

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

CONTENTS

FEATURE ARTICLE

As the Climate Changes, So Will Natural Resource Damage Claims by Steve Goldberg, Esq., Darrin Gambelin, Esq. and Holly Tokar, Esq., Downey Brand, LLP, California 255

LEGISLATIVE DEVELOPMENTS

Massachusetts Has New Climate Change Legislation Looking to Net Zero Carbon Emissions by 2050 262

CLIMATE CHANGE SCIENCE

Recent Scientific Studies on Climate Change 264

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 267

LAWSUITS FILED OR PENDING

Environmental Groups File Suit Seeking to Stop Crude Pipeline Alleging Drinking Water Contamination Concerns 275

RECENT FEDERAL DECISIONS

Second Circuit Determines Clean Water Act, Section 401, Deadline Cannot Be Modified by Agreement 277
New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission, ___ F.3d ___, Case No. 19-1610 (2nd Cir. Mar. 23, 2021).

Continued on next page

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District Court Denies Preliminary Injunction against Water and Sewer District for Alleged Clean Water Act Violations 278

Cottonwood Environmental Law Center, Montana Rivers, and Gallatin Wildlife Association v. Edwards and Big Sky Water and Sewer District, ___F.Supp.3d___, Case No. 2:20-cv-00028-BU-BMM (D. Mt. Mar. 23, 2021).

District Court Rules Environmental Analysis of GHGs Insufficient under NEPA for Mine Expansion Project 280

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).

RECENT STATE DECISIONS

California Court of Appeal Finds Development Reliant on Groundwater Supplies Benefited by Water Supply Project Survives CEQA Challenge 283

Landwatch Monterey County v. County of Monterey, *Unpub.*, Case No. H046932 (6th Dist. Mar. 29, 2021).

Minnesota Supreme Court Finds States Evaluating Synthetic Minor Source Clean Air Act Permits Have No Duty to Investigate for Sham Permitting Motives 284

In re Matter of Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc., 955 N.W.2d 258 (Sup. Ct. Minn. Feb. 24, 2021).

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FEATURE ARTICLE

AS THE CLIMATE CHANGES,
SO WILL NATURAL RESOURCE DAMAGE CLAIMS

By Steve Goldberg, Darrin Gambelin, and Holly Tokar

The effects of climate change present new challenges to the government and private sector. This will mean new policies and regulations, particularly at the federal level. Rejoining the Paris Climate Accord, renewed emphasis on evaluating greenhouse gas (GHG) emission impacts and potential changes to the Securities and Exchange Commission Environmental, Social and Governance reporting for public companies are just a few examples. There are also well-established existing regulatory frameworks and related policies that are, and will increasingly need to adapt to the effects of climate change. This article examines the impacts of climate change on Natural Resource Damages (NRD)—an established regulatory program at the intersection of climate change science, economics, planning and their application to the legal remedies provided by the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)—to recover damages for injuries to natural resources from oil spills and releases of hazardous substances.

CERCLA NRD claims have increased in recent years and creative remediation projects are looking at restoration of injured resources as a remedial component at federal Superfund sites. Examples of CERCLA sites with NRD include sediment contamination in a river or bay or discharges from inactive mining sites. Evaluating the effects of climate change at CERCLA sites is complicated by multiple factors. Injuries to resources from hazardous substance releases at these sites typically occur over extended periods of time with changes in the climate impacting baseline conditions—increasing the difficulty of differentiating

the injury to resources that were caused by climate change from the effects of exposure and injury caused by the release of hazardous substances. Contrast this with the effects of an oil spill, covered by OPA, which are typically sudden events of shorter duration with impacts to resources from climate change, as well as the spill, more easily measurable. Accordingly, while this article focuses on the effects of climate change as applied to NRD for oil spills, similar NRD concepts apply to NRD claims under CERCLA.

First, we provide an overview of climate change impacts and the key legal and regulatory concepts of NRD that invoke climate change considerations. Next we provide examples from recent NRD settlements that considered the effects of climate change in the selection and planning for restoration projects—a key component of NRD discussed further below. Last, we consider how climate change factors will be a more substantial factor in future NRD settlements and the selection, planning and implementation of restoration projects.

Climate Change Background

There is scientific consensus that “human interference with the climate system is occurring, and climate change poses risks for human and natural systems.” Field et al., *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*, Intergovernmental Panel on Climate Change, 3 (2014) https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf. Climate change includes changes to the climate system that are evolving over a longer period of time (e.g., sea level rise or gradual increases in ocean temperature),

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as well as an increase in the frequency of extreme weather events. These climate change effects complicate NRD claims arising from oil spills because they may impact the same resources. For example, coastal wetlands ecosystems and marine life may be impacted by an oil spill, but they may also be impacted by climate change. Indeed scientists predict with very high confidence that, throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion due to sea level rise. Further, sea level rise, ocean warming, and ocean acidification impact marine ecosystems. For example, warmer ocean temperatures can raise the metabolism of species exposed to the higher temperatures, and in some cases can be fatal. It is these climate changes and impacts—including the increased frequency and intensity of extreme weather events—that may harm the same wetland ecosystems and marine life injured by an oil spill. This complicates both the injury assessment and restoration planning components of NRD claims.

Key Legal and Regulatory Concepts of NRD

The goal of NRD is to make the public whole for injuries to natural resources and services resulting from an incident involving a discharge of oil (OPA 1002(a)) or from injuries caused by the releases of hazardous substances. (CERCLA 107(a)(4)(c)). The NRD process involves two important steps: 1) determination of the nature, degree, and extent of any injury to natural resources and services, the NRD Assessment or NRDA; and 2) development of a suite of cost-effective projects to restore any lost resources or services to baseline, *i.e.* pre-incident conditions, and to compensate for interim losses to the damaged resources. 15 C.F.R. § 990.50-990.53; *see also*, Injury Assessment, Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, prepared for the Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration (hereinafter *Injury Assessment*), p. 1-4, available at: <https://darrp.noaa.gov/sites/default/files/Injury%20assessment.pdf>; Restoration Planning, Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, prepared for the Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration (hereinafter *Restoration Planning*),

p. 1-5, available at: <https://darrp.noaa.gov/sites/default/files/Restoration%20Planning.pdf>

Various environmental statutes designate federal and state agency trustees to bring NRD claims on behalf of the public. Federal agency trustees typically include the National Oceanic and Atmospheric Administration (NOAA) and the Department of the Interior U.S. Fish & Wildlife Service. In California, the lead agency is generally the California Department of Fish & Wildlife, however other agencies also serve in trustee roles depending on the jurisdiction for the state resources affected by the incident. Examples include the California Department of Parks and Recreation and the State Lands Commission.

Causal Link between the Incident Injuries to Natural Resources

The effects of climate change on the affected resources should be a critical factor in assessing whether, and to what extent, a resource has been injured. A successful NRD claim requires a causal link between the injury to a natural resource and the release of oil or hazardous substances. *See, e.g., Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 777 (D.C. Cir. 1997). What is considered injury to a natural resource? Injury is “an observable or measurable adverse change in a natural resource or impairment of a natural resource service.” 15 C.F.R. § 990.30. Natural resource damages assessment then involves “collecting and analyzing information to evaluate the nature and extent of injuries *resulting from* an incident.” *Id.* (emphasis added). Implicit in that analysis is that the adverse change in a natural resource or impairment of services is not attributable to another cause—for example, a climate change related event. 15 C.F.R. § 990.51. Injuries attributable to natural causes are not compensable under NRD.

Determination of the causal link between the release and injury to resources may be complicated by climate change and related extreme weather events. Climate related changes, including changes in temperature, precipitation, and sea level rise are causing rapid changes to habitat. Often there are data gaps on the abundance of a species or the health of a habitat resulting from these changes. Thus when an incident occurs, it is difficult to determine whether degradation to habitat or species results from the incident or climate change.

Injuries Are Measured against the Baseline

Even where a causal link is found between resource injury and the incident, damages are only found and measured against the injury to resources above “baseline.” Baseline is the condition of natural resources and services that would have existed if the incident had not occurred. 15 C.F.R. §§ 990.30, 990.52. NRDA allows compensation for total injury in relation to baseline. This is a function of the magnitude of the injury and the time it takes for the resource to recover to baseline.

Climate change events also make it more difficult to determine the extent and duration of the injury. First, the magnitude of the injury may be difficult to determine when the baseline may have recently shifted due to climate change. For example, determination of the baseline for marine mammals injured in the Refugio Beach Oil spill was effected by an anomalous stranding year for California sea lion pups, tied to reduced prey availability and climate events.

Second, if the baseline is not well known or is changing, it is difficult to determine when the resource has recovered to baseline. In addition, if the resource was in a vulnerable condition such that the incident was the tipping point, the resource may not recover or recovery to baseline may be extended for a longer period.

Restoration Planning and Climate Change

Following the determination of injury, the Trustees must develop a suite of restoration projects to restore the injured resources and services. 15 C.F.R. § 990.53(a). The Trustees develop a range of feasible alternative projects and evaluate each for several key factors. 15 C.F.R. § 990.54. These projects may be primary, which return the resource to its pre-incident condition, and compensatory, which compensate for interim losses pending recovery to baseline. 15 C.F.R. § 990.53

In comparing alternative restoration projects, the trustees evaluate several key factors in accordance with NRD regulations. Factors relevant to climate change, in particular, include (i) the cost to carry out the projects, (ii) the extent to which each alternative is expected to return the injured natural resources and services to baseline and compensate for interim loss, (iii) the likelihood of success of each alternative, and (iv) the nexus between the project and the injured

resource, including location. See 15 C.F.R. § 990.54.

Climate change can affect the selection and potential success of restoration projects. For example, following an oil spill, sea level rise and coastal erosion may make shoreline habitat restoration projects a less preferred alternative. Considering the key factors, such as likelihood of success, trustees may determine that there are greater long-term benefits in engaging in more inland projects.

NEPA and CEQA

Federal and state law and guidance directing trustee actions in implementing restoration plans for NRD also require consideration of climate. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* and Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 C.F.R. Chapter V, apply to restoration actions by federal trustees, except where a categorical exclusion or other exception to NEPA applies. 15 C.F.R. § 990.23 (a). As trustees develop restoration plans, they must also prepare an Environmental Assessment or Environmental Impact Statement. 15 C.F.R. § 990.23 (c). Federal courts have held that NEPA requires federal actors to disclose and consider climate impacts in their environmental reviews. See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008). In 2016, the CEQ issued guidance to help federal agencies consider greenhouse gas emissions and climate change in such reviews. 81 Fed. Reg. 51866 (Aug. 5, 2016). Although this guidance was withdrawn in 2017, on January 20, 2021, President Biden issued Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” which in part directed CEQ to review, revise, and update its 2016 Greenhouse Gas Guidance. 86 Fed. Reg. 7037 (Jan. 25, 2021). It can be expected that in the near future all restoration alternatives will be evaluated for climate impacts through the environmental review process.

Similarly, California agencies evaluating restoration projects must consider both the impact of the project on climate change and the impacts of climate change on the project under the California Environmental Quality Act (CEQA). 14 Ca. Code Regs. § 15064.4. The analysis must reasonably reflect evolving scientific knowledge of climate change.

The Trustees publish the results of their assessment of the injuries to natural resources as well as the selection of restoration projects for each incident, in a Damage Assessment and Restoration Plan (DARP) which typically includes an assessment of the selected restoration projects under NEPA and, for California incidents, under CEQA.

Climate Change and NRD Claims

The regulations governing the NRD process do not mention climate change. When OPA was passed, the focus was on preventing and responding to oil spills. At the time, climate change was perhaps not an obvious consideration. See, *Summary of the Oil Pollution Act*, United States Environmental Protection Agency (last updated July 28, 2020) <https://www.epa.gov/laws-regulations/summary-oil-pollution-act>. But, as discussed above, the effects of climate change on NRD can affect both the assessment of injury to resources as well as restoration projects.

There is little evidence to date that climate change has played a significant role in injury assessment. Most DARP's will include a discussion of baseline as required by OPA and the NRD regulations, but little to no discussion of the effects of climate change on the injured resources. Although there is scant evidence in published DARPs of the effects of climate change, it is possible that this has been, (and if not, will be), a topic discussed by technical experts for the Trustees and the responsible parties in evaluating the extent of injury.

In contrast to the lack of evidence of climate change effects on the injury assessment component of NRD, it appears climate change is being considered more frequently when evaluating restoration projects. We expect this will only become more common as climate change studies, data and policies become more prevalent.

Recent Restoration Plans Considering Climate Change

Several NRD claims and related DARPs from the last few years illustrate the increasing consideration of the effects of climate change on restoration planning and implementation.

Below we discuss three oil spill incidents, including two in California, and one chemical release site in Michigan that involved NRD claims and illustrate

how climate changes are being considered in the assessment of resource injuries (very few with minimal consideration) and in the selection and implementation of restoration projects (still few but increasing).

Deepwater Horizon

The Deepwater Horizon oil spill resulted in a NRD settlement of \$8.8 billion, the largest settlement of an NRD claim under OPA or CERCLA. Deepwater Horizon also has influenced other NRD claims in the past decade. Restoration projects have and will continue to be implemented over many years. The impact of climate change on restoration projects remains to be considered and studied, but still merits discussion here. The scientific studies and the magnitude of the settlement and restoration project efforts are precedents being considered by trustees and responsible parties at all other NRD related incidents. As the restoration projects are designed and implemented, the effects of climate change and extreme weather events on such efforts must be watched.

On April 20, 2010, the *Deepwater Horizon* mobile drilling unit exploded, caught fire, and sank in the Gulf of Mexico. This incident resulted in a massive oil spill, as 3.19 million barrels of oil were released into the Gulf. During the injury assessment and restoration planning stages, the Trustees determined that injuries caused by the spill were so widespread that the entire Northern Gulf of Mexico ecosystem was injured.

The Trustees identified five overarching goals to address the suite of injuries that occurred at both local and regional scales: restore and conserve habitat, restore water quality, replenish and protect living coastal and marine resources, provide and enhance recreational opportunities, provide for monitoring adaptive management, and administrative oversight to support restoration implementation. Several public comments raised the issue of climate change. For example, one comment urged implementation of both habitat restoration plans with a shorter lifespan and long-term adaptation plans. In their response, the Trustees acknowledged "the systemic threats of climate change" and said they would consider key ecological factors such as connectivity, size, and distance between projects, as well as factors such as resiliency and sustainability in project selection, design, and implementation. The Trustees further explained that restoration planning, project development, and

an “appropriate level of tiered NEPA analysis” would “consider climate change and resiliency planning.” *Deepwater Horizon Oil Spill: Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement*, <https://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan>.

Kalamazoo River (Michigan)

From the late 1950s to the 1970s, releases of polychlorinated biphenyls from Kalamazoo-area paper mills caused the contamination of sediments, flood-plain soils, water, and living organisms in and near Portage Creek and the Kalamazoo River in Michigan. During the restoration planning process, the Trustees considered which projects would provide maximal benefits overtime. The Trustees gave preference to projects that incorporated resiliency to the impacts of climate change, and therefore provided longer-term benefits.

In the Environmental Impact Statement (EIS) for Restoration Resulting from the Kalamazoo River NRDA, there was a particular focus on climate change. The EIS examined how climate change might interact with proposed restoration projects. It notes increases in temperatures, shifts in timing and intensity of precipitation events, increases in the duration of the growing season, and decreases in the amount and duration of snow cover and lake ice formation. The analysis further discusses greenhouse gas emissions, and the uncertainty in underlying relationships and feedback loops. The Trustees, while identifying the various aspects of climate change, also recognized the high degree of uncertainty regarding the effects of climate change on restoration. The Trustees considered climate change adaptation principles such as prioritizing habitat connectivity, reducing existing stressors, protecting key ecosystem features, and maintaining diversity to lessen the compounding effects of climate change. See *Final Restoration Plan and Programmatic Environmental Impact Statement for Restoration Resulting from the Kalamazoo River Natural Resource Damage Assessment*, August 2016, <https://www.fws.gov/midwest/es/ec/nrda/KalamazooRiver/pdf/RestorationPlanPEISKalRiverAugust2016Final.pdf>.

Castro Cove (Richmond, California)

From 1902 to 1987, Chevron USA Inc. (Chevron) owned and operated a petroleum refinery in Rich-

mond, California that discharged hazardous substances in Castro Cove, a portion of San Pablo Bay in northern California. A Final DARP/EA was released in 2010. After estimating the total resource injury caused by contamination in Castro Cove, the Trustees analyzed a suite of alternative restoration projects. In making their project selections, the Trustees considered the future effects of global sea level rise on coastal resources in the San Francisco Bay, recognizing that climate change could affect the long-term success of restoration projects.

The Trustees devoted a subsection of the Final DARP/EA to uncertainties behind global sea level rise and how this affected project alternatives. The Trustees acknowledged the 2007 Intergovernmental Panel on Climate Change (IPCC) report that projected estimated global average sea level rise between 0.6 and 2 feet, and the Pacific Institute report projecting a 1.4 meter average sea level rise along the California Coast, by the end of the 21st century. The Trustees considered the effects of sea level rise on coastal flooding, wetland habitats, salinity of estuaries and freshwater aquifers, tidal ranges in rivers and bays, transport of sediment and nutrients, and contamination patterns in coastal areas. Ultimately, the Trustees selected the preferred restoration projects with an eye to these climate uncertainties. *Castro Cove/Chevron Richmond Refinery Damage Assessment and Restoration Plan/Environmental Assessment*, June 2010, <https://repository.library.noaa.gov/view/noaa/3874>.

Refugio (Santa Barbara, California)

In May 2015, an underground oil pipeline running parallel to Highway 101 accidentally released approximately 2,900 barrels of crude near Refugio State Beach in Santa Barbara County, California. About 20 percent of the released oil reached the Pacific Ocean and adjoining shorelines. Eighty percent of the released oil remained in the upland area between the oil pipeline and the ocean, where it evaporated, biodegraded in the soil, or was recovered by responders. Although only a draft DARP/EA has been released, there is some consideration of climate change in both the injury assessment and the selection of restoration projects.

In the 2020 Draft DARP/EA, the Trustees noted that the injury analysis may be complicated by the 2015 El Nino event and the presence of a warm water

mass, known as “the blob.” These events took place within the same time frame as the oil spill, and had their own distinct impact on marine life and resource health. The blob, as an atmospheric anomaly, impacted ocean productivity and food availability for marine species, while El Nino conditions were associated with warmer sea surface temperatures.

In the restoration planning section of the draft DARP/EA, the Trustees identified “[m]ajor anthropogenic stressors” that effect the shoreline environment as a factor when considering shoreline restoration projects. These stressors include sediment deficit, coastal armoring, beach nourishment, beach grooming, invasive species, and changing environmental conditions. The Trustees noted that future climate scenarios predict rising sea levels, which results in increased overall coastal erosion, as well as ocean acidification and large storms. The shoreline restoration projects proposed by the Trustees aim to reverse and portion of the negative effects of these stressors, and have long-term beneficial effects. <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=178526&inline>.

The Future of Climate Change in NRD

Consideration of climate change is likely to become more prominent in future NRD analyses and settlements. Determining causation of resource injury—as a result of the release of oil or hazardous chemicals or linked to climate change—will become more difficult in areas impacted by climate change. For example, it may be difficult to determine whether and to what extent coastal habitat is damaged by an oil release versus a recent storm event, such as a hurricane. Determining when resources have recovered also may become more difficult where climate change has impacted habitat. Areas subject to prolonged drought may no longer support habitat requiring frequent precipitation, so this habitat may not recover to pre-incident conditions. Developments in climate change science and development of more comprehen-

sive baseline data should assist with the determination of causation and when a resource has recovered.

More flexibility on the selection of restoration projects also will be necessary for many incidents. Typically, Trustees will select restoration projects closely linked to the type of resources damaged and in close physical proximity to the incident. However, another factor that must be considered in the selection of projects, likelihood of success, may force Trustees to consider other projects. Where climate change has impacted habitat such that a damaged resource or species is no longer viable in the area of incident, Trustees must either consider projects that restore habitat or species other than those damaged by the incident, or projects located outside the area of the incident.

Conclusion and Implications

As studies about climate change become more widespread, the existing regulatory framework for NRD claims will need to adapt. Currently, the regulations governing NRD claims do not mention climate change, but this also may change. Nevertheless, even within the existing regulatory framework, we expect technical experts engaged in the NRDA process will focus more on climate change evaluating the extent of injury to resources. Climate change has already been a factor in the selection and implementation of restoration projects, particularly within the last decade. We can expect climate changes and the effects of extreme weather events will get more attention in future NRD assessments, settlements, and the selection, planning and implementation of restoration projects, particularly with additional study on the effectiveness and resiliency of restoration projects in the fact of climate change and extreme weather events.

**Editor’s Note:* Steve Goldberg and Darrin Gambelin served as counsel for Plains Pipeline, L.P. during the Refugio NRD. The views expressed in this article are those of the authors and do not reflect the views of Plains Pipeline, L.P.

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LEGISLATIVE DEVELOPMENTS

MASSACHUSETTS HAS NEW CLIMATE CHANGE LEGISLATION LOOKING TO NET ZERO CARBON EMISSIONS BY 2050

Massachusetts Governor Charlie Baker signed sweeping climate change legislation into law in April 2021 that sets the course for net zero carbon emissions in the Commonwealth by 2050, while boosting solar technology and offshore wind farms, and codifying protections for low-income and minority residents living in so-called “Environmental Justice” communities. Enactment of Senate Bill 9—dubbed the “Next-Generation Roadmap for Massachusetts Climate Policy”—comes after months of negotiations between Baker, a Republican, and the Democratically controlled legislature that saw two vetoes by the governor and a flurry of amendments to bring environmental and business stakeholders into the fold. (National Law Review: <https://www.natlawreview.com/article/third-time-s-charm-massachusetts-climate-legislation-finally-set-to-become-law>).

Senate Bill 9

The new law mandates that Massachusetts reach zero net greenhouse gas emissions by 2050, with interim goals of a 50-percent reduction in emissions by 2030 and 75-percent reduction by 2040. The law also requires Bay State regulators to set new statewide emissions limits every five years, in addition to limits on emissions in each of six key sectors: electric power, transportation, commercial, industrial and residential energy (heating and cooling), industrial manufacturing, and natural gas distribution.

The new law will have a particularly large impact on electric utilities in the Commonwealth. Investor-owned utilities will be required to increase the share of their power generated by renewable sources by at least three percent per year beginning in 2025. Meanwhile, Municipal Light Plants—small publicly owned utilities that serve specific cities or towns—will be required to purchase 50 percent of their power from “non-carbon emitting” sources by 2030, a number that will escalate to 100 percent by the year 2050.

Renewable Energy

Renewable energy production will also be getting a boost with requirements that the state increase wind power by 2,400 megawatts by 2050 and new incentives for hydrogen energy, fuel cell technology and geothermal heating and cooling. In addition, the new law seeks to accelerate adoption of solar technologies in underserved communities across the Commonwealth by creating a grant program—amounting to \$500,000 annually—to subsidize the purchase and installation of solar panels by nonprofit organizations serving low-income communities. The Massachusetts Department of Energy will also be required under the new law to prioritize rooftop solar installations for low-income households through the state’s already-existing solar incentive program.

‘Environmental Justice’

The new solar initiatives are just two of the many ways in which the new law shines a light on environmental justice issues in the Commonwealth. While environmental justice policy had up to this point been dictated by a series of executive orders from the governor’s office, the new law for the first time codifies clear criteria for what constitutes an “Environmental Justice” community—based on race, income and English-language proficiency—and boosts environmental protections and resources in those communities. Environmental impact reports will now take cumulative environmental impacts on lower-income Environmental Justice communities into consideration, in an effort to avoiding foisting an “unfair or inequitable environmental burden” on vulnerable communities that are too often already dealing with pollution and other environmental issues. (Section 58). The law also orders the creation of government-funded workforce development and education programs for minority- and women-owned small businesses and individuals living in Environmental Justice communities. (Section 13).

A Legacy of the 2008 Global Warming Solutions Act

The new law is an overhaul of the landmark Global Warming Solutions Act (GWSA), signed into law by Baker's Democratic predecessor, Governor Deval Patrick, in 2008. The GWSA required a 25 percent reduction in greenhouse gas emissions from all sectors below the 1990 baseline emission level by the year 2020. (Full text: <https://malegislature.gov/Laws/SessionLaws/Acts/2008/Chapter298>). A 2018 progress report issued by the Commonwealth estimated a 22.4 percent drop in the first ten years after the GWSA's passage, with expectations that Massachusetts would hit its 2020 target. (Full text: <https://www.mass.gov/doc/gwsa-10-year-progress-report/download>).

Despite the overall success of the GWSA, early implementation of the bill was marked by nearly a decade of sharp disagreements between the Commonwealth and environmental groups over the need for more-stringent regulations to ratchet down emissions. (Full text: <https://www.wgbh.org/news/2017/07/13/politics-government/law-and-effect-global-warming-solutions-act-2008>). Those disagreements culminated in a 2016 decision by the Massachusetts Supreme

Judicial Court, in which the court concluded that the GWSA unambiguously required the Massachusetts Department of Environmental Protection to promulgate limits on greenhouse gas emissions that would tighten as time progressed. *Kain v. Dept. of Environmental Protection*, 474 Mass. 278 (2016): <http://mass-cases.com/cases/sjc/474/474mass278.html>.

Conclusion and Implications

As the new law takes hold in the coming years, all eyes will be on Massachusetts regulators as they write and implement the regulations that will push the Commonwealth to achieve its ambitious climate goals.

Early reaction to the Massachusetts climate law has been positive on both sides of the aisle, with the support of everyone from local environmental nonprofits to the Boston Chamber of Commerce. The bipartisan bill marks an important step forward for Massachusetts on its path to net zero emissions and could serve as a blueprint for states across the nation. The full text of the bill is available online at: <https://malegislature.gov/Bills/192/S9/RollCall>. (Travis Kaya)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Effects of Climate Change on Modern Agriculture

Robust agricultural productivity is a fundamental prerequisite for sustainable and equitable global development. Because agriculture relies on favorable weather and climate conditions, scientists have modeled potential effects of climate change on future agricultural productivity. However, little to no research has been done to quantify the productivity losses of modern agriculture from the historical influence of anthropogenic climate change. To help understand how agriculture might change in the future, it is pertinent to understand how anthropogenic climate change has affected current, modern agricultural productivity.

A team of scientists from Cornell University, University of Maryland – College Park, and Stanford University developed a model to investigate the effects of anthropogenic climate change on agricultural productivity from 1961 to present. They define a metric of global agricultural total factor productivity (TFP), which represents the amount of agricultural output (crops and livestock) per unit of resource input (labor, land, capital, and materials). By estimating TFP at a country-level over time and comparing these trends to relative warming, the team is able to extract a number of statistically significant conclusions. First, there is a measured and significant relationship between TFP and weather: warmer growing seasons resulted in slower TFP growth. Second, the total aggregate impact of the climate warming from 1961 to present has resulted in an effective seven-year loss of productivity growth. Meaning, without anthropogenic climate change, the global agricultural productivity in 2020 would have been realized in 2013. The final key conclusion is that anthropogenic climate change is not affecting agricultural productivity equitably; in fact, warmer regions such as Africa, Latin America, and the Caribbean experienced a more significant cumulative loss in TFP than cooler regions such as North America, Europe, and Central Asia. There are a few shortcomings of this study that should be noted. For example, the authors do not normalize for the

effects of increased atmospheric CO₂ on plant productivity.

A key takeaway of this study is the value in understanding the to-date effects of anthropogenic climate change; while often the discussion and research around anthropogenic climate change are forward-looking, it can be similarly insightful to recognize that the global climate has already warmed more than 1°C above pre-industrial levels. Recognizing the impacts of anthropogenic climate change on our present-day productivity and welfare can illuminate the urgency for action to prevent more severe consequences in the future.

See: Ortiz-Bobea, A., et al. Anthropogenic climate change has slowed global agricultural productivity growth. *Nature Climate Change*, 2021; DOI:10.1038/s41558-021-01000-1

Consumption of Microplastics by Zooplankton Exacerbates Climate-Change Driven Ocean Deoxygenation

Climate change has led to decreased oxygen levels in the world's oceans, mostly driven by warming temperatures which decrease oxygen solubility. Deoxygenation can affect nutrient availability and significantly disrupt the ecosystem. Numerous other anthropogenic drivers also contribute to deoxygenation, such as agricultural runoff and microplastics pollution. The consequences of agricultural runoff and eutrophication of bodies of water have long been studied, but in recent years, the scientific community has been turning its attention to the effects of ocean microplastic pollution on zooplankton. Microplastics are defined by the National Oceanic and Atmospheric Administration (NOAA) as fragments smaller than 5 millimeters in diameter. Microplastics can be found in some consumer products but are also generated when larger pieces of plastic degrade.

A recent study by Kvale et al. of GEOMAR Helmholtz Centre for Ocean Research in Germany demonstrated that zooplankton consumption of microplastic can decrease water column oxygen by as much as 10 percent. When zooplankton consume microplastic in-

stead of organic matter, it leads to shifts in the ocean's biogeochemistry, particularly in biological processes that regulate the dissolved oxygen content of the ocean. In ecosystems with abundant nutrients at the surface, the reduction in nutrient consumption by zooplankton leads to higher volumes of sinking detritus. The subsequent re-mineralization of this detritus consumes oxygen at a higher rate than is typical in an ecosystem. In ecosystems without abundant nutrients at the surface, the reduction in zooplankton nutrient consumption does not lead to additional detritus, the nutrients continue to cycle in the surface levels of the ocean, and no significant change in oxygen concentration is seen. Kvale et al. ran four different simulations: no ingestion of microplastic by zooplankton, plus three scenarios with microplastic uptake: low, moderate, and high microplastic concentrations and uptake rates. Although counterintuitive, the low concentration scenario leads to higher selectivity and efficiency in microplastic consumption.

According to the simulation, the Southern Ocean in the low concentration scenario has the highest oxygen loss (15 moles of O₂ per m₂ in 2020) as it is not a surface nutrient-limited ecosystem. A similar trend is observed for the North Pacific Ocean. On a global scale, the total oxygen loss compared to a 1960 historical baseline is between 0.2 percent and 0.5 percent and may increase to 0.7 percent by 2100. Kvale et al. estimate that climate change driven global oxygen loss is approximately 1 percent compared to 1960. The key takeaway of this study is the relative magnitude of the zooplankton-microplastic mechanism compared to climate change impacts. This study illustrates the importance of accounting for all anthropogenic related mechanisms in ocean models in order to avoid underestimating future oxygen trends.

See: Kvale, K., Prowe, A.E.F., Chien, C.T. et al. Zooplankton grazing of microplastic can accelerate global loss of ocean oxygen. *Nat Commun* 12, 2358 (2021). <https://doi.org/10.1038/s41467-021-22554-w>

See: <https://oceanservice.noaa.gov/facts/microplastics.html>

A Global Analysis of Subsidence, Relative Sea-Level Change and Coastal Flood Exposure

The study of global sea level rise (SLR) is largely important because of its global economic and social implications on coastal communities and beyond. However, the vast majority of studies focus

on climate-induced SLR; that is, the rise in mean sea level that occurs as a result of warming global temperatures caused by increased anthropogenic greenhouse gas emissions. Less common is the study of geologic sources of relative sea level change such as the glacial-isostatic adjustment (GIA, defined as the movement of land as a result of previous ice-age burdens, NOAA), plate tectonics, and subsidence (the sinking of ground as a result of underground material movement, NOAA). The focus of research on geologic sources has been analyzing how GIA has impacted local relative sea level change, but a global approach that incorporates subsidence is largely missing from the greater conversation.

A study published in *Nature Climate Change* sought to analyze the importance of subsidence on global relative SLR and its subsequent impact on coastal flood risk. To do so, Nicholls et al. considered the impacts of climate-induced SLR, GIA, natural subsidence (the compaction of young sediments in deltas) and human-induced subsidence on deltas and alluvial plains (the result of withdrawal of underground fluids like water, gas, and oil) at both the delta and sub-delta scale. Local relative SLR was scaled globally by using either the length of total global coastline (length-weighted SLR) or the total coastal population (population-weighted SLR).

The researchers found that while the length-weighted SLR did not show subsidence as a particularly important contributor to global relative SLR, the population-weighted SLR found subsidence accounted for 51-70 percent of total global relative SLR. To the researchers, this was an important yet logical finding: typically, a higher population density will require more human activity that induces subsidence, like ground water withdrawal. The results also extend to coastal flood risk: using coastal flood plain population as the metric for exposure, Nicholls et al. found that the exposed population increases by 25-30 million people by 2050, assuming similar trends extend through this period.

The largest takeaway from the study is a newfound understanding that human-induced subsidence has a much larger impact on relative sea level change than was previously estimated, and it results in a larger portion of the population becoming exposed to coastal flood risks. This knowledge can encourage the consideration of reducing coastal city subsidence as a valuable tactic alongside greenhouse gas emissions

mitigation and climate change adaptation. Including subsidence in the global analysis of relative SLR can further bolster these findings to find more innovative solutions to the global threat of rising sea levels.

See: Nicholls, R.J., Lincke, D., Hinkel, J. et al. A global analysis of subsidence, relative sea-level change and coastal flood exposure. *Nat. Clim. Chang.* 11, 338–342 (2021). <https://doi.org/10.1038/s41558-021-00993-z>

See also: <https://oceanservice.noaa.gov/facts/subsidence.html>, <https://oceanservice.noaa.gov/facts/glacial-adjustment.html>.

Carbon Storage Dynamics in the Tropical Andean Forest

Forests contain a critical diversity of biological life and are important contributors to the macro-level ecosystem of our planet. Forests can act as carbon sinks, storing carbon dioxide in vegetation and soil rather than releasing this greenhouse gas into the atmosphere. As the biological diversity of each forest varies, so does the dynamic of carbon flux between a forest's vegetative sinks and the atmosphere. The variation in carbon flux can be attributed to factors such as vegetation type, elevation, and temperature. These differences can cause difficulty in developing estimates of tropical forest carbon storage, which are largely based on lowland ecosystems that have less variation in vegetation and terrain than higher-elevation tropics. The forest coverage on the Andes mountains in South America is one such region with high variation in ecosystems, elevation, and biodiversity, and information on its carbon stock is lacking.

A team of researchers from the Universidad Nacional de Colombia Sede Medellín analyzed the dynamics of above ground biomass and associated stored carbon of the Andean forest. The data was synthesized from 119 forest-monitoring plots across five countries, spanning a range of more than 10,000

feet in elevation across both subtropical and tropical Andes. Using this data for two primary modeling techniques, structural equation modeling and Information Theory natural model-averaging, the researchers identified precipitation, temperature, and size-dependent mortality of trees as the most dominant drivers of above ground carbon dynamics in the Andean forest. Additionally, the results of the research found that the above ground carbon stored in the Andean forests are a globally significant carbon sink with a net uptake in carbon that is stronger than lower-elevation forest sinks.

The results of this research come at a time when lowland forests are trending toward reaching carbon saturation, as exemplified in recent research showing that the Amazon forest was a net emitter of carbon dioxide in recent years from 2010 to 2017 (Covey, et al., 2021). Understanding the variation in capacity for carbon storage is all the more urgent in light of this, and the increasing capacity for carbon uptake in the Andean forest will be important to counterbalance the apparent declining capacity of other sinks.

See: Duque, A., Peña, M.A., Cuesta, F. et al. Mature Andean forests as globally important carbon sinks and future carbon refuges. *Nat Commun* 12, 2138 (2021). <https://doi.org/10.1038/s41467-021-22459-8>

See also: Covey K, Soper F, Pangala S, Bernardino A, Pagliaro Z, Basso L, Cassol H, Fearnside P, Navarrete D, Novoa S, Sawakuchi H, Lovejoy T, Marenco J, Peres CA, Baillie J, Bernasconi P, Camargo J, Freitas C, Hoffman B, Nardoto GB, Nobre I, Mayorga J, Mesquita R, Pavan S, Pinto F, Rocha F, de Assis Mello R, Thuault A, Bahl AA and Elmore A (2021) *Carbon and Beyond: The Biogeochemistry of Climate in a Rapidly Changing Amazon*. *Front. For. Glob. Change* 4:618401. doi: 10.3389/ffgc.2021.618401 (Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

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

- March 25, 2021 - Amid concerns raised by and appeals filed by non-governmental organizations, members of the community and the company itself, the U.S. Environmental Protection Agency (EPA) has withdrawn its Clean Air Act “plantwide applicability limit” (PAL) permit for the Limetree Bay Terminals and Limetree Bay Refining facility on St. Croix in the U.S. Virgin Islands originally issued by EPA on December 2, 2020. The withdrawal of the PAL permit does not require the facility to discontinue operations. EPA is reconsidering the PAL permit in light of information received during the permitting process and President Biden’s executive orders that federal agencies review environmental actions taken during the previous administration. EPA will undertake a thoughtful, timely, technical and legal review of the regulatory requirements applicable to the facility under the Clean Air Act that will engage a broad range of stakeholders. A Clean Air Act PAL permit like the one issued to Limetree Bay gives a regulated entity some flexibility for how it manages air pollution emissions from modifications at a permitted facility. While the PAL permit was issued on December 2, 2020, it never became effective under EPA regulations due to the timely appeals that were filed with EPA’s Environmental Appeals Board (EAB) by a consortium of environmental and community groups as well as Limetree Bay itself. In their appeals, both sides asked that the permit be sent back to EPA so the Agency could consider their objections to the permit. By withdrawing the permit, EPA can consult with the affected parties, reassess the permit, and review the legal requirements applicable to the facility under the

Clean Air Act outside of EAB’s process. The facility is also subject to a Clean Air Act consent decree.

- April 1, 2021—The EPA and the U.S. Department of Justice have reached a settlement with Othello-based Multistar Industries, Inc. after the agencies found the company violated multiple chemical accident prevention provisions of the Clean Air Act meant to protect the public and first responders from dangerous chemicals. The company’s Othello, Washington facility stores and distributes anhydrous ammonia and other chemicals. Following inspections in 2013 and 2017, EPA alleged Multistar failed to comply with Clean Air Act Section 112(r) requirements that facilities storing more than 10,000 pounds of anhydrous ammonia are properly designed, operated, and maintained to minimize the risk of an accidental release. Multistar also failed to promptly update deficiencies identified in required compliance audits and failed to meet requirements of a 2016 compliance order Multistar entered into with EPA. In addition to requiring Multistar to pay a \$135,000 penalty, the settlement requires the company to pay penalties if it violates the risk management program requirements at its ammonia storage and distribution facility, and provide compliance records and reports to EPA on a semi-annual basis.

- April 7, 2021 - In a settlement with the EPA, Northern Pelagic Group, LLC (NorPel) has agreed to pay a \$220,000 penalty to settle EPA’s claims that the company violated the chemical accident prevention requirements of the federal Clean Air Act and the hazardous chemical reporting requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA) at its New Bedford seafood processing facility. EPA alleged that the company, which maintains a significant amount of ammonia at its New Bedford facility, failed to file a Risk Management Plan (RMP) with EPA. RMPs are required for facilities that manage, maintain or produce hazardous chemicals requiring stringent management to ensure

public safety. EPA also alleged that the company had not adequately designed, operated, or maintained its refrigeration system. Finally, NorPel failed to file its annual EPCRA Tier II chemical inventory report for the 2015 reporting year with the state and local emergency response authorities. As a result, all facilities receiving letters report that they have now completed process hazard reviews. Approximately 75 percent of these were a result of EPA's General Duty Clause initiative, showing that the compliance rate, absent the effort, was low.

- April 8, 2021 - Under a recent settlement with the EPA, ITW Polymers Sealants North America, Inc. (ITW), an adhesive manufacturer, has corrected alleged violations of chemical safety regulations and will pay a settlement penalty of \$345,000 to settle claims that the company violated chemical accident prevention laws at a facility in Rockland, Massachusetts. EPA alleged that ITW, a wholly owned subsidiary of Illinois Tools Works Inc., failed to comply with chemical accident prevention requirements stemming from the federal Clean Air Act. EPA and ITW reached an administrative settlement of EPA's enforcement case. ITW has now corrected nearly all of the alleged violations and will finish the remaining corrective work by the end of May 2021.

- April 8, 2021 - A company that made media for growing plants in South Portland, Maine, has agreed to pay a \$137,294 penalty to settle charges by the EPA that it violated the Clean Air Act's chemical accident prevention rules. In the action, EPA alleged that Quick Plug N.A. failed to follow federal regulations in its use of toluene diisocyanate, an extremely hazardous substance known as TDI that it used in making a soil-like media for growing seeds. EPA further alleged that the company failed to prepare and submit a Risk Management Plan (RMP) due to its use of the chemical.

- April 8, 2021 - The EPA announced settlements with three facilities in Pennsylvania 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 (listed below) allegedly violated the Clean Air Act's prohibition on the 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. Specifically, all three companies were penalized for allegedly selling defeat devices and have certified that they are now in compliance with applicable requirements. The three Pennsylvania companies are:

Pypes Performance Exhaust, LLC of Hatfield, Montgomery County; Hassler Diesel Performance of Bethel, Berks County; and Bell Performance Solutions of Shoemakersville, Berks County. These enforcement actions are part of EPA's National Compliance Initiative for Stopping Aftermarket Defeat Devices for Vehicles and Engines.

- April 8, 2021 - The U.S. Department of Justice, on behalf of the EPA filed a motion to enter the first modification to a 2011 consent decree with HOVENSA L.L.C., the prior owner of the Limetree Bay facility, located on St. Croix in the U.S. Virgin Islands. The 2011 consent decree resolves alleged Clean Air Act (CAA) violations at the refinery when operated by HOVENSA. Together with EPA's enforcement and permitting oversight of the facility, the modification will advance the agency's ongoing efforts to ensure protection of public health and the environment. The modification transfers certain of HOVENSA's obligations under the 2011 consent decree to Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC (Limetree Bay). The modification includes references to updated CAA requirements and updates benzene waste and leak-detection and repair audits and operating requirements, which ensure reduced emissions from refinery equipment and process units. It also makes adjustments to account for Limetree Bay's lower operating capacity as compared to HOVENSA's. The modification also transfers certain obligations of the 2011 consent decree to an environmental response trust. The trust was established during HOVENSA's bankruptcy proceedings to address Resource Conservation and Recovery Act requirements and to distribute the remaining consent decree-required escrow funds, which are now approximately \$4.5 million, to be used for Territorial Supplemental Environmental Projects chosen by the Virgin Islands Department of Natural Resources, and to distribute consent decree-required funds to assist the Virgin Islands Water and Power Authority in air monitoring. EPA continues to work with Limetree Bay, which is a key economic engine for the territory,

and neither the original consent decree nor the modifications prohibit or permit Limetree Bay's operation of the refinery. Rather, they provide requirements that Limetree Bay must comply with during operations. The facility must comply with all federal and territorial environmental regulations as well as its operating permits. Limetree Bay is in a community predominantly made up of people of color and low-income populations who are already disproportionately affected by environmental burdens. These disproportionate burdens present environmental justice concerns, which are a priority for EPA.

- April 15, 2021 - The EPA has reached a settlement with Winfield Solutions LLC, doing business as Omnium, to resolve an alleged violation of the federal Clean Air Act Risk Management Program regulations at the company's fertilizer manufacturing and distribution facility in Dodge City, Kansas. As part of the settlement, the company will pay a \$83,975 civil penalty. According to EPA, Omnium is subject to Risk Management Program regulations because of the location and storage of over 20,000 pounds of aqueous ammonia in concentrations over 20 percent at the facility. EPA has found that many regulated facilities are not adequately managing the risks that they pose or ensuring the safety of their facilities in a way that is sufficient to protect surrounding communities. Approximately 150 catastrophic accidents occur per year at regulated facilities. These accidents result in fatalities, injuries, significant property damage, evacuations, sheltering in place, or environmental damage. Many more accidents with lesser effects also occur, demonstrating a clear risk posed by these facilities.

- April 20, 2021 - Under a recent settlement with the EPA, N&D Transportation Company, Inc. has corrected alleged violations of chemical safety regulations and will pay a settlement penalty of \$314,658 to settle claims that the company violated chemical accident prevention laws at its facility in North Smithfield, Rhode Island. The settlement resolves EPA claims that the company violated chemical accident prevention provisions of the Clean Air Act and chemical inventory reporting requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA). EPA alleged that between 2015 and 2020, the company violated the Clean Air

Act by failing to comply with chemical and process hazard safety requirements under both "general duty clause" (GDC) and "risk management program" (RMP) provisions, and violated EPCRA by failing to properly prepare and submit EPCRA chemical inventory reports for numerous chemicals present at its 100 Industrial Drive facility. "Extremely hazardous substances" (EHS) requiring reporting at the facility included formaldehyde, toluene diisocyanate (TDI), peracetic acid, and sulfuric acid. The N&D facility is situated near a tributary of the Blackstone River as well as many businesses and residences, the closest of which is under a tenth of a mile away. This case is part of an EPA Chemical Accident Risk Reduction National Compliance Initiative. EPA Region 1 coordinated with other federal, state, and local agencies to bring this facility into compliance, including the Occupational Health and Safety Administration (OSHA), Department of Homeland Security (DHS), Rhode Island Department of Environmental Management (RIDEM), the State Fire Marshal's Office, and the North Smithfield Fire Department. EPA works with these and other stakeholders to improve safety and compliance at chemical warehouse facilities.

- April 21, 2021 - EPA announced that Adrenaline Performance LLC of Shelley, Idaho has agreed to pay a \$48,600 Clean Air Act penalty for illegally selling and installing vehicle emissions-control defeat devices to businesses and individuals in southeast Idaho. EPA alleges that from approximately January 1, 2018 to June 17, 2020, the company sold, marketed, or installed at least 671 parts or components that bypass, defeat, or render inoperative the manufacturers' technology and design necessary to reduce vehicle emissions to meet federal Clean Air Act. These hardware systems are operated and monitored by software systems. In the agreement, the company agreed to stop selling and installing all products that violate the CAA. The penalty Adrenaline Performance agreed to pay reflects the company's demonstrated limited ability to pay a higher penalty. The parts were designed and marketed for use on makes and models of diesel pickup truck engines manufactured by Cummins Inc., General Motors Company and Ford Motor Company.

Civil Enforcement Actions and Settlements—

Water Quality

•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 federal Clean Water Act (CWA) 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 October 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 unauthorized 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 U.S. Army Corps of Engineers (Corps), which was not obtained. 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.

•March 22, 2021 - The EPA has ordered Detry Pumping Services, Inc. to adopt environmentally responsible practices for disposing and storing of fats, oils and grease (FOG) and upgrade its facility to address Clean Water Act violations at their Piti-Santa

Rita facility. An EPA inspection in 2017 found that Detry had not prepared an adequate Spill, Prevention, Control, and Countermeasure Plan (SPCC) to prevent discharge of oil to surface waters nor implemented all requirements of the Clean Water Act. Furthermore, the inspection found the facility mixed FOG with powdered-lime mineral to create a slurry and then dumped it on the facility grounds, 300 feet from the Antantano river. In 2019, a second site visit by EPA found no significant improvements. According to the Guam Water Authority, FOG blockages cost Guam residents over \$500,000 annually and cause raw sewage spills. Installing grease traps or grease interceptors and/or collecting used FOG in containers for proper disposal at facilities designed and operated to manage this waste can reduce impacts to the environment.

•March 24, 2021 - The EPA recently reached an agreement with LKQ Northeast, Inc., a national owner and operator of auto salvage yards, to bring its three Massachusetts salvage yards into compliance with the Clean Water Act and pay penalties for alleged violations of the federal storm water requirements at the facilities. Under the agreement, LKQ Northeast paid the following penalties for the alleged storm water noncompliance: \$129,425 for its Webster facility, \$83,000 for its Leominster facility, and \$81,000 for its Southwick facility. All of the facilities had either not identified or incorrectly identified stormwater conveyance paths and/or discharge points (outfalls). Additionally, the facilities had conducted inadequate corrective actions to try and mitigate the monitored pollutants as required. Discharge of stormwater associated with industrial activities, including auto salvaging, is regulated under the Clean Water Act's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Discharges (MSGP) and state water protection laws.

•March 24, 2021 - In a settlement agreement with the United States and the Commonwealth of Pennsylvania, Chesapeake Appalachia LLC (CALLC) has resolved a federal-state lawsuit, alleging Clean Water Act violations disclosed by CALLC at 76 locations in Pennsylvania. In a consent decree, lodged in the U.S. District Court for the Middle District of Pennsylvania, CALLC has agreed to pay a \$1.9 million penalty for violating federal and state clean water laws, and

to restore or mitigate harm to the impacted water resources. Under Clean Water Act Section 404, as well as state permit requirements, permits from the U.S. Army Corps of Engineers (Corps) and the Pennsylvania Department of Environmental Protection (PADEP) are required before dredged or fill material may be discharged into wetlands or waterways. In 2014, CALLC informed EPA, the Army Corps and PADEP that an internal audit had identified potential unauthorized discharges of fill material without applicable permits at multiple sites in the Commonwealth. Following lengthy negotiations and multiple site visits by EPA, PADEP and the Corps, the company ultimately disclosed potential unauthorized discharges at a total of 76 sites across Pennsylvania, impacting about 26 acres of wetlands and 2,326 linear feet of streams. As part of the settlement, CALLC (or its successor) will either seek after-the-fact authorization from the Army Corps and/or PADEP as appropriate to leave the fill in place, or CALLC will restore the impacted wetlands or waterways. In all cases, the impacted water resource either will be restored or the environmental harm will be offset through off-site compensatory mitigation.

- March 30, 2021 - The EPA ordered the City of New York to construct and operate two Combined Sewer Overflow (CSO) retention tanks to control contaminated solids discharges at the Gowanus Canal Superfund site in Brooklyn, New York, which is a key component of the Gowanus Canal cleanup. The EPA's order follows previous orders that EPA issued in 2014 and 2016 to require the city to find a location for and design the two tanks.

The 2013 cleanup plan for the Gowanus Canal Superfund site includes dredging to remove contaminated sediment from the bottom of the canal, which has accumulated because of industrial activity and CSO discharges. More than a dozen contaminants, including polycyclic aromatic hydrocarbons, polychlorinated biphenyls, and heavy metals, including mercury, lead, and copper, are present at high levels in the Gowanus Canal sediments.

- April 5, 2021 - EPA announced a Clean Water Act settlement with Burlington Northern Santa Fe Railway Company (BNSF) in which the company has agreed to pay \$140,000 for alleged Clean Water Act violations associated with a discharge of oil into the

North Platte River near Guernsey, Wyoming. The discharges occurred on February 4, 2019, in Wendorver Canyon, northwest of Guernsey; due to a derailment of three locomotives and five rail cars owned by BNSF. The sources of the diesel and oil were two of the derailed locomotives. BNSF reported the spill to the National Response Center (NRC) and an EPA On-scene Coordinator was dispatched to the spill site. BNSF worked with the State of Wyoming and EPA to clean up the spill.

- April 12, 2021 - EPA announced a proposed Clean Water Act (CWA) settlement with Texas-based Arrow Midstream Holdings, LLC (Arrow Midstream) in which the company has agreed to pay \$106,500 for alleged Clean Water Act violations associated with two releases of produced water from pipelines into tributaries of Lake Sakakawea near Mandaree, North Dakota on the Fort Berthold Indian Reservation. The company has also taken action to reduce the likelihood of similar releases in the future, by removing the pipeline material involved in the releases from other pipelines on the Reservation.

- April 21, 2021 - The US Navy has agreed to make more than \$39 million in repairs at the Newport Naval Station in Rhode Island that will ensure the facility is in compliance with laws regulating the discharge of stormwater into Coddington Cove, an embayment of Narragansett Bay. Under the terms of a recent agreement with the EPA, the Navy will complete stormwater discharge infrastructure improvements by 2030 at the former Derektor Shipyard, settling EPA allegations that the facility was in violation of the Clean Water Act. The repairs include seven specific projects along the bulkhead, a retaining wall along the waterfront. The Naval Station, located in the Rhode Island towns of Newport, Portsmouth, Middletown, and Jamestown, operates under a municipal storm water permit issued by Rhode Island Department of Environmental Management. The facility includes the former Derektor shipyard, a Superfund site. The case stems from an inspection of the facility in August 2016 to evaluate the condition of the stormwater conveyance system that was contributing to erosion and discharge of soils to Coddington Cove. The inspection focused on the presence of sinkholes and the condition of stormwater infrastructure covered under the site's stormwater

permit. The Navy has also identified numerous holes in the bulkhead wall. The Navy is collecting soil and sediment samples in the area to assess the potential risks to human health and the environment from soil exposed by the sinkholes or from soil erosion into Coddington Cove.

Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste

• March 31, 2021 - EPA has ordered ViaClean Technologies, operating in Philadelphia, to stop marketing the pesticide BioProtect RTU with claims that it is effective against surfaces from public health related pathogens such as the coronavirus. Although the product is registered to inhibit the growth of “non-public health” microorganisms, it is not registered to address “public health” pathogens. EPA is concerned that customers may have used this product as protection from a virus—such as the coronavirus—in lieu of other EPA-approved disinfection methods. ViaClean provided two BioProtect RTU fact sheets containing public health claims to at least one customer, including the statement that the pesticide can be used to kill “germs.” Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), products that claim to kill or repel bacteria or germs, including disinfectants, are considered pesticides and must be registered with the EPA. Public health claims can only be made regarding products that have been properly tested and are registered with the EPA.

• April 14, 2021 - The EPA has settled with the Idaho Transportation Department over federal asbestos violations at an ITD building in Rigby, an eastern Idaho community approximately 90 miles from Yellowstone Park. The settlement includes a \$61,250 penalty. According to related case documents, two untrained ITD workers improperly removed asbestos-containing materials from a break room, contaminating the space in the process. Under federal asbestos law, building owners or operators must notify the appropriate state agency before any demolition, or before any renovations of buildings that could contain a certain threshold amount of asbestos or asbestos-containing material. ITD did not inspect the building prior to the renovation or report the anticipated removal of asbestos-containing material to EPA.

• April 19, 2021—The EPA announced that Uni-

var Solutions USA, Inc. of Portland, Oregon will pay a \$165,000 penalty for violating federal pesticide laws when it failed to properly label its “Woodlife 111” pesticide which is used as a wood preservative. EPA cited the company for 33 violations of the FIFRA when Univar sold and distributed the misbranded pesticide via bulk shipments. Under FIFRA, a pesticide is misbranded if, “the labeling accompanying it does not contain directions for use which are necessary ... to protect health and the environment” and if “...the label does not contain a warning or caution statement which may be necessary ... to protect health and the environment.”

Indictments, Sanctions, and Sentencing

• March 28, 2021 - A New York man pleaded guilty to illegally removing and disposing of asbestos. According to court documents, during the summer of 2016, Gunay Yakup, 31, of Newburgh, joined an existing conspiracy to illegally remove asbestos from a former IBM site in Kingston. The facility in question contained over 400,000 square feet of regulated asbestos-containing material (RACM), as well as an additional 6,000 linear feet of RACM pipe wrap. Yakup, who had special asbestos abatement training, was hired as a worker and supervisor by an asbestos abatement company. On the job, he was pressured by other conspirators to expedite the removal of asbestos at the site. Doing so meant that Yakup and his crew violated the Clean Air Act’s “work practice standards,” which address how asbestos can be stripped, bagged, removed, and disposed of with relative safety. Yakup is scheduled to be sentenced on July 27 at 10 a.m. and faces a maximum penalty of five years in prison. Yakup admitted that he and his co-conspirators removed substantial amounts of RACM from the former IBM site in violation of these work practice standards, oftentimes dry and in a way that produced visible emissions. They also stored bulk quantities of RACM waste on site in open containers. The EPA has determined that there is no safe level of exposure to asbestos. Special agents of the EPA and individuals from the New York Departments of Labor and Environmental Conservation investigated the case.

• April 13, 2021 - The Justice Department, EPA and the State of Illinois have announced an amendment to the 2005 Clean Air Act consent decree signed with ExxonMobil Oil Corporation to resolve

violations at its petroleum refinery in Joliet. The consent decree amendment will reduce air pollution through upgrades and improvements and address violations of the 2005 consent decree and the CAA. ExxonMobil will make physical and operational changes to its sulfur recovery plant that will reduce emissions of hydrogen sulfide and sulfur dioxide and will meet a lower sulfur dioxide emission limit at its north sulfur recovery unit. ExxonMobil will also make physical and operational changes to the emission controls for its fluidized catalytic cracking unit, also referred to as the FCCU, and it will meet lower emission limits for sulfur dioxide and nitrogen oxides at the FCCU. To address continuous emissions monitoring system violations, ExxonMobil will develop a comprehensive plan to ensure implementation and compliance with regulatory requirements. Under the consent decree amendment, ExxonMobil will pay \$1,515,463 in penalties, \$1,086,640 to the federal government and \$428,823 to the State of Illinois. The amendment also includes an estimated \$10 million of improvements to reduce air emissions from the facility.

- April 14, 2021 - The Algoma Central Corporation (Algoma), headquartered in St. Catharines, Ontario, was fined \$500,000 after pleading guilty to dumping wastewater into Lake Ontario. Algoma operated a fleet of dry and liquid bulk carriers on the Great Lakes. One of the vessels in the defendant's fleet was the M/V Algoma Strongfield (Strongfield). Built in China, the Strongfield was delivered to Canada on May 30, 2017, by a crew from Redwise Maritime Services, B.V. (Redwise), a vessel transport company based in the Netherlands. During the Strongfield's delivery voyage, while manned by a Redwise crew, the oily water separator and oil content monitor malfunctioned or failed on multiple occasions, which resulted in an accumulation of unprocessed oily bilge water. Because Algoma had negligently failed to inform the 3rd officer and the captain what the wash water tank contained, approximately 11,887 gallons of unprocessed oily bilge water were released into Lake Ontario. The discharge was stopped when another Algoma employee learned of the discharge and informed the 3rd officer and captain that the wash water tank contained unprocessed oily bilge water and instructed them to stop the discharge immediately. After the incident, Algoma

contacted Canadian and U.S. authorities to report the discharge. In addition to the fine, Algoma was put on probation for a period of three years during which it must implement an environmental compliance plan.

- April 20, 2021 - An indictment was unsealed in the U.S. District Court for the Eastern District of Michigan charging two Italian nationals, along with a previously charged co-conspirator, for their alleged role in a conspiracy to defraud U.S. regulators and customers by making false and misleading statements about the emissions controls and fuel efficiency of more than 100,000 diesel vehicles sold in the United States by FCA US LLC. According to court documents, Sergio Pasini, 43, of Ferrera, Italy, and Gianluca Sabbioni, 55, of Sala Bolognese, Italy, two senior diesel managers at Fiat Chrysler Automobiles Italy S.p.A. (FCA Italy), a wholly owned subsidiary of Stellantis N.V. — along with a previously charged co-conspirator, Emanuele Palma, 42, of Bloomfield Hills, Michigan — were responsible for developing and calibrating the 3.0-liter diesel engine used in certain FCA diesel vehicles. Their responsibilities included calibrating several software features in the vehicles' emissions control systems to meet emissions standards for nitrogen oxides (NOx), a family of poisonous gases that are formed when diesel fuels are burned at high temperatures, while also achieving best-in-class fuel efficiency targets set by FCA US LLC. The superseding indictment alleges that Palma, Pasini, Sabbioni, and their co-conspirators, purposely calibrated the emissions control functions to produce lower NOx emissions under conditions when the subject vehicles would be undergoing testing on the federal test procedures or driving "cycles," and higher NOx emissions under conditions when the subject vehicles would be driven in the real world. Palma, Pasini, Sabbioni, and their co-conspirators allegedly referred to the manner in which they manipulated one method of emissions control as "cycle beating." Pasini and Sabbioni are each charged with one count of conspiracy to defraud the United States and to violate the Clean Air Act, one count of conspiracy to commit wire fraud, and six counts of violating the Clean Air Act. If convicted, Pasini and Sabbioni each face up to five years in prison on the conspiracy count to defraud the United States and to violate the Clean Air Act, up to 20 years in prison on the conspiracy count to

commit wire fraud, and up to two years in prison for each count of violating the Clean Air Act. If convicted, Palma faces up to five years in prison on the conspiracy count to defraud the United States and to violate the Clean Air Act, up to 20 years in prison on the conspiracy count to commit wire fraud, up to two

years in prison for each count of violating the Clean Air Act, and up to five years in prison for each count of making false statements. A federal district court judge will determine any sentence after considering the U.S. Sentencing Guidelines and other statutory factors.

(Andre Monette)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUPS FILE SUIT SEEKING TO STOP CRUDE PIPELINE ALLEGING DRINKING WATER CONTAMINATION CONCERNS

Memphis environmental groups are suing to overturn federal approval of a planned 49-mile-long crude oil pipeline that they say unfairly targets black and low-income communities and threatens drinking water aquifers across the region. The furor in Memphis adds to the growing national controversy over oil and gas projects—including the paused Keystone XL Pipeline in Montana—approved by the U.S. Army Corps of Engineers (Corps) under the blanket “Nationwide Permit 12” (NWP 12), which was issued in 2017 to fast-track environmental review for oil and gas pipelines. The lawsuit was filed in the U.S. District Court for the Western District of Tennessee. [*Memphis Community Against Pollution, Inc., et al. v. U.S. Army Corps of Engineers, et al.* (W.D. Tenn.)]

Background

The subject of the lawsuit is the proposed Byhalia Connection Pipeline, running from the Mississippi River, through southwest Memphis and eventually into Marshall County, Mississippi. The pipeline is being constructed by Byhalia Pipeline, LLC, a Texas-based joint venture between Plains All American Pipeline, builder and operator of more than 4,000-miles of crude oil pipelines across North America, and Valero Energy Corporation, an international manufacturer and marketer of fossil fuels and petrochemical products. Project proponents say the pipeline would provide a critical link between the Diamond Pipeline, which supplies crude oil from oil fields across the American Mid-South region to Memphis-area refineries, and the Capline Pipeline, which transports fuel between key hubs in Central Illinois and the Gulf Coast. (Source: <https://byhalia-connection.com/about-project/>).

Environmental groups, however, claim the pipeline’s proposed route would endanger local drinking water supplies of hundreds of thousands of people while threatening the health and property values of low-income and predominantly black neighborhoods in southwest Memphis.

Water Contamination Concerns

As one of the largest cities in the world to rely exclusively on artesian wells, Memphis (City) has long been protective of its underground water reserves. (Source: <http://www.mlgw.com/images/content/files/pdf/WQR%202018-sm.pdf>). For that reason, pipeline opponents are particularly concerned about those portions of the Byhalia Pipeline’s route that would cross over the Memphis Sand Aquifer, the sole source of water for the region. (Source: <https://www.mlgw.com/about>).

The developer and environmental groups are at odds over just how much of a risk crude oil spills would pose to the City’s water supply. Geological surveys show that the aquifer is separated from the surface by a layer of dense clay, averaging 500-feet-thick, through which the City’s utility extracts water via its extensive network of wells and pump stations. (Source: <https://caeser.memphis.edu/resources/memphis-aquifer/>). The developer has assured residents that, since the pipeline would sit just four feet below ground, there would be minimal risk that any crude oil spills or seepage would reach water supplies. (Source: <https://byhaliaconnection.com/wp-content/uploads/2021/04/Byhalia-Connection-Overview-3-21-6.pdf>). Maps published by the Southern Environmental Law Center, however, show breaches, holes and leaks in the clay layer that could allow contaminants to penetrate underwater reservoirs, even from pipelines buried just below ground level. (Source: <https://www.southernenvironment.org/news-and-press/news-feed/what-you-need-to-know-about-how-the-byhalia-pipeline-impacts-memphis>).

The Boxtown Neighborhood

In addition to water concerns, environmental justice advocates claim the pipeline’s proposed route unfairly targets poor and minority communities in southwest Memphis. In particular, the lawsuit focuses on the pipeline’s proposed path through the neighborhood of Boxtown, where the poverty rate today exceeds 32 percent, with cancer risk at four times

the national average. Boxtown is already home to a number of significant pollution sources, including from local oil refineries, steel mills, a retired coal-fired power plant and newly constructed natural gas plant. (Complaint at page 41.)

The developer claims the proposed route was drawn to avoid Memphis landmarks and major population centers. (Source: <https://wreg.com/news/cbs-this-morning-puts-national-spotlight-on-byhalia-pipeline-fight/>) As currently drawn, the pipeline would cut through a number of privately owned lots in the Boxtown neighborhood, along with at least two parcels owned by Shelby County. (Source: <https://wreg.com/news/byhalia-pipeline-whats-next-after-county-votes-not-to-sell-vacant-land/>). As of early April 2021, the developer said that it had successfully secured easements with 95 percent of private landowners along the proposed route, but was dealt a blow earlier in the year when the Shelby County Commission voted down a resolution to sell County land for pipeline construction. (Source: <https://wreg.com/news/byhalia-pipeline-whats-next-after-county-votes-not-to-sell-vacant-land/>).

In recent weeks, the Byhalia Pipeline dispute has drawn national attention, with Vice President Al Gore and 28 members of Congress, including Rep. Steve Cohen who represents the Memphis area, joining calls for a complete federal government review of the pipeline's potential environmental impacts—this time, with full input from the impacted communities. (Source: <https://cohen.house.gov/media-center/press-releases/representatives-cohen-and-ocasio-cortez-urge-biden-administration>).

Section 404 and Nationwide Permit 12

The Byhalia Pipeline controversy has renewed scrutiny of NWP 12, which gives blanket environmental approval for fast-tracking development of oil and gas pipelines across the country.

Pursuant to Section 404 of the Clean Water Act, a federal permit is required for the discharge of any dredged or fill materials into federal navigable waters. 33 U.S. Code § 1344. However, Section 404(e) allows the Army Corps of Engineers to issue general permits, or “nationwide permits”—valid for a maximum of five years and broadly applicable to projects nationwide—which authorize activities with minimal

individual and cumulative adverse environmental effects. Id. Previous “nationwide permits” have provided blanket permits under the Clean Water Act for residential developments, wetland and stream restoration activities, and commercial shellfish aquaculture. (EPA [website link](#)).

The Corps re-issued NWP 12 in March 2017, allowing the Corps to approve permits for construction of utility pipelines across rivers, streams and wetlands without being subject to the normal environmental processes under Section 404 of the Clean Water Act, the National Environmental Policy Act and Endangered Species Act. (Source: <https://www.federalregister.gov/documents/2017/01/06/2016-31355/issuance-and-reissuance-of-nationwide-permits>). Since 2017, NWP 12 has been applied to a number of controversial pipeline projects across the country, including the Keystone XL Pipeline through Montana which was paused by the Biden Administration in early 2021.

In March, the Corps issued new Nationwide Permits that split NWP 12 in four, and separated out the portion of NWP 12 that applies to oil and gas pipelines. (Source: <https://www.natlawreview.com/article/us-army-corps-engineers-revises-nationwide-permit-12>). This means that, should the Biden Administration decide to rescind NWP 12 as it pertains to pipelines like Byhalia and Keystone XL, the Corps would still retain authority to fast-track non-fossil fuel projects.

Conclusion and Implications

Mounting legal and political pressure by local environmental groups and their allies in Washington have posed major obstacles to what just two months ago seemed like a smooth path to approval for the Byhalia Pipeline. While revocation of the Byhalia permit would be a major win for environmental justice advocates in Memphis, the Biden administration's decision on this issue would also reverberate nationally and could affect the viability of fossil fuel pipeline projects across the country for years to come. The lawsuit is available online at: <https://wreg.com/wp-content/uploads/sites/18/2021/04/MEMPHIS-COMMUNITY-AGAINST-POLLUTION-VS-ARMY-CORPS-OF-ENGINEERS.pdf>.

(Travis Kaya)

RECENT FEDERAL DECISIONS

SECOND CIRCUIT DETERMINES CLEAN WATER ACT, SECTION 401, DEADLINE CANNOT BE MODIFIED BY AGREEMENT

New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission,
___F.3d___, Case No. 19-1610 (2nd Cir. Mar. 23, 2021).

The U.S. Court of Appeals for the Second Circuit recently determined that the one-year time period for issuing a federal Clean Water Act, Section 401 water quality certification is mandatory, and a certifying agency cannot enter into an agreement or otherwise coordinate with an applicant to alter the time period. If the certifying agency does not act within the provided statutory time period the authority is waived.

Factual and Procedural Background

Section 401 of the Clean Water Act requires an applicant for a federal permit to obtain a certification that the proposed project complies with state water quality standards and other requirements of state law. It also requires the state to “act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request,” or their certification authority is waived. If a state denies certification within the statutory time period, then no license or permit shall be granted. If a state issues a certification contingent on the applicant’s satisfaction of various conditions, the appropriate federal agency must incorporate those conditions into the final license.

National Fuel proposed to construct a 99-mile long natural gas pipeline from western Pennsylvania to upstate New York known as the Northern Access 2016 Project. Before proceeding with this type of project, the Natural Gas Act required a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC). Because construction and operation of the pipeline could result in discharges into New York waterways, National Fuel was also required to obtain a Section 401 water quality certification.

Accordingly, in March 2015, National Fuel applied to FERC for a certificate of convenience and necessity and, the following year, applied to the New York Department of Environmental Conservation (DEC)

for a Section 401 water quality certification. At some point after National Fuel was asked to supplement the second time, it became clear that the DEC would not be able to make a final determination within one year of the date of the initial application because it had not completed the notice-and-comment process required by the Clean Water Act and by state regulations.

In an attempt to extend the one-year deadline, the DEC and National Fuel entered into an agreement revising the date on which the application was deemed received by the DEC to April 8, 2016, extending the deadline for the DEC to issue or deny the required certification by 36 days. Subsequently, DEC denied National Fuel’s application and National Fuel petitioned for review. While the petition was pending, National Fuel filed with FERC a motion for expedited action. FERC concluded that Section 401 established a deadline that could not be extended by private agreement. DEC petitioned for review of FERC’s decision as well.

The Second Circuit’s Decision

The threshold issue for the petitions is whether a state and a project applicant may extend the one-year deadline for acting on a Section 401 water quality certification application. The circuit court previously determined that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision. The court determined that Section 401’s one year deadline is mandatory in that it does not merely “spur” the agency to action but it bars untimely action by depriving the agency of its authority after the prescribed time limit.

The court next considered whether DEC’s denial of National Fuel’s certification request should be regarded as untimely because the agreement to change

the receipt date must be deemed void. To make this determination, the court examined the legislative history of Section 401. In examining the legislative history the court concluded “with a good deal of clarity” that limiting a certifying state’s discretion and eliminating a potential source of regulatory abuse was what the one-year limit in Section 401 was intended to achieve. The original version of the House Bill did not set any time limit for state action, but was later amended to require affirmative state action “within a reasonable period of time” in order to prevent delay due to a certifying state’s passive refusal or failure to act. Eventually, that language was refined and the one-year time limit was included in the final version of the bill after the Senate bill was combined with the House bill. The legislative history, the court determined, showed that Congress was not primarily concerned with protecting the rights of individual applicants. Rather, Section 401’s time limit was meant to protect the regulatory structure, particularly in situations involving multiple states: in other words, to guard against one state “sitting on its hands and doing nothing” at the expense of other states that are also involved in a multi-state project.

Accordingly, the court held that it was bound by Congress’ intention expressed in the text of Section 401 and reinforced in its legislative history to reduce flexibility in favor of protecting the overall federal licensing regime. The court therefore held that Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period, and that the DEC waived its certification authority by failing to act within one year of the actual receipt of the application.

The court upheld the FERC’s conclusion that the DEC waived its authority under Section 401.

Conclusion and Implications

This case provides that the one-year deadline for a state to act on an application for a Clean Water Act Section 401 water quality certification cannot be extended by agreement with a project applicant. Such an agreement may waive a state’s authority to review and act on such an application. The Second Circuit’s opinion is available online at: <https://casetext.com/case/ny-state-dept-of-envtl-conservation-v-fed-energy-regulatory-commn-1>.

(Henry Castillo, Rebecca Andrews)

DISTRICT COURT DENIES PRELIMINARY INJUNCTION AGAINST WATER AND SEWER DISTRICT FOR ALLEGED CLEAN WATER ACT VIOLATIONS

Cottonwood Environmental Law Center, Montana Rivers, and Gallatin Wildlife Association v. Edwards and Big Sky Water and Sewer District, ___F.Supp.3d___, Case No. 2:20-cv-00028-BU-BMM (D. Mt. Mar. 23, 2021).

The U.S. District for the District of Montana, Butte Division, denied the three nongovernmental organizations’ (plaintiffs) request for a preliminary injunction against Big Sky Water and Sewer District’s (BSD) discharging practices within the West Fork of the Gallatin River. After carefully reviewing the circumstances, the court held that a preliminary injunction would be inappropriate based on the record before the court, allowing BSD to continue these discharge practices until further proceedings.

Factual and Procedural Background

BSD provides wastewater and sewer services by

collecting water from district water users within the resort community at Big Sky, Montana. This water is collected for treatment at its Water Resources Recovery Facility (WRRF), which removes debris and grit, treats nitrogen through aerobic and anaerobic conditioning, filters the water, and finally disinfects the water. After treating this water and placing it in holding ponds at the WRRF, BSD disposes all of its treated effluent water through irrigation—primarily by irrigating the neighboring Meadow Village Golf Course during the summer months.

Plaintiffs allege that BSD over-irrigated the Meadow Valley Golf Course, allowing for nitrogen

and other pollutants to flow downhill and leach into the groundwater. The groundwater is hydrologically connected to the West Fork of the Gallatin River. If groundwater rises too high, the holding pond liners may float, which leads to effluent spillover from the holding pond. BSD diverts groundwater under its holding ponds into the West Fork of the Gallatin River using an underdrain pipe system to prevent such spillover. Plaintiffs argued that BSD must obtain a permit under the federal Clean Water Act (CWA) for the discharge of nitrogen originating in its holding ponds and entering the West Fork of the Gallatin River via the underdrain pipe system. In doing so, Plaintiffs requested a preliminary injunction to halt these discharge practices.

The U.S. District Court's Decision

In order to obtain a preliminary injunction, a court considers and balances four elements: 1) the likelihood of success on the merits; 2) the likelihood of irreparable harm in the absence of preliminary relief; 3) the balance of equities; and 4) the public interest served by the injunction.

First, BSD argued that plaintiffs were unlikely to succeed on the merits on two grounds: 1) the court lacks subject matter jurisdiction because plaintiffs failed to provide adequate notice of suit under the CWA, and 2) plaintiffs failed to allege a valid CWA violation. Turning to the first argument, the court held Plaintiffs provided adequate notice by providing the appropriate 60-day notice. Furthermore, the court reasoned that BSD had superior access to information regarding the violation, specifically on the hydrology of the area. As to the second argument, the court determined that the mere conveyance of pollutants from one part of a hydrologically interconnected system to another is not a clear violation of the CWA and that the path of pollutants from the ponds, to a golf course, to groundwater and then to the river was not the functional equivalent of a direct discharge. The court thus agreed with BSD in holding that

plaintiffs were unlikely to succeed based on the record since Plaintiffs did not present strong enough evidence to show that BSD's practices were "additions" of pollutants from a "point source" to "navigable waters" within the meaning of the CWA.

Second, plaintiffs argued that an injunction is necessary to prevent harm to the waters of the West Fork of the Gallatin River, specifically with the potential for algal blooms. However, the court noted there was factual uncertainty regarding whether pollutants from the WRRF holdings ponds reach the West Fork of the Gallatin River. Plaintiffs' member impact statements were useful for a standing analysis but failed to point to irreparable harms that would warrant extraordinary and drastic injunctive relief requested.

Third, BSD argued that the public has a strong interest in maintaining a functional waste treatment and sewage system. Plaintiffs responded that the public retains a strong interest in preserving the water quality of the river. The court determined the public interest did not favor either party.

Finally, the court noted that a preliminary injunction represents an extraordinary remedy—one that should not be awarded as a matter of right, but only upon a clear showing that the plaintiff is entitled to such relief. Based on the above analysis, the court held that a preliminary injunction would be inappropriate since serious questions remained regarding the success of plaintiffs' case.

Conclusion and Implications

This case demonstrates that a high showing on the likelihood of success on the merits is required to obtain a preliminary injunction to stop alleged discharges from the operation of a publicly owned wastewater treatment plant. A preliminary injunction will only be awarded in extraordinary circumstances. The District Court's opinion is available online at: <https://casetext.com/case/cottonwood-envtl-law-ctr-v-edwards>.

(Megan Kilmer, Rebecca Andrews)

DISTRICT COURT RULES ENVIRONMENTAL ANALYSIS OF GHGS INSUFFICIENT UNDER NEPA FOR MINE EXPANSION PROJECT

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, the plaintiffs argued that BLM failed to prop-

erly 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 Impacts 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 proj-

ect 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 20 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 the 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 sufficient-

ly 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)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL FINDS DEVELOPMENT RELIANT ON GROUNDWATER SUPPLIES BENEFITED BY WATER SUPPLY PROJECT SURVIVES CEQA CHALLENGE

Landwatch Monterey County v. County of Monterey, Unpub., Case No. H046932 (6th Dist. Mar. 29, 2021).

On March 29, 2021, the California Court of Appeal for the Sixth Appellate District held in an *unpublished* decision that a final Environmental Impact Report (EIR), under the California Environmental Quality Act (CEQA) for a residential subdivision project prepared by the County of Monterey (County) adequately addressed groundwater resources issues, despite overdraft conditions and downward trending groundwater levels in certain areas of the groundwater basin.

Background

In 2001, Harper Canyon Realty, LLC, a developer (Harper), proposed the development of the Harper Canyon Subdivision Project (Project) in Monterey County (County). Harper's development application was deemed complete in 2002. In 2005, the County began preparing an environmental impact report (EIR) for the Project.

The Project involved a combined development permit for the subdivision of 344 acres into 17 residential lots for single-family homes. Water for residences in the proposed subdivision would come from two existing wells, one that was drilled for an existing housing subdivision and another drilled on Harper's land. Two scientific studies had directly or indirectly analyzed the potential effects of operations of the wells proposed for the Project, including a 2002-2003 Project-specific study, and a regional groundwater study prepared for another County entity in 2007 to evaluate groundwater resources capacity within a planning area that encompassed the two wells. The 2007 study was supplemented in 2010. The 2007 study observed overdraft conditions in portions of the Salinas Valley Groundwater Basin as well as declining groundwater levels, but the 2010 supplement found that current and increased groundwater pumping could be sustained for decades where "large saturated

thickness of the aquifer stored large volumes of water." Neither the 2007 study nor the 2010 supplement referenced the Project specifically.

The purpose of the 2007 study was to recommend maintaining or revising a particular zoning overlay that limited land use due to scarce groundwater resources. Notably, the two wells for the Project were not located within that zoning overlay. Instead, the two wells received the benefits of sustained groundwater levels due to the operation of two reservoirs and an ongoing water project called the Salinas Valley Water Project, which helps hydrologically balance the Salinas Valley Groundwater Basin. The Salinas Valley Water Project, which became operational in 2010, formed a central component of the analysis in the County's EIR for the Project, the first draft of which was issued in 2008. The final EIR was issued in 2013, and noted that the Project was located within the Corral de Tierra Subbasin of the Salinas Valley Groundwater Basin.

The Court of Appeal's Decision

The Court of Appeal rejected petitioners' argument that the final EIR was informationally inadequate under CEQA with respect to its discussion of groundwater resources. First, petitioners contended that the final EIR's environmental setting related to groundwater resources was internally contradictory, in that the final EIR asserted both overdraft and surplus in the groundwater basin and asserted that the Project's wells were hydrologically connected and not connected to adjacent areas where groundwater resources are stressed. Similarly, petitioners argued that the environmental setting description was incomplete because it failed to disclose the declining groundwater levels and aquifer depletion described in the 2007 study. Second, petitioners argued that the EIR improperly concluded that the Project would not result

in a considerable cumulative impact when combined with other development within the groundwater basin. The Court of Appeal rejected all of petitioners' arguments.

The Claims Made by Petitioners

With respect to petitioners' argument that the EIR was internally inconsistent, the court observed that the final EIR acknowledged an overdraft condition existed within the Salinas Valley Groundwater Basin. The court also determined that the EIR did not improperly rely on or claim that a surplus existed in reaching its conclusion that the Project lacked a cumulative impact on groundwater resources. Instead, the court held that the final EIR relied on the property owners' financial contributions to the Salinas Valley Water Project, which benefited groundwater levels in the vicinity of the development project. Those payments also supported the County's conclusions that the Project would have a long-term sustainable groundwater supply, and would likewise have a less than significant impact on groundwater resources.

The court also rejected petitioners' argument that the EIR omitted reference to the existence and magnitude of aquifer depletion as identified in the 2007 study. According to the court, because the EIR referenced overdraft in the Salinas Valley Groundwater Basin and discussed the 2007 report, the EIR "reasonably acknowledged" the overdraft problem.

Finally, the court rejected petitioners' argument that the final EIR was internally inconsistent because the Project's wells were said to be both hydrologically connected and not hydrologically connected. The court observed that the EIR concluded the wells were

hydrogeologically contiguous with aquifers in the east Salinas Valley that were not in the less productive or stressed areas within the 2007 study area. Accordingly, the court held that the EIR was not internally contradictory and therefore was not informationally inadequate under CEQA.

With respect to petitioners' argument that the Project would result in cumulatively considerable impacts to groundwater resources, the court observed that the EIR relied on the 2010 supplement's conclusion that the Project is located in an area of large saturated thickness within the Salinas Valley Groundwater Basin and which was hydrogeologically connected to the non-stressed subareas within the basin. Moreover, the EIR concluded that the potential effect of cumulative groundwater pumping on groundwater supply would be mitigated by the Salinas Valley Water Project. The Court of Appeal held that the EIR's discussion of cumulative impacts was sufficient under CEQA.

Conclusion and Implications

This *unpublished* decision stands for the proposition that an overdrafted groundwater basin is not an absolute bar to future development. However, adequately funded water supply projects that benefit local groundwater basins, including discrete areas within such basins, may be an important factor for the viability of future developments, including their ability to withstand challenges under environmental laws like CEQA. The court's *unpublished* opinion is available online at: <https://www.courts.ca.gov/opinions/non-pub/H046932.PDF>.

(Miles Krieger, Steve Anderson)

MINNESOTA SUPREME COURT FINDS STATES EVALUATING SYNTHETIC MINOR SOURCE CLEAN AIR ACT PERMITS HAVE NO DUTY TO INVESTIGATE FOR SHAM PERMITTING MOTIVES

In re Matter of Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc.,
955 N.W.2d 258 (Sup. Ct. Minn. Feb. 24, 2021).

When an applicant to emit regulated air emissions seeks a minor source permit from a state agency based on proposed operational limits, in order to avoid major source best available control technology review,

does the state agency have an affirmative duty to investigate whether a "sham" permit is being sought with the intent to exceed emissions limits?

Background

In 2005, PloyMet Mining, Inc. (PolyMet), proposed construction and operation of a “copper-nickel-platinum mine” in Minnesota at the site of a former iron ore processing facility; the new mine would “include both new construction and refurbished equipment left from the previous iron ore processing facility.” Ten years later, the state’s Department of Natural Resources (DNR) deemed adequate a Final Environmental Impact Statement regarding the mine, and in 2016 PolyMet applied to the Minnesota Pollution Control Agency (Agency) for an air emissions permit pursuant to the federal Clean Air Act (42 U.S.C. §§ 7401–7671q, the CAA) as a “synthetic minor source.”

The CAA differentiates between major and minor sources of air emissions, with major sources (emitting or with the potential to emit 250 tons per year of a regulated pollutant) required to “undergo an exacting review process before construction that includes stringent pollution control measures known as “best available control technology.” 40 C.F.R. § 52.21(b) (12). Minor sources, in contrast, are not required to use best available control technology. “Synthetic” minor sources are facilities that have the potential to emit 250 tons per year of a regulated pollutant, but that chose “instead to adopt enforceable operational restrictions so as to reduce ... actual emissions to less than that limit is a ‘synthetic minor source.’ *See, In re Shell Offshore, Inc.*, 15 E.A.D. 536, 550 (EAB 2012).”

Going back to the major source preconstruction review process, the evaluation of best available control technology:

... depends on a case-by-case analysis weighing energy, environmental, and economic impacts. As a general rule, it is more expensive to retrofit pollution control measures onto existing equipment than to construct new equipment with better pollution control measures. ... A source that first obtains a minor source permit and later, after construction of the facility, seeks modification of the permit to become a major source could therefore, depending upon the circumstances, be allowed to install less stringent pollution control technologies than if it had originally sought a major source permit. For example, if the cost of retrofitting outweighs the

environmental benefits of the available pollution control measures, the facility may not be required to install the more stringent measures. (Internal citations omitted.)

In order to be permitted as a synthetic minor source, PolyMet proposed that its ore “throughput” be limited to a maximum of 32,000 tons per day, among other operational restrictions, to ensure that its emissions remain below 250 tons per year—notwithstanding that the iron ore processing equipment to be incorporated into the new facility would allow the mine to exceed the 250 ton per year emissions limit. The Agency, in turn, proposed to impose as well monitoring and recordkeeping requirements focused on compliance with the emissions limits.

Various environmental groups submitted public comments expressing concerns that PolyMet was applying for a “sham” synthetic minor source permit, *i.e.*, that PolyMet was seeking a synthetic minor source permit with the intent that, post-permit issuance, it would emit more than 250 tons per year of regulated emissions. Shortly following the close of the public comment period, PolyMet’s parent corporation filed a financial reporting document that included analyses of the mine’s economic viability under the throughput limit, as well as two scenarios premised on higher production rates:

These preliminary projections suggested that, because of existing infrastructure at the ... site, PolyMet could increase internal rates of return, decrease payback time, and increase revenues under the higher throughputs.

DNR and the Agency both rejected further protests from the environmental groups, characterizing the discussion of the higher-throughput scenarios in the financial reporting document as “preliminary in nature,’ ‘speculative,’ and uncertain.” The permit issued and the environmental groups sought writ relief from the state court of appeals, which was granted. Minnesota’s Supreme Court granted review.

The Minnesota Supreme Court’s Decision

In order to determine whether the Agency had an affirmative obligation to carry out a prospective inquiry into PolyMet’s intentions regarding mine operations, before issuing the air emissions permit,

the Supreme Court examined U.S. Environmental Protection Agency (EPA) binding regulations “defining appropriate restrictions in synthetic minor source permits and the accompanying supporting commentary in the Federal Register” (40 C.F.R. § 50.21; Approval and Promulgation of Implementation Plans, 54 Fed. Reg. at 27,280–81) and EPA non-binding “Guidance,” released at the same time that the regulations were adopted and that was intended to:

... provide[] more detail for states to determine what restrictions are permissible in synthetic minor source permits and how to identify when a facility has received a sham permit.

The regulations recognize the risk posed by issuance of synthetic minor source permits, and therefore EPA reserved to itself concurrent enforcement authority over operational limits that may be exercised alongside and independent from the states. 54 Fed. Reg. at 27,274. In order to counter the “incentive to accept operational restrictions as a synthetic minor source so” as to “begin construction and operation relatively quickly,” and then “seek relaxation of those restrictions—making it a major source—without undergoing preconstruction review,” EPA proposed “three solutions.” *Id.* at 27,280. First, the synthetic minor source permit could be denied. Second, were the permit issued, any subsequent major source permit process “would require the source to undergo preconstruction review—including determination of best available control technology—as though it never began construction in the first place.” *Id.*, 40 C.F.R. § 52.21(r)(4).

Lastly, if EPA determined that a “synthetic minor source permit had been obtained with an intent to construct, and possibly begin operation of, a major new source or modification without first obtaining a [] permit,” then the EPA would consider the initial synthetic minor source permit to be a sham. If such bad faith intent is shown, the EPA “deems the new source or modification to have been major” from the outset, and it will then consider:

... seeking injunctive relief, civil penalties, and criminal sanctions ... from the beginning of actual construction.

Essentially, this enforcement alternative allows

the EPA to look back to the first day of construction and view the source as having been in violation of its synthetic minor source permit because it was, in fact, a major source.

(Internal citations omitted.) The Court noted that penalties could be substantial:

If a source, for example, gets caught violating only one operating condition of its synthetic minor source permit 5 years after receiving a sham permit, the civil penalties alone could amount to nearly \$200 million.

An Affirmative Duty to Inquire More Rigorously?

Critical to its analysis of whether the Agency neglected an affirmative duty to inquire more rigorously into PolyMet’s motives, the Court noted that EPA’s contemporaneous commentary on the regulations discusses enforcement entirely in retrospective terms:

At no point do the relevant regulations suggest that the objective indicia of a sham permit necessarily disqualify a source from obtaining a synthetic minor source permit in the first instance.

The Court concluded that the non-binding Guidance similarly treated enforcement against sham permits as a retrospective exercise, and further that the Guidance advised that:

[s]tates that have serious nonattainment problems may wish to adopt more stringent review procedures than those that do not. Operating Permit Program, 57 Fed. Reg. 32,250, 32,284 (July 21, 1992) (codified at 40 C.F.R. pt. 70). ‘This latter statement suggests a key point: based upon our review of the applicable federal regulations, the Agency could, if it so desired, investigate sham permitting during the synthetic minor source permit application process, but it is not required to do so.’

Conclusion and Implications

The Minnesota Supreme Court’s decision leaves open the possibility that that state could use its delegated authority under the Clean Air Act to ag-

gressively investigate synthetic minor source permit applicants for “sham” permit intentions. However, the requirement that synthetic minor sources undergo any subsequent best available control technology review as if construction had never begun, let alone the substantial financial penalties that may be levied

on bad-faith actors, may continue to persuade the state it need not take on prospective investigation duties. The Supreme Court of Minnesota’s opinion is available online at: <https://mn.gov/law-library-stat/archive/supct/2021/OPA190115-022421.pdf>. (Deborah Quick)

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