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CLIMATE CHANGE™

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FEATURE ARTICLE

CHALLENGING FEDERAL AGENCY RETREAT ON REMAND—WHEN DOES REGULATORY RELIEF CONSTITUTE FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW?

By Deborah Quick

Two U.S. Environmental Protection Agency (EPA) regulations adopted pursuant to the federal Clean Air Act (42 U.S.C. § 7401 *et seq*., CAA) were successfully challenged, and the matters remanded to EPA for implementation by the D.C. Circuit. In both instances, EPA chose to regulatory retreat, sparking subsequent petitions for review. In separate decisions released on the same day the D.C. Circuit explored whether EPA's post-remand regulatory retreats were final actions subject to judicial review. [*Sierra Club v. EPA*, 955 F.3d 56 (D.C. Cir. Apr. 7, 2020); *NRDC v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020)]

The Significant Impact Levels Guidance

Sierra Club v. EPA, 955 F.3d 56 (D.C. Cir. Apr. 7, 2020)

The CAA's Prevention of Significant Deterioration (PSD) program requires major emitting facilities to obtain a permit "setting forth emission limitations" for a facility prior to construction. *See* 42 U.S.C. § 7475(a)(1), § 7470-79. Issuance of a PSD permit is dependent on the applicant demonstrating that new emissions from the proposed project:

> . . .will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, [or] (B) national ambient air quality standard in any air quality control region[.] 42 U.S.C. § 7475(a)(3). . . .The 'maximum allowable increase' of an air pollutant is a marginal level of increase above the defined baseline concentration and is known as the 'increment.' 75 Fed. Reg. 64,864, 64,868 (Oct. 20, 2010).

The states are charged with implementing the PSD program "in accordance with their [state implementation plans, or] SIPs and federal minimum standards, *see* 42 U.S.C. § 7410(a)(1)-(2), (1)" However, the CAA "authorizes EPA to promulgate regulations regarding the ambient air quality analysis required under the permit application review." *See* 42 U.S.C. § 7475(e)(3. EPA adopted regulations "outlining a set of values for states to use in determining what level of emissions does 'cause or contribute to' a violation under section 7475(a)(3)." *See* 40 C.F.R. § 51.165(b)(2); 52 Fed. Reg. 24,672, 24,713 (July 1, 1987).

These values are known as Significant Impact Levels" (SILs) when used as part of an air quality demonstration in a PSD permit application. *See* SILs Guidance at 9.

2010 regulations "incorporating PM2.5 values into [EPA's] preexisting table of significance values at 40 C.F.R. § 51.165(b)(2)" were challenged by the filing of a petition for review. EPA asked the D.C. Circuit:

> To vacate and remand the … regulations so EPA could address flaws it had recognized during the course of litigation. *See*, *Sierra Club v. EPA*, 705 F.3d 458, 463-64 (D.C. Cir. 2013).

In vacating the regulations, the D.C. Circuit Court stated that, on remand,

> . . .the EPA [might] promulgate regulations that do not include SILs or do include SILs that do

not allow the construction or modification of a source to evade the requirement of the Act as do the SILs in the current rule. Id. at 464.

Subsequent to the 2010 remand, EPA "posted online and sought informal public comment on a new draft of guidance on the use of SILs," and then in 2018 issued the SILs Guidance at issue in this case, having revised it in response to comments received. EPA described its SILs Guidance:

> As the first of a two-step approach, explaining it hoped to 'first obtain experience with the application of these values in the permitting program before establishing a generally applicable rule.'

The Suspension of the Hydrofluorocarbons Rule

NRDC v. Wheeler, 955 F.3d 68 (D.C. Cir. Apr. 7, 2020)

In response to a 1990s amendment to the CAA requiring transition away from the use of ozone-depleting substances to "less harmful substitutes." Initially, many transitioned to hydrofluorocarbons (HFCs), which, subsequently have been established as "powerful greenhouse gases that contribute to climate change." 2015 EPA regulations "disallowing the use of HFCs as a substitute for ozone-depleting substances" were found partially invalid by the D.C. Circuit in *Mexichem Flour, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), to the extent those regulations purported to "force users who had already switched to HFCs to make a second switch to a different substitute." The D.C. Circuit "vacated the rule in part and remanded to the agency."

On remand, in 2018 EPA:

> . . .the agency decided to implement our decision by suspending the rule's listing of HFCs as unsafe substitutes in its entirety, meaning that even current users of ozone-depleting substances can now shift to HFCs. And EPA did so without going through notice-and-comment procedures.

The D.C. Circuit's Decisions

The CAA "provides for judicial review only of 'final action,' 42 U.S.C. § 7607(b)(1), a limitation coterminous with the concept of 'final agency action' in the Administrative Procedure Act, 5 U.S.C. § 704. *See Sierra Club v. EPA*, 873 F.3d 946, 951 (D.C. Cir. 2017)." Were EPA's responses on remand to the D.C. Circuit's prior decisions in both *Sierra Club v. EPA* and *NRDC v. Wheeler* "final actions" subject to judicial review?

Bennett v. Spear, 520 U.S. 154, (1997) articulates the "familiar two-prong test" for finality of agency actions. *U.S. Army Corps of Engineers v. Hawkes Co.*, ___U.S.___, 136 S. Ct. 1807 (2016), characterized it as "finality's touchstone." Under *Bennett*, the challenged agency action must both:

> [1]. . mark the consummation of the agency's decisionmaking process. . .[and is not]. . .of a merely tentative or interlocutory nature. . .[and]
>
> [2] be one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett*, 520 U.S. at 177-78 (citations and internal quotation marks omitted).

Each prong of the *Bennett* analysis "must be satisfied independently for agency action to be final[.]" *Soundboard Ass'n, v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir 2018).

Applying *Bennett* Analysis to the Significant Impact Levels Guidance

Applying *Bennett* to the SILs Guidance at issue in *Sierra Club v. EPA*, the court focused on the second prong, whether EPA's issuance of the Guidance determined "rights or obligations," or from which "legal consequences" would flow. *Bennett*, 520 U.S. at 177-78.

Whether an agency action has "direct and appreciable legal consequences" under the second prong of *Bennett* is a "'pragmatic'" inquiry. *Hawkes*, 136 S. Ct. at 1815 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)).

> And as we recently emphasized, courts should 'make prong-two determinations based on the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it. *Cal. Cmtys.*

Against Toxics v. EPA, 934 F.3d [627] at 637 [(D.C. Cir. 2019)].

When deciding whether guidance statements meet prong two:

> . . .this Court has considered factors including: (1) 'the actual legal effect (or lack thereof) of the agency action in question on regulated entities'; (2) 'the agency's characterization of the guidance'; and (3) 'whether the agency has applied the guidance as if it were binding on regulated parties.' *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014).

The D.C. Circuit described *Hawkes* as representing "a long line of cases illustrating a pragmatic approach to finality by focusing on how agency pronouncements actually affect regulated entities." For example, in citing *Sackett v. EPA*, 566 U.S. 120, 126 (2012), the agency action was final "because it exposed petitioners to double penalties in a future enforcement proceeding and limited their ability to obtain a certain type of permit" and in *Abbott Labs* noncompliance with the challenged agency action "risked 'serious criminal and civil penalties.'" In contrast, the D.C. Circuit held in *Valero Energy Corporation v. EPA*, 927 F.3d 532 (D.C. Cir. 2019) that challenged EPA guidance was not reviewable as final because it "imposed no obligations, prohibitions, or restrictions," and "put no party to the choice between costly compliance and the risk of a penalty of any sort," EPA admitted the guidance "had no independent legal authority," and, finally:

> The relevant statute provided regulated parties a mechanism by which to challenge any EPA action that was premised on the statutory interpretation that the guidance advanced." 927 F.3d at 536-39.

SILs Guidance Did Not Constitute Final Agency Action

the SILs Guidance imposes no obligations, prohibitions or restrictions on regulated entities, does not subject them to new penalties or enforcement risks, preserves the discretion of permitting authorities, requires any permitting decision relying on the Guidance be supported with a robust record, and does not prevent challenges to individual permitting decisions. The SILs Guidance is not sufficient to support a permitting decision—simply quoting the SILs Guidance is not enough to justify a permitting decision without more evidence in the record, including technical and legal documents. *See* SILs Guidance at 19. It is also not necessary for a permitting decision—permitting authorities are free to completely ignore it. *See* id. at 19-20. As such, we find the SILs Guidance does not result in "direct and appreciable legal consequences" as required under prong two of *Bennett*.

The D.C. Circuit denominated as "paramount" to its conclusion "the amount of discretion [state] permitting authorities retain" post-issuance of the Guidance:

> In *Catawba County*, this Court found an agency memo nonfinal where it did not 'impose binding duties on states or the agency. ... [but] merely clarifie[d] the states' duties under the [CAA] and explain[ed] the process EPA suggests,' noting those views were open to revision. 571 F.3d 20, 33-34 (D.C. Cir. 2009). . . .The SILs Guidance explicitly preserves state discretion regarding what degree of modeling or analysis may be necessary for each petition and does not require states to review their programs or take any proactive action in response.

Regarding *Bennet's* second prong as applied to *NRDC v. Wheeler*, no party disputed:

> . . .that, to the extent the 2018 Rule suspends the 2015 Rule's HFC listings, the 2018 Rule determines legal rights and obligations and carries legal consequences by giving regulated parties the legal right to replace ozone-depleting substances with HFCs.

Analysis under the *Mexichem* Decision

The court proceeded to analyze EPA's (and industry intervenors') argument that the court's own decision in *Mexichem*:

> . . .not the 2018 Rule, … suspended the 2015 Rule's HFC listings. According to that account, the 2018 Rule 'simply applies and implements' *Mexichem* and 'therefore has no independent legal consequences.'

The *Mexichem* holding:

> . . .rested on an understanding of EPA's statutory authority to regulate entities' replacement of ozone-depleting substances. We reasoned that an entity 'replaces' an ozone-depleting substance when it switches to a substitute substance, and that EPA's statutory authority thus extends only to regulating the initial switch.

As HCFs are not ozone-depleting, once an entity had transitioned from an ozone-depleting substance to HCFs, EPA had no statutory authority to compel a further transition from HCFs and therefore "EPA cannot permissibly apply the 2015 Rule's HCF listings to entities already using HCFs." However, the court:

> . . .made no suggestion. . .that EPA cannot apply the 2015 Rule to entities still using ozone-depleting substances, . . .[rather]. . .[f]our distinct times, we emphasized that we were vacating the 2015 Rule only 'to the extent' the Rule requires replacements of HFCs, *id.* at 454, 462, 464, confirming that we otherwise sought to leave the HFC listings intact.

The 2018 Rule, however, went further than the partial *vacatur* that concluded *Mexichem*:

> . . .by instituting a complete vacatur of the 2015 Rule's HFC listing. And vacating those listing has the effect of suspending regulatory requirements, which qualifies as determining legal rights and obligations and carrying legal consequences for purposes of the second finality prong.

The court rejected EPA's argument that the 2015 Rule's HFC listings did not "contain[] discrete, severable text that Mexichem could have struck to implement a partial vacatur."

It is a routine feature of severability doctrine that a court may invalidate only some applications even of indivisible text, so long as the "valid applications can be separated from invalid ones." *Fallon* et al., *Hart & Wechsler's: The Federal Courts and the Federal System* 170 (7th ed. 2015). As the Supreme Court has explained, when a court encounters statutory or regulatory text that is "invalid as applied to one state of facts and yet valid as applied to another," it should "try to limit the solution to the problem" by, for instance, enjoining the problematic applications "while leaving other applications in force." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006)

In *Mexichem*, the court sought to:

> . . .'limit the solution to the problem' by vacating the 2015 Rule's HFC listings only as applied to entities that EPA lacks authority to regulate (those who had already switched from ozone-depleting substances to HFCs), leaving the listings intact as applied to other entities (those who had not).

The court was not required "in any express severability analysis about the text of the 2015 Rule." EPA was obligated to 1) follow the *Mexichem* analysis in implementing the 2015 Rule, 2) sought rehearing with the goal of obtaining complete vacatur of the 2015 Rule, or 3) engage in notice-and-comment rulemaking post-remand in order to implement the 2018 Rule.

Conclusion and Implications

Even in retreat, agencies must pick their way carefully across the regulatory battlefield with a clear understanding of their permissible scope of action. In *Sierra Club*, the scope of remand allowed EPA the flexibility to execute a near-total retreat by way of issuing non-binding guidance following informal notice-and-comment. Without any enforceable commitment to ever adopt binding SILs, this regulatory retreat rests beyond judicial review. In *NRDC*, however, the agency failed to stay within the limited scope of the court's remand, thereby bringing itself once more within the D.C. Circuit Court of Appeals' jurisdiction.

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CLIMATE CHANGE NEWS

CLIMATE CHANGE TIED TO PREGNANCY RISKS, ESPECIALLY AMONG AFRICAN AMERICAN MOTHERS

A recent scholarly paper has indicated that pregnant women exposed to high temperatures or significant air pollution are more likely to have children who are born premature, underweight, or stillborn. African American mothers and their children face these outcomes at a much higher rate than the population at large, based on new research examining more than 32 million births in the United States.

The Paper

The research, published in June in *JAMA Network Open*, part of the *Journal of the American Medical Association*, presents some of the most substantial evidence to date linking aspects of climate change with harm to newborns. The study adds to a growing body of evidence that people of color bear a disproportionate share of the danger from pollution and global warming. Not only are communities of color in the United States drastically more likely to be hotter than surrounding areas (a phenomenon known as the "heat island" effect), but they are also more likely to be located near polluting industries.

It is well-established that pregnancy outcomes are worse for women of African descent, but the study shows these outcomes are exacerbated by climate change, according to Rupa Basu, one of the paper's authors and the chief of the air and climate epidemiological section for the Office of Environmental Health Hazard Assessment in California. The research examined 57 studies published since 2007, that found a relationship between heat or air pollution and birth outcomes in the United States.

Higher Temperatures Linked to Premature and Stillbirths

The cumulative findings offer reason for concern that the toll on infants' health will grow as climate change worsens. Higher temperatures, which present an increasing issue as climate change causes more frequent and intense heat waves, are associated with an increase in premature births. Four of the studies found that high temperatures were tied to an increased risk of premature birth ranging from 8.6 percent to 21 percent. Low birth weights were also more common as temperatures rose.

The authors also examined two studies looking at the link between higher temperatures and stillbirths. One found that every temperature increase of 1 degree Celsius in the week before delivery corresponded with a 6 percent greater likelihood of stillbirth between May and September. Both studies affirmed racial disparities in the number of stillbirths.

Pollution Problems

The paper also looked for research examining the effects of pregnancy from greater exposure to two types of air pollution: ozone, also known as smog, and tiny particles called PM 2.5. Both types of pollution are becoming more prevalent as climate change worsens. The vast majority of the studies reviewed in the paper determined that ozone and PM 2.5 are also associated with preterm births, low birth weights and stillbirths. One study found that high exposure to air pollution during the final trimester of pregnancy was linked to a 42 percent increase in the risk of stillbirth.

Another study, looking at almost half a million births in Florida in 2004 and 2005, found that for every two miles closer a mother lives to a plant that uses garbage to produce energy, the risk of low birth weight increased by 3 percent. Living closer to power plants was also tied to a higher risk of preterm birth.

Mothers with asthma are at particularly high risk. One study found that severe preterm birth, occurring fewer than 28 weeks into pregnancy, increased by 52 percent for asthmatic mothers exposed to high levels of air pollution. Most of the studies examining the link between air pollution and preterm birth or low birth weight found that the risks are greater for African American mothers.

Lifelong Effects

Premature birth and low birth weight can have consequences that last a lifetime, affecting such things as brain development and vulnerability to

disease, according to Nathaniel DeNicola, another of the paper's authors and an assistant professor of obstetrics and gynecology at George Washington University's School of Medicine and Health Sciences.

That increased risk adds to the already existing disproportionate burdens faced by women of African descent when it comes to pregnancy. Mothers of African descent are 2.4 times more likely to have children with low birth weight than white women, a 2018 study found. (*See,* https://mhnpjournal.biomedcentral.com/articles/10.1186/s40748-018-0084-2)

An analysis published last year found that the risk of stillbirth was as much as twice as great for mothers of African descent as for caucasian mothers across a number of wealthy countries. (*See,* https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002838)

The particular vulnerability of African American mothers to heat and air pollution is likely the result of systemic problems, according to the authors. African Americans are more likely to live close to power plants and other sources of air pollution, and may be less likely to have air conditioning in their homes or less able to afford higher electrical bills, or to live in neighborhoods with green spaces that can help keep temperatures down and mitigate pollution.

Compounding the risks from temperatures and pollution, research has shown that communities of color tend to have less access to medical assistance, and that patients of color tend not to receive equal levels of treatment.

Conclusion and Implications

Climate change permeates every aspect of our lives, and often exacerbates existing systemic issues. The fight against global warming must take into account its practical effects, and the evidence that the changing planet does not impact all communities—or all nations—equally. A just approach to combating climate change must involve equitable policies that address structural racism in order to mitigate the dual harms of rising temperatures and pollution on infants, the most vulnerable among us. For more information on the paper, *see:* https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2767260?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=061820.

(Jordan Ferguson)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

COVID-19 Shelter-in-Place Temporarily Reduces Emissions

In response to the ongoing COVID-19 health crisis, governments across the world have instituted shelter-in-place and forced confinement policies. These policies have radically shifted patterns of human activity and resource consumption, leading many to wonder how this crisis has affected greenhouse gas (GHG) emissions.

A team of researchers lead out of the University of East Anglia set out to answer this question. Because active monitoring of global GHG emissions is limited, the team used activity data from six major economic sectors as a surrogate for emissions: power generation, industry, surface transport (*e.g.*, cars, trains), public buildings and commerce, residential, and aviation. Data from these major sectors are collected from 69 countries (representing 97 percent of global CO_2 emissions). Based on the policies implemented, each area was assigned a "confinement index" (CI) that reflects the stringency of the shelter-in-place policies from zero (*e.g.*, no restrictions), to three (*e.g.*, mandatory national lockdowns for all but essential workers). The team then estimated emissions reductions associated with each sector and each CI.

The study finds that from January 1 to April 30, 2020, the COVID-19 shelter-in-place policies reduced daily global GHG emissions by approximately 8.6 percent, compared to average emissions in 2019. At the peak of confinement in early April, the decrease was as high as 17 percent. The largest contributing economic sector to the total emissions change was the surface transportation sector (36 percent reduction). While the aviation sector had the largest decrease in activity, it contributed to a much smaller fraction of overall global GHG emissions. The study, which concluded in late April, also analyzed the potential emissions impacts of three potential post-COVID recovery paths. Unsurprisingly, the longer it takes to recover, the larger the anticipated reduction in annual GHG emissions.

As the authors highlight, the temporary emissions reduction from COVID-19-related policies is not a sustainable way to meet global climate goals. While global pandemics are certainly not a desirable or reasonable solution for climate change, this study showcases how responsive global emissions are to governmental policies. Here, the shelter-in-place policies act as a case study for both how effective government policies are at shaping consumer, industrial, and transportation decisions and their resulting emissions, and how quickly governments can take action to fight a potential threat to human health. As the global community rebuilds following the pandemic, government agencies should consider long-term environmentally friendly policies.

See: Le Quéré, C., *et al*. Temporary reduction in daily global CO_2 emissions during the COVID-19 forced confinement. Nature Climate Change, 2020; https://doi-org/10.1038/s41558-020-0797-x

Carbon Capture and Storage's Role in Meeting IPCC Climate Goals

Carbon dioxide (CO_2) levels in the atmosphere are at an all-time high and scientists and policymakers alike are working to mitigate the climate change impact. One mitigation strategy is carbon capture and storage (CCS), which involves capturing CO_2 emissions from industrial exhaust streams and sequestering it where it cannot be released back into the atmosphere (typically underground). It is also possible to apply CCS directly to the air to reduce the existing CO_2 concentration. The Intergovernmental Panel on Climate Change (IPCC) has modeled a range of pathways for limiting climate change to 2°C warming by 2100, and large-scale use of CCS is required in nearly all of them.

A recent study by Zahasky of University of Wisconsin-Madison and Krevor of Imperial College London analyzed the rate at which CCS technology and sequestration capacity would need to grow in order to meet these IPCC goals. The researchers first established a baseline by estimating that between 1996 and 2020, CO_2 storage capacity has grown at an annual rate of 8.6 percent, with the current storage

rate around 30 MT of CO_2 per year. If CCS capacity continues at this growth rate through 2100, cumulative CO_2 storage will reach 441 GT in 2100, a significant mitigation, but still well below the median IPCC pathway of 865 GT of CO_2 stored. In order to meet the more ambitious IPCC pathway of 1,218 GT of CO_2 stored by 2100, the annual growth rate of storage capacity would need to be at least 10 percent. The study determined, however, that there are trade-offs between growth rate and required storage capacity. The slower the growth rate, the more actual space required in order to meet this same 1,218 GT goal. For instance, if CCS storage capacity increases at a rate of 10.6 percent per year, 2,692 GT worth of space is actually required in order to sequester 1,218 GT of CO_2 by 2100. If the annual growth rate can be pushed even higher, to 12.1 percent beginning in 2030, then only 1,505 GT worth of actual space is required to meet the same goal. A similar trade-off is seen if the increase in growth rate is delayed beyond 2030.

The researchers acknowledged the complexity of this trade-off: the ability for storage capacity to grow at a rate of 10-12 percent will require significant technological innovation and government incentives, but on the other hand, total geological storage capacity is finite Previous studies estimate the total capacity at 10,000 GT, but with significant uncertainty. Further research must be done to reduce this uncertainty and provide a more accurate upper bound on available storage capacity. This study determined that only 2,700 GT worth of capacity is required to meet IPCC targets, but research should be done to verify the availability of this capacity. The researchers acknowledged that external factors such as land regulations, government policies, and economic feasibility may reduce the total global storage space to only 400 GT, and the trade-offs illustrated by this study may help guide decisions to ensure there are adequate resources for carbon capture and storage to successfully contribute to IPCC climate goals.

See: Christopher Zahasky, Samuel Krevor. Global geologic carbon storage requirements of climate change mitigation scenarios. Energy & Environmental Science, 2020. https://doi.org/10.1039/d0ee00674b

Increasing the Feasibility of Carbon Capture

Carbon capture is the process by which carbon dioxide (CO_2) is separated from a gaseous mixture such as air or exhaust from combustion processes, so that it can be utilized or stored. According to the IPCC's recent Special Report on Global Warming at 1.5 degrees Celsius, carbon capture and storage (CCS) will be important to mitigating the impacts of climate change. However, current CCS technologies are still in development, are expensive, and have high operation and regeneration energy requirements.

Researchers in Australia developed a new nanocomposite material that combined metal organic frameworks (MOFs), magnetic nanoparticles, and porous hydrophobic polymers to increase the adsorption of CO_2 from combustion emissions. The CO_2 in a gaseous mixture selectively sticks to the material and then a regeneration process is applied to remove the purified CO_2 from the adsorbent so that it may be stored or otherwise utilized.

The goal of the study was to develop an effective regeneration process to reduce energy required for carbon capture at power plants and industrial processes. Using the new nanocomposite material and a magnetic induction swing adsorption (MISA) regeneration process, the study experiments showed an energy requirement of 0.36 kWh per kg CO_2 adsorbed, which is 45 percent less than existing CCS adsorption technologies which use amines, such as monoethanolamine (MEA). The composite was able to adsorb CO_2 at rate of 3.13 kg CO_2 per hour per kg of composite. The study experiments confirmed, however, that MOFs performance is limited in wet conditions, which reduced the adsorption rate by half to 1.16 kg CO_2 per hour per kg composite.

This study sets the record for low energy cost of an adsorbent material, and is an important step forward in terms of reducing the energy penalty and costs of CCS. Future work should build on the novel adsorbent and regeneration process to work towards a CCS technology that is low cost, scalable and effective across a range of CO_2-emitting process conditions.

See: Muhammad Munir Sadiq Kristina Konstas Paolo Falcaro Anita J. Hill Kiyonori Suzuki Matthew R. Hill. Engineered Porous Nanocomposites That Deliver Remarkably Low Carbon Capture Energy Costs. Cell Reports Physical Science, 2020, https://doi,org/10.1016/j.xcrp.2020.100070

Natural Climate Solutions and Global Warming Impacts

To effectively minimize the risks associated with global warming, a combination of strategies will need

to be employed. While reducing greenhouse gas emissions is a major piece of the puzzle, there are additional approaches that can aid in the mitigation of global warming impacts. One such approach has been titled the "negative emissions" approach, which involves storing carbon in naturally occurring biological reservoirs. Forests, soils, and wetlands represent naturally occurring biological reservoirs that aid in carbon sequestration by reducing greenhouse gas fluxes.

In a recent study prepared for the American Geophysical Union, Crusius *et al.* aim to explore the effects of enhancing biological reservoirs on future conditions by utilizing a numerical model to simulate future CO_2 emissions and climatic response. In terms of natural mitigation, tropical forests yield maximum mitigation potential among the naturally occurring biological reservoirs, followed by non-forested soils, then saltmarshes, mangroves, and seagrasses. In addition, slowing tropical deforestation represents a significant step in reducing avoidable greenhouse gas emissions. As shown by Crusius *et al.*, the implementation of the natural climate solutions explained above, paired with reductions in fossil fuel emissions, could keep the average global post-industrialization temperature rise below 1.5°C. Relying on natural climate solutions can accelerate global warming mitigation compared to reducing fossil fuel emissions alone.

An accelerated approach to global warming mitigation is essential, given that natural climate solutions are at risk of stopping or reversing due to global warming. If the impacts of climate change continue to worsen, the carbon stored in biological reservoirs could be released back into the atmosphere, offsetting emissions reduction efforts. In addition, deforestation contributes to the reduction in availability for carbon sequestration in the natural environment. In the event that carbon storage within biological reservoirs is depleted, future cumulative emissions could be similar to those expected in the absence of natural mitigation altogether. This conclusion highlights the importance of taking immediate action and understanding how to maximize the carbon storage benefits in the natural environment.

See: Crusius, J. (2020). "Natural" climate solutions could speed up mitigation, with risks. Additional options are needed. Earth's Future, 8, e2019EF001310. https://doi.org/10.1029/2019EF001310
(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

CALIFORNIA DWR, DESPITE DRY CONDITIONS, INCREASES STATE WATER PROJECT WATER DELIVERIES—BUREAU OF RECLAMATION INCREASES WATER ALLOCATIONS FROM THE CENTRAL VALLEY PROJECT

The California Department of Water Resources (DWR) recently announced it would increase the previously planned 2020 water deliveries from the State Water Project (SWP) from 15 percent to 20 percent. DWR was able to increase the water delivery allocations to 29 agencies (SWP Contractors) due to the Sierra snowpack conditions resulting from above-average precipitation in May. The U.S. Bureau of Reclamation (Bureau) also recently announced that water allocations from the Central Valley Project (CVP) are increasing at a rate of 5 percent.

Background

The SWP is the largest state-built water and power project in the nation, with over 700 miles of canals and pipelines, 20 pumping plants, four pumping/generating plants, five hydro-electric power plants, 33 storage facilities and 21 reservoirs and lakes. The SWP has a total reservoir storage capacity of 5.8 million acre-feet, in addition to the water already in the delivery system and delivers an average of 2.4 million acre-feet of water annually through its system.

Construction of the SWP started in the 1960s with the first water deliveries to the Bay Area in 1962 and into Southern California in 1972. The SWP has delivered over 70 million acre-feet of water since its first delivery in 1962. Today, the SWP delivers water to 29 SWP Contractors who in turn deliver water to over 23 million Californians and over 750,000 acres of irrigated farmland. The SWP also delivers water to other public agencies and provides water for wildlife and recreational uses. Approximately 70 percent of SWP deliveries are for urban use and 30 percent are for agricultural use.

The SWP Contractors take deliveries of water from the SWP, pursuant to long-term contracts (Water Contracts) that were entered into when the SWP was created. These Water Contracts obligate the SWP Contractors for the costs of constructing, operating and maintaining the SWP facilities, and for the water that is delivered to them through the SWP facilities. Although SWP Contractors are entitled to 4.2 million acre-feet of water, the SWP is only capable of deliveries on average of between 2.5 million and 3.5 million acre-feet of water.

2020 Annual Water Deliveries

Each October, the 29 SWP Contractors apply to the SWP for the following year's water allocation deliveries, up to the maximum allocation authorized in their individual Water Contracts. Each December, DWR publishes the allocation amounts for the coming year. The annual water allocations are based on several factors, including: 1) historical water supply data, 2) current reservoir storage, and 3) amount of water requested by the SWP Contractors. After the annual allocation is made, DWR continues to monitor climatic conditions, reservoir levels and Sierra snowpack, and may adjust the allocations accordingly. An initial allocation of 10 percent was announced in December 2019 due to a very dry winter. This allocation was increased to 15 percent in January 2020. In May 2020, DWR announced an increase from 15 percent to 20 percent due to the above-average precipitation brought by the recent May storms.

2019 Dry Winter and 2020 May Storms

DWR reported that this year's snowpack was the eleventh driest on record since 1950, and precipitation was the seventh driest on record since 1977. Despite the dry winter, May storms delivered 181 percent of average precipitation for the northern Sierra for this time of year allowing for DWR to slightly revise upward its allocation.

The Central Valley Project

The federal CVP, which is operated by the Bureau, delivers 7 million acre-feet of water on average

each year to irrigate approximately 3 million acres of California lands, and supplies drinking water for more than 1 million households. The CVP has long-term agreements to supply water to more than 250 contractors in half of California's 58 counties. Deliveries by the CVP include providing an annual average of 5 million acre-feet of water for farms; 600,000 acre-feet of water for municipal and industrial uses; and water for wildlife refuges and maintaining water quality in the Sacramento-San Joaquin Delta. The construction of the CVP helped propel California to becoming the largest agriculturally productive state in the country, providing 25 percent of the nation's table food. California has led the nation in agricultural and dairy production for the last 50 years.

The Bureau's recent adjustment in allocation results in water users on the west side of the San Joaquin Valley receiving a 5 percent increase in water allocation from 15 to 20 percent of their contracted amount. Municipal and industrial users saw a five percent jump to 70 percent of their contracted amount.

Conclusion and Implications

The recent announcements by the Department of Water Resources and U.S. Bureau of Reclamation are welcome news to water consumers throughout the state. While the recent spring storms helped to mitigate low snowpack conditions, total allocations remain disappointing for most State and CVP Contractors in response to remarkable dry conditions. The Contractors and the communities they serve continue to monitor SWP and CVP trends and to develop local projects and programs promoting resource conservation.
(Chris Carrillo, Derek R. Hoffman)

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY CONSIDERS 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 appli-

cation 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 and recent efforts by the Trump administration to relax enforcement actions, there were fewer items to report on this month.

•May 21, 2020—The U.S. Environmental Protection Agency (EPA) has settled a case against Norlite, LLC to resolve past violations of the Clean Air Act related to the testing of their hazardous waste combustor (HWC) emissions and setting of operating parameter limits at its Cohoes, New York facility. The facility was found to be violating EPA's HWC Maximum Achievable Control Technology (MACT) requirements. EPA has been monitoring the facility's actions as it came into compliance with these requirements and the settlement announced requires the payment of $150,000 for the past violations. This action is separate from the investigation of recent concerns voiced regarding the incineration of fire-fighting foam at Norlite. The violations resolved by the announced settlement were identified during an EPA inspection in 2015 and a review of data going back to 2012. The inspection and data review revealed exceedances of operating limits, called Operating Parameter Limits or OPLs. In March 2015, EPA conducted a compliance evaluation inspection at Norlite's facility to assess the company's compliance with the HWC MACT. As part of the inspection, EPA requested production and operational data from Norlite for its kilns. EPA's review of Norlite's data revealed that the company had exceeded multiple OPLs on numerous occasions over the course of three years (2012- 2014). Specifically, Norlite exceeded the OPL for maximum gas exit temperature, which is necessary to control emissions of dioxins and furans, and it exceeded the OPL for minimum pressure drop in the scrubber, which impacts the ability to control emissions of hydrogen chloride, chlorine gas and particulate matter. Norlite subsequently submitted information to the EPA showing that it exceeded the applicable emissions limits for chromium, arsenic, and beryllium during a performance test the company conducted on December 7, 2017. As background, EPA issued an Administrative Compliance Order on May 18, 2016, directing Norlite to, among other things, come into compliance with the then-applicable OPLs and conduct additional performance testing to update the applicable OPLs for one of its kilns. Norlite conducted a Comprehensive Performance Test on Kiln 1 of its Cohoes facility in December 2017. The Clean Air Act requires that these performance tests be conducted every five years. Norlite had been alternating the kilns for which they conducted the performance tests during each five-year cycle. Norlite demonstrated compliance with the Clean Air Act requirements for Kiln 1 during the December 2017 performance test, which also re-established the operating parameter limits for the kiln. The EPA further pursued a penalty for the past violations, which is the subject of the settlement.

•May 28, 2020—EPA and the state of Kansas announced a settlement with HollyFrontier El Dorado Refining LLC (HollyFrontier) to address alleged Clean Air Act violations resulting from exceedances of emission limits and failure to comply with chemical accident prevention statutory and regulatory safety requirements at its El Dorado, Kansas, refinery. Under the terms of the agreement, HollyFrontier agreed to pay a $4 million civil penalty and make improvements to the refinery that will greatly reduce harmful air emissions of sulfur dioxide and particulate matter, two pollutants that can cause serious respiratory problems, as well as improve its risk management practices. The El Dorado refinery, one of the largest refineries in the Midwest, is subject to regulations that limit harmful air pollution emissions and protect communities from accidental releases of hazardous substances. According to EPA and the Kansas Department of Health and Environment, HollyFrontier

repeatedly violated regulations prohibiting visible smoke emissions from the refinery's main flare, resulting in releases of potentially harmful particulate matter. In addition, the company on several instances exceeded regulatory limits for hydrogen sulfide in fuel gas, failed to monitor for hydrogen sulfide, and failed to minimize emissions using good air pollution control practices, all of which resulted in harmful releases of sulfur dioxide. Further, EPA alleged that many of the Clean Air Act violations are repeat violations that were cited in a 2009 settlement involving the El Dorado refinery. The El Dorado refinery is also subject to statutory and regulatory requirements designed to prevent accidental releases of hazardous substances. EPA alleged that the company failed to design and maintain a safe facility, and failed to comply with chemical accident prevention regulations, including failure to inspect and test equipment and correct deficiencies in equipment. These prevention failures led to a September 2017 catastrophic release of naphtha, a flammable hydrocarbon mixture, which resulted in a fire and the subsequent death of one employee. Terms of the settlement include the installation of air pollution controls and upgrades at the refinery to reduce smoke from the flare, thereby reducing sulfur dioxide and particulate matter emissions. In addition, the company agreed to conduct audits of its risk management practices at the refinery and to perform corrective actions based on the audit results. The amount of injunctive relief is estimated to be at least $12 million. The consent decree lodged in the U.S. District Court for the District of Kansas is subject to a 30-day public comment period and final court approval.

•May 28, 2020—EPA announced three settlements with vehicle repair shops involved in the illegal sale and installation of aftermarket devices that were designed to defeat the emissions control systems of heavy-duty diesel engines. The companies: Innovative Diesel LLC in Elkton, Maryland; AirFish Automotive LLC in Laurel, Delaware; and Diesel Works LLC in Mt. Joy, Pennsylvania allegedly violated the Clean Air Act's prohibition on the manufacture, sale, or installation of so-called "defeat devices," which are designed to "bypass, defeat, or render inoperative" a motor vehicle engine's air pollution control equipment or systems. Illegally-modified vehicles and engines contribute substantial excess pollution that harms public health and impedes efforts by EPA, tribes, states and local agencies to attain air quality standards. Innovative Diesel agreed to pay a $150,000 penalty to resolve alleged Clean Air Act violations involving the sale of or offering for sale of defeat devices at its diesel truck repair facility. Innovative Diesel sold at least 4,876 devices designed to defeat emission controls on diesel trucks manufactured primarily by Ford Motor Co. The aftermarket products included hardware components and electronic tuning software, known as "tunes," that hack into and reprogram a vehicle's electronic control module to alter engine performance and enable the removal of filters, catalysts and other critical emissions controls that reduce air pollution. AirFish Automotive agreed to pay a $32,333 penalty to resolve similar Clean Air Act violations associated with the sale of 30 aftermarket defeat devices at its facility in Laurel, Delaware. Additionally, AirFish Automotive offered for sale nine aftermarket defeat devices on its company web site. Diesel Works agreed to pay a $22,171 penalty to resolve similar violations related to 18 sales and 15 instances of installation of performance tuning products, exhaust replacement pipes, and exhaust gas recirculation (EGR) delete kits. Today's vehicles emit far less pollution than vehicles of the past. This is made possible by careful engine calibrations, and the use of filters and catalysts in the exhaust system. Aftermarket defeat devices undo this progress and pollute the air we breathe. The emissions impact depends on the original vehicle design, and the extent of the vehicle modifications. EPA testing has shown that a truck's emissions increase drastically (tens or hundreds of times, depending on the pollutant) when its emissions controls are removed. Even when the filters and catalysts remain on the truck, EPA testing has shown that simply using a tuner to recalibrate the engine (for the purpose of improving fuel economy) can triple emissions of NOx. As part of the settlements, the companies did not admit liability for the alleged violations but have certified that they are now are in compliance with applicable requirements.

•May 29, 2020—Under a proposed settlement with the United States and the Commonwealth of Massachusetts, Sprague Resources LP will take steps to limit emissions of volatile organic compounds (VOCs) from oil storage tanks at seven facilities across New England. The terms of the proposed settlement are designed to bring Sprague into com-

pliance with federal air pollution control laws that regulate the emissions of VOCs from heated #6 oil and asphalt tanks, which can pose public health risks. The tanks covered under this settlement are located in Everett, Quincy, and New Bedford, Massachusetts; Searsport and South Portland, Maine; Newington, New Hampshire; and Providence, Rhode Island. This agreement resolves alleged violations by Sprague of federal and Commonwealth of Massachusetts clean air laws. Under the agreement: 1) Sprague will apply for revised state air pollution control permits for facilities in Massachusetts, New Hampshire, and Maine, where such permits are required, which will limit the amount of #6 oil and asphalt the company can pass through its facilities and will limit the number of tanks that can store #6 oil and asphalt at any one time. Under the agreement, Sprague must apply for permits for facilities in Everett and Quincy, Massachusetts, Newington, New Hampshire, and South Portland and Searsport, Maine; 2) A Sprague-owned facility in New Bedford, Massachusetts, will stop storing #6 oil and asphalt. This facility would be allowed to open one tank to store asphalt if it obtains a permit for that activity; 3) Sprague will install, operate and maintain carbon bed systems to reduce odors from several tanks in South Portland, Maine, and Quincy, Massachusetts, which have been the subject of odor complaints from nearby residents and 4) Sprague will pay a total of $350,000 in civil penalties, $205,000 to the U.S. government and $145,000 to the Commonwealth of Massachusetts.

•On June 5, 2020, the U.S. Environmental Protection Agency (EPA) reached a settlement with Hydrite Chemical Co. to resolve alleged violations of the federal Clean Air Act (CAA) chemical accident prevention regulations. Following an accidental chemical release at Hydrite's chemical manufacturing and distribution facility in Waterloo, Iowa, EPA inspected the facility in April 2019. At the time of the inspection, the facility contained over 10,000 pounds of anhydrous ammonia. EPA found various violations of the chemical accident prevention regulations during the inspection, including that Hydrite failed to calculate and report the amount of anhydrous ammonia it stored, failed to develop and implement procedures for safely handling anhydrous ammonia and responding to accidental releases, and failed to timely implement recommendations for the company's own compliance audits. Hydrite has now taken steps to return the facility to compliance. The company will pay a civil penalty of $79,900.

•On June 2, 2020, EPA, the New Jersey Department of Environmental Protection, and the New Jersey Division of Law announced a proposed settlement with the Somerset Raritan Valley Sewerage Authority to resolve alleged violations of the CAA and state permitting requirements associated with sewage sludge incineration at the Sewerage Authority's wastewater facility in Bridgewater, New Jersey. Under the proposed settlement, the Sewerage Authority will pay a $225,000 penalty for the violations, to be divided evenly between EPA and the State of New Jersey. The Sewerage Authority has operated two sewage sludge incinerators at its Bridgewater facility. EPA found that the Sewerage Authority had failed to demonstrate compliance with emission limits and failed to establish operating parameter limits that would be used to ensure compliance with emission limits for pollutants such as mercury. The Sewerage Authority also failed to satisfy performance testing requirements and submit required control and monitoring plans and reports, among other violations. New Jersey found the facility was in violation of state requirements as well. In 2017 and 2018, the Sewerage Authority failed to operate components associated with one sewage sludge incineration unit in accordance with its operating permit, which is a violation of the New Jersey Air Pollution Control Act and its implementing regulations. The Sewerage Authority has agreed to comply with all CAA requirements for one of its two units and has ceased operations at the other unit after a catastrophic failure occurred there. This closed unit has been taken out of the Sewerage Authority CAA operating permit. If the Sewerage Authority brings the unit back into use, it would be bound under the settlement to meet all state and federal permitting and operating requirements. As a state mitigation project, the Sewerage Authority has agreed to spend no less than $50,000 to implement a Project School Clean Sweeps Mercury Recovery Program to collect mercury thermometers and other mercury-containing equipment at five schools in Somerset and Middlesex Counties.

•On May 27, 2020, Harcros Chemicals, Inc. and MGP Ingredients, Inc. were sentenced in federal court in Topeka, Kansas. Both companies pled guilty to negligently violating the CAA. In 2016, a chlorine gas cloud formed over MGP Ingredients' facility in Atchison, Kansas when sulfuric acid was mistakenly combined with sodium hypochlorite. The release resulted in an evacuation of the nearby community and a shelter in place order in other areas. The companies have each paid a $1 million fine.

•In June 2020, the California Air Resources Board announced a settlement with Radiator Specialty Company of Indian Trail, North Carolina for $109,440. Radiator sold, supplied, offered, and/or manufactured for use in California a carburetor or fuel-injection air intake cleaner product containing volatile organic compounds exceeding state regulatory limits. Radiator has modified the product to meet regulatory requirements.
(Allison Smith)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT SENDS LAWSUITS ALLEGING PUBLIC NUISANCE AGAINST BIG OIL BACK TO STATE COURTS

City of Oakland v. BP PLC, ___F.3d___, Case No. 18-16663 (9th Cir. May 26, 2020);
County of San Mateo v. Chevron Corporation, ___F.3d___, Case No. 18-15499 (9th Cir. 2020).

Oil companies lost a pair of court battles in May 2020 that could lead to further litigation seeking damages for the impacts of climate change. The Ninth Circuit rejected arguments by energy companies and ruled that state courts are the appropriate forum for lawsuits alleging that oil companies promoted petroleum as environmentally responsible despite knowledge it was contributing to drought, wildfires, and rising sea levels.

Background

The lawsuits claim Chevron, Exxon Mobil, ConocoPhillips, BP, Royal Dutch Shell, and other companies created a public nuisance and should pay for damage from climate change—including helping to build sea walls and other infrastructure to protect against the impacts of global warming—which could result in tens of billions of dollars of construction. The Ninth Circuit's ruling overturned a decision by a federal judge to dismiss lawsuits brought by the cities of San Francisco and Oakland.

San Francisco City Attorney Dennis Herrera applauded the decision in a statement asserting that these companies:

> . . .should not be able to stick taxpayers with the bill for the damage they knew they were causing. We will continue to hold these companies accountable for their decades-long campaign of public deception about climate change and its consequences.

The rulings are a major step for local governments hoping to pursue this litigation. Yet it could take years before any lawsuits actually proceed to trial, if the current challenges even make it to that point. The rulings also face continued challenges that may require review by a larger panel of the Ninth Circuit and, potentially, even review by the U.S. Supreme Court.

A Pattern of Challenges

The Ninth Circuit's ruling is not the only federal decision that these cases are best brought before state courts. An appeals court in Virginia ruled that a similar case brought by the City of Baltimore belonged in Maryland courts, and federal district courts in other locations have issued similar decisions.

Some industry stakeholders, including a group affiliated with the National Association of Manufacturers, maintain that climate liability lawsuits should take the shortest path possible to the U.S. Supreme Court, in order to prevent years of court proceedings and the increased damages to the environment that may occur in the meantime. Chevron has not indicated whether it intends to appeal the Ninth Circuit's ruling, but said that the cases involve issues of federal law and policy and should not be resolved by state courts.

The rulings move these challenges closer to the discovery phase, which will allow the cities to request potentially damaging documents, depositions of top executives, and further information about the role oil companies have played in dissuading the American public about the dangers of climate change.

The Ninth Circuit's Decision

Denial of Cities' Motion to Remand Was Improper

Under the general "well pleaded complaint rule" a civil action arises under federal law when a federal question appears on the face of the complaint. However, there are two exceptions to the well-pleaded complaint rule. The first category of cases excepted

form the general rule are those that fall into a "special and small category" of state law claims that arise under federal law. The second exception is the "artful pleading doctrine," which allows removal to federal court where federal law completely preempts a plaintiff's state law claim. The Energy Companies argued both exceptions to the well-pleaded rule granted federal jurisdiction.

The court first considered Energy Companies' argument that the Cities' state law claim raised a substantial question of federal law, because it implicated a variety of federal interests including energy policy, national security, and foreign policy. The court disagreed. It reasoned that the question of whether the Energy Companies can be held liable for public nuisance based on the production and promotion of the use of fossil fuels and thus be required to spend billions on abatement, is no doubt an important policy question, but it does not raise a substantial question of federal law for the purpose of determining federal question jurisdiction. The court further explained, that the evaluation of the Cities' public nuisance claim would require factual determinations, and a state law claim that is fact bound and situation specific is not the type of claim for which federal jurisdiction lies.

The court next considered the Energy Companies' argument that the Cites' state law claim for public nuisance arises under federal law because it is completely preempted by the federal Clean Air Act (CAA). The court also disagreed with this contention. First, it determined that the exception does not apply because the CAA is not one of those three statutes recognized by the U.S. Supreme Court as having preemptive force. The court further found that the CAA's statutory language does not indicate that Congress intended to preempt every state law cause of action within its scope. Rather, the CAA includes a savings clause, which indicates Congress intended to preserve state-law causes of action. Lastly, the CAA's statement that "air pollution control at its source is the primary responsibility of states and local governments" further weighed against the Energy Companies' contention. Accordingly, the court held that the second exception to the well-pleaded complaint rule did not apply. The Circuit Court remanded the case to the District Court to determine whether there was an alternative basis for federal jurisdiction.

Dismissal for Failure to State a Claim was Improper

The Ninth Circuit next considered whether dismissal of the Cities' complaint for failure to state a claim was proper. The court held that although the District Court lacked jurisdiction at the time of removal, the Cities cured any subject matter jurisdiction defect by amending their complaints to include a public nuisance claim under federal law. Thus, at the time of dismissal, there was federal subject matter jurisdiction over the Cities' claim.

Further, the court reasoned that the Cities reserved their right to argue removal was improper when they amended their complaint to expressly state they were doing so in response to the District Court's ruling. Thus, the court rejected the Energy Companies' contention that the Cities' amended complaint waived the Cities ability to argue removal was improper.

Further, the Circuit Court of Appeals recognized that when a case is improperly removed to federal court, a District Court must generally remand the case to state court even if subsequent actions conferred subject matter jurisdiction. An exception to this rule exists when considerations of "finality, efficiency, and judicial economy" excuse the violation. The court held, however, that a dismissal for failure to state a cause of action, unlike a grant of summary judgement, is insufficient to present considerations of "finality, efficiency and judicial economy." Thus, the exception did not apply.

Personal Jurisdiction

Lastly, in a footnote, the Circuit Court declined to rule on whether the District Court lacked personal jurisdiction. It held that if on remand, the District Court determines the case must proceed in state court, the Cities may then move the District Court to vacate its personal jurisdiction ruling.

Conclusion and Implications

Allowing these cases leave to proceed in state court would grant the local governments behind them their preferred venue and could result in recovery against oil companies for their role in climate change. Suits of this complexity will take many years to resolve, but the Ninth Circuit's ruling is a first step towards allowing discovery to begin in these cases. Whether or not the local governments prevail, that

discovery process could provide information that will change the views of the public and underscore the role or major energy corporations in downplaying the effects of their businesses on climate change. The Ninth Circuit's decision in *City of Oakland* is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/26/18-16663.pdf; the court's decision in *County of San Mateo* is available here: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/26/18-15499.pdf. (Jordan Ferguson)

FIFTH CIRCUIT HOLDS CLEAN AIR ACT TITLE V PERMITTING DOES NOT ENCOMPASS RE-EXAMINATION OF PREVIOUSLY-ISSUED TITLE I PERMITS

Environmental Integrity Project v. U.S. Environmental Protection Agency, 960 F.3d 236 (5th Cir. 2020).

The Fifth Circuit endorsed a 2017 U.S. Environmental Protection Agency (EPA) regulatory order by which the agency reversed course in its implementation of the federal Clean Air Act's Title V permit program. In the decades since Title V's enactment, EPA had increasingly regarded Title V permitting as an occasion to re-examine the propriety of state permits previously issued under the act's Title I.

Background

The Clean Air Act (42 U.S.C. § 7401 *et seq.*, the act or CAA) experiment in "cooperative federalism" divides between the federal and state governments responsibility for "controlling and improving the nation's air quality." *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 821-822 (5th Cir. 2003). EPA is tasked with "formulating national ambient air quality standards," which the states implement. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 308 (2014). State Implementation Plans (SIPs) including, *inter alia*, procedures for implementing the act's Title I provisions regarding New Source Review (NSR). The NSR program requires operators to "obtain a preconstruction permit before building a new facility or modifying an old one." Title I requires that all state SIPs include certain provisions relating to NSR, including proscribing for new "major" emission sources (*i.e.*, those with "the potential to emit 100 tons per year of any air pollutant, *Util. Air Regulatory Grp.*, 573 U.S. at 310)) substantive requirements for issuance of preconstruction permits; NSR for "minor" emission sources entails less stringent substantive requirements.

In 2002, EPA adopted regulations allowing existing sources to a "Plantwide Applicability Limitation" or "PAL" permit that, for a ten-year term, allows expansion without the necessity for NSR, *i.e.*, "[t]he whole facility can avoid major new-source review for alterations if, as altered, the whole facility's emissions do not exceed levels specified in the PAL permit." As with SIPs and preconstruction permits, state's PAL programs and individual PAL permits must be reviewed by EPA.

Congress adopted Title V of the CAA in 1990 to consolidate in a single operating permit all substantive requirements a pollution source must comply with, including preconstruction permits previously issued under Title I of the Act." Title V permits must:

> . . .include four kinds of contents: (1) 'enforceable emission limitations and standards,' (2) a compliance schedule, (3) a monitoring and recordkeeping requirement, and (4) 'such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.' 42 U.S.C. § 7661c(a).

EPA's implementing regulations for Title V define "applicable requirements" as:

> (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan. . .; [and]

> (2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I. . . .40 C.F.R. § 70.2. State SIPs and PAL programs, and individual state-issued preconstruction, PAL program and Title V permits—all are subject to EPA review for conformance with the CAA, with EPA review including public notice and comment periods. In the event that third parties do not agree with an EPA decision not to object to a state program or permitting decision, third parties can petition EPA, and if the agency denies a petition, seek judicial review.

In 2012, ExxonMobil sought to revise its Title V permit to allow an expansion of its facility in Baytown, Texas. ExxonMobil had previously obtained a PAL permit that, effectively, allowed it to obtain a preconstruction permit for the expansion as a minor, rather than major, source. The Texas Commission on Environmental Quality revised ExxonMobil's Title V permit to incorporate a Title I permit for a minor new source. The public interest petitioner, Environmental Integrity Project (EIP) challenged that decision, arguing that Title V review should encompass a review of the validity of any underlying NSR—here, a review of the validity of the PAL, and specifically EIP's argument that the PAL impermissibly shielded the new facility from review as a major source. The Texas Office of Administrative Hearings and EPA both endorsed the state agency's action; a petition for judicial review followed. EPA's decision rested on its 2017 "*Hunter* Order," *In the Matter of PacifiCorp Energy, Hunter Power Plant, Order on Petition No. VIII-2016-4* [*Hunter* Order], at 11 (Oct. 16, 2017), by which EPA articulated its view that "the intent of title V is not to second-guess the results of any State's NSR program." *Ibid.*

The Fifth Circuit's Decision

The Fifth Circuit reviewed the *Hunter* Order under the "weak[]" deference accorded agency decisions pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), rather than the more deferential standard set forth in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), "because, independent of *Chevron*," the Court found EPA's "reasoning persuasive as a construction of the relevant provisions of Title V and its implementing regulations."

Recognizing a Significant Course Correction for EPA

The *Hunter* Order represents a significant course correction following EPA's increasingly expansive interpretation of Title V's "applicable requirements" language and that phrase's regulatory definition in 40 C.F.R. § 70.2. As delineated in the *Hunter* Order, EPA initial interpreted Title V narrowly as requiring that title I preconstruction permits were to be incorporated "without further review." However:

> . . .[a] few years later, EPA began drifting from this view, interpreting § 70.2(1) more broadly to allow the agency to 'examine the propriety of prior construction permitting decisions.'

At its limit, EPA was reviewing, in the context of a subsequent Title V permitting processes, state's issuance prior Title permits "for reasonableness and arbitrariness." The *Hunter* Order rejected this trajectory, returning EPA to:

> . . .its original view of Title V … constru[ing] § 70.2 such that the requirements described by subsection (1) are merely those contained in the facility's existing Title I permit.

Title V's Text—Congressional Intent

Turning first to Title V's text, the court found persuasive EPA's argument that Congress did not include "an explicit requirement that EPA review the 'substantive adequacy' of the underlying preconstruction permits during the Title V process." Further, the court found that Title V does not contain "any language guiding the agency on how to perform a review of that nature." In contrast, Title I provides EPA "with more stringent oversight authority," supporting the *Hunter* Order's conclusion that the agency has "a more limited role" under Title V. Further, "Title I is better geared for 'in-depth oversight of case-specific' state permitting decisions 'such as through the state appeal process." Fundamentally, the court found persuasive EPA's argument that "Congress did not intend to recapitulate the Title I process in Title V." As for section 70.2's regulatory definition of "applicable requirements," the court rejected EIP's argument that the "term encompasses *all* the act's requirements as applied to a particular source, and not simply the

requirements that happen to be contained in a Title I new-source permit." (Emphasis original.)

However, by use of the general term "applicable requirements" Congress did not intend to "hide elephants in mouseholes" by "alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *New York v. FERC*, 535 U.S. 1, 22. Reading "applicable requirements" in the context of § 766.1c(a), the Fifth Circuit concluded it as a "residual" clause that must be interpreted in light of the specific preceding terms (*U.S. v. Buluc*, 930 F.3d 383, 388-389 (5th Cir. 2019), here "'enforceable emission limitations and standards,' a compliance schedule, and a periodic monitoring report."

The *Hunter* Order Comported with Title V's Structure and Purpose

The Court also found the *Hunter* Order to comport with the structure and purpose of Title V, which was, per EPA, not intended to "add new substantive requirements." Rather, "Title V's purpose was to simplify and streamline source's compliance with the act's substantive requirements" by consolidating in one permitting document "all of the clean air requirements applicable to a particular source of air pollution" with the goal of promoting:

> . . .clarity and transparency. . .to the regulatory process to help citizens, regulators, and polluters themselves understand" the regulatory requirements applicable to a given source. *Sierra Club v. Johnson*, 541 F.3d 1257, 1260 (11th Cir. 2008). . . .This goal … is at cross-purposes with using the Title V process to reevaluate preconstruction permits.

The court also observed that Title V permits must be renewed every five years, *see*, 42 U.S.C. § 7661a(b)(5), tends to support the agency's view that Title V was not intended to serve as a vehicle for re-examining the underlying substance of preconstruction permits. Subjecting a source's preconstruction permit to periodic new scrutiny, without any changes to the source's pollution output, would be inconsistent with Title V's goal of giving sources more security in their ability to comply with the act. *See id*. § 7661a(b)(6).

Recognizing that EPA had changed its tune, the Fifth Circuit noted it "may still defer to its present position, 'especially' when the current view 'closely fits the design of the statute as a whole." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417-418 (1993). The petition was rejected.

Conclusion and Implications

A direct challenge to the *Hunter* Order is pending in the Tenth Circuit, *Sierra Club v. EPA*, Case No. 18-9507 (10th Cir.). A contrary result there could set up Supreme Court review based on a Circuit split. The Fifth Circuit's opinion is available online at: http://www.ca5.uscourts.gov/opinions/pub/18/18-60384-CV0.pdf.
(Deborah Quick)

EIGHTH CIRCUIT UPHOLDS BANKRUPTCY CLAIM DISCHARGE BARRING CLIMATE CHANGE SUITS BY CALIFORNIA MUNICIPALITIES

In re Peabody Energy Corporation, 958 F.3d 717 (8th Cir. 2020).

The Eighth Circuit Court of Appeals, on May 6, 2020, upheld a decision of the U.S. District Court which upheld a bankruptcy court order barring suits by three California local governments asserting various common law claims arising from the defendant-debtor's fossil fuel industry activities.

Background

Peabody Energy Corporation, an energy company headquartered in Missouri, filed for Chapter 11 bankruptcy in 2016, and, pursuant to a bankruptcy court-approved plan including a date by which governmental entities were required to file proofs of any claims they wished to assert, emerged as a reorganized corporation.

Shortly thereafter, three California local governments—San Mateo County, Marin County and the City of Imperial Beach—each sued Peabody and more than 30 other energy companies for their alleged contributions to global warming. The nearly identi-

cal lawsuits, filed in California state courts, asserted causes of action for "strict liability and negligence for failing to warn, strict liability for a design defect, negligence, trespass, and private nuisance." In addition, the lawsuits included causes of action for public nuisance, one on behalf of the people of California for which abatement was sought, and one on their own behalf for which disgorgement of profits was the claimed remedy. The facts alleged against Peabody "focused on acts occurring from 1965 to 2015" and alleged "sparingly":

> . . .that Peabody had exported coal from California, continued to export coal from California, participated in 'a national climate change science campaign' in 1991, and was linked to groups seeking to undermine the connection between the companies' fossil fuel products and climate change. None of the local California jurisdictions had filed proofs of claims in the Peabody bankruptcy.

Peabody sought an injunction from the bankruptcy court barring the local government lawsuits and requiring that they be dismissed with prejudice on the basis that the bankruptcy court-approved reorganization plan had discharged all claims against Peabody. In opposition, the California local governments argued their claims were exempted from the bankruptcy plan. The bankruptcy court and US. District Court both agreed with Peabody and this appeal ensued.

The Eighth Circuit's Decision

Post-Reorganization 'Governmental Claims'

Reviewing the bankruptcy court's order for abuse of discretion, the Eighth Circuit first analyzed whether the local government's claims were exempted under a provision of the Peabody bankruptcy plan allowing post-reorganization "governmental claims brought 'under any applicable Environmental Law to which any Reorganized Debtor is subject.'" Environmental Law was defined as "all federal, state and local statutes, regulations and ordinances concerning pollution or protection of the environment, or environmental impacts on human health and safety." These included a list of ten federal statutes such as the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Federal Insecticide, Fungicide and Rodenticide Act, as well as "any state or local equivalents of the" federal laws.

The local governments' non-nuisance, *i.e.*, common law, claims were, the Circuit Court of Appeals concluded, not "state or local equivalents" of relevant environmental laws because the phrase "state or local equivalents" references "equivalents to the ten federal statutes listed, not equivalents to 'statutes, regulations and ordinances concerning pollution'" The alternative interpretation urged by the local governments would render superfluous the second reference to "state" and "local."

Bankruptcy Plan Envisioned Common Law Claims

Further, the court reasoned that had the drafters of the plan intended to include common law claims in the Environmental Law carve-out they would have done so, particularly in light of their inclusion of the examples of federal statutes and the explicit limitation to "statutes, regulations and ordinances." The Eighth Circuit found the nuisance claims, which "rely on specific California statutes," to present a "closer call." Nonetheless, it held these too did not come within the carve-out, as:

> . . .unlike the federal statutes listed, nuisance claims have their roots in the common law and are often referred to as common-law claims, including in Missouri—the jurisdiction that Peabody calls home—whose laws may well have been the focus of the parties who drafted the carveout.

The court also found that the listed statutes are designed to remedy particular environmental problems. In contrast, nuisance law, while it may be used to resolve an environmental problem, does not focus on particular environmental problems. In fact, a nuisance can be something with no effect whatsoever on the environment—like something "indecent or offensive to the senses" or the sale of illegal drugs.

'Police or Regulatory Law' Claims

The California jurisdictions also relied on a reorganization plan exemption for governmental claims brought 'under any … applicable police or regulatory

law." The court agreed with the bankruptcy court that this provision was reasonably interpreted to distinguish between governmental action that "would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate" is not an exercise of the police or regulatory power, but is rather the act of a creditor, the "so-called pecuniary interest rule." *See*, 11 U.S.C. 362(b)(4) and *In re Commonwealth Cos.*, 913 F.2d 518, 523 (8th Cir. 1990).

Remedy of Disgorgement of Profits—The Pecuniary Interest Rule

Among the remedies sought by the local governments was disgorgement of profits, which if awarded would "diminish the value of the other creditors' ownership stakes in the reorganized Peabody," allowing the California governments to obtain a portion of the bankruptcy estate "without ever having themselves participated in the bankruptcy proceedings"—precisely the outcome the pecuniary interest rule was designed to preclude. The representative public nuisance claims also fell afoul of the pecuniary interest rule, notwithstanding that "California law does not permit" the recovery of "damages under that theory" but rather would limit relief to "an equitable decree ordering Peabody to abate the nuisance." But "[t]he difficulty with this argument is that, even though California law limits the recovery on this claim to equitable relief, that relief can include obligations to pay money," for example to a receiver who would be charged with carrying out a clean-up.

Lastly, the court held the California jurisdictions filed their lawsuits "as victims of alleged torts, not because they are exercising regulatory or police authority over Peabody," authority it would be difficult for them to exercise over "an out-of-state company acting outside" their jurisdictional boundaries.

Conclusion and Implications

Creative, broadly drawn climate change litigation may increasingly run into fossil fuel industry bankruptcies as a bar, whether bankruptcies result from purely financial exigencies or are more strategically deployed. The Eighth Circuit's decision is available online at: https://ecf.ca8.uscourts.gov/opndir/20/05/183242P.pdf.
(Deborah Quick)

DISTRICT COURT LEAVES KLAMATH RIVER PROJECT INTERIM PLAN IN PLACE—DENIES MOTION TO LIFT STAY ON LITIGATION OVER CHALLENGE TO SALMON BIOLOGICAL OPINION

Yurok Tribe, et al. v. U.S. Bureau of Reclamation, et al.,
___F.Supp.3d___, Case No. 3:19-cv-04405-WHO (N.D. Cal. May 29, 2020).

On May 29, the U.S. District Court for the Northern District of California declined to lift a stay on litigation between the Yurok Tribe and the U.S. Bureau of Reclamation (Bureau) that would have rekindled the tribe's lawsuit challenging a proposed operations plan for the Klamath River Project and related Biological Opinion (BiOp) that the tribe believes would, if implemented, jeopardize the continued existence of salmon and other aquatic species that utilize the Klamath River. Instead, the federal court's ruling leaves in place an interim plan that requires additional water for certain endangered fish species, provided certain hydrological and water supply conditions are met.

Background

The Yurok Tribe (Tribe) filed suit in 2019 challenging the U.S. Bureau of Reclamation's operating plan for the Klamath River Project (Project) for the years 2019-2024. The lawsuit also challenged a related Biological Opinion prepared by the National Marine Fisheries Service (NMFS), which concluded that the Bureau's proposed operation of the Project would not jeopardize the existence of certain fish species. The Project is located in Klamath County, Oregon, and Siskiyou and Modoc counties in northern California. The Project consists of several reservoirs, including Upper Klamath Lake, Clear Lake, and Ger-

ber Reservoir, which serve more than 230,000 acres of farmland in addition to providing recreational water sport opportunities. The Project also regulates water flows on which various endangered aquatic species rely for habitat, reproduction, and rearing, including the Southern Oregon/Northern California Coast coho salmon, lost river sucker, and short nose sucker.

The federal Endangered Species Act (ESA) prohibits the "take" of any species that is listed as threatened or endangered under the ESA without a permit. Under the ESA, "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." For marine and anadromous species like salmon, the Secretary of Commerce is responsible for listing threatened or endangered species, typically following a petition process by interested persons. In addition to listing a species as endangered or threatened, the Secretary must also designate "critical habitat" for each species, to the maximum extent prudent and determinable.

A federal agency such as the Bureau is required under the ESA to consult with NMFS to ensure that any action proposed by the agency will not likely result in jeopardizing the continued existence of a marine or anadromous species, nor adversely affect designated critical habitat. If, it is determined that a project is likely to adversely affect a listed species or designated critical habitat, the action agency initiates "formal consultation" by providing information related to the potential effects of the agency's action to NMFS, ordinarily via submission of a biological assessment. At the end of formal consultation, NMFS prepares a Biological Opinion. The Biological Opinion contains NMFS' analysis supporting its determination that the proposed action is or is not likely to jeopardize the continued existence of the species or adversely modify critical habitat. If a jeopardy or adverse modification determination is made, the Biological Opinion is referred to as a "jeopardy opinion" and must ordinarily identify reasonable and prudent alternatives according to which a project may move forward without exposing the agency to liability under the ESA. If a Biological Opinion determines that the project is not likely to jeopardize the continued existence of the species, and is thus a "no jeopardy" opinion, the federal action agency is still subject to the terms and conditions of the incidental take statement and any reasonable and prudent measures.

NMFS' BiOp, issued in 2019, is a "no jeopardy" opinion, because it concluded that the Project would not likely jeopardize the continued existence of Southern Oregon/Northern California Coast coho salmon and southern resident killer whales, and would not adversely modify critical habitat for coho salmon. The Tribe filed its lawsuit on July 31, 2019 challenging the Project and the BiOp, and also filed a motion for preliminary injunction seeking up to 50,000 acre-feet of supplemental water to be released for the benefit of coho salmon. After it was discovered that certain computer modeling information was incorrect as it related to critical habitat for coho salmon and the Bureau's determination that the Project would not adversely modify such habitat, Reclamation re-initiated formal consultation with NMFS. The Tribe and the Bureau consequently agreed to stay the litigation until September 2022 in exchange for operating the Project in accordance with an "interim plan" from April 2020 to March 2023.

Under the interim plan, the Bureau would augment flows for coho salmon by as much as 40,000 acre-feet in the May-June period, provided that lake levels in Upper Klamath Lake did not drop below 4,142 feet and the supply in Upper Klamath Lake was forecast to be above 550,000 acre-feet during those months. In the event Upper Klamath Lake falls below that level or stored water is less than 550,000 acre-feet, the interim plan requires the Bureau to consult with NMFS to reallocate water to meet the needs of protected fish species, and obtain the input of the Tribe and other interested parties. Absent any such reallocation, the interim plan's 40,000 acre-foot allocation to coho salmon is comprised of 23,000 acre-feet from the Project's agricultural allocation and 17,000 acre-feet from Upper Klamath Lake. On April 1, the Bureau forecast that Upper Klamath Lake supply would be 577,000 acre-feet, above the 550,000 acre foot threshold required to release 40,000 acre-feet of augmented flows for coho salmon.

The District Court's Decision

In early May, despite its April 1 forecast, the Bureau reduced augmentation flows for coho salmon because lake levels at Upper Klamath Lake dropped below 4,142 feet. The Tribe, deeming the Bureau's determination not to release augmented flows for coho salmon a violation of the interim plan, filed an emergency motion asking the federal court to lift the

litigation stay and to re-instate the Tribe's complaint and motion for preliminary injunction. However, instead of 50,000 acre-feet of water for coho salmon, the Tribe's motion only sought 30,000 acre-feet of water—23,000 acre-feet for coho salmon, and 7,000 acre-feet for ceremonial and cultural purposes related to the Tribe's Boat Dance. In its reply to the Bureau's opposition to the Tribe's emergency motion, the Tribe eliminated its ask for 7,000 acre-feet for the Boat Dance and reduced its ask for coho salmon flows to 16,000 acre-feet.

In support of its motion, the Tribe argued that the Bureau was deviating from the interim plan, because: 1) once the Bureau forecasted on April 1 that Upper Klamath Lake supply would be sufficient to release augmentation flows for coho salmon, it was required to make those releases, 2) the Bureau lacked flexibility in eliminating augmentation flows for coho salmon, and 3) the Bureau failed to properly coordinate with the parties as required by the interim plan. The Bureau opposed the Tribe's motion, arguing, among other things, that an exceptionally dry April failed to generate sufficient water needed to exceed 550,00 acre-feet in Upper Klamath Lake supply that was a prerequisite to release 40,000 acre-feet for coho salmon. The Bureau also argued that releases from Upper Klamath Lake could impact ESA-listed Lost River and short nose suckers, and therefore it could not prioritize releasing flows for coho salmon over the needs of the suckers. Instead, the Bureau maintained that it had the needed flexibility to make reallocations to coho salmon flows after consulting with NMFS and receiving input from the Tribe and other parties under the interim plan.

District Court's Denies Motion to Lift Litigation Stay

Following a hearing on the motion, the court denied the Tribe's motion to lift the litigation stay and reinstate its motion for preliminary injunction, and therefore denied the Tribe's request for temporary restraining order as moot. The court interpreted several provisions in the interim plan to provide the Bureau with the flexibility to make adjustments to allocations for augmented flows for coho salmon, and found that the Bureau had properly consulted with NMFS and obtained the input of the Tribe and other parties before making the reallocation. The court paid particular attention to the interim plan's requirement that the Bureau obtain scientific input from its own and NMFS' biologists through a technical advisory process established by the interim plan related to the needs of ESA-listed species in the event Upper Klamath Lake levels would drop below 4,142 feet. Following this consultation, the Bureau determined that augmented releases for coho salmon would imperil endangered sucker species in Upper Klamath Lake given low lake levels and dry conditions, and thus declined to continue augmentation releases. Accordingly, the court found that the Bureau had not violated the interim plan that would justify lifting the litigation stay. Because the Bureau did not violate the interim plan, the court determined that the litigation stay should not be lifted.

Conclusion and Implications

The court's ruling leaves the interim plan in place, and the litigation initiated by the Tribe remains stayed pending development of a new Project operations plan and Biological Opinion. While it is unclear if climatic conditions will continue to require Reclamation to make adjustments to water flows, the interim plan apparently provides sufficient flexibility for the Bureau of Reclamation to make needed adjustments to water releases to provide, to the extent possible, for the demands of various listed fish species and other water users.
(Miles Krieger, Steve Anderson)

CALIFORNIA COURT OF APPEAL HOLDS SEEKING STREAMBED ALTERATION AGREEMENT FROM DEPARTMENT OF FISH AND WILDLIFE IS NOT A 'FURTHER DISCRETIONARY APPROVAL'

Willow Glen Trestle Conservancy v. City of San Jose,
___Cal.App.5th___, Case No. H047068 (6th Dist. May 18, 2020).

In ruling on petitioners' second attempt to halt the demolition of the Willow Glen Trestle, the Sixth District Court of Appeal held that the act of seeking a new streambed alteration agreement (SAA) from the California Department of Fish and Wildlife (CDFW) for the previously reviewed project was not a "new discretionary approval," and therefore subsequent environmental review was not required.

Factual and Procedural Background

In 2014, the City of San Jose (City) approved a Mitigated Negative Declaration (MND) for the demolition and replacement of the Willow Glen Railroad Trestle, a wooden railroad bridge built in 1922. When the City approved the MND, the trestle was not listed in the California Register of Historical Resources. The Friends of the Willow Glen Trestle filed a lawsuit challenging the MND. The Superior Court concluded that substantial evidence supported a fair argument that the trestle was a historical resource, and the City was therefore required to prepare an Environmental Impact Report (EIR). The Court of Appeal remanded the matter to the trial court, holding that the substantial evidence standard of review, not the fair argument standard, applied to the City's determination of historical status. (*Friends of Willow Glen Trestle v. City of San Jose*, 2 Cal.App.5th 457 (2016).)

In May 2017, the California State Historical Resources Commission approved listing the trestle in the California Register of Historical Resources. Also, in 2017, the City's SAA with CDFW expired. The City submitted a new notification to CDFW, which subsequently issued a final SAA in August 2018. Petitioners filed a lawsuit alleging that entering into the SAA was a discretionary approval by the City that triggered supplemental review under Public Resources Code § 21166 of the California Environmental Quality Act (CEQA).

The trial court temporarily enjoined the City from proceeding with demolition of the bridge, but ultimately denied the petition. The trial court found that the City's actions in connection with the 2018 SAA were not a discretionary approval—reasoning that the City's approval of the 2014 MND included approval of the SAA.

Petitioners appealed the trial court's decision. Additionally, petitioners sought a writ of *supersedeas* from the Sixth District Court of Appeal, which was granted, enjoining the destruction of the bridge pending resolution of appeal.

The Court of Appeal's Decision

Public Resources Code § 21166 and CEQA Guidelines § 15162 require supplemental environmental review, in limited circumstances, when an agency must make a "further discretionary approval" for a project for which the agency has already completed review. Petitioners argued that the City's submission of a notification to CDFW in order to obtain a new SAA amounted to an approval by the City, requiring supplemental environmental review. The Court of Appeal disagreed, holding that approval of the SAA was an action by CDFW, not the City.

Petitioners argued that the City's act of seeking and accepting the SAA was a discretionary approval. Quoting the California Supreme Court in *Friends of College of San Mateo Gardens v. San Mateo Community College District*, 1 Cal.5th 937, 945 (2016) (*San Mateo Gardens*), the Sixth District Court of Appeal emphasized that §§ 21166 and 15162 limit the circumstances under which a subsequent or supplemental EIR must be prepared, and promote the interests in finality and efficiency. If every action in connection with a project were considered an "approval," the court said, each and every step of a lead agency would reopen environmental review under CEQA.

Petitioners also argued that different rules should apply because this was the City's own project, rather than a private project. Petitioners asserted that because the City retained discretion to reconsider or alter the project, its failure to abandon the project

was itself a new discretionary approval. The Court of Appeal rejected this argument, reiterating that the purpose of § 15162 is to limit subsequent environmental review. Additionally, the court stated that § 15162 makes no distinction between public and private projects.

The court concluded that the City was implementing the project when it submitted a new notification to CDFW and when it accepted the SAA. The only new approval was CDFW's, a decision which petitioners left unchallenged.

Conclusion and Implications

Applying the principles espoused by the California Supreme Court in *San Mateo Gardens*, the Court of Appeal offered further clarity on what triggers supplemental analysis under CEQA. It also serves as an important reminder to carefully track all further discretionary decisions made by responsible agencies—as failing to do so may forfeit any further challenge to a project.

https://www.courts.ca.gov/opinions/documents/H047068.PDF

(Elizabeth Pollock, Christina Berglund)

CALIFORNIA SUPERIOR COURT ISSUES ORDER DENYING WRIT CHALLENGE TO CUPERTINO HOUSING PROJECT APPROVED UNDER SB 35

Friends of Better Cupertino v. City of Cupertino, Case No. 18CV330190 (Santa Clara Super. Ct. May 6, 2020).

On May 6, 2020, Honorable Helen E. Williams of the Superior Court for the County of Santa Clara issued an order in *Friends of Better Cupertino v. City of Cupertino*, denying a controversial challenge to a developer's application to build a housing project on the site of the former Vallco Fashion Mall in the City of Cupertino (City). The case was originally filed in 2018, after the City approved the redevelopment of the large housing project under the streamlined procedures of "SB 35," codified as Government Code § 65913.4 (referred to herein as SB 35 or § 65913.4). Housing and climate change—many in the state feel the two issues are inseparable as climate change may in the near future dictate where housing can be built in a state already lacking affordable housing.

Factual Background

As a refresher, SB 35 was authored by Senator Scott Wiener and passed in 2017, as part of a comprehensive legislative package of housing bills intended to address California's housing crisis. The bill created a streamlined, ministerial approval process for infill developments in areas that have failed to meet their regional housing needs assessment goals. Following the passage of SB 35, a developer proposed to redevelop an outdated shopping mall in the City of Cupertino (City) with a mixed-use project which would include 2,402 residential units, half of which would be designated as affordable units. The City determined that the proposed project complied with SB 35's eligibility criteria for streamlined review and issued final approval in September 2018.

However, before the City even approved the project, petitioners had filed a petition for writ of mandate, claiming that the City had a ministerial duty to reject the application because the project was allegedly ineligible for streamlined review and approval. Petitioners also argued that the project failed to comply with certain objective planning and design standards that were prerequisites for streamlined review.

The Superior Court's Ruling

All of petitioner's claims were based on the assumption that the City had a ministerial duty to *reject* an application submitted for streamlined review if the project conflicts with objective planning standards set forth in § 65913.4, subdivision (a). Thus, the court's order was centered on the fact that petitioners were mistaken in assuming that SB 35's authorization for ministerial *approval* of eligible projects also imposed a corresponding ministerial duty to *reject* a nonconforming project. Acknowledging that there is no

appellate precedent on this issue, the court concluded that the statute does not impose a ministerial duty on agencies to undertake the review or to reject a nonconforming application.

Petitioners also argued that the project did not qualify for ministerial approval under SB 35 because the City made various discretionary decisions in evaluating the project application. This led the court to analyze whether project review and approval under the statute is actually a strictly ministerial process. Although SB 35 was meant to include ministerial, non-discretionary review, the court determined that an agency may still be required to make decisions that involve some element of discretion. The number, nature, and complexity of the enumerated eligibility standards and the application of unenumerated local standards necessarily take matters out of the domain of purely ministerial review. As such, the statute allows for a "hybrid review process" in which objective criteria are evaluated through a mechanism that is still adjudicatory in nature and involves the exercise of some agency discretion. Here, the City had no choice but to exercise some discretion in order to comply with § 65913.4. Accordingly, petitioners could not show that the City violated the statute.

Aside from the flawed premise for petitioner's claim for writ relief, the court determined that petitioners' substantive claims also lacked merit. Petitioners incorrectly treated the City's decision to approve the project as a purely ministerial one, but they failed to substantiate their arguments under a non-deferential standard of review and also did not present arguments capable of review under a deferential, abuse of discretion standard. Therefore, petitioners failed to show their entitlement to any writ relief. Further, the court was not impressed by petitioner's briefing, which was described as disorganized and creating more questions than answers.

Conclusion and Implications

The City of Cupertino has indicated that it is in the process of issuing permits to prepare the site for project development. It is unclear at this time whether petitioners plan to file an appeal of the trial court's order. While the trial court's ruling is not binding precedent, it is nevertheless an important win for project proponents that hope to benefit from the streamlining procedure of SB 35.
(Nedda Mahrou)

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