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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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LAW AND REGULATION REPORTER

RECENT STATE DECISIONS

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ENVIRONMENTAL NEWS

PRESIDENT BIDEN ISSUES EXECUTIVE ORDER ADDRESSING CLIMATE-RELATED FINANCIAL RISK

On May 20, 2021, President Biden issued an Executive Order on Climate-Related Financial Risk (Order) aimed at incorporating climate-risk and other environmental, social, and governance (ESG) considerations in financial regulations and virtually all aspects of government spending and oversight. Specifically, the Order: 1) directs the Director of the National Economic Council and the National Climate Advisor to develop a comprehensive, government-wide strategy to measure, assess, mitigate, and disclose climate-related financial risks to "federal government programs, assets and liabilities;" 2) directs the Treasury Secretary to develop a report with recommendations of actions that financial regulators can take to incorporate climate-related financial risk into their regulatory and supervisory practices; 3) aims to develop recommendations for the National Climate Task Force on approaches related to the integration of climate-related financial risk into federal financial management and reporting, especially as that risk relates to federal lending programs; 4) directs the Secretary of Labor to consider suspending, revising, or rescinding any Trump administration-era rules that barred investment firms from considering ESG factors in their investment decisions to protect U.S. workers' savings and pensions; and 5) directs the heads of various federal agencies to submit various actions to integrate climate-related financial risk into their respective agency's procurement process.

Background

Since his campaign, President Biden has focused on climate change and the creation of new jobs through clean energy initiatives. The Order is consistent with at least eight other executive orders related to climate change, increased environmental review, flood risk assessment, and federal support of underserved communities.

The Executive Order

Goals

First, the Order outlines the Biden administration's goal of advancing measurable and accurate disclosure of climate-related financial risks. The Order directs the Director of the National Economic Council and the National Climate Advisor, in coordination with the Treasury Secretary and the Director of the Office of Management and Budget (OMB), to develop, within 120 days, a comprehensive, government-wide strategy to measure, assess, mitigate, and disclose climate-related financial risks to government programs, assets, and liabilities, and determine public and private financing needs to reach net-zero greenhouse gas emissions by 2050. Additionally, the Director of OMB and the Chair of the Council of Economic Advisers must develop and publish annually an assessment of the Federal Government's climate risk exposure.

Enhancing Climate-Related Savviness

Second, the Order focuses on enhancing climate-related savviness from both financial regulators and major federal suppliers. The Order directs the Treasury Secretary, in her role as the chair of the Financial Stability Oversight Council (FSOC), to assess climate-related financial risks to the financial stability of the Federal Government and the stability of the U.S. financial system. The Treasury Secretary shall work with other FSOC members to issue a report, within 180 days, recommending actions that financial regulators can take to incorporate climate-related financial risk into their regulatory and supervisory practices, processes to identify climate-related financial risk to the financial stability of the U.S., and actions to mitigate these risks, including through regulatory standards. The Treasury Secretary shall also direct the Federal Insurance Office to work with states to assess climate-related issues or gaps in the supervision and regulation of insurers in connection

with the potential for major disruptions of private insurance coverage in regions vulnerable to climate change impacts.

Directs OMB and National Environmental Council to Develop Recommendations

Third, the Order directs the Director of OMB and the Director of the National Economic Council to develop recommendations for the National Climate Task Force on approaches related to the integration of climate-related financial risk, especially as that risk relates to federal lending programs. Additionally, the Secretary of Agriculture, the Secretary of Housing and Urban Development, and the Secretary of Veterans Affairs shall also consider approaches to better integrate climate-related financial risk to their Federal lending policies and programs.

Directs the Secretary of Labor to Examine and Assess Trump Administration Rules

Fourth, the Order directs the Secretary of Labor to consider suspending, revising, or rescinding any Trump administration-era rules that barred investment firms from considering ESG factors, including climate-related financial risks in their investment decisions related to U.S. workers' pensions and savings. The order also asks the Labor Secretary to take other actions to protect U.S. workers' savings and pensions from climate-related financial risks, and assess how the Federal Retirement Thrift Investment Board is taking into account the ESG factors. The Labor Secretary shall submit a report on any actions taken pursuant to the Order within 180 days.

Actions to Integrate Climate-Related Financial Risk into Agency Procurement

Finally, the Order directs the heads of various federal agencies to submit to the Director of OMB, the National Climate Task Force, and the Federal Chief Sustainability Officer various actions to integrate climate-related financial risk into their respective agency's procurement process.

Conclusion and Implications

The purpose of this Order is to create clear steps that the federal Government can take to shield the U.S. economg from threats created by climate change. For example, extreme weather patterns related to climate change can disrupt supply chains and the government's ability to provide communities with basic necessities such as housing, electricity, and water. The White House also noted that the steps outlined in the Order, in addition to other steps taken to combating climate change, will help protect workers' life savings, create new jobs, and benefit the U.S. economy. It is very likely that the Order along with previous actions by this administration related to climate change are laying the groundwork for future regulations and standards regarding disclosure and assessment of climate-related risks for financial institutions. The Executive Order is available here: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/.
(Madeline Weissman, Hina Gupta)

CALIFORNIA WATER SUPPLIERS PLAN MANDATORY WATER CONSERVATION RESTRICTIONS IN RESPONSE TO DROUGHT CONDITIONS

Drought conditions have emerged again in California after back-to-back dry years, belowaverage snowpack, and warm temperatures. Governor Gavin Newsom has already declared multiple drought emergencies this year, the most recent of which expanded the declaration to 41 counties, representing 30 percent of the state's population. As of this writing, the declaration has not been extended statewide, nor has the California State Water Resources Control Board (SWRCB or State Board) imposed statewide mandatory restrictions. Many local water suppliers are already planning to impose local conservation restrictions to prepare against potentially dire water supply conditions.

Background

Recent reports indicate that precipitation runoff to the Sacramento River Basin has dropped far below projected levels for the year and may cause 2021 to be the second driest year on record. The California Department of Water Resources (DWR) recently announced that State Water Project initial allocations would be reduced from ten percent to five percent. In May, the U.S. Bureau of Reclamation (Bureau), announced reduced Central Valley Project water deliveries from 55 percent to 25 percent for urban and industrial customers, and from 5 percent to zero percent for agricultural customers. Both Santa Clara Valley Water District (SCVWD), which serves 2,000,000 residents in the Silicon Valley region, and Contra Costa Water District (Contra Costa Water), which serves 500,000 residents in the East Bay, have asked Reclamation to increase allocation to the minimum health and safety requirements, which are above the 25 percent level.

Local Mandatory Water Conservation Restrictions

In response to current conditions, these and other water suppliers are taking steps to impose local water conservation restrictions.

SCVWD and Contra Costa Water

In June, SCVWD declared a water shortage emergency condition throughout its vast service territory, and called for a mandatory 15 percent reduction in water use compared to 2019. About 50 percent of SCVWD water supply comes from outside the county, and the declaration noted that imported water supplies are decreasing. SCVWD reported that depleted Sierra Nevada snowpack caused a significant reduction in the amount of imported water that the district will receive in 2021. SCVWD CEO Rick Callender described the current dry conditions as "an emergency." SCVWD Vice-Chair Gary Kremen said:

> We're having problems buying water on the open market because everyone else is buying it at the same time. The price is like 10 times what it was two years ago.

Compounding the issue, the Federal Energy Regulatory Commission ordered Anderson Reservoir (the largest surface reservoir in the county) to be drained for public safety reconstruction work. The Anderson Reservoir is not expected to be usable again for ten years.

It was also recently reported that Contra Costa Water is planning to vote on a conservation order in July 2021.

City of Pismo Beach

Other water suppliers are also responding to drought conditions. At its June 1, 2021 City Council meeting, the City of Pismo Beach (Pismo Beach) declared a Moderately Restricted Water Supply. This declaration imposed similar restrictions to those imposed in 2014 and include no outdoor irrigation (such as sprinklers) between the hours of 10 a.m. and 4 p.m., required use of hand-controlled water shut-off devices for those washing cars or boats, and prohibiting restaurants from serving water to customers unless specifically requested. Other rules include prohibiting water use for cleaning driveways, patios, parking lots, sidewalks, and streets, except by the city contracted street sweeper, or where necessary to protect the public health and safety. The city also prohibited the use of potable water in a decorative manner that does not recirculate the water. Pismo Beach Public Works Director Ben Fine said anyone who violates these restrictions will first receive a warning letter, and subsequent offenses will be met with an increasing fine, starting at $100.

Voluntary Conservation

Other public agencies are taking a voluntary conservation approach. The City of Napa recently asked residents to voluntarily cut 15 percent of their water use, while Sonoma County is asking for 20 percent. Grant Davis of Sonoma Water, which has 600,000 customers, said "(I)f we do not see a 20 percent reduction, then we will likely move into a mandatory conservation situation, probably on July 1," and he says he intends to ask the state to reduce flows along the Russian River by 20 percent to conserve water in Lake Sonoma and Lake Mendocino. Will Reisman of the San Francisco Public Utilities Commission, which has 1,600 irrigation customers, says the agency is asking its customers to reduce their use by 10 percent.

Conclusion and Implications

Many water suppliers have sized up the current and future availability of water and have decided that water conservation is now necessary. Other agencies are starting with requests for voluntary conservation. Whether statewide restrictions will emerge like those during the 2012-2016 Drought remains to be seen, though much of state is already declared to be in a state of emergency. At the current trend, much of the state could be forced to grapple with this issue by the end of the summer, and it would not be surprising to see many local agencies again imposing mandatory conservation restrictions on end users.
(Gabriel J. Pitassi, Derek R. Hoffman)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Climate Warming Consistently Reduces Grassland Ecosystem Productivity

Climate change influences a variety of environmental factors that impact ecosystem productivity, such as precipitation, solar radiation, and temperature. For grasslands, these factors are complex and may interact with each other in a number of ways, making the impact of climate change on productivity difficult to predict and interpret. Studies have largely focused on specific and discrete combinations of environmental changes, impacts on one specific type of grassland at a time, and short-term impacts.

Wu et al. published the first long-term, multifactor, multi-grassland study on the impacts of climate change on natural grassland Aboveground Net Primary Productivity (ANPP) in the June issue of AGU's Earth's Future. The team relied on ANPP data collected in the 1980s and 2010s from 254 sites across the Qinghai Tibetan grassland, the Loess Plateau, and the Inner Mongolian Plateau to assess the 30-year impacts of multiple climate variables on ANPP in lowland, alpine, and temperate grasslands. The team analyzed the change in ANPP (measured in harvesting peak aboveground biomass by dry weight), climate data on air temperature, soil temperature at 0-20 centimeters depth, precipitation, solar radiation, sunshine duration, cumulative daily mean temperature exceeding 5 and habitat moisture index (measured as the growing season precipitation over the cumulative daily mean temperature exceeding 5). The goal was to examine the effects of climate change on ANPP across the three types of grasslands and determine the contribution of different climate variables to changes in ANPP for each grassland type, in the hopes of better predicting the sensitivity of different grassland ecosystems to future climate change scenarios.

The study found that across all types of grassland, ANPP declined by more than 50 percent, with an average rate of decline of 6.1 g/m^2/yr over the 30-year period between 1980 and 2010. Among the three types of grassland, lowland and alpine grasslands declined much more significantly and rapidly than temperate grasslands. In the same time period, climate data showed significant increases in temperature (air temperature, soil temperature, and solar radiation) but no significant changes in precipitation or habitat moisture index. Statistical analyses on the climate and ANPP data revealed that while moisture had the strongest impact on ANPP, because there were no significant changes in precipitation, soil temperature was the primary reason for ANPP decline. As the authors explain, an increase in soil temperature can decrease soil moisture, inhibit seed germination, suppress plant growth and increase evapotranspiration, thereby compounding the effects of droughts.

The researches explain that due to limited spatial and temporal coverage, soil temperature is studied in much less detail than air temperature in the context of declining ANPP. However, the results of this study underscore the significance of accounting for soil temperature in future studies to understand declining grassland productivity.

Wu, G.-L., Cheng, Z., Alatalo, J. M., Zhao, J., & Liu, Y. (2021). Climate warming consistently reduces grassland ecosystem productivity. *Earth's Future*, 9, e2020EF001837. https://doi.org/10.1029/2020EF001837.

Increasing Ozone in Antarctica

Ozone is both critical for life on earth and a harmful air pollutant, depending on where in the atmosphere it is found. Stratospheric ozone plays a crucial role in safeguarding earth from the sun's powerful rays. However, tropospheric ozone, found at lower levels in the atmosphere, is a greenhouse gas with a global warming potential 1000 times that of CO_2. An increase in tropospheric ozone can result from oxidation of precursor chemicals such as NO_x as well as ozone transportation from the stratosphere.

A recent study conducted by Kumar, et al. statistically analyzed the spatial and temporal variation of ozone in Antarctica over a 25-year period. Using a variety of statistical techniques on data averaged across eight stations, the researchers found long-term trends in tropospheric ozone. Data from all stations

included in the study demonstrated a cyclical pattern with seasonal peaks in ozone levels, largely attributable to meteorological phenomena that transport ozone-rich air from surrounding regions. Coastal stations only showed a single, winter peak, while inland stations showed both a winter peak and a spring peak. The winter peak resulted from air-mass transportation of ozone from surrounding regions, and the inland, spring peak resulted from ozone produced by snowpack NO_x emissions. Because results demonstrated the influence of local meteorology on air-mass transport, the study also looked at long-term air-mass transport trends in Antarctica. The authors found that, in addition to ozone transportation from surrounding regions such as South America, downward transportation of ozone from the stratosphere was a significant contributor to the observed increases in lower and mid-tropospheric ozone in Antarctica.

The study concludes that this increase in lower and mid-tropospheric ozone should prompt greater attention to long-term trends in Antarctica and surrounding regions, especially given the positive feedback cycle between tropospheric ozone and global warming. The implications of an unchecked rise in tropospheric ozone would include sea-ice melting, among other negative impacts to local and global ecosystems.

See: Kumar, P., Kuttippurath, J., *et al.* The Increasing Surface Ozone and Tropospheric Ozone in Antarctica and Their Possible Drivers. *Environmental Science & Technology*, 2021; DOI: 10.1021/acs.est.0c08491

Reducing the Climate Impact of Aircraft Contrails Via Fuel Reformulation

Aircraft condensation trails, or contrails, form when water vapor droplets from aircraft fuel combustion rapidly condense when emitted into the cold air. Contrails interact with solar radiation in a few ways: the droplets can scatter solar radiation back into space (cooling effect), send radiation into the atmosphere (warming effect), or trap radiation from the Earth's surface (warming effect). Research shows contrail cirrus clouds have a net warming effect on the Earth, with an average radiative forcing of 57 mW/m^2, however, this can increase to as high as 500 mw/m^2 along major travel corridors

Given the high radiative forcing effect of contrails (in addition to CO_2 and other GHG emissions from fuel combustion), researchers are turning their attention towards how to reduce the climate impact of contrails. In a recent collaboration between the German Aerospace Center (DLR) and the US National Aeronautics and Space Administration (NASA), Voigt et al. determined that a new jet biofuel blend can reduce ice crystal concentration, and thus radiative forcing effect, in contrail cirrus clouds. In-flight testing was conducted for five different fuels – two conventional petroleum-based jet fuels, and three synthetic or biofuel jet fuel alternatives. One key parameter in these fuels is the aromatic and naphthalene content. These ring-shaped compounds affect the formation of soot and ice particles in the contrail. Voigt et al. found significantly lower soot and ice particle emissions were generated during the combustion of alternative fuel blends (up to 50 percent lower than the conventional fuels), and attributed the decreased soot and ice particle formation to a lower concentration of aromatic compounds in the alternative fuel blends. Voigt et al. also determined a nonlinear relationship between particle concentration and radiative forcing: the nearly 50 percent decrease in concentration translated to a 20-70 percent reduction in radiative forcing compared to current average measurements.

With this new study, Voigt et al. illustrate the importance of researching other pathways of warming beyond CO_2 emissions and conclude that widespread conversion to low aromatic synthetic or bio-based fuels has significant potential for reducing the detrimental effects of global air travel.

See: Voigt, C., Kleine, J., Sauer, D. *et al.* Cleaner burning aviation fuels can reduce contrail cloudiness. *Commun Earth Environ* **2,** 114 (2021). https://doi.org/10.1038/s43247-021-00174-y.
(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

CALIFORNIA TO STOP ISSUING FRACKING PERMITS BY 2024 AND PHASE OUT OIL EXTRACTION BY 2045

California Governor Gavin Newsom has directed the responsible state agencies to stop issuing new hydraulic fracturing (fracking) permits by January 2024 and phase out all oil extraction in the state by 2045. The announcement comes just months after Newsom unveiled an ambitious executive order that would put the state on the path to carbon neutrality by mid-century.

Fracking Permit Ban

On April 23, Newsom directed the California Department of Conservation's Geologic Energy Management Division (CalGEM) to stop issuing new permits for hydraulic fracturing by January 2024. As a result, CalGEM is expected to issue new regulations to wind down permits in the coming months.

"As we move to swiftly decarbonize our transportation sector and create a healthier future for our children, I've made it clear I don't see a role for fracking in that future and, similarly, believe that California needs to move beyond oil," Newsom said in an April 23 press release.

The fracking permit ban is being celebrated as a major victory for environmental groups in the state. While fracking accounts for just two percent of California's oil production according to the California Department of Conservation, banning the practice has been a flashpoint among environmental groups who raised concerns over chemical spills, groundwater contamination and water waste near fracking sites.

In recent years, legislative and administrative efforts to restrict fracking have resulted in a decline in fracking activity, but this is the first time that the state has issued a permanent ban on the practice. According to the Governor's office, fracking in the state is at its lowest level since stringent regulations were put in place by the legislature back in 2014. The Newsom administration had also imposed a temporary moratorium on fracking permits in 2019, but lifted the moratorium in 2020 following independent scientific review.

Despite mounting pressure from environmental groups to stop fracking operations, Newsom had initially balked at an outright ban and instead sought an incremental approach meant to address economic effects on the geographic regions most dependent on the petroleum industry. Newsom had also previously claimed that he lacked the executive authority to ban fracking and called on the legislature last year to instead pass a ban of its own.

An anti-fracking bill introduced by State Senators Scott Wiener (D-San Francisco) and Monique Limon (D-Santa Barbara) earlier this year was, however, met with fierce opposition from the oil industry and a number of petroleum industry trade unions. As proposed, the legislation would not only ban fracking but also impose stringent restrictions on oil extraction in the state, including a ban on wells within 2,500 feet of homes, schools and other populated areas beginning as early as January 2022. Similar bills had previously failed in the legislature in 2014 and again in 2020. With the April 23 announcement, Newsom is apparently reversing his stance in deciding to use his regulatory authority to phase out fracking activity in the state.

Oil Extraction Ban

Newsom has also ordered the California Air Resources Board (CARB) to begin planning for a complete phase out of oil extraction in the state by no later than 2045. The phase-out will now officially be included in the state's Climate Change Scoping Plan, which was set up to promote cross-sector and cross-agency collaboration focusing on benefits in disadvantaged communities, opportunities for job creation and economic growth on the path to carbon neutrality. The governor's latest announcement comes on the heels of his September 2020 executive order, which called, among other things, for the phase-out of new fossil fuel-powered passenger vehicles by 2035.

"This would be the first jurisdiction in the world to end oil extraction," California Secretary of Environmental Protection Jared Blumenthal told *The Los Angeles Times* following the governor's announcement:

> It's a big deal. I think it really helps frame all the other activities that we're doing something really important and it's a clear signal that we need to build a just transition for that industry.

The latest announcement drew criticism from the oil industry and a number of trade unions, including pipe fitters and electrical workers, who argue that the measure will cost thousands of union jobs and hollow out economies in the state's major oil-producing regions, including the economically depressed Central Valley. Meanwhile, environmental groups in large part lauded the announcement as the next step in the state's efforts to cut greenhouse gas emissions and target climate change, with some groups calling for an accelerated timeline on the fracking and oil extraction ban.

Conclusion and Implications

Newsom's directives may constitute a major inflection point in Sacramento's willingness to tackle the oil and gas industry as well as union interests that had previously opposed an outright ban on fracking. Nevertheless, both the fracking ban and the oil extraction phase-out are expected to spawn litigation and continue to be a major point of contention in the state for years to come. A link to Governor's Announcement is available online at: https://www.gov.ca.gov/2021/04/23/governor-newsom-takes-action-to-phase-out-oil-extraction-in-california/.
(Travis Kayla)

CALIFORNIA DEPARTMENT OF WATER RESOURCES AND THE U.S. BUREAU OF RECLAMATION RELEASE THE STATE WATER PROJECT AND CENTRAL VALLEY PROJECT DROUGHT CONTINGENCY PLAN

In connection with the state's current drought conditions, the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) released the Drought Contingency Plan (Drought Plan) for the State Water Project (SWP) and the Central Valley Project (CVP). The Drought Plan contains important data and operational criteria for addressing the state's water shortage, including current hydrological conditions, a drought monitoring plan, and species status updates.

Background

DWR manages the SWP, a water delivery and storage system that supplies water to municipal, industrial, and agricultural users across the state. The SWP serves more than 27 million people and irrigates roughly 750,000 acres of farmland. The Bureau manages the CVP, a federal water delivery and storage system in California operated in coordination with the SWP. The CVP delivers enough water to irrigate approximately 3 million acres of farmland and supply nearly 1 million households with water.

The current water year, Water Year (WY) 2021, is one of the driest years on record; in conjunction with data from last year, WY 2020 and WY 2021 constitute the second driest two-year period in California history. Additionally, reservoir storage is far below average going into the summer months. For example, at the end of April, Lake Oroville was at 42 percent capacity, Lake Shasta was at 50 percent capacity, and Folsom Lake was 37 percent capacity. In light of these dry conditions, water quality is also of concern. Salinity in the Sacramento-San Joaquin Delta (Delta) is expected to rise through the fall months. Consequently, DWR and the Bureau project that a slightly higher outflow of water to the Delta is necessary to maintain low salinity.

In May of 2021, Governor Gavin Newsom issued an Emergency Proclamation on the state's drought conditions. This Emergency Proclamation expanded the state of emergency to include the Delta, among other watersheds, and a total of 41 counties.

In response to the Emergency Proclamation and the state's extremely dry conditions, DWR and the Bureau released the Drought Plan to provide an important update on water supplies and information on potential areas of concern. In addition to this report, DWR and the Bureau will continue providing weekly water condition and hydrology updates.

The Drought Contingency Plan

The Drought Plan includes a May operational forecast that runs through December 31, 2021. The forecast is based on a 90 percent exceedance forecast from DWR's Hydrology and Flood Operations Office's May 1 Bulletin 120 forecast. The 90 percent exceedance forecast represents a 90 percent chance that the inflow of water will be greater than the forecasted value and a 10 percent chance that inflow will be less than the forecasted value. In simpler terms, there is a 10 percent or less chance that California's conditions will be equally dry or drier moving forward this year. DWR and the Bureau designed the forecast to account for multiple water uses, manage the potential risk of the drought continuing into WY 2022, and meet various regulatory requirements. The Drought Plan discusses three goals for the SWP and the CVP with the operational forecast: 1) meet CVP and SWP service area health and safety requirements; 2) preserve upstream water storage; and 3) meet water right and regulatory obligations.

In light of the 90 percent exceedance operations forecast, DWR and the Bureau identified multiple areas of potential concern in the SWP and CVP. First, meeting State Water Resources Control Board Decision 1641 water quality standards for the Delta. Other areas of concern include, but are not limited to, water storage levels and temperature management on the Sacramento and Trinity River systems; meeting the minimum health and safety requirements in the American River basin; and reduced carryover storage of the New Melones Reservoir into WY 2022.

To deal with the water shortage, DWR and the Bureau implemented various drought actions. The Drought Plan first discusses the development of the Drought Toolkit. The Toolkit outlines a coordination process with other agencies and provides actions and measures that can be implemented during droughts. In addition, the Bureau has coordinated with the Sacramento River Settlement Contractors (SRSC) regarding solutions to address demand reductions and water temperature management.

In an action to address concerns with meeting Decision 1641 standards, DWR and the Bureau filed a Temporary Urgency Change Petition (TUCP) in May for approval by the State Water Resources Control Board (SWRCB). The TUCP requested a reduction of outflow requirements for both June and July, changed the combined maximum SWP and CVP exports for June and July to 1,500 cubic feet per second, and petitioned to modify one salinity compliance location to meet critical year Delta salinity standards. To satisfy Decision 1641 outflow requirements in the month of May, The Bureau also made increased releases from the New Melones Reservoir. Similar releases are anticipated over the summer months to continue supporting water quality and outflow in the Delta.

As part of drought actions made in conjunction with the SWRCB, DWR and the Bureau expect the SWRCB will issue curtailment orders to water users located in the Central Valley and Delta. On June 15, 2021, the SWRCB sent notices of water unavailability to all post-1914 water right holders in the Sacramento-San Joaquin watershed. Additionally, SWP and CVP contractors across the state are individually taking actions to reduce their water use and increase flexibility for water operations across the state. The Drought Plan includes a list of those contractors and agencies and the measures they are taking to address the water shortage.

DWR and the Bureau are also considering avoiding water releases from Friant Dam while using the SWP's share of the San Luis Reservoir to supply or support water deliveries to The Bureau's senior water rights holders.

Conclusion and Implication

The Drought Plan emphasizes the overall shortage of water in California. The Drought Plan lists multiple proposals and actions aimed at addressing the water shortage across the state. Like those discussed in this article, the remainder focus on water quality, wildlife management, and water supply management. The Department of Water Resources and the U.S. Bureau of Reclamation will continue updating this plan as conditions change.
(Taylor Davies, Meredith Nikkel)

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

•May 17, 2021—EPA announced a settlement requiring Spectro Alloys Corporation to upgrade air pollution control equipment to reduce air emissions at the company's facility in Rosemount, Minnesota. The upgrades, which EPA estimates will cost at least $1 million to install, will help protect the environment and public health in the surrounding area by reducing air emissions. The company has also agreed to pay a $110,000 civil penalty to resolve its alleged violations of the federal Clean Air Act. EPA has now filed a consent agreement and final order and entered into an administrative consent order with Spectro Alloys Corporation to resolve these alleged CAA violations. The administrative consent order requires Spectro to install a new baghouse, which will control all emissions from the furnace including the hearth, upgrade the dryer baghouse, install new capture hoods and make additional improvements to the dryer closed vent system, increase emissions monitoring, and make improvements to the facility's operations, maintenance, and monitoring plan. The consent agreement and final order requires Spectro Alloys Corporation to pay a $110,000 penalty to the federal government.

•May 24, 2021—EPA announced a settlement with Lupton Petroleum Products Inc. and the former owner of a refinery for violating the Clean Air Act. This action protects human health and the environment by reducing the risk of accidental chemical releases. Lupton Petroleum Products Inc. and the facility's former owner will pay a penalty of $279,472 and restore the Lupton, Arizona facility to compliance with federal law on an established schedule. The facility is a small petroleum refining facility where Lupton Petroleum Products refines transmix, an unusable mixture of diesel and gasoline, back into diesel and gasoline.

•May 26, 2021—EPA and the U.S. Department of Justice (DOJ) reached a proposed settlement with The Metropolitan District (MDC), headquartered in Hartford, Conn., for violations of the Clean Air Act. Under the proposed consent decree filed in federal District Court, the MDC will pay a civil penalty of $298,000 and will be required to come into compliance with Clean Air Act emission limits and monitoring requirements to limit the amount of air pollution emitted from the MDC's sewage sludge incinerators (SSIs). The MDC provides potable water and sewerage services to the greater Hartford area. At its Hartford location, the MDC processes sewage waste from Hartford and seven other neighboring communities. Its three sewage sludge incinerators reduce the volume of sewage sludge through incineration and, in doing so, emit a variety of air pollutants. Under the federal Clean Air Act rules that came into effect in 2011, an owner of an SSI that makes changes over the life of the unit that cost more than 50 percent of the original cost must meet more stringent emissions standards. The proposed consent decree lodged in the U.S. District Court for the District of Connecticut states that the MDC must install and operate additional monitoring equipment and, by April 30, 2022, meet the more stringent CAA standards applicable to modified SSIs. The proposed consent decree, lodged in the U.S. District Court for the District of Connecticut on May 25, 2021, is subject to a 30-day public comment period and approval by the federal court.

•June 3, 2021—WVA Manufacturing LLC will pay a $182,350 penalty to settle alleged Clean Air Act violations at its primary-metals manufacturing fa-

cility in Alloy, West Virginia. The alleged violations are related to fugitive particulate matter emissions from several of the facility's furnaces and other production activities. Scientific studies have shown these types of excess emissions can contribute to decreased lung function and increased respiratory symptoms, such as irritation of the airways, coughing or difficulty breathing. The area surrounding the facility is considered to be in an area of potential environmental justice concern, and corrective actions in this settlement will help reduce negative health impacts in this area. As part of the settlement, the company has certified that it is now in compliance with applicable Clean Air Act requirements.

•June 11, 2021—EPA announced that the U.S. Department of Justice filed a motion on June 8, 2021 to enter a settlement with the Atlantic County Utilities Authority (ACUA) in the U.S. District Court for the District of New Jersey that resolves violations of Clean Air Act and New Jersey Air Pollution Control Act regulations at ACUA's wastewater treatment plant in Atlantic City, New Jersey. Under the proposed settlement, ACUA will take a series of steps to bring the facility into compliance with federal and state laws that protect clean air by reducing pollution from sewage sludge incinerators. ACUA will also pay a $75,000 civil penalty and fund a state-only project with the New Jersey Department of Environmental Protection (NJDEP) to install electric vehicle charging stations in Atlantic County. EPA estimates that the actions already taken by ACUA to comply with the Clean Air Act sewage sludge incinerator requirements prior to lodging of the settlement, and the additional actions required by the settlement, cost ACUA approximately $3 to $4 million. As part of the settlement, ACUA will also spend at least $30,000 to fund the installation of electric vehicle charging stations for public use in Atlantic County. If unable to find a government entity within Atlantic County willing to work with ACUA on the project, ACUA will instead pay $30,000 to NJDEP's "It Pay$ to Plug In" program. The state program provides grants to offset the cost of purchasing and installing electric vehicle charging stations. The charging station project was included in the proposed settlement to resolve state-law claims and will be entirely overseen by NJDEP. This settlement is part of EPA's multi-regional initiative to bring municipal sewage sludge incinerator facilities into compliance with Clean Air Act requirements.

•June 17, 2021—EPA announced settlements with four automotive parts distributors for violations of the Clean Air Act. The companies illegally manufactured or sold aftermarket auto parts that bypass or disable required emissions control systems, otherwise known as defeat devices. The companies paid $282,926 in penalties. The practice of tampering with diesel and gasoline powered vehicles by installing defeat devices can bring about the emitting of large amounts of NOx and particulate matter. AutoAnything, Inc. sold aftermarket exhaust systems designed to defeat the emissions control systems on motor vehicles and motor vehicle engines. The firm also sold products, commonly known as 'tuners,' which enable the user to easily turn off emission controls installed and certified by vehicle manufacturers to comply with the Clean Air Act. The company, headquartered in San Diego, California, paid a $125,000 penalty.

No Limit Enterprises Inc., doing business as No Limit Fabrication and No Limit Diesel, manufactured and/or sold tuner-related products and other components that bypass, defeat, or render inoperative emission controls installed and certified by vehicle manufacturers to reduce vehicle emissions. The company, headquartered in Moorpark, California, paid a $150,000 penalty, which was reduced due to financial hardship.

Integrated Strategic Resources, Inc., doing business as Andy's Auto Sport, sold aftermarket exhaust systems designed to defeat the emissions control systems on motor vehicles and motor vehicle engines. The company, headquartered in Monterey, California, paid a $5,000 penalty.

T&R Performance Solutions sold aftermarket parts designed to defeat the emissions control systems of motor vehicles and motor vehicle engines. The company, headquartered in Simi Valley, California, paid a $2,926 penalty. This agreement was reached under EPA's expedited settlement policy, which is only used in certain circumstances to address minor, easily correctable violations.

Civil Enforcement Actions and Settlements—Water Quality

•May 17, 2021—In a recent settlement with the EPA and the U.S. Department of Justice, a group of

related companies have agreed to perform wetland restoration and pay a fine as the result of EPA and DOJ allegations that the companies illegally filled wetlands on a 22-acre site in Scarborough, Maine in violation of the federal Clean Water Act (CWA). Maietta Enterprises, Inc., Maietta Construction, Inc., and M7 Land Co. LLC will perform approximately $850,000 worth of wetland restoration and mitigation and pay a $25,00 penalty under a proposed Consent Decree. Starting in the 1960s, the companies continuously used the site as a material staging and reprocessing area for Maietta Construction Inc.'s earthwork operations. Maietta Construction filled approximately ten wetland acres falling under the jurisdiction of the CWA on the site. Prior to disturbance, these wetlands were mainly forested freshwater wetlands with a mixture of coniferous and hardwood trees and were adjacent to an unnamed tributary to the Spurwink River, a navigable waterway that runs through the Rachael Carson National Wildlife Refuge. Converting large areas of natural wetlands to other uses can profoundly alter natural flood mitigation properties and undermine the pollutant-filtering abilities of wetlands while reducing important habitat. The restoration will involve removing fill and restoring about five acres of previously forested wetlands, creating a plant buffer between areas of remaining fill and restored areas, restoring and enhancing 1.2 wetland acres by managing invasive species and removing fill, mitigating some 7.7 adjacent acres of forested wetlands, in part by plugging drainage ditches and managing invasive species, and establishing a 14.5 acre conservation easement to preserve the wetlands in perpetuity.

•May 25, 2021—EPA has settled a series of Clean Water Act violations by ZWJ Properties, LLC for its Win Hollow Subdivision construction site in Boise, Idaho that discharges to Crane Creek, a tributary of the Boise River. ZWJ Properties agreed to pay a civil penalty of $62,000 to resolve EPA's allegations. Managing stormwater at construction sites prevents erosion. Uncontrolled stormwater runoff can cause serious problems for the environment and people, including sediment choked rivers and streams; flooding and property damage; impaired opportunities for fishing and swimming, and in some extreme cases, threats to public drinking water systems.

•May 28, 2021—Under a settlement with the EPA, Patriot Stevedoring & Logistics, the port operator at Brayton Point in Somerset, Massachusetts has changed its system for loading scrap metal in order to avoid illegally discharging scrap metal into Mt. Hope Bay, in violation of the Clean Water Act. Patriot Stevedoring & Logistics also agreed to pay a $27,000 penalty to settle the alleged violations by EPA's New England office that it discharged without a permit between Feb. 25 and Oct. 30 of 2020. Patriot Stevedoring changed its metal stevedoring process in September 2020 to load scrap metal onto a dumpster-like carrier that is hoisted directly into the ship's cargo bay for unloading. This avoids metal being dropped into the water during loading. The company agreed to phase out the use of the mechanical claws it had used before. Patriot Stevedoring leases the port at 1 Brayton Point Road, the location of a coal power plant that is no longer operating. This port area discharges stormwater from one outfall into the bay. Eastern Metal Recycling is a deliverer of up to 50 truckloads of shredded scrap metal to the port daily and after about a month, enough is stockpiled to call in a ship to pick it up.

•June 2, 2021—EPA has reached a settlement with Thomas Robrahn and Skillman Construction LLC of Coffey County, Kansas, to resolve alleged violations of the federal Clean Water Act (CWA) that occurred within the Neosho River. Under the settlement, the parties will pay a $60,000 civil penalty. According to EPA, Robrahn and Skillman Construction placed approximately 400 cubic yards of broken concrete into the river adjacent to Robrahn's property in an attempt to stabilize the riverbank. The work impacted about 240 feet of the river and was completed without first obtaining a required CWA permit. As part of their settlement with EPA, the parties also agreed to remove the concrete and restore the impacted site to come into compliance with the CWA. Under the CWA, parties are prohibited from discharging fill material into water bodies unless they first obtain a permit from the U.S. Corps of Engineers. If parties place fill material into water bodies without a permit, the Corps may elect to refer an enforcement case to EPA.

•June 8, 2021—EPA recently reached an agreement with Emhart Teknologies LLC, a manufacturer

of precision screw-thread wire and screw-lock inserts based in Danbury, Conn., to settle alleged violations of the Clean Water Act. Under the settlement, Emhart Teknologies agreed to pay a penalty of $29,658 for allegedly discharging a mixture of water and coolant, used to keep the facility's cutting machines from overheating during their operations, into the Sympaug Brook located near Danbury, Connecticut. The mixture contained oil and toxic metals, such as copper and lead, which were left over from machining operations. Emhart Teknologies' facility performs screw machine operations that generate used coolant containing oil and toxic metals from machining brass. An automatic sump pump operated by the facility displaced 1,800 gallons of dilute metal cutting coolant from an aboveground storage tank into nearby storm basins, which subsequently discharged into the Sympaug Brook. The facility reported that 15 barrels (or 630 gallons) of dilute cutting coolant reached the brook. The company completed the cleanup of the brook shortly after the spill was discovered and was cooperative with EPA during the enforcement investigation and case settlement negotiations. The Clean Water Act prohibits the discharge of oil or hazardous substances to waters of the United States in quantities that may be harmful to public health or the environment.

•June 9, 2021—The U.S. Attorney's Office and the EPA New England regional office has entered into a consent decree with the City of Quincy, Massachusetts. to resolve violations of the Clean Water Act regarding the City's stormwater and sanitary sewer systems. Water sampling indicated untreated sanitary sewage discharging from numerous Quincy stormwater outfalls, including outfalls discharging at beach areas. The settlement requires Quincy to implement extensive remedial measures to minimize the discharge of sewage and other pollutants into Quincy Bay, Dorchester Bay, Neponset River, Hingham Bay, Boston Harbor and other water bodies in and around Quincy. The cost of the remedial measures is expected to be in excess of $100 million. The City will also pay a civil penalty of $115,000. Under the proposed consent decree, Quincy will implement a comprehensive and integrated program to investigate, repair and rehabilitate its stormwater and sanitary sewer systems. The proposed settlement is also consistent with EPA directives to strengthen enforcement of violations of cornerstone environmental statutes in communities disproportionately impacted by pollution, with special focus on achieving remedies with tangible benefits for the community. The proposed consent decree establishes a schedule for Quincy to investigate the sources of sewage being discharged from its storm drains. Quincy will first complete its investigations of drainage areas discharging to beach areas, including Wollaston Beach and the Adams Shore area. Quincy will prioritize the rest of the investigations according to the sensitivity of receiving waters and evidence of sewage. The proposed consent decree also requires Quincy to remove all identified sources of sewage as expeditiously as possible. In addition, Quincy is required to conduct frequent and enhanced monitoring (in both dry and wet weather) of its stormwater outfalls. Some portions of Quincy's sanitary sewer system are over 100 years old. Numerous studies conducted by Quincy have identified significant and widespread defects in the sanitary sewer system, including cracks that allowed sewage to leak. While Quincy has made some repairs to the sanitary sewer system, the proposed consent decree will require future work to be conducted on a fixed schedule and coordinated with its stormwater investigations. The proposed consent decree requires the City to conduct all investigations and complete remedial work by December 2034.

•June 10, 2021—EPA announced a settlement with Karl and David Lamb to remedy environmental impacts associated with alleged Clean Water Act (CWA) violations in Duchesne County, Utah. The Administrative Order on Consent (AOC) between EPA and the Lambs remedies unpermitted dredge and fill activities, and associated discharges, to the Duchesne River and its adjacent floodplain on the Uintah and Ouray Reservation. Under the terms of the AOC, the Lambs have agreed to submit and implement a restoration plan to remedy the impacts of the earthmoving activities on the Duchesne River. EPA is working collaboratively with the Ute Indian Tribe and the Lambs to oversee the completion of all actions required by the order. EPA and the U.S. Army Corps of Engineers (Corps) conducted a site visit at the Lamb's property in September of 2019, and confirmed the activities listed above had taken place. These activities resulted in discharges of dredged and fill material into and along approximately 0.96 acres of the Duchesne River and floodplain, increasing

the potential for erosion and sedimentation within the river. To ensure there are no disproportionate environmental impacts in this area, local community members should contact EPA with any information about activities that could degrade the river and the associated watersheds and environment in this historically underserved area.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•May 25, 2021—EPA has issued "Stop Sale" orders to Grow Green, LLC, doing business as Hydro Pros Garden Center, in Utica, A. E. Fleming Co., Inc., doing business as Great Lakes Garden Wholesale, in Warren, and Jungle Control, LLC in Troy, Michigan, to immediately halt the sale or distribution of certain unregistered pesticide products. EPA's "Stop Sale" order to Grow Green, LLC, is to prevent the company's further sale and distribution of four unregistered pesticides, Power Si 1.22—2.14—0.90, Power Si Bloom 0.81—2.47—0.95, Hammer Head Bloom Enhancer, and Jungle Control Ferocious Premium Plant Optimizer. EPA's "Stop Sale" order to A. E. Fleming Co., Inc., is for the unregistered pesticide Hammer Head Bloom Enhancer. The order to Jungle Control LLC is for the unregistered pesticide Jungle Control Ferocious Premium Plant Optimizer. A laboratory analysis of Hammer Head Bloom Enhancer indicated the presence of plant growth regulator, paclobutrazol. Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), products that claim to be used for plant growth regulator purposes are considered pesticides and must go through EPA's registration process to ensure that the products perform as intended prior to their distribution or sale in commerce. The order also requires these companies to stop any online offers for the sale or distribution of any of these products.

•June 2, 2021—Alliant Techsystems Operations LLC will pay a $350,000 penalty to settle several alleged environmental violations at the U.S. Navy-owned Allegany Ballistics Laboratory in Keyser, West Virginia. Alliant Techsystems, a subsidiary of the Northrup Grumman Corporation, operates the laboratory under a lease with the Navy. There, Alliant Techsystems manufactures military products that include solid fuel rocket motors, explosive warheads, solid fuels and propellants. The cited violations were related to hazardous waste storage and treatment operations, the facility's Clean Air Act permit, water discharge requirements under the facility's National Pollution Discharge Elimination System (NPDES) permit, and the facility's Spill Prevention Control and Countermeasures Plan. The company allegedly violated the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. Along with the $350,000 penalty, Alliant Techsystems must ensure it is in full compliance with state and federal environmental requirements.

•June 8, 2021—EPA announced a settlement with Hawaii Fueling Facilities Corporation (HFFC) and Signature Flight Support, LLC, also known as Signature Flight Support Corporation (SFSC), to resolve violations of the Oil Pollution Act. The violations are related to the bulk fuel storage facility on Sand Island, in Honolulu, that is owned by HFFC and operated by SFSC. The facility stores and distributes jet fuel to the Honolulu International Airport. The settlement includes a commitment from HFFC and SFSC to make improvements at the facility to come into compliance with oil spill prevention requirements. The two companies will also pay a penalty. The Sand Island facility has 16 bulk aboveground storage tanks. In January 2015, the former operator noticed an inventory discrepancy in one of the tanks and estimated that 42,000 gallons of jet fuel had been released through the tank's bottom. Approximately 1,944 gallons of fuel were recovered outside of the facility boundaries.

Failure to implement measures required by the SPCC Rule can result in an imminent and substantial threat to public health or the welfare of fish and other wildlife, public and private property, shorelines, habitat, and other living and nonliving natural resources.

•June 9, 2021—EPA announced a settlement with HK Construction, Corp., for violations of federal regulations related to lead-based paint. The firm, based in Honolulu, will pay a $14,981 penalty for failing to comply with the Renovation, Repair and Painting Rule, which requires it to take steps to protect the public from exposure to lead while doing residential remodeling work. Although the federal government banned residential use of lead-based paint in 1978, it is still present in millions of older homes, sometimes under layers of new paint.
(Andre Monette)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT DECISION BROADENS FEDERAL APPELLATE REVIEW OF REMAND ORDERS IN A BLOW TO PLAINTIFFS BRINGING NUISANCE ACTIONS IN CLIMATE CHANGE CASES

BP P.L.C. v. Mayor and City Council of Baltimore, ___U.S.___, Case No. 19-1189 (May 17, 2021).

On May 17, 2021, the U.S. Supreme Court issued a 7-1 decision in *BP P.L.C. v. Mayor and City Council of Baltimore* finding that federal Courts of Appeals may review all theories when considering an appeal of a U.S. District Court's remand order. This is one of several active cases filed against fossil fuel companies claiming damages resulting from the companies' negative impacts on climate change. The decision is a win for fossil fuel company defendants, such as ExxonMobil and Chevron, who have been seeking to remove these cases to federal court where they believe they have an advantage defending against public nuisance claims in light of the U.S. Supreme Court's 2011 decision in *AEP v. Connecticut*.

Background

In *BP P.L.C.*, the City of Baltimore sued fossil fuel companies in Maryland state court, arguing that the City suffered damages as a result of the companies' knowledge and failure to warn about the climate change dangers of their products. The defendant companies quickly removed the case to federal court pointing to a variety of federal statutes applicable to the case, but most importantly, a federal provision that permits a federal forum for actions against an officer of the United States. The companies argued that this provision applied because much of the their oil exploration, drilling, and production activities resulted from government direction.

In response, the City of Baltimore filed a motion for remand back to state court. The U.S. District Court then reviewed each of the grounds for removal and determined that none of the grounds justified removal to federal court and thus remanded the case back to state court. The companies appealed the remand decision to the Fourth Circuit Court of Appeals, and it is the scope of the Fourth Circuit's review of this remand decision that became the central issue for the U.S. Supreme Court.

At the Fourth Circuit Court of Appeals

As a general rule, federal Courts of Appeals lack the authority to review a District Court's remand decision. However, 28 U.S.C. § 1447(d) provides an exception whereby a remand order is reviewable if the case was removed under the federal officer or civil rights removal statutes. On appeal, the Fourth Circuit Court of Appeals interpreted this exception as limiting a federal court's authority to review only the part of the District Court's order discussing the federal officer removal statute and not the other grounds for removal argued for by the oil companies. The Fourth Circuit thus refused to consider any other grounds for removal and affirmed the District Court's order regarding the federal officer statute removal ground. It is this narrow issue, whether the exception under 28 U.S.C. § 1447(d) allows a federal appellate court to review an *entire* remand order or just the portion dealing with the federal officer removal statute, that the Supreme Court examined in *BP P.L.C.*

The Supreme Court's Decision

The Supreme Court ultimately disagreed with the Fourth Circuit and held that a federal court of appeals may "review the merits of all theories for removal that a District Court has rejected" and not only arguments under the federal officer or civil rights removal statutes. In arriving at this decision, Justice Gorsuch, writing for the majority, relied on the plain text of §1447(d) and Supreme Court precedent. The Court noted that the use of the word "order" without any qualifications in the plain language of §1447(d))—" an order remanding a case to the State court [pursuant to § 1442 or § 1443] shall be reviewable by appeal"—indicates that the exception allows courts to review the *whole* order rather than a mere portion of it. The Court further pointed to its decision in *Yamaha Motor Corp., U.S.A. v. Calhoun* where

the Court similarly held that a federal statute using the word "order" allowed courts to review any issue within the entire order.

The Court's narrow holding is limited to this procedural issue. Thus, the Fourth Circuit must now reassess the entirety of the District Court's remand order. This increases the oil companies' chances of litigating the case in federal court.

Conclusion and Implications

The Court's decision could have drastic implications for the different states, cities and counties that have filed similar climate change suits across the country. Like in *BP P.L.C.*, the fossil fuel companies have removed most of these state court cases to federal court. For example, the California counties of San Mateo, Marin, and Santa Cruz and cities of Imperial Beach, Santa Cruz and Richmond brought climate change actions in California state court which were then removed to federal court and subsequently remanded back to state court. The Ninth Circuit, like the Fourth Circuit, also determined that its review of the remand decision was limited to the federal officer removal statute. However, the Supreme Court vacated the Ninth Circuit's judgment in these consolidated cases and remanded for further consideration in light of its decision in *BP P.L.C.*

If these cases remain in federal court, the plaintiffs' risk of dismissal increases. This consequence materialized most recently in April 2021 when the Second Circuit affirmed the dismissal of New York state's lawsuit against Chevron, ConocoPhillips, Exxon Mobil, Shell, and BP. Citing to *AEP v. Connecticut*, the Second Circuit held that claims related to domestic fossil fuel emissions are displaced by the federal Clean Air Act and also held that claims related to foreign emissions are non-justiciable political questions. If the Second Circuit's decision is any indication of how federal courts will treat the merits of these cases, then plaintiffs in these cases will likely want to avoid federal forums. But given the Supreme Court's decision to broaden review of remand orders, this may prove to be a much more difficult task. The Court's opinion is available online at: https://www.supremecourt.gov/opinions/20pdf/19-1189_p86b.pdf.
(Monica Browner, Darrin Gambelin)

U.S. SUPREME COURT DETERMINES CONTRIBUTION ACTION UNDER CERCLA SECTION 113(F) REQUIRES SETTLEMENT OF CERCLA LIABILITY—NOT CLEAN WATER ACT LIABILITY

Territory of Guam v. United States, ___U.S.___, 141 S.Ct. 1608 (May 24, 2021).

The U.S. Supreme Court recently held that a party may seek contribution under Subsection 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) only after settling a CERCLA-specific liability. The Court's holding reverses the U.S. Court of Appeals for the District of Columbia Circuit's earlier ruling that the Territory of Guam's (Guam) settlement of alleged federal Clean Water Act (CWA) violations triggered the statute of limitations on Guam's ability to seek contribution against the United States under CERCLA subsection 113(f)(3)(B).

Factual and Procedural Background

In 2004, Guam and the U.S. Environmental Protection Agency (EPA) entered into a consent decree regarding the Ordot Dump (Site) after the EPA sued Guam for alleged violations of the CWA. The site had originally been constructed by the United States Navy, who had deposited toxic military waste at the site for decades prior to ceding control of it to Guam. Guam's compliance with the consent decree, which included a civil penalty, would constitute full settlement and satisfaction of the claims against it under the CWA.

Thirteen years later, Guam sued the United States under CERCLA for its earlier use of the site, alleging the United States was liable under CERCLA §§ 107(a) and 113(f)(3)(B). Section 107(a) allows a state, including a territory, to recover:

> . . .all costs of [a] removal or remedial action' from 'any person who at the time of disposal of

> any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.
>
> Section 113(f)(3)(B) provides that a:
>
> . . .person who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who is not [already] party to a [qualifying] settlement.

Actions for contribution under § 113(f)(3)(B) are subject to a three year statute of limitations.

On appeal, the D.C. Circuit determined that Guam could not bring an action under Section 107(a) because it could have brought a contribution claim under § 113(f) as a result of settling its CWA liability in the 2004 consent decree. However, because the three-year statute of limitations had expired, Guam could no longer proceed with its contribution action either. The Supreme Court granted Guam's petition for writ of *certiorari*.

The Supreme Court's Decision

Guam presented two arguments challenging the D.C. Circuit's decision, however the Court only needed to address Guam's first argument to resolve the issue. In its first argument, Guam contended that it never had a viable contribution claim under § 113(f) because this section only applies when a settlement resolves liability under CERCLA, and it should therefore be able to pursue a recovery action under § 107(a). The Supreme Court agreed, holding that a settlement must resolve a CERCLA liability to trigger a contribution action under Subsection 113(f)(3)(B).

The Supreme Court's analysis focused on the totality of § 113(f), which, the Court explained, governs the scope of a contribution claim under CERCLA. Reading § 113(f) as a whole, the Court determined that the provision is concerned only with distribution of CERCLA liability. The Court reasoned that because a contribution suit is a tool for apportioning the burdens of common liability among responsible parties, the most obvious place to look for the threshold liability in this case was CERCLA. The Court noted that this approach was consistent with the principle that a federal contribution action is almost always a creature of a specific statutory regime.

According to the Court, this interpretation is confirmed by the language of Subsection 113(f)(3)(B), which provides a right to contribution in the specific circumstance where a person has resolved liability through settlement. This right to contribution, the Court stated, exists within the specific context more broadly outlined in § 113(f). Further, the Court explained that a predicate CERCLA liability is apparent in § 113(f) when its provisions are read in sequence as integral parts of a whole. The Court pointed out that Subsection 113(f)(1), the "anchor provision," is clear that contribution is allowed during or following any civil action under CERCLA §§ 106 or 107. The Court concluded that the context and phrasing of Subsections 113(f)(2) and (3) also presume that the right to contribution is triggered by CERCLA liability, and that these provisions are best understood only by reference to the CERCLA regime, including Subsection 113(f)(1). On this point, the Court noted that Subsection 113(f)(3)(B) ties itself to Subsection 113(f)(2), which in turn mirrors Subsection (f)(1)'s anchor provision requiring a predicate CERCLA liability. The Court further noted that Subsection 113(f)(3)(B) used the term "response action," which is used in several places throughout CERCLA.

Remedial Actions under CERCLA are Not the Same as Remedial Actions under the Clean Water Act

Addressing the United States arguments, the Court opined that while remedial measures taken under another environmental statute might resemble action taken in a formal CERCLA response action, applying Subsection 113(f)(3)(B) to settlement of environmental liability that might have been actionable under CERCLA would stretch the statute beyond its statutory language. The Court was similarly unpersuaded by United States' argument that there was a lack of express demand of a predicate CERCLA action in Subsection 113(f)(3)(B), focusing instead on Subsection 113(f)(3)(B)'s use of the phrase "response action," an express cross-reference to another CERCLA provision, and placement in the statutory scheme. Finally, the Court dismissed the United States argument that interpreting Subsection 113(f)(3)(B)'s as only allowing a party to seek contribution after settling a CERCLA liability would be redundant in light of Subsection 113(f)(1). To this, the Court

stated that it was interpreting Subsection 113(f)(3)(B) according to its text and place within a comprehensive statutory scheme rather than trying "to avoid surplusage at all costs." The Court thus held that the "most natural" reading of Subsection 113(f)(3)(B) is that a party may seek contribution under CERCLA only after settling a CERCLA-specific liability.

Conclusion and Implications

The importance of the Court's opinion to parties who may seek cost recovery or contribution from other responsible parties under CERCLA after entering a settlement agreement to discharge potential environmental liability under federal law cannot be understated. In particular, as the Court points out in the final footnote of the opinion, this case has the added benefit of providing clarity as to the application of the three-year statute of limitations for contribution actions under Subsection 113(f)(3)(B). Beyond this specific holding, the Court's view of contribution provisions in general is useful precedent for courts and interested parties in interpreting contribution provisions in other statutes. The Supreme Court's opinion is available online at: https://www.supremecourt.gov/opinions/20pdf/20-382_869d.pdf.
(Heraclio Pimentel, Rebecca Andrews)

FIRST CIRCUIT UPHOLDS' STATE LAW ENFORCEMENT AS BARRING CLEAN WATER ACT CITIZEN SUIT BUT REQUIRES ALL OPERATORS ON-SITE TO OBTAIN NPDES PERMITS

Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc., 995 F.3d 274 (1st Cir. 2021).

The U.S. Court of Appeals for the First Circuit recently determined that an enforcement action brought by the Massachusetts Department of Environmental Protection (Department) against a developer for sediment-laden stormwater discharges barred a citizen suit under the federal Clean Water Act (CWA) for the same violations. The court also determined that all operators on the project site were required to obtain a National Pollutant Discharge Elimination System (NPDES) CWA permit to discharge from the site.

Factual and Procedural Background

Robert and Janice Gallo and their son Steven Gallo (Gallos) served as the only officers, directors, and shareholders of Gallo Builders, Inc. (Gallo Builders) and as the only members of Arboretum Village, Inc. (Arboretum Village; collectively: Defendants). The Defendants have been involved in the construction of a large residential development in Worcester, Massachusetts, known as Arboretum Village Estates (Development).

Arboretum Village obtained an NPDES permit from the U.S. Environmental Protection Agency (EPA) for the Development (Construction General Permit). The Department monitored the Development for compliance with state regulations and discovered that the site was discharging silt-laden runoff from unstable, eroded soils into an unknown perennial stream, which ultimately ended up in the Blackstone River. As a result, the Department issued a Unilateral Administrative Order (UAO), which required Arboretum Village to undertake numerous remedial actions or face civil penalties. Following the issuance of the UAO, construction of the Development stopped. Arboretum Village appealed the UAO, resulting in Arboretum Village and the Department entering into a settlement agreement and the issuance of the Administrative Consent Order with Penalty (ACOP).

Despite approval of the ACOP, Blackstone Headwaters Coalition, Inc. (Blackstone) filed a citizen suit against Defendants, alleging that Defendants violated the CWA by failing to obtain and comply with the Construction General Permit conditions for the Development. Specifically, Blackstone brought two claims: 1) the Gallo Builders failed to obtain the Construction General Permit for the Development—despite Arboretum Village obtaining their own, and 2) Arboretum Village failed to adhere to the conditions in the Construction General Permit.

The CWA prohibits the discharge of pollutants

from point sources into waters of the United States. The CWA's NPDES permit program authorizes discharges into waters of the United States from point sources. The State of Massachusetts regulates and enforces water protection programs through the Massachusetts Clean Water Act (MCWA), but the state has not received authorization under § 402(b) of the CWA to administer the NPDES permit program under the MCWA.

The CWA authorizes individuals to file complaints against those who violate the CWA when the EPA or an authorized State fails to perform an act or duty required by statute. The CWA, however, precludes citizen suits when a state is diligently prosecuting the violation under a comparable state law.

Defendants and Blackstone filed cross-motions for summary judgment to determine whether the ACOP barred Blackstone's citizen suit. Defendants also sought summary judgment on Count I of the complaint concerning Construction General Permit coverage and Count II concerning discharges of sediment-laden stormwater. The district court granted summary judgment against Blackstone as to its claims in Counts I and II and denied Blackstone's cross-motion for summary judgment as to the applicability of the statutory preclusion bar for diligent prosecution. Blackstone appealed these determinations.

The Court of Appeals' Decision

Diligent Prosecution Bar to Citizen Suits

The court first addressed the issue of whether the CWA's "diligent prosecution" barred Blackstone's claim that Defendants discharged sediment-laden stormwater in violation of the CWA. The court considered four distinct questions under this issue: 1) whether the Department's action was commenced and prosecuted under a state law comparable to the CWA, 2) whether the Department's action sought to enforce the same violation alleged by Blackstone, 3) whether the Department was diligently prosecuting its action when Blackstone filed its complaint, and 4) whether Blackstone's suit is a civil penalty.

On the first question, the court noted that the Department appeared to have commenced its enforcement action under the MCWA, at least in part. Based on prior case law, the court determined that the MCWA was a comparable state law to the federal CWA. Blackstone did not dispute this conclusion. Instead, Blackstone contended the Department's enforcement action was brought under the Massachusetts Wetlands Protection Act (MWPA) and not under the MCWA, and that the MWPA was not a comparable state law to the CWA. The court agreed with Blackstone that the MWPA is not a comparable state law to the CWA, because it is narrower in scope than the CWA. Nevertheless, the court concluded the Department's enforcement action was brought, at least in part, under a comparable law: the MCWA.

On the second question, Blackstone argued its action targeted the causes of Defendants' water pollution while the Department's action targeted only the Defendants' pollution *per se*, and that the particular violations referenced in the complaint occurred on different days than the violations alleged in the ACOP. The court rejected this argument, reasoning that the ACOP required Defendants to implement actions that would prevent sediment-laden discharges, and that this forward-looking course of action would remedy the violations alleged in Blackstone's complaint.

On the third question, the court reasoned that the ACOP included a series of enforceable obligations on Defendants designed to bring the project into compliance and to maintain compliance with promulgated standards, while at the same time reserving to the Department a full set of enforcement vehicles for any instances of future non-compliance. Thus, the Department was "diligently prosecuting" the same violation.

On the fourth question, Blackstone argued that the "diligent prosecution" provision only bars duplicative citizen suits for civil penalties but not claims seeking declaratory and injunctive relief. The court reasoned that because the CWA's citizen suit provision does not authorize citizens to seek civil penalties separately from injunctive relief, the preclusion bar extends to civil penalty actions and to injunctive and declaratory relief. As a result, the court of appeal upheld the award of summary judgment to Defendants on Blackstone's claim for sediment-laden stormwater discharges.

Finally, the court considered whether the Gallo Builders were required to obtain coverage under the Construction General Permit. Defendants contended that because Arboretum Village obtained coverage under the Construction General Permit and because

both Arboretum Village and Gallo Builders were both owned by the Gallos, any failure by Gallo Builders, to also enroll under the permit was a nonactionable technical violation. The court rejected this argument, reasoning that the Gallo Builders was an operator of a construction project, and thus needed to obtain coverage under the Construction General Permit in order to discharge from the Development, regardless of Arboretum Village's coverage under the same permit. The court thus reversed the district court's decision and required all operators to obtain coverage under the Construction General Permit.

Conclusion and Implications

This case supports a diligent prosecution bar to citizen suits, as long as the state enforcement action was brought, at least in part, pursuant to a comparable state law. The case also appears to support a contention that every operator on a construction site may be required to obtain individual permit coverage to discharge from the site. The court's opinion is available online at: https://casetext.com/case/blackstone-headwaters-coal-inc-v-gallo-builders-inc-2.
(Kara Coronado, Rebecca Andrews)

NINTH CIRCUIT FINDS U.S. FISH AND WILDLIFE SERVICE FAILED TO EXPLAIN WHY IT REVERSED PREVIOUS LISTING DECISION REGARDING PACIFIC WALRUS

Center for Biological Diversity v. Haaland, ___F.3d___, Case No. 19-35981 (9th Cir. June 3, 2021).

The Center for Biological Diversity brought an action challenging a decision by the U.S. Fish and Wildlife Service (FWS or Service) to reverse its previous decision that the Pacific walrus qualified for listing as an endangered or threatened species under the federal Endangered Species Act (ESA). The U.S. District Court had granted summary judgment for the Service, but the Ninth Circuit Court of Appeals reversed, finding that the FWS did not sufficiently explain its change in position.

Factual and Procedural Background

In 2008, the Center for Biological Diversity petitioned the FWS to list the Pacific walrus as threatened or endangered under the ESA, citing the claimed effects of climate change on walrus habitat. In February 2011, after completing a special status assessment, the FWS issued a decision finding that listing of the Pacific walrus was warranted, finding that: the loss of sea-ice habitat threatened the walrus; subsistence hunting threatened the walrus; and existing regulatory mechanisms to reduce or limit greenhouse gas emissions to stem sea-ice loss or ensure that harvests decrease at a level commensurate to predicted population declines were inadequate. Although the Pacific walrus qualified for listing, however, the need to prioritize more urgent listing actions led the Service to conclude that listing was at the time precluded.

The FWS reviewed the Pacific walrus's status annually through 2016, each time finding that listing was warranted but precluded. In May 2017, the Service completed a final species status assessment. Among other things, that assessment concluded that while certain changes, such as sea-ice loss and associated stressors, continued to impact the walrus, other stressors identified in 2011 had declined in magnitude. The review team believed that Pacific walruses were adapted to living in a dynamic environment and had demonstrated the ability to adjust their distribution and habitat use patterns in response to shifting patterns of ice. The assessment also concluded, however, that the walrus' ability to adapt to increasing stress in the future was uncertain.

In October 2017, after reviewing the assessment, the FWS issued a three-page final decision that the Pacific walrus no longer qualified as threatened. Like the 2011 decision, this decision identified the primary threat as the loss of sea-ice habitat. Unlike the earlier decision, however, the 2017 decision did not discuss each statutory factor and cited few supporting studies. Mainly, it incorporated the May 2017 assessment by reference, finding that, although there will likely be a future reduction in sea ice, the Service was unable to reliably predict the magnitude of the effect and

the behavioral response of the walrus to this change. Thus, it did not have reliable information showing that the magnitude of the change could be sufficient to put the species in danger of extinction now or in the foreseeable future. The decision also found that the scope of any effects associated with an increased need for the walrus to use coastal haulouts similarly was uncertain. The 2017 decision referred to the 2011 decision only in its procedural history.

The Center for Biological Diversity filed its lawsuit in 2018, alleging that the 2017 decision violated the Administrative Procedure Act (APA) and the ESA. In particular, the Center for Biological Diversity claimed that the Service violated the APA by failing to sufficiently explain its change in position from the earlier 2011 decision. The U.S. District Court granted summary judgment to the FWS, and the Center for Biological Diversity in turn appealed.

The Ninth Circuit's Decision

The Ninth Circuit reversed the grant of summary judgment, finding that the "essential flaw" in the 2017 decision was its failure to offer more than a cursory explanation of why the findings underlying the 2011 decision no longer applied. Where a new policy rests upon factual findings contradicting those underlying a prior policy, the Ninth Circuit explained, a sufficiently detailed justification is required. The 2011 decision had contained findings, with citations to scientific studies and data, detailing multiple stressors facing the Pacific walrus and explained why those findings justified listing. The 2017 decision, by contrast, was "spartan," simply containing a general summary of the threats facing the Pacific walrus and the agency's new uncertainty on the imminence and seriousness of those threats. The Ninth Circuit found that more was needed.

The Ninth Circuit also found that the 2017 decision's incorporation of the final species status assessment did not remedy the deficiencies. The assessment did not purport, for example, to be a decision document, and while it provided information it did not explain the reasons for the change in position. The assessment itself also reflected substantial uncertainty and, while it did provide at least some new information, it did not identify the agency's rationale for concluding that the specific stressors identified as problematic in the 2011 decision no longer posed a threat to the species within the foreseeable future.

Ultimately, the Ninth Circuit noted, the FWS may be able to issue a decision sufficiently explaining the reasons for the change in position regarding the Pacific walrus. But the 2017 decision was not sufficient to do so, and the Ninth Circuit found that it could not itself come up with the reasons from the large and complex record. It therefore reversed the grant of summary judgment with directions to the U.S. District Court to remand to the Service to provide a sufficient explanation of the new position.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the standards of judicial review that apply when an administrative agency alters a previous policy and a general discussion of the listing process under the ESA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/03/19-35981.pdf.
(James Purvis)

EIGHTH CIRCUIT FINDS FUGITIVE EMISSIONS FROM COAL STORAGE DEEMED OUTSIDE THE REACH OF THE CLEAN AIR ACT NEW SOURCE PERFORMANCE STANDARDS

Voight v. Coyote Creek Mining Company, LLC, 999 F.3d 555 (8th Cir. 2021).

The Eighth Circuit Court of Appeals has affirmed the lower court decision in *Voight v. Coyote Creek Mining Company, LLC*, holding that a coal storage pile at the Coyote Creek lignite mining operation in North Dakota was not part of Coyote Creek's coal processing plant regulated under the federal Clean Air Act (CAA) New Source Performance Standards (NSPS). As a result, the fugitive emissions from the coal pile were excluded from the calculations determining whether the coal processing plant, and by ex-

tension the coal mine, was a major source under the CAA Prevention of Significant Deterioration (PSD) regulations. The Court of Appeals decision upheld the state's permitting of the plant as a minor source, rather than a major source.

Factual and Procedural Background

Coyote Creek Mining Company (Coyote Creek) mines lignite, a low-grade coal, at the Coyote Creek Mine (the mine) in rural North Dakota. After the coal is extracted, it is transported several miles from the surface mine to Coyote Creek's coal processing plant, where it is unloaded onto an open storage pile that covers an area of roughly eight acres. The coal pile abuts a retaining wall that separates the pile from the crushing equipment of the coal processing plant. Coal from the pile is fed into the crushing equipment by an apron feeder, situated at the top of the coal pile. Plaintiffs-Appellants Julie and Casey Voight own a large ranch adjacent to the mine.

Under CAA PSD regulations, a surface coal mine or a coal processing plant is subject to federal major source review and permitting if it has the potential to emit (PTE) at least 250 tons per year of any criteria pollutant regulated under the CAA. When determining the applicability of PSD, fugitive emissions, like coal dust, are not included in the calculation of PTE for a surface mine, but are included in calculating PTE for a coal processing plant. Where a coal processing plant qualifies as a major source, an adjacent surface coal mine would be regulated as part of the major source, though the mine itself does not trigger major source review. Under Subpart Y of the NSPS, coal processing plants that process more than 200 tons of coal per day are subject to additional requirements, including implementing a fugitive dust control plan for open storage coal piles.

Coyote Creek applied for a minor source air permit from the North Dakota Department of Health (Department), describing the mining operation, including coal extraction from the mine face, transport and storage of the coal, the coal processing facility, and transfer of the coal to a nearby electricity generating plant. The application identified the apron feeder, but not the coal pile, as part of the coal processing plant. In conducting its analysis of the mining operation, and the Department did not treat the coal pile as part of the coal processing plant. Accordingly, the coal dust fugitive emissions from the coal pile were excluded from the PTE calculation for the coal processing plant and it was permitted as a minor source under state air quality laws, rather than as a federal major source. The Department also concluded that the NSPS requirements for fugitive dust control of open storage coal piles was inapplicable to the Coyote Creek coal pile because it was not part of the coal processing plant.

After construction of the mining operation in 2015, the Voights filed suit against Coyote Creek, seeking declaratory and injunctive relief and civil penalties for violations of the CAA. The Voights allege that the mine required a major source PSD permit and that a dust control plan was required under the NSPS for the coal processing plant. Both parties moved for summary judgment on whether the NSPS applied to the coal pile. If the coal pile was found to be part of the coal processing plant, the plant and the mine would be regulated as a major source, requiring a major source permit. Coyote Creek would also be required to implement a fugitive dust control plan for the coal pile under the NSPS.

At the District Court

The U.S. District Court granted summary judgment in Coyote Creek's favor. The District Court found that the language of the NSPS regarding applicability to coal storage piles was ambiguous, but relying on guidance on the NSPS from the U.S. Environmental Protection Agency (EPA) and the Department's permitting decision on the Coyote Creek facilities, District Court concluded that that the NSPS did not apply to the coal pile as part of the coal processing plant. As a result, Coyote Creek's facilities required only a minor source permit from the Department.

New Source Performance Standards

The NSPS applies to coal processing plants, defined as:

> . . .any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying.

The performance standards for coal processing plants, including fugitive dust control, under the

NSPS apply to "affected facilities in coal preparation and processing plants that process more than … (200 tons) of coal per day." Affected facilities is defined to include:

> . . .[t]hermal dryings, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, transfer and loading systems, and open storage piles.

Thus, an open storage pile is only subject to the NSPS where it is *in* the coal processing plant. The regulations do not define what it means for an affected facility to be "in" a coal processing plant, however.

The Eighth Circuit's Decision

The Voights asserted that the NSPS unambiguously applied to the coal pile as part of Coyote Creek's coal processing plant. The Voights argued that the definitions of "coal processing plant" and "open storage pile" clearly demonstrate that the NSPS broadly applies to open storage piles, regardless of their location before or after the coal crushing equipment.

Conversely, Coyote Creek argued that the regulations, along with EPA's guidance on the NSPS conclusively demonstrate that the coal pile is not part of the coal processing plant.

Ambiguous Regulations

The Court of Appeals agreed with the District Court that the text of the regulations do not unambiguously answer the question raised in this case: whether a coal pile that is adjacent to the coal processing equipment, and is used for both storage and loading coal into the coal processing equipment, is "in" the coal processing plant itself. The Court of Appeals noted that the regulations clearly contemplate the inclusion of coal piles that are within coal processing plants, but do not provide unambiguous direction as to when exactly a coal pile is "in" a coal processing plant so as to be considered an affected facility subject to the NSPS requirements.

Making Sense of the Regulatons

With its finding that the regulations are ambiguous, the Court of Appeals looked to interpretive guidance. Quoting *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the opinion provided that deference to EPA guidance is appropriate where: 1) the regulation is genuinely ambiguous, 2) the agency's interpretation of the regulation is reasonable, 3) the interpretation is the agency's authoritative or official position, 4) the interpretation in some way implicates the agency's substantive expertise, and 5) the interpretation reflects fair and considered judgment.

The Court took EPA's NSPS *Applicability of Standards of Performance for Coal Preparation Plants to Coal Unloading Operations* as offering clarification on when a coal pile is considered to be "in" a coal processing plant, specifically:

> . . .if the coal is unloaded for the purpose of storage, then the unloading activity is not an affected facility under NSPS Subpart Y. The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of NSPS Subpart Y.

The court also looked at EPA's responses to comments on proposed amendments to the NSPS, where it stated that it "interprets coal unloading into the first hopper 'downstream' from any form of transportation to be the beginning of the 'coal preparation plant.'" Based on the purpose and use of the Coyote Creek coal pile, the court determined that it is a hybrid between a storage and unloading pile, with coal unloaded for storage, which would not be subject to the NSPS, and coal unloaded onto receiving equipment, an activity subject to the NSPS. The court felt that either could be plausible, but that the more reasonable interpretation was that the NSPS applies only to open storage piles where the piles occur past the first hopper. Coyote Creek's coal pile occurs before the first hopper, so was found to not be subject to the NSPS.

The dissent in the case praised the majority for overturning the prior decision, which gave deference to a state agency's interpretation, but nevertheless disagreed with the majority's conclusion. The dissenting opinion stated that the majority misread the regulation and that a better interpretation was that the coal pile was "in" the coal processing plant.

Conclusion and Implications

With its decision in *Voight v. Coyote Creek Mining Company*, the Eight Circuit has followed established

precedent from the U.S. Supreme Court on deference to agency guidance when the court if faced with interpreting ambiguous regulatory language. EPA's adopted guidance on the coal processing plant NSPS, *Applicability of Standards of Performance for Coal Preparation Plants to Coal Unloading Operations*, and the agency's formal responses to comments during rulemaking to amend the NSPS were deemed by the court to be appropriate interpretive guidance on the meaning of regulatory language concerning open coal storage piles associated with coal processing plants. Even with this guidance, however, the court felt that the two differing interpretations offered by the parties were both plausible. Specific to the question before this court on a coal storage pile being "in" a coal processing plant, unfortunately the court did not offer much explanation on *why* defendant-appellee Coyote Creek's interpretation was found to be 'more reasonable' than that advanced by Plaintiffs-Appellants Casey and Julie Voight. Such explanation would be useful to permittees and regulatory agencies, as well as courts, facing analogous fact patterns in interpreting or applying the NSPS for coal processing plants.

In the end, perhaps the Eighth Circuit's more impactful action was to limit the deference due to a state agency's interpretation of federal regulations when permitting a facility, from the court's prior decision in the *Voight* case. While the Eighth Circuit's statements on such deference were dicta, the majority opinion was clear that a state agency's permitting decision can provide a useful guide for a court's interpretative exercise, but is not due deference by the court and does not act as a dispositive factor in the court's interpretation of federal regulations.
(Allison Smith)

RECENT STATE DECISIONS

CALIFORNIA SUPERIOR COURT ORDERS DEVELOPER BACK TO THE DRAWING TABLE OVER INADEQUATE EIR FOR WILDFIRE AND VEHICLE EMISSIONS CONCERNS

Climate Resolve v. County of Los Angeles, et al., Case No. 19STCP01917 (L.A. Cnty Super Ct.).

A Los Angeles Superior Court Judge last month overturned Los Angeles County's 2018 environmental approval of a proposed largescale residential and commercial development at Tejon Ranch, approximately 60 miles north of Downtown Los Angeles. The ruling cited inaccuracies and omissions in the project's Environmental Impact Report (EIR) and ordered the developer back to the drawing board to address wildfire risk and vehicle greenhouse gas emissions. The rejection of the EIR will halt construction on the project, adding further delays to nearly two decades of protracted negotiations between the developer and regional environmental groups.

The Centennial Development Project

The project—dubbed "Centennial"—has been under development for nearly 20 years by the Tejon Ranch Company on its 270,000-acre ranch just north of Los Angeles. The Ranch is currently the largest privately held contiguous piece of private property in California, encompassing undeveloped swaths of the southern San Joaquin Valley, Tehachapi Mountains, and Antelope Valley.

Once completed, Centennial would form a major new population hub straddling the border between Los Angeles and Kern counties. The developer envisions the construction of nine "villages," each containing a mix of land uses enabling residents to live near schools, shops, civil buildings, medical facilities and job centers, to be built over the course of two decades. As currently envisioned, the development would include up to 19,000 dwelling units on approximately 5,000 acres of land, in addition to approximately 7,000,000 square feet of commercial and industrial space.

2008 Environmental Agreement

Centennial has been a major point of contention among regional environmental groups who claim that the development of such a large expanse of untouched land threatens the region's ecosystems and exacerbates worsening wildfire risks. In an effort to stave off environmental litigation and build goodwill, Tejon Ranch Company entered into an agreement in 2008 with a number of those environmental groups—including the Sierra Club, the Natural Resources Defense Council, and Audubon California—to conserve 240,000 acres of undeveloped lands in the Tehachapi Mountains for public tours, education and research. Under that agreement, the developer had been required to make payments of approximately $800,000 per year to the Tejon Ranch Conservancy, a consortium established to execute the agreement. In exchange, the developer would have the right to develop the remaining portions of its property for residential and commercial uses without the specter of environmental litigation.

Believing that it had quieted environmental concerns, the developer continued to pursue largescale construction projects on the portions of the Tejon Ranch land not covered by the 2008 agreement. In 2015, the County began initial environmental review of the latest iteration of the Centennial project under the California Environmental Quality Act (CEQA). Because of the massive scale of the proposed project, the County determined that a comprehensive EIR was warranted. The Draft EIR was released in May 2017, with the County receiving extensive public feedback and, as a result, proposing a number of changes and updates to the EIR. In December 2018, the Los Angeles County Board of Supervisors voted 4-1 to approve the Final EIR. In casting the sole dissenting vote, County Supervisor Sheila Kuehl said that she believed "it is not a good idea to build a brand-new city so far from everything else" and raised particular concerns over wildfires in the area.

2019 Lawsuit Challenging the County Approval

County approval was, however, short-lived. In early 2019, environmental groups that were not party to the 2008 Agreement—led by Climate Resolve and the California Native Plant Society—filed suit in Los Angeles Superior Court challenging the Final EIR. After nearly two years of litigation, Los Angeles County Superior Court Judge Mitchell Beckloff handed down a ruling in April 2021 that dismissed the vast majority of the plaintiffs' claims, but ultimately rejected the County's approval of the EIR on grounds that it did not adequately consider the development's potential impact on wildfire risk and vehicle greenhouse gas emissions. In particular, Judge Beckloff found that the EIR did not address the potential danger that wind-driven embers from the development site could pose to off-site forested areas. This decision came after a spate of large wildfires threatened local population centers along the San Gabriel Mountains and in the Antelope Valley in the summer and fall of 2020.

Both the developer and its opponents claimed victories following the April decision. The Tejon Ranch Company said that the ruling, which dismissed 20 of the petitioners' 23 claims, narrowed the remaining environmental issues and paved a path to final approval. Meanwhile, Climate Resolve and its co-plaintiffs celebrated the decision as a major step in forcing the County to rethink the largescale development.

The ruling requires that the developer return to the drawing table to propose adequate mitigation measures for wildfire risks and greenhouse gas emissions, before receiving additional approval by the County Board of Supervisors. Tejon Ranch says it will work with County officials to address Judge Beckloff's concerns and continue to work toward final sign-off on the project. Environmental groups, meanwhile, are doubtful that any steps the developer proposes will be adequate to overcome the inadequacies in the EIR identified by the Judge.

Conclusion and Implications

The April ruling constitutes another major roadblock for the development of this controversial project. As the state continues to grapple with the development of new communities in high wildfire risk areas and efforts to meet stringent greenhouse gas emissions targets, efforts by Tejon Ranch to win environmental approval for its largescale will be closely watched by developers across California in the coming years.
(Travis Kaya)

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