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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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LAW AND REGULATION REPORTER

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ENVIRONMENTAL NEWS

DROUGHT IN CALIFORNIA: SOUTH FORK DISCONNECTED FROM EEL RIVER—STATE'S RESERVOIRS ARE CURRENTLY HOLDING SIGNIFICANTLY LESS WATER

If you drive north on Highway 101 past Sonoma County, you'll eventually reach California's world-famous Avenue of the Giants, a 30-plus mile stretch of ancient redwoods towering hundreds of feet over residents and tourists alike. Slithering along below these lumbering beauties, however, the South Fork Eel River is experiencing record low flows, so low in fact that the South Fork has been cut off entirely from the Eel River.

USGS Flow Gauge Results

As of September 17, the US Geologic Survey flow gauge results at Leggett showed flows had dropped to 6.98 cubic feet per second (cfs). Before that, the previous historic low of 8.86 cfs was set back in 2002. Just south of Leggett, flows at the South Fork's tributary Elder Creek were only 0.5 cfs. Disturbingly enough, however, these flows weren't even the most concerning along the South Fork: flow gauge results at Bull Creek, which feeds into the South Fork just above Dyerville, reached a record low flow of a pitiful 0.03 cfs. This virtual non-flow at Bull Creek unsurprisingly comes just before the point of disconnect between the South Fork and the Eel River.

While flows at the Miranda gauge also dipped to a record low of 7.07 cfs—down from the previous record low of 12.1 cfs in 2008—some weekend rainfall following September 17's gauge readings was able to revive the South Fork's flows, bringing them back up to around 30 cfs. For reference, wet years normally lead to flows around 40 to 80 cfs around this time of the year.

Timber Industry and Groundwater Extraction Impacts

Adding to the problems brought on by the recent droughts, the South Fork is also suffering from the effects of the timber industry and groundwater extractions from nearby wells. The historical clearcutting practices and development in the area has led to a lack of riparian coverage, allowing for increased evaporation from the creeks and therefore resulting in lower flows.

As for groundwater extractions, the only confined aquifer in the area lies underneath the lower Eel River. Accordingly, wells along the South Fork, for example, that do not pump from this confined aquifer can have a significant impact on surface water flows. Over time, these groundwater extractions along the river have made it so that the South Fork is no longer a "gaining stream," as geologists call it. Rather, contributions from both groundwater extractions and the loss of riparian coverage have led to the South Fork becoming a losing stream.

California's Reservoirs are Also in a Dire State

Diminished river flows also implicate the storage of precious water in the state's largest reservoirs. The California Department of Water Resources has reported recently the following percentage information *for September* for the following reservoirs:

- *Trinity*: The Trinity Reservoir has historically been at 43 percent capacity and currently is at 30 percent of total capacity;

- *Shasta*: The Shasta Reservoir has historically been at 40 percent capacity and currently is at 24 percent of total capacity;

- *Oroville:* The Oroville Reservoir has historically been at 36 percent and currently is at 22 percent of total capacity;

- *Melones:* The Melones Reservoir has historically been at 63 percent and currently is at 35 percent of total capacity;

- *Folsom:* Folsom Reservoir has historically been at 41 percent and currently is at 24 percent of total capacity;

•*San Luis:* San Luis Reservoir has historically been at 27 percent and currently is at 13 percent of total capacity;

•*Don Pedro*: Don Pedro Reservoir has historically been at 74 percent and currently is at 50 percent of total capacity;

•*Millerton*: Millerton Reservoir has historically been at 139 percent and currently is at 57 percent of total capacity. (*See:* https://cdec.water.ca.gov/resapp/RescondMain)

All the other key state reservoirs, with the exception of Perris Reservoir [which is at 84 percent currently, are down substantially as well. (Ibid)

Conclusion and Implications

The Eel River is California's third largest watershed and is designated as a Wild and Scenic River at both the state and federal level. It supports one of the California's largest salmon and steelhead runs as well as its largest remaining old-growth redwood forests. The South Fork Eel River has also been a recreational hot spot for Californians, providing recreation among its thousands of acres of protected wilderness and hundreds of miles of river.

Unfortunately for this northern Californian gem, not much can be done to aid the South Fork other than to just wait and see when the next rains will come. The recent spurt of rain was a huge help in bring flows back up to near-normal conditions, but it is looking more and more like these dry conditions are the new normal. The disconnection of the hundred-plus mile stretch of the South Fork is reflective of the state's current battle with the persistent drought conditions, and California regulators will need to continue to improve the state's response to this ongoing threat. Reservoirs, too, are feeling the pain of this record drought.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

CLIMATE CHANGE BILL PASSES CALIFORNIA LEGISLATURE—THE SEA LEVEL RISE MITIGATION AND ADAPTATION ACT OF 2021

In response to climate change conditions and scientific modeling predicting a rise in California sea levels, the California Legislature recently passed the Sea Level Rise Mitigation and Adaptation Act of 2021 (Senate Bill 1(Atkins-D San Diego) (SB 1). SB 1 provides resources to coastal communities and municipal governments to address the rise in sea levels associated with climate change. As of the date of this writing, SB 1 awaited the Governor's signature to become enacted into law. [*Note:* Just as this article went to "print" we learned that Governor Newsom signed SB 1 into law on September 23, 2021]

Background

According to the Legislative Analyst's Office (LAO), sea level rise poses a significant threat to California's 1,100-mile coastline. The LAO predicts California's sea levels will rise by seven feet by the year 2100, causing devastating impacts to coastal communities' infrastructure, roadways and drinking water supplies. UC San Diego Scripps Institution of Oceanography forecasts that subtle changes in sea level will worsen flooding, negatively impact freshwater sources, impede coastal areas' ability to provide adequate drainage and, in some cases, submerge communities altogether.

LAO Projections

The LAO summarizes that in 2019, U.S. Geological Survey conducted an extensive study and comprehensive modeling effort evaluating sea level rise, precipitation patterns, cliff erosion, beach loss and other coastal threats. The modeling results projected that approximately one-half million Californians and approximately $150 billion in property are at risk of flooding along the coastline by the year 2100. According to the LAO, these damages equate to approximately 6 percent of the state's gross domestic product. The LAO projects that these economic impacts would be similar in scale to the damage caused by Hurricane Katrina, and that the cumulative damage by the end of the century could be more impactful than the State's most devastating earthquakes and wildfires.

Coastal Commission Policies

SB 1 directs the California Coastal Commission to account for sea level rise in its planning, policies and activities. In particular, it requires the Coastal Commission to consider recommendations and guidelines for the identification, assessment, minimization and mitigation of sea level rise within each local coastal program. SB 1 also requires state and regional agencies to identify, assess and mitigate the impacts of sea level rise.

Sea Level Rise State and Regional Support Collaborative and Funding

SB 1 establishes the California Sea Level Rise State and Regional Support Collaborative (Collaborative) to advise local, regional and state governments on sea level rise mitigation efforts. It requires the Collaborative to expend up to $100 million per year for grants to local and regional governments to update local and regional land use plans to take into account sea level rise and to fund investments to implement those plans.

Additional Funding for Environmental Justice Small Grant Program

Finally, existing law establishes the Environmental Justice Small Grant Program which provides grants to community groups for environmental justice issues. The California Secretary for Environmental Protection is currently authorized to spend up to $1.5 million per year under the grant program. SB 1 authorizes the Secretary to spend up to $2 million per year and requires $500,000 of the funds to be allocated for grants to organizations addressing and mitigating the effects of sea level rise in disadvantaged communities.

SB 1 passed the California Senate on a 33-2 bipartisan vote [and we learned that Governor Newsom signed the bill into law on September 23, 2021].

Comments from Senator Atkins

Senator Atkins has stated, in part:

> Sea level rise and climate change have begun to threaten iconic communities, precious ecosystems, and critical infrastructure up and down California's coast. It's vital that we make key investments and changes to our planning strategies to account for this climate reality. SB 1 gives our local governments and communities tools and funding, which helps foster coordination and more inclusive solutions to the challenges of sea level rise. . . .

Conclusion and Implications

The California Legislature is taking a proactive approach to mitigate projected significant threats to California's coastline and coastal economy. Scientific research and modeling referenced by the LAO indicates that if the problem is not addressed now, it will become a coastal and economic crisis costing taxpayers, homeowners, businesses and local communities massive losses in the not-too-distant future. Senator Atkins' website contains additional information on the background and workings of SB 1: https://sd39.senate.ca.gov/news/20210923-governor-newsom-signs-senate-leader-atkins'-historic-sb-1-—-sea-level-rise-mitigation. For the complete history and final text of SB 1, *see:* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1. (Chris Carrillo, Derek R. Hoffman)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Air Pollution and Public Health Impacts from Agricultural and Vegetation Fires in Southeast Asia

Fires are often used as a tool for agricultural management and forest clearance, a method dubbed "open biomass burning." These agricultural fires are a major source of fine particulate matter pollution, which degrades air quality and causes significant human health impacts. In fact, air pollution is a leading cause of death globally. Preventing fires and avoiding the associated air pollution could yield an increase in life expectancy and avoid premature deaths due to air pollution for populations across the globe. In Southeast Asia, open biomass burning is frequently employed for agricultural needs, though the health impacts of these types of fires in the region are not fully understood.

Researchers based out of University of Leeds published a study quantifying the potential to avert premature deaths due to open biomass burning. The researchers assessed the fire emissions of sulfur dioxide, black carbon, organic carbon, fine particulate matter (defined as particles that are 2.5 microns or less in diameter, also called PM2.5), and ozone using multiple fire emissions datasets. They then simulated the release of these pollutants compared to baseline pollutant levels without the agricultural fires. The results show that eliminating fire emissions reduced the PM2.5 concentrations by 40-70 percent across regions in Thailand, Myanmar, Cambodia, and Laos, and by <10 percent to 31 percent across other regions within Southeast Asia. When considering population density across the regions, the elimination of open biomass burning decreased PM2.5 concentrations by 7 percent, with reductions of 16 percent in in Mainland Southeast Asia and 2 percent in southeastern China. This would substantially reduce the population exposure to PM2.5 levels that are above the World Health Organization (WHO) Air Quality Interim Target 2, which is 25 micrograms per cubic meter. By assessing the disease burden of the fire-related pollutants, the research shows that the PM2.5 reductions from eliminating agricultural fires would avoid 59,000 premature deaths annually in the region. Using the subnational infant mortality rate as a proxy for population poverty levels, the researchers showed that the public health burden and premature deaths from agricultural fires disproportionately fall on poorer populations within the region of study.

By quantifying the impact on mortality that these agricultural fires have on populations in Southeast Asia, the research shows the importance of addressing agricultural fires as a source of pollution in addition to more traditional sources such as industry and transportation.

See: Carly L. Reddington,Luke Conibear, Suzanne Robinson, Christoph Knote, Stephen R. Arnold, Dominick V. Spracklen. Air Pollution From Forest and Vegetation Fires in Southeast Asia Disproportionately Impacts the Poor. GeoHealth, Volume 5, Issue 9. July 30 2021. https://doi.org/10.1029/2021GH000418.

Impacts of Climate Change on Future Biodiversity of Phytoplankton

Marine ecosystems are not just an important source of food and resources for many individuals, but they are also crucial for regulating atmospheric CO_2 levels and climate. Anthropogenic climate change, however, is disrupting the natural balance and biodiversity of many marine ecosystems through mechanisms such as ocean warming, acidification, and deoxygenation. As the ecosystems change, marine life will have to adapt, migrate, or become extinct. Phytoplankton are at the center of the marine ecosystem– these species sustain the marine food chain and regulate biogeochemical cycles within the ocean. In a recent study published in *Nature Communications*, Henson et. al. of the National Oceanography Centre in Southampton analyzed the impact of climate change on the biodiversity of phytoplankton.

Henson et al. selected a high emissions climate change scenario, similar to a model known as RCP8.5, and a marine ecosystem model with 35 unique types of phytoplankton, far greater than the 2 or 3 types often modeled by other researchers in the field. The 35 types were selected primarily to repre-

sent the diversity of biogeochemical functions completed by phytoplankton. Henson et al. found that phytoplankton biomass is expected to decrease in the majority of the tropical and subtropical ocean due to decreasing nutrients, and increase in higher latitude regions due to reduced sea ice and more hospitable conditions. In terms of phytoplankton diversity, it is estimated that up to 30 percent of modeled types may become extinct in certain tropical areas, while the number of species may increase by up to 30 percent in higher latitude regions. Henson et al. also evaluated the Shannon diversity index which accounts for both biodiversity and evenness in biomass. It was determined that the index would decrease in 92 percent of all ocean regions, due mostly to the concentration of biomass into fewer species. Henson et al. also predict higher rates of turnover in the future, meaning increased variability in the types of phytoplankton present at the same location over time.

The results of the study suggest that climate change will have long standing impacts on the stability of marine ecosystems. Henson et al., however, acknowledge several limitations to the model used in the study. The phytoplankton studied were selected to represent a range of biogeochemical functions, but not temperature sensitivities. This means the study does not directly account for the impact of increased ocean temperatures on the phytoplankton, but rather the indirect impact of disrupted nutrient systems (due to climate change). Furthermore, the phytoplankton are assumed not to adapt to changing conditions, and thus the biomass trends and turnover of species may be considered a worst-case scenario. The study also did not account for anthropogenic climate change impacts beyond climate and temperature – impacts such as runoff, pollution, and habitat loss. Future studies can incorporate these factors to generate more accurate predictions for the health of marine ecosystems.

See: Henson, S.A., Cael, B.B., Allen, S.R. et al. Future phytoplankton diversity in a changing climate. Nat Commun 12, 5372 (2021). https://doi.org/10.1038/s41467-021-25699-w.

Greenland's Coastal Ice Caps Show Signs of Growth During Past Periods of Warming

Polar ice melting has long been used as a symbol of the climate crisis. It is one of the most notable and recognized effects of climate change: scientists have been warning about glaciers receding due to warmer weather for decades. While current glacial melting is well understood, gaps remain in our understanding of how glaciers have behaved historically. Understanding the historical behavior of glaciers subject to environmental variation will help better contextualize the current state of our climate crisis.

The Woods Hole Oceanographic Institution, along with five partner institutions, studied the historical behavior of coastal glaciers, which have experienced a much more varied climate than the more often studied inland glaciers. For this study, the researchers collected and analyzed an ice core, which is a cylindrical sample removed from a glacier or ice sheet. Ice cores are composed of layers that were formed in different time periods, with the most recently deposited ice at the top and the oldest ice at the bottom. Analysis of ice core data shows historical changes in precipitation patterns and chemical makeup. Comparing coastal and inland ice cores allowed the scientists conducting this study to determine how the ice caps behaved differently across Arctic regions. In this study, the coastal ice core revealed an unexpected increase in size during periods of slight warming. Inconsistent with the behavior of glaciers under today's warming climate, the trend discovered in this study points to the nuances of glacial response to environmental changes: a slight increase in temperature will cause more precipitation, which in turn will cause a glacier to grow, while a large increase in temperature will cause melting and result in glacial recession. The glacial expansion observed in the study was justified by slighter warming at the time relative to the extreme temperature increase glaciers are experiencing today.

This was the first study conducted on a coastal ice core and the first to document larger shifts in temperature and precipitation patterns. Understanding the historical climate variability and associated glacial response provides valuable insight into today's climate crisis, which continues to reduce coastal glaciers. Research efforts to collect coastal ice cores should continue while we still have access to these dwindling repositories of historical climate data.

See: Woods Hole Oceanographic Institution. "A recent reversal in the response of western Greenland's ice caps to climate change: Research suggests

some ice caps grew during past periods of warming." ScienceDaily. ScienceDaily, 9 September 2021. www.sciencedaily.com/releases/2021/09/210909162229.htm.

The Surprisingly Inexpensive Cost of State-Driven Emission Control Strategies

Policy instruments designed at decarbonizing economies such as carbon taxes are critical in the fight against global warming. In response to increasingly varied levels of support for such policies across state lines, large federal governments are relying more heavily on heterogenous internal decarbonization policy. This is a shift away from what many imagined decarbonization policy to look like: a large, top-down, uniform, national policy plan. But heterogenous internal policy can allow for more experimentation with implementation and leadership and can make up for the diversity of interests and capabilities that different sectors of a country contain. The main question remains: how much more expensive is it?

Most policy modeling assumes uniform nationwide policy implementation because it is believed to be more economical. However, a recent study published in Nature Climate Change challenges this assumption. Using the US as a case study, researchers analyzed to what degree heterogenous decarbonization policy increases costs. They did this by splitting US states into three categories (low, middle, and high support for decarbonization policies) and analyzing three general scenarios (Uniform, Hybrid, and Heterogeneous carbon pricing) in comparison to a nation-wide greenhouse gas emissions target. The results were modeled using an integrated assessment model: Global Change Assessment Model with state-level detail in the United States (GCAM-USA).

The results were quite surprising: for a national GHG emissions mitigation effort of 20 percent, 40 percent, 60 percent and 80 percent decarbonization, the heterogenous approach was only 14 percent, 9 percent, 4 percent, and 5 percent more expensive than the uniform approach, respectively. In other words, the national mitigation cost is only slightly higher with a heterogenous approach, contrary to what was previously believed.

What factors make heterogenous decarbonization cost effective? The model suggests that inter-grid energy trade across state lines can account for variances between low-, mid-, and high-supporting states. The availability of low-carbon electricity infrastructure is also important, and the availabilities of carbon capture and storage (CCS) and biomass are even more important. These two technologies, CCS and biomass, appear to be crucial in keeping costs low: the lack of investment in CCS and limited availability of biomass significantly increased the costs of heterogenous decarbonization. Engaging states with lower support levels is also crucial: when some states with low support were modeled as having no engagement in decarbonization policy, the heterogenous scenario's cost rose significantly.

As the authors note, their findings demonstrate that heterogenous policy can be surprisingly inexpensive; however, the feasibility of such policies, and the control strategies they depend on, remains to be demonstrated. Carbon capture storage is still not widely available and there are legitimate concerns about inter-grid trade flexibility working across existing policy regulations and real-world obstacles. Heterogenous policy could be a powerful tool to circumvent varying levels of constituent support but before we can truly depend on it as a similarly expensive approach to uniform decarbonization policy, further research needs to be done to solidify its feasibility.

See: Peng, W., Iyer, G., Binsted, M. et al. The surprisingly inexpensive cost of state-driven emission control strategies. Nat. Clim. Chang. 11, 738–745 (2021). https://doi.org/10.1038/s41558-021-01128-0.
(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION DECLARES FIRST-EVER WATER SHORTAGE FOR THE COLORADO RIVER, MANDATING REDUCED DELIVERIES TO THE STATES OF ARIZONA, NEVADA AND TO MEXICO

Due to historically low water levels in Lake Mead due to punishing drought, on August 16, 2021, the U.S. Bureau of Reclamation (Bureau) declared a first-ever water shortage for the Lower Colorado River Basin. Starting in January, Lake Mead will operate in what is known as a Level 1 Shortage Condition, significantly reducing the amount of water that will be delivered to Arizona, Nevada and Mexico. Additional cuts will ensue should Lake Mead's water level continue to decline.

This article focuses particularly on the impacts to Nevada.

The Historic Drought

Most of the Colorado River's flow originates in the Rocky Mountains. As the river makes its way to Mexico, its water is stored in Lake Powell and Lake Mead.

Since the early 2000s, the Colorado River Basin has faced its worst drought in recorded history. The water level of Lake Mead, which serves as the source of most of the Las Vegas area's drinking water, has dropped more than 130 feet since January 2000. To address the ongoing conditions, in 2019, after lengthy negotiations, the seven states that use Colorado River water—California, Nevada and Arizona in the lower basin, and New Mexico, Utah, Colorado and Wyoming in the upper basin—developed Drought Contingency Plans for the Upper and Lower Basins.

Thereafter, the drought worsened, and the Upper Basin experienced an exceptionally dry spring in 2021. April-to-July runoff into Lake Powell totaled just 26 percent of average despite near-average snowfall last winter. Researchers attributed this decline to a warming climate. Soils are so dry that they soak up melting snow before it reaches the river.

As of August 2021, the Bureau projected that for the 2021 water year (which ends September 30), unregulated inflow into Lake Powell—the amount that would have flowed to Lake Mead without the benefit of storage behind Glen Canyon Dam—was approximately 32 percent of average. Total Colorado River system storage as of August was 40 percent of capacity, down from 49 percent at the same time in 2020.

In August, the Bureau issued its study of the Colorado River's water outlook for the ensuing 24 months. That forecast showed that by the end of 2021, Lake Mead would reach a level of 1,066 feet above sea level, a level not seen since the reservoir began to fill after completion of Hoover Dam in the 1930s. At that level, the lake will be at 34 percent of capacity. A shortage can be declared at an elevation of 1,075 feet.

The Tier 1 Shortage Declaration

Lake Mead's low water levels and the dismal forecast prompted the Bureau to issue a first-ever water shortage declaration for the Lower Basin, referred to as Tier 1. The required shortage reductions, which begin in January 2022, are:

- Arizona: 512,000 acre-feet, which is approximately 18 percent of the state's annual apportionment;
- Nevada: 21,000 acre-feet, which is 7 percent of the state's annual apportionment; and
- Mexico: 80,000 acre-feet, which is approximately 5 percent of the country's annual allotment.

What The Shortage Declaration Means for Nevada

Southern Nevada gets about 90 percent of its water supply from the Colorado River. In some respects, it has been planning for this moment for the last two decades.

In 2002, the Colorado River experienced its lowest recorded flows on record. Yet that same year, Southern Nevada used more water than it ever had before. Recognizing the need to reduce water use, the Southern Nevada Water Authority (SNWA) implemented an aggressive water conservation program that resulted in significant water reductions.

Mandatory conservation measures adopted in 2003 included seasonal watering restrictions, golf course water budgets, a grass replacement program in which customers are paid to remove grass, water waste penalties, and changes to municipal development codes that significantly reduced the impact of new development on the water supply.

As a result of these measures, the Las Vegas area used 23 billion gallons less water in 2020 than in 2002, despite a population increase of more than 780,000 residents during that time. This represents a 47 percent decline in per capita water use since 2002.

Adding to these efforts, in the 2021 legislative session, the Nevada Legislature passed AB 356, which prohibits the use of Colorado River water to irrigate nearly 4,000 acres of "nonfunctional" turf by the end of 2026. This includes grass in medians, roundabouts, business centers, homeowners association entrances and along parking lots and streets. In that decorative grass consumes about 10 percent of the Las Vegas Valley's annual water supply, the legislation is projected to save nearly 9.5 billion gallons (or 30,000 acre-feet) of water annually.

In addition to these conservation measures, SNWA's 2020 Integrated Resource Planning Advisory Committee (IRPAC) recommended specific actions to achieve further reductions in water use. Key focus areas include:

- Reducing non-functional turf and limiting turf installation in new development;
  Limiting cool-season turf installation in public spaces and expediting conversion to warm-season turf in public facilities;
- Enhancing landscape watering compliance through implementation of smart controller technology;
- Speeding repairs of leaks through implementation of advanced metering infrastructure;
- Reducing consumptive water losses associated with evaporative cooling, primarily in commercial and industrial buildings;
- Encouraging water-efficient development and discouraging consumptive use by new large water users; and
- Making infrastructure investments.

The Las Vegas Valley Water District has urged its customers to dial back their irrigation clocks in the fall and winter to ensure watering only occurs on assigned water days. According to a statement on the Water District's website, customer compliance with cool weather watering days would result in a 7-billion-gallon savings, which is the entire reduction required under the shortage declaration.

Conclusion and Implications

Nevada's existing conservation measures will likely allow it to achieve the reductions mandated by the Tier 1 declaration. The bigger question is what comes next. Will the Tier 1 cuts be enough to halt Lake Mead's decline, even as climate change continues to affect the river's hydrology? Bureau projections suggest that additional tier-level shortage declarations could go into effect. Even a robust Rocky Mountain snowpack this year may not be enough to reverse the current downward trend.
(Debbie Leonard)

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

•August 30, 2021—Arizona-based Gear Box Z (GBZ) has agreed to stop manufacturing and selling aftermarket automotive products widely known as "defeat devices," that, when installed, bypass, defeat, or render inoperative U.S. Environmental Protection Agency (EPA) certified emission controls on motor vehicles thereby increasing emissions and harming air quality. In January 2020, the United States sued GBZ, which manufactured and sold thousands of defeat devices, alleging that these devices violated the Clean Air Act (CAA). In March 2021, the court found that the United States would likely prevail on the merits of its case, that GBZ's products are defeat devices, and issued a preliminary injunction ordering GBZ to immediately halt the illegal sale of the devices. In its decision, the court found that the continued selling of these defeat devices would cause irreparable harm by increasing motor vehicle emissions that impair human health and the environment. The settlement prohibits GBZ from manufacturing and selling any defeat devices; it also bars GBZ and its owners from selling or transferring any intellectual property associated with these products, providing technical support for these products, and investing in or obtaining revenue from other companies' manufacture and sales of defeat devices. Under the settlement, GBZ and its owners will pay a civil penalty of $10,000, which was based on their financial situation.

•August 30, 2021—EPA assessed civil penalties against two companies for installing or selling "defeat devices" in vehicle engines to render emissions controls inoperative, in violation of the federal Clean Air Act. Diesel repair shop Midwest Truck Products LLC of Cantril, Iowa, will pay a $75,000 penalty. South Central Diesel Inc. of Holdrege, Nebraska, an industrial machinery and equipment distribution company, will pay a penalty of $50,954. According to EPA, the companies tampered with vehicle engines and/or sold devices to remove emissions controls for hundreds of customers. In addition to paying civil penalties, the companies certified that they have stopped disabling vehicle emission controls.

•September 9, 2021—Arbor Hills Energy LLC (AHE) has agreed to significantly reduce, if not virtually eliminate, AHE's sulfur dioxide (SO2) emissions at its landfill gas-to-energy facility (Facility) in Northville, Michigan, to resolve alleged federal Clean Air Act and state law violations. In a complaint filed simultaneously with the consent decree, the United States and the State of Michigan allege several Clean Air Act and State law violations, including exceedances of the Facility's permitted SO2 emissions limits. This pollutant causes harm to human health and the environment once emitted into the air, including premature death, heart attacks, respiratory problems and adverse environmental effects. Based on an evaluation of the company's limited ability to pay, AHE also will pay a civil penalty of $750,000, split equally between the United States and the State of Michigan. The proposed decree, lodged in the U.S. District Court for the Eastern District of Michigan, resolves EPA's and Michigan's Clean Air Act and State law claims against AHE.

•September 9, 2021—EPA has announced settlements with four companies for alleged violations of Clean Air Act chemical release prevention requirements at four anhydrous ammonia facilities in Central California. The companies will pay more than $826,000 in civil penalties and make safety improvements to their facilities, with the goal of protecting the public and first responders from dangerous chemicals.

A September 2019 EPA inspection of the Dreyers Grand Ice Cream Inc. facility located in Bakersfield, California, found the company failed to: comply with process safety and hazard evaluation requirements; correct deficient equipment; manage change requirements; comply with compliance audit requirements; and submit accurate hazardous chemical reports for anhydrous ammonia. Dreyers paid a penalty of $301,066 and improved process safety.

An April 2018 EPA inspection of the Kern Ice and Cold Storage LLC. facility in Bakersfield, California found the company failed to: identify hazards and conduct an adequate hazard review; design and maintain a safe facility; and minimize the consequences of a release. Kern Ice agreed to a civil penalty of $115,012 and will make modifications to the facility to improve safety.

A June 2018 EPA inspection of Dole Fresh Vegetables Inc., owned by Dole Foods LLC and located in Marina, California, found the company failed to design and maintain a safe facility. Dole Fresh Vegetables also did not comply with process safety, hazard evaluation, and operating procedure requirements. Dole Fresh Vegetables paid a penalty of $206,621 and made modifications to the facility to improve.

A June 2018 EPA inspection of the Dole Packaged Foods LLC. owned by ITOCHU Corporation and located in Atwater, California, found the company failed to: comply with process safety, hazard evaluation, operating procedure, and training requirements; correct deficient equipment; and develop and implement an adequate emergency response plan. Dole Packaged Foods paid a civil penalty of $203,445 and installed physical barriers around ammonia pressure vessels and piping.

•September 13, 2021—EPA announced a settlement requiring Jeg's Automotive Inc. of Delaware, Ohio, to pay a $300,000 civil penalty for selling aftermarket motor vehicle parts that EPA alleges violated the Clean Air Act. As part of the settlement, Jeg's also agrees to perform a supplemental environmental project valued at $275,000 to replace three school buses for Columbus City Schools in areas of environmental justice concern. Between June 1, 2016, and July 23, 2020, Jeg's sold at least 1,892 defeat devices, including exhaust gas recirculation, or EGR, block plates, pipe kits and electronic control module reprogrammers, also known as tuners. The tuners prevent the on-board diagnostics from sending trouble codes to activate the check engine light or limp mode. Under the settlement, Jeg's will perform a supplemental environmental project to benefit Columbus City Schools. Jeg's will replace three older buses serving areas with environmental justice concerns with new buses featuring modern pollution controls.

•September 13, 2021—Formosa Plastics Corporation, Texas, has agreed to pay $2.85 million in civil penalties and to improve its risk management program to resolve alleged violations of the Chemical Accident Prevention Provisions of the Clean Air Act at its petrochemical manufacturing plant in Point Comfort, Texas. In the complaint, filed with the proposed consent decree, the United States alleges 20 violations of the CAA. EPA's investigation of Formosa was spurred by a series of fires, explosions and accidental releases at the Point Comfort plant spanning from May 2013 through October 2016. These accidents caused injuries to workers, including second- and third-degree burns and chlorine inhalation requiring hospitalization, as well as property damage and the release of extremely hazardous substances to the environment. Formosa will be required to update its response and personal protection plans to prevent employee injury, conduct a third-party audit of its risk management practices, perform corrective actions based on audit results and develop key performance indicators to evaluate future compliance.

•September 15, 2021—Xtreme Diesel Performance (XDP), an automotive parts manufacturer and retailer based in Wall Township, New Jersey, with a sales distribution center in Las Vegas, Nevada, has agreed to stop manufacturing and selling parts for diesel pickup trucks that, when installed, bypass, defeat, or render inoperative EPA-approved emission controls and harm air quality, as part of an agreement to resolve alleged Clean Air Act violations. The company will pay a $1,125,000 penalty, which was reduced due to XDP's limited financial ability to pay a higher penalty. In addition to requiring XDP to pay a penalty of $1,125,000, the settlement requires XDP to destroy any violative products still in its inventory, cease providing technical support or honoring warranty claims for previously-sold violative products, revise its marketing materials, notify the customers that purchased the subject parts that the products at

issue violate the Clean Air Act and conduct compliance training for its employees and contractors.

Civil Enforcement Actions and Settlements—Water Quality

•August 31, 2021—The U.S. Department of Justice (Justice Department) and the U.S. Environmental Protection Agency (EPA) announced a settlement with the Northern Cheyenne Utilities Commission (NCUC) resolving alleged violations of the federal Clean Water Act (CWA) and National Pollutant Discharge Elimination System (NPDES) regulations at the Lame Deer Wastewater Treatment Facility (facility) in the Northern Cheyenne Reservation in Lame Deer, Montana. The settlement, set forth in a consent decree lodged in the U.S. District Court for the District of Montana, requires the NCUC to make significant physical and operational improvements to the facility, some of which have already been implemented, and to improve the financial capacity of the NCUC to ensure sustained public health and environmental compliance. The settlement also includes a civil penalty to address past violations, adjusted downward to $1,500 based on an inability to pay determination, and stipulated penalties to resolve any future violations during the five-year minimum effective period of the consent decree.

•September 2, 2021—The United States, together with the State of Indiana, announced that the U.S. District Court for the Northern District of Indiana has approved the revised consent decree requiring U. S. Steel Corporation (U.S. Steel) to address alleged violations of the Clean Water Act and other federal and Indiana laws by undertaking substantial measures to improve wastewater treatment and monitoring systems at its steel manufacturing and finishing facility in Portage (known as its Midwest Plant) and to strengthen and broaden U.S. Steel's public and stakeholder notification procedures in the event of a spill or release to ground, soil or water. The consent decree approved by the court also requires U. S. Steel to pay $601,242 as a civil penalty, to be split evenly between the United States and the State of Indiana, and to reimburse the U.S. Environmental Protection Agency ($350,653) and the National Park Service ($12,564) for response costs incurred as a result of an April 2017 spill of wastewater containing pollutants that flow into Lake Michigan. In addition, the decree requires U.S. Steel to pay the National Park Service's calculation of damages ($240,504) resulting from beach closures along the Indiana Dunes National Park shoreline, and the National Oceanic and Atmospheric Administration's natural resource damage assessment costs ($27,512).

•September 15, 2021—EPA settled an enforcement action with the Union Pacific Railroad for Clean Water Act violations near the Columbia River in Oregon. The violations allegedly occurred when a UPRR train derailed and released approximately 47,000 gallons of Bakken crude oil in Mosier, Oregon. Most of the released oil discharged to the Mosier wastewater treatment plant. An estimated ten gallons of the Bakken Crude oil passed through the treatment plant and caused a sheen on the Columbia River. Final estimates of environmental impact included: 47,000 gallons of oil released, with 16,000 gallons burned or vaporized. Federal, state and UPRR cleanup actions included installing several wells to monitor and treat contaminated shallow groundwater. A total of 2960 tons of oil-contaminated soil was excavated and transported off-site for disposal. As part of the agreement, UPRR will pay a civil penalty of $52,500 to the U.S. Treasury. UPRR will also pay a $30,000 civil penalty to the State of Oregon for discharging oil to the Columbia River according to a settlement agreement with Oregon DEQ. In addition, UPRR has also reimbursed cleanup costs for Oregon DEQ, the Washington Department of Ecology and EPA.

•September 15, 2021—EPA issued a new emergency drinking water order to the Oasis Mobile Home Park, located on the Torres Martinez Desert Cahuilla Indians Reservation in California. This order requires the current management of Oasis, as well as the U.S. Bureau of Indian Affairs (BIA) land allotment trustees, to comply with federal drinking water requirements by correcting ongoing problems with Oasis' drinking water system that endanger residents.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 15, 2021—EPA issued an Administrative Order on Consent (AOC) directing Techtrix, Inc. (Techtrix), an electroplating and metal finishing shop located at 525 Plainview Street, Gadsden, Alabama, to immediately inventory, properly manage,

and appropriately dispose of all solid and hazardous waste at their facility pursuant to § 7003 of the Resource Conservation and Recovery Act (RCRA). EPA, in coordination with the Alabama Department of Environmental Management (ADEM), have determined this action is necessary to protect the environment and public health of the surrounding community. The AOC requires Techtrix to provide site security to prevent potential human health impacts; inventory, manage and dispose of its solid and hazardous waste; and take steps to prevent the future mismanagement and releases of hazardous waste, among other things, to protect human health and the environment. ADEM will assist EPA in overseeing Techtrix's compliance with the AOC.

•September 16, 2021—EPA reached an agreement with Superior Battery to conduct a cleanup at its warehouse in Morris, Illinois, that experienced a significant fire in June. The cleanup is expected to begin in October. EPA entered an Administrative Settlement Agreement and Order on Consent with Superior Battery to clean up the warehouse in Morris, which contains various types of batteries including lithium-containing batteries, in addition to solar panels, waste electronics and other materials. Superior Battery will perform the cleanup under EPA supervision, and submit work and safety plans to EPA. The agreement requires Superior Battery to clean up hazardous (and potentially hazardous) substances from the burned materials at its warehouse. Superior Battery must consolidate hazardous substances and contaminants, package and ship all batteries in accordance with Department of Transportation rules, and perform sampling and analysis of waste, soil, burned material, asbestos, storm water, and air. All wastes will be shipped off-site for disposal. EPA will monitor and oversee Superior Battery's compliance with the Order.

•September 16, 2021—EPA penalized Owens-Brockway Glass Container, Inc. $38,900 for violating the Emergency Planning and Community Right-to-Know Act's Toxic Release Inventory provisions when it failed to report information about toxic chromium compounds at its Portland facility. Owens-Brockway Glass Container uses iron chromite to make green glass at the facility. When super-heated in a furnace, iron chromite produces new chromium compounds which are then incorporated into green glass bottles. Under TRI, facilities that store, process, or manufacture certain toxic chemicals above threshold amounts must file annual reports of their chemical releases and transfers with EPA and appropriate state agency. In this case, EPA found that in 2017 and 2018 Owens-Brockway Glass Container failed to file required reports indicating it manufactured and processed chromium compounds in quantities that exceeded the threshold reporting amounts of 25,000 pounds.

Indictments, Sanctions and Sentencing

•September 24, 2021—A senior manager of diesel drivability and emissions at Fiat Chrysler Automobiles (FCA) was charged in an indictment unsealed for his alleged role in a conspiracy to mislead U.S. regulators, customers and the public by making false and misleading statements about the emissions control software used in more than 100,000 FCA diesel vehicles in order to increase the vehicles' emissions when they were not running on federal emissions test cycles. Emanuele Palma, 40, an Italian citizen and resident of Bloomfield Hills, Michigan, is charged with one count of conspiracy to defraud the United States, to violate the Clean Air Act and to commit wire fraud. Palma is also charged with six counts of violating the Clean Air Act, four counts of wire fraud and two counts of making false statements to representatives of the FBI and the U.S. Environmental Protection Agency's Criminal Investigation Division (EPA-CID). The indictment alleges that Palma and his co-conspirators purposefully calibrated the emissions control functions to produce lower NOx emissions under conditions when the subject vehicles would be undergoing testing on the federal test procedures or driving "cycles," and higher NOx emissions under conditions when the subject vehicles would be driven in the real world.
(Andre Monette)

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JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT UPHOLDS EMINENT DOMAIN AUTHORITY FOR FERC 'CERTIFICATE' GAS PIPELINE COMPANY DESPITE NEW JERSEY'S SOVEREIGN IMMUNITY CHALLENGES

PennEast Pipeline Co., LLC v. New Jersey, ___U.S.___, 141 S.Ct. 2244 (2021).

On June 29, 2021, an uncharacteristic majority of the U.S. Supreme Court upheld the right of Federal Energy Regulatory Commission (FERC) certificate holders to exercise federal eminent domain authority and bring condemnation actions against states to acquire necessary rights-of-way to construct pipelines. Despite New Jersey's defense that sovereign immunity protected the state against condemnation suits, the majority—a mix of liberal and conservative justices, Justices Roberts, Breyer, Alito, Sotomayor, and Kavanaugh—found that no such protection applied. Despite the subject matter involving natural gas and the NGA, the implications for construction projects for the interstate transfer of water—something severe drought in the nation has prompted renewed interest in—the case is highly instructive of the potential clash of the power of a federal agency and state's rights. Perhaps one day this federal power may tested under this decision with the U.S. Bureau of Reclamation and interstate water projects.

Background

In 1938, Congress authorized FERC to administer the Natural Gas Act (NGA), for the transportation and sale of natural gas in interstate commerce. Pursuant to NGA § 717f(e), in order to build an interstate pipeline, a natural gas company must first receive a certificate from FERC that the construction "is or will be required by the present or future public convenience and necessity." Congress further amended NGA after natural gas companies struggled to exercise their construction rights without a mechanism by which to secure property rights. That 1947 amendment authorized FERC certificate holders to exercise federal eminent domain power under NGA § 717f(h).

PennEast Pipeline's Exercise of Federal Eminent Domain Power

In 2015, PennEast applied to FERC for a certificate of public convenience and necessity, intending to construct a 116-mile pipeline from Pennsylvania to New Jersey. After FERC satisfied procedural requirements including public notice and comment and the environmental impact statement required by the National Environmental Policy Act (NEPA), FERC granted the certificate in January 2018.

After FERC certification, PennEast filed complaints in U.S. District Court in New Jersey to exercise its federal eminent domain power and begin establishing just compensation for affected property owners. The property PennEast sought to condemn included parcels in which New Jersey holds possessory and non-possessory interests (such as conservation easements). New Jersey (State) challenged the eminent domain complaints on sovereign immunity grounds. The District Court held that New Jersey was not immune from PennEast's federal eminent domain power. The Third Circuit Court of Appeals vacated and remanded to dismiss the claims against the State, reasoning that New Jersey's sovereign immunity protection shielded the State from condemnation actions brought pursuant to PennEast's NGA eminent domain power. The Third Circuit further reasoned that if Congress intended to abrogate state sovereign immunity, it would have been clearly stated in NGA. The U.S. Supreme Court granted *certiorari*.

The U.S. Supreme Court's Decision

Delegation of Federal Eminent Domain Power to Private Delegatees

The Supreme Court commented that the federal government has exercised its eminent domain authority since the founding of the country. Since that time,

the Court has repeatedly recognized that this includes the ability of the federal government to exercise such power over property owned by a state. The Court further explained that the federal eminent domain power may be delegated to private parties, inclusive of exercising federal eminent domain power within states. It was undisputed that Congress passed NGA § 717f(h) specifically to allow pipeline development by allowing FERC certificate holders to condemn any necessary rights-of-way. Therefore, it is well-established that NGA empowers FERC certificate holders to condemn property.

New Jersey's Sovereign Immunity Defense

New Jersey's principal defense was that sovereign immunity barred condemnation actions against non-consenting states, and that NGA did not abrogate sovereign immunity because the statute did not speak on the issue with sufficient clarity.

Sovereign immunity protects states from being sued unless: 1) the state unequivocally expressed consent to suit, 2) Congress clearly abrogated state sovereign immunity under the Fourteenth Amendment, or 3) the state waived sovereign immunity in "the plan of the Convention," referring to the structure of the original Constitution itself. In *PennEast*, New Jersey argued that its sovereign immunity remained intact because no exception applied.

The Court disagreed, explaining that states consented in "the plan of the Convention" to allow federal eminent domain power and condemnation proceedings by private delegatees when states entered the federal system and agreed to yield to the powers of the federal government. The Court further disagreed with New Jersey's attempt to divorce the power to exercise eminent domain from the ability to bring a condemnation proceeding. The court reasoned that eminent domain power is "inextricably intertwined" with the ability to bring condemnation proceedings.

Dissenting Opinions

Justice Barrett issued a dissenting opinion, joined by Justices Thomas, Kagan, and Gorsuch. The dissent argued that there was no textual, structural, or historical support for the argument that states surrendered to private condemnation suits in the plan of the Convention. Without such support, Justice Barrett argued that no other exception to sovereign immunity applied and as such New Jersey should be immune to suit in this case.

Justice Gorsuch joined Justice Barrett's dissent in full and authored a second dissenting opinion to clarify the difference between structural immunity and Eleventh Amendment immunity, both held by states. Justice Gorsuch explained that structural immunity is the constitutional entitlement that applies regardless of the type of suit, whereas the Eleventh Amendment provides immunity for a particular category of suits: suits filed against states, in law or equity, by diverse plaintiffs.

Conclusion and Implications

The U.S. Supreme Court ultimately held that NGA § 717f(h) authorizes FERC certificate holders to exercise federal eminent domain power and condemn all necessary rights-of-way, regardless of private party or state ownership. This federal eminent domain power is inextricably linked to the ability to bring condemnation actions against states. Further, sovereign immunity is not offended because the States consented to federal eminent domain power at founding when states agreed to submit to the federal government. The case resolved the important question of whether natural gas companies can acquire rights-of-way across state-owned property in order to construct pipeline systems. This clears a path for future development of energy infrastructure across the country. It too may portend development of water-transfer pipeline projects from states with an abundance of water to those that suffer from drought. (Alexandra L. Lizano, Darrin Gambelin)

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NINTH CIRCUIT REJECTS U.S. EPA'S APPROVAL OF OZONE PLAN FOR CALIFORNIA'S SAN JOAQUIN VALLEY

Association of Irritated Residents v. U.S. Environmental Protection Agency, ___F.4th___, Case No. 19-71223 (9th Cir. Aug. 26, 2021).

On August 26, 2021, the U.S. Court of Appeals for the Ninth Circuit held that the U.S. Environmental Protection Agency's (EPA) approval of the San Joaquin Valley Air Pollution Control District's (Air District) air quality plan to address ozone in California's San Joaquin Valley was arbitrary and capricious and inconsistent with the federal Clean Air Act. More specifically, the court concluded that a contingency measure in the Air District's State Implementation Plan (SIP) for meeting the air quality standard for ozone that would be triggered if other provisions in the SIP did not achieve further progress towards meeting the standard was inadequate and EPA did not provide a reasonable explanation for approving the measure. The Air District must now reevaluate the measures set forth in its SIP to address ozone in the San Joaquin Valley.

Background

Under the Clean Air Act, EPA must issue standards for pollutants such as ozone. As part of the cooperative framework under the federal Clean Air Act, state agencies such as the Air District and the California Air Resources Board (CARB) must then establish SIPs to meet EPA's standards—the Air District is tasked with developing a SIP for San Joaquin Valley and CARB is responsible for submitting the SIP to EPA for approval. SIPs also must include enforceable emissions limitations to attain the relevant air quality standards.

Areas that do not meet EPA's standards for specific pollutants such as ozone can be designated as a "nonattainment" area. SIPs for nonattainment areas must include provisions for "reasonable further progress," as well as "annual incremental reductions in emissions" in order to achieve attainment. For extreme nonattainment areas, SIPs also must provide for reasonable further progress of "at least 3 percent of baseline emissions each year."

In addition, SIPs for nonattainment areas must "provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress" or fails to attain the relevant air quality standard. These measures "shall . . . take effect in any such case without further action by the State or the [EPA] Administrator." Finally, any SIP revision for an extreme nonattainment area "shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone."

The Air District and EPA' Actions

In 2012, EPA designated the San Joaquin Valley as an extreme nonattainment area for the eight-hour ozone standard. In 2018, the Air District proposed updates to its SIP, which included a new type of contingency measure that involved the repeal of a rule allowing for the sale of small containers of paint—ozone precursors such as volatile organic compounds (VOCs) and oxides of nitrogen (NOX) can form when paint is in the presence of sunlight. The Air District also prescribed an "Enhanced Enforcement Activities Program," which entailed several different options to reduce emissions if the Air District failed to meet a milestone or attainment.

EPA approved the Air District's revised SIP. Most importantly, EPA also acknowledged that it had previously recommend in guidance that contingency measures "should provide emissions reductions approximately equivalent to one year's worth of [reasonable further progress], which, with respect to ozone in the . . . Valley," amounted to about 11.4 tons per day. In contrast, EPA estimated that the Air District's contingency measure to address small paint containers would provide reductions of only one ton per day. Moreover, EPA allowed the Air District to count:

> . . .additional emission reductions projected to occur that a state has not relied upon for purposes of [reasonable further progress] or attainment . . . and that result from measures the state has not adopted as contingency measures.

The Legal Challenge to the Air District's Revised SIP

The Association of Irritated Residents (AIR) petitioned the Ninth Circuit to review EPA's approval of the Air District's revised SIP to meet the air quality standard for ozone in the San Joaquin Valley. AIR's main argument was that the contingency measure tied to small paint containers was an unreasonable interpretation of the Clean Air Act and was arbitrary and capricious under the Administrative Procedure Act because the measure only provided a nominal emissions reduction of one ton per day.

The Ninth Circuit's Decision

The Ninth Circuit agreed with AIR that EPA's approval of the contingency measure was arbitrary and capricious because in approving the contingency measure that provided a lower emissions reduction, EPA failed to acknowledge that it had changed its understanding of what reasonable progress meant. Moreover, because EPA did not provide a reasoned explanation for the change, the court found that the rule was arbitrary and capricious. The court explained that "EPA still must give a reasoned explanation for departing from agency practice or policy" and "[b]ecause the agency did not provide a reasoned explanation for approving the state plan, the rule is arbitrary and capricious."

Separately, the Air District challenged AIR's standing to challenge the contingency measure on the basis that the measure had not been activated yet, and thus AIR's members failed to establish injury in fact and/or that setting aside the contingency measure would not redress AIR's alleged injuries. However, the court held that because the San Joaquin Valley has failed to meet ozone standards, AIR's alleged injuries were fairly traceable and not hypothetical.

In addition, the Ninth Circuit denied AIR's separate challenge to the Air District's Enhanced Enforcement Activities Program. Because EPA did not recognize the program as a standalone contingency measure, but a strengthening measure, and the program did not create any emission limitation, there was nothing in the Clean Air Act that prevented the Air District from implementing the program.

Conclusion and Implications

In light of the Ninth Circuit's decision on the contingency measure, the Air District must now reevaluate the measures set forth in its SIP to address ozone in the San Joaquin Valley. Once the Air District addresses the inadequacies in the SIP, CARB will eventually submit the SIP to EPA for approval. The court's published opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/26/19-71223.pdf.
(Patrick Veasy, Darrin Gambelin)

NINTH CIRCUIT CONTINUES TO UPHOLD THE SIGNIFICANT NEXUS TEST FOR NAVIGABLE WATERS UNDER THE FEDERAL CLEAN WATER ACT

Sackett v. U.S. Environmental Protection Agency, et al., 8 F.4th 1075 (9th Cir. 2021).

For the last 13 years, the U.S. Environmental Protection Agency (EPA) and the Sacketts, Michael and Chantell, have been engaged in what can only be described as a federal Clean Water Act (CWA) saga, that has generated largely procedural CWA case law. For instance, in 2012, upon hearing one of the Sacketts' cases, the U.S. Supreme Court determined that issuance of a jurisdictional determination by the U.S. Corps of Engineers (Corps), that identifies jurisdictional "Waters of the United States" (WOTUS), constituted final agency action subject to challenge in federal court. (*Sackett v. U.S. Environmental Protection Agency*, 566 U.S. 120 (2012).) In the most recent case, the Ninth Circuit Court of Appeals primarily considered whether the Sacketts' Idaho property contained wetlands subject CWA Section 404 dredge and fill permitting requirements. (*Sackett v. U.S. Environmental Protection Agency*, (9th Cir. 2021); 33 U.S.C. § 1344.) To reach a conclusion, the Ninth Circuit examined which of the now-many WOTUS

definitions controlled the character of wetlands in this case, as well as which opinion, in the notoriously fractured *Rapanos v. United States*, (547 U.S. 715 (2006)), applies. Ultimately, the Ninth Circuit found that the WOTUS definition in place at the time of agency action controls the analysis, and that, pursuant to the holding in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), Justice Kennedy's significant nexus test is the controlling case law in the Circuit.

Factual Background of the Sacketts' Case

In 2004, the Sacketts purchased a residential lot near Priest Lake in Idaho, which they intended to develop. In 2007, after obtaining county building permits, the Sacketts placed sand and gravel fill on the property, prompting EPA to issue a compliance order requiring restoration of the property's jurisdictional wetlands, and spurring a challenge by the Sacketts, which has been winding through the federal courts in a myriad of ways ever since. Moreover, in 2008, the Corps issued a jurisdictional determination (JD) indicating that the property contained wetlands subject to regulation under the CWA and supporting the compliance order.

On the eve of a 2020 EPA briefing deadline, which the court had twice extended, EPA issued a letter to the Sacketts withdrawing the amended compliance order issued 12 years prior. Consequently, EPA moved to dismiss the case as moot. However, the court did not find EPA's mootness arguments persuasive in light of the agency's ongoing modification of the WOTUS definition, among other issues. The Ninth Circuit explained that one EPA administration's decision not to enforce a compliance order did not bind the agency in the future under different leadership. Ultimately, the court determined the case was not moot, as enforcement of the compliance order could resume with a new administration, and proceeded to hear oral argument.

Background of the WOTUS Definition

As the Sacketts' case made its way through the federal courts, the EPA and Corps (Agencies) modified the WOTUS definition on a number of occasions: in 2015, under the Obama Administration, the Agencies issued the Clean Water Rule (80 Fed. Reg. 37054); in 2019, the Agencies, under the Trump administration, restored the pre-2015 WOTUS definitions as a part of its repeal and replace effort (84 Fed. Reg. 56626); in 2020, the Agencies, again under the Trump administration, issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250); and most recently, a U.S. District Court in Arizona vacated the Navigable Waters Protection Rule, (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*, ___F.Supp.4th___,Case No. CV-20-00266-TUC-RM (D. Ariz. 2021)), prompting the Agencies' to issue a statement that the earlier pre-2015 regime applies once again for the time being. The Agencies, under the Biden administration, also intend to place their stamp on the WOTUS definition; however, the timing of a new WOTUS definition is uncertain. (86 Fed. Reg. 41911.)

In addition to the Agencies' ongoing modification of the WOTUS definition, Supreme Court case law has shaped the interpretation of WOTUS over the years. In 1985, the Court held that wetlands abutting traditional navigable waterways were considered WOTUS in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In 2001, the Court clarified that "non-navigable, isolated, intrastate waters" did not constitute WOTUS subject to regulation, and effectively eviscerated the "migratory bird rule" in *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001). And perhaps most famously, in 2006, the Supreme Court issued a notoriously fractured opinion in *Rapanos v. United States*, which articulated no clear majority interpretation of the WOTUS definition. Justice Scalia, writing for the plurality, articulated that jurisdictional wetlands are confined to those with a "continuous surface connection" to "relatively permanent, standing or flowing bodies of water." While, Justice Kennedy issued a separate concurrence, establishing the "significant nexus test," which turns on whether wetlands, "alone or in combination with similarly situation lands" would "significantly affect the chemical, physical, and biological integrity" of more traditional navigable water bodies.

The Ninth Circuit's Decision

The Sacketts argued that the Scalia plurality opinion set forth in the *Rapanos* case is the governing standard; because their property does not have a continuous surface connection to a navigable water, it is not subject to regulation under the CWA. However,

the Ninth Circuit disagreed, finding that *Northern California River Watch v. City of Healdsburg*, which applied Justice Kennedy's significant nexus test, is the controlling law of the Circuit. The Sacketts argued that when the Ninth Circuit held Justice Kennedy's significant nexus test was controlling law for the Ninth Circuit, the court failed to apply a reasoning-based approach for determining which opinion applies under a fractured case with no prevailing majority, as required by *United States v. Davis*, (825 F.3d 1014 (9th Cir. 2016) (*en banc*)). However, the court rejected the Sacketts' argument and upheld *Healdsburg* and the significant nexus test, paving the way for a determination that the Sacketts' property contained wetlands subject to the CWA.

Conclusion and Implications

The 2020 Navigable Waters Protection Rule attempted to do away with the significant nexus test, initially making *Sackett v. EPA* notable for the continued application of the significant nexus test in the Ninth Circuit. However, the import of *Sackett v. U.S. EPA*, in terms of applying the significant nexus test despite adoption of the Navigable Waters Protection Rule, has likely been diminished by the Agencies' purported return to the pre-2015 WOTUS definition, which includes application of the significant nexus standard. Additionally, in *Sackett*, the Ninth Circuit Court of Appeals found that the WOTUS definition in place at the time of the challenged agency action (here, issuance of the compliance order and JD) controlled, allowing the court to apply the significant nexus test without controversy, to determine the status of Sacketts' property. Taken together, recent developments confirm that the significant nexus test is likely the law of the land in the Ninth Circuit, at least for now. The Ninth Circuit's opinion of August 18, 2021 is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-ca9-19-35469/pdf/USCOURTS-ca9-19-35469-0.pdf.
(Meghan A. Quinn, Alexandra L. Lizano, Darrin Gambelin)

DISTRICT COURT ADDRESSES THE SCOPE OF FEDERAL JURISDICTION AND REMOVAL IN CASE ALLEGING FALSE MARKETING OF FOSSIL FUELS AND GREENHOUSE GAS EMISSIONS

City of Hoboken v. Exxon Mobil Corp., ___F.Supp.4th___, Case No. 2:20-cv-14243 (D. N.J. Sept. 8, 2021).

Numerous local governments have brought state law claims against a wide range of oil and gas companies alleging that the defendant companies persisted in marketing fossil fuels despite their understanding of the risks of climate change and the role of carbon fuels in generating greenhouse gases. Those knowingly false marketing efforts allegedly caused and will cause local governments to incur substantial costs to proactively mitigate against the risks of climate change, as well as recover from climate change-driven weather disasters. The defendant oil and gas companies have sought, with uneven success thus far, to remove these claims to federal courts.

Background

The City of Hoboken (City) filed a complaint in New Jersey state court against non-diverse Exxon Mobil and other oil and gas companies alleging state common law claims for public nuisance, private nuisance, and negligence, as well as violation of the New Jersey Consumer Fraud Act. The City seeks compensation for losses it has suffered from Superstorm Sandy and "similar events" resulting from climate change, as well as the City's "abatement and remediation efforts" related to global warming. The City's theory of liability alleges that the defendant "oil and gas companies and related entities, engaged in a decades-long campaign to downplay the effect of fossil fuel usage on climate change."

Specifically, the City alleges that Exxon and the other defendants have known about and studied the potential harms from fossil fuel usage since the 1950s. Despite this knowledge, Defendants decided to prioritize their profits and actively suppressed evidence of the effects of global warming. Beginning in the late 1980s, Exxon's strategy to combat global warming:

> . . .shifted from trying to understand the impact of fossil fuels on climate change to trying to dispute and conceal their impact. It has continued to employ this strategy through the present day.

To do so, Exxon and other defendants created front groups with neutral names to promote climate science denial and misinformation campaigns. To that end, from 1998 to 2007, It was alleged that ExxonMobil gave over $20 million to think tanks and organizations that published research and ran campaigns denying climate science. But while defendants were engaged in their misinformation campaign, they were actively making business plans that accounted for rising sea levels and warming temperatures due to global warming.

The City alleged that the defendants subsequently switched their tactics from " outright deception" to a plan to "greenwash consumers." Greenwashing refers to defendants' strategy to make consumers think that Defendants are committed to combatting climate change when, in fact, defendants have not made any changes to their fundamental, core business of extracting and producing fossil fuels."

Defendants removed the case to U.S. District Court; the City moved to remand back to state court.

The District Court's Decision

As courts of limited jurisdiction, federal courts "must presume th[ey] lack[] jurisdiction over a matter unless jurisdiction is shown to be proper." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Federal courts in cases lacking diverse parties may have jurisdiction on the basis of federal question:

> . . .if the complaint 'establishes that federal law create[s] the cause of action or that the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law.' *ACR Energy Partners, LLC v. Polo N. Country Club, Inc.*, 143 F. Supp. 3d 198, 202 (D.N.J. 2015).

Nonetheless, a case will be remanded if the complaint, on its face, does not allege a federal claim, *i.e.*, if it is "well pled." The City plainly asserted only well-pled, state law claims. The defendants argued, however, that the "complete preemption" exception to the well-pleaded complaint rule mandated remand, under which federal jurisdiction is conferred:

> . . .where Congress 'has expressed its intent to completely pre-empt a particular area of law such that any claim that falls within this area is necessarily federal in character.' *Tishman Constr. Corp. of N.J.*, 760 F.3d at 302 (quoting *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999)).

The District Court rejected this argument, as the defendants failed to identify any provision of the federal Clean Air Act establishing that Congress intended:

> . . .to displace state law remedies that fall within the ambit of the Clean Air Act. Defendants also fail to identify any means for a litigant to assert a federal cause of action under the Act.

The District Court also rejected defendants' argument that the City's claims necessarily arise under federal law "because they seek to regulate transboundary and international emissions and pollution." Defendants argued this supported federal jurisdiction on the basis that "there are certain specialized areas, including interstate pollution, where there is an overriding interest in having a uniform federal rule," and argument that the District Court characterized as premising federal jurisdiction on the theory that the City's claims were completely preempted by federal common law. But even if the City's claims were grounded in federal common law—and no such common law has been recognized by the courts—asserting preemption by federal common law is an "ordinary preemption" affirmative defense, not a basis for federal jurisdiction.

The balance of defendants' arguments for federal jurisdiction were premised on a federal regulatory link to their production activities—that they produced hydrocarbons from lands under the jurisdiction of the federal Outer Continental Shelf Lands Act, that their operations had involved the federally-owned Elks Hill petroleum reserve, and that they supplied specialized products to the military. In addition to various legal deficiencies specific to each of these arguments, they all share the fundamental flaw that they address defendants' production of oil and gas, not their market-

ing activities—the subject of the City's suit. On this, and other bases, the District Court rejected each of these arguments.

Conclusion and Implications

Defendant oil and gas companies have yet to identify a reliable path to federal jurisdiction for the burgeoning suits brought by local governments. Faced with ever-growing liabilities for forward-looking mitigation as well as post-disaster remediation efforts, local jurisdictions have thus far largely been able to keep their claims in state courts. The lack of federal regulation of the oil and gas industry's marketing efforts may, in this long view, end up as a disadvantage to the industry.
(Deborah Quick)

DISTRICT COURT ADDRESSES STATE CHALLENGES TO THE BIDEN ADMINISTRATION DIRECTION ON THE USE OF ESTIMATES FOR GREENHOUSE GAS EMISSIONS—FINDS LACK OF ARTICLE III STANDING

Missouri, et al. v. Biden, ___F.Supp.4th___, Case No. 4:21-cv-00287 (E.D. Mo. Aug. 31, 2021).

Since 2008, federal agencies have estimated the social costs of greenhouse gas emissions when analyzing the costs and benefits of proposed agency actions, including the adoption of regulations. Presidents Obama and Trump both provided direction to agencies regarding the use of consistent estimates, although the two administrations directed agencies to use different estimates. President Biden, likewise, acted to ensure consistency among agency estimates via an executive order. A baker's dozen of states challenged that order on the theory that its implementation would inevitably, eventually, increase their regulatory burdens. But can a federal court exert jurisdiction over a dispute based on *future hypothetical*, if allegedly inevitable, harms?

Background

Following the Ninth Circuit's 2008 opinion in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008):

> . . .federal agencies have. . .employed estimates of the social cost of greenhouse gases prepared by interagency working groups in connection with related cost-benefit analyses.

In 2016, agencies relied on estimated costs developed by an interagency working group established by President Obama. President Trump disbanded the Obama-era working group and "withdrew" the work of that group, directing federal agencies to, instead:

> . . .ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in [the Office of Management and Budget] Circular A-4.

Incoming President Biden on January 20, 2021, signed Executive Order (EO) 13990, establishing an Interagency Working Group on the Social Cost of Greenhouse Gases. The Working Group was tasked with publishing, within 30 days:

> . . .estimates of the monetized damages associated with incremental increases in greenhouse gas emissions" for the "social cost of carbon. . .[and the]. . .social cost of nitrous oxide . . .[and]. . .of methane [Interim Estimates" of respectively, "SCC," "SCN," and "SCM"].

EO 13990 also requires the Working Group to publish a final SCC, SCN, and SCM by no later than January 2022 and:

> . . .provide recommendations to the President, by no later than September 1, 2021, regarding areas of decision-making, budgeting, and pro-

curement by the Federal Government where the SCC, SCN and SCM should be applied.

Further requirements include making recommendations to the President regarding procedures and methodologies to revise and revise SCC, SCN and SCM. The Working Group was directed to take account of expert opinion and the scientific literature, and solicit input from and engage the public "and stakeholders" and "ensure that the SCC, SCN, and SCM reflect the interests of future generations in avoiding threats posed by climate change." The Interim Estimates of SCC, SCN, and SCM released by the Biden-established Working Group were consistent with the 2016 estimated social costs, adjusted for inflation.

Missouri and 12 other states sued the President and various other executive branch departments and officials, challenging EO 13990 as violating separation of powers and various agency statutes, as well as presenting both procedural and substantive violations of the Administrative Procedure Act (APA). In essence, the plaintiff states argued that the Working Group's Interim SCC, SCN, and SCM were flawed and inaccurate, and that their employment by agencies would lead to more, and more burdensome, regulations. Plaintiffs sought to have implementation of EO 13990 enjoined. The federal administration sought to have the suit dismissed for lack of subject matter jurisdiction because the plaintiffs lack standing.

The District Court's Decision

Article III Standing

To establish Article III standing, plaintiffs must show: 1) an injury in fact, 2) a causal relationship between the injury and the challenged conduct, and 3) that a favorable decision will likely redress the injury. *Animal Legal Def. Fund v. Vaught*, Case No. 20-1538, 2021 WL 3482998, at *1 (8th Cir. Aug. 9, 2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)). Plaintiffs bear the burden of establishing each of the three elements of standing. *Ibid.*

The District Court concluded that the plaintiff states have not suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 856, as revised (May 24, 2016) (quoting *Lujan*, 504 U.S. at 560)). Plaintiffs argued that the court should assume that at some point in the future, one or more agencies will 'inevitably' issue one or more regulations that rely in some way upon the Interim Estimates, that such agency will 'inevitably' disregard any objections to the methodology by which the Interim Estimates were calculated; and that this yet-to-be-identified regulation will then harm plaintiffs in a concrete and particularized way.

Rather, the District Court reasoned:

> EO 13990 neither requires nor forbids any action on the part of Plaintiffs but instead merely prescribes standards and procedures governing the conduct of federal agencies engaged in rulemaking and other agency actions when monetizing the value of changes in greenhouse gas emissions.

Fundamentally, the Interim Estimates "alone, do not injure [p]laintiffs." Rather, plaintiffs "fear" an injury "from hypothetical future regulation possibly derived from these Estimates."

Plaintiffs were unable to establish the elements of causation and redressability "[f]or similar reasons."

The *Bennett v. Spear* Decision

The court rejected plaintiffs' reliance on *Bennett v. Spear*, 520 U.S. 154 (1997):

> . . .in which the Supreme Court held that a group of ranchers and irrigation districts had standing to challenge a Fish and Wildlife Service Biological Opinion that had the effect of requiring minimum water levels in particular reservoirs.

In that case, the Biological Opinion "had a '*virtually determinative effect*' on the agency's resulting water level restrictions."

Unlike the Biological Opinion in Bennett, neither EO 13990 nor the Interim Estimates mandate agencies issue the particular regulations that Plaintiffs fear will harm them. As noted above, the mandate in EO 13990 on which plaintiffs focus is limited to one of innumerable other factors in the cost-benefit analysis conducted by a wide range of agencies in an even wider range of regulatory contexts, and only to the

extent consistent with applicable law. It is implausible to suggest that the Interim Estimates alters the legal regime to which agencies are subject.

Similarly, plaintiffs could not establish redressability because they could not show that "a favorable decision" would "avoid[], or at least delay[], a regulatory burden." *City of Kennett*, 887 F.33d at 432:

> Even if the Court were to declare the Interim Estimates non-binding, agencies would be free to--and may be required to, *see Center for Biological Diversity*, 538 F.3d at 1200--consider the social costs of greenhouse gas emissions. And agencies may arrive at the same or even more costly regulations at the same speed or even more quickly than Plaintiffs currently predict."

Conclusion and Implications

Having failed to establish standing to challenge EO 13990, plaintiffs who wish to pursue their objections must do so via the conventional method of challenging specific agency actions relying on the Interim, and any Final, Estimates. Having exhausted their objections before the appropriate agency, plaintiffs will then be allowed to pursue any remaining issues in federal court.
(Deborah Quick)

TRUMP ERA MODIFICATIONS TO THE DEFINITION OF THE 'WATERS OF THE UNITED STATES REMANDED BY THE DISTRICT COURT IN ARIZONA TO THE EPA FOR FURTHER CLARIFICATION

Pascua Yaqui Tribe, et al. v. U.S. Environmental Protection Agency, et al., *Unpub.*,
Case No. CV-20-00266-TUC-RM (D. Az Aug. 30, 2021).

The U.S. District Court in Arizona recently remanded and vacated two final rules promulgated by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps; Collectively, Agencies). Together, the rules repealed and redefined the term "waters of the United States" (WOTUS) in the federal Clean Water Act (the rules are referred to collectively as the NWPR). The court's decision was *not* certified for publication.

Factual Background

The Clean Water Act prohibits the discharge of pollutants into "navigable waters" and defines this term as "the waters of the United States, including the territorial seas." In *Rapanos v. United States*, 547 U.S. 715 (2006), a plurality opinion from Justice Kennedy determined that a water is navigable if the waters are navigable in fact or there is a significant nexus between the water or wetland and a navigable water. The four-justice plurality opinion offered by Scalia determined that the phrase only applied to "relatively permanent, standing or continuously flowing bodies of water forming geographic features" and "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right."

In 2015, the Agencies promulgated the "Clean Water Rule" to define the term "navigable waters." On February 28, 2017, President Donald Trump issued Executive Order 13,778 which suggested repealing the 2015 Clean Water Rule and redefining "navigable waters" using the Scalia plurality opinion in *Rapanos*. In 2019, the Clean Water Rule was repealed, and, in 2020, the NWPR was promulgated. On January 20, 2021, President Joe Biden issued Executive Order 13,990 which directed agencies to re-evaluate any changes within the last four years that conflict with important national objectives and resulted in a notice of intent to restore the Kennedy plurality definition of "navigable waters" in *Rapanos*. The Agencies provided notice of their intent to restore the pre-2015 regulatory definition of "waters of the United States" while working to develop a new regulatory definition.

Procedural Background

Plaintiffs Pascua Yaqui Tribe, Quinault Indian Nation, Fond du Lac Band of Lake Superior Chippewa, Menominee Indian Tribe of Wisconsin, Tohono O'Odham Nation, and Bad River Band of Lake Superior Chippewa challenged the NWPR and its exclu-

sion of most wetlands from the definition of "navigable waters." On May 11, 2021, plaintiffs moved for summary judgement. On July 13, 2021, defendant-interveners Chantell and Michale Sackett (Sackett) and defendant-interveners Arizona Rock Productions Association; National Stone, Sand, and Gravel Association; Arizona Cattle Feeders Association; Home Builders Association of Central Arizona; Arizona Fam and Ranch Group; Arizona Farm Bureau; and Arizona Chapter Associated General Contractors (business interveners) filed a cross-motion for Summary Judgment.

The Agencies did not respond to the motions for summary judgment, and instead sought a voluntary remand of the challenge to the definition of "navigable waters" without vacating the case. Plaintiffs did not oppose the requested remand, but requested that the remand include a *vacatur*. The Sacketts opposed remand and the *vacatur*. The business-interveners did not oppose the remand, but opposed vacating the NWPR.

The District Court's Decision

The Motion to Remand

The court first considered the EPA's unopposed request to voluntarily remand the Clean Water Rule. Courts generally grant a voluntarily requested remand unless the request is frivolous or made in bad faith. Here, the court determined the voluntary remand request was not frivolous or made in bad faith. The Sacketts argued the EPA lacked discretion to revise the Clean Water Rule's definition of "adjacent wetlands," because the definition was required by under *Rapanos*. The court determined the Ninth Circuit already rejected the Sacketts' argument that the *Rapanos* plurality opinion is controlling. Thus, the court remanded the NWRP to the Agencies.

The Motion to Vacate

The court next considered two equitable factors in determining whether to vacate the NWPR: 1) the seriousness of the agency's errors, and 2) the disruptive consequences of an interim change that may itself be changed

On the question of the seriousness of the Agencies' errors, the court noted that the Agencies agreed the NWPR may not have adequately considered the CWA's statutory objectives or the effects of the repeal of the 2015 Clean Water Rule on the integrity of the nation's waters. These potential inadequacies were not mere procedural errors that could be remedied through further explanation. Instead, these errors could result in significant actual environmental harms. As a result, the court concluded the seriousness of the Agencies' errors in repealing and redefining "waters of the United States," the likelihood that the definition of "waters of the United States" will be further altered on remand, and the possibility of serious environmental harm weighed in favor of remand with *vacatur*.

The court next considered and rejected business intervenors' argument that a return to a pre-2015 regulatory regime would increase regulatory uncertainty. The court reasoned that uncertainty attends *vacatur* of any rule and is insufficient to justify remand without *vacatur*. Further, the court noted that the pre-2015 regulatory regime is familiar to the Agencies and to industries and that the Agencies intend to return to the pre-2015 regulatory regime while working on the new definition of "waters of the United States." As a result, regulatory uncertainty did not weigh in favor of remand without *vacatur*.

Conclusion and Implications

This *unpublished* case remanding and vacating the repeal of the 2015 Clean Water Rule and the adoption of a new definition of "waters of the United States" does not provide precedential authority in challenges to the Trump era changes to the definition of "navigable waters"; however, EPA's lack of a response to the motion for summary judgement and the court's remand and *vacatur* signal a forthcoming change to the definition of "navigable waters" that will likely apply nationwide. The court's *unpublished* opinion is available online at: https://earthjustice.org/sites/default/files/files/order_remand_and_vacate.pdf. (Anya Kwan, Rebecca Andrews)

DISTRICT COURT DENIES CLEAN WATER ACT DEFENDANTS' MOTIONS TO DISMISS INDICTMENT COUNTS FOR INSUFFICIENT PLEADINGS

United States v. Bruce Evans, and Bruce Evans, Jr.,
___F.Supp.4th___, Case No. 3:19-CR-009 (M.D. Pa. Aug. 19, 2021).

The U.S. District Court for the Middle District of Pennsylvania recently denied the motions of two criminal defendants charged with multiple violations of the federal Clean Water Act (CWA), who had separately moved to dismiss several charges filed against them. At issue was whether the government sufficiently made its charging allegations against each defendant.

Factual and Procedural Background

Father, Bruce Evans, Sr. (Evans Sr.), and his son, Bruce Evans, Jr. (Evans Jr.), operated a waste treatment facility. The facility discharged treated effluent under a CWA permit issued under the National Pollutant Discharge Elimination System (NPDES) program. Father and son were charged under an initial indictment in 2019, and a superseding indictment the following year, with violations of the CWA for failing to comply with terms of the facility's NPDES permit. Evans Sr. was charged with 35 counts, and Evans Jr. was charged with five counts.

Under the CWA, a "knowing" violation of the CWA's discharge prohibition in § 301 may be prosecuted as a felony. In addition, the CWA criminalizes acts and omissions beyond the direct act of discharging pollutants into water: permit conditions require that holders, for example, "properly supervise, operate and maintain . . . treatment facilit[ies]," and failure to do so may give rise to criminal liability under CWA § 301.

Evans Sr. moved to dismiss six counts on the grounds that: 1) the government failed to establish the "knowing" element for each contested charge, 2) the government failed to allege his conduct of "intentionally pumping the contents" of a waste tank onto the ground and nearby grass during a tank cleaning implicated the "navigable waters" element, and 3) the counts related to his alleged failure to submit various reports prior to 2014 were barred by the CWA's five-year statute of limitations. Further, Evans Sr. argued these failures did not adequately inform him of the nature of the charges against him or allow him to adequately defend himself.

Evans Jr. moved to dismiss five of his counts on similar grounds that 1) the government failed to allege he was an "operator" of the facility and 2) the government failed to establish he committed the alleged violations "knowingly." Evans Jr. separately demanded a bill of particulars in the alternative, that the government must provide him additional "factual or legal information for him to prepare his defense . . . ."

The District Court's Decision

'Knowing' Element

The District Court first considered whether the indictments sufficiently alleged "knowing" violations of the CWA. The court relied on a Ninth Circuit case which reasoned that:

> . . .for a defendant to 'knowingly' add a pollutant in violation of the [CWA], he must know that he discharged an enumerated substance from a conveyance, and that the substance was 'discharged into water . . . .'

The government is not required "to prove [] that a defendant knew he discharged a substance [into 'waters of the United States' but 'into water.'

Applying the Ninth Circuit's reasoning, the District Court denied the motions to dismiss. The court noted the indictment alleged that defendants knowingly violated permit conditions by failing to properly supervise, operate and maintain the treatment facility, by knowingly allowing waste materials to not be properly treated and to accumulate below the outfall of the sewage treatment plant in an unnamed tributary. In addition, the court determined the indictment against Evans Sr. alleged his extensive involvement with the facility dating back to 1996

as a board member and facility manager. The court reasoned that even though Evans Sr. was not the operator, the indictment alleged his role as manager made him responsible for overseeing the operations of the facility, for dealing with the facility's engineering and environmental contractor on a day-to-day basis for approximately 26 years, and for regularly dealing with the state environmental department. In addition, the indictment alleged Evans Sr. signed the renewal of the facility's NPDES permit. Based on these allegations related to Evans Sr.'s long history with the facility, the court determined the indictment sufficiently alleged "knowing" violations to withstand a motion to dismiss.

'Navigable Waters' Element

The court next evaluated and rejected Evans Sr.'s contention that the government failed to allege he polluted "navigable waters," because the indictment alleged Evans Sr. merely allowed pollutants to spill onto soil and grass. The court reasoned that the "waters of the United States" language merely implicated the statute's jurisdictional element under the Commerce Clause. It further reasoned that CWA § 1319(c)(2)(A) makes it "a felony to knowingly violate 'any permit condition or limitation implementing' the CWA." As a result, the court concluded an allegation of intentionally dumping pollutants on the ground sufficiently stated a "knowing" violation of a permit condition, sufficient to withstand a motion to dismiss.

'Operator' Element

The court also considered and rejected Evans Jr.'s argument that the government failed to allege he was an "operator" under the CWA. The court observed that the indictment alleged Evans Jr. submitted a notarized application for certification as a wastewater treatment plant operator and that Evans Jr. was certified as an operator. Thus, the court concluded there was no merit to Evans Jr.'s claim the indictment failed to allege he was an operator of the facility.

Evans Sr.'s Statute of Limitations Defense

The court granted in part and denied in part Evans Sr.'s motion to dismiss several counts against him for nondisclosures more than five years before the indictment. The government argued Evans Sr.'s reporting violations were a continuing offense that tolled the statute of limitations. The court rejected the government's argument, reasoning that each failure to provide a report was its own complete violation of the CWA. As such, Evans Sr.'s conduct prior to January 8, 2014 was time-barred.

Evans Jr.'s Alternate Request for a Bill of Particulars

Finally, the District Court denied Evans Jr.'s request in the alternate for a more detailed bill of particulars from the government, noting that the government's:

> 52-page Superseding Indictment, viewed in its entirety, contains more than enough factual allegations to put both defendants on notice of the charges against them, [and] contains charging paragraphs that track the language of [the applicable statute] . . . .

Ultimately, the court denied Evans Jr.'s motion to dismiss in its entirety, and only granted Evans Sr.'s motion to dismiss with regard to his statute of limitations defense.

Conclusion and Implications

This case reaffirms the traditional principle that a criminal indictment is a mere accusation; the government need only allege sufficient facts that, if true, establish each element of each offense. An indictment need not prove every element outright. The court's opinion is available online at: https://www.casemine.com/judgement/us/612341e94653d00b2d598a95. (Carl Jones, Rebecca Andrews)

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