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

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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 SILs 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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ENVIRONMENTAL NEWS

NINE ORANGE COUNTY, CALIFORNIA WATER AGENCIES CONSIDER LITIGATION OVER PFAS CONTAMINATION

Nine Orange County, California water agencies are considering filing a lawsuit against chemical manufacturers of per- and polyfluoroalkyl substances, commonly known as PFAS, including 3M and DuPont, in order to fund cleanup of the "forever chemical" in groundwater in Orange County. PFAS contamination is an increasing concern nationwide, and states including California are currently implementing their own standards for the chemical. Accordingly, cleanup and removal costs associated with PFAS are rising.

Background

Per- and polyfluoroalkyl substances, commonly known as PFAS, are a large group of chemical compounds that do not occur naturally in the environment. PFAS substances are oil, water, temperature, chemical, and fire resistant. This makes them difficult to break down in the environment or through treatment. PFAS were first commercially produced in the 1940s. Two of the most commonly found PFAS chemicals, perfluorooctane sulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), are no longer manufactured in or imported into the United States.

PFAS can be found in firefighting foam, food packaging, commercial household products such as nonstick cookware, drinking water, and living organisms, including fish, animals, and humans. There is some scientific evidence that levels of exposure of PFAS may lead to cancer, low infant birth weights, immune system problems, and thyroid hormone disruption.

Currently, there is no federal regulation of PFAS as a hazardous waste or pollutant. In 2016, the U.S. Environmental Protection Agency (EPA) issued a Lifetime Health Advisory (LHA) of 70 parts per trillion for PFOS and PFOA combined, and a recommendation that water systems notify their customers when the combined PFOS and PFOA levels exceed the LHA. In February 2020, EPA announced its preliminary determination to regulate PFOS and PFOA in drinking water. Once an interagency review is complete, EPA will submit a national maximum contaminant level (MCL) proposal that will set the drinking water limit nation-wide.

In February 2020, the California State Water Resources Control Board (SWRCB) announced it would set response levels (RLs) of 10 parts per trillion (ppt) for PFOA and 40 ppt for PFOS. If a water system tests above the response levels for PFOA or PFOS, the water system is required to take the affected water source offline, treat the source, and notify its customers in writing. This action followed on the SWRCB's August 2019, decision to reduce the drinking water notification level (NL) from 14 to 5.1 ppt for PFOA and from 13 to 6.5 ppt for PFOS.

As a result of California's new response levels for PFOA and PFOS, water agencies across the State have temporarily removed wells from service as they begin treatment. In preparation for potentially more stringent standards, water agencies across the state are strategizing how to treat and remove the chemical from their water supply. In Orange County, specifically, 71 of 200 drinking water wells could be shut down due to PFAS levels.

The Orange County Water District Considers Lawsuit

Orange County Water District (OCWD), is comprised of 19 member agencies and serves nearly 2.5 million residents. The agency is in the process of developing plans to construct new PFAS treatment plants that will remove PFAS from the groundwater it uses for its primary supply. These new systems will take two to three years to become fully operational. OCWD estimates that its total cost for PFAS cleanup, increased imported water supply, and construction and maintenance of new treatment facilities, could cost nearly $1 billion. In order to meet water supply demands in the short-term, OCWD's member agencies are relying on imported water supplies from northern California and the Colorado River.

While it is not publicly known exactly which companies OCWD will file claims against, PFAS manu-

facturers that may be subject to OCWD's lawsuit include 3M, Dupont, and Chemours. These companies are also involved in lawsuits related to PFAS contamination nationwide.

Other States Respond

In May, more than 200 property owners in North Carolina filed a federal lawsuit against DuPont and Chemours in the U.S. Eastern District Court of North Carolina. There, property owners seek punitive damages to cover the cost of cleaning the PFAS contamination on their properties and installing water filters to remove PFAS from the drinking water supply. The state of New Hampshire filed a lawsuit claiming the polluted water is a result of the chemicals and requests that the chemical manufacturers be held financially responsible for the cost of treatment and cleanup.

In previous cases, these chemical companies have settled PFAS contamination lawsuits for hundreds of millions of dollars. In 2017, DuPont and Chemours agreed to pay $671 million to settle 3,550 personal injury claims from residents in Ohio and West Virginia for polluting an area around a manufacturing plant. In 2018, 3M settled a lawsuit with Minnesota, agreeing to pay $850 million for releasing PFAS in the ground and into the Mississippi River from 1950 to 2000. Thus, there may be some precedent for remedies that may be available to OCWD should it decide to initiate legal action.

Conclusion and Implications

If OCWD pursues litigation, it is possible that other water agencies in southern California will join, expanding the size and scope of the litigation. Alternatively, water agencies may wait to see the results of the litigation if it moves forward, and then decided to take separate, subsequent legal action against the chemical manufacturers. Entities affected by PFAS are working on how to effectively and efficiently clean up the contamination using directives from the federal and state governments. However, with limited federal or state financial aid for cleanup, more individuals may turn to legal action against the chemical manufacturers that caused the pervasive contamination. The potential financial remedies that may be available could elevate litigation as a means of obtaining compensation to cover clean-up costs associated with PFAS.
(Sofia McGraw, Steve Anderson)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES ENVIRONMENTAL DOCUMENT FOR REPAIR OF FRIANT-KERN CANAL IN CALIFORNIA

The U.S. Department of the Interior, Bureau of Reclamation (Bureau) has released its environmental document for a project intended to repair the Friant-Kern Canal, entitled the Friant-Kern Canal Middle Reach Capacity Correction Project (Project). The Project aims to restore the capacity of a 33-mile reach of the Friant Kern Canal (FKC), located in California, to its original design and constructed capacity level, which has been reduced by over 50 percent as a result of subsidence and design deficiencies.

Background

In 1942, the Bureau completed construction of Friant Dam, located on the San Joaquin River (SJR) about 16 miles northeast of Fresno, California, as part of the federal Central Valley Project (CVP). Friant Dam serves CVP contractors through three separate river and canal outlets: the SJR, the Madera Canal, and the FKC. The FKC conveys water by gravity more than 152 miles in a southerly direction from Millerton Lake to the Kern River four miles west of Bakersfield.

Since completion of construction by the Bureau in 1951, the FKC lost its ability to fully convey its previously designed and constructed capacity, resulting in restrictions on water deliveries to CVP contractors. The reduction in capacity is considered to be a result of several factors, including regional land subsidence and original design limitations. For example, under existing conditions estimated maximum conveyance capacity in the middle reach of the FKC is 1,323 cubic feet per second (cfs). Under the preferred alternative for the Project, capacity would be restored to 4,000 cfs.

In 1988, a coalition of environmental groups led by the Natural Resources Defense Council (NRDC) filed a lawsuit entitled *NRDC et al. v. Kirk Rodgers et al.*, which challenged the renewal of long-term water service contracts between the United States and certain CVP Contractors. NRDC, Friant Water Authority (FWA), certain CVP contractors and the U.S. Departments of the Interior and Commerce agreed to terms and conditions of a Stipulation of Settlement (Settlement) of that action. The Settlement established a "Restoration Goal" related to, among other things, releases of water from Friant Dam to the confluence of the Merced River and a "Water Management Goal" that, among other things, is intended to reduce or avoid adverse water supply impacts to Friant Contractors resulting from the release of Restoration Flows.

As part of federal legislation implementing the Settlement relative to the Water Management Goal—as provided for in Public Law 111-11, § 10201 and the Water Infrastructure Improvements for the Nation Act— the Bureau's Project is to restore conveyance capacity of the FKC Middle Reach to such capacity as it was designed and constructed by the Bureau, and increase the storage capacity in Millerton Lake through improved operations at Friant Dam.

The Environmental Analysis

In its Public Draft Environmental Impact Statement / Environmental Impact Report (EIS/EIR) for the Project, the Bureau analyzed two Project Alternatives to address subsidence impacts: 1) a Canal Enlargement and Realignment Alternative (CER Alternative); and 2) a Canal Enlargement Alternative (CE Alternative). The designed flow rates of the Project Alternatives would restore the capacity of the Middle Reach of the FKC to the original design rates of between 3,500 cfs and 4,500 cfs for each of four separate FKC canal segments. For purposes of the California Environmental Quality Act (CEQA), FWA has identified the CER Alternative as the "Proposed Project." The Bureau of Reclamation has not yet identified a "Preferred Alternative" as per regulations under the National Environmental Policy Act (NEPA) regulations. The Bureau has stated the Preferred Alternative will be identified in the Final EIS/EIR. Major characteristics of preferred alternative, the CER Alternative, include raising approximately

13 miles of the existing FKC, constructing a new 20-mile realigned canal, replacing check structures and siphons at Deer Creek and White River, and replacing road crossings, turnouts, and various associated utilities.

The No Action/No Project Alternative (No Action Alternative) includes projected conditions as they would exist in the year 2070 if the Project is not implemented. Under the No Action Alternative, the Bureau and FWA would not take additional actions towards restoring the capacity of the FKC Middle Reach. The Bureau identified four foreseeable actions that would affect future conditions in the Project area if no action was taken:

(1) annual Restoration Flow volume would increase through 2025 when SJR channel improvements allow for full and continued release of annual Restoration Flow volume;

(2) additional subsidence would further reduce the FKC Middle Reach capacity, which would further reduce CVP water supplies to some CVP Contractors;

(3) full compliance with the state's Sustainable Groundwater Management Act would restrict groundwater pumping and preclude the ability of CVP Contractors to offset reduced FKC water deliveries with additional groundwater supplies; and

(4) CVP Contractors would attempt to minimize water delivery impacts by rescheduling allocated CVP water supplies in available Millerton Lake conservation space (storing) for delivery at a later time.

Conclusion and Implications

Years after the San Joaquin Settlement, much effort has been made to achieve the Settlement's Restoration Goal. The Project represents a step toward achieving the Settlement's Water Management Goal. FWA initiated the CEQA process by issuing a Notice of Preparation on December 2, 2019, and during the initial scoping period, the Bureau of Reclamation and the Friant Water Authority received a total of 11 comments. A public presentation of the Project by the Bureau occurred on June 8, 2020, and the comment period on the environmental document extended through June 22, 2020.
(David Cameron, Meredith Nikkel)

CALIFORNIA'S JUDICIAL COUNCIL AMENDS EMERGENCY RULE TOLLING STATUTES OF LIMITATIONS AS THEY RELATE TO CALIFORNIA ENVIRONMENTAL QUALITY ACT

Back in early April, the California Judicial Council (Council) first adopted Emergency Rule No. 9 to suspend statutes of limitation on all civil cases until 90 days after Governor Newsom lifts the state of emergency related to the COVID-19 pandemic. However, the Council has amended the emergency rule so that it is no longer tied to the state of emergency declaration. The new rule will restart statutes of limitations on set dates—either August 3 or October 1, 2020. Under the amended Emergency Rule 9, the tolling period for actions brought under the California Environmental Quality Act (CEQA) and planning and zoning law expires on August 3, 2020.

Emergency Rule No. 9

On April 6, 2020, the Judicial Council adopted 11 temporary emergency rules in response to the COVID-19 pandemic. The Judicial Council's Emergency Rule No. 9 tolled statutes of limitations for all civil causes of action "until 90 days after Governor [Newsom] declares that the state of emergency related to the COVID-19 pandemic is lifted." Although it was unclear at the time, many worried that the rule would also apply to toll the deadline for filing a writ petition under CEQA because writs of mandate are considered special proceedings of a civil nature and are governed by the same rules in Part II of the Code of Civil Procedure that apply to ordinary civil actions. (Code Civ. Proc., § 1109.)

Because Emergency Rule No. 9 was so broad in scope, developers and anti-NIMBY groups were up in arms because this extended tolling period goes against

the legislative intent behind having short statutes of limitations for CEQA and other land use-related legal challenges. For example, the time for filing certain initial pleadings under CEQA is 30, 35, or 180 days (Pub. Resources Code, § 21167); 60 days for claims under the California Coastal Act (Pub. Resources Code, § 30802) and validation actions (Code Civ. Proc., § 860); and 90 days for cases challenging governmental actions for which a shorter statute of limitations has not been set.

COVID-19's Ongoing Impacts in California

Although the Governor proclaimed a state of emergency on March 4, 2020, the state of emergency has not yet ended, and there is no indication when the emergency proclamation will be lifted. The uncertainty surrounding when the Governor's state of emergency order will be lifted put the deadline to file a CEQA challenge in flux, giving would-be challengers significantly more time to file an action. Under Emergency Rule 9, as it was originally drafted, the time in which to bring such actions could be tripled beyond the statutory time even after the state of emergency is lifted. This was problematic because a long tolling is inconsistent with the short limitation periods in statute and the legislature's intent that such causes of action be brought expeditiously. Various interested groups requested the Judicial Council to clarify how Emergency Rule No. 9 would affect CEQA actions. Up until the recent clarification, this was an evolving situation, with no clear answer regarding whether the rule applied to CEQA actions.

Amendments to the Emergency Rule

On May 29, 2020, the Judicial Council adopted amendments to Emergency Rule No. 9 to provide fixed dates for the tolling of civil statutes of limitations. The amendment suspends from April 6 to October 1 the statutes of limitations for civil causes of action that exceed 180 days, and suspends from April 6 to August 3 the statutes of limitations for civil causes of action that are 180 days or less. Causes of action with short-term statutes of limitation, such as CEQA actions, have the more immediate deadline of August 3 because those deadlines are designed to ensure that any challenges are raised more quickly.

The Judicial Council proposed August 3, 2020, as the earlier end date to ensure that courts will be able to process the civil actions and provide certainty and reasonable notice to litigants of the end of the tolling period, without overly impacting the construction and homebuilding industry or other areas in which the legislature has mandated short statutes of limitation. All said, the amended tolling rule results in a total tolling period of approximately four months for those actions that have a statute of limitations under 180 days.

Conclusion and Implications

As California begins a phased re-opening and courts restore services shuttered due to the COVID-19 pandemic, we are likely to see an end to certain emergency measures that were adopted to address the global health hazard. However, because the pandemic presents an unprecedented crisis, the Judicial Council may re-institute certain emergency measures if health conditions worsen or change. Therefore, it is important to check court websites frequently to keep up to date with changes to critical filing deadlines.

The Judicial Council's Circulating Order Memorandum relating to the Emergency Rule No. 9 amendment is accessible at the following link: https://jcc.legistar.com/View.ashx?M=A&ID=790621&GUID=A0ED0998-D827-4792-9BD1-A3A4FC-F939AA

(Nedda Mahrou)

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.

Civil Enforcement Actions and Settlements—Air Quality

•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, NY 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 firefighting 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. 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. 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 compliance 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.

•June 5, 2020—EPA has reached a settlement with Hydrite Chemical Co. to resolve alleged violations of federal Clean Air Act chemical accident prevention regulations following an accidental chemical release that injured an employee. The accident occurred at a Hydrite Chemical Co. chemical manufacturing and distribution facility in Waterloo, Iowa. Reducing risks from accidental releases of hazardous substances at industrial and chemical facilities is a top priority for EPA, and one of seven National Compliance Initiatives. EPA inspected Hydrite in April 2019 in response to the accidental chemical release that injured one of its employees. At the time of the EPA inspection, the facility contained over 10,000 pounds of anhydrous ammonia, making it subject to chemical accident prevention regulations, commonly known as the Risk Management Program, intended to protect communities from accidental releases of hazardous substances. In response to the inspection findings, Hydrite took the necessary steps to return its facility to compliance. To settle the alleged violations, the company agreed to pay a civil penalty of $79,900.

Civil Enforcement Actions and Settlements—Water Quality

•May 21, 2020—EPA has reached a $6,521,025 settlement with 145 parties to clean up contaminated groundwater at the Omega Chemical Corporation Superfund Site in Whittier, California. This latest EPA settlement, which is subject to a 30-day public comment period, has been concluded with parties that each sent one to three tons of waste to the Omega Chemical Corporation site. This Superfund site was formerly the location of a recycling company and is marked by extensive soil and groundwater contamination. The settlement is expected to provide funding for cleanup activities at the site and for the approximately four miles of contaminated groundwater that extends beyond the property line and reaches the cities of Whittier, Santa Fe Springs and Norwalk, California. As of April 2019, EPA had incurred more than $42 million in costs since 1999 for cleaning up the site. EPA has recovered more than $27 million from potentially responsible parties through a series of settlement agreements. The Omega Chemical Corporation was a refrigerant and solvent recycling facility, located at 12504 and 12512 East Whittier Blvd., that operated between 1976 and 1991. It handled drums and bulk loads of industrial waste solvents and chemicals that were processed to form commercial products. Subsurface soil and groundwater at and around the site have high concentrations of trichloroethylene (TCE), perchloroethylene (PCE), Freons and other contaminants. Consumption of high levels of TCE and PCE for extended periods of time can cause damage to the nervous system, liver and lungs and increase risk of cancer. The Omega location became a Superfund site in 1999, when it was added to the Superfund National Priorities List. Since that time EPA has overseen the removal of more than 2,700 drums as well as more than 12,500 pounds of contaminants from the soil and groundwater. This effort has included treatment of more than 30 million gallons of contaminated groundwater since 2009. In addition, since 2010 a soil vapor extraction system has operated to address potentially harmful vapor intrusion from the Omega Site.

•May 21, 2020—EPA announced a settlement with USS POSCO Industries under the Clean Water Act for violations of federal oil pollution prevention regulations. The metal products manufacturer has

corrected the violations and agreed to pay a $31,770 penalty. USS POSCO Industries, which manufactures steel in Pittsburg, Calif., violated EPA's oil pollution prevention regulations by failing to update and recertify its Spill Prevention, Control and Countermeasure (SPCC) plan for its Pittsburg facility; failing to perform routine oil tank inspections; failing to have adequate sensors on tanks; and failing to remove accumulations of oil outside tanks and collection trenches.

•June 1, 2020—Under a settlement with EPA, the Hawai Department of Human Services (HDHS) has agreed to close all pollution-causing large-capacity cesspools (LCCs) that it owns and operates. EPA banned LCCs in 2005, under the federal Safe Drinking Water Act. Under the agreement, HDHS will close two illegal LCCs and conduct a compliance audit to review and close any remaining LCCs owned or leased by HDHS by April 2021. With this audit HDHS will confirm that all owned or leased properties are connected to a sanitary sewer system or operate a compliant septic system. HDHS will avoid penalties for any other LCCs found during the audit. This effort furthers EPA's goal of closing LCCs in Hawai'i while incentivizing voluntary disclosure of additional LCCs on HDHS properties. EPA discovered the two illegal large cesspools, which HDHS will shut down during a July 2018 inspection. The cesspools are connected to buildings at the Hawai'i Youth Correctional Facility (HYCF) in Kailua, Oahu. The HYCF property is operated by the Office of Youth Services, a subagency of HDHS. As part of the agreement, HDHS will connect the HYCF buildings to the municipal sewer system or a compliant septic system. HDHS will also pay a $128,000 penalty. EPA is authorized to issue compliance orders and/or assess penalties to violators of the Safe Drinking Water Act's LCC regulations. However, to encourage regulated entities to voluntarily discover, promptly disclose, and expeditiously close large-capacity cesspools, EPA is willing to forego enforcement actions and penalties.

•June 2, 2020—EPA, the State of New Jersey Department of Environmental Protection (NJDEP) and the State of New Jersey Division of Law are announcing a proposed settlement with the Somerset Raritan Valley Sewerage Authority (SRVSA), which would resolve alleged violations of the Clean Air Act and state permitting requirements associated with sewage sludge incineration at SRVSA's wastewater facility in Bridgewater, New Jersey. Under the proposed settlement, SRVSA would pay $225,000 in penalties for the past violations. This amount will be divided evenly between EPA and the State of New Jersey. The settlement also requires SRVSA to comply with all outstanding requirements of the sewage sludge incineration regulations, including conducting a performance test and the submission of control and monitoring plans and other reports. SRVSA had operated two sewage sludge incinerators (SSI) at its Bridgewater facility. EPA found that SRVSA 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. SRVSA also failed to satisfy performance testing requirements and submit required control and monitoring plans and reports, among other violations. New Jersey found the facility in violation of state requirements as well. The proposed settlement also includes a state-only, non-federal mitigation project. SRVSA 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.

•June 15, 2020—EPA has taken enforcement actions in Kauai to close 16 pollution-causing large capacity cesspools (LCCs) and collect $55,182 in penalties. Under the Safe Drinking Water Act, EPA banned large capacity cesspools in 2005. In 2019, EPA inspectors found 15 LCCs associated with the Hale Kupuna Elderly Housing Complex in Omao, Kauai. The owner of the housing complex, Kauai Housing Development Corporation (KHDC), confirmed that 14 of those LCCs serviced seven multi-unit residential buildings, and one LCC serviced a recreation center building. Under the EPA compliance order announced, KHDC has agreed to close the cesspools by no later than December 31, 2022. KHDC plans to replace the LCCs with a state-approved wastewater treatment system. At the Nukoli'i Beach Park Comfort Station, located on the windward side of Kauai, EPA inspectors found the restrooms discharged to an LCC. The owner, the Kauai Beach Resort Association, has agreed to pay

a $55,182 penalty and close the LCC by January 31, 2021. Groundwater provides 95 percent of all domestic water in Hawaii, where cesspools are used more widely than in any other state. In 2017, the State of Hawaii passed Act 125, which requires the replacement of all cesspools by 2050.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•May 20, 2020—On Wednesday, May 13, 2020, EPA and Swix Sport USA (Swix) finalized an agreement resolving Toxic Substances Control Act (TSCA) violations associated with the importation of noncompliant ski wax products containing per- and polyfluoroalkyl substances (PFAS). Swix agrees to pay a fine and develop a $1M educational program to raise awareness in ski communities about PFAS chemicals in ski waxes. Swix violated the TSCA Premanufacturing Notice requirements and Import Certification requirements when it imported ski wax products containing six different PFAS chemicals on at least 83 occasions that were not included on the TSCA Inventory or otherwise exempt for commercial purposes. Once the chemicals were identified, Swix immediately ceased importation of the products containing the PFAS substances and quarantined products in its control in the United States. PFAS are a group of man-made chemicals that includes PFOA, PFOS, and many other chemicals. PFAS have been manufactured and used in a variety of industries around the globe, including in the United States since the 1940s. PFOA and PFOS have been the most extensively produced and studied of these chemicals. Both chemicals are very persistent in the environment and in the human body—meaning they don't break down and they can accumulate over time. EPA identified certain ski wax products containing PFAS substances that at the time of import had not been reviewed by EPA for health and safety risks. Ski wax technicians and other users who apply waxes to skis may be exposed from handling the wax and possibly through the vapors while applying the wax and melting it. Under the terms of the settlement, Swix has agreed to spend approximately $1,000,000 to develop and implement an outreach and training program referred to as a Responsible Waxing Project (RWP) and pay a $375,625 civil penalty.

•May 26, 2020—EPA has reached a settlement with BNSF Railway Company to resolve alleged violations of the federal Resource Conservation and Recovery Act (RCRA) at a facility owned by the company in Sioux City, Iowa. In the settlement, BNSF agreed to clean up an estimated 2 million pounds of broken cathode ray tube (CRT) glass, a hazardous waste, placed and stored there by a previous occupant. The Sioux City facility was acquired by BNSF in 2014. In 2017, EPA conducted an inspection of the site and determined that the accumulated, broken CRT glass at the site contained lead concentrations that exceeded federal limits. BNSF has submitted to EPA a work plan to remove, manage and dispose of the CRT glass, in accordance with federal law. Through a Consent Agreement and Final Order filed by EPA on May 21, the EPA approved the work plan. BNSF will have about four months to complete the cleanup. Cathode ray tubes are the glass video displays found in televisions and computer monitors. Under RCRA, owners of facilities that process or store hazardous waste must obtain a permit issued by EPA or an authorized state. The Sioux City facility is one of six sites in Iowa and Nebraska where an estimated 16.9 million pounds of CRT glass were placed and stored by an individual named Aaron Rochester and his company, Recycletronics. Neither Rochester nor Recycletronics ever obtained a hazardous waste permit to store the CRT glass at the sites, which led to a criminal indictment for Rochester. He currently awaits trial and maintains he is financially unable to pay for the removal of the CRT glass.

•June 4, 2020—EPA has issued a "Stop Sale" order to PureLine Treatment Systems, LLC in Bensenville, Illinois, to immediately halt the sale or distribution of certain pesticide products. The company has made claims about these pesticides that are not allowed under the products' registrations and could mislead the public regarding the products' safety and effectiveness against the virus that causes COVID-19. The "Stop Sale" order requires the company to stop selling or distributing pesticides which EPA has determined to be misbranded, until those false or misleading claims regarding their effectiveness against SARS-CoV-2 are removed from their labels and sales materials. EPA issued the order to PureLine because the company offers products for sale through its website while making public health claims that the products will protect against viruses, including SARS-CoV-2, the

virus that causes COVID-19. In order for PureLine to make any public health claims referencing effectiveness against SARS-CoV-2, the company must apply for and obtain approval to do so from EPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). In addition, the "Stop Sale" order alleges that Pureline has made false or misleading claims on its website in connection with the offer to sell or distribute the products. The company made statements claiming or suggesting that the products can be used to "sterilize" a facility, when the product labeling approved as part of the products' registrations do not indicate that they can or should be used for sterilization. The "Stop Sale" order also alleges that PureLine is offering for sale and distribution a product identified as 'N95 Mask Decon System,' for use in conjunction with an EPA-registered product called "Pure Vista." PureLine is offering this product for distribution or sale claiming that it can be used with "Pure Vista" to sterilize N95 masks, and that such a process has been approved by the EPA, among other federal agencies. In fact, "Pure Vista" is not registered for use as a sterilant or to sterilize N95 masks. Under FIFRA, products that claim to kill, destroy, prevent, or repel bacteria or viruses, among other things on surfaces, are considered pesticides and must go through EPA's registration process to ensure that the products perform as intended prior to their distribution or sale in commerce.

•June 8, 2020—EPA and the Justice Department announce the lodging of a proposed consent decree in federal District Court that would require Atlantic Richfield to undertake or finance over $150 million of clean-up work at the Butte Priority Soils Operable Unit (BPSOU) site in Montana. This settlement agreement provides the framework for the continued cleanup of mining-related contamination, will protect public health and the environment, and provide enhanced community benefits through the implementation of park-like amenities along the Silver Bow Creek Corridor. The cleanup activities required under the consent decree include removal of contaminated tailings at the Northside and Diggings East Tailings areas along with contaminated sediments and additional floodplain contamination from Silver Bow and Blacktail Creeks. It also requires more extensive treatment of contaminated storm water before it flows into the creeks, and the capture and treatment of additional contaminated groundwater. Atlantic Richfield will provide financial assurances for future cleanup actions.

•June 15, 2020—C&S Farms, Inc. of Laurel, Delaware, will pay a $25,000 penalty as part of a settlement over alleged violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) related to pesticide safety requirements for agricultural workers, EPA announced. EPA cited C&S for allegedly failing to comply with FIFRA's agriculture Worker Protection Standard which requires the display of pesticide and safety information for agricultural workers and for allegedly failing to provide decontamination supplies to employees who worked in pesticide-treated areas.

•June 16, 2020—EPA has reached a settlement with The Powder Shop Inc. to resolve alleged violations of the federal Resource Conservation and Recovery Act (RCRA). The Cedar Rapids, Iowa, business performs custom and industrial metal coating, metal sandblasting, and metal grit blasting. These activities generate waste that is considered hazardous by federal standards. EPA inspected The Powder Shop in May 2019 to determine the company's compliance with hazardous waste regulations intended to protect employees and the public. During the inspection, EPA determined that the company failed to perform hazardous waste determinations on wastes that were, in fact, hazardous due to their ignitability and toxicity. Further, The Powder Shop failed to comply with hazardous waste generation and handling requirements; failed to implement required emergency preparedness procedures; and failed to properly label its used oil containers, one of which was found leaking at the facility. In response to the inspection findings, The Powder Shop took the necessary steps to return its facility to compliance. To settle the alleged violations, the company agreed to pay a civil penalty of $19,000.

Indictments, Convictions, and Sentencing

May 29, 2020—Rong Sun, who sold an unregistered pesticide as protection against viruses such as COVID-19, has pleaded guilty to violating the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). According to U.S. Attorney Pak, the charges and other information presented in court:

The defendant sold an unregistered pesticide, Toamit Virus Shut Out, through eBay, claiming that it would help protect individuals from viruses. The pesticide was marketed as "Virus Shut Out" and "Stop The Virus." The eBay listing depicted the removal of viruses by wearing the "Virus Shut Out" and "Stop The Virus" product. Additionally, the listing stated that "its main ingredient is ClO2, which is a new generation of widely effective and powerful fungicide recognized internationally at present. Bacteria and viruses can be lifted up within 1 meter of the wearer's body, just like a portable air cleaner with its own protective cover." It also stated that "In extraordinary times, access to public places and confined spaces will be protected by one more layer and have one more layer of safety protection effect, thus reducing the risks and probability of infection and transmission." The listing further claimed that Toamit is "Office and home essentials during viral infections reduce transmission risk by 90 percent." Under FIFRA, the EPA regulates the production, sale, distribution and use of pesticides in the United States. A pesticide is any substance intended for preventing, destroying, repelling, or mitigating any pest. The term "pest" includes viruses. Pesticides are required to be registered with the EPA. Toamit Virus Shut Out was not registered and it is illegal to distribute or sell unregistered pesticides. Sun imported the pesticide from Japan and later sold it to individuals around the United States. The charges carry penalties of up to one year in prison and a $100,000 fine. Sentencing for Rong Sun, a/k/a Vicky Sun, 34, of Fayetteville, Georgia, is set for June 29, 2020 at 10:00 a.m., before U.S. Magistrate Judge John K. Larkins III.
(Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REQUIRES U.S. FOREST SERVICE TO PREPARE EIS AFTER IT FINDS ENVIRONMENTAL ASSESSMENT PREPARED FOR RESTORATION PROJECT SEVERELY LACKING

Bark v. United States Forest Service, 958 F.3d 865 (9th Cir. 2020).

The U.S. Ninth Circuit Court of Appeals recently rejected an Environmental Assessment (EA) prepared by the U.S. Forest Service (USFS) that determined that an Environmental Impact Statement (EIS) was not required. Instead, the court found that an EIS must be prepared under the National Environmental Policy Act (NEPA). As the court noted, the EA did not substantively address multiple expert opinions and evidence that the Crystal Clear Restoration Project (CCR Project) near Mount Hood would have significant environmental impacts and be ineffective at reducing forest fire danger. The court also found that the EA failed to properly assess cumulative impacts from the CCR Project. Ultimately, the decision again highlights the need for agencies conducting environmental assessments under the NEPA to perform a full and defensible assessment of potential environmental impacts, before determining that an EIS is not required. This is especially true for projects that are "highly controversial."

Factual and Procedural Background

The USFS proposed the CCR, which involved the sale of timber affecting 11,742 acres in the Mt. Hood National Forest. The USFS claimed that the forest stands in the project area were overstocked as a result of past management practices. According to the USFS, overcrowded forests, where trees are closer together, are more susceptible to insects and disease and to high-intensity wildfires. The CCR Project would allow for logging at specific locations pursuant to a technique called "variable density thinning." This process would give the USFS flexibility in choosing which trees to cut thus allowing the USFS to create variation within an area of forest so that it "mimic[ed] a more natural structural stand diversity." The CCR Project would leave an average canopy of 35-60 percent in the affected project site, with a minimum of 30 percent where the forest is more than 20 years old.

The USFS conducted an Environmental Assessment under NEPA. The EA determined that the CCR Project had no significant effects and USFS issued a Finding of No Significant Impact (FONSI) and did not prepare an EIS.

BARK, a conservation organization, filed a complaint against the USFS, bringing claims under NEPA and the National Forest Management Act (NFMA). The NEPA claim alleged that the USFS did not undertake a proper analysis of the environmental impacts of the Project or of alternatives to the Project. The U.S. District Court granted summary judgment against BARK on all claims.

The Ninth Circuit's Decision

The Ninth Circuit Court began by noting that Circuit Courts will review a District Court's grant of summary judgment *de novo*. Under the federal Administrative Procedure Act, a Circuit Court can overturn an agency's conclusions when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An agency action is arbitrary and capricious if the agency:

> . . .relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. . .An agency's factual determinations must be supported by substantial evidence.

When reviewing an agency's finding that a project has no significant effects under NEPA, the court must determine whether the agency met NEPA's hard look

requirement that:

> . . .based its decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant.

The term "significant" includes "considerations of both the context and intensity of possible effects."

The court determined that based on the above principles, the USFS' decision not to prepare an EIS was arbitrary and capricious for two independent reasons: 1) the project's environmental effects were highly controversial and uncertain, meaning that an EIS must be prepared, and 2) the USFS failed to identify and meaningfully analyze the cumulative impacts of the project.

Project Effects Were Highly Controversial and Uncertain

The Ninth Circuit noted that the effects of the project were highly controversial and uncertain, thus requiring preparation of an EIS. Although the USFS claimed that the purpose of the project was to reduce the risk of wildfires and promote safe fire-suppression activities— BARK identified considerable evidence showing that "variable density thinning" will not achieve that purpose.

As the court noted, under NEPA, a project is:

> . . .highly controversial if there is a substantial dispute about the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.
>
> A substantial dispute exists when evidence:
>
> . . .casts serious doubt upon the reasonableness of an agency's conclusions. . . .mere opposition alone is insufficient to support a finding of controversy."

The Risk of Fire

The USFS presented evidence that variable density thinning made treated areas more resilient to fire danger. However, substantial expert opinions were also presented by BARK that contradicted USFS claims regarding the effectiveness of the practice. BARK highlighted that it has become more commonly accepted that reducing fuels does not consistently prevent large forest fires, and seldom significantly reduces the outcomes of large fires. BARK also presented evidence that variable density thinning might exacerbate fire severity in some instances, and that a reduction in fuel does not necessarily suppress fire risk and intensity.

The court noted that the environmental analysis did not sufficiently address the opinions that were contrary to the USFS opinions regarding the variable density thinning program and merely incorporated conclusory statements such as "there are no negative effects to fuels from the Proposed Action treatments." Therefore, BARK showed that a substantial dispute existed about the effect of variable density thinning on fire suppression, even though the circuit court's role was not to assess the merits of variable density thinning. The court noted that while BARK pointed to numerous expert sources contradicting USFS theories as to the effectiveness of variable density thinning, the USFS merely reiterated its conclusions about vegetation management and did not meaningfully respond to the substantive research presented by BARK. Under NEPA, when one factor raises "substantial question" about whether an agency action will have a significant environmental effect, an EIS is warranted. Because the project was highly controversial and its effects uncertain, the court concluded that USFS's decision not to prepare an EIS was arbitrary and capricious.

Failure to Identify and Meaningfully Analyze Cumulative Impacts

The Ninth Circuit also noted that the USFS failed to identify and meaningfully analyze cumulative impacts of the CCR Project. Under NEPA, a cumulative impact is the:

> . . .impact on the environment which results from the incremental impact of the action where added to other past, present, and reasonably foreseeable future actions regardless of what agency. . .undertakes such other actions.

The court noted that although the USFS EA attempted to analyze the cumulative effects of the CCR Project by including a table listing other projects, the cumulative impacts analysis was insufficient because

it included no meaningful analysis of any of the identified projects. The court found glaring shortcomings in the USFS' cumulative impacts analysis as it simply listed other projects without including any information about any of the projects listed beyond naming them. Nonetheless, the USFS EA concluded that there were no direct or indirect effects that would cumulate from the project, and that the project would have a beneficial effect on forest stands by moving them towards a more resilient condition. As the court noted, "[t]hese are the kind of conclusory statements, based on vague and uncertain analysis that are insufficient to satisfy NEPA's requirements."

The court went on to highlight other parts of the USFS analysis that relied on conclusory assertions that the Project has "no cumulative effects," such as where it listed effects that may occur with relation to specific sub-topics such as fuels management, transportation resources and soil productivity.

Ultimately the court determined that there was nothing in the EA that could constitute "quantified or detailed information" about the cumulative effects of the project. This meant that the EA created substantial questions about whether the Project would have a cumulatively significant environmental impact, requiring an EIS.

Conclusion and Implications

Reviewing the case *de* novo, the Ninth Circuit's decision highlights the importance for agencies preparing Environmental Assessments of performing full and defensible analyses that takes a hard look at a project's potential environmental impacts before determining that an EIS is not necessary. This is *especially true* where controversy surrounds such projects. (Travis Brooks)

SECOND CIRCUIT HOLDS ACCUMULATION OF PERFLUOROOCTANOIC ACID IN BLOOD FROM DISCHARGES INTO GROUNDWATER MAY MEET PERSONAL INJURY THRESHOLD IN NEW YORK

Benoit, et al. v. Saint-Gobain Performance Plastics Corp., et al.,
___F.3d___, Case No. 17-3941 (2nd Cir. May 18, 2020).

The U.S. Court of Appeals for the Second Circuit ruled that plaintiffs pled a cognizable claim for medical monitoring costs allegedly caused by the release of perfluorooctanoic acid (PFOA) from Saint-Gobain Performance Plastics Corporation and other defendants. The court found that the plaintiffs' allegation that PFOA accumulated in their blood was a sufficient injury that allowed the action to survive a motion to dismiss, even though the plaintiffs had not manifested symptoms of a physical disease caused by the PFOA accumulation.

Factual and Procedural Background

Plaintiffs are residents of the Village of Hoosick Falls, New York (Village). Defendants have owned and operated a manufacturing facility located in the near vicinity of the Village for a number of years. As a part of its manufacturing process, defendants applied a solution containing PFOA to the fabrics produced by the defendants. PFOA is a chemical used to make fabrics that repel oil, stains, grease, and water. PFOA can persist in the environment, particularly in water, for many years, and it is readily absorbed after consumption, accumulating in the blood stream. It is alleged that the leftover PFOA solution was then released into floor drains where it eventually migrated into the groundwater, contaminating local wells and drinking water.

In 2014 and 2015, the Village tested the local water supply and discovered PFOA in municipal wells at levels up to 662 parts per trillion (ppt), in private wells up to 412 ppt, and in groundwater near the facility up to 18,000 ppt. In late 2015, the U.S. Environmental Protection Agency (EPA) recommended that an alternative water source be provided to Village residents until PFOA levels subsided, and it advised residents not to drink, or cook with the water. In 2016, the EPA issued advisory findings stating that PFOA concentrations in drinking water greater than 70 ppt are harmful to human health.

In 2016, the plaintiffs brought claims in the U.S. District Court for the Northern District of New York for negligence, strict liability, trespass and nuisance arising from the defendants' PFOA releases into the groundwater. A significant number of the plaintiffs alleged that PFOA had accumulated in their blood, which increased their risk of health problems later in life. As a result, the plaintiffs sought damages covering the costs they would incur to test, monitor, and remediate the effects of their PFOA exposure. In response, the Defendants moved to dismiss, stating that the plaintiffs had failed to allege a tort under New York law because recovery for future harm is barred where there is no present physical injury, arguing that the mere accumulation of PFOA in the blood did not constitute an injury.

The District Court denied the motion to dismiss the claims for medical monitoring on both the personal injury and property damage grounds and certified its decision for interlocutory appeal. The Second Circuit then granted defendants' petition for leave to appeal.

The Second Circuit's Decision

The threshold issue before the Circuit Court of Appeals was whether the accumulation of PFOA in the blood, without a current physical manifestation of disease, could qualify as an injury under New York law. To recover under a theory of either negligence or strict liability under New York law, a plaintiff must prove that there was an injury to person or property. New York courts have consistently found that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven. In other words, medical monitoring is only available as a form of remedy for an existing tort. There is no independent action for medical monitoring.

Nevertheless, another line of decisions addressed the topic of what constitutes an "injury for the purposes of tort law" and concluded that the presence of a toxin in a person's body constitutes a physical injury sufficient to proceed on a claim for medical monitoring.

Meeting the Physical Injury Requirement for Personal Injury Claims

In light of these cases, the Second Circuit held that, under New York law, an action for personal injury cannot be maintained absent an allegation of any physical injury. However, to meet the physical injury requirement, it is sufficient to allege either: (1) there is a clinically demonstrable presence of toxins in the plaintiffs' body, or (2) there is some physical manifestation of toxin contamination. As a result, because the plaintiffs alleged that they were exposed to PFOA through the defendants' releases and those releases caused a buildup of PFOA in their blood, the Second Circuit concluded that the plaintiffs pled physical injuries under New York law sufficient to allow them to seek the costs of medical monitoring.

Medical Monitoring Relief

The Second Circuit also briefly analyzed whether a plaintiff with no cognizable claim for personal injury could seek medical monitoring as a part of a claim for property damage. Due to the lack of certainty in prior cases regarding this topic, the Second Circuit concluded that the District Court's ruling on the availability of medical monitoring relief for a property damage claim fell outside of the court's review jurisdiction. Ultimately, the Second Circuit left open the question of whether, in a claim for medical monitoring costs, the injury threshold could be satisfied by pleading an injury to property alone.

Conclusion and Implications

This decision stands for the proposition that heightened levels of PFOA in the blood can satisfy the physical injury requirement for the purposes of surviving a motion to dismiss under New York law. As a result, more plaintiffs may be able to survive a motion to dismiss if they can show accumulated levels of toxins within their blood, potentially allowing more actions to proceed to the trial stage. The court's decision is available online at: https://www.ca2.uscourts.gov/decisions/isysquery/7b765558-8f7f-42bc-b257-b1c3a9e40fc5/5/doc/17-3491_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/7b765558-8f7f-42bc-b257-b1c3a9e40fc5/5/hilite/

(Geremy Holm, Rebecca Andrews)

NINTH CIRCUIT FINDS STATE LAW-BASED CLIMATE CHANGE LAWSUIT DID NOT RAISE FEDERAL QUESTIONS FOR PURPOSES OF FEDERAL COURT REMOVAL

City of Oakland v. BP, PLC et al., ___F.3d___, Case No. 18-16663 (9th. Cir., May 26, 2020).

A California state law claim for public nuisance in a climate change lawsuit brought by the City of Oakland and the City and County of San Francisco (Cities) against five of the world's largest energy companies (Energy Companies) did not, according to the Ninth Circuit Court of Appeals, raise issues relating to interstate disputes or conflicting states' rights in order to justify removal to federal court.

Factual and Procedural Background

In September 2017, the Cities sued the Energy Companies, alleging the companies' production and promotion of massive quantities of fossil fuels caused or contributed to global warming, reduced sea shorelines, increased shoreline erosion, salt-water impacts on the Cities' wastewater treatment systems, and interference with storm water infrastructure among other injuries. They further alleged these actions have caused, and will continue to cause, the Cities to incur significant costs to abate the harms. Accordingly, the Cities sought an order of abatement requiring the Energy Companies to fund a climate change adaption program for the Cities.

The Energy Companies removed the Cities' action to federal court, on the grounds that the Cities' public nuisance claim was governed by federal common law because the claim implicated "uniquely federal interests." The Cities moved to remand the case to state court. The U.S. District Court denied the Cities' motion, finding the Cities' claim was "necessarily governed by federal common law" as it raised issues relating to "interstate and internal disputes implicating the conflicting rights of states or. . . relations with foreign nations" and that these issues had to be resolved pursuant to a uniform federal standard.

In response to the District Court's ruling, the Cities amended their complaints to include a public nuisance claim under federal common law. The Energy Companies moved to dismiss the amended complaints. Thereafter, the District Court dismissed the Cities' amended complaints for failure to "state a claim upon which relief can be granted" under Federal Rule of Civil Procedure § 12(b)(6) and dismissed four of the five Energy Companies for lack of personal jurisdiction. The District Court then entered judgments in favor of the remaining Energy Companies and against the Cities.

The Cities appealed, challenging: (1) the denial of their motions to remand; (2) the dismissal of their complaints for failure to state a claim; (3) and the dismissal of four of the five defendant Energy Companies for lack of personal jurisdiction.

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

This case addresses an important question regarding when climate change lawsuits may implicate federal question jurisdiction for purposes of removal from state court. In sum, because neither exception to the well-pleaded complaint rule applied to the Cities' original state law claim, federal jurisdiction was not proper at the time of removal. The Ninth Circuit's decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/26/18-16663.pdf

(Nathalie Camarena, Rebecca Andrews)

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 § 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 identical 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 HOLDS EPA HAS AN ONGOING NONDISCRETIONARY DUTY UNDER THE CLEAN WATER ACT TO UPDATE THE NATIONAL CONTINGENCY PLAN

Earth Island Institute, et al., v. Andrew R. Wheeler, et al.,
___F.Supp.3d___, Case No. 20-CV-00670-WHO (N.D. Cal. June 2, 2020).

On June 2, 2020, the U.S. District Court for the Northern District of California denied defendants Andrew Wheeler and the U.S. Environmental Protection Agency's (collectively: EPA) motion to dismiss plaintiffs' cause of action for violation of the federal Clean Water Act (CWA). On an issue of first impression, the court considered whether the CWA imposes a nondiscretionary duty on EPA to update or amend the National Contingency Plan (NCP), a plan for responding to oil and hazardous substance contamination that was last updated over 25 years ago. District Court Judge William H. Orrick determined EPA's duty to update is nondiscretionary, such that the environmental plaintiffs could bring a cause of action pursuant to the CWA's citizen-suit provision. The court also denied the American Petroleum Institute's motion to intervene, ruling that the lawsuit concerned EPA's procedure, but not any substantive decision.

Procedural Background

Plaintiffs Earth Island et al., (plaintiffs) sued EPA on January 30, 2020, alleging causes of action under the CWA and the Administrative Procedure Act (APA), claiming that the current NCP is "obsolete and dangerous." Plaintiffs alleged that because the current plan permits the use of chemical dispersants proven harmful to humans and the environment, EPA is required under the CWA to amend or update the plan. Plaintiffs further alleged that EPA violated its duties under the APA to conclude a matter presented to it within a reasonable time. EPA filed a motion to dismiss, and the American Petroleum Institute filed a motion to intervene, which EPA did not oppose. Plaintiffs opposed both motions.

The District Court's Decision

The CWA requires the President to prepare and

publish a National Contingency Plan for removal of oil and hazardous substances and to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances. The CWA also provides that the NCP "may, from time to time, as the President deems advisable" be revised or otherwise amended.

Under the CWA's citizen suit provision, a citizen may bring suit against the EPA where there is alleged a failure to perform any act or duty which is not discretionary. To state a claim for relief, the citizen suit must allege "a nondiscretionary duty that is 'readily-ascertainable' and not 'only [ ] the product of a set of inferences based on the overall statutory scheme.'"

Mandatory Duty

The court first considered EPA's argument that the plain language of the CWA is permissive, not mandatory. The court rejected this argument, noting that EPA's permissive plain language argument appeared valid on first review "without context," however courts routinely note that "may" does not always indicate discretionary or permissive action. As it related to the CWA, the court also observed the cases interpreting EPA's obligations have held that EPA must review relevant guidelines for possible revision, and that formal revisions must comply with detailed statutory criteria. Here, the court noted that EPA's duty to promulgate the NCP in the first instance is nondiscretionary.

An Ongoing Duty

The court also analyzed the statute's context and found that the CWA requires EPA to take various actions related to the NCP, including: (i) to "prepare and publish the NCP"; (ii) to ensure the NCP provides "efficient, coordinated, and effective action"; (iii) to establish a Coast Guard strike team and national center to assist in carrying out the NCP, a system of surveillance and notice to safeguard against discharges of oil and hazardous substances and imminent threats of such discharges, and a schedule of dispersants that may be used to carry out the NCP; and (iv) to ensure that removal of oil and hazardous substances "shall, to the greatest extent possible, be in accordance with" the NCP. The court concluded that the NCP requirements in the CWA contemplate an ongoing duty that in turn strongly suggests that the duty to update and revise the NCP is not discretionary, but required.

The also court rejected EPA's interpretation of the statute, because it would allow EPA to "fail to review, update, or amend the NCP for decades, despite scientific advances," incidences of oil and hazardous substances discharges, and "an internal report concluding that the NCP was outdated and inadequate." EPA's interpretation would frustrate the purpose of the statute to achieve an efficient response to pollution.

Conclusion and Implications

The current NCP is more than 25 years old. This decision will obligate EPA to update the NCP with new information related to the use of chemical dispersants proven harmful to humans and the environment. The court's opinion is available online at: https://ecf.cand.uscourts.gov/doc1/035119332281
(Rebecca Andrews, Patrick Skahan)

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