

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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FEATURE ARTICLE

ARE ‘WETLANDS’ REALLY ‘WATERS OF THE STATE OF CALIFORNIA’
UNDER CALIFORNIA’S PORTER-COLOGNE ACT?

By David Ivester, Esq.

California regulates “discharges of waste” into “waters of the state” under the Porter-Cologne Act. Contrary to popular supposition, “waters of the state” properly do not include “wetlands.” The California Legislature had no intention of reaching wetlands when it enacted the statute in 1969. What!? But the California State Water Resources Control Board (SWRCB) and the Regional Water Quality Control Boards (RWQCBs) have long treated “wetlands” as “waters of the state” and asserted they have jurisdiction to regulate discharges of waste into them. Indeed, after a decade or so of consideration, the SWRCB recently adopted an extensive regulation prescribing detailed procedures by which it intends to do exactly that. That the SWRCB and RWQCBs have claimed this authority and have so far gotten away with it does not though establish the validity of their claim nor shield it from challenge.

The Porter-Cologne Act

Whether “wetlands” are “waters of the state” regulated under the Porter-Cologne Act is a question of how to read and understand the statute, and that calls for recognizing and following well established, fundamental principles of statutory interpretation. Even though the SWRCB and RWQCBs have long been in the habit of treating wetlands as waters of the state, their claim has never been examined or sanctioned by any court. It remains, in that sense, an open legal question.

The Porter-Cologne Act provides that anyone discharging or proposing to discharge “waste” within any region in the state that could affect the quality of “waters of the state” must first file a report of waste discharge with the pertinent RWQCB and then comply with the conditions of any “waste discharge

requirements” (*i.e.*, a permit by another name) issued by the SWRCB. (Wat. Code §§ 13260, 13264.) (Whether discharging “waste” extends beyond discarding or disposing of “sewage and any and all other waste substances,” as “waste” is defined in the Porter-Cologne Act, to also encompass placing and using materials such as sand, gravel, soil, concrete, and lumber for some intended, useful purpose, *e.g.*, building houses and roads, repairing levees, or contouring agricultural fields, is a different question for another day.)

When enacting the Porter-Cologne Act in 1969, the Legislature defined “waters of the state” to mean “any surface water or groundwater, including saline waters, within the boundaries of the state.” (Wat. Code § 13050(e).)

Legislative Intent

The touchstone of understanding a statute is legislative intent, and in construing a statute, the “fundamental task is to ascertain the Legislature’s intent so as to effectuate the purpose of the statute.” (*Smith v. Superior Court*, 39 Cal.4th 77, 83 (2006).) Toward this end, “we begin with the language of the statute, giving the words their usual and ordinary meaning.” (*Id.*)

In 1969, the Legislature undoubtedly understood “surface water” in keeping with its ordinary meaning and then existing law to refer not just to any H₂O on the ground surface, but rather to an actual body of water, either flowing or still, that “encompasses both natural lakes, rivers and creeks and other bodies of water, as well as artificially created bodies such as reservoirs, canals, and dams.” (*People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294, 301-302 (1996).) “But by surface waters are not meant any waters

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which may be on or moving across the surface of the land without being collected into a natural watercourse.” (*Horton v. Goodenough*, 184 Cal. 451, 453 (1920).)

Integral to identifying a surface waterbody and delineating its extent is ascertaining and recognizing its boundary, the ordinary high-water mark at common law, which distinguishes the surface waterbody from surrounding land. In *Churchill Co. v. Kingsbury*, 178 Cal. 554 (1918), for instance, the California Supreme Court considered whether certain lands:

. . . were swamp and overflowed lands, passing to the state by grant from the United States, or were lands lying under the waters of a navigable lake, belonging to the state by virtue of her sovereignty. (*Id.* at 557).

Noting that a survey had been made of the ordinary high-water mark of the lake, the Court affirmed that “[t]he lake consists of the body of water contained within the banks as they exist at the stage of ordinary high water.” (*Id.* at 559.) It distinguished that from other “land [that] was not a part of the bed of the lake, but was marsh or swamp land adjoining the border of the lake.” (*Id.*)

“Wetlands” was a word not yet appearing in any California court decision by the time the Porter-Cologne Act was enacted. The term has come into currency more recently to generally refer to areas that do not contain enough water often enough or long enough to develop an ordinary high water mark identifying them as waterbodies and delimiting their boundaries, but instead experience inundation or saturation by water often enough and long enough (perhaps as little as a couple weeks per year) to develop soil characteristics typical of anaerobic conditions and support a prevalence of vegetation typically adapted for saturated soil conditions.

Not only did the Legislature define “waters of the state” to mean “surface waters” as commonly understood, it also said nothing in the Porter-Cologne Act or its legislative history to suggest it intended these terms to include “wetlands” (or swamps, marshes, bogs, or the like). When passing the act, the Legislature said nothing of “wetlands” in its definition of “waters of the state.” Indeed, the Legislature never mentioned wetlands *anywhere* in the Porter-Cologne Act. Nor did it refer to wetlands *anywhere* in the

legislative history of the Porter-Cologne Act. If the Legislature had intended to depart from the common understanding of surface waters and start treating wetlands as waters of the state, one would reasonably expect the Legislature to have left at least some hint of that innovation in the Act and its legislative history. It did nothing of the sort. The Legislature’s omission of any reference to wetlands is compelling; it plainly did not have wetlands in mind when it enacted the statute and defined the “waters of the state” regulated under the act.

That rightly marks the end of the inquiry:

Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Burden v. Snowden*, 2 Cal.4th 556, 562 (1992).)

The Legislature’s intent is manifest. “Waters of the state” as defined by the Legislature in the Porter-Cologne Act do not include wetlands.

State Water Resources Control Board Claims over Wetlands

The SWRCB and RWQCBs nonetheless have long claimed authority to regulate wetlands as “waters of the state.” On April 2, 2019, the SWRCB formalized their regulatory practices in this regard by adopting a state wetland definition and procedures for discharges of dredged or fill material to waters of the state. (State Water Resources Control Board, Res. No. 2019-0015; 23 Cal. Code Reg. § 3013.) In doing so, it asserted that wetlands of various types are “waters of the state.” (State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State, p. 2 (Apr. 2, 2019) (Procedures); Staff Report, pp. 3-4 (Apr. 2, 2019).)

This claim does not withstand scrutiny. Disregarding the first principle of statutory interpretation, the SWRCB failed even to attempt the fundamental task necessary to understanding the Porter-Cologne Act, *i.e.*, read it with the aim of ascertaining the Legislature’s intent. In the Procedures and accompanying materials, the SWRCB spoke much about why it regarded including wetlands within its regulatory purview to be a good idea, but said almost nothing about what the Legislature intended. The act’s meaning though is not a question of policy for the SWRCB

to decide as if writing on a clean slate, but rather a question of statutory interpretation. The SWRCB's responsibility is to faithfully ascertain and implement the Legislature's intent, and not to arrogate to itself the authority to decide what it thinks should be the scope of its own regulatory jurisdiction.

As explained above, both the text and legislative history of the Porter-Cologne Act reveal no intent of the Legislature to treat wetlands as "waters of the state." The SWRCB has not offered any sound reason to imagine otherwise. It said nothing of the omission of any reference to "wetlands" in the statute and its legislative history. It said nothing of the ordinary meaning and common law understanding of "surface waters." The most the SWRCB offered was its own characterization that the act defines waters of the state "broadly" to include "any surface water or groundwater, including saline waters, within the boundaries of the state." (Procedures, p. 2; Staff Report, p. 57.) Simply labeling the act's definition as "broad," though, hardly serves as evidence of the Legislature's intent. Even less does such a facile assertion explain or justify supposing the Legislature intended to include wetlands within "waters of the state."

Seemingly dropping all pretense of seeking the Legislature's intent, the SWRCB instead offered a novel theory for injecting "wetlands" into "waters of the state." It observed that Congress enacted the federal Clean Water Act to regulate discharges of dredged or fill material into "waters of the United States." Since the Clean Water Act is subject to constitutional limitations, *e.g.*, the limited reach of the federal commerce power, inapplicable to the Porter-Cologne Act predicated on the state's general police powers, the SWRCB observed that "waters of the state" thus could extend beyond "waters of the United States" that Congress might regulate under the commerce power. (Staff Report, pp. 16-17.) On that premise, the SWRCB asserted without further explanation that "[w]aters of the state" includes all "waters of the U.S." (Procedures, p. 2; Staff Report, p. 57.) Extending its assertion even further, the SWRCB reasoned that since the term "waters of the United States" has been defined by the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) in their regulations to include "wetlands," "waters of the state" necessarily includes wetlands as well. (Staff Report, pp. 13-21, 55.)

This makes no sense. It is but wordplay, toying with an impossibility and a *non sequitur*—and failing to offer any real basis for the SWRCB's claim over wetlands. First, the impossibility: When the Legislature enacted the Porter-Cologne Act in 1969, it could not have intended "waters of the state" to include "waters of the United States" because the latter term had not yet been invented. Congress did not coin it until three years later when passing the Clean Water Act in 1972. Similarly, the Legislature could not have had in mind then nonexistent Corps and EPA wetland regulations when it defined "waters of the state" in the Porter-Cologne Act. The SWRCB cannot subsequently infuse "waters of the state" with meaning the Legislature could not possibly have intended when it defined the term. (See, *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1388-1389 (1987); 78 Ops.Cal.Atty.Gen. 137, 140 (1995), observing that a California statute "could not possibly have been intended or designed to conform with the federal counterpart" enacted years later.)

The SWRCB nonetheless tried bootstrapping its claim, saying that its own regulation adopted in 2000 stating that, for certain limited purposes, "[a]ll waters of the United States are also 'waters of the state'" (23 Code Cal. Reg. § 3831(w)):

[This]. . .reflects an intention by the Water Boards to include a broad interpretation of waters of the United States into the definition of waters of the state. (Staff Report, p. 57.)

The SWRCB's regulation, though, equates waters of the state with waters of the United States *only* for purposes of "certifications" provided by the SWRCB and RWQCBs pursuant to certain federal laws, such as § 401 of the federal Clean Water Act, and not for any other purposes. If anything, the regulation's limitation to circumstances governed by federal law suggests that, contrary to the SWRCB's supposition, in other contexts all waters of the United States are *not* necessarily waters of the state. More to the point, though, it is the Legislature's intention, not the SWRCB's, that establishes the meaning of "waters of the state." An agency cannot simply will a statute to mean what *it* wishes. Indeed, to the extent the SWRCB strayed beyond the Legislature's intention, its regulation is invalid.

Second, the *non sequitur*: In defining “waters of the state,” the Legislature, of course, was not bound by constitutional limitations on Congress in defining “waters of the United States,” and that may explain how “waters of the state” could extend to surface waters beyond the reach of the federal commerce power. How that observation might have any bearing though on the SWRCB’s further assertion that “waters of the state” must also be read to encompass features other than the “surface waters” specified by the Legislature, the SWRCB does not explain. It simply does not follow that because the Legislature had the power to regulate surface waters beyond Congress’ reach, it necessarily intended to regulate features other than surface waters, such as wetlands—and, moreover, did so without saying so.

Conclusion and Implications

The Porter-Cologne Act and its legislative history demonstrate the lack of any intent by the California Legislature to treat “wetlands” as “waters of the state.” In nonetheless claiming authority to regulate “wetlands,” the State Water Resources Control Board shrugs off the Legislature’s intent and instead resorts to alternative theories serving only to reveal the absence of any sound basis for its claim. “Waters of the state” within the meaning of the Porter-Cologne Act properly do not extend beyond “surface waters” to encompass “wetlands” elsewhere on the landscape.

That said, as a matter of practicality, there is little reason to expect major changes in the scope of wetland regulation in California any time soon. The vast majority of wetlands are regulated under the federal Clean Water Act by the Corps and EPA—and by the State Water Resources Control Board and Regional Water Quality Control Boards exercising their authority under § 401 of that federal CWA to “certify” whether permits to fill such wetlands comply with pertinent federal and state requirements. That regula-

tory program will continue unaffected by whether the Boards regard wetlands to be “waters of the state” under state law. Moreover, wetlands outside federal jurisdiction commonly are regulated in some manner under local ordinances or other state or regional programs; those regulatory programs will continue as well.

The SWRCB’s newly adopted wetland regulatory Procedures may well remain in place too. Having accustomed itself for many years to enjoy regulatory jurisdiction under the Porter-Cologne Act at least coextensive with that exercised by the Corps and EPA under the Clean Water Act and having worked for a decade to develop the Procedures to extend and refine its regulatory program, the board appears sufficiently invested in the effort to not readily relinquish it. Few landowners have much incentive to challenge that claim. Owners of the vast majority of wetlands regulated under the federal or some other program would gain little or no regulatory relief by removal of the SWRCB’s largely duplicative regulation of wetlands under the Porter-Cologne Act. Whatever projects or activities they undertake affecting those wetlands would remain subject to regulation under those other programs even if the SWRCB or a court set aside the Procedures. Landowners with wetlands outside the jurisdiction of the federal agencies, who thus might gain some regulatory relief by removal of the SWRCB and RWQCBs’ regulatory program, typically tend to prefer trying to reach acceptable resolutions of their land use issues through permitting rather than litigation. Generally, only those with their backs against the wall, such as those facing enforcement actions and penalties or onerous permit requirements, prohibitively expensive avoidance and mitigation measures, and the like, may feel sufficiently motivated to contest the legality of the Boards’ claim that they can regulate “wetlands” as “waters of the state.” In the meantime, the Boards’ house of cards likely will remain undisturbed.

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ENVIRONMENTAL NEWS

PRESIDENT BIDEN ISSUES MAJOR EXECUTIVE ORDERS ON CLIMATE CHANGE

In his first week in office, President Joe Biden signed several executive orders aimed at tackling climate change and transitioning the country to a new clean energy economy. The executive actions included establishing climate change as a national security priority, conserving at least 30 percent of federal land and oceans by 2030, and cancelling new oil and gas leases on public lands and waters.

Background

President Biden is using the early days of his term to focus on his biggest campaign promises, and hoping to make massive progress using executive orders rather than trying to push legislation through a deadlocked Congress. Biden's climate policy will focus on creating green jobs and union opportunities as well as environmental justice for communities disproportionately impacted by climate change.

The administration argues that these actions will build modern and sustainable infrastructure while restoring the primary role of science in the environmental decisionmaking of the executive branch. These orders further the president's agenda to cut carbon emissions from the electricity sector by 2035 and achieve net-zero emissions by 2050.

These orders are separate and apart from Biden's executive order, signed on his first day in office, to rejoin the U.S. into the Paris climate accord, a landmark agreement among nations to curb emissions.

A Focus on Job Creation

Much of the administration's pitch behind these executive orders appears aimed to counteract long-standing Republican attacks that Biden's climate policies would inevitably hurt an economy already weakened by the COVID-19 pandemic. Biden asserts that technological gains and demands for wind and solar infrastructure would create work that would more than make up for job losses, even in parts of the country more reliant on the existing energy industry, including coal and fracking.

Biden also emphasizes that his climate agenda will increase the number of jobs which pay "prevailing wages" due to government contracts. While economists question the likelihood of Biden meeting his job projections, studies consistently finds that environmental regulations are a net wash, as jobs lost in polluting sectors often equal jobs created in clean energy and environmental mitigation.

Pausing Oil and Gas Leases

The decision to pause issuance of oil and gas leases on federal lands and waters is a significant step toward Biden's campaign promise to put a stop to new drilling permits on federal lands and waters. Yet the executive order does not go that far, instead directing the Interior Department "to the extent consistent with applicable law" only to "pause" leases pending a review of the climate-change effects associated with drilling on federal lands and waters. The order does not address permits. The order also calls for increasing renewable energy production on those lands and waters, with the goal of doubling offshore wind by 2030.

Environmental activists believe that ending new leasing for offshore oil and gas could prevent over 19 billion tons of greenhouse gas emissions.

A National Security Priority

For the first time in American history, climate change will be a core part of all foreign policy and national security decisions. This order is aimed at broadly refocusing the federal government on climate policy both at home and abroad.

This order formalized the role for John Kerry, a former Secretary of State, as President Biden's international climate envoy, and provided him a seat on the National Security Council. The action also calls for the federal government's 17 intelligence agencies to create a first-ever National Intelligence Estimate of the national security risks posed by climate change.

The administration announced it will host a Climate Leaders Summit of major emitting nations and

others on Earth Day, which will fall on April 22 this year. The administration is expected to announce a new set of specific targets for how it will lower carbon dioxide emissions under the Paris Agreement at that time.

Due to the Trump administration's withdrawal from the Paris Agreement, the United States has fallen behind in its efforts to meet its promises under the accord. The nation had pledged to slash emissions up to 28 percent below 2005 levels by 2020. Now, energy analysts speculate the Biden administration could pledge to cut emissions between 40 and 50 percent below 2005 levels by 2030.

'Evidence-Based Decisions'

President Biden also issued a sweeping memorandum instructing federal agencies to make what the

White House calls "evidence-based decisions guided by the best available science and data." Every agency—not just those that conduct scientific research—must appoint "Scientific Integrity" officials to ensure this is done.

This is in response to the Trump administration's efforts to thwart climate science and to disregard evidence produced by the scientific community.

Conclusion and Implications

These executive orders mark the first step in the Biden administration's efforts to reverse course on four years of climate change denialism in the executive branch. While these orders will not unilaterally change the course of climate change, they represent a cross-section of how Biden may approach these systemic issues across his term.

(Jordan Ferguson)

CRIMINAL CHARGES FILED AGAINST FORMER MICHIGAN GOVERNOR STEMMING FROM FLINT DRINKING WATER CRISIS

In a move that surprised some observers of the Flint Michigan drinking water crisis and saga, the former Governor of Michigan, Rick Snyder, was indicted earlier this month on two criminal charges of willful neglect of duty.

Factual Background

The facts surrounding the Snyder indictments involve his being informed in advance that there were definite as well as additional possible health risks involved in making the water supply switch, a move dictated primarily by a search for less expensive water. Because of the age and condition of the Flint system, the condition of the river water, and basic water delivery chemistry, the change resulted in there being pollutants, including lead leached from pipes, in the water delivered at peoples' taps. Snyder allowed the change to proceed and only declared a crisis after serious harm was obviously occurring.

The Charges

Both are misdemeanor allegations that relate to the Governor's participation in the replacement of the drinking water supply for Flint Michigan. At

least a dozen deaths are attributed to drinking the replacement water drawn from the Flint River, which was known to be polluted, rather than purchasing water supplies drawn from Lake Huron. The charges were sought and are being advanced by the Attorney General of Michigan, Dana Nessel. Prosecution is in the hands of the Michigan Solicitor General and the Wayne County prosecutor. Eight other officials were indicted at the same time as Snyder, with the charges individualized for each. In two cases, the indictments include involuntary manslaughter felony allegations. In another, perjury is alleged.

Procedural Summary of Case

In mid-year 2020 the Sixth Circuit U.S. Court of Appeals had remanded to federal District Courts the pending class actions for tort recovery against Snyder and several other Michigan state and local government officials, finding that Snyder's alleged conduct was egregious enough to believe he may be found by a jury to have violated the substantive due process rights of Flint citizens by his lack of actions to protect against dangers of illness explained to him. He is the first governor in Michigan history to face indictment for conduct in office.

Issue of Immunity

Throughout the saga there have been reports of officials at different levels of federal, state and local government not taking seriously enough or acting fast enough to prevent the foreseeable and foreseen problems of health issues for those Flint residents and others drinking the replacement water. Usually in the past, where tragedies have occurred, governmental officials have enjoyed the protection of immunities that are afforded by law. If the Flint saga teaches nothing else to lawyers and officials, those days of expected and rather regularly accorded immunity are apparently gone.

The Parties Weigh in

The criminal charges were denounced by several Flint activists as being a mere slap in the face. Some advocated for manslaughter charges that would result in hard time for the former governor.

Governor Snyder's counsel denounced the indictment as a political stunt. Attorney General Nessel had ordered her predecessor's investigation into the same situation curtailed, claiming that the investigation was not proceeding in a professional enough manner. She had then appointed the Solicitor Gen-

eral and Wayne County prosecutor to conduct a new investigation, from which the current indictments have resulted. A special grand jury consisting of a circuit judge reviewed the evidence and returned the indictments.

Conclusion and Implications

As these charges pend, a U.S. District Court judge in Ann Arbor has taken under advisement a proposed settlement on behalf of affected people in Flint. The settlement is valued at about \$640 million, with not all potential defendant parties involved participating. The federal EPA itself, along with engineering firms, remain targets of additional litigation for tort recovery. Proceeds are to be distributed to citizens who drank the Flint water. The opposition to the settlement contends the money received per Flint resident, reportedly around \$500, is too little to be serious compensation for the harms caused.

The case and defense of the Governor may well explore the limits of power, both legal and practical, in the 21st century. Although governors of states are singularly powerful officials, their actions are constrained not only by state, but federal laws. Local decisions and authority also must often be consulted. (Harvey M. Sheldon)

MASSACHUSETTS INSTITUTE OF TECHNOLOGY CONVENES INDUSTRY LEADERS INTO CLIMATE AND SUSTAINABILITY CONSORTIUM

On January 28, the Massachusetts Institute of Technology (MIT) convened the "MIT Climate and Sustainability Consortium" (MCSC), an alliance of leaders from a broad range of industries and aims to vastly accelerate large-scale implementation of real-world solutions to address the threat of climate change. The MCSC unites similarly motivated companies to work with MIT to build a process, market, and ambitious implementation strategy to create innovative environmental solutions.

Background

The MCSC will involve a cross-sector collaboration to meet the urgency of climate change. The MCSC will take positive action and foster the necessary collaboration to meet this challenge, with

the intention of influencing efforts across industries. Through a unifying, deeply inclusive, global effort, the MCSC will strive to drive down costs, lower barriers to adoption of best-available technology and processes, speed retirement of carbon-intensive power generating and materials-producing equipment, direct investment where it will be most effective, and rapidly adopt best practices from one industry to another.

The consortium will focus on fostering collaboration to meet the urgency of climate change. The MCSC will take positive action and foster the necessary collaboration to meet the moment, with the intention of influencing efforts across industries. The MCSC will strive to drive down costs, lower barriers to adoption of technology and processes, speed retirement of carbon-intensive power generating and

materials-producing equipment, direct investment where it will be most effective, and rapidly translate best practices from one industry to the next in an effort to deploy social and technological solutions faster than the climate can change.

Engineering Solutions

The consortium will be led by the MIT School of Engineering and engaging students, faculty, and researchers from across MIT. The consortium will include companies from a broad range of industries, including aviation, agriculture, consumer services, electronics, chemical production, textiles, infrastructure and software.

The inaugural members of the MCSC are companies with intricate supply chains that may be well-positioned to help lead the way towards climate solutions. The goal of the consortium will be to foster solutions that can be utilized across industries and borders, to create a global response to the worsening climate catastrophe.

Inaugural Members

The inaugural members of the MCSC are: Accenture, a global professional services company; Apple, a technology innovator; Boeing, the world's largest aerospace company; Cargill, a global food manufacturer; Dow, a global manufacturer; IBM, an artificial intelligence company; Inditex, a fashion retailer; LafargeHolcim, the world's global leader in building materials; MathWorks, a mathematical computing

software company; Nexlore, a technology company; Rand-Whitney Containerboard (RWCB), a manufacturer of linerboard; PepsiCo, a global food and beverage company; and Verizon, a communications company.

Corporate-Based Solutions

The MCSC faces criticism from some environmental activists due to its membership, some of the largest companies—and thus, some of the largest creators of carbon emissions—in the world. The consortium is formed among allegations that corporations should not, by themselves, be leading the fight against climate change and that government regulations are better positioned to create these solutions.

Conclusion and Implications

Whether the MCSC can fundamentally change the private sector's approach to pollution and carbon emissions remains to be seen. At its best, the consortium may develop innovative solutions to the climate crisis in a cost-effective manner. However, activists' concerns over the consortium's makeup, which includes large companies some environmental activists argue are not well positioned to pivot to a green future, may stymie its success. There is little downside to more brain power being put toward the problem of climate change, though whether the MCSC can make progress that will satisfy environmentalists and foster actual global change remains to be seen. (Jordan Ferguson)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Climate Change Could Shift Global Precipitation

General atmospheric circulation—the movement of air around the planet—is critical in establishing and maintaining ecosystems. How air moves around the earth and how much water vapor is in that air can determine whether an area will be a tropical forest or a desert. One notable feature of atmospheric circulation is the intertropical convergence zone (ITCZ), which is a region of heavy precipitation surrounding the equator. Any changes in the location or scale of the ITCZ would have severe implications on precipitation patterns which affect food production, extreme weather events, drought, and more.

There is a general consensus among scientists that the warming associated with climate change will nudge the ITCZ toward whichever hemisphere is hotter overall. However, little research has been done to characterize how perturbations in the ITCZ might affect individual longitudinal slices of the earth. A recent collaboration between scientists at the University of California, Irvine, and Yale University ran 27 state-of-the-art climate models to simulate the effects of climate warming on the ITCZ at each degree of longitude, seasonally and annually. The simulations confirmed the team's hypothesis that there would be longitudinal variation in the ITCZ shifts. In fact, while the ITCZ shifts northward over eastern Africa and the Indian Ocean, the ITCZ shift is southward over the eastern Pacific Ocean, South America, and the Atlantic Ocean. Over Africa and the Indian Ocean, the shift in ITCZ was as high as one-degree latitude north (approximately 69 miles), while the southward shift over the Americas was as high as two degrees in latitude. This could result in more intense flooding in southern India and more intense drought in Central America.

Precipitation is critical for food security and biodiversity. Shifting the ITCZ would result in shifting precipitation patterns, which could cause severe instabilities for human livelihood in tropical and equatorial areas. It is therefore fundamental to understand how the ITCZ shift from climate change

will affect a given region or country and to be able to quantify the effects on food security, drought, severe weather events, and loss of biodiversity. Doing so can help both motivate the need to mitigate greenhouse gas emissions and identify proper adaptation measures to protect citizens.

See: Mamalakos, A., *et al.* Zonally contrasting shifts of the tropical rain belt in response to climate change. *Nature Climate Change*, 2021; DOI:10.1038/s41558-020-00963-x

Global Terrestrial Water Storage and Drought Severity under Climate Change

Terrestrial water storage (TWS) refers to the total continental water stored globally which includes canopies, snow, ice, rivers, lakes, reservoirs, wetlands, soil, and groundwater. Improvements in global hydrological models (GHMs) and land surface models (LSMs) have expanded our understanding of global TWS systems and their historical changes, but future projections of hydrological fluxes from general circulation models (GCMs) still lack a full characterization of TWS components. Because TWS can be used as a powerful index for drought severity (TWS-DSI), this gap in our understanding of future changes to TWS can impede a holistic analysis of the impact of climate change on the global frequency and severity of droughts.

In a study prepared for *Nature Climate Change* by Pokhrel *et al.*, an ensemble of 27 multi-model hydrological simulations from seven LSMs and GHMs were analyzed under four cases of radiative forcing (pre-industrial control (PIC), historical climate (HIST), and low (RCP2.6) and medium-high (RCP6.0) emissions scenarios) to assess both the impact of climate change on TWS, and the impact of climate-induced TWS changes on the frequency and severity of droughts on a global scale.

The results found that climate change is expected to cause a decline in TWS for the majority of land surface area, including most of the southern hemisphere, conterminous U.S., most of Europe and the Mediterranean. Meanwhile, TWS is expected to

increase in eastern Africa, south Asia, and northern high latitudes, especially Northern Asia. Changes in TWS storage are found to be the strongest by the late 21st century under RCP6.0, when around 67 percent of land area will see a decrease in TWS, while only 33 percent of land area will see an increase. These results were found to have high confidence: there was strong agreement in the direction of change across ensemble members, and the simulated TWS results were in good agreement with the Gravity Recovery and Climate Experiment (GRACE) results for the historical period.

The frequency and severity of droughts were found to align with these global changes in TWS. By the late 21st century, moderate to exceptional TWS droughts are expected to be 17-34 percent more frequent in all continents but Asia, which is instead expected to see an increase in both severe drought and in moderately to exceptionally wet conditions. Under RCP6.0, the amount of land area and global population exposed to extreme-to-exceptional TWS droughts is expected to double by the late 21st century, impacting an additional ~488 million people above baseline estimates.

As a result of these findings, this study concludes that as a direct result of an increase in radiative forcing and its impact on climate change, the majority of global land area will experience a decrease in TWS and an increase in TWS droughts. These findings point to the importance of considering TWS components in future projections using GCMs to understand the impacts of climate change on global hydrological fluxes.

See: Pokhrel, Y., Felfelani, F., Satoh, Y. *et al.* Global terrestrial water storage and drought severity under climate change. *Nat. Clim. Chang.* (2021). <https://doi.org/10.1038/s41558-020-00972-w>

Effects of Increased Temperature on the Relationship between Rice Crops and the Brown Planthopper

The consequences of climate change on agriculture and the global food supply are already being observed. Studies have shown that climate change can increase the intensity and frequency of extreme weather—droughts and floods alike. Increased global temperatures also have an impact on the relationships between the insects and crops in an ecosystem. A recent study published in *Nature* by a team of international

researchers led by Horgan *et al.* investigated the effects of elevated temperatures on the relationship between the brown planthopper (*Nilaparvata lugens*) and rice crops. Previous studies have shown that rice crops are largely resistant to the brown planthopper due to a specific series of genes in the crops that inhibit feeding. The brown planthopper, however, is known for the rapid evolution of its populations and ability to adapt to feed on the once-resistant rice. This creates a necessity for new rice varieties to be bred or engineered. Despite this challenge, the rice variety known as IR62 has successfully maintained resistance to the brown planthopper for the past 30 years. In contrast, the variety IR22 is susceptible to brown planthopper infestation.

In order to understand the effect of temperature on the relationship between brown planthoppers and rice crops, Horgan *et al.* studied the survival and reproduction rates of brown planthoppers that interacted with susceptible IR22 and resistant IR62 varieties of rice at 5° increments between 15°C and 35°C. As expected, the brown planthoppers were shorter-lived in general on the resistant IR62 variety, with longevity greatest at 15°C. The quantity and size of egg batches, however, was highest at 30°C for both IR22 and IR62 and lowest at 25 and 35°C. Nymph survival and development rates were lowest at 35°C for IR22 and IR62, with nymph biomass accumulation highest at 25-30°C for both rice varieties. Biomass, however, was higher for nymphs on the susceptible IR22 variety. Finally, nymph development into adults was observed only at 25 and 30°C in both varieties. These results indicate that the effect of temperature on brown planthoppers is similar in both rice varieties, although the magnitude of the effect may vary. Furthermore, the optimal temperature for rice's resistance properties is 25°C. This indicates that although 25°C is also an optimal temperature for brown planthopper survival, the rice's resistance serves as a check on the insect population. As temperatures increase to 30°C, however, the rice becomes less resistant as the brown planthopper's egg laying rate increases. This could lead to an imbalance in the ecosystem and decrease in crop output. Horgan *et al.* conclude that increased global temperatures could lead to similar outcomes in other crop varieties. Further studies can provide insight into potential threats to food security and serve as a motivation for developing innovative agricultural solutions.

See: Horgan, F.G., Arida, A., Ardestani, G. *et al.* Elevated temperatures diminish the effects of a highly resistant rice variety on the brown planthopper. *Sci. Rep.* 11, 262 (2021). <https://doi.org/10.1038/s41598-020-80704-4>

A New Framework for Quantifying the Remaining 1.5 °C Carbon Budget

The Paris Agreement established the target of remaining under the 1.5°C warming threshold to avoid the worst effects of climate change. To understand how much CO₂ can be emitted before this level of warming is reached, researchers have estimated the remaining carbon budget using various approaches and different underlying assumptions. The variation in methods has yielded a wide array of resulting carbon budget estimates, many of which do not account for uncertainties such as permafrost thaw.

In a study published in *Nature Communications* led by Matthews *et al.*, a team from Concordia University introduced a framework to address uncertainties and provide a narrower carbon budget estimate. The five key uncertain parameters that were accounted for in the estimate are the amount of warming that has occurred to date, the amount of CO₂ emitted over the past 150 years, warming attributed to CO₂ vs. other greenhouse gases, future warming from non-CO₂ emissions and, lastly, warming that has not yet occurred from emissions currently in the atmosphere. The framework allows for separation of the effects of the key uncertainties while also relating the uncertainties to one another, yielding a carbon budget

estimate that incorporates their combined effect. The data used for the uncertainties are derived from observational and modelled data as well as data from future emissions scenarios that reach net-zero CO₂ emissions before 2100. Using this framework, the researchers estimate a median remaining carbon budget of 440 billion tonnes CO₂ from 2020 onwards. The estimated budget range is 230—670 billion tonnes CO₂, corresponding to a 67—33 percent chance of remaining within budget and limiting global warming to 1.5°C. This carbon budget range equates to five to 10 years of current emissions levels.

It is important to note that the framework focuses on geophysical uncertainties, or those that pertain to the scientific understanding of the climate system, and does not incorporate socioeconomic factors relating to human decisions. The researchers did estimate that the socioeconomic uncertainties of future human decisions could shift the median 1.5°C carbon budget by ±170 billion tonnes.

The results of this study provide a clearer picture of the remaining carbon budget and the likelihood of staying below 1.5°C global warming. Additionally, the results provide more understanding on the role human decisions have on impacting that carbon budget.

See: Damon Matthews, H., Tokarska, K.B., Rogelj, J. *et al.* An integrated approach to quantifying uncertainties in the remaining carbon budget. *Commun Earth Environ* 2, 7 (2021). <https://doi.org/10.1038/s43247-020-00064-9>
(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

U.S. EPA FINALIZES GREENHOUSE GAS EMISSIONS REGULATIONS FOR AIRCRAFT ENGINES

On December 23, 2020, the U.S. Environmental Protection Agency (EPA) issued a final rule adopting greenhouse gas (GHG) emission standards for commercial aircraft—the first time EPA has ever regulated the largest GHG emission source in the United States transportation sector. *See*, 86 Fed. Reg. 2136 (Jan. 11, 2021). According to EPA, GHGs from aircraft engines comprise 10 percent of the total emissions from the transportation sector and 3 percent of the United States' total GHG emissions. The new rule adopts the GHG standard set by the International Civil Aviation Organization (ICAO) in 2017 by setting a standard for fuel efficiency for certain aircraft engines. In addition to setting GHG fuel efficiency standards, the new regulation also updates engine emissions testing and measurement procedures to measure fuel efficiency applicable to certain air pollutants. Although EPA characterizes its new regulation as a historic action that will continue the trend of the United States leading the world in reducing GHG emissions, critics of the regulation claim that the new rule merely perpetuates business-as-usual by formalizing a standard that the aircraft industry has already been following for years.

GHG Regulation Background

This new regulation was precipitated by multiple legal decisions in 2011 that required EPA to make an endangerment finding under the federal Clean Air Act (CAA) to reduce the emission of air pollutants from aircraft. In 2016, EPA issued two findings: 1) concentrations of six GHGs in the atmosphere—carbon dioxide (CO₂), methane, nitrous oxide (N₂O), hydrofluorocarbons, per-fluorocarbons, and sulfur hexafluoride—endanger the public health and welfare of current and future generations under CAA § 231(a)(2)(A), and 2) GHGs emitted from certain classes of engines used in certain aircrafts are contributing to that endangering air pollution under CAA § 231(a)(2)(A). These findings triggered a requirement under § 231(a) of the CAA for EPA to promulgate standards addressing GHG emissions from certain aircraft engines.

Summary of the GHG Regulation

The new regulation sets a limit on CO₂, one of the two major GHGs emitted by airplane engines. The standard adopted in the regulation mirrors the standards adopted by the ICAO in 2017. The ICAO is a specialized agency of the United Nations that adopts Standards and Recommended Practices on a wide range of aviation-related matters, including aircraft emissions. EPA noted that its decision to adopt the ICAO's standard was in part to ensure that the United States' airplane manufacturers could market their planes for international operation more easily by seeking certification from the Federal Aviation Administration (FAA) rather than from a certification authority of another country.

As stated above, the regulation controls GHG emissions by setting a standard for fuel efficiency, rather than directly measuring the output of CO₂ in each aircraft. According to EPA, both CO₂ and N₂O emissions scale with fuel burn, thus allowing them to be controlled through fuel efficiency. Further, the new regulation also updates engine emissions testing and measurement procedures to measure fuel efficiency applicable to hydrocarbons, nitrogen oxides, carbon monoxide, and smoke in current regulations. These updates also mirror the recent amendments to ICAO standards, which base emissions testing on measuring the performance of the whole airplane rather than the airplane engines alone. Instead of testing a single chemical compound, the CO₂ emissions test procedure measures fuel efficiency based on how far an airplane can fly on a single unit of fuel at the optimum cruise altitude and speed.

Effective on January 11, 2021, the adopted GHG standards apply to civil subsonic jet airplanes, such as larger commercial jet aircraft like the Boeing 777 and the Boeing 787, and larger civil subsonic propeller driven airplanes such as the ATR 72 and the Viking Q400. The GHG standards only apply to new type design airplanes (newly developed airplane designs that have not previously been type certificated by the FAA and are not yet being built or flown) and

in-production airplanes on or after January 1, 2028. Already manufactured airplanes that are currently in use do not need to comply with the new standards.

Comments on the Rule

Critics of the rule complain that the new regulation is not stringent enough, arbitrary, and unlawful. Commenters on the proposed rule pointed out that under the CAA, EPA is required to take into account the technological feasibility required to control the pollutant. Here, they argue, more stringent standards are feasible for in production and new type design airplanes. EPA itself admits that it does not project any GHG emissions reductions associated with this new rule. Critics point out, and again EPA admits itself in the preamble of the regulation, that the United States manufacturers have already developed or have already begun the process of developing technologies to comply with the ICAO's standard before EPA adopted its standard. Moreover, many planes already manufactured and in use today already meet the new standards. It seems that market pressures to increase fuel efficiency has already achieved the new regulation's goals.

In response, EPA noted that its broad discretion under the CAA allows it to weigh more heavily factors such as safety and cost in determining whether a regulation is reasonable and does not need to create a technology-forcing standard. More stringent standards, EPA contends, could put U.S. manufacturers at a competitive disadvantage.

On the other hand, some commenters have qualms over the new regulation as being too harsh on the aviation industry. In particular, in arguing for a ten-

year delay of the 2028 in-production applicability date for a class of wide body purpose-built freighters such as the Boeing 767F and Airbus A330-220F, Boeing commented that the COVID-19 pandemic has severely affected its supply chain and customer demand. As a result, Boeing states, it needs additional time to get some of its planes upgraded or replaced in an economically feasible manner. However, the new regulation addresses Boeing's concerns by including exemption provisions providing relief from the GHG standards in the event of unforeseen circumstances or hardships.

Conclusion and Implications

The EPA final rule is available online at: <https://www.govinfo.gov/content/pkg/FR-2021-01-11/html/2020-28882.htm>

In order to implement this new rule, the FAA will now need to promulgate rules that implement EPA's standard so that it can issue certificates to all complying aircraft. But any rules it formulates could be in further need of amendment as all eyes now fall on President Biden and his pick for EPA Administrator, Michael S. Regan. The new administration could very well introduce the kind of stringent aircraft GHG emissions regulations that the critics are calling for. Already, the future of the rule is in question as twelve states and the District of Columbia have filed a challenge to the rule in federal court. The case is *State of Cal. et al. v. The U.S. Environmental Protection Agency*, case number 21-1014, in the U.S. Court of Appeals for the District of Columbia Circuit. (Monica Browner, Hina Gupta)

U.S. EPA PUBLISHES THE CLEAN AIR ACT COST-BENEFIT RULE AMIDST OPPOSITION AND THE END OF THE TRUMP ADMINISTRATION

“Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process,” a rule promulgated by the U.S. Environmental Protection Agency (EPA), was made effective on December 23, 2020. 85 F.R. 84,130 (Dec. 23, 2020) (to be codified at 40 C.F.R. pt. 83). The rule consists of three main elements. The first requires a benefit-cost analysis (BCA) for all future significant proposed and final regulations under the Clean

Air Act (CAA). The second element requires the BCAs stem from best practices from the economic, engineering, physical, and biological sciences. The rule outlines the BCA element requirements, including following established analysis protocols. Finally, the rule imposes increased transparency in the BCA results. By implementing such standards, the rule has created a cause of action for future regulations if the EPA does not follow these protocols.

The EPA's stated goals for this rule are to ensure consistency and allow for transparency in the rule-making process. Generally, industry is a proponent of this rule, stating such consistency and transparency were overdue, arguing this rule gives opponents the chance to challenge the EPA if they find the requirements were not met. Opponents, including many environmentalists, find industry groups could just as easily sue the EPA if they did not find the results to their liking. Others also argue the cost-benefit calculations will not be sufficiently reliable and the rule goes against the core of the CAA because it does not adequately consider co-benefits.

Background

In April 2017, the EPA solicited feedback on Executive Order 13777, which directed federal agencies to establish Regulatory Reform Task Forces to evaluate and recommend existing regulations for replacement, repeal, or modification. After receiving comments concerning costs and benefits, an Advanced Notice of Proposed Rulemaking was issued by the EPA in June 2018 to gain further public input and brainstorm strategies to increasing rulemaking consistency and transparency regarding benefit and cost considerations. In June 2020, a Notice of Proposed Rulemaking was issued by the EPA, proposing a cost-benefit rule solely concerning the CAA. The EPA solicited comments and made modifications, and on December 9, 2020, the rule was finalized before its publication in the *Federal Register*. The final rule was published and made effective on December 23, 2020.

The Benefit-Cost Rule and Its Implications

The benefit-cost rule's stated goal is to improve the rulemaking process by increasing consistency in regulation analysis, and increasing transparency regarding analysis and final decision making. The first element of the rule requires BCAs to be prepared by the EPA for all future significant proposed and final regulations under the CAA, and those BCAs must be considered in the decision making process, unless otherwise prohibited by law. Significant regulations will include: those with large effects on the economy; those materially adversely affecting an industry, group, or community; or those that are otherwise novel or relevant. Second, the BCAs must be developed using the best available scientific information, conforming

to the best practices from the economic, engineering, physical, and biological sciences, consistent with the EPA's and Office of Management and Budget's guidelines. BCAs must include a statement of need, an examination of regulatory options contributing to the stated objectives of the CAA, and an assessment of all benefits and costs of these regulatory options. The BCAs also require a quantification of all benefits, a monetization of benefits, and a qualitative characterization of benefits that cannot be quantified or monetized. Finally, the rule includes requirements to increase transparency regarding benefit and cost presentation, releasing BCA results to the public when legal. The preamble must include a section summarizing the BCA results, including total benefits, costs, and net benefits. Any benefits and costs that accrue to non-U.S. populations must be reported separately.

The rule only pertains to internal EPA practices and allows for a cause of action if a party finds the BCA standards were not met. It states the EPA had the authority to promulgate the rule under CAA § 301(a)(1) because the section is "sufficiently broad to allow the promulgation of rules that are necessary and reasonable to effect the purposes of the Act." *NRDC v. EPA*, 22 F.3d 1125, 1148 (D.C. Cir. 1994). The rule went into effect immediately upon publication because the EPA found it was under the "good cause" exemption under the Administrative Procedure Act § 553(d)(3) which normally requires 30-days to pass after a rule's publication for it to become effective.

Proponents, Opponents, and Potential Legal Challenges

Some rule advocates hope the rule will usher in an era of clarity and reliability. They find it allows for the general public to understand why and how rules are made. Some opponents argue the cost-benefit rule was made to move away from the EPA permitting regulations based off of co-benefits, benefits that were not the stated objective of the regulation, thus minimizing the value of such benefits and undercutting public health benefits. Others support the rule because they find reliance on co-benefits can inflate benefits and justify an entire outcome. Many find this rule would work against future regulations similar to the regulation of mercury in the coal industry under the Obama administration. The regulation was permitted because the benefits outweighed the costs not due to mercury reduction itself, but due to the reduc-

tions in particulate matter that come from controlling mercury. While some proponents argue the cause of action created by the rule allows for both industry and environmentalists to have more agency, some opponents disagree, finding the rule largely benefits industry, allowing such groups to sue the EPA simply because the BCAs were not completed to their liking.

Additionally, many find that quantifying costs and benefits can be extremely complex and uncertain. They argue costs, value judgements, and science are changeable, making BCA calculations less reliable. A public comment was made about a recent National Academies finding that there cannot be a credible calculation of domestic benefit concerning greenhouse gasses using current models because they ignore the effect that would be had on climate change. The EPA responded, stating the final rule requires the Agency consider BCAs when making its decision, but

the EPA did not make a specific BCA consideration test or mandatory BCA consideration process.

Conclusion and Implications

While the CAA benefit-cost rule was recently enacted, delighting some and enraging others due to its new BCA requirements, the future of this rule is unknown. Suits post-publication, who will bring them, and what their outcome will be is unclear. In addition, on his first day in office President Biden issued an Executive Order instructing the EPA to consider publishing a proposed rule to suspend, revise, or rescind the cost-benefit rule. (January 20, 2021 Executive Order on Protecting Public Health and the Environment Restoring Science to Tackle the Climate Crisis.)

(Megan Unger, Darrin Gambelin)

U.S. EPA FINALIZES GUIDANCE ON IMPLEMENTATION OF U.S. SUPREME COURT'S 'FUNCTIONAL EQUIVALENT' CLEAN WATER ACT TEST IN COUNTY OF MAUI CASE

On January 14, 2021, the U.S. Environmental Protection Agency (EPA) finalized guidance regarding the implementation of the U.S. Supreme Court's decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. ____ (2020) (*Maui*), which established a "functional equivalent" test to determine when discharges to groundwater that ultimately reach surface waters should be regulated under the federal Clean Water Act in the same manner as a direct discharge to surface waters (*Maui* Guidance). The *Maui* Guidance states that any discharge must meet certain "baseline permitting principles" comprised of threshold conditions that trigger the National Pollutant Discharge Elimination System (NPDES) Permit requirement, and the type of analysis permit writers currently conduct for surface water discharges. In doing so, the *Maui* Guidance sets forth an additional factor that should be evaluated when determining whether a discharge to groundwater requires an NPDES Permit—"the design and function of the treatment system"—and provides guidance regarding the types of discharges and associated treatment systems for which NPDES Permits will not be required.

Background—The *Maui* Decision

In *Maui*, the Supreme Court held that an NPDES permit is required "if the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters." According to the Court, evaluation of whether a discharge of a pollutant to groundwater is the "functional equivalent of a direct discharge from the point source into navigable waters," requires the application of the following seven factors: 1) the pollutant's travel time between the discharge point and the navigable water; 2) the distance traveled; 3) the material through which the discharge travels; 4) dilution or chemical changes during travel; 5) the amount of pollutant entering the navigable water as compared to the amount that leaves the point source; 6) the way or location the pollutant enters the navigable water; and 7) the degree to which the pollution has retained its identity upon reaching the navigable water. The opinion makes clear that the list is not exhaustive, but notes that time and distance may be the most important factors. (See: https://www.supremecourt.gov/opinions/19pdf/18-260_jifl.pdf)

The *Maui* Guidance Summary

The primary focus of the *Maui* Guidance appears to be a reduction in the number of inquiries from the regulated community regarding whether or not an NPDES Permit is required for a particular discharge. To eliminate a number of those inquiries, the *Maui* Guidance describes “baseline permitting principles” that seek to resolve questions from the regulated community (and potentially frivolous litigation). The baseline permitting principles, which consume the majority of the eight-page guidance memorandum, are primarily a recitation of the elements that traditionally trigger the NPDES Permit requirement as applied to surface waters.

By confirming that all discharges are subject to the described framework, the EPA adopts an additional factor that:

...may prove relevant and thus should be considered when performing a ‘functional equivalent’ analysis: the design and performance of the system or facility from which the pollutant is released.

The *Maui* Guidance indicates that an evaluation of the design and performance of the facility or system from which a pollutant is released is customary when the agency evaluates whether a direct discharge requires an NPDES Permit. The *Maui* Guidance goes one step further by describing treatment system designs and discharge point locations that are unlikely to be subject to the NPDES Permit requirement, as well as the influence of such system component designs and locations on the composition of any pollutants discharged to groundwater that ultimately reach surface water. For example:

...the point of discharge may be engineered to direct the pollutant into a subsurface aquitard or to a surface area designed to slow the transit time of a pollutant that ultimately reaches a water of the United States.

EPA also clarifies that the agency anticipates that the issuance of NPDES Permits for discharges of pollutants to groundwater:

...will continue to be a small percentage of the overall number of NPDES permits issued following application of the Supreme Court’s ‘functional equivalent’ analysis.

To emphasize this point, the *Maui* Guidance reminds practitioners that: 1) the discharge must first meet the threshold requirements that trigger the NPDES Permit requirement; and 2) all of the factors comprising the “functional equivalent” test must be applied to the discharge. In other words, a demonstration that pollutants associated with a point source discharge merely reach surface waters falls short of the analysis required by the *Maui* decision, and would not trigger the NPDES Permit requirement for discharges to groundwater.

Conclusion and Implications

The *Maui* Guidance provides insight into how the EPA will apply its current NPDES permit program framework to groundwater discharges, confirmed by the establishment of the new “design and performance” factor. Moreover, the *Maui* Guidance crafts a distinction between the Ninth Circuit’s “fairly traceable” standard and the Supreme Court’s “functional equivalent” test by indicating that the fact that a pollutant associated with a point source discharge to groundwater reaches surface waters is *not enough* to trigger NPDES permitting.

However, whether the *Maui* Guidance will remain in effect is unclear, given the Biden administration’s recent adoption of the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, which will require EPA to revisit all “regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021” that may be inconsistent with the Biden administration’s policy on environmental protection and public health. The outcome of that review process remains to be seen. For more information about the Guidance, see: <https://www.epa.gov/npdes/releases-point-source-groundwater>)

(Nicole Granquist, Meghan Quinn, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Civil Enforcement Actions and Settlements— Air Quality

•December 17, 2020 - The U.S. Environmental Protection Agency (EPA) has settled a significant case against Crowley Fuels of Alaska for violations of federal environmental laws at the company's bulk gasoline storage facilities in Juneau, Ketchikan, Douglas, and Palmer. The company has agreed to pay a penalty of \$1,337,365. EPA found that Crowley failed to install vapor emissions controls on the gasoline storage tanks and loading rack at its Juneau terminal in violation of the federal Clean Air Act (CAA). As a result of operating the Juneau terminal without the required controls, EPA estimates that 110,000 pounds of excess gasoline vapors escaped to the environment. Gasoline vapors are a known source of benzene, a known carcinogen, and toluene, which is a central nervous system depressant. Specifically, the company violated the New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants for bulk gasoline terminals at its Juneau terminal by not having air pollution controls to capture vapors released from gasoline storage tanks and a loading rack used to fill tanker trucks. EPA also found that Crowley violated the Emergency Planning and Community Right-to-Know Act when it failed to report information about certain chemicals and chemical compounds at its Juneau and Ketchikan terminal facilities annually from 2013 to 2018. Crowley Fuels processed liquid petroleum which contained benzene, cyclohexane, ethylbenzene, naphthalene, toluene, xylene, 1,2,4-trimethylbenzene, n-Hexane, and lead compounds in quantities that exceeded their threshold reporting amounts. Under the Emergency Planning and Community Right to Know Act, facilities that use certain toxic chemicals above specified thresholds must file annual reports of their chemical releases and transfers with EPA and their appropriate state agency. The information collected by EPA from industrial and federal facilities using these chemicals serves as the basis of the Toxics Release Inventory, a national database that can be reviewed by communi-

ties, government and industry. Because Crowley's TRI forms were not submitted in a timely manner, the information for these chemicals was not available to the public. On September 16, 2020 EPA issued an administrative compliance order on consent that requires the company to either install air pollution control equipment on the storage tanks and the truck loading rack at the Juneau terminal by July 2021 or convert the terminal to diesel-only service. Also, the company has submitted and certified outstanding Toxics Release Inventory (TRI) reports.

•January 14, 2021—EPA, U.S. Department of Justice announced that the United States has filed and simultaneously settled a civil lawsuit against Toyota Motor Corporation, Toyota Motor North America Inc., Toyota Motor Sales U.S.A. Inc., and Toyota Motor Engineering & Manufacturing North America Inc. (Toyota) for systematic, longstanding violations of Clean Air Act emission-related defect reporting requirements, which require manufacturers to report potential defects and recalls affecting vehicle components designed to control emissions. In connection with the settlement, the United States has filed a consent decree, agreed to by Toyota, that resolves the government's complaint through Toyota's payment of a \$180 million civil penalty and the imposition of injunctive relief. The \$180 million penalty is the largest civil penalty for violation of EPA's emission-reporting requirements. The consent decree remains subject to a period of public comment and court approval. The complaint filed in Manhattan federal court alleges that from approximately 2005 until at least late 2015, Toyota systematically violated Clean Air Act automobile defect reporting requirements designed to protect public health and the environment from harmful air pollutants. Clean Air Act regulations require manufacturers to notify EPA by filing an Emissions Defect Information Report (EDIR) when 25 or more vehicles or engines in a given model year have the same defect in an emission control part or an element of design installed in order to comply with emission

standards and other EPA regulations. The regulations also require vehicle manufacturers to file a Voluntary Emissions Recall Report (VERR) with EPA when they perform a recall to correct defects in emission-related parts, and to update EPA on the progress of such recalls through Quarterly Reports. For ten years, Toyota routinely failed to comply with these reporting requirements. During that time, Toyota materially delayed filing an estimated 78 EDIRs, filing many only when disclosing non-compliance to EPA in 2015, at which point some were as much as eight years late. Toyota also failed to file 20 VERRs and more than 200 quarterly reports. During the period of noncompliance, Toyota managers and staff in Japan knew that Toyota was no longer attempting to determine whether it was aware of 25 instances of the same emission-related defect in a model year—the threshold requirement for filing an EDIR. Rather than follow this legally required standard, Toyota unilaterally decided to file EDIRs principally when Toyota was independently required to file distinct reports with California regulators under a less strict standard—a standard that EPA had rejected as too lenient when Toyota had previously proposed to rely on it for federal reporting. Time and again, Toyota managers and staff in Japan identified the discrepancy between Toyota's procedures and the plain language of the federal requirements but failed to bring Toyota into compliance. And Toyota's American unit was well aware of red flags indicating Toyota's noncompliance, but did not address the problem. Toyota admits, acknowledges, and accepts responsibility for what is included in the consent decree. Between approximately 2005 and late 2015, Toyota routinely filed emission defect reports to EPA materially late and, in many cases, failed to file such reports at all until a self-disclosure of non-compliance in late 2015.

•January 14, 2021—EPA announced a Clean Air Act settlement in which Big West Oil, LLC (Big West Oil) has agreed to pay a \$344,364 penalty and address violations of Risk Management Plan requirements at its petroleum refining facility in North Salt Lake, Utah. The company has been cooperative in correcting all identified deficiencies and has also agreed to improve the maintenance of process equipment to reduce the possibility of an accidental release of hazardous chemicals at the facility. The settlement, filed as a Consent Agreement on January 13, 2021,

resulted from a 2016, EPA inspection at the Big West Oil facility that revealed several Clean Air Act Risk Management Plan violations related to the management of flammable mixtures and hydrofluoric acid; including deficiencies associated with process safety information, hazard analysis, mechanical integrity, and operating procedures. This case is part of EPA's National Compliance Initiative to reduce risks from chemical accidents, and it addresses compliance within an industry sector—petroleum refining—which can pose serious risks from such accidents. Following recommendations made by the U.S. Chemical Safety and Hazard Investigation Board in April of 2019, EPA Region 8 is focused on ensuring compliance with the Risk Management Plan Rule at petroleum refining facilities that store and process hydrofluoric acid. The Big West Oil facility is subject to Clean Air Act Risk Management Plan regulations because it stores and processes large quantities of flammable mixtures and hydrofluoric acid, a hazardous substance that is highly toxic, and when released to air, may cause severe injury, burns, or death. The Risk Management Plan Rule, or Section 112(r) of the Clean Air Act, requires facilities holding more than 10,000 pounds of flammable mixture or 1,000 pounds of hydrofluoric acid to develop a Risk Management Plan and submit that plan to EPA.

•January 19, 2021—EPA and the U.S. Department of Justice announced a settlement that will require Midwest Can Company, one of the largest manufacturers of portable fuel containers in the United States, to pay a \$1.7 million civil penalty to resolve Clean Air Act violations. The violations resulted from failure to disclose test results showing that Midwest's portable fuel containers did not meet regulatory standards and emitted higher amounts of pollutants than allowed by federal law. Under the terms of the settlement, Midwest will also conduct two supplemental emission tests in the next four years on its currently certified co-extruded plastic portable fuel containers and submit complete results from those tests to the EPA. The complaint filed simultaneously with the settlement alleges that Midwest violated the Clean Air Act because its 2014 applications for certificates of conformity failed to disclose test results showing that the portable fuel containers did not meet regulatory standards and emitted higher amounts of VOCs than allowed by federal law. EPA

discovered the violations following a series of investigative actions from 2016-2018. In 2016, EPA conducted emission testing on five of Midwest's portable fuel containers sold under the 2014 certificates of conformity. All five containers failed the emission test. EPA proceeded in 2017 to inspect the test lab utilized by Midwest to conduct emission testing of its portable fuel containers. In 2018, EPA received and reviewed additional information from the test lab, which revealed the violations related to Midwest's applications for certificates of conformity.

Civil Enforcement Actions and Settlements— Water Quality

- December 23, 2020—EPA, the U.S. Department of Justice, and the state of Illinois announced an agreement with the city of Peoria and the Greater Peoria Sanitary District (GPSD) that will yield significant reductions of sewage discharges from Peoria's wastewater systems into the Illinois River and Peoria Lake. The settlement resolves federal Clean Water Act violations by the city of Peoria and GPSD related to combined sewer overflows (CSOs) and National Pollutant Discharge Elimination System (NPDES) permit exceedances. Under the proposed consent decree Peoria will implement a remedial measures program that will significantly reduce CSO discharges to the Illinois River and Peoria Lake. Peoria's combined sewer system is currently overwhelmed by stormwater runoff during heavy rain or snow, causing CSO discharges to the Illinois River and Peoria Lake. These discharges consist of untreated human waste mixed with stormwater and contain high concentrations of bacteria, sediment, and other pollutants that impair water quality in the Illinois River and Peoria Lake. The proposed consent decree provides Peoria flexibility to choose and build projects at periodic intervals as necessary to meet performance standards, reducing the number and volume of CSO discharges over time as projects are implemented. Peoria plans to use a high proportion of green infrastructure (e.g., permeable pavement, rain gardens, and bioswales) to achieve its performance criteria. Peoria's overall CSO controls are estimated to cost approximately \$129 million and will be completed by Jan. 1, 2040, with four interim milestones to ensure progress. The settlement also requires GPSD to implement improvements to maximize the flow of combined sewage from Peoria to its Wastewater Treatment Plant (WWTP),

including cleaning its portion of the combined sewer system. GPSD will also eliminate the discharges from two remote treatment units within its sanitary sewer system by July 1, 2028. GPSD's work will cost approximately \$25 million and will be fully completed by 2032. After the implementation of both Peoria and GPSD's CSO controls, the average annual CSO discharges will be reduced by approximately 92 percent. In addition, approximately 696,000 pounds of pollutants will be prevented from being discharged to the Illinois River and Peoria Lake each year. The proposed consent decree also requires Peoria to develop a public participation plan that will involve Peoria's residents in the implementation of the CSO remedial measures program and an enhanced CSO notification system to alert the public when a CSO occurs through a personal email address, if provided, or Peoria's publicly available website. Finally, the settlement requires Peoria to pay a \$100,000 civil penalty and perform a state supplemental environmental project. For the civil penalty, Peoria will pay the United States \$75,000 and pay Illinois \$25,000.

- January 7, 2021—EPA recently concluded an Expedited Settlement Agreement with Aspen Homes and Development, LLC located in Coeur d'Alene, Idaho, resolving violations of the federal Construction General Permit for preventing stormwater pollution. Aspen Homes and Development is the owner and operator of the Riverview Heights construction site in Coeur d'Alene, where numerous alleged violations occurred. The Company agreed to pay a \$20,325 penalty as part of the settlement. EPA's enforcement action followed an inspection by Idaho Department of Environmental Quality, on EPA's behalf, responding to a citizen's complaint received in September 2019. According to documents associated with the case, Aspen Homes and Development compiled a long list of violations by:

- Failing to install and maintain erosion and sediment control measures, which resulted in muddy stormwater runoff leaving the property
- Failing to conduct and document over 25 inspections, and
- Failing to update and maintain Stormwater Pollution Prevention Plan (SWPPP) records.

Since, in this case, erosion leads to sediment and other pollutants entering the nearby, already-impaired Spokane River, EPA estimates that this action prevented just over 170,000 pounds of sediment from migrating offsite. This action was concluded under an Expedited Settlement Agreement. According to EPA officials, Expedited Settlement Agreements offer business and industry a faster, more streamlined process to resolve permit violations with monetary penalties commensurate to the severity of the violations. This wasn't the developer's first contact with EPA's enforcement program. EPA reached an earlier Clean Water Act settlement with Aspen Homes on July 13, 2017, when the Company paid \$11,000 for similar stormwater violations.

Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste

•December 17, 2020 - EPA and the Department of Justice announced a proposed nationwide settlement with Home Depot U.S.A. Inc. resolving alleged violations of the EPA's Lead Renovation, Repair and Painting (RRP) Rule at home renovations performed by Home Depot's contractors across the country. The States of Utah, Massachusetts, and Rhode Island, which have EPA-authorized RRP programs, are joining the United States in this action. EPA discovered the alleged violations when investigating five customer complaints about Home Depot renovations (in Illinois, Maine, Michigan, Minnesota and Wisconsin), which showed Home Depot subcontracted work to firms that in some cases did not use lead-safe work practices, perform required post-renovation cleaning, provide the EPA-required lead-based paint pamphlets to occupants, or maintain records of compliance with the law. EPA then conducted a comprehensive review of Home Depot's records of renovations performed throughout the United States and identified hundreds of instances in which Home Depot sent uncertified firms to perform renovations that required certified and trained firms. In addition, EPA identified instances in which Home Depot failed to establish, retain, or provide compliance documentation showing that specific contractors had been certified by EPA, had been properly trained, and had used lead-safe work practices in projects performed in homes. For the most serious violations addressed by the settlement, Home Depot offered its customers inspections using certified professionals and, if dust lead hazards were found,

it performed specialized cleaning and verification. Under the settlement, Home Depot will implement a company-wide program to ensure that the contractors it hires to perform work for its customers comply with the RRP Rule during renovations of homes built before 1978. Home Depot must also investigate and respond to customer complaints. In instances where the contractor did not comply with Lead Safe Work practices. Home Depot will perform an inspection for dust lead hazards and, if they are found, provide a specialized cleaning. EPA will monitor Home Depot's responses to customer complaints. In addition to the requirements related to its renovations, Home Depot will provide important information about following lead-safe work practices to its professional and do-it-yourself customers in its stores, on its website, on YouTube, and in workshops. The settlement, in a consent decree lodged with the District Court for the Northern District of Georgia, requires Home Depot to implement a comprehensive, corporate-wide program to ensure that the firms and contractors it hires to perform work are certified and trained to use lead-safe work practices to avoid spreading lead dust and paint chips during home renovation activities. Home Depot will also pay a \$20.75 million penalty, the highest civil penalty obtained to date for a settlement under the Toxic Substances Control Act. Of the \$20.75 million penalty, \$750,000 will be paid to Utah, \$732,000 to Massachusetts, and \$50,000 to Rhode Island.

•December 21, 2020—EPA, U.S. Department of Justice (DOJ), the Kalamazoo River Natural Resource Trustee Council, and Michigan Department of Environment, Great Lakes, and Energy (EGLE) announced entry of a consent decree on December 2, that requires NCR Corp. to clean up and fund future response actions at a significant portion of the Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site. The consent decree also includes payments related to natural resource damages and past cleanup efforts at the site. The federal District Court judge entered the consent decree after a public comment period on the proposed agreement. The Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site is in Allegan and Kalamazoo counties and is divided into six segments, or operable units (OUs), that require cleanup. According to the settlement terms, NCR Corporation will spend approximately

\$135.7 million cleaning up three areas of OU 5. OU 5 includes 80 miles of the Kalamazoo River and three miles of Portage Creek. In addition, NCR will pay:

\$76.5 million to EPA for past and future costs in support of river cleanup activities.

\$27 million to natural resource trustees of the Kalamazoo River Natural Resource Trustee Council for Natural Resources Damage Assessment and claims.

\$6 million to State of Michigan for past and future costs. In the early 1970s, PCBs were identified as a problem in the Kalamazoo River. In 1990, in response to the nature and extent of PCB contamination, the site was added to the National Priorities List, which includes the nation's most serious uncontrolled or abandoned hazardous waste releases. EPA, working along with EGLE, has cleaned up three of the six operable units, removed nearly 470,000 cubic yards of contaminated material from the site, cleaned up and restored about twelve miles of the Kalamazoo River and banks, and capped 82 acres worth of contaminated material.

- January 11, 2021 - EPA announced a settlement with Helena Agri-Enterprises, LLC for violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) at its establishments in Exeter, Oxnard, Modesto, and Kerman, California. The company has agreed to pay a civil penalty of \$88,000 and has certified they are now in compliance. The case was referred to EPA by California's Department of Pesticide Regulation (DPR) following DPR inspections at the four facilities in 2018 and 2019. The inspections found multiple violations of FIFRA requirements, including failure to seal cracks in containment structures and loading pads, insufficient capacity of containment structures, failure to generate and maintain repackaging records, failure to attach and maintain complete product labels, and offering for sale misbranded products. Federal pesticide laws require proper pesticide handling, labeling and packaging, as well as registration of pesticide products and pesticide production facilities. These requirements protect public health and the environment by minimizing the risks associated with the production, use, storage and disposal of pesticides.

- January 12, 2021—EPA has ordered MJB Worldwide LLC and Hy-Vee Inc. to stop the sale and distribution of disinfectant wipes that EPA says are

noncompliant with federal law and may represent a danger to consumers. EPA issued the “Stop Sale, Use, or Removal Orders” to MJB Worldwide and Hy-Vee on Jan. 11, 2020. These orders require immediate termination of all distribution and sales of Outlaw Germ Justice Disinfectant Wipes and prohibit all future sales of the product at any Hy-Vee locations in Iowa, Kansas, Missouri and Nebraska. MJB Worldwide LLC produces and distributes “Outlaw Germ Justice Disinfectant Wipes,” claiming the product kills bacteria and viruses. According to EPA, the company failed to register the product in violation of the Federal Insecticide, Fungicide and Rodenticide Act. Under the law, any manufacturer of a pesticide—including those intended to kill pathogens—must register the product with EPA.

Indictments, Convictions, and Sentencing

- January 14, 2021 - The president and owner of Oil Chem Inc. pleaded guilty in federal court in Flint, Michigan, to a criminal charge of violating the Clean Water Act stemming from illegal discharges of landfill leachate — totaling more than 47 million gallons — into the city of Flint sanitary sewer system over an eight and one half year period. Robert J. Massey, 69, of Brighton, Michigan, pleaded guilty before U.S. District Judge Stephanie Dawkins Davis in the Eastern District of Michigan. Sentencing has been scheduled for May 14. Oil Chem, located in Flint, processed and discharged industrial wastewaters to Flint's sewer system. The company held a permit issued by the city of Flint under the auspices of the Clean Water Act, which allowed it to discharge certain industrial wastes within permit limitations. The city's sanitary sewers flow to its municipal wastewater treatment plant, where treatment takes place before the wastewater is discharged to the Flint River. The treatment plant's discharge point for the treated wastewater was downstream of the location where drinking water was taken from the Flint River in 2014 to 2015. According to an agreed upon factual statement in the plea agreement filed in federal court, Oil Chem's permit prohibited the discharge of landfill leachate waste. Landfill leachate is formed when water filters downward through a landfill, picking up dissolved materials from decomposing trash. Massey signed and certified Oil Chem's 2008 permit application and did not disclose that his company had been and planned to continue to receive landfill leachate,

which it discharged to the sewers untreated. Nor did Massey disclose to the city when Oil Chem started to discharge this new waste stream, which the permit also required. Massey directed employees of Oil Chem to begin discharging the leachate at the close of business each day, which allowed the waste to flow from a storage tank to the sanitary sewer overnight. From January 2007 through October 2015, Massey arranged for Oil Chem to receive approximately 47,824,293 gallons of landfill leachate from eight different landfills located in Michigan. One of the landfills was found to have polychlorinated biphenyls (PCBs) in its leachate. PCBs are known to be hazardous to human health and the environment.

•January 19, 2021 - A California agricultural developer has agreed to pay a civil penalty, preserve streams and wetlands, effect mitigation, and be subject to a prohibitory injunction to resolve alleged violations of the Clean Water Act on property near the Sacramento River located in Tehama County, California, the Justice Department announced. Roger J. LaPant Jr. purchased the property in this case in 2011 and sold it in 2012 to Duarte Nursery Inc. which, in turn, sold it that same year to Goose Pond Ag Inc. Goose Pond's activities on the property were the subject of a settlement announced by the Justice Department in September 2018 and approved by a federal judge in June 2019. Duarte's activities on an adjoining site were the subject of a settlement agreement announced by the Justice Department in August 2017 and approved by a federal judge in December 2017. LaPant has agreed to pay \$250,000 in civil penalties; purchase \$100,000 worth of compensatory mitigation credits; dedicate another ten credits at a vernal pool conservation bank; effect long-term preservation streams, wetlands, and buffer areas on two sites with a total acreage of over 400 acres; and be subject to a prohibition on certain new activities in waters or wetlands absent pre-clearance from the U.S. Army Corps of Engineers. In total, the approximate cost

of LaPant's obligations under the settlement is \$1.2 million. This case stems from agricultural development activities LaPant conducted during his brief ownership of the property, which prior to his ownership had laid fallow and unfarmed for more than 20 years. LaPant's conduct in this case, part of an effort to convert the property to orchard use, contributed to the destruction or significant degradation of streams and wetlands at the site. Even before LaPant purchased the site, he received information that alerted him to the presence of federally protected streams and wetlands on the property. Despite that information, he conducted earthmoving activities in streams and wetlands without a CWA dredge-or-fill permit. The settlement agreement reached secures a significant penalty and mitigation for these violations, while providing fairness for agricultural developers who comply with the applicable laws.

•January 19, 2021 - A developer and his companies have agreed to effectuate \$900,000 in compensatory mitigation, preserve undisturbed riparian areas, conduct erosion-control work on streams, and be subject to a prohibitory injunction to resolve alleged violations of the Clean Water Act on property north of Houston, Texas, the Justice Department announced. The case stems from activities Thomas Lipar conducted to create the Benders Landing Estates housing development on property containing streams and wetlands that feed into Spring Creek and the West Fork of the San Jacinto River, which, in turn, flow into Lake Houston. Beginning in 2005, the defendants operated earthmoving machinery and filled substantial segments of streams and acres of abutting wetlands. Despite receiving information about the aquatic condition of the property, Lipar did not seek a CWA dredge-or-fill permit. The settlement agreement reached secures significant mitigation for these alleged violations, while providing fairness for developers who comply with the applicable laws. (Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REJECT'S DISTRICT COURT HOLDING THAT ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT FOR ROAD PROJECT VIOLATED NEPA

Bair v. California Department of Transportation, 982 F.3d 569 (9th Cir. 2020).

In a December 2, 2020 decision, a three-judge panel from the Ninth Circuit Court of Appeals rejected a U.S. District Court's ruling that the California Department of Transportation's (Caltrans) Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) related to a proposed road widening project through Richardson Grove State Park violated the National Environmental Policy Act (NEPA). The decision is the latest development in several years of state and federal litigation over the road improvement project. The Ninth Circuit panel concluded that the hundreds of pages of environmental analysis and mitigation measures by Caltrans constituted a sufficient "hard look" at the project's potential environmental impacts as required by NEPA.

Factual and Procedural Background

Highway 101 bisects Richardson Grove State Park (the Grove) and is lined with redwood forests in southern Humboldt County, California (County). Because several old-growth redwoods abut Highway 101 in the Grove, the highway is a two-lane highway "on nonstandard alignment." This means that through the Grove, Highway 101 was restricted to certain trucks that exceed the length of 65 foot long "California Legal Trucks." These longer trucks are known as industry-standard Surface Transportation Assistance Act of 1982 trucks (STAA).

In 2010, Caltrans proposed a strategic widening project that would make the roadway accessible to STAA trucks. The project would involve slightly widening the roadway and straightening some curves along a one mile stretch of Highway 101 within the Grove.

Caltrans assumed responsibility to obtain environmental approval of the project under NEPA. In 2010, the County prepared an Environmental Analysis that included "extensive analysis" of the project's environ-

mental effects and included efforts to minimize those effects.

Caltrans determined that the project's impacts on the Grove would be minor and would not remove any old-growth redwoods. Although the project would involve construction of roadways in the structural root zones of redwoods, according to Caltrans' experts, sufficient plans and reduction measures were included to mitigate these effects. After determining that the project would not significantly harm old-growth redwoods within the Grove, Caltrans issued the EA and a FONSI for the project in May of 2010.

Plaintiffs filed suit in 2010 challenging the project. During the 2010 lawsuit, the U.S. District Court granted partial summary judgment in favor of plaintiffs and required Caltrans to undertake additional studies, including new maps of each redwood tree, its root health zone, and the environmental impacts to each tree. In response, Caltrans commissioned a new tree report, took public comments, responded to comments, and then issued a NEPA revalidation of the project in January 2014.

Plaintiffs filed a second suit in 2014 alleging similar claims to the 2010 suit. The 2014 case was dismissed after Caltrans withdrew the FONSI in response to an adverse ruling in a parallel state court action. In response to the state court order, Caltrans reduced the scope of the project and prepared an additional report on the project's impacts on nearby trees.

In 2017, Caltrans returned with a modified project designed to reduce its environmental impact, primarily by narrowing the project's proposed roadway shoulder widths. Plaintiffs again sued raising seven claims, including alleged violations of NEPA, the Department of Transportation Act, the Wild and Scenic Rivers Act, and a violation of the Administrative Procedure Act. The District Court granted plaintiffs' partial summary judgment on their NEPA claims and specifically identified the following issues that it

claimed Caltrans had not adequately considered in the EA:

...whether (1) redwoods would suffocate when more than half of their root zones were covered by pavement; (2) construction in a redwood's structural root zone would cause root disease; (3) traffic noise would increase because of the larger size of the STAA trucks or because of additional numbers of trucks; and (4) redwoods would suffer more frequent and severe damage as a result of strikes by STAA trucks.

As a result of these alleged shortcomings, the District Court found that Caltrans had not taken the necessary "hard look" at environmental impacts of the project, and that the EA was therefore inadequate. The District Court held that given the "substantial questions" raised by the above, Caltrans should prepare an Environmental Impact Statement (EIS). The District Court then enjoined Caltrans from proceeding with the project until an EIS was prepared.

The Ninth Circuit's Decision

The NEPA Claim and Alleged Need for an EIS

The Ninth Circuit noted that agency decisions that allegedly violate NEPA are reviewed under the Administrative Procedure Act, and courts will set aside decisions:

...only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

A determination of whether an agency's decision not to prepare an EIS was arbitrary and capricious requires courts to determine whether an agency has:

...taken a hard look at the consequences of its actions, based on its decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant.

Although a court's review is "searching and care-

ful" it is narrow and "courts cannot substitute [their] own judgment for that of the agency." Courts ask whether an agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment" when finding whether an EA and FONSI were appropriately issued.

Based on these standards, the court rejected the District Court's finding that Caltrans violated NEPA when it issued the EA for the project. The 2017 FONSI was based on the analysis contained in Caltrans' revised EA, which incorporated the analysis of the 2010 EA and the 2013 revised supplemental EA. Here, because the 2010 EA as supplemented and revised constituted a "hard look" at the project's environmental effects, Caltrans' issuance of the 2017 FONSI was reasonable and sufficient under NEPA.

Claim of Tree Suffocation

Regarding redwood tree suffocation, the court noted that Caltrans sufficiently considered the effect of paving over tree root zones. The project incorporated measures to reduce this effect, for example the project would use special paving material to allow for greater porosity and promote air circulation under the asphalt. Caltrans' tree expert determined that the project would not cause extreme stress to the redwoods "or overwhelm their natural resilience." The court found that Caltrans reasonably concluded, based on its analysis, that the project would not significantly impact the health of protected redwoods in the grove.

Claim of Construction within Root Zones

Regarding construction within root zones, the court similarly found that Caltrans performed the necessary "hard look" the project's effects on these root zones. Although the California State Parks handbook recommended that "no construction should take place in the structural root zone of a protected tree," it was not clear whether this guidance applied to the project. Moreover, Caltrans was not required to adopt the State Parks' opinion of the project. NEPA anticipates the administrative record may contain conflicting and contradictory opinions. Here Caltrans could and did reasonably refuse to follow the State Parks handbook, especially where it relied on evidence specifically pertaining to the effects of the project.

Traffic and Noise Analyses

Regarding traffic and noise, the court again found that Caltrans had taken a sufficient hard look at the project's environmental effects. The court rejected the District Court's finding that STAA trucks would be noisier than California Legal trucks because the District Court cited no specific evidence in support of this assumption and in effect was stepping into the agency's shoes to perform its own factual analysis.

Claim of Increased Vehicle Collisions

Last, the court rejected the District Court's findings as to an alleged increase in the number and severity of collisions with trees. Regarding collision frequency, the purpose of the project was to widen the road to provide more room for trucks and traffic. Caltrans reasonably concluded that the project would reduce the frequency of vehicle collisions with trees. Regarding crash severity, the court did not find any documentation in the administrative record indicating that STAA trucks would cause more damage

when they strike trees. Accordingly, plaintiffs failed to administratively exhaust this issue, and even if it had, the court found that Caltrans' analysis included a sufficiently hard look into this issue.

Conclusion and Implications

The Ninth Circuit reversed the District Court's judgment requiring Caltrans to prepare an EIS, and directed the District Court to resolve the other unresolved issues in the case consistent with its decision.

The Ninth Circuit's decision in *Bair* is the latest development in multi-year litigation related to Caltrans' proposed roadway improvements through the environmentally sensitive old-growth redwood groves in Richardson Grove State Park. It is unclear whether this decision will allow the project to move forward, or whether ongoing litigation will continue to slow the project. A copy of the decision can be found at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/02/19-16478.pdf>
(Travis Brooks)

NINTH CIRCUIT FINDS FEDERAL AGENCIES VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT AND ENDANGERED SPECIES ACT IN APPROVING OFFSHORE OIL FACILITY

Center for Biological Diversity v. Bernhardt, 982 F.3d 723 (9th Cir. 2020).

Various conservation groups brought suit challenging the U.S. Department of the Interior's Bureau of Ocean Energy Management's (BOEM) approval of an offshore oil drilling and production facility, claiming that the approval failed to comply with the National Environmental Policy Act (NEPA), the federal Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA). After holding that it had original jurisdiction over the claims, the Ninth Circuit Court of Appeals found that BOEM acted arbitrarily and capriciously by failing to quantify the emissions resulting from foreign oil consumption in its Environmental Impact Statement (EIS). The Ninth Circuit also held the U.S. Fish and Wildlife Service (FWS) violated the ESA by relying on uncertain, nonbinding mitigation measures and failing to estimate the project's amount of nonlethal take of polar bears. In all other respects, the Ninth Circuit denied the petition.

Factual and Procedural Background

Hilcorp Alaska, LLC sought to produce crude oil from Foggy Island Bay, which is located along the coast of Alaska in the Beaufort Sea. To extract the oil, Hilcorp would need to construct an offshore drilling and production facility. That facility—referred to as “the Liberty project,” or “the Liberty prospect”—would be the first oil development project fully submerged in federal waters. Hilcorp estimates that the site contains about 120 million barrels of recoverable oil, which it would plan to extract over the course of 15 to 20 years.

The site is located within the outer Continental Shelf of the United States and thus governed by the Outer Continental Shelf Lands Act (Act). Under that Act, BOEM oversees the mineral exploration and development of the Outer Continental Shelf. This may include, among other things, leasing federal

land for oil and gas production. The Act requires BOEM to manage the outer Shelf in “a manner which considers [the] economic, social, and environmental values” of the Shelf’s natural resources. Relying on a Biological Opinion prepared by the Service, BOEM approved the project. Various environmental groups then sued, alleging that the BOEM failed to comply with NEPA, the ESA, and the MMPA. Under the Outer Continental Shelf Lands Act, the Ninth Circuit had original jurisdiction over the challenge.

The Ninth Circuit’s Decision

The NEPA Claims

The Ninth Circuit first addressed petitioners’ claims that BOEM’s EIS was arbitrary and capricious because it: 1) improperly relied on different methodologies in calculating the lifecycle greenhouse gas emissions produced by the “no action” alternative and the other project alternatives, thus making the options incomparable; and 2) failed to include a key variable (foreign oil consumption) in its analysis of the “no action” alternative.

First, with respect to the methodologies used, the Ninth Circuit disagreed and found that BOEM had not applied a different methodology in estimating emissions among the alternatives. While the EIS used a “market simulation model” in connection with its analysis of the “no action” alternative, the “lifecycle” analysis conducted for other alternatives implicitly took this analysis into account. This analysis, the Ninth Circuit concluded, was a relative comparison, sufficient for making a reasoned choice among alternatives.

Second, with respect to the omission of emissions associated with foreign oil consumption, the Ninth Circuit agreed that such omission violated NEPA. This issue, as the court framed it, was essentially one of economics—if oil is produced at the project site, the total supply of oil in the world will increase; increasing global supply will reduce prices; once prices drop, foreign consumers will buy and consume more oil. The model used in the EIS, however, assumed that foreign oil consumption would remain static, whether or not oil is produced at the project site. The EIS, the Ninth Circuit concluded, should have either given a quantitative estimate of the downstream

greenhouse gas emissions that would result from consuming oil abroad, or explained more specifically why it could not have done so, and provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis. Having failed to do so, the court found that the alternatives analysis was arbitrary and capricious.

The Endangered Species Act Claims

The Ninth Circuit next addressed petitioners’ claims that the FWS violated the ESA by: 1) relying on uncertain mitigation measures in reaching its conclusions in the Biological Opinion; and 2) failing to specify the amount and extent of “take” in the incidental take statement included within the Biological Opinion.

First, while the Ninth Circuit acknowledged that the record reflected a “general desire” to impose mitigation, it agreed that any mitigation proposed by the FWS was too vague to enforce. The generality of the measures also made it difficult to determine the point at which the agency may renege on its promise to implement the measures. The Ninth Circuit also found that, while the FWS did not appear to have relied on any of these measures in its “no jeopardy” conclusion, it had relied on such measures in its “no adverse modification” finding (in which it concluded that the polar bear’s critical habitat would not be adversely affected by the project). Accordingly, it found that the FWS’ reliance on these uncertain mitigation measures was arbitrary and capricious, and that the FWS’ Biological Opinion therefore violated the ESA.

Second, the Ninth Circuit agreed that, while the FWS contemplated that the harassment and disturbances polar bears would suffer could trigger re-consultation, the Biological Opinion failed to quantify the project’s amount of nonlethal take to the polar bear (or explain why it could not do so). “Take” under the ESA, the court explained, can occur via injury or death, as the Biological Opinion recognized, but it can also occur via nonlethal harassment. On this basis, the Ninth Circuit found that the FWS’ incidental take statement violated the ESA.

Conclusion and Implications

The case is significant because it contains a substantive discussion of both NEPA and the ESA,

particularly as they relate to the analysis of alternatives under NEPA and reliance on mitigation measures under the ESA. The decision is available

online at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/07/18-73400.pdf>
(James Purvis)

ELEVENTH CIRCUIT FINDS MERE ALLEGATIONS OF A HYDROLOGICAL CONNECTION ARE INSUFFICIENT FOR A CRIMINAL CONVICTION UNDER THE CLEAN WATER ACT

United States v. Coleman, Unpub., Case No. 19-15127 (11th Cir. Dec 21, 2020).

The U.S. Court of Appeals for the Eleventh Circuit, in an *unpublished* decision, recently vacated an accepted guilty plea for knowingly violating the federal Clean Water Act. The court determined that the government failed to provide a sufficient factual basis to demonstrate a discharge significantly affected the chemical, physical, and biological integrity of a navigable water through allegations of a hydrological connection alone.

Factual and Procedural Background

Plaintiff, Coleman, drove a fuel truck that provided fuel to gas stations. When he realized his truck was loaded with 3,000 gallons of the wrong type of diesel fuel, he dumped the fuel on the ground near Highway 319 in Thomas County, Georgia. In 2019, plaintiff was charged by information with one count of violating the federal Clean Water Act by knowingly discharging 3,000 gallons of diesel fuel into a water of the United States.

The Clean Water Act prohibits the discharge of pollutants into “navigable waters” and defines this term as “the waters of the United States, including the territorial seas.” Under *Rapanos v. United States*, 547 U.S. 715 (2006), a plurality of the U.S. Supreme Court determined that a water is navigable if the waters are navigable in fact or there is a significant nexus between the water or wetland and a navigable water. There is a significant nexus when there is a significant impact to the chemical, physical, and biological integrity of a navigable water. A “mere hydrologic connection” alone is insufficient.

Plaintiff waived indictment and pled guilty without a plea agreement. The plea colloquy alleged:

The diesel fuel dumped on the ground migrated

into adjacent storm water drainage that flows directly into a creek. That unnamed creek is a tributary of Good Water Creek which flows into Oquina Creek and then into the Ochlocknee River, a traditionally navigable water of the United States.

Plaintiff was sentenced to an 18-month imprisonment, followed by a year of supervised release and was required to pay a fine of \$5,000. Plaintiff appealed.

The Eleventh Circuit’s Decision

Plaintiff appealed on three grounds—all related to how navigable waters are defined. Plaintiff first claimed the U.S. District Court erred by failing to establish a sufficient factual basis for the navigable waters element during the plea colloquy as specified in Federal Rules of Criminal Procedure Rule 11(b) (3). Rule 11 requires a factual basis before entering a judgment of guilty, so as to be sure that a factually innocent defendant does not mistakenly plead guilty. To satisfy Rule 11, the government must present the trial court with evidence from which it could reasonably find that a defendant was guilty. The key issue in Coleman’s appeal was whether the government provided a sufficient factual basis to determine that Plaintiff was guilty of knowingly discharging a pollutant into a navigable water.

Applying the *Rapanos* Decision

The court reasoned that the plea colloquy only established that the diesel fuel migrated into an adjacent storm water drainage that flows directly into a creek and that the unnamed creek is a tributary of other creeks that eventually flow into a traditionally

navigable water of the United States. Because the Eleventh Circuit follows the *Rapanos* “significant nexus” test, the government was required to demonstrate that the fuel entered water that “significant affect” the “chemical, physical, and biological integrity” of a navigable water. Allegations of a hydrologic connection alone were inadequate to establish this showing on a “four-steps-removed” navigable water in light of the standard imposed by Rule 11.

The court vacated its prior ruling based on plaintiff’s first argument and declined to discuss the two remaining arguments.

Conclusion and Implications

This *unpublished* case cannot provide any precedential authority in other criminal cases; however, its reasoning suggests that a criminal conviction for knowingly discharging to a water of the United States under the Clean Water Act may not be legally supportable under Federal Rules of Civil Procedure Rule 11 without facts showing there is a significant chemical, physical, and biological impact on a navigable water. Allegations of a “mere hydrologic connection” may not provide such a sufficient factual basis. The court’s decision is available online at:

<https://media.ca11.uscourts.gov/opinions/unpub/files/201915127.op2.pdf>

(Anya Kwan, Rebecca Andrews)

MONSANTO PCB CLEAN WATER ACT CLASS ACTION SETTLEMENT REJECTED BY THE DISTRICT COURT

City of Long Beach v. Monsanto Company, et al.,
___F.Supp.3d___, Case No. CV 16-3493 FMO (C.D. Cal. Nov. 25, 2020).

The U.S. District Court for the Central District of California recently denied plaintiffs’ Renewed Motion for Certification of Settlement Class, Preliminary Approval of Class Action Settlement, Approval of Notice Plan, Appointment of Class Action Settlement Administrator, and Appointment of Class Counsel in a Clean Water Act class action lawsuit against Monsanto. The court enabled plaintiffs to file a renewed motion by December 31, 2020.

Background

Monsanto Company manufactured polychlorinated biphenyls (PCBs) between the 1930s and 1977. The City of Long Beach and twelve other governmental entities (plaintiffs) filed a class action citizen suit against Monsanto under the Clean Water Act seeking funds for PCB remediation and monitoring programs. Plaintiffs allege PCBs contaminated their stormwater systems and environmental resources.

Plaintiffs recently filed a motion to certify the class and approve a settlement agreement for this class action lawsuit. The court must approve these proposals to ensure all class members are adequately protected before the case can settle.

The District Court’s Decision

The court considered and rejected the proposed settlement agreement for five reasons. First, the court assessed the settlement agreement’s release of claims. The release provided, in part, language that sought or suggested the claims of persons or entities who were not parties to the case would be barred. The release also referenced claims under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court reasoned that Monsanto is only entitled to the release of claims plaintiffs asserted, or could have asserted, in the current case. Monsanto cannot have class members indemnify it for other claims asserted in future cases by non-class members. Similarly, the court determined it was improper to release Monsanto from CERCLA claims because there were no such claims in the operative complaint. Finally, the court was especially concerned about the release’s breadth in relation to the “very modest payout” most class members would receive under the settlement.

Second, the court considered a provision that would reduce class members’ payments if a state attorney general filed a future action against Monsanto.

Plaintiffs argued this clause was intended to prevent double payment by Monsanto. The court saw no reason why class members' payments should be reduced because of government law enforcement conduct, because the class members and the government had different interests that should not affect each other's potential recovery.

Third, the court considered a cancellation provision. The provision provided that the settlement fund (which funds payments to class members) would be reduced if any class members opted out of the settlement. The court reasoned such a provision could unfairly affect settlement fund allocation, which would be determined by a Special Master in the future, after applications were made for such allocations.

Fourth, the court considered the attorneys' fees provision, which required Monsanto to pay \$98 million for attorneys' fees. The court considered the fee amount to be excessive for this stage in the proceedings, especially because plaintiffs had included fees and costs of a Special Master and consulting experts to assist the Special Master, which Plaintiff should not have included.

Fifth, the court considered the settlement agreement's lack of specificity regarding how the agreement would be monitored and implemented over time. Estimating that this settlement would take several years and would be complex to administer, the court

required that the parties appoint a Special Master to report to the court and implement the settlement.

Based on these critiques of the settlement agreement, the court denied plaintiffs' motions for Certification of Settlement Class, Preliminary Approval of Class Action Settlement, Approval of Notice Plan, Appointment of Class Action Settlement Administrator, and Appointment of Class Counsel, without prejudice. Plaintiffs' had until December 31, 2020 to file renewed motions that took the court's criticisms into account.

Conclusion and Implications

This decision rejects the proposed settlement agreement between plaintiffs and Monsanto in the longstanding dispute over PCB contamination. It also provides guidance on what terms are acceptable and unacceptable in a class action settlement agreement under the Clean Water Act. Importantly, a settlement agreement should operate to settle disputes between the parties and should not act as a broad shield that extends to protect a defendant from actions by non-parties. The court's rulings are available online at: <https://www.courtlistener.com/recap/gov.uscourts.cacd.648298/gov.uscourts.cacd.648298.254.0.pdf> (William Shepherd, Rebecca Andrews)

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