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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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LAW AND REGULATION REPORTER

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CLIMATE CHANGE NEWS

NEW RESEARCH STUDY ATTEMPTS TO QUANTIFY THE COST OF CLIMATE CHANGE AND FLOOD RISK IN THE UNITED STATES—FOR THE INDIVIDUAL HOMEOWNER

A new study, undertaken by First Street Foundation has been released in which the foundation attempts to quantify just how financially detrimental the ongoing risk of flooding—due to climate change—is within the United States.

Background

First Street Foundation (First Street) is a not-for-profit research and technology group which focuses on "America's Flood Risk." First Street finds that the financial toll of flood damage from climate change is and would continue to be enormous, and further finds that while:

> institutional real estate investors and insurers have been able to privately purchase flood risk information, the same cannot be said for the majority of Americans.

First Street goes on to detail the problem as follows:

> Flooding is the most expensive natural disaster in the United States, costing over $1 trillion in in inflation adjusted dollars since 1980. . . .the majority of Americans have relied on Federal Emergency Management Agency (FEMA) maps to understand their [flood] risk. However, FEMA maps were not created to define risk for individual properties. This leaves millions of households and property owners unaware of their true risk.

In addressing the issue, First Street's mission statement is to fill the need for:

> . . .accurate, property-level publicly available flood risk information. . . via a team of leading modelers, researchers and data scientists to develop the first comprehensive, publicly available flood risk model. . .[which is]. . .peer reviewed. . . .(https://firststreet.org/mission/)

Study: 'Defining America's Flood Risk'

In the new research study, issued by First Street on February 22, 2021, it analyzes the "underestimated flood risk to properties throughout the United States." First Street emphasizes that while the insurance industry, for example, has access to risk assessment, the private real property owner generally does not. That theme is key to First Street: providing the tools for informed decision-making at the individual property owner level. It also suggests that at the city or county level, land use planning to assess risk from flood can benefit from its Study.

Methodology

First Street applies its "Flood Model" and marries that information to an "analysis of the depth-damage functions from the U.S. Army Corps of Engineers" in order to estimate "Average Annual Loss" for residential properties throughout the United States and "into the climate-adjusted future." The Flood Model of 2020 Methodology is available online at: https://firststreet.org/flood-lab/published-research/flood-model-methodology_overview/

The analysis referred to above, is to a scientific abstract done in the fall of 2020, entitled "Assessing Property Level Economic Impacts of Climate in the US, New Insights and Evident from a Comprehensive Flood Risk Assessment Tool" and is available online at: https://www.mdpi.com/2225-1154/8/10/116

Expanded Mapping of Economic Risk Associated with Flood Risk

First Street has found that a "great deal of flood risks exists outside of Federal Emergency Management Agency's designated Special Flood Hazard Areas (SFHAs)." This current First Street Study provides a:

> . . .vastly expanded mapping of economic risk

associated with flood risk, and demonstrates the extent to which information asymmetries on flood risk contribute to financial market asymmetries, specifically in the form of under-estimations of financial and personal risk to property owners. (https://firststreet.org/flood-lab/published-research/highlights-from-the-cost-of-climate-americas-growing-flood-risk/)

What the Study Revealed

The Study found that for the long-term impact of climate change, there were nearly 4.3 million homes (defined as 1-4 units) across the U.S. with *substantial* flood risk that would result in financial loss. The Study also found that if these homes were to insure against flood risk, the estimated risk through FEMA's National Flood Insurance Program (NFIP), the rates would need to increase 4.5 times to cover the estimated risk in 2021, and 7.2 times to cover the growing risk by 2051.

First Street found that the average estimated loss for the 5.7 million properties that have *any* flood risk and an expected loss from that flooding represents $3,548 per home. Using climate modelling projection for 30 years hence, yields a 67 percent increase in the average estimated loss per household. (*Ibid*)

Conclusion and Implications

The First Street Study contains a lot of fascinating and useful information including interactive models. In the end, the Study hopes to provide accurate and comprehensive estimated, to the general public, of annual flood damage in order to improve risk management and "cost-effective hazard mitigation planning." Emphasis is on the Study's availability to individual property owners, renters and communities—think city planners—to make informed decisions about risk reduction. For more information, with a wealth of information and inner statistical and methodology links, *see:* https://firststreet.org/flood-lab/published-research/highlights-from-the-cost-of-climate-americas-growing-flood-risk/
(Robert Schuster)

LEGISLATIVE DEVELOPMENTS

UPDATE OF CLIMATE CHANGE RELATED BILLS IN THE CALIFORNIA LEGISLATURE

What follows is a summary of bills in the California Legislature, that are related to climate change. Due to the mercurial of bills and the legislative process, since reporting on these bills they may have experience significant change in text or status. Therefore, it is suggested that the reader stay apprised of these changes via the California Legislature's website at: https://leginfo.legislature.ca.gov/faces/publicationsTemplate.xhtml

Coastal Resources

•**SB 1 (Atkins)**—This bill would include, as part of the procedures the Coastal Commission is required to adopt, recommendations and guidelines for the identification, assessment, minimization, and mitigation of sea level rise within each local coastal program, and further require the Coastal Commission to take into account the effects of sea level rise in coastal resource planning and management policies and activities.

SB 1 was introduced in the Senate on December 7, 2020, and, most recently, on February 17, 2021, was set for hearing in the Committee on Governmental Organization on March 16, 2021.

•**SB 627 (Bates)**—This bill would, except as provided, require the Coastal Commission or a local government with an approved local coastal program to approve the repair, maintenance, or construction of retaining walls, return walls, seawalls, revetments, or similar shoreline protective devices for beaches or adjacent existing residential properties in the coastal zone that are designed to mitigate or protect against coastal erosion.

SB 627 was introduced in the Senate on February 18, 2021, and, most recently, on February 22, 2021, was suspended pursuant to Joint Rule 55.

Environmental Protection and Quality

•**AB 1260 (Chen)**—This bill would exempt from the requirements of the California Environmental Quality Act (CEQA) projects by a public transit agency to construct or maintain infrastructure to charge or refuel zero-emission trains.

AB 1260 was introduced in the Assembly on February 18, 2021, and, most recently, on February 22, 2021, was read for the first time.

•**SB 7 (Atkins)**—This bill would reenact with certain changes (including changes to greenhouse gas reduction and labor requirements) the Jobs and Economic Improvement Through Environmental Leadership Act of 2011, which provides for streamlined judicial review of "environmental leadership development projects," including streamlining environmental review under CEQA by requiring lead agencies to prepare a master Environmental Impact Report (EIR) for a General Plan, plan amendment, plan element, or Specific Plan for housing projects where the state has provided funding for the preparation of the master EIR.

SB 7 was introduced in the Senate on December 7, 2020, and, most recently, on February 18, 2021, was read for a second time with the author's amendments and then re-referred to the Committee on Environmental Quality.

Public Agencies

•**AB 1295 (Muratsuchi)**—This bill, beginning on or after January 1, 2022, would prohibit the legislative body of a city or county from entering into a residential development agreement for property located in a "very high fire risk area," which is defined to mean a very high fire hazard severity zone designated by a local agency or a fire hazard severity zone classified by the State Director of Forestry and Fire Protection.

AB 1295 was introduced in the Assembly on February 19, 2021, and, most recently, on February 22, 2021, was read for the first time.

Zoning and General Plans

•**SB 12 (McGuire)**—This bill would require the safety element of a General Plan, upon the next revision of the housing element or the hazard mitigation

plan, on or after July 1, 2024, whichever occurs first, to be reviewed and updated as necessary to include a comprehensive retrofit strategy to reduce the risk of property loss and damage during wildfires.

SB 12 was introduced in the Senate on December 7, 2020, and, most recently, on January 28, 2020, had its referral to the Committee on Natural Resources and Water rescinded because of the limitations placed on committee hearings due to ongoing health and safety risks of the COVID-19 virus.

•**SB 499 (Leyva)—**This bill would prohibit the land use element of a General Plan from designating land uses that have the potential to significantly degrade local air, water, or soil quality or to adversely impact health outcomes in disadvantaged communities to be located, or to materially expand, within or adjacent to a disadvantaged community or a racially and ethnically concentrated area of poverty.

SB 499 was introduced in the Senate on February 17, 2021, and, most recently, on February 22, 2021, was suspended pursuant to Joint Rule 55.
(Paige Gosney)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Effects of Marine Heatwaves on Recovery of Kelp Forests Along Northern California Coast

The health of marine ecosystems depends on nutrient availability, temperature, acidity, and a range of other factors. An imbalance in the ecosystem can be created by long term gradual changes or discrete destructive events. While some events and trends are naturally occurring phenomenon, such as El Niño or marine heatwaves (MHW), researchers are observing an increase in the frequency and intensity of these events, most likely due to climate change. MHW events have significant consequences on nutrient availability and seem to have a particularly destructive impact on coastal ecosystems.

A recent study published in *Nature Communications Biology* by McPherson et. al. analyzed multi-decade trends in bull kelp canopy coverage off the northern California coast to better understand the effects of MHW and other climate phenomena on the ecosystem. Canopy coverage was determined using 34 years of satellite imagery from the United States Geological Survey, specifically focusing on a 350 kilometer stretch of coastline between Sonoma and Mendocino counties. McPherson et al observed that the canopy coverage pattern up until 2014 was dynamic, but stable. Beginning in 2014, canopy coverage declined dramatically and has continued to remain low. McPherson et al tied this trend to two key events: the sea star wasting syndrome (SSWS) epidemic of 2013 and a multi-year MHW event between 2014 and 2016 which occurred simultaneously with a strong El Niño event. The SSWS epidemic was a biological event that disrupted the food chain in the Northern California marine ecosystem. The bull kelp populations collapsed due to increasing sea urchin populations, which were previously controlled by the sea stars. The already vulnerable bull kelp population was then further decimated by a multi-year MHW in which mean sea surface temperatures were two standard deviations warmer than normal. These warmer temperatures are tied to low nitrate concentrations and decreased nutrient availability.

Although the sea star epidemic was the original destabilizing event for this ecosystem, the effects of climate change can be seen in the continued elevated temperatures and decreased nutrient concentrations, factors which also limit bull kelp recovery. McPherson et al conclude that the bull kelp population will not restabilize so long as the urchin population remains uncontrolled. With the sea star population still locally extinct, a naturally occurring event or human intervention will be needed to control the urchin population. McPherson et al recommend increased real time measurements of local marine ecosystems to establish more reliable baselines. These datasets will help provide context for naturally occurring phenomena as well as climate change-driven events, such as multi-year MHWs, especially as climate-related events are expected to increase and intensify in coming years.

See: McPherson, M.L., Finger, D.J.I., Houskeeper, H.F. *et al.* Large-scale shift in the structure of a kelp forest ecosystem co-occurs with an epizootic and marine heatwave. *Commun Biol* **4,** 298 (2021). https://doi.org/10.1038/s42003-021-01827-6

Systematic Review of The Outcomes and Trade-Offs of Ten Types of Decarbonization Policy Instruments

Ambitious decarbonization policies are crucial to reaching greenhouse gas (GHG) emissions reduction targets necessary to reduce the global risk of climate change. Unfortunately, fears over potential negative social and economic trade-offs can impede the implementation of necessary policy changes. Understanding and publicizing how different decarbonization policies can minimize trade-offs and yield co-benefits is crucial to ensuring a quick, safe, and effective transition to a sustainable economy. Unfortunately, a lack of a more systematic analysis prevents us from understanding how these policy instruments compare.

Researchers Peñasco, Díaz Anadón, and Verdolini sought to fill this gap by creating a systematic review (SR) of ten decarbonization policy instruments in a

study prepared for *Nature Climate Change*. The policy instruments compared include:

- building codes and standards that maximize energy savings;
- renewable portfolio standards that establish quotas for renewable energy;
- government procurement of sustainable work, goods, or services;
- public research and development (R&D) funding for low-carbon technologies;
- feed-in tariffs or premiums (FITs/FIPs) that guarantee purchase of renewable electricity above market price;
- energy auctions that create a competitive bid for renewable energy electricity generation;
- energy taxes and exemptions from such taxes;
- GHG emissions allowance trading schemes, more commonly referred to as cap-and-trade systems for greenhouse gas emissions;
- tradeable green certificates (TGCs) that prove energy was generated renewably, and
- white certificates that prove a certain quantity of energy was saved.

The decarbonization policy instruments were analyzed across seven outcome categories: 1) environmental effectiveness, 2) technological effectiveness, 3) cost effectiveness, 4) innovation outcomes (ability to generate incentive for innovation), 5) competitiveness, 6) distributional outcomes (fairness), and 7) other social outcomes (ability to be accepted and implemented). They also developed an "agreement indicator" to determine the level of agreement across evaluations.

The researchers found that there was high agreement on the positive impact on environmental and technological outcomes across all policy instruments. While encouraging, this is to be expected for instruments designed for their environmental benefit. Perhaps more importantly, the researchers found that many of the policy instruments yielded some negative impacts on competitiveness and distribution. There was less agreement on these outcomes, and understanding why can yield recommendations for minimizing the tradeoffs associated with decarbonization policies.

For competitiveness outcomes, the researchers found that energy taxes and cap-and-trade systems had negative impacts, usually as a result of subsequent rising energy prices. The researchers recommend pairing such instruments with tax exemptions and revenue recycling mechanisms to ease the competitiveness burdens. Additionally, there was high agreement on the positive impacts R&D had on competitiveness for large firms; as a result, the researchers recommend focusing these efforts on small to medium enterprises (SMEs) to facilitate innovation and decrease competitiveness trade-offs, a benefit that can be extended to government procurement as well. As for distributional trade-offs, the researchers found that instruments focused on deploying renewables had short- and medium-term negative impacts. Creating predictable, adjustable, and technology-specific FITs support positive cost-related and distributional outcomes for smaller scale developments. When paired with energy auctions that benefit larger firms, these can create positive impacts on distribution trade-offs across different sectors of the market.

The researchers' conclusions, based on a systematic review of diverse evaluations of different policy instruments, are crucial to informing and developing strong decarbonization policies that positively impact not only the fight against climate change but also a more sustainable economy and equitable future.

See: Peñasco, C., Anadón, L.D. & Verdolini, E. Systematic review of the outcomes and trade-offs of ten types of decarbonization policy instruments. Nat. Clim. Chang. 11, 257–265 (2021). https://doi.org/10.1038/s41558-020-00971-x

The Role of Food Systems on Global Greenhouse Gas Emissions

The food supply chain has changed considerably over the last several decades as populations have grown and demands have shifted. This has led to a changing impact of food systems on planetary warming. To understand the full impact of food systems, each step of the food supply chain needs to be consid-

ered. However, because emissions from food systems are scattered across sectors such as agriculture, energy, and transportation, the impact of food systems is not fully apparent in typical sectoral analyses of GHG emissions. Thus, a full picture of global and country food system emissions has not been understood.

A recent study published in Nature Food introduces a database of global food system GHG emissions that addresses this problem. The database, titled EDGAR-FOOD, includes emissions from all aspects of the food system, including production, processing, transportation, packaging, and consumption; and includes data from years 1990-2015. The results of the information compiled in the database show that in 2015, food systems emissions accounted for approximately 34 percent of global GHG emissions, or 18 Gt CO_2e. The majority of the emissions (71 percent) were due to the land-based sector, which includes agricultural and associated land use and land use changing (LULUC) activities. Supply chain processes such as transport, fuel production, waste management, and packaging were responsible for the remaining 29 percent of emissions.

By looking at the trends from 1990 to 2015, the study shows that global food systems emissions have grown at a lower rate than global population growth. Food system emissions were shown to be lower in regions the study considered as industrialized compared to regions considered developing (4.9 Gt CO_2e for industrialized regions and 13 GT CO_2e for developing regions). However, as the authors highlight, much of the food produced in developing countries is consumed in industrialized countries. Developing regions showed a higher emissions contribution from LULUC activities than industrialized regions, while industrialized regions show a large contribution from energy emissions. The top six emitting economies contributed 51 percent of the estimated global food system emissions for 2015. The economies were China, Indonesia, United States, Brazil, European Union, and India.

By understanding the emissions associated with each step of the food system, the study shines a light on the contributions food systems, and particularly LULUC, have on global GHG emissions. The study also provides insight into how energy and transportation demand is impacted by food sector activities. The study indicates that strategies to reduce fossil fuel reliance in high-emitting sectors such as transportation and energy will help decarbonize the food system, but food sector-specific strategies will be required to address LULUC, which is a key driver of global food-system emissions.

See: Crippa, M., Solazzo, E., Guizzardi, D. *et al*. Food systems are responsible for a third of global anthropogenic GHG emissions. *Nat Food* (2021). https://doi.org/10.1038/s43016-021-00225-9

Climate Change Policy Toward Gender Equality

In honor of Women's History Month, *Nature Climate Change* featured a review paper exploring the complex and interconnected relationship between climate change and gender equality. While these issues may sound unrelated, climate change—its effects, responsive adaptation strategies, and mitigation policies—can illuminate massive gender inequities. Were all people truly equal in their living condition, potential opportunities, and societal treatment, gender would not be a dimension of disparity amongst people's climate vulnerability and resilience potential. In reality, societal norms and power dynamics have disadvantaged women to the point where the United Nations Framework Convention on Climate Change has made gender equality a principal commitment of any climate change adaptation or mitigation scheme.

The review paper—which was a joint effort between scientists in Australia and Malaysia—surveyed a climate change literature since 2014 to understand how assumptions about gender were used in crafting adaptation and mitigation strategies. From this effort, the authors identify a number of dangerous assumptions that hinder real progress in achieving just climate policies, including: women are intrinsically nurturing and connected to the environment; women as a population are homogenous and uniformly vulnerable; gender equality only benefits women; and quantitative gender metrics are often misleading or misconstruing. These assumptions result in women carrying the bulk of the environmental burden without appropriate societal empowerment or value. Additionally, this can lead well-intentioned programs to face backlash from men without universally benefitting women. Based on this analysis, the authors provide four concrete suggestions toward better gender equality in climate change policy. First, programs should be intentional when setting gender-based goals, and whether the program intends to

empower women, or simply reach women. Second, more research must be done to quantify and communicate gender equality in climate change. Third, research should develop strong and standardized metrics to measure whether a given policy achieves gender equality. Finally, the community must work to dismantle other systemic barriers in gender equality (*e.g.*, education, cultural norms).

Gender inequality is a systemic problem that manifests itself in climate change. However, it is worth noting that gender inequality does not exist in a vacuum, nor in a binary "men-versus-women" paradigm. In fact, intersectionality—the interconnection between various components of a person's identity (*e.g.*, race, socioeconomic status, class)—can provide additional context into a person's climate vulnerabilities and barriers toward resilience. Additionally, as the scientific community strives for more research into gender inequality, it is critical to acknowledge that multiple genders exist, and that dismantling inequalities faced by any person based on their gender, even if that gender is not female, remains a fundamental milestone towards achieving gender equality.

See: Lau, J. D., et al. Gender equality in climate policy and practice hindered by assumptions. Nature Climate Change, 2021; DOI:10.1038/s41558-021-00999-7

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

REGULATORY DEVELOPMENTS

COUNCIL ON ENVIRONMENTAL QUALITY RESCINDS TRUMP ADMINISTRATION DRAFT GUIDANCE THAT LIMITED THE CONSIDERATION OF GREENHOUSE GAS EMISSIONS DURING ENVIRONMENTAL REVIEWS UNDER NEPA

On February 19, 2021, the Council on Environmental Quality (CEQ) rescinded the Trump administration-issued draft guidance, which would have narrowed how federal agencies consider greenhouse gas (GHG) emissions and climate change impacts from development and infrastructure projects under the National Environmental Policy Act (NEPA). *See,* National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10,252 (Feb. 19, 2021). Although the CEQ may develop and issue additional guidance on how agencies should consider GHG emissions and climate change impacts under NEPA, the CEQ's current action returns the use of Obama administration guidance that promotes a broader evaluation of GHG emissions and climate change impacts during the environmental reviews.

Background

The National Environmental Policy Act requires federal agencies to consider the effects and impacts from proposed actions or projects on the environment. 42 U.S.C. § 4321 *et seq.* In general, federal agencies satisfy this requirement by preparing environmental review documents such as Environmental Assessments or Environmental Impact Statements, which evaluate potential environmental effects from the proposed project.

NEPA also created the CEQ, which is the main federal agency overseeing NEPA implementation. The CEQ regulations set forth how federal agencies should comply with NEPA. Moreover, the CEQ has the authority to issue guidance regarding how agencies should satisfy NEPA's requirements. *See,* 40 C.F.R. § 1506.7.

As explained in the CEQ's recent notice, development and infrastructure projects that are reviewed and approved by federal agencies often have the potential to emit or sequester GHG emissions, and may otherwise impact climate change. In addition, federal courts have previously held that NEPA requires federal agencies to disclose and consider climate change impacts during the agency's project reviews under NEPA. *See, e.g.*, *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008).

Greenhouse Gas Guidance

Consistent with the above framework, the CEQ previously issued "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews" (2016 GHG Guidance), which attempted to provide a set of overarching recommendations for determining how to consider GHG emissions and climate change effects in NEPA reviews. *See,* 81 Fed. Reg. 51,866 (Aug. 5, 2016). Among other proposals, the CEQ's 2016 GHG Guidance recommended that agencies: 1) use projected GHG emissions as a proxy for assessing potential climate change effects when preparing a NEPA analysis for a proposed agency action; 2) quantify projected direct and indirect GHG emissions, taking into account available data and GHG quantification tools that are suitable for the proposed agency action; and 3) where agencies do not quantify the GHG emissions for a proposed agency action because tools, methodologies, or data inputs are not reasonably available, include a qualitative analysis in the NEPA document and explain the basis for determining that quantification is not reasonably available. *Id.*

However, on March 28, 2017, former President Trump issued Executive Order 13783, "Promoting Energy Independence and Economic Growth," which ordered the CEQ to rescind the 2016 GHG Guidance. On June 26, 2019, the CEQ then proposed "Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions" (2019 Draft GHG Guidance). 84 Fed. Reg. 30,097.

The CEQ never finalized the 2019 Draft GHG Guidance, but proposed to significantly narrow the scope of considering GHG emissions during the NEPA environmental review process. For example, the 2019 Draft GHG Guidance stated that federal agencies should assess effects from GHG emissions "when a sufficiently close causal relationship exists between the proposed action and the effect." In other words, a "but for" causal relationship should not be sufficient. Further, the 2019 Draft GHG Guidance directed agencies to quantify a proposed action's projected "direct and reasonably foreseeable indirect GHG emissions" only when the amount of those emissions is substantial to warrant quantification, and when it was practicable to quantify the GHG emissions using available data and GHG quantification tools. *See id*.

The CEQ's Action and Implications

On his first day in office, President Biden issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which ordered the CEQ to rescind the 2019 Draft GHG Guidance. On February 19, 2021, the CEQ's notice rescinding the 2019 Draft GHG Guidance was published in the Federal Register and returned an agency's ability to use of the 2016 GHG Guidance.

Conclusion and Implications

As a result of the February 19, 2021 rescinding of the 2019 Draft Guidance, the CEQ reestablished the broader trend of accounting for greenhouse gas emissions during environmental reviews under NEPA. Indeed, while the CEQ clarified that it may issue updates to the 2016 GHG Guidance, the CEQ explicitly recommended that in the interim, federal agencies should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including through the use of the 2016 GHG Guidance. Accordingly, going forward project proponents should expect heightened consideration of GHG emissions and climate change impacts during NEPA reviews.
(Patrick Veasy, Hina Gupta)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Air Quality

•February 18, 2021 - The U.S. Environmental Protection Agency announced two settlements with vehicle repair shops in Delaware that were involved in the illegal sale and installation of aftermarket devices that were designed to defeat the emissions control systems of heavy-duty diesel engines. The companies—Delaware Speed and Custom LLC in Milton, and Bo Daddy's Diesel and Auto Repair in Seaford—allegedly violated the federal Clean Air Act's prohibition on the manufacture, sale or installation of so-called "defeat devices," which are designed to "bypass, defeat or render inoperative" a motor vehicle engine's air pollution control equipment or systems. Delaware Speed and Custom LLC paid a $12,529 penalty for allegedly selling defeat devices, and Bo Daddy's paid a $6,000 penalty for allegedly selling and installing defeat devices. As part of the settlements, the companies have certified that they are now are in compliance with applicable requirements. These enforcement actions are part of EPA's National Compliance Initiative for Stopping Aftermarket Defeat Devices for Vehicles and Engines.

•February 24, 2021 - On Monday, January 25, 2021, the U.S. District Court for the Northern District of Alabama, in Birmingham, entered a consent decree (CD) that resolves allegations by the U.S. Environmental Protection Agency (EPA) and the Jefferson County Board of Health (JCBH) that Drummond Company (Drummond) violated certain provisions of the federal Clean Air Act and implementing regulations at its coke chemical byproducts recovery plant located at the ABC Coke facility in Tarrant. The ABC Coke facility consists of two related industrial plants-a coke oven battery plant and a coke byproduct recovery plant which is the subject of the CD Entry of the CD resolves a separate complaint filed by the Greater Birmingham Alliance to Stop Pollution (GASP), an environmental advocacy group, challenging the lodged CD. Based on inspections of the ABC Coke byproducts recovery plant conducted in 2011 and 2014, EPA and JCBH alleged that Drummond violated federal regulations known as National Emission Standards for Hazardous Air Pollutants. The proposed CD lodged in February 2019 required Drummond to address the alleged violations by enclosing open waste streams, sealing leaking equipment to prevent emissions of benzene into the air, and developing and implementing a revised Leak Detection and Repair (LDAR) program to ensure the company conducts appropriate monitoring and leak detection and repair activities. The CD also required Drummond to pay a civil penalty of $775,000 and to conduct a Supplemental Environmental Project that requires Drummond to use an infrared thermal imaging camera to detect leaks during periodic inspections. Subsequent to the 2011 and 2014 inspections, and prior to the lodging of the CD, Drummond began implementing corrective actions to seal and enclose the open waste streams and leaking equipment. Drummond also developed a revised LDAR program meeting the requirements of the consent decree which it began to implement in 2017. After lengthy discovery and negotiations following lodging to address GASP's separate complaint, the parties reached a settlement that expands the existing CD's LDAR requirements so that those requirements will continue beyond the termination of the CD. On January 15, 2021, the parties filed their settlement documents with the court, and on January 25, 2021, the court dismissed GASP's complaint and entered the CD. As of the date of entry, Drummond had completed most of the work required by the CD to enclose and seal waste streams and equipment. In addition, JCBH and GASP entered into a separate settlement agreement

that includes, among other things, an agreement by JCBH to direct its share of the civil penalty to a local foundation which provides funding for community-based projects.

•March 2, 2021—EPA announced a settlement requiring Steel Dynamics, Inc. (SDI) to upgrade air pollution control equipment to reduce air emissions at the company's facilities in Butler, Indiana. The upgrade, which will cost $3 million, will help protect the environment and public health in the surrounding area by reducing particulate matter (PM) emissions. The company has also agreed to pay a $475,000 civil penalty, split evenly between the state of Indiana and United States government. These actions will resolve the alleged violations of the Clean Air Act. EPA alleged that SDI was violating the Clean Air Act by failing to comply with its Title V permit. SDI owns and operates two steel facilities in Butler: Iron Dynamics Division and Flat Roll Division. During an inspection and record review, EPA identified multiple violations at each plant. These violations included a failure to capture all emissions from three ladle metallurgical stations and route them to a baghouse, as required by the company's Title V operating permit. EPA's consent decree with SDI resolves the alleged violations. Specifically, the consent decree requires SDI to upgrade the capture and control of emission from the ladle metallurgical stations by constructing and operating a new or expanded baghouse. This new or expanded baghouse will reduce PM emissions and protect public health.

•March 9, 2021—EPA announced that Premier Performance of Rexburg, Idaho, one of the nation's largest sellers of aftermarket automotive parts, has agreed to pay a $3 million penalty under the Clean Air Act for illegally selling emissions-control defeat devices to businesses and individuals throughout the U.S. EPA alleges that from approximately January 2017 to February 2019, the company and three of its related companies—JB Automotive in Iowa, RallySportDirect in Utah, and Stage 3 Motorsports in Arizona—manufactured or sold at least 64,299 parts or components that bypass, defeat, or render inoperative the manufacturers' technology and design necessary to reduce vehicle emissions to meet state and federal Clean Air Act standards. Tampered diesel pickup trucks emit large amounts of NOx and particulate matter, both of which contribute to serious public health problems in the United States. To meet emission standards intended to protect public health, manufacturers employ certain hardware devices, such as exhaust gas recirculation, diesel particulate filters, and selective catalytic reduction, as emission control systems to manage and treat exhaust to reduce levels of particulate matter, non-methane hydrocarbons, NOx, and carbon monoxide released into the air. These hardware systems are operated and monitored by software systems. In an agreement reached in February, the companies have agreed to stop manufacturing and selling all products that violate the CAA and have advised EPA that they have implemented work practice standards and procedural safeguards to prevent the sale of defeat devices. The parts were designed and marketed for use on makes and models of diesel pickup trucks and engines manufactured by Cummins Inc., FCA US LLC, General Motors Company, and Ford Motor Company.

•March 18, 2021—EPA has reached a settlement with a Boonville, Missouri, company for allegedly tampering with vehicle emission controls in violation of the federal Clean Air Act. According to EPA, SC Diesel LLC installed so-called "defeat devices" in at least 145 vehicles and separately sold defeat devices on at least 193 occasions. Under the terms of the settlement, SC Diesel must pay a penalty of $10,000. The company must also certify under penalty of law that it will refrain from disabling emissions controls in the future. Tampering of car engines, including installation of aftermarket defeat devices intended to bypass manufacturer emissions controls, results in significantly higher releases of nitrogen oxides and particulate matter, both of which contribute to serious public health problems in the U.S. These problems include premature mortality, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, chronic bronchitis, and decreased lung function. Numerous studies also link diesel exhaust to increased incidence of lung cancer.

Civil Enforcement Actions and Settlements—Water Quality

•February 24, 2021 - EPA has announced settlements with Basin Marine, Inc. and Balboa Boatyard of California, Inc., to resolve federal Clean Water

Act violations for discharging contaminants into Newport Bay. Under the settlements, Basin Marine and Balboa Boatyard will pay a combined $202,132 in penalties and will maintain preventative measures to reduce the discharge of pollutants through stormwater runoff into Newport Bay, an impaired water body for numerous pollutants. The violations pertained to discharges of paint solvents, fuel, oil, hydraulic fluid, and heavy metals, including lead, zinc, and copper. Stormwater discharges containing heavy metals have been found to harm aquatic life and sensitive marine ecosystems. EPA found Clean Water Act violations at Basin Marine during inspections in 2018 and 2019, and at Balboa Boatyard in 2019. The violations at both facilities related to regulations preventing the discharge of pollutants through stormwater as well as the failure to comply with California's industrial stormwater permit. At Basin Marine, EPA inspectors found the facility had failed to conduct required stormwater sampling, had not properly cleaned and disposed of identified debris near catch basins, and had exceeded limits for both copper and zinc levels in stormwater. The Balboa Boatyard facility had failed to conduct required stormwater sampling and had not identified sufficient storage capacity to contain the runoff generated during routine, seasonal rain events. Additionally, Balboa Boatyard lacked appropriate management practices to reduce pollutants associated with boat maintenance from being discharged into stormwater. Newport Bay was first identified by California in 1996 as an impaired water body due to an elevated presence of several toxic pollutants, including metals and pesticides. EPA has worked alongside the Santa Ana Regional Water Quality Control Board to reduce these pollutants through the development of Total Maximum Daily Loads in the bay and upstream watershed. Minimizing pollutants in stormwater discharges from boatyards is critical to meeting these long-term water quality objectives. EPA's settlements with Basin Marine for $142,224 and Balboa Boatyard for $59,908 resolve the CWA violations found at the facilities.

•March 1, 2021—EPA has settled with South Bend Products, LLC, over federal Clean Water Act violations at the company's South Bend, Washington, seafood processing facility. South Bend Products, LLC, a seafood preparation and processing facility, specializes in salmon and crab processing. EPA inspected the South Bend facility in 2017. After reviewing facility records, EPA identified violations of the South Bend facility's wastewater discharge permit, including:

1) Exceeded discharge limits;

2) Insufficient monitoring frequency;

3) Incorrect sampling, and

4) Incomplete or inadequate reporting.

As part of the settlement, the company agreed to pay a penalty of $101,630. In addition to paying the penalty, the company has implemented new processes and technologies to address compliance challenges at its South Bend plant. By improving its effluent treatment South Bend Products has taken steps to reduce the pollutant Total Residual Chlorine in its discharge. The company also established new sampling procedures to adequately monitor for other pollutants such as Total Suspended Solids, Biological Oxygen Demand, and Oil and Grease. Collectively, these measures serve to improve South Bend Products' discharge to the waters of Willapa River and Bay.

•March 2, 2021—EPA, Region 8, announced it entered into seven Safe Drinking Water Act (SDWA) Administrative Orders on Consent (AOCs) with its tribal partners between December 1, 2020—February 12, 2021. Tribe owned or operated drinking water systems agreed to these AOCs to address violations of the National Primary Drinking Water Regulations to ensure public health protection on Tribal lands. AOCs illustrate substantial collaboration between EPA and the Tribes and Tribal utilities. The consensual agreements memorialize enforceable steps, and specific time frames, for drinking water systems to come into compliance with drinking water regulations. Prior to negotiating the AOCs, EPA provided the systems extensive compliance assistance. EPA's compliance assistance varies depending on the needs of each system, but often includes support by phone calls and emails, as well as visits from technical assistance providers. The seven orders address different violations at each facility and include monitoring violations and violations related to addressing significant deficiencies; failure to notify the public

of violations; and failure to prepare and distribute a Consumer Confidence Report to the systems' customers. EPA continues to work with these systems to address violations of drinking water regulations and ensure public health protection. Safe Drinking Water Act 1414 negotiated orders were finalized for various systems in Montana for the Blackfeet Indian Reservation. Other orders addressed various water systems for the Arapahoe Tribe of the Wind River Reservation, Wyoming. Other orders addressed systems at the Belknap Indian Reservation, Montana, and regarding systems for the Assiniboine Tribes of the Fort Belknap Indian Community (FBIC) and Prairie Mountain Utitlites.

•March 4, 2021—EPA has taken enforcement action on Kauai to direct the closure of seven large-capacity cesspools (LCCs) and collect $221,670 in fines from the Hawaii Department of Land and Natural Resources (DLNR). In 2005 EPA banned LCCs, which can pollute water resources, under the Safe Drinking Water Act. EPA is authorized to issue compliance orders and/or assess penalties to violators of the Safe Drinking Water Act's LCC regulations. EPA's enforcement action to close LCCs owned by DLNR is based on an August 2019 inspection and additional submitted information. The enforcement action includes the following DLNR properties: 1) Camp Hale Koa: Located in the Kokee Mountain State Park and 2) Waineke Cabins; 3) Kukui Street commercial property, located in the town of Kapa'a.

Since the 2005 LCC ban, more than 3,600 LCCs in Hawaii have been closed; however, many hundreds remain in operation. Cesspools collect and release untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams, and the ocean. Groundwater provides 95 percent of all local water supply in Hawaii, where cesspools are used more widely than in any other state.

•March 4, 2021—EPA has reached settlements with three construction companies alleged to have violated the federal Clean Water Act (CWA) by unlawfully discharging pollutants into Mill Creek in western Johnson County, Kansas. As part of the settlements, the companies will pay a combined $122,000 in penalties. According to EPA, ABP Funding LLC, KAT Excavation Inc., and Pyramid Contractors Inc. each violated terms of the CWA permits to which the companies were subject. EPA alleges that, among other permit violations, the companies failed to implement practices to limit the release of construction pollution into streams and other waters. EPA says those failures resulted in discharges of sediment and construction-related pollutants into Mill Creek. The state of Kansas has designated Mill Creek as an "impaired" water body for excess sediment and other pollutants. According to EPA, ABP Funding LLC, KAT Excavation Inc., and Pyramid Contractors Inc. each violated terms of the CWA permits to which the companies were subject. EPA alleges that, among other permit violations, the companies failed to implement practices to limit the release of construction pollution into streams and other waters. EPA says those failures resulted in discharges of sediment and construction-related pollutants into Mill Creek. The State of Kansas has designated Mill Creek as an "impaired" water body for excess sediment and other pollutants. ABP Funding and KAT Excavation were involved in a joint residential construction project and Pyramid Contractors was involved in a separate road-widening project. Under the CWA, companies that propose to disturb an acre or more of land in proximity to protected water bodies are required to obtain stormwater construction permits and to follow the requirements outlined in the permits in order to reduce pollution runoff. Failure to obtain a permit or follow the requirements of a permit may violate federal law.

•March 11, 2021—EPA has reached a settlement with North Star Paving & Construction, Inc. for violations of federal drinking water protection laws at the company's paving and construction business in Soldotna, Alaska. EPA alleges that North Star violated the Safe Drinking Water Act's Underground Injection Control regulations aimed at protecting groundwater sources of drinking water. An unauthorized underground injection well, also known as a Motor Vehicle Waste Disposal Well, was located on North Star's property. To resolve the violations, the company has agreed to pay a penalty of $130,000 and permanently close and decommission the well. EPA's compliance investigation found that North Star failed to safely maintain, and failed to properly decommission, an unauthorized underground injection well at the company's auto repair shop. As of April 2000, all

new construction of Motor Vehicle Waste Disposal Wells were banned. Subsequently, all existing Motor Vehicle Waste Disposal Wells in Alaska were required to be permanently closed by January 2005, to protect groundwater and drinking water sources. Vehicle shop floor drains flowing into underground wells have the potential to contaminate areas identified by the State of Alaska as drinking water source protection areas. An injection well could allow motor vehicle fluids -- and toxic chemicals or metals such as benzene, toluene, ethylbenzene, and xylenes, and lead-- to contaminate groundwater sources of drinking water. North Star's injection well was located above a protected drinking water aquifer for a community water system in Soldotna. EPA's preliminary groundwater sampling at the property found elevated concentrations of chemicals from motor vehicle fluids.

•March 15, 2021—Under a recent settlement with the EPA, Cashman Dredging & Marine Contracting Co., LLC, based in Quincy, Massachusetts, will pay a penalty of $185,000 for alleged violations of the Marine Protection, Research, and Sanctuaries Act (MPRSA, also known as the Ocean Dumping Act). EPA alleged that the violations occurred during the transport of dredged material from New Bedford Harbor in Massachusetts to the Rhode Island Sound Disposal Site (RISDS). On one occasion, a disposal vessel operated as part of the project dumped its load of dredged material 2.6 miles outside the authorized disposal site and on three separate occasions, dumped it in the wrong locations within the RISDS. The company's noncompliance was verified in part by the electronic monitoring devices onboard the disposal vessels. The company was cooperative with EPA and the U.S. Army Corps of Engineers (Corps) during the enforcement investigation and case settlement negotiations and has committed to making changes in its operations to ensure compliance with MPRSA in the future. This action was the result of a coordinated investigation by EPA and the Corps, which issues permits for the disposal of dredged material. Under the Ocean Dumping Act, EPA designates dredged material disposal sites for long-term use. Before designating these sites, EPA conducts an environmental review process, including providing opportunities for public participation. Each designated site has its own site management and monitoring plan. Disposal is strictly prohibited outside of these sites because of the potential of harm to the marine environment and the difficulty of assessing what the harmful impacts may be.

•March 18, 2021—EPA has reached a settlement with Swain Construction Inc. in Omaha, Nebraska, for alleged violations of the federal Clean Water Act. According to EPA, the concrete recycling and sales company discharged pollutants into protected waters adjacent to its facility without obtaining required permits. As part of the settlement, the company will restore the damaged streams and pay a $150,000 civil penalty. In the settlement documents, EPA alleges that Swain Construction used mechanized equipment to move concrete rubble, construction debris, and other pollutants into Thomas Creek and Little Papillon Creek, impacting approximately 1,300 feet of stream channel. Two EPA inspections at the company's facility in 2019 confirmed these unauthorized activities, as well as a lack of pollution controls that resulted in unauthorized stormwater discharges and wastewater runoff into Thomas Creek from the company's dust-suppression efforts. Both streams are designated as "impaired" by the state of Nebraska. Waters are assessed as impaired when an applicable water quality standard is not being attained. In addition to paying the penalty, the company also agreed to restore the impacted stream stretches and install facility controls to minimize or eliminate further discharges.

•March 18, 2021—The U.S. Department of Justice, EPA, and Bureau of Land Management (BLM) announced that they have reached a proposed settlement with John Raftopoulos, Diamond Peak Cattle Company LLC and Rancho Greco Limited LLC (collectively: the defendants) to resolve violations of the Clean Water Act and the Federal Land Policy and Management Act (FLPMA) involving unauthorized discharges of dredged or fill material into waters of the United States and trespass on federal public lands in northwest Moffat County, Colorado. On Oct. 22, 2020, the United States filed suit in federal district court alleging that beginning in approximately 2012, and as recently as approximately 2015, the defendants discharged dredged or fill material into Vermillion Creek and its adjacent wetlands in order to route the creek into a new channel, facilitate agricultural activities and construct a bridge. These alleged unau-

thorized activities occurred on private land owned by the defendants and on public land managed by BLM, constituting a trespass in violation of the FLPMA. Vermillion Creek and its adjacent wetlands are waters of the United States and may not be filled without a CWA Section 404 permit from the Corps, which was not obtained. EPA develops and interprets the policy, guidance and environmental criteria the Corps uses in evaluating permit applications. The United States' lawsuit further contended that the defendants' alleged trespass also included unauthorized irrigation, removal of minerals and destruction of numerous cottonwood trees on federal public land. The fill and related activities on BLM lands were conducted without BLM authorization. The defendants' trespass actions not only interfered with the public's right to current enjoyment of federal public lands, but also jeopardized the future health and maintenance of these lands for use by all. Under a proposed settlement filed in the U.S. District Court for the District of Colorado to resolve the lawsuit, the defendants agreed to: pay a $265,000 civil penalty for CWA violations; pay $78,194 in damages and up to $20,000 in future oversight costs for trespass on public lands managed by BLM; remove the unauthorized bridge constructed on public lands; restore approximately 1.5 miles of Vermillion Creek to its location prior to defendants' unauthorized construction activities; restore the 8.47 acres of wetlands impacted adjacent to the creek; and plant dozens of cottonwood trees to replace those previously removed from federal lands. Additionally, under the terms of the proposed settlement, the defendants will place a deed restriction on their property to protect the restored creek and wetlands in perpetuity. This proposed settlement will repair important environmental resources damaged by the defendants. The portions of Vermillion Creek and its adjacent wetlands impacted by the defendants' unauthorized activities provided aquatic and wildlife habitat, runoff conveyance and groundwater recharge. The straightening of Vermillion Creek contributed to erosion of the bed and banks of the stream and detrimental sediment deposition downstream of the channelization. Browns Park National Wildlife Refuge, which provides important habitat for the endangered Colorado pikeminnow, is located at the confluence of Vermillion Creek and the Green River, approximately one mile downstream from the impacted area. Similarly, the destruction of numerous cottonwood trees located adjacent to the creek eliminated nesting, perching, and roosting habitat for raptor species, including bald eagle, golden eagle and red-tailed hawk. Cottonwood galleries with riparian vegetation also provide nesting habitat for a variety of migratory birds.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•February 25, 2021 - The U.S. Department of Justice filed a complaint on behalf of EPA in the District of Puerto Rico that calls for the municipality of Toa Alta to stop disposing of solid waste at its landfill and take steps to address public health and environmental threats posed by dangerous conditions at the landfill, which is being operated in violation of federal and commonwealth solid waste laws. The complaint also asks the court to order the municipality of Toa Alta to pay civil penalties for its violations of a 2017 EPA order that addressed problems at the landfill. The complaint cites three central threats posed by the landfill:

> The municipality of Toa Alta is taking inadequate action to prevent large quantities of leachate—water mixed with hazardous pollutants that seeps from the landfill—from escaping into nearby neighborhoods, surface waters and the underlying groundwater aquifer.
>
> The landfill's slopes in certain areas are not stable and may collapse, potentially endangering people working at the landfill and residents whose homes are near the foot of the landfill.
>
> The Municipality has not consistently been placing required soil on top of the waste disposed at the landfill at the end of each day's disposal activities.

EPA is in communication with the Puerto Rico Department of Natural and Environmental Resources concerning the problems at this landfill. EPA is coordinating with the department in efforts to improve solid waste management in Puerto Rico.

•February 25, 2021—EPA announced the completion of another cleanup at the former Koppers Wood-Treating Facility at 1555 North Marion Street, Carbondale, Illinois. The agency required the cur-

rent owner, Beazer East Inc., to address dioxin/furan-contaminated soil on 16 acres of the site. Work crews cleared trees and brush to expand existing soil covers and excavated more than 34,000 tons of contaminated soil. The company also seeded native plants in accessible areas and will resume seeding remaining areas in the spring. Erosion controls will be maintained at site boundaries and around the ditches and creek until the seeding is done and vegetation is established. Previously, in 2010, Beazer East completed a six-year cleanup at the site under EPA's supervision. The discovery of remaining contamination made additional cleanup necessary. Both cleanups were ordered under the authority of the federal Resource Conservation and Recovery Act. From 1902 until 1991, Koppers treated railroad cross ties, utility poles and other wood products with chemical preservatives at its Carbondale facility which contaminated land and nearby waterways.

•February 25, 2021—EPA has settled an enforcement case with the Fairchild Semiconductor Corporation that resolves alleged violations of hazardous waste regulations at the company's semiconductor manufacturing facility in South Portland, Maine. Under the settlement, Fairchild has agreed to maintain compliance with federal regulations issued under the Resource Conservation and Recovery Act (RCRA) to reduce hazardous air pollutants and volatile organic compounds (VOCs) emissions. Fairchild has certified that the facility has corrected its violations and agreed to pay a penalty of $104,545. The company was cooperative during EPA's enforcement investigation and the case settlement negotiations. Fairchild's manufacturing processes generate liquid solvent wastes that can emit hazardous VOCs. The facility was storing solvent hazardous wastes in several tanks but had no RCRA air emissions compliance program in place for the tanks nor did it meet RCRA air requirements for labeling, monitoring, and record-keeping for the various equipment associated with the tanks. EPA discovered the violations after conducting a RCRA compliance inspection at Fairchild's facility. After the inspection, the facility dismantled a 5,500-gallon hazardous waste storage tank that was violating RCRA's air emissions regulations and instituted a RCRA air compliance program for its other tanks and equipment subject to these regulations. This proposed settlement is part of an EPA National Compliance Initiative that focuses on RCRA air emissions to reduce hazardous air pollutants at hazardous waste-handling facilities. RCRA requires effective monitoring and control of air emissions from hazardous waste storage tanks, pipes, valves, and other equipment since these emissions can cause adverse health and environmental effects and can contribute to ground-level ozone (smog) formation.

•March 2, 2021—EPA announced it has reached a settlement agreement with Brenntag Pacific, Inc. for violations of the Toxic Substances Control Act (TSCA). Brenntag Pacific, Inc. has corrected the violations and will pay a $128,265 fine. The violations were discovered following inspections at Brenntag Pacific, Inc. facilities in Fairbanks, Alaska and in Santa Fe Springs, California. EPA inspectors found the company failed to submit accurate and timely reports and notification associated with the import and export of nine chemicals. In addition, the company failed to produce first-time export notices for four chemicals. Under the Toxic Substances Control Act, chemical importers and manufacturers are required to submit Chemical Data Reporting information to EPA every four years. EPA uses this data to track the chemicals being imported into the country and to assess the potential human health and environmental effects of these chemicals. In addition, EPA makes the non-confidential business information it receives available to the public. The quadrennial chemical data reports for 2016—2019 were due from industry last month.

•March 3, 2021 - Chemical manufacturer UCT will pay a $44,880 penalty to settle hazardous waste violations at its Bristol, Pennsylvania, facility, the U.S. Environmental Protection Agency announced. EPA cited the company for violating the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. RCRA is designed to protect public health and the environment and avoid long and extensive cleanups, by requiring the safe, environmentally sound storage and disposal of hazardous waste. UCT manufactures a variety of chemical products at its facility at 2731 Bartram Road in Bristol. These include solid phase extraction products for hospitals, clinical and toxicology labs, food safety testing labs, pharmaceutical and biotech companies, and environ-

mental testing facilities; and silane/silicone products used in the glass and fiber optic industries, medical device, cosmetics, paints and coatings, adhesives and electronics industries. According to EPA, the company violated RCRA rules including storing hazardous waste for more than 90 days without a permit, failure to properly mark hazardous waste containers, failure to keep hazardous waste containers closed, failure to make waste determinations and failure to provide annual RCRA training. The settlement reflects the company's compliance efforts, and its cooperation with EPA in the investigation and resolution of this matter. As part of the settlement, the company has certified its compliance with applicable RCRA requirements.

•March 15, 2021—EPA announced a settlement requiring Western Reserve Chemical Corp. in Stow, Ohio, to pay a civil $357,000 penalty for violations of chemical data reporting regulations under the Toxic Substances Control Act, or TSCA. EPA alleged that from 2012-2015, WRCC failed to submit data reports for 18 chemical substances as required by TSCA. The company imports various chemicals for businesses that formulate rubber, plastics, adhesives, sealants and coatings. Companies are required to give EPA information on the chemicals they manufacture or import into the United States. EPA uses the data to help assess the potential human health and environmental effects of these chemicals and makes the non-confidential business information available to the public. WRCC's violations presented a potential harm to the Agency's ability to maintain accurate and updated information regarding commercially-produced chemicals. EPA's consent agreement and final order with the company resolves the alleged violations and requires the payment a $357,000 civil penalty in installments within 18 months.

•March 15, 2021—EPA has reached settlements with six residential home renovators in Missouri for alleged violations of lead-based paint regulations under the federal Toxic Substances Control Act. The settlements include two renovators from the Kansas City area: Montgall, LLC and Karin Ross Designs LLC; three renovators from the St. Louis area: Woodard Cleaning and Restoration Inc., Starke Inc., and City Restoration & Revival LLC; and one renovator from Springfield: The Window Dudes LLC. Under the terms of the settlements, the companies agreed to pay civil penalties and to certify that they are in compliance with the law requiring the use of lead-safe work practices during renovations, known as the Renovation, Repair and Painting (RRP) Rule. The Agency uses an array of mechanisms to promote compliance and, thereby, reduce the risk of lead exposure. Enforcement actions result in the reduction of human exposure to lead paint, most importantly for vulnerable populations such as young children and pregnant women.

Indictments, Convictions, and Sentencing

•February 18, 2021 - A vessel operating company was sentenced in Hagatna, Guam, for illegally discharging oil into Apra Harbor, Guam, and for maintaining false and incomplete records relating to the discharges of oily bilge water from the vessel Kota Harum. Pacific International Lines (Private) Limited (PIL), Chief Engineer Maung Maung Soe, and Second Engineer Peng Luo Hai admitted that oily bilge water was illegally dumped from the Kota Harum directly into the ocean and into Apra Harbor, Guam, without being properly processed through required pollution prevention equipment. Oily bilge water typically contains oil contamination from the operation and cleaning of machinery on the vessel. The defendants also admitted that these illegal discharges were not recorded in the vessel's oil record book as required by law. Specifically, on Oct. 4, 2019, Hai, who was employed by PIL, used the Kota Harum's emergency fire/ballast pump to discharge oily bilge water directly overboard, leaving an oil sheen upon the water of Apra Harbor. Additionally, Soe, who was also employed by PIL, admitted that excessive leaks in the vessel caused oily bilge water to accumulate in the vessel's engine room bilge at a rate that exceeded the oil water separator's (required pollution prevention machinery) processing capacity. Rather than repairing these leaks before continuing to sail or storing the oily bilge water in holding tanks to be discharged to shore-side reception facilities, it was the routine practice onboard the Kota Harum to discharge the oily bilge water directly overboard into the ocean. Soe then failed to record these improper overboard discharges in the vessel's oil record book. PIL pleaded guilty to five felony violations of the Act to Prevent Pollution from Ships for failing to accurately maintain the Kota Harum's oil record book,

and one felony violation of the Clean Water Act for knowingly discharging oil into a water of the United States in a quantity that may be harmful. The judge sentenced PIL to pay a total criminal penalty of $3 million and serve a four-year term of probation, during which all vessels operated by the company and calling on U.S. ports will be required to implement a robust Environmental Compliance Plan. Soe and Hai previously pleaded guilty and were sentenced to two years of probation and one year of probation, respectively. Additionally, both Soe and Hai are prohibited from serving as engineers onboard any commercial vessels bound for the United States during their respective terms of probation.
(Andre Monette)

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
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RECENT FEDERAL DECISIONS

U.S. SUPREME COURT FINDS FOIA'S DELIBERATIVE PROCESS EXEMPTION PROTECTED DRAFT BIOLOGICAL OPINIONS FROM PUBLIC DISCLOSURE

U.S. Fish & Wildlife Service v. Sierra Club, 592 U.S.___, 141 S.Ct. 777 (Mar. 4, 2021).

The Sierra Club brought a Freedom of Information Act (FOIA) action against the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), challenging their denial of a request for certain draft Biological Opinions generated during a rule-making process by the U.S. Environmental Protection Agency (EPA). After the Ninth Circuit Court of Appeals found that the documents should be produced, on March 4, 2021, the U.S. Supreme Court reversed, finding that the deliberative process privilege protected the documents from disclosure.

Factual and Procedural Background

In 2011, the EPA proposed a rule regarding the design and operation of "cooling water intake structures," which withdraw large volumes of water to cool industrial equipment. Because aquatic wildlife can become trapped in these structures and die, the EPA was required to "consult" with the FWS and NMFS (together: Services) under the Endangered Species Act (ESA) before proceeding. Generally, the goal of consultation is to assist the Services in preparing a Biological Opinion on whether an agency's proposal would jeopardize the continued existence of threatened or endangered species. Typically, these opinions are known as "jeopardy" or "no jeopardy" opinions. If the Services find that the action will cause "jeopardy," they must propose "reasonable and prudent alternatives" that would avoid harming the threatened species. If a "jeopardy" opinion is issued, the agency either must implement the alternatives, terminate the action, or seek an exemption from the Endangered Species Committee.

After consulting, the EPA made changes to the proposed rule, which was submitted to the Services in 2013. Staff members at the Services completed draft Biological Opinions, which found the proposed rule was likely to jeopardize certain species. Staff sent these drafts to the relevant decisionmakers within each agency, but decisionmakers at the Services neither approved the drafts nor sent them to the EPA. The Services instead shelved the drafts and agreed with the EPA to extend the period of consultation. After further discussions, the EPA sent the Services a revised proposed rule in March 2014 that significantly differed from the 2013 version. Satisfied that the revised rule was unlikely to harm any protected species, the Services issued a joint final "no jeopardy" Biological Opinion. The EPA issued its final rule that same day.

The Sierra Club submitted FOIA requests for records related to the Services' consultations with the EPA. The Services invoked the deliberative process privilege to prevent disclosure of the draft "jeopardy" Biological Opinions analyzing the EPA's 2013 proposed rule. The Sierra Club brought suit to obtain those records. The U.S. District Court agreed with the Sierra Club, and the Ninth Circuit affirmed in part. Even though the draft Biological Opinions were labeled as drafts, the Ninth Circuit reasoned, the draft "jeopardy" opinions constituted the Services' final opinion regarding the EPA's 2013 proposed rule and must be disclosed. The U.S. Supreme Court then granted *certiorari*.

The Supreme Court's Decision

Generally, FOIA mandates the disclosure of documents held by a federal agency unless the documents fall within certain exceptions. One of those exceptions, the deliberative process privilege, shields from disclosure documents reflecting advisory opinions and deliberations comprising the process by which governmental decisions and policies are formulated. The privilege aims to improve agency decisionmaking by encouraging candor and blunting the chilling effect that accompanies the prospect of disclosure.

The privilege distinguishes between predecisional, deliberative documents, which are exempt from disclosure, on the one hand, and documents reflecting a final agency decision and the reasons supporting it, which are not, on the other hand. As the Supreme Court observed, however, a document does not represent an agency's final decision solely because nothing follows it; sometimes a proposal dies on the vine or languishes. What matters is if the document communicates a policy on which the agency has settled and the agency treats the document as its final view, giving the document "real operative effect."

Draft Biological Opinions Reflected a Preliminary View of the Proposed Rule

Applying those general principles, the Supreme Court found that the draft Biological Opinions were protected from disclosure under the deliberative process privilege because they reflected a preliminary view—as opposed to a final decision—regarding the EPA's proposed 2013 rule. In addition to being labeled as "drafts," the Supreme Court explained, the administrative context confirmed that the draft opinions were subject to change and had no direct legal consequences. Because the decisionmakers neither approved the drafts nor sent them to the EPA, they were best described not as draft Biological Opinions but as drafts of draft Biological Opinions. While the drafts may have had the practical effect of provoking EPA to revise its 2013 proposed rule, the Supreme Court reasoned, the privilege still applied because the Services did not treat the draft Biological Opinions as final. The Supreme Court thus reversed the Ninth Circuit decision and remanded the case for further proceedings consistent with its holding.

Conclusion and Implications

The case is significant because it contains a substantive discussion of the deliberative process privilege, particularly in the context of the U.S. Endangered Species Act—and by a Supreme Court shaped in part by the Trump administration appointees. The decision is available online at: https://www.supremecourt.gov/opinions/20pdf/19-547_new_i42k.pdf
(James Purvis)

NINTH CIRCUIT REJECTS NEPA/ESA CHALLENGES TO ROADBUILDING AND TIMBER HARVESTING PLAN IN EASTERN IDAHO

Friends of Clearwater v. Higgins, *Unpub.*, Case No. 20-35623 (9th Cir. Feb 22, 2021).

In an *unpublished* memorandum decision issued February 22, 2021, a three-judge panel of the Ninth Circuit Court of Appeals rejected plaintiffs' multiple claims under the National Environmental Policy Act (NEPA) and the federal Endangered Species Act (ESA). Plaintiffs challenged the U.S. Forest Service's approval of a road building and timber harvesting plan on 12,000 acres in eastern Idaho. In the U.S. District Court for Idaho, plaintiffs sought a preliminary injunction to prevent the plan from moving forward. Both the District court, and the Ninth Circuit Court of Appeals found that plaintiffs failed to establish a likelihood of success on the merits for their NEPA claims, and failed to demonstrate irreparable harm on their ESA claim. The Ninth Circuit therefore refused to grant an injunction.

Factual and Procedural Background

In October of 2019, the U.S. Forest Service issued a Decision Notice and Finding of No Significant Impact (FONSI) for a road construction and timber harvesting plan in Shoshone County, Idaho. The project sought to allow timber harvesting and road building to improve forest health, provide for sustainable harvesting of timber, and reduce wildfire fuels to lessen wildfire severity. The project was located on 12,000 acres and would include approximately 1,700 acres of timber harvest and prescribed burning. The would construct or reconstruct approximately 10.5 miles of roads.

In 2018, the Forest Service issued a scoping notice seeking public comment and in 2019 issued a draft and final Environmental Assessment. The Final Environmental Assessment found that no federally

endangered or threatened wildlife species were likely to be affected by the project. To determine whether any federally listed threatened or endangered species were present in the project area, the Forest Service relied on U.S. Fish and Wildlife Service (FWS) Information and Planning and Consultation (IPaC) maps for Idaho.

The wildlife report associated with the Environmental Assessment determined the project would have not have an effect on grizzly bears based largely on the lack of grizzly bear occurrence in the project area or its nearby ranger district. In response to plaintiffs' notice of intent to sue, the Forest Service asked the FWS for information regarding bears found near the project area. While a few individual GPS collared grizzlies had been tracked 10 to 15 miles from the project site, none were known to have travelled through the project area.

The Environmental Assessment also analyzed the project's impact on "elk security habitat" which is habitat that has timbered areas greater than 250 acres, more than one-half mile from a motorized route. The forest plan called for management activities to maintain existing levels of elk security where possible. The Environmental Assessment determined that the project would reduce elk security habitat by 210 acres. However, the Forest Service determined that the seasonal closure of an ATV trail in the habitat would increase elk security habitat by 314 acres, resulting in a net gain of 94 acres.

Plaintiffs sought a preliminary injunction to prevent timber harvest and road construction on the project and alleged that the Forest Service violated the Administrative Procedure Act by, among other things failing: 1) request a species list from the FWS and by failing to prepare a Biological Assessment including grizzly bears as required by the Endangered Species Act, and 2) by failing to take a "hard look" at the cumulative effects of the project on the elk population, and by failing to analyze the efficacy of the proposed ATV trail closure on the elk population.

The U.S. District Court in Idaho held that while plaintiffs had shown a likelihood of success on the merits of their ESA claim, "their generalized allegations of harm [did] not demonstrate likely irreparable injury." Because of this, the public interest and balance of equities tipped in the defendant's favor, and did not justify the issuance of an injunction.

The Ninth Circuit's Decision

In a brief memorandum decision, a three-judge panel of the Ninth Circuit Court of Appeals rejected each of plaintiffs' arguments on appeal.

On appeal, plaintiffs claimed that the District Court erred by requiring a showing of likely harm to the "species of grizzly bear" rather than harm to the interests of the members of plaintiffs' environmental group. The court noted that plaintiffs who seek to enjoin a violation of the ESA must show a "definitive threat of future harm to protected species." Harm to members of environmental groups can suffice for claims under the ESA, but only if such members can show harm to themselves as a result of harm to listed environmental species.

The Ninth Circuit found that plaintiffs failed to present sufficient evidence of irreparable harm to grizzly bears. Here, nothing in the record demonstrated that any grizzly bears had ever been located in the project area.

Plaintiffs also argued that the District Court erred by failing to adequately analyze the cumulative effects of the project on elk and the Environmental Assessment's chosen mitigation measures. Plaintiffs argued that the Forest Service was required to disclose in the Environmental Assessment historical declines in the elk population in the project area due to past logging and road building activities. The court found that a the Forest Service was not required to engage in such a "fine-grained" analysis of historical details of past actions. An aggregate method of analyzing cumulative impacts was sufficient. The Ninth Circuit agreed with the District Court that the Forest Service's proposal to increase cumulative elk security beyond baseline levels was reasonable and not an abuse of discretion. The court ruled that the District Court's conclusion that the seasonal closure of an ATV trail with signage, gates, and gate monitoring was reasonable.

Finally, plaintiffs argued that a misstatement in the Environmental Assessment that "the project area… does not include the St. Joe Wild and Scenic River Corridor" constituted a failure to fully inform the public, which deprived the public of an opportunity to offer meaningful comments on the Environmental Assessment under NEPA. The Ninth Circuit agreed with the District Court that the Environmental Assessment's single sentence incorrectly stating the

scope of the project did not "so drastically undermine public participation as to render the [Forest Service's] action unlawful."

The Ninth Circuit concluded that plaintiffs had failed to establish a likelihood of success on the merits on their National Environmental Policy Act claim or the necessary irreparable harm to prevail on their claims under the Endangered Species Act and affirmed the District Court's decision.

Conclusion and Implications

The *Friends of Clearwater unpublished* decision highlights the difficulties that environmental groups face when challenging Environmental Assessments under the Endangered Species Act, when there is a possibility, but no clear history that endangered species inhabit or migrate through project areas. The case also demonstrates that relatively small mistakes in an Environmental Assessment will not result in a finding that an Environmental Assessment deprives the public of an opportunity to offer meaningful comments on an agency's analyses in violation of NEPA. A copy of the court's unpublished decision can be found here: http://cdn.ca9.uscourts.gov/datastore/memoranda/2021/02/22/20-35623.pdf
(Travis Brooks)

FIFTH CIRCUIT ADDRESSES DIVERSITY JURISDICTION WHERE LANDOWNER SUED PETROLEUM COMPANY UNDER LOUISIANA STATE CONSERVATION LAWS OVER LEGACY SITE CONTAMINATION

Grace Ranch, L.L.C. v. BP America Production Company,
___F.3d___, Case No. 20-30224 (5th Cir. Feb. 26, 2021).

On February 26, 2021, the Fifth Circuit Court of Appeals ruled in *Grace Ranch, L.L.C. v. BP America Production Company, et. al.*: 1) reversing an order from the U.S. District Court for the Western District of Louisiana to remand the case to state court, and 2) remanding the case to the U.S. District Court for further proceedings on Grace Ranch's claims against BP America Production Company and BHP Petroleum Americas (collectively, BP) under Louisiana's conservation laws for the cleanup of legacy contamination on Grace Ranch's property from oil and gas operations. The Court of Appeals also denied Grace Ranch's motion to dismiss the case for lack of jurisdiction.

Background

The dispute relates to contamination from the disposal of drilling waste and other byproducts of oil and gas production in unlined earthen pits in Louisiana, before this practice was banned under state law in the mid-1980s. It is settled law in Louisiana that individuals purchasing such contaminated lands cannot sue oil and gas owners and operators in tort or contract for damage inflicted before the purchasers acquired the property. As a result, such landowners have attempted to obtain a remedy for this legacy contamination by enforcing state conservation laws. The Louisiana Department of Natural Resources Statewide Order 29-B requires the closure of these unlined oilfield pits and that "various enumerated contaminants in the soil be remediated to certain standards." A landowner can sue under Louisiana Statutes Annotated § 30.16 to force compliance with the Statewide Order if the Louisiana Office of Conservation fails to do so after receiving notice from the landowner adversely affected by a violation of the Order.

The District Court's Decision

The landowner in this case, Grace Ranch, filed suit in state court against BP for contamination on its property after the Louisiana Office of Conservation declined to enforce Statewide Order 29-B. BP removed the case to federal court, asserting jurisdiction based on diversity of citizenship. While Grace Ranch and BP are diverse parties, Grace Ranch maintained that the state's role in the case defeated that diversity jurisdiction. Under state law, any injunction obtained

by Grace Ranch against BP would be entered in favor of the Louisiana Office of Conservation, which Grace Ranch argued made the state a real party in interest. Grace Ranch also urged the federal court to abstain from exercising jurisdiction under the abstention doctrine presented in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The District Court ruled that there was diversity jurisdiction, but remanded the case to state court based on *Burford*, finding that abstention was appropriate because the state court offered a better forum for resolving unsettled questions about the application of state law.

BP appealed the District Court's order, and Grace Ranch filed a motion to dismiss BP's appeal for lack of jurisdiction, continuing to assert that the State of Louisiana's involvement in the case defeated diversity jurisdiction. On this appeal, the Fifth Circuit Court of Appeals ruled on the question of diversity jurisdiction, the jurisdiction of the Court of Appeals to hear the appeal, and whether the federal court should abstain from hearing the case and remand it to state court.

The Fifth Circuit's Decision

Diversity Jurisdiction

The Fifth Circuit Court of Appeals ruled that it has subject matter jurisdiction over the case, because the State of Louisiana is not a party to the lawsuit, nor a real party in interest. Federal District Courts have original jurisdiction over disputes between citizens of different states, where the amount in controversy exceeds the minimum threshold. When a state is a party to a lawsuit, or a real party in interest, diversity of citizenship does not exist, however. Federal statute vests federal courts with jurisdiction when a suit is between citizens of different states, but not when a state is one of the parties.

The Court of Appeals found that the State of Louisiana was not a party in this case, and therefore diversity jurisdiction existed. Grace Ranch argued that the state is a party to the lawsuit because Louisiana Statutes Annotated § 30:16 is a vehicle for landowners to enforce state conservation law where the state declines to act, with any injunction obtained entered *only in the name of the Louisiana Office of Conservation*. The Court of Appeals found that the state is not a proper party however, because it has not authorized landowners to sue in its name. Though some Louisiana laws expressly authorize non-state entities to sue to protect the state's interests in specific situations, or outline litigation authority that encompasses suit on the state's behalf, the Fifth Circuit found that § 30:16 does neither. The court explained that a private entity suing under § 30:16 does so on its own behalf. The language of the statute does not support that the plaintiffs are "vindicating the State's interest" through their suits, or that a plaintiff has been deputized to act on the part of the state.

The court also found that Louisiana is not a real party in interest. Under precedent, a state has a real interest in litigation if the relief sought will inure to it alone, so that a judgment for a private plaintiff will effectively operate in the state's favor. A state is just a nominal party if its only stake in a suit is a general government interest in securing compliance with the law. Based on these principles, the court held that Louisiana's interest in environmental regulation does not make the state a real party in interest to Grace Ranch's lawsuit. Otherwise, the state would be a party in interest in all litigation, because the state always has an interest in enforcing its laws. Here, Grace Ranch has a pecuniary interest in the outcome of the litigation, and the state does not. In addition, Louisiana has no real interest in the litigation because the U.S. District Court could fairly enter a final judgment without the state's involvement in the case.

Appellate Jurisdiction over Abstention Ruling

The Fifth Circuit Court of Appeals found that it has jurisdiction to review the abstention ruling from the District Court. While the Fifth Circuit hasn't addressed its jurisdiction to hear an abstention-based remand order since revisions to the statute governing this issue, § 1447(d) of Title 28 of the U.S. Code, the court agreed with the consensus among other Circuit Courts of Appeal that appellate courts can review abstention-based remands. The revised statutory language limits review of remands based on a "defect other than lack of subject matter jurisdiction." Other Circuits have uniformly rejected the view that "defect" includes all non-jurisdictional remands. The Fifth Circuit explained that abstention involves a discretionary assessment of how hearing a case would impact the delicate state/federal balance, not a defect or deficiency. Accordingly, the court found that it had jurisdiction to hear BP's appeal of the remand order.

The doctrine of abstention under *Burford v. Sun Oil Co.* allows federal courts to avoid entanglement with state efforts to implement important policy programs. As the Court of Appeals noted, it will only abstain in the rare instances when hearing a case within its equity jurisdiction would be prejudicial to the public interest. *Burford* charges courts to carefully balance state and federal interests in exercising its authority to abstain, with abstention disfavored "as an abdication of federal jurisdiction." The five factors outlined in *Burford* for a court to analyze in considering abstention are: 1) whether the cause of action arises under federal or state law, 2) whether the case requires inquiry into unsettled issues of state law or into local facts, 3) the importance of the state interest involved, 4) the state's need for a coherent policy in that area, and 5) the presence of a special state forum for judicial review.

The Court of Appeals found here that the first and second factors tended to favor abstention, though were not dispositive. The cause of action involved a state law claim, though "federal courts hear state law claims all the time."

The case also involved an unsettled question of Louisiana law, namely whether landowners can sue under § 30:16 for past violations of conservation law, but this on its own did not justify a federal court's refusal to hear a case.

The Court of Appeals found that the third factor favored abstention as well, because the state has a strong interest in remediating contaminated lands, though under precedent, even powerful state interests will not always justify abstention.

But with regard to the fourth factor, Grace Ranch did not demonstrate to the Fifth Circuit that federal resolution of the lawsuit would disrupt Louisiana's efforts to establish a coherent policy for the remediation of contaminated lands. The Court of Appeals noted that it may have to reach the unsettled question of whether relief is available for past violations of State Order 29-B, but it did not find that federal jurisdiction over the case would risk interfering with the Officer of Conservation's enforcement of Louisiana's conservation laws in the future.

Finally, the Court of Appeals also found that the fifth factor weighed against abstention, given that Louisiana provides no special forum for judicial review of these conservation lawsuits.

Weighing all of the factors together, the court determined that there was not enough for it to refrain from its general duty to exercise the jurisdiction given by Congress to federal courts. Accordingly, it found that abstention was *not* warranted in this case, and reversed the remand order.

Conclusion and Implications

With this decision, the Fifth Circuit has limited landowners' ability to have § 30:16 claims heard in state court if the defendant oil and gas company is domiciled outside of Louisiana and would prefer to have the case heard in federal court. With this remand, Grace Ranch will have its substantive claims seeking cleanup of this lands under Louisiana's conservation laws heard by the U.S. District Court, rather than in state court. Whether a state court would have been more receptive to Grace Ranch's claims is speculative, but this ruling by the Fifth Circuit Court of Appeals is a win for BP in its efforts to keep the case in federal court. With this decision, diverse oil and gas companies defending against § 30:16 claims from landowners will have confidence that they can remove the case to be heard in federal court. The court's opinion is available online at: https://www.ca5.uscourts.gov/opinions/pub/20/20-30224-CV1.pdf
(Allison Smith)

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DISTRICT COURT RULES EPA MUST DETERMINE WHETHER A CLEAN WATER ACT DISCHARGE 'MAY AFFECT' WATER QUALITY IN ANOTHER STATE

Fond Du Lac Band of Lake Superior Chippewa v. Wheeler,
___F.Supp.3d___, Case No. 19-CV-2489 (D. Minn. Feb. 16, 2021).

The U.S. District Court for the District of Minnesota recently granted in part and denied in part a motion to dismiss the Fond Du Lac Band of Lake Superior Chippewa's (Tribe) federal Clean Water Act (CWA) claims against defendants the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). The court's holding determined whether the EPA may decline to object to a National Pollutant Discharge Elimination System (NPDES) permit and whether the EPA may decline to determine whether a discharge "may effect" the waters of another state under the CWA Section 404 permit process.

Factual and Procedural Background

The Fond Du Lac Band of Lake Superior Chippewa is a federally recognized Indian Tribe and is considered a "State" for CWA purposes. The Tribe's reservation waters are meeting all water quality standards except with respect to mercury. The primary source of mercury is alleged to come from existing mines in the vicinity of a proposed mining project at issue in this case. The proposed mining project would be upstream from the Tribe's reservation. The Tribe's complaint alleges the project would release significant amounts of mercury downstream.

The proposed mining project required a CWA § 404 "dredge and fill" permit and a § 402 NPDES permit. Minnesota administers the NPDES program, and EPA retains the right to prevent issuance of an NPDES permit by objecting in writing. EPA initially submitted letters indicating it would object to the proposed project, but EPA did not end up objecting to the state's permit issuance in the end.

The Corps issues § 404 permits. As a prerequisite to obtaining a permit, the applicant must obtain a CWA § 401 certification from the state that discharges will comply with applicable provisions of the CWA. A state issuing a Section 401 certification must notify the EPA, and if EPA determines the proposed discharge "may affect" the water quality of another state (a "may affect" determination), the EPA must notify the affected state. The Tribe is a "State" for purposes of the CWA. Here, the EPA did not make a "may affect" determination and did not provide notice of any "may affect" determination to the Tribe. The § 404 permit was issued for the proposed project.

The Tribe brought action against EPA and the Corps challenging EPA's decision not to object to the state's issuance of an NPDES permit, EPA's decision not to provide notice to the Tribe, and the Corps' ultimate issuance of the § 404 permit. EPA and the Corps moved to dismiss the first four counts of the Tribe's complaint for lack of jurisdiction and for failure to state a claim.

The District Court's Decision

The NPDES Permit

The court first considered defendants' claim that the court lacked jurisdiction to consider EPA's failure to object to the NPDES permit. The CWA explicitly grants EPA the authority to waive its right to object to a proposed NPDES permit, therefore the main issue was whether EPA's waiver decision was subject to judicial review under the Administrative Procedure Act (APA), or whether it was "committed to agency discretion by law," and unreviewable. The Tribe did not dispute that the EPA's ultimate decision to waive its right to object was unreviewable, but instead took the position that a "limited review" of the EPA's decision-making process was permissible under a Fifth Circuit Court of Appeals case and an Eighth Circuit case.

The District Court ruled against the Tribe, determining that a "limited review" of the kind the Tribe was asking for would really not be different from a review of the EPA's ultimate decision, which is unreviewable. The court, therefore, granted defendants' motion to dismiss this cause of action.

The Section 404 Permit and Failure to Notify

In its second and third causes of action, the Tribe challenged EPA's failure to notify the Tribe of a "may affect" determination as part of the Section 404 permitting process. The two relevant issues were: 1) whether the EPA could decline to make a "may affect" determination, and 2) whether EPA's "may affect" determination was judicially reviewable.

On the issue of whether the EPA could decline to make a "may affect" determination, the EPA argued the determination was discretionary and beyond judicial review under the APA. The court rejected EPA's and concluded the "may affect" determination was *not* a discretionary matter. The court reasoned the "may affect" determination was not discretionary because the language in context was unlike other discretionary matters under case law precedent. In other statutes that courts have held to grant discretionary authority, the language has granted open-ended, ongoing authority to the agency to take various types of actions. Here, the court observed that the statutory language for the "may affect" determination referred to a specific decision that must be made within 30 days. In other words, the statute contemplated that EPA would make a decision, one way or the other.

The court then addressed whether the "may affect" determination was reviewable under the APA. The court held that the determination was reviewable. The court reasoned that the APA embodies a general presumption of judicial review, and the exceptions to the general presumption are narrow. The exception that makes agency actions unreviewable when "committed to agency discretion by law" depends on whether the statute applies a "meaningful standard against which to judge the agency's exercise of discretion." Here, the court found that the standard to judge EPA's action regarding a "may affect" determination is whether the discharge may violate the water quality standards of another state.

Conclusion and Implications

This case determines that the EPA must make a "may affect" determination under the CWA Section 404 permitting process, and decides that EPA's failure to object to a state-issued NPDES permit is beyond judicial review because it is committed to agency discretion. The Tribe's remaining claims will continue to move forward against EPA and the Corps. (William Shepherd, Rebecca Andrews)

DISTRICT COURT ALLOWS CLEAN WATER ACT CITIZENS SUIT TO PROCEED DESPITE PREVIOUS SETTLEMENT WITH STATE AGENCY OVER THE SAME VIOLATIONS

Lower Susquehanna Riverkeeper and the Lower Susquehanna Riverkeeper Association v. Keystone Protein Company, ___F.Supp.3d___, Case No. 1:19-cv-01307 (M.D. Pa. Feb. 18, 2021).

The U.S. District Court for the Middle District of Pennsylvania denied a factory owner's motion for summary judgment, holding that the Pennsylvania Clean Streams Law (PCSL) and the federal Clean Water Act (CWA) are not "roughly comparable" statutes. As such, the plaintiffs' citizen's suit was allowed to proceed with its claims under the CWA, despite the fact that the factory had settled litigation with the Pennsylvania Department of Environmental Protection (PADEP) for the same violations under the PCSL.

Factual and Procedural Background

In March 2012, the PADEP issued Keystone Protein Company (Keystone) a National Pollutant Discharge Elimination System (NPDES) permit, authorizing the discharge of total nitrogen from the factory's wastewater treatment plant with specific daily and monthly maximum concentration limits. Because Keystone's wastewater treatment plant was not designed to meet these limits, Keystone violated the permit on a routine basis.

Within the same year, Keystone entered into a Consent Order and Agreement with PADEP to

upgrade its wastewater treatment plant in order to comply with the set total nitrogen limits by October 2016. This order also imposed penalties for discharges that exceeded the permit nitrogen limits. By 2017, Keystone entered into a second Consent Order and Agreement with PADEP, which superseded and replaced the previous Order. The second Consent Order allowed for a later date of June 2021 to complete the new wastewater treatment facility with the caveat that Keystone was subject to stipulated penalties if it failed to comply with effluent limitation guidelines. The public and the plaintiffs, however, did not receive notice, or have an opportunity to comment, prior to the signing of these consent orders.

Plaintiffs, Lower Susquehanna Riverkeeper and the Lower Susquehanna Riverkeeper Association, brought a citizen's suit under CWA against Keystone. Plaintiffs alleged that Keystone violated the CWA along with the conditions and limitations established by a related permit system. Keystone moved for summary judgment, arguing that the plaintiff's lawsuit is precluded by PADEP's own enforcement action, as seen in the two consent orders. Plaintiffs filed cross motions for summary judgment on the issue of standing, diligent prosecution, the number of days of violation, and the maximum civil penalty.

The District Court's Decision

Standing

The court first addressed whether the plaintiffs had standing in the matter. Under the Clean Water Act, any person who has an interest and adversely affected by the actions in question may bring a citizen suit under the CWA. After the court found that the plaintiffs demonstrated that their personal use of the environment was affected by the discharges, the discharge was in fact caused by Keystone, and the court could redress the issue, the court held the plaintiffs had standing. Additionally, the court found the plaintiffs met all three requirements for associational standing, effectively establishing their jurisdiction over the case.

Issue Preclusion—Diligent Prosecution

Next, the court turned to the issue of preclusion, addressing whether the PCSL and the CWA were comparable since the CWA prohibits citizen's suits when a state has already "commenced and is diligently prosecuting an action under a [comparable] State law." The court identified a circuit split on what finding is needed to determine whether the CWA and state law are comparable and noted that the Third Circuit Court of Appeals had not articulated which standard the court used. On one hand, courts apply the "overall comparability" which looks at the following key factors: 1) whether the state law contains comparable penalty provisions which the state is authorized to enforce, 2) whether the state law has the same overall enforcement goals as the federal CWA, 3) whether the state law provides interested citizens a meaningful opportunity to participate at significant states of the decision-making process, and 4) whether the state law adequately safeguards citizens' legitimate substantive interests. On the other hand, courts apply the "rough comparability" standard, which focuses on the penalty assessment, public participation, and judicial review.

The District Court opted to use the "rough comparability" standard because of its easier and more logical application along with a reduction in uncertainty for litigants, the legislature, and administrative agencies. The court then concluded that the CWA and the PCSL were *not* comparable statutes. Specifically, the court reasoned that the Clean Streams Law under the PCSL, unlike the CWA, did not provide the public with adequate notice and the opportunity to participate in PADEP's initial assessment of a civil penalty, which is expressed through the two consent orders in question. In doing so, the court denied Keystone's motion for summary judgment on the jurisdictional issue of preclusion.

Clean Water Act Violations

After resolving the threshold issues of standing and preclusion, the court turned to the issues of: 1) the number of days which Keystone faces liability for violating its NPDES permit and consequently violating the CWA; and 2) the maximum civil penalty that Keystone will be obligated to pay for the violations. As to the first issue, the court noted that plaintiffs alleged Keystone violated its monthly average concentration limit for total nitrogen for 73 months and the daily maximum concentration limit for total nitrogen on 288 days. Keystone did not dispute the total number of days in which it violated the daily maximum limit. The court granted plaintiff's motion for partial

summary judgment concerning Keystone's liability for daily maximum violations. The court, however, deferred determination of the extent of Keystone's violations of the monthly average limit, noting that district courts have discretion to determine how many violation days should be assessed for penalty purposes for violations of a monthly average limit, based on whether violations are already sufficiently sanctioned as violations of a daily maximum limit. As a result, the court will revisit Keystone's violations of the monthly average limit at the penalty phase of litigation.

On the issue of maximum civil penalty, the court denied summary judgment, opting to defer judgment until the penalty phase of this litigation for efficiency and fairness purposes.

Conclusion and Implications

This case nicely illustrates a current Circuit Court of Appeals' split on the issue of diligent prosecution bar under a comparable state law and, is one of the first cases to identify the "rough comparability" standard as the applicable standard within the Third Circuit Court of Appeals. This case might provide the right set of facts for the U.S. Supreme Court to review.

(Megan Kilmer, Rebecca Andrews)

DISTRICT COURT RULES ENVIRONMENTAL ANALYSIS OF GREENHOUSE GASES INSUFFICIENT UNDER NEPA

Utah Physicians for a Healthy Environment, et al. v. U.S. Bureau of Land Management, ___F.Supp.3d ___, Case No. 2:19-cv-00256-DBB (D. Utah Mar. 24, 2021).

The U.S. District Court for Utah has remanded an Environmental Impact Statement (EIS) for the expansion of the Coal Hollow Mine in southern Utah to the U.S. Bureau of Land Management (BLM) for revision, finding that BLM did not take a sufficiently "hard look" under the National Environmental Policy Act (NEPA) at the indirect effects and cumulative impacts of greenhouse gas (GHG) emissions associated with the expansion of the mine.

Factual and Procedural Background

In 2018, BLM approved a 2,114-acre lease for Alton Coal Development to expand the existing Coal Hollow Mine, doubling its size. Following a draft and supplemental draft EIS in 2011 and 2015, respectively, and almost 200,000 comments from interested parties, BLM published a Final EIS and issued the Record of Decision in connection with the approval of the lease. Plaintiffs Utah Physicians for a Healthy Environment, Sierra Club, Natural Resources Defense Council, National Parks Conservation Association, Grand Canyon Trust, and WildEarth Guardians challenged BLM's analysis of the environmental impacts of the lease under NEPA.

The District Court's Decision

Plaintiffs argued that BLM violated NEPA in three ways in its analysis of the proposed mine. First, plaintiffs claimed that BLM failed to analyze the impacts of GHGs generated directly and indirectly from the expansion of the mine. They asserted that while the mine's GHG emissions had been quantified, BLM had failed to calculate the social or economic costs of the mine's emissions, even though the agency had quantified various benefits associated with the mine. Second, plaintiffs alleged that BLM failed to adequately analyze the cumulative impacts of the mine's GHGs, having limited its review to climate impact sources in two counties in Utah, rather than all U.S. Department of Interior coal mining projects under review. Third, plaintiffs argued that BLM failed to properly analyze the impact of mercury emissions resulting from combustion of coal from the mine.

The court looked to the NEPA regulations and considered each of the cases plaintiffs urged the court to follow, distinguishing them on most points, yet finding instances where the EIS fell short.

Analysis of GHGs, Climate Change, and Socioeconomic Impacts

The District Court first considered whether the EIS adequately addressed the impacts of the mine's GHG emissions. The court found fault with the EIS in delineating the mine's socioeconomic benefits, but not quantifying or discussing the social and economic costs associated with its GHG emissions.

The EIS forecast myriad economic benefits, quantifying the number of jobs created, the income from those jobs, the economic contribution of the coal produced from the mine expansion, federal royalties, tax revenue, and downstream economic benefits. The EIS also discussed various socioeconomic costs, such as declines in housing values, increases in traffic and noise, decreases in air quality, prospects of blasting damage, and environmental justice issues, among other effects, while neglecting to quantify any costs related to the mine's GHG emissions and its contribution to climate change.

Plaintiffs contended that the economic costs of GHGs were not quantified and that BLM should have used the Social Cost of Carbon to forecast these economic costs. BLM asserted that NEPA does not require the agency to monetize all of a proposed action's effects. Further, BLM argued that it was not required to utilize the Social Cost of Carbon to calculate costs associated with the mine's GHGs.

The court found that BLM adequately explained its concerns with using the Social Cost of Carbon, and thus did not violate NEPA by failing to use this tool to calculate costs associated with the mine's GHGs. The court nevertheless concluded the treatment in the EIS of GHGs and their costs was problematic, finding it "to be spread out and disjointed in such a way that the public is unlikely to find the related pieces and put them together or have confidence that the agency considered the interrelated qualitative and quantitative information as a whole." One section in the EIS on GHGs calculated the volume of projected GHGs from the proposed mine, including indirect emissions from combustion of the coal produced, and placed those emissions in the context of total global GHG emissions. A separate section on climate change qualitatively discussed the effects of GHGs on climate generally, and acknowledged that there are many socioeconomic costs and impacts from climate change, though without reference to the GHGs the mine would generate. Meanwhile, the socioeconomics section was silent as to the mine's GHG emissions or climate change, and the associated socioeconomic costs. Accordingly, the Court concluded that BLM had not presented the relevant quantitative and qualitative information and analysis in a way that the Court and the public could be confident that BLM had taken the requisite "hard look" at the mine's impacts from GHGs.

Cumulative Impact of GHG Emissions

On the second question presented in *Utah Physicians*, the court found that BLM had failed to take a sufficiently hard look at the cumulative impact of GHG emissions from the expansion of the mine. Under the NEPA regulations, a cumulative impact is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." To review the sufficiency of the analysis in the EIS, the court examined the administrative record as a whole to determine whether BLM made a reasonable, good faith, objective presentation of cumulative impacts sufficient to foster public participation and informed decision making. The court noted that a meaningful cumulative impact analysis must address: 1) the area in which the effects of the proposed project will be felt, 2) the impacts that are expected in that area from the proposed project, 3) other actions, past, present, and proposed, and reasonably foreseeable, that have had or are expected to have impacts in the same area, 4) the impacts or expected impacts from these other actions, and 5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

BLM defined the cumulative impacts assessment area as approximately 2.85 million acres over two counties, along with the reasonably foreseeable coal haul transportation route. The EIS inventoried reasonably foreseeable actions and developments in the assessment area over the next twenty years, identified likely coal, oil, and gas development in the assessment area, and discussed cumulative impacts over a dozen different types of resources. While present and reasonably foreseeable future fossil fuel developments in the assessment area were identified in the cumulative impacts analysis, no quantitative or qualitative

discussion was provided regarding GHG emissions from these developments, though data regarding other emissions was provided. While the EIS discussed GHGs and climate change generally, and projected GHG emissions were calculated, the cumulative impacts section provided no data or substantive discussion about GHGs from the expansion of the mine, or other present or reasonably foreseeable future actions. The cumulative impacts analysis also did not cross reference these other sections of the EIS that addressed GHGs and climate change.

The District Court concluded that the EIS failed to meaningfully describe and discuss relevant information on other present and reasonably foreseeable future GHG sources. Plaintiffs contended that that BLM should have analyzed the cumulative impacts of all DOI coal mining projects under review, in line with recent decisions in *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 77 (D. D.C. 2019), and *Indigenous Environmental Network v. U.S. Department of State*, 347 F.Supp.3d 561 (D. Mt. 2018). The District Court, however, expressly declined to impose a requirement that all federal or Department of Interior mining approvals be included in the cumulative impacts analysis.

Analysis of Mercury Emissions

On the third issue before the court in *Utah Physicians*, the court held that BLM had taken a sufficiently hard look at the impacts associated with mercury emissions from the combustion of coal produced at the mine. In the EIS, BLM quantified the mercury emissions, recognized the impacts to fish, wildlife, and human health from these mercury emissions, and explained why a more detailed mercury analysis was not performed. Plaintiffs argued that BLM failed to adequately analyze the effects of mercury from combustion of the mine's coal, including the effects of mercury deposition on fish near the Intermountain Power Plant (IPP). The existing mine provided about 6 to 18 percent of the coal combusted at IPP on an annual basis, but BLM stated that it was not known with any certainty where the coal mined from the new tract would be shipped and combusted. The court noted that there was no precedent requiring a more detailed analysis by BLM of impacts to the environment from mercury, given the uncertainty as to the location, method and timing of combustion by end-users of the mine's coal. The court concluded that the analysis in the EIS did not violate the requirements of NEPA to take a "hard look" at the impact of mercury emissions.

Conclusion and Implications

Based on BLM's failure to take a sufficiently hard look at the indirect effects and cumulative impacts of GHGs associated with the expansion of the Coal Hollow Mine, the U.S. District Court remanded the EIS to the Bureau of Land Management for revision, without vacating BLM's approval of the FEIS and Record of Decision. The court noted that an order of *vacatur* would disrupt the activities that have commenced since the lease approval, such that the vacatur would "lead to impermissibly disruptive consequences in the interim." While plaintiffs succeeded on the merits of two out of three claims, based on this decision, Alton Coal Development appears likely to proceed without any shift in the mine expansion as proposed.

The case provides some utility to NEPA practitioners, with its evaluation of the analysis in the BLM EIS of GHGs, climate change, and socioeconomic impacts, as well as the indirect effects of combustion of the mine's coal. The opinion put boundaries on the analysis of GHGs, climate change, and associated socioeconomic effects, finding that an agency is not required to use the Social Cost of Carbon to evaluate GHGs and deferring to the agency in the tools it uses to monetize impacts from GHGs and climate change. The court nevertheless underscored that where an agency rejects the use of certain tools or methodologies, it must provide a reasoned explanation and clearly present its quantitative or qualitative information and analysis on a particular impact. The court also made clear that an agency is not required to look to its, or other agency, actions nationwide in evaluating cumulative impacts associated with GHGs and climate change. With respect to indirect, downstream effects associated with fossil fuel production, such as mercury deposition, the opinion supports the approach that indirect effects should be addressed in an EIS where information on downstream activities is available and reasonably certain, but does not require analysis of scenarios that are uncertain.
(Allison Smith)

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RECENT STATE DECISIONS

MINNESOTA ENTERS INTO THE REGULATION OF GROUNDWATER QUALITY REGULATION OF GROUNDWATER VIA NPDES PERMITTING

In re Reissuance of an NPDES/SDS Permit to United States Steel Corp., 954 N.W.2d 572 (Minn. Feb. 10, 2021).

The State of Minnesota's groundwater has been adjudicated to be a "Class 1 water" to which secondary drinking water standards apply as a matter of law by the Minnesota Supreme Court in *In re Reissuance of an NPDES/SDS Permit to United States Steel Corp*. The Court also held that a person whose holding basin discharges to the groundwater is held subject to federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permitting. The Supreme Court limited its opinion to the issue of the meaning of state groundwater regulations and the authority of the Minnesota Pollution Control Agency to interpret its own rules. However, coming as it does in the aftermath of the Supreme Court's *Maui* decision about the application of NPDES permit requirements to discharges to groundwater, the decision has implications and importance far beyond the taconite tailings basin that generated the controversy.

The *Maui* Decision

In *County of Maui v. Hawaii Wildlife Foundation et al,* 140 S. Ct. 1462, 206 L. Ed. 2d 640 (Apr. 23, 2020) the U. S. Supreme Court issued a landmark holding about the receiving waters that are subject to the NPDES permit requirement of the Clean Water act. The Court held as follows:

> We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

Background

In the Minnesota case reviewed here the facts are that U.S. Steel had for many years separated high grade iron ore from taconite it mined in northern Minnesota. Some 70 percent of the mined material was regularly discharged to a "tailings" basin after the purest ore was extracted. Along with the taconite tailings there were discharges of chemicals. The basin is unlined. Contaminants from the basin would leach to groundwater and also through the sides of the basin to the surrounding lake waters.

Originally, after the federal Clean Water Act went into effect, the company had obtained and still possessed an NPDES permit for its discharges to the basin. It had sought a timely permit renewal in the 1990s, but that renewal did not occur until much more recently. In the interim, the state warned the company of concern over the sulfates seeping to groundwater, and the company has instituted control measures effecting some capture of sulfates. However, sulfate levels have continued to increase in the groundwater.

After notice and hearing, in 2018 the company was issued a new NPDES permit that contains a limitation on sulfate discharges to both groundwater and surrounding waters. The permit requires U.S. Steel to meet a sulfate limit of 250 mg/L in groundwater at the facility's boundary by 2025. It also requires U.S. Steel to reduce sulfate levels in the tailings basin itself to 357 mg/L by 2028. The 250 mg/L sulfate standard applied by the MPCA is set out in secondary drinking water standards promulgated by the U.S. Environmental Protection Agency (EPA), *see*: 40 C.F.R. § 143 (2020), which are incorporated by reference into Minnesota law, *see*: Minn. R. 7050.0220-.0221 (2019).

The Minnesota Supreme Court's Decision

In reaching its decision, the Minnesota Supreme Court noted that state law in Minnesota adopts the Clean Water Act programs for NPDES discharges, as well as a state system (SDS). It also classifies "waters of the State" according to their importance for human consumption. In describing water classifications, however, it does not expressly place groundwater in any classification. This latter fact had led to the Court of Appeals siding with the company in previously ruling that the groundwater contaminated by the tailings basin was *not* Class 1 water. However, on its *de novo* review of the state Court of Appeals, the Supreme Court of Minnesota noted that some sections of the related state law clearly do apply to underground waters. As a result, the Supreme Court found Minnesota state law ambiguous on the issue.

Having pronounced the law ambiguous, the Minnesota Supreme Court went on to rule in favor of the state's pollution control agency as having adopted a reasonable interpretation of the law. The Court of Appeals decision was reversed and the power of the Minnesota agency to apply permit requirements and set limits on concentrations in groundwater was upheld by the Court:

> We conclude that groundwater is a Class 1 water under Minnesota law. Accordingly, we hold that the MPCA correctly exercised its authority by applying the Class 1 secondary drinking water standards to the 2018 Permit. We therefore reverse the decision of the court of appeals on this issue and remand the case to the court of appeals for further proceedings.

Conclusion and Implications

It appears that the State of Minnesota has determined that Class 1 groundwater is a "water of the state" that is subject to discharge permission and standards, just as if it were a surface water. It should be noted that the result goes farther than the *Maui* decision's holding by applying the permit standard to groundwater irrespective of whether the given discharge inevitably and "functionally" is as if to navigable waters. Even if the tailings basin itself may be viewed as (and probably is) a discrete conveyance, the fact that an unlined basin may need a permit even where there are no surface waters immediately nearby is apparent and notable. This issue will probably be the subject of further judicial and legislative attention. The Supreme Court's opinion in this matter is available online at: https://mn.gov/law-library-stat/archive/supct/2021/OPA182094-021021.pdf
(Harvey M. Sheldon)

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