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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

NEW TECHNICAL STUDY ASSESSES COSTS AND PRACTICAL CONSIDERATIONS IN MOVING WATER FROM THE MISSISSIPPI TO FUEL DROUGHT STRIKEN COLORADO RIVER BASIN

The concept of shipping Mississippi River water to dry western states has been in drought discussions for many years now. Despite the popularity of this idea, there has been a surprising lack of information available to the public to weigh the practical aspects of such a proposal. In response to this, and specifically in response to the recent discussion on the subject in the Arizona state legislature, a trio of researchers led by environmental scientist and professor at Western Illinois University Roger Viadero took a deeper look at the costs associated with such a project. The resulting technical report covers some of the major constraints that such a project would face, including the how and how much for moving water from the Mississippi to refill Lake Powell and Lake Mead.

A Look into How Much Water is Available

Using data from the US Geological Survey (USGS), the researchers started the report with some preliminary problems pervasive in any proposal to move water westward. The USGS has collected water level and flowrate data at a gage station in Lees Ferry, Arizona, dating back to 1921. From 1921 to August 2022, the average measured flowrate at Lees Ferry was 14,457cfs, or 10.5 Million Acre-Feet per year (MAF/yr). The U.S. Bureau of Reclamation, however, reported the average annual natural flowrate in the same timeframe as 14.2 MAF/yr. The report does note that this discrepancy is largely the result of differences in terminology and data reduction methods, but regardless of the of the different measurements the main takeaway from this was that neither number is sufficient to satisfy the 15 MAF annual allocation assigned to the Upper and Lower Colorado River Basins.

Despite the differences in data noted above, the report takes specific aim at the assertion that roughly 4.5 million gallons per second flow past the Old River Control Structure (ORCS) on the Mississippi. To assess this number, the report looked at the low, average, and high water discharge data for the Mississippi River just above the ORCS from 2002 to 2022. Over the two decades reviewed, however, the 4.5 million gallons per second was never even hit – the highest flowrate over the 20-year period occurred in 2019 where it reached 4,488,000 gallons per second. Furthermore, the average flowrate over that period was just 3.2 million gallons per second.

Now with the total flowrate of the Mississippi River in mind, the report next moved on to assess the proposed diversion rate of 250,000 gallons per second to refill Lake Powell and Lake Mead. When comparing this figure to the flowrate of the Mississippi, this proposed diversion is just under 8 percent of the total average flow. While this figure may seem relatively small, in dryer years the 250,000 gallons per second figure occupies nearly 17 percent of the river's total flow—a not insignificant amount of water. To put this figure into perspective, the Colorado River will soon face a 21 percent reduction in diversions as a result of a Tier 2 water shortage.

The Absolute Scale of Moving So Much Water to the West

Even assuming the Mississippi River could withstand the withdrawal of 250,000 gallons per second, the researchers expressed serious skepticism as to the feasibility of transporting so much water. In moving water, the flowrate directly relates to the velocity of the water as well as the cross-sectional area of the diversion facilities used to move the water. Water conveyance systems can typically move water at a rate of three to eight feet per second while operating pumps at reasonable efficiencies and minimizing mechanical wear. Taking the median of this range, the researchers assumed that in this case a cross-sectional area of roughly 6,100 feet would be needed to meet the proposed flow requirement of 250,000 gallons per second.

For an open channel conveyance system, the researchers explained that this would necessitate a channel that is 100 feet wide and 61 feet deep, or

1,000 feet wide and 6.1 feet deep. By comparison, the State Water Project's California Aqueduct varies from 12 to 85 feet in width and averages 30 feet in depth. Using this average depth, the proposed flowrate of 250,000 gallons per second would still necessitate a channel that is 200 feet wide and 30.5 feet in depth—a channel that would be twice the size of California's own monumental conveyance system. Furthermore, in digging such a channel, over 1.9 billion cubic yards of excavated material would be created in the process.

Using a pipeline to move the water isn't much better an idea either. The piping required to move the proposed flowrate would need to be around 88 feet in diameter – or about the same height as a seven-story building.

The cross-sectional area alone creates a significant barrier for the conveyance by itself, but two other factors pose major roadblocks as well: distance and elevation. The shortest distance between the Mississippi and the Colorado spans a little less than 1,200 miles, but a straight shot from river-to-river is a pipe dream at best. A more realistic route running along established highways and interstates would run nearly 1,600 miles. The vertical distance would also be immense. Looking at the direct route from the ORCS to Lake Powell, the maximum elevation would reach just over 11,000 feet outside Santa Fe, New Mexico. In any case, the water would need to move from the ORCS with an elevation of about 30 feet, all the way up to Lake Powell which sits at an elevation of 4,620 feet. The California Aqueduct, by comparison, traverses the relatively flat Central Valley before being lift over the Tehachapi Mountains where 14 pumps lift water about 1,900 feet—less than half of the elevation difference between the ORCS and Lake Powell.

Conclusion and Implications

The idea of moving water from the relatively wet eastern side of the United States to the arid west has always been a tempting proposition. Tempting as it is, however, it is simply too large an undertaking to be feasibly accomplished. In the words of the researchers, "time, space, ecology, finances, and politics aren't on the side of this proposal." The researchers even assessed this massive project at a mere $0.01 per gallon of water moved, but even at this cost the researchers concluded it would cost at least $135 billion to refill Lakes Powell and Mead. Furthermore, even when looking beyond the sheer scale of the project and its associated cost, the diversion would likely require the coordination and cooperation of a dozen-or-so states. Despite the pessimistic view of such a proposal, the researchers' report did not purport to dissuade readers from the idea of moving water westward, it served to inform readers that no one solution exists that can save western states from persistent drought. Instead, these states will need to continue to implement smaller scale projects while improving conservation efforts in order to maintain adequate water supply through this and future drought. For more information on the study, *see:* https://www.researchgate.net/publication/364353761_Meeting_the_Need_for_Water_in_the_Lower_Colorado_River_by_Diverting_Water_from_the_Mississippi_River_-A_Practical_Assessment_of_a_Popular_Proposal.

REGULATORY DEVELOPMENTS

U.S. DEPARTMENT OF THE INTERIOR ANNOUNCES $210 MILLION FOR DROUGHT RESILIENCE PROJECTS IN THE WEST

On October 17, 2022, the United States Department of the Interior announced that $210 million from President Biden's Bipartisan Infrastructure Law will be allocated to drought resilience projects in the West. The funding is aimed at bringing clean drinking water to western communities through various water storage and conveyance projects. These projects are anticipated to add 1.7 million acre-feet of storage capacity to the West, which can support around 6.8 million people for an entire year. In addition to these projects, the allocation will fund two feasibility studies on advancing more water storage capacities.

Background

On November 15, 2021, President Joe Biden signed the Bipartisan Infrastructure Law, also known as the Bipartisan Infrastructure Investment and Jobs Act, into law. This is a different funding source for drought resilience projects than the Inflation Reduction Act that President Biden signed into law in August 2022. The overall focus of the Bipartisan Infrastructure Law is to rebuild the country's infrastructure, create good jobs, and grow the economy. There are six main priorities guiding the law's implementation: (1) investing public funds efficiently with measurable outcomes in mind; (2) buy American and increase the economy's competitiveness; (3) create job opportunities for millions of people; (4) invest public dollars equitably; (5) build infrastructure that withstands climate change impacts; and (6) coordinate with state, local, tribal, and territorial governments to implement these investments.

President Biden's Executive Order for the Bipartisan Infrastructure Law also established a Task Force to help coordinate its effective implementation. Members of the Task Force include the following agencies: Department of the Interior; Department of Transportation; Department of Commerce; Department of Energy; Department of Agriculture; Department of Labor; Environmental Protection Agency; and the Office of Personnel Management. The Office of Management and Budget, Climate Policy Office, and Domestic Policy Council in the White House are also on the Task Force.

For its part under the Bipartisan Infrastructure Law, the Bureau of Indian Affairs, U.S. Geological Survey, Bureau of Reclamation (Bureau), Office of Wildland Fire, U.S. Fish and Wildlife Service, and the Office of Surface Mining Reclamation and Enforcement submitted spend plans to Congress detailing how the funds, in creating new programs and expending existing ones, will meet the Bipartisan Infastructure Law's overall goals and priorities. The Department of the Interior also submitted a spend plan outlining how it would restore ecosystems, protect habitats, and plug and reclaim orphaned gas and oil wells.

The Bureau's spending plan outlined in detail what programs the Bipartisan Infrastructure Law will fund. This includes $8.3 billion set aside for water and drought resilience across the country. The water and drought resilience programs are aimed at protecting water supplies for both the natural environment and people. The funds will support water recycling and efficiency programs, rural water projects, dam safety, and WaterSMART grants.

The Bureau's spend plan also provide $1.5 billion for wildfire resilience, with investments aimed at federal firefighters, forest restoration, hazardous fuels management, and various post-wildfire restoration activities. Further, the spend plan outlines a $1.4 billion investment in ecosystem restoration and resilience, with funding allocated to stewardship contracts, invasive species detection and prevention, ecosystem restoration projects, and native vegetation restoration efforts.

Finally, the spend plan allocates $466 million to tribal climate resilience and infrastructure. This includes investment in community-led transitions for tribal communities, such as capacity building and adaptation planning. The funds will also help the construction, repair, improvement, and maintenance of irrigation systems.

Drought Resilience Projects in the West

The Bipartisan Infrastructure Law's allocation of $8.3 billion to drought resilience will help important water infrastructure projects across the United States. Of the $8.3 billion, $210 million is set aside for projects in the West. The money will support various groundwater storage, water storage, and conveyance projects. In particular, it will help secure dams, finalize rural water projects, repair water delivery systems, and protect aquatic ecosystems. The selected projects in the West are scattered throughout Arizona, California, Colorado, Montana, and Washington. The projects receiving funding in California include the B.F. Sisk Dam Raise and Reservoir Expansion Project; the Sites Reservoir Project; and Phase II of the Los Vaqueros Reservoir Expansion Project.

$25 million is allocated to the San Luis and Delta Mendota Authority to pursue the B.F. Sisk Dam Raise and Reservoir Expansion project. The project would add an additional ten feet of dam embankment across the entire B.F. Sisk Dam crest to increase the storage capacity of the San Luis Reservoir. It is estimated that this project will create around 130,000 acre-feet of additional water storage.

The Sites Reservoir Project will receive $30 million for its off-stream reservoir project on the Sacramento River system, just west of Maxwell, California. This project is capable of storing 1.5 million acre-feet of water. The reservoir uses existing and new facilities to pump water into and out of the reservoir, with ultimate water releases into the Sacramento River system through a new pipeline near Dunnigan, existing canals, and the Colusa Basin Drain.

Finally, the Bipartisan Infrastructure Law allocates $82 million to the Los Vaqueros Reservoir Expansion Phase II, which will add roughly 115,000 acre-feet of additional water storage. The Los Vaqueros Reservoir, located in Contra Costa County, will expand from 160,000 acre-feet to 275,000 acre-feet. Increased capacity in the Los Vaqueros Reservoir will help improve Bay Area water supply and quality, increase water supplies for the Central Valley Project Improvement Act refuges, add flood control benefits, increase recreational opportunities, and provide additional Central Valley Project operational flexibility.

Conclusion and Implications

The Biden administration's Bipartisan Infrastructure Law will allocate much needed funds to important water infrastructure projects throughout the West, especially in California. However, similar to the Inflation Reduction Act, it is unclear whether this funding will offset any current drought impacts. The Bipartisan Infrastructure Law, P.L. 117-58 is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3684/text.
(Taylor Davies, Meredith Nikkel)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS WATER CONSERVATION STANDARDS FOR URBAN SUPPLIERS

On October 19, 2022, the State Water Resources Control Board (State Water Board) adopted new regulations (Cal. Code Regs., tit. 23, §§ 980-986) that establish water loss performance and monitoring standards for urban retail water suppliers (Urban Suppliers), as part of California's conservation efforts amid ongoing drought. Urban Suppliers that are unable to demonstrate minimal system losses by July 1, 2023 will need to provide information to a statewide leak registry, and starting January 1, 2028, comply with volumetric real water loss standards.

Background

Urban Suppliers—defined as entities that serve more than 3,000 service connections or 3,000 acre-feet of potable water per year—supply water for approximately 90 percent of California's population. Improved monitoring and reduced urban water system leaks have been targeted by the Legislature and the State Water Board as means to improve the state's water resiliency. Since October 2017, Urban Suppliers have submitted annual water loss audits to the Department of Water Resources (DWR). That data showed some Urban Suppliers in 2019 losing

over 100 gallons per connection, per day, and annual statewide water losses of 261,000 acre-feet. Sections 10608.34 and 10609.12 of the Water Code direct the State Water Board to develop and adopt regulations that will reduce water loss in urban water systems and achieve more efficient water use in California.

New Regulatory Requirements for Water Loss Performance

The regulations address the state's need for comprehensive information on water losses in individual systems by requiring Urban Suppliers to supply information on metering practices, pressure management, infrastructure failures and repairs, and costs for reducing water losses. (Cal. Code Regs., tit. 23, § 983.) That information is to be used to determine each Urban Supplier's water loss baseline and volumetric water loss standard, which caps the amount of water that may be lost through leaks, metering gaps, or other forms of waste. By monitoring and reducing leaks in their distribution systems, the State Water Board anticipates Urban Suppliers can collectively save 88,000 acre-feet per year, or enough water to meet the needs of more than 260,000 additional households.

Under Section 982(d) of the regulations, Urban Suppliers with highly efficient systems may provide documentation by July 1, 2023 that sufficiently demonstrates their systems lose a baseline of 16 gallons per connection per day or less. If consistent low water loss can be established through high quality metering and measurement data, then the 16 gallons per connection per day standard will apply, and the utility will not be subject to the additional questionnaires and reporting required by Section 983. If low water loss cannot be demonstrated, or if the data is found by the State Water Board to be deficient, the Urban Supplier must respond to a number of questionnaires that will be used to develop an appropriate volumetric "real water loss standard." (Id. at § 983.) Responses regarding water loss data quality are due on July 1, 2023, while responses regarding pressure management, systematic management, and supplier costs that affect real loss reduction are due on July 1, 2024. All questionnaires must be updated three years after the initial deadline.

A utility's real water loss standard is calculated as the "sum of annual reported leakage plus annual background leakage plus unreported leakage over 2027." (Id. at § 982(b)(1).) Section 981 of the regulations provides that by January 1, 2028, each Urban Supplier shall reduce its system losses to comply with its applicable real water loss standard and, thereafter, standards are assessed every third year based on average real losses reported in the Urban Supplier's annual audits. A utility's failure to meet a real water loss standard may prompt the State Water Board's executive director to issue conservation orders that mandate certain actions to bring the supplier into compliance, or require additional information for an enforceable conservation agreement. (Id. at § 986.)

Recognizing a need for flexibility, the regulations contemplate several variances and exceptions for unexpected adverse circumstances, and for suppliers that serve disadvantaged communities. Section 984 provides that an Urban Supplier may submit a request to the State Water Board to adjust its real water loss standard based on conditions that affect its operations or system. Any request submitted after July 1, 2023, however, must be supported by an explanation that the supplier did not have access to necessary measurement data prior to that date. Variances from real water loss standards are available under Section 985, for Urban Suppliers who have encountered unexpected adverse conditions out of their control, such as physical damage to infrastructure or significant changes to the utility's financial situation, though drought conditions, on their own, are inadequate justification. For the first compliance period, Urban Suppliers will not be considered out of compliance if their water loss audits show progress from their baseline, and they have submitted a request for an exception by January 1, 2028. (Id. at § 981(i).) Finally, Urban Suppliers that serve disadvantaged communities with median household incomes below 80 percent of the state's median have until January 1, 2031 to comply with their real water loss standards. (Id. at § 981(h).)

Conclusion and Implications

With increasingly unreliable precipitation patterns, and an expected 10-percent reduction of traditional water supplies due to climate change, water conservation remains a core component of Governor Newsom's "all of the above" Water Resilience Portfolio. The State Water Board's water loss performance standards go into effect on April 1, 2023, giving Ur-

ban Suppliers a small window of time before the July 1, 2023 deadline to respond to questionnaires on the quality of their water loss data.

Information on the regulations and the state's water conservation efforts is available at: https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/rulemaking.html.
(Austin Cho, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Air Quality

•October 18, 2022—EPA announced that two companies, PARTSiD, Inc. and PARTSiD, LLC, will pay a penalty of nearly $500,000 in response to EPA claims that the companies illegally sold aftermarket products that disable vehicles' emissions-control systems—known as defeat devices. Under a legal agreement with EPA, the company has stopped selling the illegal devices and will pay $491,474 for past violations. EPA found that PARTSiD LLC sold hardware and software specifically designed to defeat required emissions controls on vehicles and engines, including aftermarket exhaust pipes; exhaust-related removal kits; and aftermarket computer software that can alter fuel delivery, power parameters, and emissions. These components are part of vehicle emission control systems installed in most automobiles to meet federal emission standards, and typically control more than 90% of the regulated pollutants passing through them.

•November 7, 2022—The United States announced that Utica Resource Operating LLC (URO) has agreed to a settlement resolving alleged Clean Air Act violations at URO's oil and gas production well facilities in Ohio. The settlement addresses URO's failure to capture and control air emissions from storage vessels and to comply with associated inspection, recordkeeping, and reporting requirements. Under the terms of the settlement, URO will complete a $1.9 million suite of injunctive relief at 15 well pad facilities to come into compliance with the Clean Air Act and the facilities' operating permits and implement mitigation measures at many of the wells owned by URO and pay a penalty of $1 million. The injunctive relief includes a multi-step compliance program to review the current design of each storage vessel system and then make necessary design improvements to ensure that vapors will not be released to the environment during operations. The settlement requires URO to invest approximately $1.5 million in equipment upgrades and retrofits. These mitigation measures will further reduce pollution at URO well pads to offset past excess emissions from URO's violations.

•November 10, 2022—EPA announced that it reached a settlement with Diesel Fuel Systems, Inc. of Bangor, Maine. The settlement resolved EPA's allegations that the company sold and installed aftermarket parts, known as "defeat devices," from 2019 to 2021 in violation of the federal Clean Air Act. Under the terms of the settlement, Diesel Fuel Systems agreed to pay a penalty of $100,000, certified to EPA that it will destroy all tampered equipment, and has ceased the sale and installation of such defeat devices.

•November 10, 2022—EPA announced that it reached a settlement with 21 Motorsports, an online retailer based in Clinton, Massachusetts, resolving allegations it sold 11 aftermarket emissions tampering devices, in violation of the Clean Air Act. The company agreed to pay a penalty of $5,697, under a pilot program for addressing smaller-scale vehicle tampering violations, and certified that it has ceased the sale of defeat devices.

Civil Enforcement Actions and Settlements—Water Quality

•October 19, 2022—EPA announced it reached a settlement with Guam Shipyard to meet pollutant discharge requirements under the Clean Water Act to protect Apra Harbor. The facility is authorized to discharge industrial stormwater through a Clean Water Act permit. In 2019 EPA issued an order to Guam

Shipyard on stormwater discharge permitting and pollution requirements. Two years later the Shipyard and EPA reached a settlement regarding the same set of issues. In 2022, EPA inspectors observed the facility had a large accumulation of waste materials throughout the site, including debris, blasting grit, paints and oil which may discharge directly into Apra Harbor. Additionally, the facility failed to conduct monitoring and failed to submit required reports to EPA. EPA is requiring the facility to clean the site, implement best practices, train employees, submit reports to EPA, and update its Stormwater Pollution Prevention Plan.

•October 20, 2022—EPA announced that it has reached a settlement with Goguen Transportation, Inc. of Gardner, Mass., resolving alleged violations of the Clean Water Act associated with two tanker truck accidents in Revere and Athol, Mass. that resulted in oil discharges to local waters. On two separate occasions, fuel oil was spilled from tanker trucks owned and operated by Goguen Transportation, polluting local waters and violating the Clean Water Act. The company will pay a $35,354 penalty. EPA estimates that the company has spent over $570,000 to clean up the Revere spill, and that remediation for the Athol spill will be no less than $300,000 based on the distance oil traveled and amount of oil spilled.

•October 20, 2022—EPA announced an enforcement action to close two illegal large capacity cesspools (LCCs) at the Wailuku Professional Plaza in Hilo and one cesspool at the SKS Management LLC self-storage business in Kailua-Kona. Under the Safe Drinking Water Act, EPA banned LCCs in 2005. The Wailuku Professional Plaza is located about 100 feet from the Wailuku River in Hilo. In July 2021, EPA conducted an inspection of the Plaza and found two unlawful cesspools serving the multi-tenant commercial office building. Wailuku Professional Plaza, LLC agreed to close the illegal cesspools and pay a $43,000 penalty on May 4, 2022. EPA also found that the self-storage business has a restroom that is served by a large capacity cesspool. The facility's operator settled the case, agreeing to pay a $28,780 penalty and close the illegal cesspool by September 1, 2023.

•October 25, 2022—EPA and DOJ announced a consent decree with Flexsteel Industries Inc. under which the company has agreed to pay $9.8 million for the cleanup of contamination at the Lane Street Ground Water Contamination Superfund site in Elkhart, Indiana, and to reimburse EPA for a portion of its past costs incurred at the site. According to the complaint filed simultaneously with the proposed consent decree in the Northern District of Indiana, Flexsteel is liable for the cleanup because its former manufacturing operations contributed to contamination at the site. Previously, EPA entered into administrative settlements with two other potentially responsible parties for their alleged contributions to the contamination at the site. The consent decree is subject to a 30-day public comment period and final court approval and will be available for public review on the DOJ website.

•October 27, 2022—EPA announced a settlement with Petroff Trucking Company, Inc., for an alleged violation of the Clean Water Act. The company has agreed to purchase and secure 15.5 wetland acres to compensate for wetlands it destroyed in East St. Louis, Illinois. The settlement is memorialized in a proposed consent decree that the United States lodged with the U.S. District Court for the Southern District of Illinois on October 25, 2022. In 2020, the United States, on behalf of EPA, alleged in a complaint that from 2016 through 2019, Petroff Trucking Company, Inc., dredged, filled, and excavated 15.5 acres of wetlands without a permit in clear violation of the Clean Water Act. The operation discharged pollutants into the wetlands which led to their complete destruction. Petroff Trucking Company, Inc., will not pay a civil penalty because a financial analysis revealed it was formally dissolving and no longer had an ability to pay a civil penalty. However, Petroff has agreed to find and expend $259,000 to buy compensatory wetlands to resolve this action.

•November 1, 2022—The EPA announced a settlement with the city of Lakewood, Ohio, under which the City has agreed to perform work that will significantly reduce discharges of untreated sewage from its sewer system into Lake Erie and the Rocky River. The settlement is set forth in an interim partial consent decree that was filed today in federal court in the Northern District of Ohio. The decree requires Lakewood to complete construction of a high-rate treatment system that will treat combined sewer overflows and build two large storage basins that will hold

millions of gallons of wastewater until it can be sent to the wastewater treatment plant. Under the decree, Lakewood will spend about $85 million to improve its sewer system and will pay a civil penalty of $100,000, split evenly between the United States and Ohio. The decree would partially resolve the violations alleged in the underlying complaint filed by the United States and the state of Ohio. The complaint alleges that Lakewood discharged untreated sanitary sewage into the Rocky River or directly into Lake Erie on at least 1,933 occasions from January 2016 through the present, and on numerous occasions from January 2016 through the present, Lakewood discharged water from combined sewer outfalls that violated the effluent limitations included in its National Pollutant Discharge Elimination System permit. Lakewood will be required through a subsequent, enforceable agreement with the United States and the state of Ohio to implement a plan that addresses the remaining permitted and unpermitted overflows in Lakewood's sewer system and to demonstrate compliance with the Clean Water Act.

•November 7, 2022—EPA announced an administrative order directing Michael Zahner of Bollinger County, Missouri, to take immediate steps to comply with the federal Clean Water Act. According to EPA, both Zahner and his company, Zahner Management Company LLC filled federally protected streams without obtaining required Clean Water Act permits. EPA also filed administrative complaint on October 7, 2022 pursuing $171,481 in penalties for the alleged Clean Water Act violations.

•November 7, 2022—EPA announced an administrative order directing Mark Schmidt of Lancaster County, Nebraska, to comply with the federal Clean Water Act. According to EPA, Schmidt and his company, Evergreen Development Inc., filled federally protected streams without obtaining required Clean Water Act permits. EPA alleges that Schmidt and his company channelized a stream; removed in-stream vegetation; and placed fill material into a stream and abutting wetlands, as part of a 16.5-acre residential development project. Further, EPA alleges that Evergreen Development let its Clean Water Act stormwater permit authorization lapse during construction. The Order requires Schmidt and his company to submit a plan to EPA to restore the site or to mitigate for lost stream and wetland functions, as well as ordering Evergreen to reinstate its Clean Water Act permit.

•November 8, 2022—EPA announced a settlement under the Agency's Coal Combustion Residuals (CCR) program with Evergy Kansas Central Inc. at the company's retired Tecumseh Energy Center coal-fired power plant in Tecumseh, Kansas. In the settlement, Evergy will take certain actions to address potential groundwater contamination from a CCR impoundment at the Tecumseh site, under the federal Resource Conservation and Recovery Act (RCRA). The settlement requires Evergy to assess the nature and extent of CCR contamination at a CCR impoundment at the Tecumseh site. EPA alleges Evergy failed to adequately prepare groundwater monitoring and corrective action reports, comply with groundwater monitoring system requirements, comply with groundwater sampling and analysis requirements, complete an assessment monitoring program, and comply with CCR impoundment closure and post-closure reporting requirements. Evergy will install additional monitoring wells, conduct groundwater sampling and analysis, and update closure plans for the facility's CCR impoundment. If Evergy determines that remediation is necessary, then it will meet with EPA to discuss next steps. The company will also pay a civil penalty of $120,000.

•November 9, 2022—EPA announced a settlement with the city of Elyria, Ohio, and the State of Ohio, under which the City will complete a series of capital projects designed to eliminate discharges of untreated sewage from its sewer system into the Black River, 10 miles upstream from Lake Erie. Elyria is expected to spend nearly $250 million to improve its sewer system. It will also pay a civil penalty of $100,000 to the United States and pay $100,000 to Ohio's Surface Water Improvement Fund. The consent decree would resolve the violations alleged in the underlying complaint filed by the United States and the state of Ohio. Under the proposed consent decree, Elyria will construct various projects within its sewer system to be completed by Dec. 31, 2044.

•November 14, 2022—EPA and the Department of Justice announced a settlement with four separate solar farm owners to resolve alleged violations of the Clean Water Act. The project owners shared the

same contractor, and the alleged violations were construction permit violations and stormwater mismanagement at large-scale solar generating facilities: a site near LaFayette, Alabama, owned by AL Solar A LLC (AL Solar); a site near American Falls, Idaho, owned by American Falls Solar LLC (American Falls); a site in Perry County, Illinois, owned by Prairie State Solar LLC (Prairie State); and a site in White County, Illinois, owned by Big River Solar LLC (Big River). The states of Alabama and Illinois joined in the Alabama and Illinois settlements. Together, the four settlements assessed a total of $1.34 million in civil penalties.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•October 18, 2022—EPA announced it has reached a settlement with Kennebec Property Services, LLC of Manchester, Maine, resolving alleged violations of the Lead Renovation, Repair and Painting (RRP) Rule and requiring Kennebec to provide information about compliance with lead safety rules on its cable TV program "Maine Cabin Masters" which is broadcast on the Warner Bros. Discovery Network. In a Consent Agreement and Final Order, EPA alleged that Kennebec performed five renovations in 2020 at residential properties constructed prior to 1978 without complying with applicable RRP Rule requirements. Specifically, EPA alleged that Kennebec failed to: obtain recertification before beginning renovations, assign a certified renovator to each renovation, provide the owner of each unit with the EPA-approved lead hazard information pamphlet, and maintain records showing their compliance with RRP measures. Since being contacted by EPA, the company has obtained RRP firm certification, certified it is complying with the RRP Rule and agreed to comply with the RRP Rule in all future renovation activities. Kennebec has paid a $16,500 penalty.

•October 19, 2022—EPA announced a settlement with UPS to resolve violations of hazardous waste regulations at 1,160 facilities across 45 states and the territory of Puerto Rico. EPA's consent agreement and final order with UPS resolves violations of hazardous waste regulations, including failure to make land disposal determinations, and conduct proper on-site management of hazardous waste, among other requirements. The company has 36 months to come into compliance across 1,160 locations and will pay a civil penalty of $5,323,008. UPS generates hazardous waste regulated under the Resource Conservation and Recovery Act (RCRA) when a package containing certain hazardous materials is damaged, as well as during day-to-day operations such as maintenance. Under the settlement, UPS has agreed to comply with all relevant state and federal RCRA laws and regulations with a focus on: (1) accurate hazardous waste determinations; (2) complete RCRA Notification; (3) proper employee training; (4) timely annual and biennial hazardous waste reporting; (5) Land Disposal Restrictions determination; (6) proper onsite management of hazardous waste; and (7) all applicable manifest requirements.

•October 27, 2022—EPA announced a settlement with Russell Apartments, LLC, a Connecticut property management and development firm located in Waterbury, for alleged violations of the Clean Air Act (CAA) and the Toxic Substances Control Act (TSCA). The company agreed to pay a penalty of $25,000 and to certify its return to compliance with these federal laws. EPA alleged that Russell Apartments, LLC (Russell) violated both the asbestos regulations under the CAA Section 112 and the National Emission Standard for Hazardous Air Pollutants for Asbestos (Asbestos NESHAP) and the Lead Renovation, Repair and Painting (RRP) Rule under TSCA. Russell allegedly violated the CAA's Asbestos NESHAP rule by failing to notify EPA of its intention to renovate, failing to adequately wet while stripping asbestos, and failing to keep asbestos waste material adequately wet. The company also allegedly violated the Lead RRP Rule by failing to train and certify their contractors in lead-based paint remediation when it carried out regulated renovation activities at a facility.

•November 9, 2022—EPA announced a settlement with January Environmental Services, Inc., January Transport, Inc., and company-owner Cris January under which the company will pay civil penalties of $1.9 million and perform comprehensive corrective measures to resolve allegations that they violated the Resource Conservation and Recovery Act (RCRA) through their used oil transportation and processing operations in Oklahoma City, Oklahoma. In a complaint filed on November 30, 2020, EPA, DOJ,

and the Oklahoma Department of Environmental Quality (ODEQ) alleged that the companies and Cris January committed multiple violations of RCRA's used oil and hazardous waste regulations. This settlement requires JES and JTI to institute a number of company-wide changes to come into compliance with RCRA used oil and hazardous waste regulations, many of which the companies have already undertaken. Compliance requirements include training staff on using proper manifest forms to track the handling of hazardous waste, develop a written waste management plan, and update emergency preparations such as coordinating with local emergency responders and hiring an independent engineer to review the facilities' spill-containment and contingency plans.

•November 10, 2022—EPA announced a settlement with Ampac Fine Chemicals, LLC to resolve violations of the Resource Conservation and Recovery Act and related state laws at its pharmaceutical manufacturing facility in Rancho Cordova, California. EPA determined that Ampac failed to comply with legal requirements that govern hazardous waste management and will pay a fine of $69,879. EPA determined that Ampac did not: perform required calibration testing; mark equipment subject to air emission standards for equipment leaks; develop a monitoring plan for valves that are difficult or unsafe to monitor; separate incompatible hazardous waste during accumulation; have a qualified professional engineer assess the integrity of an existing tank; list emergency equipment capabilities in a contingency plan; and properly label hazardous waste containers.

Indictments, Sanctions, and Sentencing

•November 2, 2022—Ionian Management Inc. (IONIAN M), a New York-based company that commercially manages three vessels, including the M/T Ocean Princess, was sentenced yesterday in the District of the Virgin Islands before U.S. District Court Judge Wilma A. Lewis in St. Croix, after pleading guilty to a violation of the Act to Prevent Pollution from Ships. IONIAN M was sentenced to pay a fine of $250,000 and placed on probation for one year. While vessels are operating within the U.S. Caribbean Emissions Control Area (ECA), they must not use fuel that exceeds 0.10 percent sulfur by weight to help protect air quality. Between Jan. 3, 2017, and July 10, 2018, the M/T Ocean Princess entered and operated within the ECA using fuel that contained excessive sulfur on 26 separate occasions. The fuel was petroleum cargo that had been transferred to the fuel tanks as authorized by IONIAN M. Once authorized, the crew of the M/T Ocean Princess transferred the higher sulfur fuel from the cargo tanks into the bunker tanks and use it to fuel the vessel, even though it exceeded the 0.10 percent sulfur by weight maximum. U.S. Coast Guard inspectors boarded the M/T Ocean Princess on July 10, 2018, to conduct an inspection and discovered the vessel's use of fuel with an excessive sulfur content. These two companies previously pleaded guilty to felony violations related to the use of non-compliant fuel and falsification of records and were sentenced to pay a combined criminal fine of $3,000,000, serve a three-year period of probation, and implement an Environmental Compliance Plan. The sentencing of Ionian M is the final chapter in this multi-year investigation and prosecution of the companies and individuals involved in the use of non-compliant, high-sulfur fuel in the operation and management of the M/T Ocean Princess.
(Andre Monette)

LAWSUITS FILED OR PENDING

MONSANTO PETITIONS FOR ELEVENTH CIRCUIT *EN BANC* REVIEW AFTER LOSING FIFRA PREEMPTION ARGUMENT AGAINST STATE LAW FAILURE TO WARN CLAIM

On November 4, 2022, Monsanto Company (Monsanto) requested the full Eleventh Circuit Court of Appeals review a decision made by a panel of the court's judges in *John D. Carson v. Monsanto Co.*, Case No. 21-10994. Monsanto's plea comes on the heels of the Eleventh Circuit panel's October 28, 2022 opinion holding that Georgia state failure-to-warn claims are not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This October decision substituted the panel's July decision but remained largely the same—a victory for plaintiffs involved in Roundup® cases around the country.

Background

In 2017, John Carson filed suit against Monsanto after he was diagnosed with malignant fibrous histiocytoma which he believes was caused by exposure to glyphosate, the main chemical ingredient in Roundup®. Carson alleged various Georgia state law claims, including the cause of action at issue here—failure to warn. The U.S. District Court for the Southern District of Georgia ruled that Carson's failure to warn claim was preempted under FIFRA because the EPA had classified glyphosate as not likely to be carcinogenic to humans and approved the Roundup® label.

Before the Eleventh Circuit Panels in July and October 2022

In both its July, and later October, 2022 opinions, the Eleventh Circuit reversed the District Court's ruling and remanded for further proceedings. The issue before the Eleventh Circuit panel was whether the Georgia common law failure to warn cause of action would be different from or in addition to any action the U.S. Environmental Protection Agency (EPA) has taken that has the force of law. The first question in this analysis, then, was whether EPA's label registration process for pesticides or FIFRA's labeling provisions carry the force of law.

As to FIFRA's labeling provision, the court found that these provisions obviously carried the force of law, but nonetheless did not preempt a Georgia state law failure to warn claim because FIFRA imposes less of a duty on Monsanto than the state failure to warn claim. Georgia law subjects a manufacturer to liability for failure to warn when the manufacturer either knows or has reason to know that the product is likely to be dangerous whereas FIFRA imposes a blanket duty, regardless of the consumer's knowledge, to warn if necessary to protect health and the environment. Thus, the state law claim merely enforces a FIFRA cause of action.

Regarding EPA registration process, the court found that it failed to meet the threshold standard of carrying the force of law. The court reasoned that the EPA registration process lacked the formality with which an administrative procedure needs to carry the force of law. Indeed the registration process, by Congress' on admission, merely served as prima facie evidence of compliance with the registration requirements of FIFRA.

Monsanto also pointed to a number of published EPA documents, demonstrating EPA's position that glyphosate does not cause cancer, as evidence that EPA's actions have a preemptive effect on Georgia's state law failure to warn cause of action. These documents included registration reviews and reregistration eligibility decisions, an EPA paper written about the EPA Scientific Advisory Panel's independent review of the effects of glyphosate, and "[v]arious papers involving scientific analysis where the EPA concluded that glyphosate did not cause cancer." But the court dismissed this line of evidence for the same reasoning as EPA's registration process—none of the documents constituted actions having the force of law. None of the documents were the result of notice-and-comment rulemaking or were sufficiently formal enough.

In sum, the Eleventh Circuit panel's reversal and remand of the District Court's ruling thwarts Monsanto's attempts at arguing that Mr. Carson's state law claims are preempted by federal law.

Monsanto's Petition for Re-Review

Monsanto's petition for Eleventh Circuit rehearing *en banc*, filed on November 4, 2022, argues the panel's decision to reverse the District Court's decision "nullified" FIFRA's preemption provision and will allow state law claims complaining of Roundup's lack of warning of glyphosate to standard despite EPA's finding that such a warning is not necessary. According to Monsanto, the U.S. Supreme Court and other Circuit Courts of Appeals, which have interpreted FIFRA and other statutes with similar preemption language, have never asked whether agency action has the "force of law." Monsanto also discusses the "harmful consequences" if the Eleventh Circuit panel's decision is allowed to stand. It argues that this ruling renders irrelevant EPA's determination of which safety warnings are required and would cause chaos amount states' opinions of which labeling standards should apply.

Conclusion and Implications

If the Eleventh Circuit panel's decision stands, it will certainly provide fodder for plaintiffs in other states with similar failure to warn state laws. And its decision not only affects all of the current litigation against Monsanto for Roundup®, but could have broader implications for labeling of other chemicals, foods, and medicines.
(Monica Browner, Darrin Gambelin)

CALIFORNIA'S PFAS LAWSUIT CASTS A WIDE NET

Beginning in the early 2010, state Attorneys General have filed a series of lawsuits based on damages allegedly caused by per- and polyfluoroalkyl substances, collectively known as "PFAS" aka "forever chemicals." Those suits originally focused on natural resource damages, like that filed by Minnesota, but have expanded in breadth to encompass claims of damage to residents' health. California's recently-filed litigation may be the broadest brought to date, potentially breaking new ground in this vast and complex litigation landscape. [*The People of the State of California, Ex Real. Rob Bonta v. 3M Company, et al.*, Case No. 22CV021745 (Superior Court for Alameda County).]

Background

On November 10, 2022, California's Attorney General Rob Bonta filed suit in Alameda Superior Court against 3M, Dupont and more than a dozen other manufacturers of PFAS. The suit alleges the defendants knew or should have known that PFAS are harmful to humans and the environment, nevertheless continued to manufacture, distribute and market PFAS while concealing from the public their harms.

PFAS are a class of chemicals developed post-World War II with heat, oil, and water resistant properties. For decades they were incorporated into a very wide array of industrial and consumer processes and products. The same attributes that make PFAS useful also mean that they take a long time to break down, so that they are very persistent in the environment and the human body. A common environmental pathway for human exposure is via drinking water.

Research has linked exposure to PFAS to, *e.g.*, diminished liver function, kidney and testicular cancer, elevated risk of cardiovascular disease, diminished antibody response to vaccines, various birth defects, developmental delays and elevated risk of miscarriage.

Several multi-district litigation actions in federal court are adjudicating or have adjudicated a very large number of claims against PFAS manufacturers, distributers and marketers by individuals, property owners and water providers, increasingly stringent regulatory proposals and final actions by the U.S. Environmental Protection Agency continue apace, and multi-district litigation regarding PFAS exposure linked to the use of fire-fighting foams on military bases continues. Beginning in the 2010s, state Attorneys General began to file suits alleging harms to their states' environment and, in later-filed suits, residents' health. Minnesota and Delaware have since settled their claims, while those of 13 other states remain pending.

The State's Claims

California's lawsuit states a wide array of claims and seeks broad remedies, pushing the envelope established in suits filed by other states' Attorneys General.

The suit identifies numerous sources of contamination beyond the typical industrial manufacturing and disposal sites, including wastewater treatment plants and landfills, alleging that PFAS have been detected in the blood of 99 percent of the California residents who have been tested, as well as being ubiquitous in the state's lakes, rivers, drinking water, and wildlife, including an allegation that PFAS have been detected in 146 public water systems serving 16 million residents of the state. This contamination is, the state asserts, due to the manufacture, distribution, marketing and disposal of PFAS by defendants. The state further alleges that its two-year investigation established that the manufacturers continued to produce, distribute and market PFAS within the state despite knowing or when they should have known of the chemicals' deleterious environmental and human health effects, and while failing to warn of those dangers.

The complaint states causes of action for public nuisance, strict product liability (failure to warn and defective/ultra-hazardous product), unlawful business practices, and negligence *per se*. The remedies sought are particularly broad and include funding for and equitable relief requiring abatement across the state by *e.g.*, the treatment of drinking water from private and public systems as well as wastewater treatment. Compensatory and restitution damages are also sought, including to fund mitigation efforts such as medical monitoring, public noticing, the provision of replacement water prior to the provision of treatment, and safe disposal and destruction.

Conclusion and Implications

The sweeping nature of the state's suit along with California's disproportionate population and economic importance makes its outcome particularly high stakes for the named defendants, and will impact as well as plaintiffs and defendants in other California state court PFAS cases. It remains to be seen whether the California courts' treatment of this case has a wider impact on the fate of PFAS litigation before the federal and other state courts.
(Deborah Quick)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS DEPARTMENT OF THE INTERIOR'S ENVIRONMENTAL ASSESSMENT FOR COAL MINE EXPANSION PROJECT VIOLATED NEPA BY FAILING TO PROVIDE SCIENCE-BASED METHODOLOGY IN ITS FONSI

350 Montana v. Haaland, 50 F.4th 1254 (9th Cir. Oct. 14, 2022).

The United States Court of Appeals for the Ninth Circuit recently affirmed in part and reversed in part a lower court's ruling that the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (Interior) violated the National Environmental Policy Act (NEPA) by failing to provide a science-based methodology in its finding of no significant impact (FONSI) for its coal mine expansion project. The Court of Appeals reversed the lower court's determination that Interior is required to use the Social Cost of Carbon (SCC) metric in quantifying the environmental harms that may occur from the project's greenhouse gas (GHG) emissions, but nevertheless ruled that Interior's 2018 Environmental Assessment violated NEPA.

Factual and Procedural Background

Signal Peak Energy, LLC operates Bull Mountains Mine No. 1 (Mine) approximately 30 miles north of Billings, Montana. In 2008, Signal Peak applied to the Bureau of Land Management (BLM) to lease approximately 2,679.76 acres of federal coal. BLM processed Signal Peak's application, prepared an Environmental Assessment in conjunction with Interior, and issued a FONSI in 2011.

In 2013, Signal Peak requested approval of a mining plan modification for its federal coal lease from the Office of Surface Mining Reclamation and Enforcement (OSMRE). The modification sought to expand coal development and mining operations into 2,539.76 acres of the remaining federal coal lands. Interior prepared an Environmental Assessment (EA), issued a FONSI, and approved the mining plan modification in 2015. Plaintiffs subsequently brought suit in the U.S. District Court for the District of Montana challenging Interior's 2015 EA, FONSI, and approval of the mine expansion.

The plaintiffs argued that Interior arbitrarily and capriciously quantified the socioeconomic benefits of the mine expansion by failing to use the SCC metric to quantify the costs of GHG emissions. The District Court agreed with the plaintiff, vacated the 2015 EA, and enjoined Signal Peak from mining in the expanded mining area pending Interior's compliance with NEPA.

On remand from the District Court, Interior prepared a third EA and FONSI and once again approved Signal Peak's Mine Expansion in 2018. Interior decided again to not utilize the SCC to quantify the costs of the project's expected GHG emissions. Interior supported this decision by claiming four justifications: (1) the SCC was originally developed for use in rulemakings, not individual adjudications, (2) the technical supporting documents and associated guidance underlying the SCC had been withdrawn; (3) NEPA does not require agencies to perform cost-benefit analyses; and (4) the 2018 EA did not fully quantify the social benefits of coal-fired energy production, and therefore using the SCC to quantify the costs of GHG emissions from the mine expansion would yield information that is both potentially inaccurate and not useful.

Plaintiffs again filed suit in District Court challenging Interior's 2018 EA, FONSI, and approval of the mine expansion. Plaintiff's main argument was that Interior violated NEPA again by refusing to use the SCC analysis in the 2018 EA. The district sided with Interior citing that their decision to not use the SCC was supported by the record and satisfied NEPA. The District Court granted summary judgment in favor of Interior on all but the plaintiffs' claim that Interior failed to consider the risk of coal train derailments. The District Court vacated the 2018 EA, but not Interior's approval of the mine expansion, and remand-

ed the matter to Interior for it to consider the risk of train derailments. Plaintiffs subsequently appealed to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit's Decision

The court first considered plaintiffs' argument that Interior violated NEPA by failing to adequately consider the actual environmental effects of the mine expansion and by not providing a convincing statement of reasons for its finding that the mine expansion would not have a significant effect on the environment.

Greenhouse Gas Emissions

The court reasoned that the 2018 EA's consideration of the mine expansion's domestic and global contributions of GHG lacked a science-based standard for significance. The court noted that Interior claimed GHG emissions generated over the life of the mine expansion would total approximately 0.44 percent of annual global GHG emissions, and summarily concluded the mine expansion's contribution relative to other global sources would be minor in the short and long term on an annual basis. The court also noted the domestic comparisons only accounted for emissions associated with mining the coal and transporting it to Vancouver, but failed to account for the emissions that would result from coal combustion in Japan and the Republic of Korea, even though the 2018 EA stated that 97 percent of the project's GHG emissions would stem from coal combustion, The project's estimated domestic emissions jumped from 0.04 percent of annual U.S. based GHG emissions to approximately 3.33 percent if combustion-generated emissions are included. Because the 2018 EA relied on an opaque comparison to total global emissions and failed to account for combustion-related emissions in its domestic calculations, the 2018 EA frustrated NEPA's purpose.

Social Cost of Carbon

The court next considered plaintiffs' argument that Interior arbitrarily and capriciously failed to use the Social Cost of Carbon (SCC) metric to quantify the environmental harms that may result from the project's GHG emissions. The court noted that NEPA does not require a court to decide whether an EA is based on the best scientific methodology, but only that an agency provides high quality information and accurate scientific analysis. Thus, the court ruled that Interior was not required to use the SCC method but must use some methodology that satisfies NEPA.

The Ninth Circuit affirmed the District Court's order in part, reversed in part, and the case was remanded to the District Court for further proceedings consistent with its opinion.

Conclusion and Implications

This case affirms the central intent behind NEPA which requires agencies to seriously and adequately consider the environmental effects associated with a given project. Agencies do not have to utilize a specific scientific method in quantifying emissions resulting from a project, however, the rationale used in an EA must be based in adequate scientific reasoning that is not arbitrary. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/10/14/20-35411.pdf. (Jovahn Wiggins, Rebecca Andrews)

D.C. CIRCUIT ISSUES EXTRAORDINARY WRIT RELIEF COMMANDING EPA TO COMPLY WITH ENDANGERED SPECIES ACT

In re: Center for Biological Diversity, ___F.4th___, Case No. 21-1270 (D.C. Cir. Nov. 22, 2022).

Taking unusually aggressive action under the All Writs Act, the D.C. Circuit Court of Appeals issued a writ of *mandamus* directing the U.S. Environmental Protection Agency (EPA) to complete an effects determination under the federal Endangered Species Act (ESA, 16 U.S.C. § 1531 *et seq*.) in connection with the agency's registration of a pesticide. The order was issued in the context of EPA's longtime, flagrant flouting of its clear statutory duties under the ESA, including in this case five solid years of failure to take any action in compliance with the Court of

Appeals previous order regarding the pesticide registration at issue.

Background

In 2014, EPA registered cyantraniliprole, a pesticide that "provides protection from pests that feast on citrus trees and blueberry bushes," under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. § 136 *et seq.*). FIFRA provides that "[n] o pesticide may be sold in the United States unless it is first registered with EPA." 7 U.S.C. § 136a(a). The statutory standards for registration provide that "EPA must approve the application if it meets composition and labeling requirements" and will perform its intended function without unreasonable adverse effects on the environment if used in accordance with widespread practices. 7 U.S.C. § 136a(c)(5)."

EPA's Environmental Fate and Ecological Risk Assessment for the registration of the new chemical *Cyantraniliprole* at the time of registration:

> . . .indicate[d] that it is 'slightly to very highly toxic to freshwater invertebrates; moderately to highly toxic to estuarine/marine invertebrates[;] highly toxic to benthic invertebrates; [and] highly to very highly toxic to terrestrial insects.'. . . [Nonetheless]. . . EPA classified cyantranilipole as a 'Reduced Risk' pesticide, a special category for pesticides it determines have a lower risk to human health and many non-target organisms.

EPA did not, prior to the 2014 registration, carry out an initial review or make an effects determination of the registration, let alone consult with the National Marine Fisheries Service or the Fish and Wildlife Service, to "insure that [the registration] … is not likely to jeopardize the continued existence of any endangered or threatened species or result in [their habitat's] destruction," pursuant to the ESA. 16 U.S.C. § 1536(a)(2)).

The Center for Biological Diversity and the Center for Food Safety (Centers) in 2017 obtained from the D.C. Circuit Court an order remanding the registration to EPA with instructions:

> . . .to replace the registration order with. . .a new registration order signed after an effects determination and any required consultation.

In those initial proceedings, EPA freely admitted it had not complied with the ESA. In the ensuing five years:

> EPA made no progress toward completing cyantraniliprole's effects determination--that is, no progress until earlier this year. Only then did EPA schedule cyantraniliprole's effects determination, thought it took no steps to complete it.

The Centers therefore returned to the Circuit Court, seeking relief under the All Writs Act, 28 U.S.C. § 1651.

The D.C. Circuit's Decision

The bar petitioners must meet to obtain *mandamus* relief is set extremely high:

A petitioner seeking *mandamus* must first establish that the agency has violated "a crystal-clear legal duty." *In re National Nurses United*, 47 F.4th 746, 752 (D.C. Cir. 2022).

A *mandamus* petitioner must show that it "has no other adequate means to attain the relief it desires." *In re Core Communications*, 531 F.3d 849, 860 (D.C. Cir. 2008) (internal quotation marks and alteration omitted). Moreover, a court may grant *mandamus* relief only when it also "finds compelling equitable grounds." *In re Medicare Reimbursement Litigation*, 414 F.3d 7, 10 (D.C. Cir. 2005) (internal quotation marks and alteration omitted). On the equities, the central question is "whether the agency's delay is so egregious as to warrant mandamus." *Core Communications*, 531 F.3d at 855 (internal quotation marks omitted).

The Circuit Court noted as well that:

> . . .this case arises from relatively unique circumstances that implicate two distinct sources of *mandamus* jurisdiction under the All Writs Act: our power to compel unreasonably delayed agency action and our power to require compliance with our previously issued orders.

Specifically with the respect to the latter issue:

> . . .[w]hen an agency ignores a court order. . .[i] t nullifie[s] [the court's] determination that its [action is] invalid and 'insulates its nullification of our decision from further review.'

In that circumstance, the equitable inquiry may be satisfied on a "lesser showing" by the petitioner.

Applying this test, the Court of Appeals easily found that EPA has a clear statutory duty to discharge its duties under the ESA prior to registering cyantraniliprole. EPA did not contest that the Centers have no adequate alternative remedy. Thus:

> . . .[t]he sole question, then, is whether EPA's delay in undertaking an effects determination is 'so egregious as to warrant mandamus.'

This equitable question is generally subject to analysis under the "'hexagonal *TRAC* factors" articulated in *Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984):

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. (Internal quotation marks and citations omitted.)

Here, Congress has "set a plain deadline" (factor 2), and the Court found that the human health and welfare interests sought to be protected by the ESA (*e.g.*, "'it is in the best interests of mankind to minimize the losses of genetic variations.'") would prejudiced by further delay, satisfying factors 3 and 5.

Factors 1 and 4

Focusing on factors 1 and 4, the Court of Appeals examined EPA's "fraught relationship with the ESA," during which the agency "has made a habit of registering pesticides without making the required effects determination." "EPA has faced at least twenty lawsuits covering over 1,000 improperly registered pesticides," a failure to comply with statutory mandates so flagrant that since 2014 EPA and the U.S. Fish and Wildlife Service have been subject to regular Congressional committee reporting requirements. In that context, EPA's assurances to the Court in this case that it would proceed with the required effects determination by September 2023 rang hollow, particularly given those assurances were undermined by the agency's recent statement that until 2030 it will only make effects determinations for pesticide registrations when subject to a court order requiring it to do so. Therefore, the Court of Appeals issued the requested relief, mandating that the effects determination and replacement of the registration order be completed by September 2023 and adding "bite" by retaining jurisdiction to monitor EPA's progress by requiring that progress reports be submitted by the agency every 60 days.

Conclusion and Implications

This case provides a useful illustration of the lengths to which an executive agency must go in defying Congressional and judicial commandments before a court will issue a writ of mandamus of this breadth. The court's retention of jurisdiction and interim progress report elements are particularly unusual. Nonetheless, in this polarized era examples of such stark executive defiance may well become more common.
(Deborah Quick)

EIGHTH CIRCUIT FINDS STATES LACKED ARTICLE III STANDING TO CHALLENGE BIDEN ADMINISTRATION'S CARBON COST METRIC

State of Missouri v. Biden, ___F.4th___, Case No. 21-3013 (8th Cir. Oct. 21, 2022).

In State of *Missouri v. Biden*, the Eighth Circuit Court of Appeals affirmed the lower court's ruling that Missouri and the other states that filed suit against President Biden had no standing to challenge Executive Order (E.O.) 13990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.": E.O. 13990 expressly revoked or suspended many Executive Orders issued by President Donald Trump, including revoking E.O. 13783, which disbanded the Interagency Working Group on the Social Cost of Greenhouse Gasses (IWG) established by President Barak Obama in 2017. E.O. 13990 re-established the IWG, directed it to publish interim and then final estimates of the social cost of greenhouse gas (GHG) emissions (interim SC-GHG estimates), and required federal agencies to use those estimates when monetizing the costs and benefits of future agency actions and regulations. (86 Fed. Reg. 7037 (Jan. 20, 2021).): The Court of Appeals held that per Article III of the Constitution, a federal court cannot grant instructive relief that directs the current administration to comply with past administrations' policies without a specific agency action to review.:

Procedural History

Upon the publication of the interim SC-GHG estimates in February 2021, and before the final estimates were published, Missouri and twelve other states filed suit against President Biden, the IWG, and various federal officials, departments, and agencies. The States' Complaint requested injunctive and declaratory relief and asserted four causes of action: (1) "Violation of the Separation of Powers"; (2) "Violation of Agency Statutes"; (3) "Procedural Violation of the [Administrative Procedures Act] APA"; and (4) "Substantive Violation of the APA.": They then moved for a preliminary injunction prohibiting "'defendants, except for the President, from using the [interim SC-GHG estimates] as binding values in any agency action.'": The defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim, arguing the States lacked Article III standing and their challenges to the interim SC-GHG estimates were not ripe for adjudication and were meritless. The U.S. District Court found in favor of the defendants, and granted the defendants' motion to dismiss for lack of subject matter jurisdiction and denied the States' motion for preliminary injunction as moot. (*Missouri v. Biden*, 588 F.Supp.3d 754 (E.D. Mo. 2021.): The States appealed the ruling.

The Eighth Circuit's Decision

The Court of Appeals reviewed the issues of Article III standing and ripeness *de novo* and affirmed the district court's ruling. In rejecting the States' request of injunctive relief, the court concluded that a federal court lacks the authority under Article III of the Constitution to direct:

> . . .'the current administration to comply with prior administrations' policies on regulatory analysis [without] a specific agency action to review.'

The court rejected the States' argument that the IWG lacked the delegation of legislative authority by Congress to develop SC-GHG estimates. The court stated:

> . . .[t]he IWG was formed by the President to communicate his policies to agencies in exercising *their* delegated legislative authority. We may not prohibit this sensible exercise of the President's executive power.

Then the court went on to analyze if there was any specific controversy falling within the judiciary's Article III power to decide Cases and Controversies in the States' case; absent which the matter was nonjudiciable and merely a policy disagreement to be decided through elected representatives in the other branches of government.

Article III Standing Analysis

The minimum standing requirements under Article III are that the:

> . . .plaintiff to show they: (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'

This test is especially rigorous when the merits of the dispute would require the court to determine whether an action taken by the executive or legislative branches of the federal government was unconstitutional.

Injury In Fact

The States argued that direct monetary injury from federal agencies' future use of the interim SC-GHG estimates would result in injury in fact. But the Court of Appeals found the argument to be insufficient as it relied on a highly attenuated chain of possibilities that: (1) an agency or agencies will issue one or more regulations that will rely on the interim estimates, (2) the agency will disregard any objections to the methodology used in the interim estimates, and (3) this to-be regulation would harm the States in a concrete and particularized way. This did not satisfy the injury in fact requirement of a threatened injury that is certainly impending.

The court discussed the limited impacts of the interim SC-GHG estimates. It stated that even if E.O. 13990 made the estimates mandatory, they may only be used to establish a consistent standard for one factor that federal agencies *may* use when conducting obligatory cost-benefit analyses. These estimates alone, the court held, do not injure the States and the injury the States allege is from a hypothetical future regulation that may be derived from the estimates. Thus, even if the States plausibly alleged a concrete injury, they failed to show those alleged injuries were caused by the estimates.

Sovereign Injury

The States also alleged a past and ongoing sovereign injury caused by the interim SC-GHG estimates' intrusion on the States' role as regulators in cooperative federalism programs, and that this injury immediately affects how States participate in formulating agency actions. While the question of whether sovereign injuries can constitute a concrete and particularized injury in fact is a controversial and unsettled question, the court held that even if the States, as sovereigns, are entitled to some undefined "special solicitude" in the standing analysis, the basic requirements of Article III standing must be met, and were not met here.

The court found E.O. 13990 clearly states the interim SC-GHG estimates only apply to federal "executive departments and agencies" and that neither E.O. 13990 nor the estimates impose obligations on the States. The fact that the States would prefer their federal agency partners not use the estimates in future program planning or decision-making is not a concrete harm to the States. Because the interim SC-GHG estimates were just "'one of innumerable other factors" in the agencies' cost-benefit analysis, any alleged future increased regulatory costs are not traceable to the estimates and the States did not challenge a specific regulation or action.

Procedural Harm

The States also alleged they had Article III standing because of the procedural harm caused by IWG's publication of the initial SC-GHG estimates without APA notice and comment procedures. The court rejected this argument because deprivation of any procedural right to the States did not affect any concrete interest of the States or result in any specific harm:

> By challenging all uses of the interim SC-GHG estimates, rather than their use in a specific agency action, the States [were] asserting only 'a procedural right *in vacuo*.'

The court also found that the IWG is not an "agency" subject to APA notice and comment requirements, and to find otherwise would "encourage constant judicial inference with the President's exercise of [their] executive power."

Because the States failed to allege plausible injury in fact fairly traceable to the interim SC-GHG estimates, the Court of Appeals found no need to consider the third element of Article III standing.:

Conclusion and Implications

This Eighth Circuit decision highlights difficulties that often come with a change of administration and the importance of proving actual harm, not just an alleged procedural harm untethered to a specific harm, along with satisfying the basic requirements of Article III standing. This ruling follows a Fifth Circuit Court of Appeals decision in March 2022 to reinstate the Biden administration's cost estimates after a Louisiana federal judge blocked their use. There, the U.S. Supreme Court refused to interfere with the Fifth Circuit's decision after Louisiana and other states requested it to put the injunction back into effect. The court's opinion is available online at: https://casetext.com/case/state-v-biden-23.
(Megan Unger, Hina Gupta)

D.C. DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF PIPELINE PROJECT

Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers,
___F.Supp.4th___, Case No. 20-3817, No. 21-0189 (D. D.C. Oct. 7, 2022).

The United States District Court for the District of Columbia recently granted summary judgment in favor of the United States Army Corps of Engineers (Corps) against challenges to their Environmental Assessment (EA) for an underwater oil pipeline project that allegedly violated the National Environmental Policy Act (NEPA) and the federal Clean Water Act (CWA). The Corps sufficiently assessed the environmental consequences associated with granting Enbridge, an oil pipeline and energy company, a permit to discharge dredged and fill material into waters of the United States.

Factual and Procedural Background

Enbridge Energy, LP sought a CWA section 404 permit that authorized the discharge of dredged or fill materials into waters of the United States and a permit to cross waters protected by the Rivers and Harbors Act in an effort to replace 282 miles of existing crude oil pipeline with 330 miles of new pipeline, crossing 227 waterways (Project). The Corps, after preparing an EA, granted Enbridge the permit to discharge material and concluded that issuing the permit would not significantly affect the environment.

Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and Sierra Club argued that issuing the permits violated various sections of NEPA, CWA, and the Rivers and Harbors Act. Separately, Friends of the Headwaters challenged the permits as well, arguing that the Corps violated NEPA and the CWA. The cases against the Corps were consolidated and the parties' cross-motions for summary judgment are before the court.

The court's analysis focused on the NEPA and CWA claims.

The District Court's Decision

The NEPA Claims

The court first considered plaintiffs' argument that the Corps arbitrarily and capriciously limited the scope of the EA to the construction-related activities authorized by the permit, rather than the construction and operation of the entire pipeline. The court found that the Corps was only required to consider the environmental impacts associated with the specific activity requiring a permit: the discharge of fill material into wetlands. In addition, the Corps did not have sufficient control and responsibility over the entire project, because the Corps does not regulate the siting of pipelines or any substance being transported within a pipeline.

The court next considered plaintiffs' argument that the Corps improperly relied on an environmental impact statement prepared under Minnesota state law instead of conducting an independent analysis. However, evidence showed that the Corps coordinated with various Minnesota state agencies during the entire project review. Moreover, the Corps was free to evaluate and incorporate the state's Environmental

Impact Statement (EIS) findings into their own assessment and was not required to duplicate studies or analyses already completed by the state.

The court next considered plaintiffs argument that the Corps failed to take a "hard look" at all aspects of the project, including climate change and reasonable alternatives. In response to the argument that the Corps failed to consider the project's contribution to climate change, the court concluded the Corps were not required to consider the effects on climate change arising from the construction of the entire pipeline and its operation. They were only required to review the effects with a reasonably close causal relationship with the discharge of dredged or fill materials, and the Corps EA satisfied this standard. In addition, the Corps' decision to limit its discussion of reasonable alternatives to a route previously designated by the State of Minnesota was appropriate. The state already considered numerous alternatives and the proposed route was the only one in which Enbridge was legally authorized to construct the project under Minnesota law, so the Corps' failure to consider routes that were rejected by the state made little practical sense.

The final challenge to the NEPA review was that the Corps' finding of "no significant impact," and consequently not preparing an EIS, was arbitrary and capricious because the Project was highly controversial and its impacts remained uncertain. To be "highly controversial," "something more" must exist. The court refused to equate "something more" with simply any criticism of the proposed project, or the fact that some people might be highly agitated. On the other hand, criticism of scientific methodologies by experts in the respective fields may be sufficient. The court found that the various criticisms of the Project that the plaintiffs relied on did not rise to the level of scientific and methodological criticism

Thus, the Corps did not act arbitrarily and capriciously in its NEPA review and did not violate NEPA.

The CWA Claims

Plaintiffs argued the Corps' analysis of alternatives, potential "degradation" of waters of the United States, and its public interest review was insufficient under the CWA.

The court first considered plaintiffs' argument that the Corps violated the CWA by failing to consider "status quo" or "no alternative" alternatives or less environmentally damaging route alternatives. The "no action" alternative in this case would have been to decommission the existing pipeline completely or continue using the pipeline. The court reasoned that the Corps' EA sufficiently discussed both of the "no action" alternatives and concluded neither would be practicable because the pipeline was deteriorating and risked greater environmental harm if it was left in its current condition. Regarding route alternatives, the Corps was only required to consider practicable routes, which did not include routes that the state agency previously rejected.

The court next considered plaintiffs' argument that a potential oil spill from pipeline operation would violate CWA prohibitions against significant degradation. The court reasoned that the EA's discussion of potential degradation was appropriately tailored to the effects arising from the specific dredge and fill activities being permitted, not a potential oil spill caused by the operation of the new pipeline.

Finally, the court considered plaintiffs' argument that the Corps failed to conduct a sufficient "public interest" review under the CWA. The plaintiffs challenge the discussion of economics, energy needs, climate change and greenhouse gas emissions, wetlands, and the risk of an oil spill. The court rejected plaintiffs' arguments, reasoning the Corps' sufficiently discussed economics because there was no evidence they should have considered out of pocket costs for consumers. There was also sufficient evidence that the project was needed because there was a demand for oil. Further, the Corps adequately limited the discussion of climate change to the proposed activity, and adequately addressed the effects on wetlands because the EA discussed the measures to avoid and mitigate impacts to wetlands and short-and long-term effects of the activity on the wetlands.

Finally, the Corps sufficiently evaluated the risk of an oil spill because the EA discussed the effects on aquatic life, birds, and mammals, and coordinated with Tribes to mitigate any effects on tribal resources. Therefore, the Corps did not violate the CWA and summary judgment was appropriate.

Conclusion and Implications

This case provides a reminder of the proper scope and tailoring of NEPA and CWA analyses as well as

the importance of taking a hard look at a project's impacts. The court's opinion is available online at: http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20221007_docket-120-cv-03817_memorandum-opinion.pdf. (Christina Lee, Rebecca Andrews)

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