERGY POLICIES CAUSE INJURY TO 'YOUTH' PLAINTIFFS

A group of young plaintiffs have filed suit in March 2020 against the State of Montana seeking injunctive and declarative relief from state energy polices, which they allege, have caused "climate disruption." The young plaintiffs, on claims based on the Montana Constitution and public trust doctrine, allege that their futures are being compromised by the state. [*Held, et al., v. State of Montana, et al.*, (1st Dist Ct. Mt 2020).]

Background

There have been in the past few years several lawsuits filed, brought by "youth" plaintiffs, against oil companies, seeking relief on theories that big oil is aware that the fossil fuel production and intended use is a known cause of climate change endangering plaintiffs lives and futures. However, recently, a group of young plaintiffs filed a lawsuit in Montana state court. This is a novel approach that may insulate the plaintiffs from some of the hurdles experienced by other youth lawsuits filed in federal court.

The Lawsuit

In *Held, et al., v. The State of Montana,* filed in the First Judicial District Court for Lewis and Clark County, in Helena, the plaintiffs consist exclusively of youth plaintiffs through their guardians. Their target: The State of Montana and its energy policies related to fossil fuels. The lawsuit seeks declaratory and injunctive relief. The action states four claims:

- The Right to Clean and Healthful Environment Including a Stable Climate System;
- The Right to Seek Safety, Health and Happiness;
- Individual Dignity and Equal Protection; and
- Protection of Montana's Clean and Healthful Environment and Public Trust Resources for Present and Future Generations. (* these and all other quotations herein are in reference to the Complaint).

The plaintiffs in the complaint describe themselves as:

> . . .children and youth in Montana, between the ages of two and 18 who have and will continue to be harmed by the dangerous impacts of fossil fuels…[who] are uniquely vulnerable to the consequences of the climate crisis, which harms [their] physical and psychological health and safety, interferes with family and cultural foundations and integrity and causes economic deprivations.

The lawsuit describes the 'Climate Crisis' as ever increases CO2 greenhouse emissions into the atmosphere causing climate disruption including the heating up of the earth from which, "the harm from present day greenhouse gas (GHG) emissions will be disproportionately borne by today's children and future generations."

The complaint ascribes knowledge and culpability to the defendants because:

> . . .this scientific concept [or climate disruption from GHGs] has been well understood by [them] for decades. . . .[but] notwithstanding their longstanding knowledge of the dangers that climate disruption and GHG emissions pose, . . .Defendants have developed and implemented a State Energy Policy in Montana. . .which involves systemic authorization, permitting. . . and facilitation of activities promoting fossil fuels. . .without regard to climate change impacts. . . .

The Claims for Liability

In Count I, plaintiffs reference the "Right to Clean and Healthful Environment," and they look to the Montana Constitution for protection. They reference sections that guarantee 1) that "All persons are born free and have certain inalienable right including the right to a clean and healthful environment"; 2) the "State . . .shall maintain and improve a clean and healthful environment for the present and future generations," reference several other sections the Montana Constitution, and reference case law which interprets the state Constitution.

In Count II, plaintiffs seek the "Right to . . .Safety, Health and Happiness." Here again they rely upon sections of the state Constitution, including: that "no person shall be deprived of life, liberty, or property with due process."

In Count III, plaintiffs seek "Individual Dignity and Equal Protection" via the Montana Constitution including their right to "The dignity of the human being [as] inviolable."

In Count IV, plaintiffs seek the "Protection of Montana's Clean and Healthful Environment and Public Trust Resources. . . " Once again, the state's Constitution is referenced including their entitlement ". . as beneficiaries under the Public Trust Doctrine [as an] attribute of sovereignty that predate the . . Constitution."

Relief Sought

Under the general relief topics of declaratory relief, plaintiffs basically seek recognition by the state court that the State of Montana's Energy Policy, codified under the Montana Code, be deemed in violation of the Constitution and public trust doctrine which have violated their rights and liberties. In terms of injunctive relief, they seek permanent enjoinment from "subjecting Youth Plaintiffs to the State's Energy Policy." They further seek the development of a remedial plan to "effectuate reductions in GHG emissions in Montana consistent with best available science . . . necessary to protect [their] rights."

Finally, they seek attorney's fees and costs of litigation and "such further or alternative relief as the Court deems just and equitable," opening the door to additional court orders and damage awards.

Conclusion and Implications

The lawsuit is novel and contains voluminous graphs, charts and scientific studies demonstrating "climate disruptions." The issue will ultimately come down to whether they can also prove proximate cause to the state—an inquiry which will also require a showing of a duty owed them by the state. This will most certainly be a high bar to scale but the case remains at the fore of "youth" lawsuits and will be worth following as the case progresses.

The voluminous complaint is available online at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200313_docket-na_complaint.pdf. (Robert Schuster)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT FINDS STATE LAW CLAIMS FOR OILFIELD CLEANUP RESTORATION PLAN MORE STRINGENT THAN A CERCLA PLAN MAY REQUIRE EPA APPROVAL

Atlantic Richfield Co. v. Christian et.al., ___U.S.___, 140 S.Ct. 1335 (April 20, 2020).

The U.S. Supreme Court determined that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or the Act) did not strip Montana courts of jurisdiction over landowners' state law tort claims for restoration damages against Atlantic Richfield Company (ARCO). The Court, however, also determined the landowners were potentially responsible parties (PRPs) under CERCLA. As a result, the Act required the landowners to seek U.S. Environmental Protection Agency (EPA) approval for their desired restoration plan.

Factual and Procedural Background

For nearly a century, the Anaconda Copper Smelter in Butte, Montana contaminated an area of over 300 square miles with arsenic and lead. For 35 years, the EPA worked with the owner and defendant, Atlantic Richfield Company (ARCO) to implement a cleanup plan under the Act. To date, ARCO estimates that it has spent roughly $450 million to remediate more than 800 residential and commercial properties in accordance with the approved cleanup plan.

In 2008, a group of 98 landowners sued ARCO in Montana state court under common law tort claims of nuisance, trespass and strict liability, seeking restoration damages that went beyond EPA's cleanup plan. For example, the landowners sought a maximum soil contamination level of 15 parts per million of arsenic, rather than the 250 parts per million level set by EPA, to excavate soil within residential yards to a depth of two feet rather than EPA's chosen depth of one, and to capture and treat shallow groundwater, a plan EPA rejected as costly and unnecessary to secure safe drinking water. The estimated cost for the additional measures was $50 to $58 million.

ARCO argued that CERCLA stripped the Montana courts of jurisdiction over the landowners' state law claim for restoration damages. The Montana Supreme Court held that the landowners' plan was not a challenge to the EPAs cleanup plan because it, "would not stop, delay, or change the work EPA is doing." It reasoned the landowners were:

> . . .simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan.

The Montana Supreme Court also held that the landowners were not PRPs prohibited from taking remedial action without EPA approval under § 122(e)(6) of the Act. It reasoned that the landowners were not Potential Responsible Parties because they had never been treated as PRPs for any purpose—by either the EPA or ARCO during the entire 30 years since the Copper Smelt was designated as a Superfund site, and that the six-year statute of limitations for a claim against the landowners had run.

Atlantic Richfield petitioned the U.S. Supreme Court for review.

The U.S. Supreme Court's Decision

Before the High Court was whether CERCLA stripped the Montana state courts of jurisdiction over the landowners' claim for more stringent restoration damages and, if not, whether the Act required the landowners to seek EPA approval of their restoration plan.

Jurisdictional Inquiry

The Court considered and rejected two arguments regarding jurisdiction. First, the Court rejected the landowners' argument that the Court lacked jurisdiction to review the Montana Supreme Court's decision.

The U.S. Supreme Court is authorized to review final judgments or decrees rendered by the highest court of a state. To qualify as final, a state court judgment must be an effective determination of the litigation and not merely an interlocutory or intermediate step. The landowners argued the Court lacked jurisdiction because the Montana Supreme Court's decision was a writ of supervisory control, which allowed the case to proceed to trial, but trial had not taken place. The U.S. Supreme Court rejected this argument, noting that Supreme Court precedent provides that a writ of supervisory control issued by the Montana Supreme Court is a final judgement within the Court's jurisdiction.

Second, the Court considered Atlantic Richfield's argument that CERCLA § 113 stripped Montana courts of jurisdiction over the landowners' lawsuit. Section 113(b) of the Act provides that U.S. District Courts have exclusive original jurisdiction over all controversies arising under the Act. The Court rejected this argument, explaining that this case does not "arise under" the Act as the term is used in CERCLA § 113(b). Instead, landowners' common law claims for nuisance, trespass and strict liability arose under Montana law. Thus, CERCLA did not deprive Montana state courts of jurisdiction over those claims.

EPA Approval

The U.S. Supreme Court next considered whether CERCLA required the landowners to seek EPA approval of their restoration plan. Section 122(e)(6) of the Act requires PRPs to obtain EPA approval of a restoration plan that is inconsistent with an approved plan. Section 107(a) of the Act lists four classes of PRPs.

The first category includes any "owner" of a "facility." "Facility" includes:

> . . .any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

The Court determined that arsenic and lead are hazardous substances, and that because they have come to be located on the landowners' properties, the landowners are PRPs. As a result, under § 122(e)(6), EPA must approve of the landowners' more stringent restoration plan.

The Opinions of Justices Alito, Gorsuch and Thomas

Justices Alito, Gorsuch, and Thomas concurred in part and dissented in part. Justice Alito concurred with the Court's majority holding that it has jurisdiction to decide the case and that the landowners are PRPs under § 122 (e)(6) of the Act. However, he was unwilling to join the Court's holding that state courts have jurisdiction to entertain "challenges" to EPA-approved plans under CERCLA.

Justices Gorsuch and Thomas concurred with the Court's holding that the Court has jurisdiction to decide the case, but dissented with the Court's holding that the landowners were PRPs under the Act.

Conclusion and Implications

The U.S. Supreme Court's decision introduces the possibility for property owners impacted by CERCLA Superfund sites to sue under common law state tort claims to implement a more stringent restoration plan than the plan approved by EPA. Further, the Court's interpretation of the Act makes it possible that the property owners could also PRPs, thereby requiring EPA approval prior to bringing such state law claims, if hazardous substances from a Superfund site have "come to be located" on their property. The High Court's opinion is available online at: https://www.supremecourt.gov/opinions/19pdf/17-1498_8mjp.pdf. (Nathalie Camarena, Rebecca Andrews)

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 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 wells 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 Louisiana 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)

DISTRICT COURT FINDS NATIONWIDE PERMIT FOR KEYSTONE XL PIPELINE AND OTHER PIPELINE AND UTILITY PROJECTS VIOLATES THE ENDANGERED SPECIES ACT

Northern Plains Resource Council v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. CV-19-44-GF-BMM (D. Mt. Apr. 15, 2020, *amended* order May 11, 2020).

The U.S. District Court for the District of Montana recently declared that the U.S. Army Corps of Engineers (Corps) violated the federal Endangered Species Act (ESA) when it reissued Nationwide Permit 12 (NWP 12), a streamlined general permit used to approve the Keystone XL pipeline and other pipelines and utility projects pursuant to § 404(e) of the federal Clean Water Act. On April 15, 2020, the court determined the Corps did not properly evaluate NWP 12 under the ESA when it determined that reissuance of the permit would have no effect on listed species or critical habitat. Further, the Corps' decision not to initiate formal programmatic consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) in reissuing NWP 12 was also "arbitrary and capricious in violation of the Corps' obligations under the ESA." The court's order completely vacated the NWP 12 permit. In a subsequent order dated May 11, 2020, the court narrowed the *vacatur* to apply only to projects for the construction of new oil and gas pipelines, but not routine maintenance, inspection, and repair activities on existing projects. Thus, the court's order "prohibit[s] the Corps from relying on NWP 12 for those projects that likely pose the greatest threat to listed species."

Factual and Procedural Background

Plaintiffs include six environmental organizations that sued the Corps alleging violations of the Endangered Species Act, the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) following its reissuance of NWP 12 in 2017. The Corps issued NWP 12 for the first time in 1977.

Section 404 of the CWA requires any party seeking to construct a project that will discharge dredged or fill material into jurisdictional waters to obtain a permit. The Corps oversees the permitting process and issues both individual permits and general nationwide permits to streamline the process. The discharge may not result in the loss of greater than one-half acre of jurisdictional waters for each single and complete project. For linear projects like pipelines that cross waterbodies several times, each crossing represents a single and complete project. Projects that meet NWP 12's conditions may proceed without further interaction with the Corps.

Under § 7(a)(2) of the ESA, the Corps is required to ensure any action it authorizes, funds, or carries out, is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. The Corps must determine "at the earliest possible time" whether its action "may affect" listed species and critical habitat. If the action "may affect" listed species or critical habitat, the Corps must initiate formal consultation with the Services. No consultation is required if the Corps determines that a proposed action is not likely to adversely affect any listed species or critical habitat. Formal consultation begins with the Corps' written request for consultation under ESA § 7(a)(2) and concludes with the Services' issuance of a Biological Opinion whether the Corps' action likely would jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

On January 6, 2017 the Corps published its final decision reissuing NWP 12 and other nationwide permits. The Corps determined that NWP 12 would result in "no more than minimal individual and cumulative adverse effects on the aquatic environment" under the CWA, and that NWP 12 complied with both the ESA and NEPA. The Corps did not consult with the Services based on its "no effect" determination, as the ESA does not require consultation if the proposed action is determined to not likely adversely affect any listed species or critical habitat.

Following the Corps' final decision, Plaintiffs challenged the Corps' determination not to initiate programmatic consultation with the Services under ESA § 7(a)(2) to obtain a Biological Opinion.

The District Court's Decision

The court considered plaintiffs' claim that the Corps acted arbitrarily and capriciously in reaching its "no effect" determination, and that the Corps should have initiated programmatic consultation with the Services when it reissued NWP 12. The court analyzed whether the Corps "considered the relevant factors and articulated a rational connection between the facts found and the choice made."

Reissuance of the Nationwide Permit Impacted Listed Species and Habitat

First, the court determined "resounding evidence" existed that the Corps' reissuance of NWP "may effect" listed species and their habitat. The court quoted statements by the Corps itself in its final determination documents acknowledging the many risks of authorized discharges by NWP 12. The Corps noted that activities authorized by past versions of NWP 12 "have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources" including "permanent losses of aquatic resource functions and services." Further, the Corps acknowledged that utility line construction "*will* fragment terrestrial and aquatic ecosystems" and that fill and excavation activities cause wetland degradation and losses. The court concluded that "[t]he types of discharges that NWP 12 authorizes 'may affect' listed species and critical habitat, as evidenced in the Corps' own Decision Document." Thus, under the ESA's low threshold for § 7(a)(2) consultation, "[t]he Corps should have initiated Section 7(a)(2) consultation before it reissued NWP 12 in 2017." The court also cited plaintiffs' expert declarations which demonstrated that reissuance of NWP 12 may affect endangered species, including pallid sturgeon populations in Nebraska and Montana, and the endangered American burying beetle. The declarations added to the "resounding evidence" in support of the conclusion that the Corps' actions "may affect" listed species or critical habitat.

Circumvention of the Consultation Process

Next, the court addressed the Corps' argument that it was authorized to circumvent § 7(a)(2) consultation requirements for programmatic consultation with the Services by relying on project-level review or General Condition 18, which provides that a nationwide permit does not authorize an activity that is "likely to directly or indirectly jeopardize the continued existence of a" listed species or that "will directly or indirectly destroy or adversely modify the critical habitat of such species." The court noted that a federal court previously concluded that the Corps should have consulted with the Services when it reissued NWP 12 in 2002. Further, the Corps had a history of consultation when it reissued NWP 12 in 2007 and 2012.

The court concluded that the Corps could not circumvent the consultation requirements of the ESA by relying on project-level review because "[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat." By contrast, project-level review, "by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat." Similarly, General Condition 18, "fails to ensure that the Corps fulfills *its* obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees." Thus, the Corps could not delegate its duty to determine whether NWP authorized activities will affect listed species or critical habitat.

Conclusion and Implications

In the end, the District Court concluded that the Corps' "no effect" determination and resulting decision to forego programmatic consultation "proves arbitrary and capricious in violation of the Corps' obligations under the ESA." The court vacated NWP 12 and enjoined the Corps from authorizing activities thereunder. In its amended order, the court limited the scope of its order to the construction of new oil and gas pipelines.

This case emphasizes the low threshold for § 7(a)(2) consultation for any activity that "may affect" listed species and critical habitat, and the need to comply with the ESA's procedural consultation requirements. The District Court's decision is available online at: https://ecf.mtd.uscourts.gov/doc1/11112687968.

(Patrick Skahan, Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL UPHOLDS CEQA ENVIRONMENTAL IMPACT REPORT FOR OIL REFINERY PROJECT

Communities for a Better Environment v. South Coast Air Quality Management District, ___Cal.App.5th___, Case No. B293327 (2nd Dist. Apr. 2, 2020).

Plaintiff Communities for a Better Environment filed suit against the South Coast Air Quality Management District (SCAQMD), alleging that an Environmental Impact Report (EIR) for a change to the thermal operating limit of a heater in an oil refinery was inadequate under the California Environmental Quality Act (CEQA). Plaintiff attacked the EIR in four main respects, which the superior court rejected. Following an appeal by plaintiff, the Court of Appeal affirmed.

Factual and Procedural Background

Tesoro owns and operates two adjacent oil refining facilities in Carson and Wilmington, which date from the early 1900s. The project at issue in this case is referred to as the Los Angeles Refinery Integration and Compliance Project and would involve both facilities. As the name implies, the purpose of the project would be to improve the integration of the two facilities and to comply with air quality regulations.

The project itself would have three components. The first component would involve shutting down a major pollution source called the Wilmington Fluid Catalytic Cracking Unit. It also would install new pipelines and physically modify certain equipment. The second component would involve the installation of new storage tanks. Increased storage tank capacity would mean oil tankers could make fewer trips, which would decrease shipping costs and air pollution.

The third component, which is the portion of the project primarily attacked in plaintiff's lawsuit, would change the thermal operating limit of a heater that heats petroleum going into the "Wilmington Delayed Coker Unit." The particular heater has 36 burners, each of which has a maximum output of 8.4 million British thermal units (Btu) per hour. Thus, the maximum heat release for the heater as a whole is 302.4 million Btu per hour. This "maximum heat rate" is contrasted with the "guaranteed heat rate," which is the rate at which the heater's manufacturer guarantees the heater will operate. That rate is 7 million Btu per hour, for a total guaranteed heat rate of 252 million Btu per hour.

The difference in these rates is important because the heater previously had a federal air pollution permit keyed to a guaranteed rate of 252, even though Tesoro has operated the heater above this rate when it had to perform certain tasks. The third component of the project proposed rewriting the heater's permit in terms of the maximum rate of 302.4 instead of the guaranteed rate of 252 to align with standard industry and agency practice. This has three notable aspects: 1) the change would be on paper only—no physical changes to the heater would be made; 2) the agency simultaneously would impose a new permit limitation on air pollution from the heater to maintain levels that would be generated if the heater never operated above 252 Btu per hour; 3) by raising the thermal operating limit, the coker could potentially process a heavier blend of crude or could increase throughput through the coker by 6,000 barrels per day.

In connection with the permit approval process, SCAQMD prepared an EIR for the proposed project. Following approval of the permits and certification of the EIR in spring 2017, plaintiff brought suit in June 2017, alleging that the EIR was inadequate. The trial court rejected plaintiff's claims, and an appeal then followed.

The Court of Appeal's Decision

Baseline for Air Quality Analysis

The Court of Appeal first addressed plaintiff's claim that the baseline used to measure the project's impact on air pollution was too high. The project

used a near-peak or 98th percentile method, that is, it was based on the refinery's worst air pollution emissions during a two-year interval before the project. This approach then excluded the top two percent of the data to rid the analysis of outliers, resulting in a 98th percentile method. The SCAQMD conducted its analysis by comparing these actual pre-project near-peak emissions with projected peak emissions after the project, so as to measure and control the worst effects of air pollution. Based on this method, the agency concluded that the project would have the beneficial effect of reducing air pollution.

Rejecting plaintiff's claim that an average-value baseline should have been used, the Court of Appeal found that substantial evidence supported the agency's use of the 98th percentile baseline, which followed the practice of the federal Environmental Protection Agency, and that it was rational to care most about the worst effects of air pollution. In so doing, the Court of Appeal rejected various arguments by plaintiff regarding the decision to use the 98th percentile threshold, including claims that: 1) federal regulatory goals differed from state regulatory purposes; 2) the 98th percentile ignores existing environmental conditions; 3) whether the U.S. Environmental Protection Agency (EPA) uses a percentile approach is immaterial to what the agency should have done under state law; and 4) the "normal" baseline is based on average conditions. The Court of Appeal found all of these claims to lack merit.

Pre-Project Composition of Crude Oil

The Court of Appeal next addressed plaintiff's claim that the agency failed to obtain information about the pre-project composition of the crude oil the refinery processes, and instead only found that the crude oil input would remain within the refinery's "operating envelope." The court rejected this argument, finding that there was no need for the EIR to detail input crude oil composition, as that information was not material to assessing the project's environmental impact. The Court of Appeal further found that the EIR gave a stable and logical explanation of why the coker will not in fact process a heavier slate of crude following the project: it is constrained by upstream and downstream equipment that would require physical modification, and that physical modification will not occur.

Increase of Throughput by 6,000 Barrels Per Day

The Court of Appeal next addressed plaintiff's claim that, without knowing exactly how the agency figured that throughput through the coker could be increased by 6,000 barrels per day, CEQA's information purpose was undermined because those who did not engage in the administrative process could not understand and critique this calculation. In particular, the court found this argument to have been forfeited because the exact issue had not been presented to the agency during the administrative process. As such, it could not be presented for the first time in litigation.

Absence of Information Pertaining to Volumes of Crude Oil

Finally, the Court of Appeal addressed plaintiff's claim that the EIR failed to disclose two numbers: 1) the existing volume of crude oil the refinery processes as a whole; and 2) the refinery's unused capacity. The court rejected this claim, finding that these numbers were not material to the EIR's goal of evaluating the project's air pollution impacts. No law, the Court of Appeal further explained, requires a report to include unnecessary data. Cross-checks and verifications also are not needed if, as was the case here, substantial evidence supports the agency's analysis.

Conclusion and Implications

CEQA cases, in analysis by the court of the adequacy of an EIR can be fact intensive and highly technical in nature. This case was no different but is significant because it involves a substantive discussion of number of CEQA issues, including in particular an agency's determination of a baseline. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B294732.PDF.
(James Purvis)

ENVIRONMENTAL LIABILITY™
ENFORCEMENT & PENALTIES Reporter

Environmental Liability, Enforcement & Penalties Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED