Volume 1, Number 3
December 2020

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
LAW AND REGULATION REPORTER

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

ENVIRONMENTAL NEWS

CONTINGENCY PLANS: EXECUTIVE ACTIONS AVAILABLE TO PRESIDENT-ELECT BIDEN ON CLIMATE CHANGE

Climate change has become a key political issue as forest fires, hurricanes and floods continue to wreak havoc nationwide. Amidst these crises, the Trump administration's move to quit the Paris climate agreement signals a nation divided over how to approach these growing issues. President-elect Joe Biden is poised to inherit a difficult situation, where polls indicate the majority of Americans are in favor of climate action, but where a divided government in Washington could complicate any efforts to make widespread change.

Background

If Republicans maintain control of the Senate, much of the planned legislation needed to implement Biden's climate agenda would be unlikely to pass into law, given current Majority Leader Mitch McConnell's open plans to slow or obstruct. Yet there is a lot that Biden can do through executive action that would could fundamentally change America's approach to fighting climate change.

Auto Emissions Rules

A major step a President Biden could take is to reinstate tough nationwide rules for auto emissions and mileage standards that were put into place under the Obama administration, and which essentially mirror regulations already in effect in California. These rules are crucial because transportation remains a top source of planet-warming emissions. When initially enacted, they were considered one of the nation's most successful efforts to combat climate change.

The Trump administration weakened those rules, allowing nearly 900 million more tons of carbon dioxide to be released than under Obama-era standards, a result of less efficient cars burning an estimated additional 78 billion gallons of fuel. The administration also revoked California's authority to set stricter auto emissions rules than those required by the federal government.

California pledged to take the fight all the way to the U.S. Supreme Court, where a conservative majority might have ruled in favor of the Trump administration. Biden has promised to reinstate the Obama standards and to make them tougher, expanding them beyond passenger vehicles and SUBs and into the highest polluters—trucks. Biden is also likely to grant California a new waiver, allowing it and the 13 other states that have adopted its standards to crack down further on tailpipe pollution.

End Drilling on Federal Land

President-elect Biden, alongside whomever he chooses as his Interior Secretary, will have broad authority to decide what kind of energy development should take place on land owned by the federal government. Biden has made clear that he would not issue new leases for fracking on federal lands.

Biden could issue a new executive order directing his Interior Secretary to halt all oil and gas leases sales and permits. This would not block oil production that is already taking place, but it would prevent more wells from being drilled and would allow for a gradual transition away from natural gas. The Obama administration used the same strategy to prevent the sale of new coal mining rights.

Experts indicate a Biden administration could go further by voiding leases that have been issued in cases where land has not yet been developed, or by buying the leases back. This could affect the Trump administration's plans to auction off more than 4,000 acres of federal land and mineral estate in California this December, which would be the first lease sale in the state since 2012.

Develop an Expanded Clean Power Plan

Established under the Obama administration, the Clean Power Plan regulated greenhouse gas emissions from power plants, the nation's second-largest source of plant-warming gas. But in 2019, Trump's EPA replaced this plan with a new rule designed to protect the coal industry while backing away from any meaningful emissions reductions.

Where the Clean Power Plan was expected to reduce emissions by about 30 percent by 2030, EPA projections suggest the replacement rule might reduce carbon dioxide emissions by 0.7 percent, if they do so at all.

Under a Biden administration, the EPA could repeal the Trump rule without any input from the Senate. Activists are urging Biden to go further than simply re-proposing the Clean Power Plan, however, because the Obama-era plan has been tied up in the courts and it is unclear whether it would survive review by a Supreme Court with a 6-3 conservative majority. Instead, advocates hope that Biden's U.S. Environmental Protection Agency (EPA) will propose a more ambitious rule to put America on the path to eliminate carbon emissions from the electricity sector by 2035.

Promote Climate Policy Abroad

President-elect Biden has already committed to rejoining the Paris climate agreement, but he can take things much further on the international stage. A report from Brown University's Climate Solutions Lab lays out a series of steps that include creating a "climate club" of countries that volunteer to reduce emissions by agreeing to set a minimum price on carbon and penalize high-emitting countries through trade measures including tariffs. (*See:* https://watson.brown.edu/files/watson/imce/news/explore/2020/Final%20CSL%20Report.pdf)

Another possibility outlined in the report calls for Biden to work with the European Union—the world's largest importer of natural gas—as well as Canada and Mexico to curb methane emissions.

Declare Climate Change a National Emergency

Some environmental activists argue that Biden should invoke emergency authority to address climate change. This step would be bold, but would provide some major potential upsides.

Under emergency authority, a Biden administration could use military funding to quickly move the country away from coal and gas-powered plans, and toward renewable energy. He could also increase the number of electric-vehicle charging stations, require automakers to produce more electric vehicles, and accelerate the expansion of clean-energy technology, all without needing to resort to Congressional approvals.

If this sounds extreme, recall that Trump declared a national emergency on the border in 2019 in order to fund his border wall. The legality of that action is still being fought over in the courts, an outcome which Biden might also face if he declared a national emergency. This time out, however, the U.S. Supreme Court has a different make-up than a few years ago.

Conclusion and Implications

The prospect of divided government—which is still uncertain given the pending Senate runoffs in Georgia in January—may hamper some of the Biden administration's more ambitious goals. Yet the increase in executive power over the last half-century ensures that Biden will have room to act, whether or not he can compromise with Senate Republicans on major climate legislation.
(Jordan Ferguson)

CALIFORNIA GOVERNOR NEWSOM ISSUES EXECUTIVE ORDER TO CONSERVE 30 PERCENT OF CALIFORNIA LANDS AND RESOURCES BY 2030

On October 7, 2020, California's Governor, Gavin Newsom, issued Executive Order N-82-20 to combat climate change by conserving 30 percent of California's lands and resources by 2030 (30 by 30 or Order). The order: 1) establishes the California Biodiversity Collaborative (Collaborative) comprised of governments, California Native American Tribes, leaders, and stakeholders; 2) sets a goal of the state to conserve at least 30 percent of California's land and coastal waters by 2030 with the Collaborative to submit conservation strategies to the Governor no later than February 1, 2022; 3) promotes biodiversity and stem extinction by relying on ecological knowledge and tribal expertise; and 4) develops a Natural and Working Lands Climate Smart Strategy to achieve the State's goal of carbon neutrality.

The October 7, 2020 Executive Order

30 by 30 follows Governor Newsom's prior Executive Order N-79-20 issued on September 23, 2020, which requires that by 2035, all new cars and passenger trucks sold in California be zero-emission vehicles. Both orders aim at fighting climate change and meeting the state's goal of carbon neutrality by 2045 by reducing demand for fossil fuel and encouraging conservation within the state. 30 by 30 has also been supported internationally by the United Nations as well as the International Chamber of Commerce, whose members wrote a letter on June 15, 2020 calling upon CEOs to push governments to include ambitious climate change focused policies. Support stems from fear over economic loss due to climate change; the World Economic Forum recently calculated that $44 trillion of economic value generation is at risk as a result of climate change and the economy will benefit from green policies.

California Biodiversity Collaborative

First, 30 by 30 directs the California Natural Resources Agency, the California Department of Food and Agriculture, the California Environmental Protection Agency and other state agencies to establish the California Biodiversity Collaborative. The Collaborative shall be comprised of governmental partners, California Native American tribes, experts, business and community leaders, and other stakeholders from across California. The Collaborative will serve as the entity tasked with establishing a baseline assessment of California's biodiversity, project the impact of climate change, and engage stakeholders across California's diverse communities to create climate change strategies.

Natural Resources Agency Must Develop Strategies by February 2022

Second, The California Natural Resources Agency and other relevant state agencies, in consultation with the Collaborative, are directed to develop and report such strategies to the Governor no later than February 1, 2022. The strategies should prioritize economic sustainability, food security, protection of biodiversity, and building climate resistance.

Strategies to Protect Native Plans and Animals

Third, 30 by 30 specifically focuses on biodiversity by directing the California Natural Resources Agency to implement strategic efforts to protect California's native plants and animals from invasive species and pests that threaten biodiversity by relying on scientific observation technology and partnering with tribal experts to use tribal expertise and traditional ecological knowledge. The Order also directs the California Department of Food and Agriculture to streamline the State's process to approve and facilitate projects that will increase the pace and scale of environmental restoration and land.

Carbon Neutrality

Fourth, the Order focuses on reaching carbon neutrality. The California Natural Resources Agency, the California Department of Food and Agriculture, the California Environmental Protection Agency, the Governor's Office of Planning and Research, and other state agencies, shall identify and implement actions to accelerate natural removal of carbon. Within one year of the Order, the California Natural Resources Agency, in consultation with the California Environmental Protection Agency, the California Department of Food and Agriculture, the California Air Resources Board (CARB), Governor's Office of Planning and Research OPR), the California Strategic Growth Council and other state agencies, shall develop a Natural and Working Lands Climate Smart Strategy (Strategy) that serves as a framework to advance the State's carbon neutrality goal. The California Air Resources Board shall take into consideration the Strategy and the California Department of Food and Agriculture shall work with farmers and ranchers to inform the next Scoping Plan process. The Scoping Plan was first approved by CARB in 2008 and must be updated at least every five years. Each of the Scoping Plans includes policies to help the state achieve its greenhouse gas emissions targets.

Conclusion and Implications

The Executive Order sets broad policy goals and identifies several state agencies to address these goals. However, it remains to be seen how the Order will

be implemented as it leaves much of the detail to the agencies. While the Order takes a broad approach to steps that California will take, it confirms California's ability to fight climate change and engage with international entities, without reliance on the federal government. The Executive Order is available online at: (https://www.gov.ca.gov/wp-content/uploads/2020/10/10.07.2020-EO-N-82-20-.pdf (Madeline Weissman, Darrin Gambelin)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Addressing Agricultural GHG Emissions Is Needed to Reach Paris Climate Agreement Targets

Global food demand is increasing as the world's population continues to grow. The agricultural systems currently in place are not equipped to meet this demand without contributing significantly to the global carbon budget. Agriculture is estimated to contribute 30 percent of all greenhouse gases due to sources including deforestation, fertilizer overuse, and livestock. Emissions are greater in "high-yield" countries such as the U.S. that use higher rates of fertilizer and modernized agriculture systems. "Low-yield" countries experiencing growth in population and wealth also face a rising food demand, though access to industrialized agriculture is not necessarily increasing. This leads to clearing more land to meet rising food demand.

A recent study from the University of California Santa Barbara shows the scale of impact agricultural emissions have on meeting the Paris Climate Agreement targets. The study reports that even if all fossil fuel combustion ceased immediately, GHG emissions from agriculture alone are on track to exceed the 1.5 °C increase in temperature above preindustrial levels by about 2050.

The most effective action the study found to reduce agricultural GHG emissions is a widespread switch to more plant-rich diets. Reducing meat consumption would decrease the amount of land cleared to raise livestock and grow livestock feed. It would also reduce the amount of biomethane released from livestock. Another key action reported by the study is reducing the use of fertilizer. An author of the study estimates 40 percent of agricultural GHG emissions are due to the N2O from the fertilizer, and using approximately 30 percent less fertilizer would achieve the same crop yield. Other emissions reductions strategies included in the study are reducing food waste by half, improving crop yields rather than clearing more land, and adjusting global per capita calorie consumption.

See: Michael A. Clark, Nina G. G. Domingo, Kimberly Colgan, Sumil K. Thakrar, David Tilman, John Lynch, Inês L. Azevedo, Jason D. Hill. Global food system emissions could preclude achieving the 1.5° and 2°C climate change targets. *Science*, 2020 DOI: 10.1126/science.aba7357

Worst-Case Scenario Climate Hazards at Global Ports

There are over 2,013 coastal ports around the world, and they have a fundamental role in the global trade network. Ports allow countries to move goods and products across the oceans, contributing substantially to the global economy. Unfortunately, coastal ports rely on certain environmental conditions in order to operate properly and safely; major threats to port operations include strong winds, high temperatures, limited visibility, tall wave heights, overtopping, floods, and tropical storms. In recent years, the incidence of super storms that threaten port operations have increased. For example, Superstorm Sandy in 2012 forced the Port of New York and the Port of New Jersey to close for over a week. When coastal ports cannot operate or their infrastructure is damaged, there are significant economic losses.

Given the global importance of coastal ports and their reliance on stable conditions, a team of international scientists set out to understand how climate change could affect global ports. They devised a framework to estimate risk levels under today's current climate conditions and the anticipated climate conditions in the year 2100 under the worst-case high emissions pathway defined by the Intergovernmental Panel on Climate Change. Under current conditions, most coastal ports are classified as low- or medium- risk, and about four percent of ports, located in cyclone-prone areas such as the Caribbean and Pacific Islands, are classified as very high risk. In the worst-case emissions scenario, climate change-induced increase in mean sea level rise is anticipated to increase overtopping and flooding risks, resulting in higher risk to many coastal ports. In 2100, over fourteen percent of ports are classified as very high risk, and six ports move into a new category of extremely

high risk. The authors acknowledge that this study is somewhat incomplete, however, as it does not include any site-specific details or impacts from fog or ice.

Coastal ports help connect countries by facilitating the global trade networks. Damage to coastal ports in one part of the world would have lasting effects on many other world nations. While this study shows that ports in certain regions in the world (e.g., Caribbean and Pacific Islands) are more prone to climate-induced risks, those increased risks will affect every other connection in the global trading network.

See: Izaguirre, C., *et al*. Climate change risk to global port operations. Nature Climate Change, 2020; DOI:10.1038/s41558-020-00937-z

Effect of Climate Change on Species' Range Size and Probability of Extinction

Human populations impact natural ecosystems all around the world. In some cases, we've maintained sustainable interactions with these ecosystems, only taking or altering what is strictly necessary. By and large, however, humans have caused disruptions that may lead to mass, irreversible extinction of plants and animals.

A recent study published in *Nature Communications* by Beyer and Manica of the University of Cambridge analyzed geographical range size losses under several climate and socioeconomic scenarios. In the study, geographical range size loss is used as a proxy for extinction probability, where range size loss is driven by a combination of land use change (such as agricultural or urban development) and climate change. Beyer and Manica estimated historical range sizes for 16,919 mammals, birds, and amphibians starting from the year 1700 using data on the distribution of species, species biome preferences, and historical climatic conditions. The range sizes were then projected out to 2100 using a combination of emissions and socioeconomic scenarios. The four emissions scenarios, known as representative concentration pathways (RCPs) 2.6, 4.5, 6.0, and 8.5, all assume increasing levels of global warming by 2100. The five socioeconomic pathways (SSPs) assume varying degrees of difficulty for adapting to and mitigating climate change.

The study found that at present, species have lost an average of 18 percent of their range sizes between 1850 and 2016. The statistics vary significantly across ecosystem type and species. Around 16 percent of the species studied have experienced a 50 percent or greater decrease in range size, with many of these species found in tropical regions. On the other hand, 18 percent of species studied—such as those that thrive in cropland - have experienced range size increases due to climate change and land use conversions. For most species studied, land use change is the major driver of range loss compared to climate change. Beyer and Manica estimate that by 2100, the average range loss could be between 13 percent at best and 23 percent at worst. The worst-case scenario assumes RCP 6.0 and a socioeconomic situation where the challenges for climate change adaptation and mitigation are high. The best-case scenario, comparable to ecosystems in 1955, assumes RCP 2.6 and a socioeconomic situation where the challenges for climate change adaptation and mitigation are low. Beyer and Manica acknowledged that their study did not account for all possible forms of human influence. For instance, hunting, pathogens, and invasive species would all affect populations and ultimately range sizes. Although climate change and land use change were treated as unique factors, future analyses could consider how these two factors are linked, especially as climate change is expected to trigger large human migrations as certain parts of the world become less inhabitable.

Beyer and Manica conclude that conservation efforts should focus on reducing agricultural land use through implementation of more sustainable practices, identifying ecologically optimal areas when land use expansion is necessary, and combatting climate change.

See: Beyer, R.M., Manica, A. Historical and projected future range sizes of the world's mammals, birds, and amphibians. *Nat Commun* **11,** 5633 (2020). https://doi.org/10.1038/s41467-020-19455-9

Population Exposure to Flooding in Response to Climate Change

Anthropogenic climate change is expected to increase heavy precipitation events globally due to the exponential increase in water vapor storage capacity of the atmosphere. Precipitation patterns are expected to vary spatially and temporally, and the impacts upon flood occurrence are not fully understood. Current estimates show that global mean precipitation is expected to increase by 1-3 percent per degree Celsius of warming, while extreme precipitation

events are expected to increase by 5-10 percent per degree Celsius of warming. This higher rate of change for extreme precipitation highlights the relationship between anthropogenic climate change and population exposure to extreme precipitation and flooding.

A study prepared for the American Geophysical Union by *Swain et al.* aims to characterize the response of potential flood hazards to projected increases in extreme precipitation in the United States, using a large climate model ensemble and advanced hydrodynamic flood model. Swain *et al.* analyze both medium and high warming scenarios to provide a range of potential impacts to extreme precipitation. The study finds an average increase in magnitude and frequency of the 100-year precipitation event of ~20 percent and >200 percent, respectively, in the high warming scenario. As a result, the study projects a ~30-127 percent increase in population exposure to flooding. The low end of the population exposure range assumes no change in total population in future years, whereas the high end of the range assumes high population growth by 2050-2079.

Interestingly, the contributions from anthropogenic climate change and population growth are not simply additive. A non-linear increase in population exposure exists when analyzing the compounded effects of climate change and population growth compared to the effects of either climate change or population growth alone. This suggests the presence of "exposure hotspots", which include regions that historically did not fall within the 100-year floodplain and were not heavily populated during the 20th century. In future years, those regions will fall into 21st century floodplains and experience population expansion simultaneously. As a result, the combined impacts of anthropogenic climate change and population growth together will yield increased population exposure compared to looking at the drivers independently. The study highlights the importance of incorporating larger and more frequent extreme precipitation events into design considerations for new infrastructure.

See: Swain, D. L., Wing, O. E. J., Bates, P. D., Done, J. M., Johnson, K. A., & Cameron, D. R. (2020). Increased flood exposure due to climate change and population growth in the United States. Earth's Future, 8, e2020EF001778. https://doi.org/10.1029/2020EF001778

(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION AND SACRAMENTO RIVER CONTRACTORS COORDINATE AND DELAY WATER DIVERSIONS TO BENEFIT CHINOOK SALMON

Sacramento River Chinook salmon are a species of fish that have been subject to numerous protections over the years in order to battle declining populations. In light of these circumstances, the U.S. Bureau of Reclamation (Bureau) has coordinated with several entities in order to delay water diversions and early flow reductions to benefit fall-run Chinook salmon, as well as provide other benefits to the ecosystem in the Sacramento Valley area.

Background

According to Reclamation, Chinook salmon are a significant part of California's natural heritage. Chinook salmon are a species of fish native to the North Pacific Ocean and the river systems of western North America, ranging from California to Alaska. Chinook are anadromous fish, meaning that they can survive and live portions of their lives in fresh and salt water. As a result, Chinook salmon have a complex life history. A Chinook salmon will spawn and rear juveniles in freshwater rivers, which then migrate downstream to the ocean to feed, grow and mature. After maturation, the Chinook return to freshwater to spawn and repeat the process.

Four distinct runs of Chinook salmon spawn in the Sacramento-San Joaquin River system. Each run is named after the season when the majority of the salmon enter freshwater as adults. According to the Bureau, endangered Sacramento River winter-run Chinook salmon are particularly important among California's salmon runs because they exhibit a life-history strategy found nowhere else on the West Coast. These Chinook salmon are unique in that they spawn during the summer months when air temperatures usually approach their warmest. In contrast, fall-run Chinook salmon migrate upstream as adults from July through December and spawn from early October through late December. The timing of runs varies from stream to stream. Late-fall-run Chinook salmon migrate into the rivers from mid-October through December and spawn from January through mid-April. The majority of young salmon of these species migrate to the ocean during the first few months following emergence, although some may remain in freshwater and migrate as yearlings.

Fall-run Chinook salmon are currently the most abundant of the Central Valley salmon species, contributing to large commercial and recreational fisheries in the ocean and popular sport fisheries in the freshwater streams. Fall-run Chinook salmon are raised at five major Central Valley hatcheries which release more than 32 million smolts each year. Due to concerns over population size and hatchery influence, Central Valley fall and late-fall-run Chinook salmon are a Species of Concern under the federal Endangered Species Act.

Under § 7 of the federal Endangered Species Act (ESA), federal agencies must consult with the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries or NMFS) relating to activities that may affect ESA-listed species. Formal consultations result in NOAA Fisheries developing a Biological Opinion. The intent of a Biological Opinion is to evaluate whether a proposed federal action will jeopardize the continued existence of an ESA-listed species, or adversely modify such species designated critical habitat. A non-jeopardy Biological Opinion usually also includes conservation recommendations that are designed to help further the recovery of ESA-listed species. A non-jeopardy Biological Opinion typically also includes reasonable and prudent measures as needed to minimize any harmful effects, and may require monitoring and reporting to ensure that the project or action is implemented as described.

In October 2019, NOAA Fisheries published its *Biological Opinion for the Reinitiation of Consultation on the Long-Term Operation of the Central Valley Project and State Water Project* (Biological Opinion). In this Biological Opinion, NOAA Fisheries evaluated the impact of Central Valley Project and State Water Project water operations on ESA-listed species,

including Sacramento River winter-run Chinook salmon. The Biological Opinion documented impacts from the proposed operations of the two water projects. NOAA Fisheries worked with the Bureau to modify the proposed action to minimize and offset those impacts.

Bureau Actions

Pursuant to the recommendations in the Biological Opinion, the Bureau has begun to work with a large variety of federal and state public agencies and contractors, to implement fall water operations to benefit salmon populations in the Sacramento River.

In order to balance temperature and wildlife needs, the Biological Opinion recommends that the Bureau reduce fall releases to save cold water and storage for next year's temperature management season in years with lower end-of-September storage. Maintaining releases to keep late spawning winter-run Chinook salmon redds underwater may drawdown storage necessary for temperature management in a subsequent year. In years with sufficient end of September storage, the Bureau will maintain higher releases in the fall to avoid dewatering the last winter-run salmon redds, indicating that there is flexibility depending on the amount of water storage available. It is also recommended that the Bureau adhere to ramping rate restrictions to reduce the risk of juvenile stranding during these operations. The Biological Opinion also contains recommendations for coordination with Sacramento River water diverters, specifically delaying diversions to avoid the risk of impacting Chinook salmon populations.

Voluntary Delay of Water Diversions

In October, the Bureau coordinated with the Sacramento River Settlement Contractors (SRS Contractors) to voluntarily delay a portion of their water diversions from October 16-31 until November 1-23, which would allow the Bureau to further reduce flows in the Sacramento River in mid-October. With lower late October and early November flows, fall-run Chinook salmon are less likely to spawn in shallow areas that would be subject to dewatering during winter base flows. As a result, according to the Bureau, early flow reductions balance the potential dewatering late spawning winter-run Chinook salmon redds and early fall-run Chinook salmon redds. These delayed water diversions and corresponding early flow reductions are anticipated to prevent the dewatering of 2.2 percent of fall-run Chinook salmon redds, which is approximately 1 million eggs, greatly benefiting fall-run Chinook salmon populations.

Conclusion and Implications

Ultimately, the Bureau of Reclamation's actions highlight ongoing partnerships in water resource management to allow entities to quickly respond to changing water conditions in a manner that ensures efficient water supply management while also addressing the needs of fish and wildlife habitat. This flexibility may prove to be a boon given that circumstances may differ greatly year-to-year. It remains to be seen if future interactions between the SRS Contractors, Bureau, and other agencies will remain on good footing, but the current interactions showcase a commitment to maintaining these relationships. For more information, *see:* https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=73005
(Miles Krieger, Steve Anderson)

CALIFORNIA PUBLIC UTILITIES COMMISSION ADOPTS DECISION TO RE-START 'REMAT' PROGRAM

On October 8, 2020, the California Public Utilities Commission (Commission or CPUC) adopted Decision 20-10-005, *Decision Resuming and Modifying the Renewable Market Adjusting Tariff Program*. The Renewable Market Adjusting Tariff, or "ReMAT" program is a feed-in tariff for small renewable energy projects located in the service territories of California's largest investor-owned utilities (IOUs). The program was enjoined in 2017 by the U.S. District Court in *Winding Creek Solar LLC v. Peevey* as violative of the Public Utility Regulatory Policies Act (PURPA). ((N.D. Cal. 2017) 293 F.Supp.3d 980, aff'd sub nom, *Winding Creek Solar LLC v. Carla Peterman, et al.* (9th Cir. 2019) 932 F.3d 861). The CPUC Decision revises

the ReMAT program to bring it into compliance with PURPA. Pacific Gas & Electric (PG&E) and Southern California Edison (SCE) will revise their tariffs implementing the ReMAT program in accordance with Decision 20-10-005.

ReMat Program History

The initial incarnation of the ReMAT program was launched in 2007 to implement Assembly Bill (AB) 1969 (2006). AB 1969 amended the California Public Utilities Code to establish a feed-in tariff for small renewable energy projects at public water and wastewater facilities. The major IOUs—PG&E, SCE, and San Diego Gas & Electric (SDG&E)—were required to provide a standard contract to all eligible facilities, up to the state-wide cap of 250 MW. The program was expanded through legislation in 2008, 2009, and 2011, opening the tariff to all renewable energy generators and increasing the maximum capacity of eligible facilities from 1.5 MW to facilities of not more than 3 MW. The state-wide cap on procurement under the program was increased to 750 MW.

With the amendments, the tariff price was changed from the market price referent, that is, the presumptive cost of electricity from a new 500 MW natural gas-fired combined cycle power plant, to a price set by the Commission based on delineated factors. In setting the price for electricity under the tariff, the Commission was required to consider: 1) the long-term market price for fixed price products determined by the utilities' general procurement activities; 2) the long-term ownership, operating, and fixed-price fuel costs for fixed-price electricity from new generation facilities; and 3) the value of different products, including baseload, peaking, and as-available electricity. The Commission developed a pricing mechanism under the ReMAT program that adjusted bi-monthly for each of the three electricity products (baseload, peaking, and as-available non-peaking), based on demand for ReMAT contracts in each of the IOUs' territories. To moderate subscription levels and price, each IOU instituted a 5 MW cap on subscriptions for each bi-monthly period, for each type of electricity product.

The *Winding Creek Solar* Decision

In 2013, Winding Creek Solar LLC filed suit in the U.S. District Court for the Northern District of California alleging the ReMAT program violated PURPA. Winding Creek contended that the ReMAT program's caps on procurement violated PURPA's mandatory purchase obligation. It also argued that the adjustable pricing mechanism violated PURPA because it was not based on the utilities' avoided costs. In 2017, the District Court granted Winding Creek's motion for summary judgment and enjoined further implementation of the ReMAT program. In 2019, the Ninth Circuit affirmed the District Court decision.

The CPUC Decision 20-10-005

The CPUC Decision modifies the ReMAT program to "both make [it] compliant with federal law and give effect to [California Public Utilities Code] § 399.20." The Commission explained in the Decision that the ReMAT program must be implemented pursuant to PURPA because the Commission is setting the wholesale price for the purchase of electricity. While the Federal Energy Regulatory Commission has exclusive jurisdiction to set rates for wholesale sales and purchases of power, the Federal Power Act allows one exception to this in permitting states to set or approve wholesale prices for purchases of electricity from qualifying facilities of 20 MW or less pursuant to PURPA. California Public Utilities Code § 399.20 requires the Commission to establish a methodology to determine the market price of electricity considering certain enumerated factors, to offer to ReMAT facilities.

Administrative Determination of Price

The Decision replaces the ReMAT adjusting price mechanism with an administrative determination of price. The new pricing methodology is based on a weighted average of the most recent long-term contracts for renewable energy facilities sized 20 MW or less executed by the IOUs. The price will initially reflect contracts executed by the IOUs from 2014 to 2019. The price will also incorporate a value for the different electricity products—baseload, as-available peaking, and as-available non-peaking—to reflect time of delivery. The CPUC's Energy Division will annually update the ReMAT prices in May of each year to reflect pricing in the most recent contracts. The Energy Division may use an expanded set of contracts to adjust the price, by including a complete

set of data from Community Choice Aggregators and Electric Service Provider contracts, if available. The Energy Division may also increase or decrease the lookback period to reflect the most recent RPS contracts, as long as the confidentiality of market-sensitive price information is maintained. The Commission decided to utilize recently executed RPS contracts as the basis for the new tariff pricing because "actual market-based energy prices are better indicators of the utilities' avoided costs" given that they represent a range of eligible renewable technologies, project sizes, and dispatchability, reliability, and other factors that the PURPA regulations outline for consideration when setting avoided cost rates. The Commission also found that use of executed contracts has the benefit of greater transparency and verifiability.

In the public proceeding to adopt the new ReMAT pricing mechanism, project developers argued that the price would be too low and ineffective at stimulating project development and achieving the mandate of the legislation establishing the program. The Decision noted that PURPA is not designed to ensure prices support a qualifying facility's cost of production, but instead provide a guarantee that the utilities will purchase electricity offered by a qualifying facility at a price that the utilities would otherwise pay for the next increment of generation.

Conclusion and Implications

The Decision also eliminates the bi-monthly program periods and limits on procurement for each bi-monthly period. The bi-monthly program periods, along with the related procurement caps, facilitated bi-monthly price adjustments under the prior ReMAT pricing mechanism. With the avoided-cost rate now administratively set, the program periods are not necessary.

The Decision does not affect ReMAT contracts that have already been executed. The CPUC declined to consider re-opening the ReMAT program to facilities in SDG&E's territory at this time. The ReMAT rules permitted SDG&E to close its ReMAT program in 2016, despite the utility having only procured about 65 percent of its allocated program capacity.
(Allison Smith)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Civil Enforcement Actions and Settlements—Air Quality

•October 19, 2020 - The U.S. Environmental Protection Agency (EPA) announced a settlement with Valero Energy Corporation and a number of its subsidiaries and affiliates that resolves alleged violations at 12 facilities of federal Clean Air Act fuel quality requirements that are designed to reduce air pollution from motor vehicles. Pursuant to the settlement, Valero will install pollution controls to reduce an estimated 23 tons of volatile organic compound emissions per year at its terminal in Port Arthur, Texas and pay a $2.85 million civil penalty to the United States. Valero will also develop and implement a company-wide Fuels Management System to help ensure its production of gasoline and diesel fuel complies with the Clean Air Act. Valero further committed to completing two benzene reduction measures at its refinery in Corpus Christi, Texas that Valero estimates will result in emission reductions of 583 pounds per year. The proposed consent decree, which was lodged in the United States District Court for the Western District of Texas, will undergo a 30-day public comment period and then be subject to final court approval.

•October 21, 2020 -The EPA has settled a Clean Air Act case against DDM Imports of Airway Heights, Washington for illegally importing from Canada three diesel pickup trucks lacking required emission controls in March 2020. The case came to EPA from U.S. Department of Homeland Security Customs and Border Protection officers who inspected the trucks at the U.S.-Canada border in Eastport, Idaho and found that the wires and connections between emissions sensors and controls and the vehicles' onboard diagnostics systems had been cut on two of the trucks. Emission controls devices had been removed from the third truck. Under the terms of the signed Consent Agreement and Final Order, the company will pay a $65,000 penalty.

•October 29, 2020 - The EPA has reached an agreement with Apache Nitrogen Products, Inc. to resolve federal civil environmental violations of the Clean Air Act's chemical accident prevention measures and of federal laws requiring timely notification of chemical accidents. EPA identified these violations following an anhydrous ammonia release that led to thirteen workers being injured at the Apache Nitrogen Products facility in St. David, Arizona. Apache Nitrogen Products, which uses anhydrous ammonia to manufacture ammonium nitrate-based explosives for mining operations and agricultural fertilizers, will pay a $1.5 million civil penalty and make widespread safety improvements to its facility, some of which have already been implemented. EPA's inspections in 2015 and 2017 were prompted by the company's release of more than 52,000 pounds of anhydrous ammonia while offloading a railcar in June 2014. During the investigation, EPA found violations of the Clean Air Act's Risk Management Program regulations, including deficiencies in the plant's hazard assessment, process safety information, operating procedures, mechanical integrity program, compliance audits, and emergency response program. The release injured 12 employees and one contractor, including seven who needed off-site medical evaluation, and also required the evacuation of employees. Under the terms of the settlement, the company has agreed to enhance safety equipment and procedures at the St. David facility, including making improvements to its preventive maintenance tracking system to ensure equipment is being inspected and tested regularly, conducting an audit of its process safety culture with the assistance of a third-party expert, and upgrading its emergency response plan to include installation of an anhydrous ammonia monitoring system and enhanced public notifications. The company has also replaced or upgraded equipment to improve accident prevention.

•November 17, 2020 - Under the terms of a recent settlement with the EPA, Connecticut Scrap, LLC and five related scrap metal companies in Con-

necticut and Rhode Island will pay a total penalty of $160,000 and take important steps to comply with the Clean Air Act. EPA alleged that Connecticut Scrap failed to comply with federal standards for large stationary diesel engines designed to reduce air pollution from these engines. EPA also claimed that Connecticut Scrap and its five related scrap metal companies failed to comply with federal standards designed to protect the stratospheric ozone layer, which shields us from ultra-violet radiation from the sun. In lieu of complying by installing controls on its large stationary diesel engine, Connecticut Scrap opted to take the engine out of service and connect to the electric power grid. Connecticut Scrap completed this conversion in March 2019. Removing this engine and switching to grid power helps reduce emissions of carbon monoxide, nitrogen oxides, volatile organic compounds, and particulate matter as well as hazardous air pollutants such as formaldehyde. Connecticut Scrap, primarily located in Uncasville, Connecticut accepts and shreds various post-consumer and industrial metals. The facility collects white goods, appliances, cars, demolition waste, and other metals from the public and from scrap yards operated by related entities in Connecticut and Rhode Island. The various metals are shredded by a hammermill shredder formerly powered by a large diesel engine. The Connecticut Scrap entities are Connecticut Scrap, L.L.C.; City Auto Parts, Incorporated; Exeter Scrap Metal, L.L.C; Nichols Auto Parts, Inc.; Ross Recycling, Inc., all in Connecticut; and Yerrington's Auto Salvage, Inc., in Rhode Island.

•November 23, 2020—EPA has reached settlements with two Iowa companies for allegedly tampering with car engines to render emissions controls inoperative, in violation of the federal Clean Air Act. According to EPA, Menzel Enterprises Iowa Inc. of West Des Moines installed so-called "defeat devices" in at least five vehicles. EPA also alleged that UpCountry Fab and Performance LLC of Clive, Iowa, removed emission control equipment and/or sold "defeat devices" on at least 48 occasions. Under the terms of the settlements, each company will pay a civil penalty and must certify that it will refrain from disabling emission controls in the future.

Civil Enforcement Actions and Settlements—Water Quality

•October 29, 2020—The U.S. Department of Justice and the EPA announced a settlement with the City of Colorado Springs, Colorado, to resolve violations of the Clean Water Act with respect to the City's storm sewer system. The settlement also includes the State of Colorado as a co-plaintiff, and the Lower Arkansas Valley Water Conservancy District and the Board of County Commissioners of the County of Pueblo as plaintiff-intervenors. The improvements made by the city under this settlement will result in significant reductions in the discharge of pollutants, such as sediment, oil and grease, heavy metals, pesticides, fertilizers, and bacteria, into Fountain Creek and its tributaries in Colorado Springs. Communities downstream of Colorado Springs will also see significant water quality improvements from the settlement. The amended complaint generally alleged that the City of Colorado Springs violated its National Pollutant Discharge Elimination System (NPDES) permit for its municipal stormwater management program by failing to require the installation and maintenance of stormwater management structures at residential and commercial developments. The complaint also alleged that the city failed to enforce requirements to prevent polluted stormwater from running off active construction sites. The city has since taken significant steps to improve its stormwater management program. The proposed settlement requires the city to take additional actions, including developing standard operating procedures and increased staff training for critical elements of its stormwater management program. In addition, under the settlement the city will capture the volume of stormwater that was required to be captured under the city's NPDES permit using an innovative approach that identifies capacity needs and the appropriate locations for adding capacity on a watershed basis. The proposed settlement also requires the city to mitigate the damage to Fountain Creek and its tributaries through stream restoration projects. The city will spend a total of $11 million on this mitigation. Finally, the City of Colorado Springs will pay a $1 million federal civil penalty. In lieu of paying a civil penalty to the state, the city will perform

state-approved supplemental environmental projects valued at $1 million that will improve water quality in the Arkansas River, into which Fountain Creek flows south of the city. The City of Colorado Springs' storm sewer system serves a population of more than 460,000 people and comprises approximately 250 miles of storm water ditches and channels, with more than 690 major outfalls, throughout the City of Colorado Springs.

•October 29, 2020 - The U.S. Department of Justice and the EPA have reached a settlement with Bobby Wolford Trucking & Salvage, Inc. and Karl Frederick Klock Pacific Bison, LLC, for federal Clean Water Act violations. The government alleges that the two parties discharged fill material into wetlands, an oxbow of the Skykomish River, and a perennial stream without obtaining the required permits. According to the federal consent decree, over a three-year period beginning in 2008, Bobby Wolford Trucking & Salvage, Inc. delivered fill material to the Karl Frederick Klock Pacific Bison, LCC property, located approximately three miles east of Monroe, Washington. The government alleges that the trucking company used heavy equipment to dump—and charged others to dump—more than 54,000 cubic yards of fill material, including construction debris, enough to fill more than 16 Olympic sized swimming pools. The fill was then dumped into an oxbow of the Skykomish River, nearby wetlands, and a perennial stream flowing through the Klock property. The government further alleges that neither Karl Frederick Klock Pacific Bison, LLC, nor Bobby Wolford Trucking & Salvage, Inc. obtained the required Clean Water Act permits before undertaking the work. Several listed "threatened" species depend on the Skykomish River, including Steelhead, Chum, Coho, and Pink salmon, as well as Chinook salmon and Bull Trout, for which this stretch of the Skykomish is designated critical habitat. Under the terms of the consent decree: 1) Bobby Wolford Trucking & Salvage, Inc. will pay $300,000 in civil penalties; 2) will perform significant restoration work, including removing approximately 40,000 cubic yards of unauthorized fill from the oxbow of the Skykomish River and nearby wetlands, re-grading the site, and paying for native plants for revegetation efforts.

The Tulalip Tribes of Washington will oversee the earth-moving and restoration work and install native plants on 17 acres of the property.

Karl Frederick Klock Pacific Bison, LLC will execute an environmental covenant to place restrictions on approximately 188 acres of the property.

•November 18, 2020 - The EPA has reached settlements with two Hays, Kansas, crude oil production facilities for allegedly discharging oil into the Saline River, in violation of the federal Clean Water Act. According to EPA, R.P. Nixon Operations Inc. released approximately 165 barrels of oil in 2016, and Empire Energy E&P LLC released approximately 16 barrels in 2019. EPA inspections of the companies' facilities conducted after the reported discharges revealed additional violations of regulations intended to prevent and contain oil spills. Under the terms of the settlements, R.P. Nixon and Empire Energy agreed to pay civil penalties of $50,000 and $37,000, respectively. R.P. Nixon also agreed to take actions to achieve compliance at approximately 90 of its oil production facilities in Kansas. Facilities that store 1,320 gallons or greater of oil products in aboveground storage tanks are subject to Clean Water Act. EPA alleges that the companies failed to comply with these requirements, and that such noncompliance contributed to the discharges to the Saline River.

•November 19, 2020 - Koppers Inc. has agreed to settle with the EPA, the state of West Virginia and the state of Pennsylvania to resolve alleged violations of federal and state environmental laws at its facilities in Follansbee and Green Spring, West Virginia, and Clairton, Pennsylvania, EPA announced. A complaint filed with the settlement agreement cited violations of the Clean Water Act's Spill Prevention, Control and Countermeasure (SPCC) and Facility Response Plan (FRP) requirements. The SPCC rules help facilities prevent a discharge of oil into navigable waters or adjoining shorelines. The FRP rules require certain facilities to submit a response plan and prepare to respond to a worst-case oil discharge or threat of a discharge. Under a proposed consent decree filed in the United States District Court of the Northern District of West Virginia, Koppers will pay $800,000 to the United States, $175,000 to West Virginia, and $24,500 to Pennsylvania. The proposed consent decree is subject to a 30-day public comment period. The complaint also cited violations of the West Virginia Above Ground Storage Tank Act and

its implementing regulations, which seek to protect and conserve the water resources of the state and its citizens. In addition, the complaint cited violations of the Pennsylvania Storage Tank and Spill Prevention Act and its implementing regulations, which set forth tank handling and inspection requirements.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•November 9, 2020—The EPA has reached a settlement with Quest USA Corp. for violations of federal pesticide law. The company, based in New York, illegally imported alcohol wipes that were not registered with the EPA through the Port of Long Beach. As the product was not EPA-registered, neither its public health claims or potential effects on human health and environment have been evaluated. The company has agreed to pay a $213,668 civil penalty. The Quest products, *BioPure Multipurpose Wipes*, were halted under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which prohibits the distribution or sale of unregistered pesticides. The company also failed to file required documents stating that it was importing pesticides into the United States. Under FIFRA, purported disinfectant products that claim to kill or repel viruses, bacteria or germs are considered pesticides and must be registered with the EPA prior to distribution or sale.

•November 12, 2020 - The EPA has entered into settlements with Central Garden & Pet, Inc. (CG&P) of Walnut Creek, California, and Nufarm Americas Inc. (Nufarm) of Alsip, Illinois, resolving alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that occurred in a pesticide production facility located in Longmont, Colorado. Under the terms of two separate Consent Agreements and two Final Orders filed on September 24, 2020, CG&P will pay a civil penalty of $285,700, Nufarm will pay a civil penalty of $80,000, and both companies must ensure the pesticides they sell and distribute are properly labeled. The settlements resulted from a July 29, 2016, EPA-led investigation at GRO TEC II, a pesticide production facility in Longmont, Colorado, owned by the parent company CG&P. The inspection found that CG&P and Nufarm were distributing pesticide products with outdated labeling that were missing important, current information on how to safely use, store, and dispose of pesticide products. The process of registering a pesticide is a scientific, legal, and administrative procedure through which EPA examines the ingredients of the pesticide; the specific site or crop where it is to be used; the amount, frequency, and timing of its use; and storage and disposal practices.

•November 24, 2020 - The EPA and CJ Air, LLC, an aerial pesticide applicator based in Nezperce, ID, have reached a settlement over a pesticide container disposal case that occurred on the Nez Perce Reservation in July 2018. EPA alleges that the containers were not rinsed according to labeling instructions and still contained toxic pesticide residue at the time of disposal. Pesticide product labels provide critical instructions about how to safely and legally handle and use pesticide products including proper disposal of containers. Unlike most other types of product labels, pesticide labels are legally enforceable. In other words, the label is the law. In this case, the label requires users to follow specific rinsing procedures prior to disposing of empty containers. Failure to properly rinse and dispose of pesticide containers—especially those containing "restricted use" pesticides—can cause environmental damage and harm people, pets and wildlife. Restricted use pesticides are not available for purchase or use by the general public because they have the greatest potential to cause serious harm to the environment and injury to applicators or bystanders if used improperly. Availability and use of such products are restricted to applicators with special training and in some cases, those under their direct supervision. The unrinsed containers created a noticeable odor and some of them contained restricted use pesticide residue. When made aware of the situation, CJ Air promptly retrieved the unrinsed containers and rinsed them according to label instructions. As part of the settlement, CJ Air agreed to pay a $5,400 penalty.

Indictments, Convictions, and Sentencing

•October 20, 2020 - Two biofuel company owners were sentenced to prison for conspiracy and making false statements to the EPA and conspiracy to defraud the IRS and preparing a false tax claim. U.S. District Judge John E. Jones III sentenced Ben Wootton, 55 of Savannah, Georgia, to 70 months and Race Miner, 51, of Marco Island, Florida, to 66 months, after a jury convicted both defendants and

their company, Keystone Biofuels Inc. (Keystone), in April 2019. The company was originally located in Shiremanstown, Pennsylvania, and later in Camp Hill, Pennsylvania. Miner was the founder and chief executive officer of Keystone. Wootton was president of Keystone, and a former member of the National Biodiesel Board. The court ordered both men to pay restitution of $4,149,383.41 to the IRS and restitution of $5,076,376.07 to the Pennsylvania Department of Environmental Protection. Wootton and Miner will also have to serve a three-year term of supervised release after their term of imprisonment. Keystone was sentenced to five years' probation and ordered to pay restitution of $4,149,383.41 to the IRS and restitution of $5,076,376.07 to the Pennsylvania Department of Environment Protection criminal fine. Wootton, Miner, and Keystone falsely represented that they were able to produce a fuel meeting the requirements set by the American Society for Testing and Materials (ASTM) for biodiesel (a renewable fuel) and adopted by the EPA, and as such were entitled to create renewable fuel credits, known as RINs, based on each gallon of renewable fuel produced. The fuel and the RINs have financial value and could be sold and purchased by participants within the federal renewable fuels commercial system. Wootton and Miner were also convicted of fraudulently claiming federal tax refunds based on IRS's Biofuel Mixture Credit. The Biodiesel Mixture Credit is a type of "blender's credit" for persons or businesses who mix biodiesel with diesel fuel and use or sell the mixture as a fuel. Wootton and Miner caused Keystone to fraudulently claim tax refunds based on non-qualifying fuel and, in at least some instances, non-existent or non-mixed fuel.
(Andre Monette)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUPS CHALLENGE EPA AMENDMENTS TO NEW SOURCE PERFORMANCE STANDARDS

Several environmental groups, who challenged U.S. Environmental Protection Act's amendments to the 2012 and 2016 new source performance standards (NSPS) for the oil and gas sector, also filed a separate lawsuit challenging the amendments to the NSPS resulting from EPA's reconsideration of fugitive emissions requirements, well site pneumatic pump standards, requirements for certification of closed vent systems, and provisions to apply for use of an alternative means of emissions limitation. [*Environmental Defense Fund v. Wheeler*, Case No. XX, *Filed* Oct. 27, 2020, D.C.]

Background

In *Environmental Defense Fund v. Wheeler*, the Environmental Defense Fund, Center for Biological Diversity, Clean Air Council, Earthworks, Environmental Integrity Project, Food & Water Watch, National Parks Conservation Association, Natural Resources Defense Council, and Sierra Club are suing Andrew Wheeler as administrator of the U.S. Environmental Protection Agency (EPA) and the EPA itself, petitioning the D.C. Circuit Court for review of the final action of Administrator Wheeler and the EPA to rescind and modify certain standards of performance for the oil and gas sector. Specifically, petitioners seek review of the NSPS titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration." (*See:* https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/epa-issues-final-policy-and-technical)

The challenged action finalizes amendments to the NSPS for the oil and gas sector. The EPA granted reconsideration on the fugitive emissions requirements, well site pneumatic pump standards, requirements for certification of closed vent systems by a professional engineer, and the provisions to apply for the use of an alternative means of emission limitation. The final action included amendments as a result of the EPA's reconsideration of the issues associated with those four subject areas and other issues raised in the reconsideration petitions for the NSPS, as well as the implementation of the rule.

Potential Harms

The Environmental Defense Fund (EDF) asserts that the Trump administration's attempt to eliminate "sensible methane standards is fundamentally flawed." The EDF argues that the rule ignores the science, the public health impacts and the low-cost solutions we have at hand, and that the rule has worked to protect Americans since its initial implementation in 2016:

> The Trump administration's attempt to eliminate these sensible methane standards is fundamentally flawed. Like so many other administration rollbacks that have already been rejected by the courts, this one ignores the science, the public health impacts and the low-cost solutions we have at hand. These sensible pollution controls have been working to protect Americans since 2016. Investors, states, community groups and even leading oil and gas producers have all called on the EPA to retain and strengthen methane safeguards. The administration has no scientific or public health basis for taking this action, and EDF will forcefully oppose it in court. These rollbacks would have devastating effects on our climate and air quality, and will disproportionately damage the well-being of more than 9 million Americans who live within half a mile of wells affected by this rollback, including many Americans in our most vulnerable communities.

Investors, states, community groups, and even some leading oil and gas producers called on the EPA to retain and strengthen methane safeguards. The EDF alleges that there is no scientific nor public health basis for taking the action. Petitioners assert that the proposed rollbacks would have devastating effects on the nation's climate and air quality, and

will disproportionately damage the health and well-being of more than 9 million Americans who live within a half mile of wells affected by the rollback. This includes many Americans in the nation's most vulnerable communities.

The oil and gas industry is one of the largest sources of human-made methane pollution. Reducing methane from oil and gas supply chains is considered among the most effective ways to slow the rate of global warming right now. Yet the Trump Administration's rollback would instead allow an estimated additional 4.5 million metric tons of methane pollution into the atmosphere each year. This pollution has the climate warming potential, when considered over a 20-year span, of nearly 400 million metric tons of carbon dioxide annually. This is nearly equal to the emissions from around 100 coal-fired power plants each year.

Conclusion and Implications

The suit is part of a growing trend of challenges to the Trump administration's environmental actions. These suits are expected to stretch well into the Biden administration, as environmental activists push to keep particular issues on the incoming administration's radar. Trump Administration officials are working to finalize further rules in the last weeks of his presidency, which are likely to create their own wave of last-minute challenges. The work of determining the country's future course on climate change will not pause during the lame duck session.
(Jordan Ferguson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REJECTS NEPA LAWSUIT CHALLENGING EIS FOR SHEEP GRAZING PLAN IN GRIZZLY BEAR HABITAT

Cottonwood Environmental Law Center v. U.S. Sheep Experiment Station, *Unpub.*, Case 19-35511 (9th Cir. Oct. 28, 2020).

In an *unpublished* decision, the U.S. Court of Appeals for the Ninth Circuit rejected environmental plaintiffs' arguments that an Environmental Impact Statement (EIS) prepared for a sheepherding plan in Montana's Centennial Mountains, a grizzly-bear habitat, violated the National Environmental Policy Act (NEPA). Plaintiffs pointed to factual inconsistencies in the Final Environmental Impact Statement (FEIS) prepared for the decision where parts of the FEIS noted there were no grizzly-bear and human interactions, but other parts of the FEIS and record detailed at least one such interaction. The court relied on the "rule of reason" to note that despite these inconsistencies, the FEIS still contained sufficient information and analysis for the federal agency to make an informed decision to approve the sheep grazing plan and examine project alternatives.

Factual and Procedural History

In 2017, environmental plaintiffs filed their third lawsuit challenging domestic sheep grazing by the federal Agricultural Research Service (ARS) in portions of the Centennial Mountains in southwestern Montana. The area is part of the Greater Yellowstone Ecosystem which is an important habitat linkage for the endangered grizzly bear population in and near Yellowstone National Park. The environmental groups alleged the presence of sheep in the area increased the likelihood of threats to the grizzly bears resulting from interactions between the bears and sheep and humans.

Plaintiffs' alleged specifically that ARS violated NEPA by conducting a flawed environmental review that was arbitrary and capricious. Specifically, Plaintiffs alleged that the FEIS was self-contradictory. The FEIS claimed that there had not been any human, grizzly-bear interactions, however there were documents in the record indicated that at least one encounter occurred between grizzly bears and sheep herders. ARS responded that the FEIS disclosed this grizzly bear encounter, and noted that the species of bear involved in the incident was unknown at the time of the encounter. ARS noted that the bear encounter was consistent with natural bear behavior, and that the bear had not lost its natural wariness of humans, and the incident was resolved by moving the sheep to a different pasture.

Plaintiffs filed a motion for summary judgment, which the district court denied. Instead, the court entered a judgment for defendants, which plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit's Decision

In an *unpublished memorandum* decision, the Court of Appeals rejected plaintiffs' arguments. The court noted that it reviews administrative agency decisions under the abuse of discretion standard. Under this standard, an agency action is arbitrary and capricious if the agency has:

> . . .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.

The 'Hard Look' Standard of Review

The court rejected plaintiffs' contention, noting that NEPA does not impose "substantive environmental" obligations on federal agencies, but instead prohibits "uninformed—rather than unwise—agency action." All that is required is that an agency take a "hard look" at environmental consequences of the agency's proposed actions. Despite plaintiffs' claims regarding internal inconsistencies in the FEIS, the

court was convinced that the ARS took a hard look at the consequences of continued sheep grazing in Montana's Centennial Mountains. In reaching its decision, the court differentiated the instant matter from prior cases where unexplained, conflicting findings in an EIS rendered the analysis therein arbitrary and capricious. Those cases involved federal agencies that changed their decision based on the same factual record without providing a reasoned explanation for its change in course. Here, ARS did not change its course and merely characterized bear encounters differently in different parts of the FEIS.

The 'Rule of Reason'

The court relied on the "rule of reason standard" which:

> . . .requires a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation.

In the instant case, the discrepancies in the FEIS's description of grizzly bear encounters did not render the FEIS so misleading that the agency and the public could not make an informed comparison of alternatives. Accordingly the court ruled that the project's NEPA analysis did not violate NEPA.

Conclusion and Implications

This latest *Cottonwood* decision is the culmination of several years of litigation challenging federal sheep grazing programs in the Centennial Mountains. While efforts to reintroduce grizzly bears, wolves, and other native species throughout the west continue, disputes and litigation between grazing interests and conservationists are sure to follow. The Ninth Circuit's *unpublished memorandum* opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/memoranda/2020/10/28/19-35511.pdf
(Travis Brooks)

D.C. CIRCUIT FINDS DISTRICT OF COLUMBIA'S WATER POLLUTION CONTROL ACT IS DISCRETIONARY

District of Columbia v. Miss Dallas Trucking, LLC,
___F.3d___, Case No. 19-CV-540 (D.C. Cir. Oct. 22, 2020), *as amended* (Nov. 12, 2020).

The Court of Appeals for the District of Columbia recently held that civil penalties under the District of Columbia's Water Pollution Control Act (WPCA) are discretionary rather than mandatory. The court's decision deviates from several federal Circuit Courts of Appeal decisions interpreting mandatory civil penalties in the language of the distinct federal Clean Water Act (CWA), the statute which served as a model for the WPCA.

Factual and Procedural Background

In March 2016, a truck owned by Miss Dallas Trucking, LLC (MDT) crashed in the District of Columbia (District) and spilled about 900 gallons of fuel and engine oil into a drainage channel leading into the Potomac River. MDT refused a request to begin cleanup, leaving the District's Department of Energy & Environment to conduct cleanup at a cost of $31,399.69. The District initiated a civil enforcement action against MDT for violations of the WPCA.

The District sought recovery of its cleanup costs and a $50,000 civil penalty for violations of the WPCA. When MDT did not answer the District's complaint, the trial court entered default judgment against MDT and granted the District an award in the amount of its cleanup costs. With regard to the civil penalty, the trial court explained that it had to consider four statutory factors when fashioning a civil penalty: 1) the size of the business, 2) its ability to continue the business despite the penalty, 3) the seriousness of the violation, and 4) the nature and extent of its success in its cleanup efforts.

At the Trial Court

The trial court concluded that the District did not adequately address the first two factors and therefore imposed no civil penalty.

The District asked the trial court to reconsider its determination as to the civil penalty. It argued that the civil penalties were mandatory based on the language of the WPCA, that any lack of evidence should be held against MDT, who possessed and withheld the pertinent information, and that the court should otherwise treat those two factors as insignificant and fashion a penalty based on the evidence available. The trial court again denied the District's request, holding that imposition of a civil penalty under the WPCA was discretionary rather than mandatory. The trial court further reasoned that the lack of evidence on MDT's size and ability to absorb the penalty precluded its imposition. The District appealed.

The D.C. Circuit's Decision

The threshold issue on appeal was whether imposition of a civil penalty was mandatory or discretionary under the WPCA. The District argued that a civil penalty, however minimal, was mandatory and that, alternatively, the trial court abused its discretion in determining no penalty was appropriated due to the lack of evidence as to two of the four statutory factors.

Whether civil penalties are mandatory under the WPCA is a question of statutory interpretation which is reviewed *de novo*.

The Court of Appeals began its inquiry with a review of the relevant statutory text, which provides as follows: "A person who violates the [WPCA] shall be subject to a civil penalty of no more than $50,000 for each violation." While the court agreed with the District that the word "shall" typically signifies a mandate, the court reasoned that "shall" was modified by the words "be subject to," which indicate that violators are liable to be assessed a civil penalty, but not that one is required.

A Split in the Circuits?

The D.C. Circuit acknowledged that four U.S. Courts of Appeal decisions had interpreted the phrase "shall be subject to a civil penalty" in the language of the CWA as requiring a civil penalty. While the WPCA was modeled after the CWA, the court pointed out that only the Ninth Circuit attempted to consider the indeterminate nature of the phrase "be subject to," noting that the Ninth Circuit had found that, at first glance, the phrase "shall be subject to" means "penalties are discretionary." And although the Ninth Circuit deviated from this interpretation in significant part to conform to the earlier decisions of its sister Circuits interpreting the CWA, the court concluded that there was no similar incentive for the court to align its interpretation of the WPCA with the distinct CWA.

Further, the court reasoned that even if the phrase "shall be subject to" were ambiguous, the rest of the statute favors the conclusion that the imposition of civil penalties is discretionary. The court pointed to the fact that the WPCA contained no statutory minimum civil penalty such that if a penalty were required, it could be nominal. The court disagreed with the District's argument that such a nominal penalty could serve a symbolic purpose, concluding that the resulting civil penalty could be as little as a penny which does not convey that WPCA violations are treated seriously. The court also opined that such a penalty was ill-suited to the strict liability imposed by the WPCA because such a symbolic gesture would apply with equal force to an inadvertent violator who made all attempts to comply with the WPCA.

The court was also unpersuaded by the District's argument that because the WPCA used clearly discretionary language elsewhere which provides that "a civil penalty . . . *may* be assessed by the Mayor," the more ambiguous phrase, "shall be subject to," should be read as a mandatory penalty. The court reasoned that the converse was also true because the WPCA's criminal penalties contained unmistakably mandatory language, plainly indicating that fines are sometimes mandatory: "'[a] person *shall be fined* at least $2,500' for criminal violations." Because this analytical point was susceptible to both interpretations, the court determined that it did not provide a basis for deviating from the phrase's most natural reading.

Abuse of Discretion at the Trial Court

Having concluded that civil penalties under the WPCA are discretionary, the court next turned to whether the trial court abused its discretion in declining to impose a civil penalty due to incomplete information on the first two statutory factors. On this point, the court agreed with the District, finding that the WPCA does not preclude imposition of a civil penalty because of a relative lack of evidence on the statutory factors. The court noted that the trial court never weighed the information it possessed on the

four factors and that the statute did not require each factor to favor imposition of a civil penalty. Thus, the trial court abused its discretion.

Limits of the Court's Decision

Finally, the court declined to squarely address whether the District had the burden to show evidence regarding the four statutory factors or whether MPT had the burden to show it lacked the size and ability to absorb a fine to mitigate an otherwise appropriate civil penalty. Instead, the court held that MPT had the burden to establish mitigating evidence because it forfeited any argument to the contrary by failing to participate in the litigation. The court thus vacated and remanded the case to the trial court for reconsideration of whether a civil penalty should be imposed.

Conclusion and Implications

This case provides state courts and litigants with a perspective on how to approach related but distinct federal precedent on an issue of statutory interpretation. It also serves as a cautionary tale for defendants who willfully neglect to defend their interests in court. The court's opinion is available online at: https://www.dccourts.gov/sites/default/files/2020-10/D.C.%20v.%20Miss%20Dallas%20Trucking%2C%2019-CV-0540.pdf
(Heraclio Pimentel, Rebecca Andrews)

FOURTH CIRCUIT ADDRESSES INCONSISTENT EPA AND DOE CRITERIA FOR SCORING RENEWABLE FUEL STANDARD EXEMPTION APPLICATIONS

Ergon-West Virginia, Incorporated v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 19-2128 (4th Cir. Nov. 17, 2020).

For more than four years, a small West Virginia refinery has sought an exemption from the federal Clean Air Act's renewable fuel standard program, in 2018 persuading the Fourth Circuit Court of Appeals to vacate the U.S. Environmental Protection Agency's denial of an exemption and remand for further proceedings. On an expanded recorded, the agency again denied the exemption. The subsequent petition looked to be resolved in the agency's favor, until late in the briefing the refinery persuaded the Court of Appeals to consider extra-record materials establishing that the application of another, similarly-situated refinery had been subject to completely different analytical criteria—in direct contradiction to repeated agency assurances and representations.

Background

In 2005, Congress amended the federal Clean Air Act (42 U.S.C. § 7401 *et seq.*, (CAA)) to establish a renewable fuel standard (RFS) program requiring "refineries and other facilities to allocate a certain percentage of their [transportation] fuel production to renewable fuels." 42 U.S.C. § 7545(o). Refineries comply by either, or both, "generating a sufficient number of renewables on their own" and/or "purchasing a sufficient number of renewable fuel credits from entities that have [produced] more than their obligation."

Concerned about the potential for the RFS program to "impose a disproportionate economic hardship on small refineries," *i.e.*, facilities with a capacity to process less than 75,000 barrels a day, Congress temporarily exempted small refineries and directed EPA and the Department of Energy (DOE) to conduct a study to determine whether the exemption should become permanent. 42 U.S.C. § 4545(o)(9)(A). Two studies later, DOE recommended that:

> . . .small refineries be allowed to apply for a continued exemption because of the continued risk that they would 'suffer disproportionate economic hardship from compliance with the RFS program if blending renewable fuel into their transportation fuel or purchasing RINs increases their costs relative to competitors to the point that they are not viable.

DOE produced a "Disproportionate Impact Index" and a "Viability Index" to be used in evaluating exemption applications, culminating in DOE issuing a study scoring applications for EPA's use.

EPA's 2016 "memorandum detailing how it evaluates small-refinery-exemption petitions" states that it considers the DOE study as well as "a variety of economic factors," the details of which require that applications include the refinery's financial information "in an effort to prove the economic hardship that would result from compliance."

Petitioner Ergon is a 23,000 barrel per day refinery in West Virginia, producing primarily non-transportation lube oils and a relatively small amount of transportation fuels, split between diesel (two-thirds) and gasoline (one-third), nearly all sold within a 170-mile radius of the refinery. Ergon petitioned for an exemption in 2016, DOE determined that Ergon's scores on the Indices did not qualify it for an exemption, and EPA concurred. The Fourth Circuit held EPA's unexplained reliance on DOE's scoring and failure to conduct any independent analysis rendered its denial arbitrary and capricious, vacating the denial and remanding for further proceedings. *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600 (4th Cir. 2018). EPA, on the basis of a more fulsome DOE explanation of its scoring, again denied Ergon's application, and Ergon's renewed petition ensued.

The Fourth Circuit's Decision

The Fourth Circuit rejected Ergon's renewed claims of defects in EPA's reliance on DOE's scores regarding "local market acceptance" of certain renewable fuels and Ergon's capacity to blend certain renewable fuels, as well as:

> . . .proof of particularized hardship arising from substantial RIN costs. However, it found merit in Ergon's assertions that EPA arbitrarily and capriciously relied on DOE's inconsistent treatment and definition of 'refining.'

At issue were DOE's consideration under Index § 1(b) of Ergon's "other business lines besides refining and marketing," in which "DOE separated Ergon's refining from its lube oil production [and] considered the latter as an 'other business line[] besides refining and marketing," and its scoring under Index § 2(a), under which DOE included Ergon's "lube oil production as refining for purposes of the relative refining margin measure."

The Department of Energy's 'Explanation'

The Fourth Circuit focused on DOE's "explanation of Ergon's other lines of business in § 1(b)."

DOE explained on remand that it has:

> . . 'always considered an applicant's additional lines of business, in particular upstream operations,' and that it 'has consistently considered lubricant manufacture at a refinery as another line of business and has applied this interpretation for all petitioners.'

If a refinery has "another line of business" under this definition, it receives a score of "0," while if it has no other line of business other than transportation fuel it receives score of "10." As applied to Ergon, DOE considered both the West Virginia plant's lube oil production and non-transportation lines of business by Ergon's parent company, resulting in a zero score. Turning to § 2(a), however, DOE included lube oil production along with transportation fuel production to conclude that "Ergon's three-year average net refining margin for 2013 to 2015 was 'well over the industry average,' so it scored this metric as a zero."

Arbitrary and Capricious Standard of Review

Up to the point where Ergon submitted its reply in support of its petition, this case appeared destined to be decided based on typical administrative law principles, with the agency arguing for deference to its legal interpretations and factual conclusions based solely on consideration of the record of the agency's proceedings with respect to the contested agency action. However, with its reply Ergon submitted materials from the application of another, unrelated refinery, establishing that:

> . . .'a similarly situated small refinery with the same lines of business as Ergon—including substantial lubricant production—received a score of "10" for [Section 1(b)] for *four straight years* from 2014 through 2017.'

Over EPA's objections, the court took judicial notice of these materials and remanded on the basis

that:

> . . .the supplemental materials go to the agency's purported methodology in reviewing an exemption petition, and consists of documentation that was—and has been—squarely in the agency's possession and knowledge.

The court concluded that "the supplemental materials directly call into question both the DOE and the EPA's unequivocal representations during the agency proceedings" and before the court:

> [A]n agency acts arbitrarily and capriciously when it 'explains its decisions in a manner contrary to the evidence before it.' [*U.S. v.*] *F/V Alice Amanda*, 987 F.2d [1078,] 1085 [(4th Cir. 1993)]. . . .And that is how it would appear the EPA acted in this case.

With the order of remand issued, with the agency is left to attempt to harmonize and explain the expanded record.

Conclusion and Implications

The architectural stability of deferential judicial review of administrative agency actions is fundamentally grounded on the courts' confidence in the completeness of the agency records before them. This case represents a rare and vivid example of the rapid erosion of credibility suffered by an agency found, as it were, "with the goods." The Fourth Circuit's opinion is available online at: https://www.ca4.uscourts.gov/opinions/171839.P.pdf
(Deborah Quick)

EIGHTH CIRCUIT FINDS NORTH DAKOTA DID NOT ENCROACH ON EPA'S NON-DELEGABLE AUTHORITY TO INTERPRET THE CLEAN AIR ACT IN ISSUING MINOR SOURCE PERMIT

Voigt v. Coyote Creek Mining Company, LLC, ___F.3d___, Case No. 18-2705 (8th Cir. Nov. 20, 2020).

The federal Clean Air Act (42 U.S.C. § 7401 *et seq*., the (CAA)) relies on "cooperative federalism" for its implementation, by which the U.S. Environmental Protection Agency (EPA) develops nationwide policies, states proposed implementation plans, EPA approves (or disapproves those plans, and states implement approved plans via, *inter alia*, permitting decisions. Here, the Eighth Circuit Court of Appeals held that the State of North Dakota did not encroach on EPA's exclusive authority to make legal determinations in applying ambiguous CAA regulations to conclude an outdoor, uncovered coal pile was not "in" an immediately adjacent coal processing plant, and therefore the plant did not require a "major source permit" mandating the incorporation of "best available control technology."

Background

In adopting the CAA, Congress established National Ambient Air Quality Standards (NAAQS) for, among other air pollutants, particulate matter. 42 U.S.C. §§ 7408-7409. EPA, in implementing the CAA, "created New Source Performance Standards (NSPS), which impose emission standards on new major sources of air pollution, including newly constructed facilities, and on modifications to existing facilities that would increase emissions" (citing *Sierra Club v. Otter Tail Power Co*., 615 F.3d 1008, 1011 (8th Cir. 2010)), with the aim of "helping achieve and maintain the NAAQS." In order to "prevent air quality degradation in attainment areas," *i.e*., "[a]reas of the country where the air quality meets the NAAQS," Congress adopted "prevention of significant deterioration of air quality (PSD) provisions." 42 U.S.C. §§ 7475, 7479(1). The PSD provisions require "major emitting facilities" to obtain a "major source permit" prior to construction; a major source permit requires, *inter alia*, "the planned use of best available control technology for each pollutant emitted by the facility." 42 U.S.C. § 7475(a)(4).

Coyote Creek mines and processes lignite coal in North Dakota, an attainment area. Coal is delivered

from the open pit mine face to the processing facility by a private haul road, where it is deposited at an approximately eight-acre coal pile with a capacity to hold approximately 180,000 tons of coal. Coal is fed—typically by gravity, if necessary, with the assistance of bulldozers—from the coal pile into an "apron feeder" and thence through the primary and secondary crushing equipment, which are housed within an enclosed area within the coal processing facility. Before construction of the mine and processing facility, Coyote Creek applied to the North Dakota Department of Health (NDDOH) for a minor, rather than a major, source permit, on the basis that "the coal pile is not part of the coal processing plant." Because the "fugitive emission" of particulate matter from the coal pile were excluded from the NDDOH's air quality analysis, a minor source permit was issued.

The Voigts own a "large ranch" in North Dakota, and challenged the issuance of a minor, rather than major, source permit for the Coyote Creek mine and processing facility. The U.S. District Court granted summary judgment to Coyote Creek.

The Eighth Circuit's Decision

The Voigts advanced two arguments challenging the U.S. District Court's decision. First, they argued that the CAA regulations at issue unambiguously required a major source permit for Coyote Creek's facilities.

The disputed regulations are found at "Subpart Y," which, if triggered, would require Coyote Creek to obtain a major source permit. Subpart Y defines "coal processing plants" and impose performance standards on "affected facilities *in* coal preparation and processing plants that process more than … (200 tons) of coal per day." 40 C.F.R. § 60.251(a) and (e) (emphasis added in Opinion). "Affected facilities" include "open storage piles" (40 C.F.R. § 60.251(d)), and an open storage pile is "any facility, including storage area, that is not enclosed that is used to store coal, including used in the loading, unloading, and conveying operations of the facility." 40 C.F.R. § 60.251(m). The issue with respect to the Coyote Creek facility is whether the coal pile (indisputably an open storage pile) is an "affected facility[y] *in* [a] coal preparation and processing plant[]." "However, the regulations do not define what it means for an affected facility to be 'in' a coal processing plant."

The Finding of Ambiguity

The District Court found both parties' competing interpretations of Subpart Y to be reasonable, and therefore concluded the regulation was ambiguous. The Eighth Circuit's own analysis of the regulatory language concluded that it, on its own, does not "provide an unambiguous answer." The Court of Appeals therefore turned to "subsequent interpretative guidance." Citing *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 278 (2009). EPA's "clarification on when a coal pile is considered to be 'in' a coal processing plant." However, that guidance was of little assistance where, as here, "the coal pile is used for storage, loading, and feeding purposes" so that it is "in essence, a hybrid between a storage and unloading pile." The District Court did not err in concluding that the regulations are ambiguous.

Cooperative Federalism

Second, the Voigts argued that the District Court erred in deferring to the NDDOH permitting decision because:

> . . the EPA has expressly reserved the authority to interpret its own NSPS regulations and the EPA does not and cannot delegate authority to states to make decisions affecting the uniform applicability and consistency of NSPS.

The court observed that this argument:

> . . .ignores the system of cooperative federalism that exists to help achieve the aims of the CAA. . .[and that]. . .EPA has expressly delegated authority to the State of North Dakota to implement NSPS rules.

The court went on to state that:

> Because implementation of the CAA hinges on a system of cooperative federalism and North Dakota has an EPA-approved [State Implementation Plan or (SIP)], North Dakota is the primary party enforcing the CAA for the State.

Declining to "second guess" the District Court's numerous findings that NDDOH did not violate the CAA or its implementing regulations in issuing the

Coyote Creek minor source permit, the Court of Appeals also touched on the scope of "EPA's non-delegable authority to make legal determinations in order to preserve the uniformity and consistency of NSPS on a national level," observing that:

> The process for. . .[states to carry out]. . .NSPS enforcement would be significantly impaired if the state authority did not have the ability to make determinations based on application of given facts to the SIP and EPA framework.

Conclusion and Implications

In the vast thicket of the Clean Air Act and its implementing regulations, ambiguities inevitably lurk. Applied to the potentially limitless factual scenarios thrown up by real world events, regulatory certainty will forever abound. This case illustrates the value of a careful and well-documented District Court opinion (96 pages!) presenting the reviewing court with a solid platform for affirmance.
(Deborah Quick)

DISTRICT COURT VACATES DEPARTMENT OF THE INTERIOR'S MEMORANDUM REMOVING INCIDENTAL TAKE PROTECTIONS FOR MIGRATORY BIRDS

Natural Resources Defense Council, Inc., et al v. U.S. Department of the Interior, et al., ___F.Supp.3d___, Case No. 1:18-cv-04596-VEC (S.D. NY 2020).

In the waning days of summer 2020 the U.S. District Court for the Southern District of New York vacated a 2017 Legal Opinion issued by the U.S. Department of the Interior's Solicitor's Office interpreting the Migratory Bird Treaty Act not to prohibit incidental taking or killing of listed bird species. The Opinion reversed a Legal Opinion issued a little under one year earlier (January 2017), in the waning days of the prior administration, in which the same office affirmed the Department of the Interior's (DOI or Department) long-standing interpretation that the Migratory Bird Treaty Act (MBTA or Act) prohibits the incidental taking or killing of migratory birds even where the activity is not specifically directed at birds. The District Court vacated the 2017 Opinion and related guidance on the grounds that it was contrary to the plain meaning of the statute and the agency's longstanding interpretation and administrative practice.

The Migratory Bird Treaty Act

In 1916, the United States and the United Kingdom (acting on behalf of Canada) entered into the "Convention between the United States and Great Britain for the Protection of Migratory Birds" with the stated purpose of "saving from indiscriminate slaughter and of ensuring the preservation of such migratory birds as are either useful to man or are harmless." In 1918, Congress ratified the Convention by passing the Migratory Bird Treaty Act. The MBTA provides that "it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, [or] kill…any migratory bird."

From the early 1970s until 2017, DOI formally interpreted the MBTA to prohibit incidental takes and kills. It also imposed liability for activities and hazards that led to the death of birds, regardless of whether the activities targeted or were intended to take or kill birds. Although DOI formally interpreted the Act to apply to the take of even one individual bird, in practice it exercised its enforcement discretion to focus on wrongdoers who ignored industry standards and actions which had "population level" impacts. Over this period, the U.S. Fish and Wildlife Service (FWS) regularly investigated the causes of incidental takes and kills of migratory birds from various industrial and other activities, and conducted enforcement activities related to the incidental take of migratory birds.

The Jorjani Opinion

In December 2017, Daniel Jorjani, the Principal Deputy Solicitor of the U.S. Department of the Interior issued a memorandum concluding the MBTA does not prohibit incidental takes or kills because the statute applies only to activities specifically aimed at

birds. (While commonly referred to as the "M" Opinion, the District Court in this case referred to the Opinion by the name of its author, and so this note does so for convenience as well.) For example, under the Jorjani Opinion, demolishing a barn containing owl nests ("incidentally" killing the owls) would not be a violation of the MBTA because destroying a barn is "rarely if ever… an act that has killing owl nestlings as its purpose." FWS FAQs following the Jorjani Opinion further provides that FWS "will not withhold a permit, request, or require mitigation based upon incidental take concerns under the MBTA."

The District Court's Decision

A suit by several U.S. States (led by New York and California) and two suits filed by environmental groups to vacate the Jorjani Opinion and subsequent guidance were consolidated into this action. Plaintiffs moved and DOI cross-moved for summary judgment. The case turned on whether DOI's interpretation of the MBTA was invalid as contrary to law under the Administrative Procedure Act (APA) and, if so, whether it had to be set aside.

Standard of Review

The court analyzed the Jorjani Opinion under the *Skidmore* deference standard, which requires the court to defer to the opinion to the extent it has the "power to persuade." Under *Skidmore* (which provides for far less deference than *Chevron* deference), factors considered include:

> . . .the agency's expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments.

The Court Vacates the Jorjani Opinion

Under these factors, the court determined that the Jorjani Opinion was not entitled to any deference. According to the court, the Jorjani Opinion was an informal pronouncement lacking notice and comment or other rulemaking procedures. Second, the court found DOI's claim to agency expertise failed because there was no evidence that DOI requested input from FWS, the expert agency tasked with implementing the statute. The court further found that the DOI's claim that the Jorjani Opinion settled years of controversy was undermined by the fact that Circuit Courts, according to the District Court, generally agree that the MBTA prohibits the incidental taking and killing of migratory birds. (Despite the court's statement, the Second Circuit Court of Appeals is one of only two Circuit Courts that have embraced this perspective. Three out of five Circuits have refused to embrace this expansive reading.) Finally, the court found that the plain language of the MBTA supports the agency's longstanding interpretation of the words "take" and "kill" to include incidental taking and killing.

The District Court vacated the Jorjani Opinion on the grounds that its interpretations of "take" and "kill" were contrary to the plain meaning of the MBTA. The court found no significant risk of disruption due to the *vacatur*, because vacating the Jorjani Opinion "simply undoes a recent departure from the agency's prior longstanding position and enforcement practices."

Conclusion and Implications

One of the early actions of a Biden Interior Department has long been thought to be reversal of the "M" Opinion; the District Court's decision here vacated the "M" Opinion, making action by the new administration to reverse it unnecessary. On November 27, 2020, FWS announced the publication of the Final Environmental Impact Statement for its proposed rule putting the "M" Opinion into regulation, defining the scope of the MBTA to exclude incidental take. The final rule is scheduled to become effective prior to the change of Administration. If the final rule is ultimately rendered ineffective by a court decision or rulemaking, practitioners will want to see if FWS returns to its pre-Obama years of enforcement discretion or, instead, seeks to use the MBTA more aggressively to address cases where there is no industry standard (such as exist for renewable energy projects) or where take is insignificant compared to a population level event. The District Court's opinion is available online at: http://nsglc.olemiss.edu/case-alert/aug-2020/us-interior.pdf
(Chris Carr, Molly Coyne)

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DISTRICT COURT DENIES MOTION TO DISMISS CLEAN WATER ACT CITIZEN SUIT—FINDS SUFFICIENT PLEADING OF CONTINUING OR INTERMITTENT VIOLATIONS

Okanogan Highlands Alliance, et al. v. *Crown Resources Corporation, et al.*, ___F.Supp.3d___, Case No. 2:20-CV-147-RMP (E.D. Wash. Oct. 5, 2020).

The U.S. District Court for the Eastern District of Washington recently denied a motion to dismiss, ruling that plaintiffs sufficiently plead continuing or intermittent violations of effluent standards or limitations to state a claim under the federal Clean Water Act (CWA) and avoid dismissal.

Factual and Procedural Background

Defendants, Kinross Gold USA, Inc., and its subsidiary, Crown Resource Corporation, own and operate Buckhorn Mountain Mine (Mine) in Okanogan County, Washington. In 2014, defendants obtained a federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit from the Washington State Department of Ecology, allowing it to discharge pollutants into waters of the state, provided that it complied with various terms and conditions. Defendants' NPDES permit was modified twice after it was issued. The Second Modified NPDES permit is alleged to require defendants to capture and treat all water at the mine, meet certain numeric effluent limitations at water quality monitoring points, maintain a capture zone for mine-generated pollutants, and adhere to monitoring and reporting requirements.

Plaintiffs Okanogan Highlands Alliance and the State of Washington brought a citizen suit action under the Clean Water Act alleging that defendants violated several terms of their NPDES permit and polluted local waters continuously since 2014. Active mining ceased in 2017; however, plaintiffs alleged that defendants continue reclamation efforts and are still discharging pollutants to ground and surface waters surrounding the Mine. Specifically, plaintiffs allege that defendants are discharging pollutants in excess of average monthly effluent limitations, failing to maintain capture zones for mine-impacted water, and failing to follow reporting requirements. In response to these claims, defendants brought a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

The District Court's Decision

Defendants' raised two arguments in support of the motion to dismiss. First, defendants argued the court did not have proper jurisdiction, because the plaintiffs alleged only "wholly past" violations of the CWA. Second, defendants argued the plaintiffs' claims should be dismissed for failing to state a cognizable claim under the CWA.

Issue of 'Wholly Past Violations'

The court first considered whether plaintiffs alleged wholly past violations. Under the CWA, a citizen plaintiff must allege "a state of either continuous or intermittent violation. . .that is, a reasonable likelihood that a past polluter will continue to pollute in the future." The court noted that citizen plaintiffs need not prove the allegations of ongoing noncompliance before jurisdiction attaches. To withstand a motion to dismiss, the plaintiffs were required to meet a minimal pleading standard, with allegations based on "good-faith beliefs, formed after reasonable injury and are well-grounded in fact.

The court determined that the plaintiffs alleged past violations by the defendants and also alleged *continuing* violations. These allegations included the defendants' failure to maintain the capture zone, which was purported to have occurred every day for the last five years as well as an ongoing pattern of noncompliance with the NPDES permit's reporting requirements. Plaintiffs also alleged the defendants continue to own and operate the Mine and to discharge pollutants to the waters around the Mine.

Ultimately, the court found the plaintiffs' allegations appeared to be based on good-faith beliefs, formed after reasonable inquiry and were well grounded in fact, which satisfied the minimum threshold

requirements for a properly plead complaint:

> Plaintiffs allege not only past violations by Defendants, but continuing violations as well. . . .These alleged violations include Defendants' failure to maintain the "capture zone," which has purportedly occurred every day for the last five years. . . .Plaintiffs further allege an ongoing pattern of frequent noncompliance with the permit's reporting requirements. . . .In support of these allegations, Plaintiffs contend that Defendants continue to own and operate the Mine; Defendants still hold an NPDES permit and are subject to its requirements; and Defendants continue to discharge pollutants to surrounding waters around the Mine. . . .Therefore, Plaintiffs' allegations of continuing violations committed by Defendants appear to be based on good-faith beliefs, "formed after reasonably inquiry," that are "well-grounded in fact. . .

As a result, the court had jurisdiction over the plaintiff's claims.

Issue of 'Failure to State a Cognizable Claim'

The court next considered whether plaintiffs' claims should be dismissed for failing to state a cognizable claim under the CWA. Dismissal of a complaint is proper where the plaintiff fails to state a claim upon which relief can be granted. In reviewing the sufficiency of a complaint, a court accepts all well-pleaded allegations of material fact as true and construes those allegations in the light most favorable to the non-moving party. To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face."

Taking the factual allegations in the complaint as true for the purposes of the motion to dismiss, the court found that plaintiffs alleged sufficient facts to state a claim. Plaintiffs alleged various violations of "effluent standards or limitations," failure to maintain the "capture zone" as required by the NPDES permit, repeatedly ignoring reporting requirements outlined by the NPDES permit. As a result, defendants' motion to dismiss was denied.

Conclusion and Implications

This case provides a reminder that at the pleading stage, allegation of fact may be sufficient to defend against a motion to dismiss. The case is also an example of how liberal pleading standards may encourage Clean Water Act citizen suits to proceed to the discovery stage. The court's ruling is available online at: https://www.courthousenews.com/wp-content/uploads/2020/10/DirtyMine.pdf
(Geremy Holm, Rebecca Andrews)

DISTRICT COURT REVERSES EPA'S NARROW JURISDICTIONAL DELINEATION BY APPLYING CONTEMPORARY JUDICIAL SCOPE OF THE CLEAN WATER ACT JURISDICTION

San Francisco Baykeeper et al. v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 3:19-cv-05941-WHA (N.D. Cal. 2020).

In October 2020, the U.S. District Court for the Northern District of California rejected a March 2019 jurisdictional delineation in which the U.S. Environmental Protection Agency (EPA) determined that a salt production complex adjacent to the San Francisco Bay was not jurisdictional and therefore not subject to federal Clean Water Act (CWA) § 404. Specifically, the court found that EPA failed to consider whether the salt ponds fell within the regulatory definition of "waters of the United States" (WOTUS), and instead erroneously applied case law to reach a determination that the salt ponds were "fast lands," which are categorically excluded from CWA jurisdiction. "Fast lands" are those areas formerly subject to inundation, which were converted to dry land prior to enactment of the CWA. The court's holding: 1) maintains the status quo with regard to CWA jurisdiction over properly identified fast lands, and 2) indicates that the true measure of the jurisdictional extent of a WOTUS is the natural extent of such

waters, absent any artificial components that limit the reach of an adjacent jurisdictional water body. Moreover, the court's holding suggests that jurisdictional delineations of wet areas at facilities developed prior to adoption of the CWA should be re-evaluated to apply landmark rulings regarding the appropriate scope of WOTUS and establishment of the "significant nexus" analysis established in the U.S. Supreme Court's *Rapanos* decision. In reaching this decision, the court did not consider or apply the most recent WOTUS definition, which became effective in June 2020 and eliminated the significant nexus analysis.

Background

The Redwood City Salt Plant continuously operated as a commercial salt-producing facility since at least 1902. The facility's salt ponds were created by reclaiming tidal marshes in San Francisco Bay through dredging, and construction of a system of levees, dikes, and gated inlets, permitted by the U.S. Army Corps of Engineers (Corps) in the 1940s. In the early 1950s, the Corps authorized construction of a brine pipeline, which connects the Redwood City Salt Plant to another salt production facility in Hayward, California. The Redwood City facility's operations have remained largely unchanged since 1951, prior to the adoption of the federal Clean Water Act in 1972. In 2000 and 2001, Cargill, Incorporated (Cargill), the current facility owner, constructed new intake pipes to bring in seawater and improve brine flow at the facility. In the absence of the improvements made by Cargill and its predecessors, some of the salt ponds would be inundated with the San Francisco Bay's jurisdictional waters.

In 2012, Cargill requested that EPA determine the jurisdictional status of the salt ponds. In response, EPA Region IX developed a draft jurisdictional determination in 2016, which indicated that only 95 acres of the Redwood City facility had been converted to "fast land" prior to enactment of the CWA. According to Region IX, the remaining 1,270 acres of the facility were jurisdictional under the CWA because:

> (1) the tidal channels within the Redwood City Salt Ponds were part of the traditionally navigable waters of the San Francisco Bay, and were not converted to fast land prior to enactment of the CWA; (2) the salt ponds in their current condition have been shown to be navigable in fact, and are susceptible to use in interstate or foreign commerce with reasonable improvements; (3) the salt ponds are impoundments of waters otherwise defined as waters of the United States; and (4) the salt ponds have a significant nexus to the traditionally navigable waters of the adjacent San Francisco Bay.

Ultimately, EPA headquarters issued a significantly different determination in March 2019, which found that the entire Redwood City facility was *not* jurisdictional, spurring a challenge by four environmental organizations.

The District Court's Decision

According to the court, EPA was bound to apply its regulatory WOTUS definition, rather than Ninth Circuit case law on the scope of CWA jurisdiction. The court found that even if headquarters intended to apply judicial precedent on the issue of "fast lands," it did so improperly. In 1978, the Ninth Circuit had previously evaluated the jurisdiction of the Redwood City Salt Plant ponds, and concluded differently than the March 2019 jurisdictional determination. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). In that earlier case, the Ninth Circuit determined: 1) that CWA jurisdiction still extended at least to those waters no longer subject to tidal inundation merely by reason of artificial dikes; and 2) the fast lands jurisdictional exemption applies only where the reclaimed area was filled in as dry upland before adoption of the CWA.

The court went on to examine EPA's application of *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), a case that determined tribal rights on land that became submerged, and thus converted to tidelands. In that case, lessors of the previously upland areas and adjacent homeowners erected shoreline defense structures on dry land, which, once submerged, constituted a trespass on the tribe's tidelands, and a violation of the CWA and the Rivers and Harbors Act. While the Ninth Circuit found violation in this case, the Ninth Circuit also confirmed that fast lands, where properly identified, are not subject to the CWA's permitting requirements. According to the court:

> . . .[e]ven if land has been maintained as dry through artificial means, if the activity does not reach or otherwise have an effect on the waters,

excavating, filling and other work does not present the kind of threat the CWA is meant to regulate.

Conclusion and Implications

In addition to providing a refined view of Clean Water Act jurisdiction over aquatic features separated from a jurisdictional water by artificial means, the court also suggested that although operations at the Redwood City Salt Plant had remained largely unchanged since 1951, any evaluation of the facility's jurisdictional status should be updated to account for the three major Supreme Court decisions regarding the appropriate scope of CWA jurisdiction: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). The *Rapanos* decision's significant nexus analysis seems to have largely influenced the court's decision here. According to the court, the salt ponds "enjoyed a water nexus to the Bay," and found that issue to be dispositive, triggering reversal of headquarters' jurisdictional determination even absent appropriate application of prior applicable Ninth Circuit case law. The court's opinion is available online at: https://oag.ca.gov/sites/default/files/Redwood%20City%20Salt%20Ponds%20MSJ%20Order.pdf?source=email

(Nicole E. Granquist, Brenda C. Bass, Meghan A. Quinn, Meredith Nikkel)

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RECENT STATE DECISIONS

OREGON SUPREME COURT DECLINES BROAD EXPANSION OF PUBLIC TRUST DOCTRINE FOR CLIMATE CHANGE

Chernaik v. Brown, 367 Or.143 (2020).

On October 22, 2020, the Oregon Supreme Court ruled against a broad expansion of the public trust doctrine to include resources beyond navigable waters and underlying land and to impose a fiduciary duty on the state to protect these resources.

Background

In a lawsuit initiated by minor plaintiffs through their guardians the plaintiffs argued that because of the State of Oregon's trustee position, the State should take action to protect various natural resources from substantial impairment due to greenhouse gas emissions and climate change. This case is one in a recent trend in which minors are suing federal and state governments pursuing a cause of action that will impose additional duties on the government concerning the effects of climate change.

At the Lower Courts

Specifically, the plaintiffs asked for declaratory judgment that the public trust doctrine includes all waters of the state, wild fish and wildlife, and the atmosphere. Moreover, the plaintiffs asked the court to impose the common law fiduciary duty of protecting trust resources on the state. The Oregon Circuit Court initially found that the plaintiff's requested relief was outside of its jurisdiction, barred by sovereign immunity, a violation of the separation of powers doctrine, and presented political questions. However, the state Court of Appeals reversed that finding, holding that the plaintiffs were entitled to a declaration regarding what natural resources are encompassed by the public trust and whether the state has a fiduciary duty to protect those resources from climate change.

In a 6-1 decision, the Oregon Supreme Court acknowledged its ability to expand the public trust doctrine, but declined to do so, or to impose common law trustee duties on the state.

The Public Trust Doctrine

The public trust doctrine originated in English common law. Under this doctrine, the crown held title to the beds of water, subject to the ebb and flow of the tide, in England and its American colonies, but the public retained the rights to travel through and fish in the water. After the American Revolution, this title passed to the 13 original states. Under the equal footing doctrine, each state gained title to navigable waters in the state at statehood. Today the public trust doctrine is the idea that at statehood, the state itself acquired title to the land underlying water that meets the federal definition of navigable water and the state's role is to act as a trustee of that land for the public. Additionally, the overlying navigable waters are considered a public trust resource. This preserves the public's right to use the waters for specific uses such as transportation and recreation.

The Supreme Court's Decision

In *Chernaik*, the Oregon Supreme Court emphasized the distinction between capability of the judiciary to expand the public trust doctrine and whether the plaintiffs established a legal ground to justify such an expansion. The Court agreed with the plaintiffs that the public trust doctrine is not necessarily fixed in scope because it is a common law doctrine. The Court detailed two previous expansions: first, when it moved from a strict ebb-and-flow test to the navigability test for qualifying waters; and second, when it clarified that it applied to all levels of government, including cities. The Court explained this history to show willingness to expand the doctrine when it furthers the primary intent of the doctrine—protecting the public's right to use navigable waters for the specified purposes of fishing and navigation.

Natural Resources Included in the Public Trust

The Court, however, did not expand the public trust doctrine, finding the plaintiffs failed to present a legal theory to correspond with their proposed expansion. The plaintiffs proposed a new test that would create a two-prong inquiry to determine whether a resource should be protected by the public trust doctrine. The test asked: 1) whether the resource is not easily held or improved, and 2) the value of the resource to the public for uses like commerce, navigation, hunting, or fisheries. The Court commented that while these questions are relevant considerations, the test as a whole was insufficient because it placed no practical limitations to constrain the analysis.

In order to address the plaintiffs' requested relief, the Court re-stated the existing law that the public trust doctrine applies to navigable waters and submerged and submersible lands. This declaration rejected plaintiffs' assertions that the doctrine should include all waters, wild fish and wildlife, and the atmosphere. The Court also rejected the reasoning that interconnectedness of natural resources should lend itself to public trust protection.

The State's Fiduciary Duties under the Public Trust Doctrine

Under the traditional interpretation of the public trust doctrine, the state is obligated to protect the public's ability to use navigable waters for fishing and navigation. In the latter portion of the opinion, the Court addressed whether common law fiduciary duty of protecting trust resources should be imposed on the state. However, the Court quickly disposed of this issue by citing judicial restraint and *stare decisis*. The Court stated that this could result in a "fundamental restructuring of the public trust doctrine," and significantly broaden the state's recognized duties. As such, the Court refused to apply the common law trustee fiduciary duty to protect trust resources to the state under the public trust doctrine.

Dissenting Opinion: 'The Time Is Now'

In a detailed dissent, Chief Justice Walters explained the role of the courts in upholding the policy decisions of the legislative and executive branches of state government, claiming "the time is now" to expand the public trust doctrine. The Chief Justice would have imposed an affirmative duty on the state to protect and preserve the natural resources held as trust property. Her dissent noted that if the purpose of the doctrine is to ensure the public's right to use the resources in the future then it must impose an obligation to act reasonably and protect those resources from substantial impairment.

A larger point in the lower cases was whether the Court's involvement was impermissible policymaking. As such, a portion of the dissent also focused on the role of the judiciary and asserted that the judiciary would not violate separation of powers principles if it acted to expand the public trust doctrine. The dissent postured that reviewing state decisions in light of the other branches' policy decisions is not policymaking. Finally, the dissent discouraged the Court from shrinking away from an obligation to enforce the rights of the people to enjoy public trust resources.

Conclusion and Implications

The Oregon Supreme Court did not entirely foreclose the possibility of expanding the public trust doctrine. The Court clarified that the plaintiffs here did not offer a viable test or legal theory upon which to add resources like all waters, wildlife, and the atmosphere to the public trust resources. It also refused to apply common law trust fiduciary duties to the state. However, the Court expressed a judicial willingness to expand the doctrine if there are legal grounds to do so.

(Alexandra Lizano, Darrin Gambelin)

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