Volume 2, Number 11
August/September 2022

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

CONTENTS

FEATURE ARTICLE

U.S. Supreme Court Rules Major Questions Doctrine Prohibits Broad Delegation of Congressional Authority to Regulate Greenhouse Gas Emissions Systems by Deborah Quick, Esq. and Lucille Flinchbaugh, Esq., Perkins Coie, LLP, San Francisco, California 299

REGULATORY DEVELOPMENTS

California Department of Water Resources Public Comment Period Opens for Resubmitted Groundwater Sustainability Plans Deemed Incomplete 305

New Mexico Water Quality Control Commission Issues National Resource Water Designations for Northern New Mexico Rivers and Streams 306

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 309

LAWSUITS FILED OR PENDING

D.C. Circuit Dismisses Environmental Interest Groups' Lawsuit Challenging U.S. EPA's Approval of Oklahoma's Coal Ash Plan under RCRA 316

RECENT FEDERAL DECISIONS

Circuit Court of Appeals:
Ninth Circuit Revisits the Meaning of 'Transportation' under RCRA 319
California River Watch v. City of Vacaville, ___F.4th___, Case No. 20-16605 (9th Cir. July 1, 2022).

Continued on next page

EDITORIAL BOARD
Executive Editor:
Robert M. Schuster, Esq.
Argent Communications Group

Rebecca Andrews, Esq.
Best Best & Krieger, LLP
San Diego, CA

Darrin Gambelin, Esq.
Downey Brand, LLP
San Francisco, CA

Hina Gupta, Esq.
Downey Brand, LLP
San Francisco, CA

Andre Monette, Esq.
Best, Best & Krieger, LLP
Washington, DC

Deborah Quick, Esq.
Perkins Coie, LLP
San Francisco, CA

ADVISORY BOARD
Douglas S. Kenney, Ph.D.
Getches-Wilkinson Center
University of Colorado, Boulder

Katherine S. Poole, Esq.
Natural Resources Defense Council

Robert C. Wilkinson, Ph.D.
Bren School of Environmental Science and Management
University of California, Santa Barbara

ARGENT COMMUNICATIONS GROUP

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
LAW AND REGULATION REPORTER

D.C. Circuit Upholds FERC's Approval of Adelphia Pipeline Acquisition under NEPA 320
Delaware Riverkeeper Network v. Federal Energy Regulatory Commission, ___F.4th___, Case No. 20-1206 (D.C. Cir. Aug. 2, 2022).

Federal Circuit Recognizes Cognizable Property Interest in Flowage Easement for Properties Flooded in Hurricane Harvey 322
Milton v. United States, 36 F.4th 1154 (Fed. Cir. 2022).

Fourth Circuit Allows Clean Water Act Citizen Suit to Proceed Despite Ongoing Proceedings at the State Level 323
Naturaland Trust, et al. v. Dakota Finance, et al., 41 F.4th 342 (4th Cir. July 20, 2022).

RECENT STATE DECISIONS

California Supreme Court Holds Federal Power Act Does Not Preempt Application of CEQA to State Authority Over Dam Licensing 326
County of Butte v. Department of Water Resources, ___Cal.5th___, Case No. C071785 (Cal. Aug. 1, 2022).

California Court of Appeal Finds Water Allocation Did Not Constitute a New 'Project' under the California Environmental Quality Act 330
County of Mono v. City of Los Angeles, 81 Cal. App.5th 657 (1st Dist. 2022).

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher: 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Copyright © 2022 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to $250,000 and up to three years imprisonment, and statutory damages in civil court are up to $150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

The material herein is provided for informational purposes. The contents are not intended and cannot be considered as legal advice. Before taking any action based upon this information, consult with legal counsel. Information has been obtained by Argent Communications Group from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, or others, Argent Communications Group does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or for the results obtained from the use of such information.

Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation. President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster,.

Environmental, Energy & Climate Change Law and Regulation Reporter is a trademark of Argent Communications Group.

FEATURE ARTICLE

U.S. SUPREME COURT RULES MAJOR QUESTIONS DOCTRINE PROHIBITS BROAD DELEGATION OF CONGRESSIONAL AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS SYSTEMS

By Deborah Quick and Lucille Flinchbaugh

The United States Supreme Court has considered whether the "best system of emission reduction" identified by the U.S. Environmental Protection Agency (EPA) in its Clean Power Plan (Plan) was within the authority granted to the EPA by § 111(d) of the federal Clean Air Act (CAA or Act). Analyzing the question under the "major questions doctrine," the Court concluded that the emissions shifting building blocks of the Plan lacked any clear congressional authorization, and therefore exceeded the EPA's regulatory authority under the Act. [*West Virginia v. Environmental Protection Agency*, ___U.S.___, 142 S.Ct. 2487 (2022).]

Background

In 2015, the EPA promulgated the Plan, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. *West Virginia*, 142 S. Ct. at 2592. The EPA cited the scarcely utilized Section 111 of the Act as its source of authority, which directs the EPA to: (1) determine, considering various factors, the best system of emission reduction which has been adequately demonstrated, (2) ascertain the degree of emission limitation achievable through the application of that system, and (3) impose an emissions limit on new stationary sources that reflects that amount. 42 U.S.C. §7411(a)(1); *see also* 80 Fed. Reg. 64510, 64538 (Oct. 23, 2015); *West Virginia*, 142 S. Ct. at 2601. Under this provision, the States have authority to set the enforceable rules restricting emissions from sources within their borders, while the EPA decides the amount of pollution reduction that must ultimately be achieved. *Id.* at 2601–02. That standard may be different for new and existing plants, but in either case, it must reflect the "best system of emission reduction" or "BSER" that the EPA has determined to be "adequately demonstrated" for the category. §§7411(a)(1), (b)(1), (d). 142 S. Ct. at 2602.

In its Plan, the EPA determined that the BSER for existing coal-fired power plants included three types of measures which the EPA called "building blocks." *Id.* at 2602–03; *see* 80 Fed. Reg. 64662, 64667 (Oct. 23, 2015). The first building block consisted of "heat rate improvements" that coal-fired plants could undertake to burn coal more efficiently. 142 S. Ct. at 2693; 80 Fed. Reg. at 64727. This type of source-specific, efficiency improving measure was similar to those that the EPA had previously identified as the BSER in other Section 111 rules. However, in this case, the EPA determined that this measure would lead to only small emission reductions because coal-fired power plants were already operating near optimum efficiency. 142 S. Ct. at 2603; 80 Fed. Reg. at 64727. The EPA explained, in order to control carbon dioxide from affected plants at levels necessary to mitigate the dangers presented by climate change, it could not base the emissions limit on measures that only improve power plant efficiency. 142 S. Ct. at 2611; 80 Fed. Reg. at 64728.

As such, the EPA included two additional building blocks in its Plan. The second building block would shift electricity production from existing coal-fired power plants to natural-gas-fired plants (*Id.*) and the third building block would shift from both coal- and gas-fired plants to new low- or zero-carbon generating capacity, mainly wind and solar. *Id.* at 64729, 64748; 142 S. Ct. at 2603. In other words, both measures

The opinions expressed in attributed articles in *Environmental, Energy & Climate Change Law and Regulation Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of *Environmental, Energy & Climate Change Law and Regulation Reporter*.

would involve what the EPA called "generation shifting from higher-emitting to lower-emitting" producers of electricity as a means of reducing carbon emissions. *Id.*; 80 Fed. Reg. at 64728. The EPA explained that such methods for implementing this shift may include reducing the plant's own production of electricity, building a new natural gas plant, wind farm, or solar installation, investing in an existing facility, or purchasing emissions allowances. *Id.* at 64731–32; 142 S. Ct. at 2603.

In determining "the degree of emission limitation achievable through the application" of the system, as required under the Act, the EPA settled on what it regarded as a "reasonable" amount of shift, projecting that by 2030, it would be feasible to have coal provide 27 percent of national electricity generation, down from 38 percent in 2014. 80 Fed. Reg. at 64665, 64694; 142 S. Ct. at 2604. From these projections, the EPA determined the applicable emissions performance rates, which were so strict that no existing coal plant would have been able to achieve them without engaging in one of these three methods of generation shifting discussed above. *Id.*

Following a stay on the Plan in 2016, the EPA repealed the Plan in 2019 following a change in administration, concluding that the EPA had exceeded its own jurisdiction under the Act. *Id.* On January 19, 2021, the D.C. Circuit reviewed the EPA's actions and determined that the EPA had misunderstood the scope of its authority under the Act. The court vacated the EPA's repeal of the Plan and remanded to the EPA for further consideration. *Id.* at 2605–06 (citing *Am. Lung Ass'n v. EPA*, 985 F. 3d 914, 995 (D.D.C. 2021, *rev'd and remanded by West Virginia*, 142 S. Ct. 2587). The court's decision was followed by another change in administration, and the EPA moved the court to partially stay its mandate. 142 S. Ct. at 2606. Westmoreland Mining Holdings LLC., North American Coal Corporation, and the States filed petitions for certiorari defending the repeal of the Plan. *Id.*

The Supreme Court's Decision—Majority Opinion

The Court explained that the main issue under consideration in this case was whether restructuring the nation's overall mix of electricity generation, to transition from 38 percent coal to 27 percent coal by 2030, can be the BSER within the meaning of Section 111. *Id.* at 2595. In analyzing this issue, the Court looked to a variety of cases where agencies were found to have exceeded their regulatory power because, under the circumstances, common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue, made it very unlikely that Congress had actually intended to do so. *Id.* at 2609. The Court explained that extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]," *Whitman v. Am. Trucking Ass'ns*, 531 U. S. 457, 468 (2001), and the Court presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Ass'n v. FCC*, 855 F. 3d 381, 419 (D. D.C. 2017); 142 S. Ct. at 2609. Accordingly, the Court determined that this question must be analyzed under the body of law known as the "major questions doctrine." *Id.*

The Major Questions Doctrine

In arguing that Section 111(d) empowered it to substantially restructure the American energy market, the EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air Regul. Grp. v. EPA*, 573 U. S. 302, 324 (2014). 142 S. Ct. at 2610. Prior to 2015, the EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, but it had never previously devised a cap by looking to a "system" that would reduce pollution simply by shifting polluting activity from dirtier to cleaner sources. 80 Fed. Reg. at 64726. 142 S. Ct. at 2610. Under its prior view of Section 111, the EPA's role was limited to ensuring the efficient pollution performance of each individual regulated source, and if a source was already operating at that level, there was nothing more for the EPA to do. *Id.* at 2612.

In contrast, the Court argued that under the Plan, the EPA was able to demand much greater reductions in emissions based on its own policy judgment that coal should make up a much smaller share of national electricity generation. *Id.* The EPA would be able to decide, for instance:

> . . .how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high en-

> ergy prices can go as a result before they become unreasonably 'exorbitant.' *Id.*

The Court asserted that under this view, the EPA could go even further, perhaps forcing coal plants to "cease making power altogether." *Id.* The Court explained that Congress:

> . . .certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. . .[and and the]. . .last place one would expect to find it is in the previously little-used backwater of Section 111(d). *Id.* at 2613.

As such, the Court determined it would be highly unlikely that Congress intended to leave to agency discretion of the decision of how much coal-based generation there should be over the coming decades.

Under the major questions doctrine, to overcome the Court's skepticism, the Government must point to "clear congressional authorization" to support its assertion of regulatory power. *Utility Air*, 573 U. S., at 324. 142 S. Ct. at 2614. The Government looked to other provisions of the Act for support, such as where the word "system" or similar words to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution are used, such as in the Acid Rain program or Section 110 of the NAAQS program. *Id.* at 2614–15. However, the Court rejected the Government's argument, differentiating these sections and finding that the references to "system" in other provisions do not equate to the kind of "system of emission reduction" referred to in Section 111. *Id.* at 2615. The Court concluded that these provisions do not provide adequate support to make a finding of clear congressional authorization. *Id.* at 2615–16. Notably, however, the Court refused to answer the question of whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. *Id.* at 2616.

In total, the Court determined that while capping carbon emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day," based on the language of the statute and the lack of any other clear congressional directive, it is not plausible that Congress intended to give the EPA the authority to adopt a regulatory scheme of such magnitude in Section 111(d). The Court reversed the D.C. Circuit's decision and remanded for further proceedings.

The Concurrence

Justice Gorsuch's concurrence, joined by Justice Alito, builds on Gorsuch's prior opinions in *Gundy v. United States*, 139 S. Ct. 2116 (2019) (dissenting) and *Nat'l Fed. of Ind. Bus. v. OSHA*, 595 U.S. ___ (2022) (concurrence) (*NFIB*), in which Gorsuch has argued for an expansive application of the major questions doctrine.

In *Gundy*, Gorsuch traced the asserted deterioration of the "intelligible principle" doctrine by which courts determine "whether Congress has unconstitutionally divested itself of its legislative responsibilities." *Gundy* (Gorsuch, dissenting), Slip Op. at 15, quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("[A] statute 'lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform' satisfies the separation of powers."). Gorsuch identifies the "traditional" separation of powers test as providing that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details." *Gundy* (Gorsuch, dissenting), Slip Op. at 10 (citing *Wayman v. Southard*, 10 Wheat. 1, 46 (1825). Subsequent cases were consistent with the:

> . . .theme that Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed. *Gundy* (Gorsuch, dissenting), Slip Op. at 11 (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944).

However, beginning in the 1940s, according to Gorsuch, the intelligible principle doctrine "mutated" far from its origins in the constitutional principle of separation of powers into a toothless box-ticking exercise, so that it was relied on "to permit delegations of legislative power that on any other conceivable account should be held unconstitutional." *Gundy* (Gorsuch, dissenting), Slip Op. at 17.

In both *Gundy* and *NFIB*, Gorsuch proposed utilizing the major questions doctrine as a corrective

to shore up the intelligible principle doctrine where an agency relies on a "statutory gap" concerning "a question of deep 'economic and political significance' that is central to the statutory scheme." *Gundy* Gorsuch, dissenting), Slip Op. at 20 (quoting *King v. Burwell*, 576 U.S. ___, ___ (Slip Op. at 8). In *NFIB*, Gorsuch concurrent champions the major questions doctrine as "guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power," in contrast with the nondelegation doctrine's rule "preventing Congress from intentionally delegating its legislative powers to unelected officials." *NFIB* (Gorsuch, concurring), Slip Op. at 5.

In *West Virginia*, Gorsuch cited to his opinions *Gundy* and *NFIB* and then articulated his understanding of the "good deal of guidance" provided by prior opinions of the Courts on application of the major questions doctrine. *West Virgina v. EPA* (Gorsuch, concurring), Slip Op. at 9. The doctrine is to be applied when:

> . . .an agency claims the power to resolve a matter of 'great political significance,' or end an 'earnest and profound debate across the country.'

Further, the major question doctrine requires:

> . . .that an agency. . .point to clear congressional authorization when it seeks to regulate 'a significant portion of the American economy.' *Id.* at 10.

And the doctrine "may apply when an agency seeks to 'intrud[e] into an area that is a particular domain of state law." *Id.* at 11. This list of "triggers" for application of the major questions doctrine is, per Gorsuch, not exclusive, but in any event are all present when considering the constitutionality of the Plan. A history of Congressional failure to regulate greenhouse gas emissions from coal-fired plants, the dominance of the electricity sector in the national economy, and that the regulation of utilities is a matter traditionally left to the states, all support, in Gorsuch's view, application of the doctrine here.

The Dissent's Argument

Justice Kagan's dissent, joined by Justices Breyer and Sotamayor, relies on traditional principles of statutory interpretation and points to the purposefully broad delegation of authority in the Act allowing EPA to define a "system," characterizing this grant of broad authority as typical, but noting that while broad the delegation is not vague:

> Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions. Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there. *West Virginia v. EPA* (Kagan, dissenting), Slip Op. at 8 (internal citations omitted).

The dissent also notes that the Court has previously described cap and trade schemes to regulate acid rain and greenhouse gases as "systems," in the course of affirming their constitutionality. *Id.* at 9.

The dissent argues that the Court's statutory interpretation precedents have typically found an impermissible delegation of legislative authority "an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience," and where "the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress' broader design."

> In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design. *Id.* at 15.

Criticizing the majority and concurrence for their reliance on the major question doctrine, the dissent argues that Congress appropriately relies on delegation to expert agencies in order to implement complex policies across an advanced industrial economy

in a rapidly evolving world. Congress, in the dissent's view, appropriately looks to expert agencies staffed with "people with greater expertise and experience" to implement broad policy goals, including "to keep regulatory schemes working over time." *Id.* at 30.

The Inflation Reduction Act

In mid-August, Congress passed and President Biden signed the Inflation Reduction Act of 2022. The Act defines various greenhouse gases as pollutants under the Clean Air Act in the course of authorizing numerous subsidies and incentive programs to support moving away from reliance on fossil fuels. Widespread commentary to the contrary, nothing in the Inflation Reduction Act nullified the Court's central holding in *West Virginia v. EPA* that Congress cannot delegate to EPA the authority to mandate generation shifting away from fossil fuels.

It remains to be seen whether the Inflation Reduction Act's minute specification of numerous, specific subsidy and incentive programs will illustrate or undercut Justice Kagan's observation of the necessity for Congress to delegate broad and continuing authority to expert agencies in order to meet evolving challenges with appropriately evolving regulations.

Conclusion and Implications

The Court's embrace of the major questions doctrine as a robust constraint of Congressional delegation raises questions as to whether the Securities and Exchange Commission's proposed climate-related disclosure rules are at risk (see https://corpgov.law.harvard.edu/2022/08/03/west-virginia-v-epa-casts-a-shadow-over-secs-proposed-climate-related-disclosure-rule/), and further afield casts doubt on evolving agency regulation in numerous technical fields not related to climate change, such as healthcare (see https://oneill.law.georgetown.edu/unpacking-west-virginia-v-epa-and-its-impact-on-health-policy/).

The Inflation Reduction Act—adopted on a party-line vote in the House of Representatives—illustrates the path forward for federal regulation: minute, specific and explicit direction to agencies to implement detailed legislatively-mandated programs. The disadvantages of this approach include that it requires an enormous expenditure of political capital, is vulnerable to repeated reversals on the House's two-year election cycle, and cannot be expected to keep pace with the pace of social, economic and scientific change that is an inevitable consequence of a modern, advanced economy. Individual states, meanwhile, may choose to delegate broadly to expert agencies and thereby exceed the federal regulatory threshold, perpetuating a patchwork approach.

Climate change is the paradigmatic collective action problem writ a global scale. *West Virginia v. EPA* throws into stark relief the question of whether there is a constitutionally sound and politically viable path to collective action sufficient to meet the demands of moment?

Deborah Quick, Esq. is Senior Counsel at the law firm, Perkins Coie, LLP, resident in the firm's San Francisco office. Debbi represents clients seeking land-use and resource permits and entitlements and compliance with environmental laws, including the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA), before administrative agencies. She defends those entitlements in litigation at both trial and appeal courts. Her practice also includes representing clients in complex civil appeals and trial court litigation in anticipation of possible appeals. Debbi sits on the Editorial Board of the *Environmental, Energy and Climate Change Law & Regulation Reporter*.

Lucille Flinchbaugh, Esq. is an Associate at Perkins Coie, LLP, San Francisco. Lucy focuses her practice on land use entitlements, site selection, permitting, and environmental compliance, representing major developers in all stages of the development process for mixed-use, commercial, and residential development projects. Her experience covers a variety of programmatic areas of environmental and land use laws and policy, from the local

to state level. Specifically, she has helped businesses navigate complex matters implicating the California Environmental Quality Act (CEQA), Subdivision Map Act, National Environmental Policy Act (NEPA), redevelopment law, and California housing laws.

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES PUBLIC COMMENT PERIOD OPENS FOR RESUBMITTED GROUNDWATER SUSTAINABILITY PLANS DEEMED INCOMPLETE

In January 2022, the California Department of Water Resources (DWR) completed its review of the first wave of Groundwater Sustainability Plans (GSP) submitted by local Groundwater Sustainability Agencies (GSAs). Under the Sustainable Groundwater Management Act (SGMA), DWR is required to evaluate whether each GSP substantially complies with that law and the DWR GSP emergency regulations to achieve the GSP's sustainability goal for the basin. DWR deemed nearly all submitted GSPs to be incomplete and requiring immediate corrections. Those GSAs were required to submit revised GSPs to DWR by July 2022. The revised GSPs are now available for review and public comment, prior to DWR making final determinations of GSP adequacy and completeness.

Background

GSPs deemed "incomplete" were required to be corrected and resubmitted to DWR within 180 days. In late July 2022, eight GSPs were resubmitted for review. The 60-day public comment period for resubmitted GSPs ends September 30, 2022. Once DWR reviews the resubmitted GSPs, it will issue final determinations for each GSP finding them either "complete" or "inadequate." If a GSP receives an "inadequate" determination, the California State Water Resources Control Board (SWRCB) may intervene and impose an interim plan to directly manage the basin, including imposing substantial fees.

Incomplete Determinations

The summary below identifies the eight basins that received an incomplete designation and summarizes DWR's primary basis for that determination:

•Eastern San Joaquin
Insufficiently defined sustainable management criteria ("SMC") for the chronic lowering of groundwater levels.
Insufficient information to support the use of the chronic lowering of groundwater level SMCs and representative monitoring network as a proxy for land subsidence.

•Merced
Insufficient justification for identifying undesirable results for chronic lowering of groundwater levels, subsidence, and depletion of interconnected surface waters only occurring in consecutive non-dry water year types.
Insufficiently defined SMC for chronic lowering of groundwater levels.
Insufficiently defined SMC for land subsidence.

•Chowchilla
Insufficiently defined SMC
Insufficiently demonstrated that interconnected surface water or undesirable results related to depletions of interconnected surface water are not present and are not likely to occur in the Subbasin.

•Kings
Insufficient SMC for chronic lowering of groundwater levels.
Insufficient minimum thresholds and measurable objectives for land subsidence.
Inconsistently identified interconnected surface water systems, and insufficiently identified the location, quantity, and timing of depletions of those systems due to groundwater use.
Insufficiently defined SMC for the depletions of interconnected surface water.
Insufficient information to support the selection of degraded water quality SMC.

•Kaweah
Insufficiently defined SMC for chronic lowering of groundwater levels.
Insufficiently defined SMC, including undesirable results, minimum thresholds, and measurable

objectives, for land subsidence.
Insufficiently and inconsistently characterized interconnected surface water and insufficiently defined SMC for the depletion of those interconnected surface waters.

•Tulare Lake
Insufficiently defined undesirable results or SMC for groundwater levels.
Insufficiently defined undesirable results or SMC for subsidence.
Insufficiently identified SMC for degraded water quality.

•Tule
Insufficiently defined undesirable results or unsatisfactory minimum thresholds and measurable objectives for groundwater levels
Insufficiently defined undesirable results or unsatisfactory minimum thresholds and measurable objectives for land subsidence.
Insufficient information to justify the proposed SMC for degraded water quality.

•Kern County
Inconsistent undesirable results for the entire basin.
Unsatisfactory SMC for the basin's chronic lowering of groundwater levels.
Unsatisfactory land subsidence SMC.

Trends

As described above, many of the deficiencies centered on a failure to sufficiently identify, define and justify sustainable management criteria. SGMA allows GSPs to identify data gaps and identify a plan to fill them. However, the establishment of SMCs is considered foundational to defining and managing local groundwater basins. Resubmitted GSPs are required to address the SMC issues and other deficiencies, which could result in the introduction of new or different GSA projects and management actions.

Public Comment

The revised GSPs are now posted on the DWR SGMA Portal for public review and comment. While DWR will not respond to public comments directly, it will consider those comments during its evaluation of the resubmitted GSPs. Public comments are submitted via the SGMA portal at https://sgma.water.ca.gov/portal/gsp/all. A SGMA Portal account is not required to submit public comments.

Conclusion and Implications

To date, the Department of Water Resources has only deemed a handful of GSPs complete: Santa Cruz Mid-County, North Yuba, South Yuba, Indian Wells Valley, 180/400 Foot Aquifer, Oxnard, Pleasant Valley, and Las Posas. Even for most of those GSPs deemed complete, DWR identified important issues to be addressed in the GSP five-year updates, or sooner. DWR's timeline to review the revised GSPs and make its final determinations is not defined by SGMA, and DWR has not indicated a projected timeframe. SGMA does, however, authorize GSAs to implement their GSPs pending DWR review, which can complicate basin management in basins where significant or controversial projects and management actions are proposed.
(Byrin Romney, Derek Hoffman)

NEW MEXICO WATER QUALITY CONTROL COMMISSION ISSUES NATIONAL RESOURCE WATER DESIGNATIONS FOR NORTHERN NEW MEXICO RIVERS AND STREAMS

On July 12, 2022, the New Mexico Water Quality Control Commission (Commission) held a meeting in which they approved Outstanding National Resource Waters (ONRW) designations for sections of the Upper Pecos, Rio Grande, Rio Hondo, Jemez River, San Antonio Creek and Redondo Creek in Northern New Mexico. An ONRW designation is significant, as it provides the highest level of water quality protection afforded by federal law through the Clean Water Act. 40 CFR 131.12(a)(3).

Background

The New Mexico Water Quality Commission has the authority to designate water bodies as ONRW pursuant to the federal Clean Water Act. Originally known as the Federal Water Pollution Control Act of 1948, this act was the first major law to address water pollution in the United States. As public awareness and concern for controlling and mitigating water pollution increased throughout the states, Congress swept into action and amended the act in 1972. After the 1972 Amendments, the law became what we now know as the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq*. (1972) (as amended). One of the major and most important amendments was the establishment of the current structure for regulating pollutant discharges into the waters of the United States.

Although the Clean Water Act provides states discretion in choosing their statewide antidegradation policies, it also provides a floor standard to ensure some protection and preservation. Pursuant to 40 C.F.R. § 131.12, the New Mexico Water Quality Control Commission approved ONRW designations for sections of the Upper Pecos, Rio Grande, Rio Hondo, Jemez River, San Antonio Creek and Redondo Creek. The Antidegradation and Implementation Methods portion of the relevant regulation states:

> The State shall develop and adopt a statewide antidegradation policy. The antidegradation policy shall, at a minimum, be consistent with the following: Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected. 40 C.F.R. § 131.12(a)(B)

The Water Quality Control Commission

The New Mexico Water Quality Control Commission is the state's water pollution control agency for all purposes of the New Mexico Water Quality Act, the federal Clean Water Act and Federal Safe Drinking Water Act. The Commission is established by statute under NMSA 1978, Section 74-6-3. The Commission consists of fourteen positions or members, and of the fourteen seats, ten seats are designees of governmental agencies and four are appointed by the Governor. Pursuant to NMSA 1978, § 74-6-3, the Commission consists of:

> . . .the secretary of environment or staff designee, the secretary of health or staff designee, the director of the department of game and fish or staff designee, the state engineer or staff designee, the chair of the oil conservation commission or staff designee, the director of the state parks division of the energy, minerals and natural resources department or staff designee, the director of the department of agriculture or staff designee, the chair of the soil and water conservation commission or a soil and water conservation district supervisor designated by the chair, the director of the bureau of geology and mineral resources at the New Mexico institute of mining and technology or staff designee, a municipal or county government representative, and four representatives of the public to be appointed by the governor for terms of four years. Additionally, at least one member appointed by the governor shall be a member of a New Mexico Indian tribe or pueblo. NMSA 1978, § 74-6-3.

Designation of a Water Body as an Outstanding National Resource Water[s]

The Commission has powers delegated to it by the CWA. The designation of a water body as an ONRW does not change or restrict uses, but it has a salutary effect. Land-use activities in existence at the time an ONRW is designated are not affected so long as they are allowed by state or federal law, controlled by best management practices, and do not result in new or increased discharges of contaminants to the ONRW. Examples of activities that are permitted to occur near designated ONRWs include recreational activities, grazing, acequia operation, maintenance and repair. Designation as an ONRW does not restrict uses or access, but simply ensures protection for water deemed to be worthy of ONRW designation. For waters to be eligible for ONRW designation – they must be part of a national or state park, wildlife refuge or wilderness areas, special trout waters, waters with exceptional recreational or ecological significance, and high-quality waters that have not been significantly modified by human activities.

Any person or agency can nominate a surface water for designation as an ONRW by filing a petition with the New Mexico Water Quality Control Commission. An ONRW is proposed for designation by filing a petition with the Water Quality Control Commission (WQCC) in accordance with the requirements under 20.6.4.9.B NMAC. Designation of a river or stream as an ONRW is very important for communities if their economy depends on recreational uses of local resources. For example, Jemez Pueblo attracts many visitors and tourists because of the nearby recreational activities available for New Mexicans to enjoy. Ensuring the long-term protection of the Jemez River, for example, is a way to strive towards protecting local small businesses and the local economy. It is anticipated that there will be other designations in the future.

U.S. Senate Bill 3129

As water becomes increasingly scarce in the Southwest amid record breaking dry conditions, attempts to preserve existing water resources will likely increase. Both of New Mexico's United States Senators have stated that this is the case. On November 2, 2021, Senators Heinrich and Lujan introduced U.S. Senate Bill 3129, the M.H. Dutch Salmon Greater Gila Wild and Scenic River Act, to the United States Senate. The Proposed Act would amend the Wild and Scenic Rivers Act to designate certain segments of the Gila River in Southwestern New Mexico as components of the National Wild and Scenic Rivers System. As of July 21, 2022 the bill has passed the Senate Committee on Energy and Natural Resources been ordered to be reported out with an amendment in a favorable manner.

Conclusion and Implications

As the Colorado River and other western rivers continue to struggle due to the ongoing drought crisis, rivers and streams across New Mexico and the rest of the Southwest are likely to see an increase in protections from governments at both the state and federal level. Seeking to designate certain rivers and streams within national or state parks, wildlife refuges, or water bodies with high recreational significance is one method to protect natural resources for generations to come, while simultaneously ensuring the survival of small local economies that depend on recreational visitors and tourists.
(Christina J. Bruff, James Grieco, J.B.)

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

•June 22, 2022—EPA announced a settlement with New England Warehousing Group, LLC, based in West Haven, Conn., for alleged violations of both the Clean Air Act's General Duty Clause (GDC) and the Emergency Planning and Community Right-to-Know Act (EPCRA) in 2019 and 2020. The New England Warehousing Group, LLC (NEWG) is a privately owned company that provides chemical warehousing and storage services to customers in New England, New York, and New Jersey. NEWG stores between ten to 12 separate products at their West Haven, Conn. facility that are reportable substances under EPCRA § 311 and 312's chemical inventory reporting requirements. Some of these products are considered extremely hazardous substances (EHSs) covered by CAA GDC requirements applicable to sources producing, processing, handling, or storing EHSs. NEWG handles and stores significant quantities of reportable substances at the facility and, in 2019, stored more than two million pounds total, including the highly flammable liquids ethanol, isopropyl alcohol, methanol, and acetone. The company failed to conduct a process hazard review for the warehouse operation and to design and maintain a safe facility, under CAA GDC requirements, and failed to submit complete, timely EPCRA Section 311 and 312 Chemical Inventory reports (Tier IIs) with state and local emergency planning and response authorities. Under the settlement, the company has agreed to pay a penalty of $109,635 and certify compliance with all its CAA GDC and EPCRA requirements.

•June 28, 2022—EPA announced a Consent Agreement and Final Order (CAFO) settling Fuyao Glass Illinois, Inc.'s alleged violations of the Clean Air Act at its glass manufacturing facility in Decatur, Illinois. In 2014, Fuyao submitted a permit application to Illinois EPA to rebuild two glass melting furnaces at its facility. Fuyao's application identified the proposed project involved physical changes but Fuyao projected that emissions would not significantly increase. EPA alleged that after construction, Fuyao's Furnace #1 triggered the federal Prevention of Significant Deterioration, or PSD, regulations when two types of particulate emissions (PM10 and PM2.5) emitted by the furnace increased by significant amounts. The company failed to report the increased emissions to Illinois EPA. Under the settlement, Fuyao is required to control PM2.5 and PM10 emissions by installing and operating a catalytic filter system; comply with a total PM emission limit of 0.30 pounds of PM10/PM2.5 per ton of glass produced on a 3-hour average basis; and adhere to additional emission testing and reporting requirements. The company will pay more than $8.5 million to purchase and install the catalytic filter system and pay a civil penalty of $450,000.

•July 7, 2022—EPA announced that Borla Performance Exhaust Inc. will pay a $1,022,500 million penalty under the Clean Air Act for illegally selling aftermarket products that counter vehicles' emissions-control systems—known popularly as defeat devices—throughout the U.S. The settlement is part of EPA's National Compliance Initiative, which focuses on stopping the manufacture, sale, and installation of defeat devices on vehicles and engines. Borla manufactured and sold aftermarket exhaust parts that are designed to remove catalytic converters from automobiles. Catalytic converters are installed in most automobiles to meet federal emission standards and typically control more than 90 percent of the regulated pollutants passing through them.

•July 25, 2022—EPA, DOJ and the State of Colorado announced a settlement with DCP Operating Company LP and five other subsidiaries of DCP Midstream LP designed to strengthen leak detection and repair practices at eight natural gas processing plants in Weld County, Colorado, located within the Denver Metro/North Front Range Ozone Nonattainment Area. The action settles allegations that DCP violated leak detection and repair requirements in federal and state clean air laws, resulting in excess emissions of volatile organic compounds (VOC) and other pollutants to the atmosphere. As part of the settlement, DCP will take corrective actions and pay a $3.25 million civil penalty for the alleged violations. Under the settlement, DCP has agreed to strengthen its leak detection and repair practices at its natural gas processing plants, as well as the to-be-constructed Bighorn natural gas processing plant. DCP will also install additional pollution reduction measures at the Kersey/Mewbourne natural gas processing plant that will cost an estimated $1.15 million and is expected to reduce VOC emissions by 26 tons per year and methane emissions by 375 tons per year.

•July 25, 2022—EPA and DOJ announced an amendment to a 2022 Clean Air Act consent decree with three subsidiaries of Dutch chemical giant LyondellBasell Industries N.V. (Lyondell). Under the amended consent decree, Lyondell has agreed to install and operate instruments and monitoring systems to ensure high combustion efficiency at the flares at its Morris facility. The company will also install a fenceline monitoring system to measure benzene levels at the boundary of the facility. In addition to the compliance requirements, Lyondell will pay a $324,000 civil penalty. The company estimates it will ultimately spend at least $4.6 million to bring the flares into compliance. The proposed amendment addresses Clean Air Act violations and is expected to reduce emissions of VOCs by 145 tons per year compared to emissions prior to EPA's enforcement action.

•July 27, 2022—EPA announced a settlement with Grimmway Enterprises, Inc. for violations of the Clean Air Act and the emergency notification-related requirements of two other federal laws at its Arvin, California facility. On August 2, 2019, approximately 2,335 pounds of anhydrous ammonia, which is designated as an Extremely Hazardous Substance, were released at Grimmway's Arvin facility. A subsequent EPA inspection found Grimmway failed to notify state emergency authorities and the National Response Center immediately after the release. The inspection also revealed that Grimmway did not have required safety information for equipment, such as pressure relief valves; lacked required safety equipment, such as chlorine sensors or alarms; was missing some required operating procedures for its ammonia refrigeration equipment; and failed to have procedures in place to notify the appropriate agencies about chemical releases. The company will pay $214,103 in civil penalties. This settlement helps protect the public, facility staff, and first responders from chemical accidents.

•July 29, 2022—EPA announced a CAFO with Red Deer Exhaust Inc. (doing business as Flo~Pro Performance Exhaust) and Thunder Diesel & Performance Company under which the companies have agreed to stop selling devices that bypass or disable vehicle emissions control systems, and pay a $1.6 million penalty. The CAFO resolves allegations that they violated the Clean Air Act (CAA). The complaint, filed simultaneously with the CAFO, alleges that the parts described above are "defeat devices" prohibited by the CAA. The Environmental Protection Agency (EPA) estimates that prior to its 2018 investigation, Flo~Pro manufactured or sold more than 100,000 aftermarket defeat devices in the United States per year. In early 2019, Flo~Pro suspended sales of the defeat devices in the United States in an effort to resolve this matter.

•August 5, 2022—EPA and Indiana Department of Environmental Management announced a settlement with Metalworking Lubricants Co. for alleged violations of the Clean Air Act at its used oil processing facility in Indianapolis. Under the terms of the settlement, the company will pay a penalty of $155,000 to the United States and $155,000 to the state of Indiana. In the complaint, EPA and IDEM alleged that Metalworking Lubricants emitted more than 25 tons of hazardous air pollutants per year, including naphthalene, ethylbenzene, xylene, phenol, and toluene, in violation of its existing permit. The company also allegedly failed to operate its scrubber at specific times when its oil-processing tanks were in operation; failed to respond when the scrubber

malfunctioned; failed to keep required records; and underestimated the amount of hazardous air pollutants in incoming oil, which affected its emissions. The company also allegedly failed to apply for a major source operating permit. In addition to the penalty, Metalworking Lubricants will install a carbon adsorption system to control total organic compound and hazardous air pollutant emissions.

Civil Enforcement Actions and Settlements—Water Quality

•July 6, 2022—EPA announced a settlement with Western Timber Products, Inc of Coeur d' Alene, Idaho under which the company has agreed to pay a $222,400 penalty for Clean Water Act violations. During inspections in May 2019 and January 2021, EPA found the company failed to obtain the required Clean Water Act permits for timber processing facilities it operates in Council and Weiser, Idaho. The Council facility discharged both wastewater and stormwater without a permit and the Weiser facility discharged stormwater without a permit.

•July 6, 2022—EPA ordered the Cliff Corp. and Grupo Caribe, LLC to stop discharges of stormwater and runoff coming from the Cliff Villas Hotel and Country Club construction project in Aguadilla, Puerto Rico, from flowing into the Atlantic Ocean. EPA concluded that the developers began work at the site and discharged pollutants into the Atlantic Ocean without the required Clean Water Act permit authorization. EPA has required the Cliff Corp. and Grupo Caribe LLC to submit an action plan within 30 days of the receipt of the order and take steps to come into compliance and properly control discharges from the site. The EPA order also requires the Cliff Corp. and Grupo Caribe LLC to provide monthly reports to the EPA describing the status and progress of the actions taken to comply with the provisions of the order.

•July 11, 2022—EPA announced a settlement with Trager Limestone LLC, which operates the Nettleton Limestone Quarry in Caldwell County, Missouri, under which the company will pay a $210,000 civil penalty and perform watershed restoration at a cost of over $300,000. According to EPA, Trager Limestone filled in approximately 935 feet of Kettle Creek without first obtaining a required CWA permit. The impacted area contains a wide variety of fish species and EPA alleged that Trager Limestone's activity resulted in loss of habitat. As part of the settlement Trager Limestone agreed to pay the civil penalty; develop an oil spill prevention plan; restore 1,012 feet of Kettle Creek; and plant trees and perform other restorative work intended to enhance watershed protection on approximately 4.7 acres of quarry property.

•July 14, 2022—EPA ordered the Kanaan Corporation to comply with critical Clean Water Act permitting and pollution reduction measures in order to address discharges of stormwater from a 19-acre site in Aguadilla, Puerto Rico, where Kanaan is building a commercial center. An EPA inspection earlier this year found that Kanaan lacked the proper Clean Water Act permits for discharges of stormwater from a site associated with the construction of the proposed Plaza Noroeste Shopping Mall on PR-2 Road in the Corrales Ward of Aguadilla. Kanaan has been discharging polluted stormwater from the site into a sewer system owned and operated by the Puerto Rico Department of Transportation and Public Works, which is connected to a creek that flows to the Culebrinas River and ultimately into the Atlantic Ocean. EPA has ordered Kanaan to develop a plan to fully implement erosion and sediments controls for the site in Aguadilla and apply for a new permit under the Clean Water Act's National Pollutant Discharge Elimination System. EPA's order also requires Kanaan to stabilize certain areas at the site and control the spread of dust.

•August 10, 2022—EPA announced a settlement with Carson City Public Works (Carson City) for violating provisions of the Clean Water Act pretreatment program at its wastewater treatment plant in Carson City, Nevada. Carson City's pretreatment program, which is federally mandated and EPA-approved, serves to protect the city's residents and infrastructure, workers' health, and the water quality of the Carson River from industrial wastewater discharges. During September 2020, EPA conducted an audit of Carson City's pretreatment program. EPA found deficiencies in the pretreatment program's legal authority, enforcement response plan, interlocal agreement, and industrial user compliance tracking. The settlement resolves those deficiencies.

•August 11, 2022—EPA announced a Federal Facility Compliance Agreement with the U.S. Marine Corps to make improvements related to stormwater discharges at the Marine Corps Base Hawaii (MCBH) located on the Mokapu Peninsula of Kaneohe, Oahu. The stormwater system at issue in this agreement is regulated by the Hawai'i Department of Health (DOH) under a National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System permit, as authorized under the Clean Water Act. In 2020, EPA and Hawai'i DOH conducted an audit of MCBH's compliance with its NPDES permit and found the facility exceeded discharge limits and failed to submit all discharge monitoring data required by the permit. The Agreement will require MCBH to, among other things, carry out a plan to prioritize stormwater outfalls for screening to effectively reduce trash discharges; evaluate appropriate projects to include systems that use or mimic natural processes that result in better stormwater management and natural areas that provide habitat, flood protection, and cleaner water; and develop a Construction Best Management Practices Field Manual to establish consistency in implementation and construction project oversight.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•June 23, 2022—EPA announced a settlement with the U.S. Air Force under which the Air Force has agreed to pay a $206,811 penalty for hazardous waste storage and handling violations at the Eareckson Air Station on Shemya Island in Alaska. EPA found that the Air Force improperly stored more than a ton of hazardous paints, hydrochloric acid, methyl ethyl ketone, and oxidizers, and more than 25 tons of hazardous waste fuel and oil. These wastes were stored for years longer than allowed under the Resource Conservation and Recovery Act. The agency also determined the Air Force failed to properly manage its universal waste, including batteries, lamps, and aerosol cans. In addition to paying the $206,811 penalty, the Air Force also agreed to ship off-site and properly dispose of approximately 55,000 pounds of hazardous waste by the end of June 2022, improve its hazardous waste and universal waste management practices, and appropriately close the area where hazardous waste was improperly stored.

•June 27, 2022—EPA announced a settlement with Vytex Corporation in Twinsburg, Ohio, to resolve alleged violations of the Lead Renovation, Repair, and Painting (RRP) Rule. The settlement includes a $112,346 civil penalty. EPA alleged that Vytex, a renovation firm that performs window and door replacement in Ohio, failed to comply with the Lead RRP Rule at various properties the company worked on from 2018 to 2019. EPA alleged Vytex did not provide the "Renovate Right" pamphlet before beginning renovation activities, which is intended to provide owners and/or occupants with information regarding potential lead-based paint hazards. EPA also alleged Vytex did not comply with all renovator certification and recordkeeping requirements at properties it worked on. Under the settlement with EPA, Vytex has agreed to comply with the RRP Rule in all future renovation activities and will pay a civil penalty of $112,346 to the federal government.

•July 5, 2022—EPA announced a CAFO with EaglePicher Technologies, LLC, a privately-held Delaware company with a manufacturing facility in E. Greenwich, settling alleged violations of the federal Resource Conservation and Recovery Act and federally-enforceable Rhode Island hazardous waste regulations. Based on a state inspection of the facility, EPA alleged that EaglePicher accumulated hazardous waste in a storage tank for greater than 90 days, failed to segregate containers of incompatible wastes, failed to properly label containers, and failed to label and track accumulation times for universal wastes. EaglePicher certified that the facility has corrected its RCRA violations and has established new RCRA compliance procedures. The company also agreed to pay a settlement penalty of $108,810.

•July 5, 2022—EPA ordered ContextLogic Inc., doing business as Wish, to stop selling several unregistered disinfectants through their e-commerce marketplace. The products are unregistered disinfectants being sold in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA issued the 'Stop Sale' order to prevent the company, located in San Francisco, from continuing to distribute or offer for sale unregistered disinfectants. By law, public health claims for pesticide products, including disinfectants, can only be made following proper testing and registration with the EPA. EPA will not register

a pesticide until it has been determined the product will not pose an unreasonable risk to human health when used according to the label directions.

• July 7, 2022—EPA announced a settlement with American Wire, LLC, a Rhode Island corporation, for alleged violations of the Lead Renovation, Repair, and Painting (RRP) Rule during 2020 renovation and construction activities at a Pawtucket, R.I. property known as American Wire Residential Lofts. As the result of an investigation that included an on-site inspection coordinated with the Rhode Island Department of Health, EPA determined that among other alleged violations, American Wire was not a Rhode Island Lead Hazard Control licensed firm (the equivalent of an EPA-certified firm). This licensing is required for companies that perform renovations that disturb painted surfaces in housing built before 1978 presumed to contain lead. EPA also alleged that the company failed to ensure that a certified Lead Renovator was designated as the person responsible for oversight of each renovation project in a building being renovated for residential occupancy. Pursuant to the settlement, American Wire has paid a fine of $25,000 and has come into compliance with lead paint laws.

•July 14, 2022—EPA, the Justice Department, and the Louisiana Department of Environmental Quality (LDEQ) announced a settlement with PCS Nitrogen Fertilizer, L.P. (PCS Nitrogen), to remedy hazardous waste issues at its former fertilizer manufacturing facility in Geismar, Louisiana. The settlement resolves alleged violations of the Resource Conservation and Recovery Act (RCRA) at the facility, including that PCS Nitrogen failed to properly identify and manage certain waste streams as hazardous wastes. These corrosive (acidic) hazardous wastes were illegally mixed with process wastewater and phosphogypsum from phosphoric acid production. The resulting mixture of wastes was disposed of in surface impoundments. The settlement requires PCS Nitrogen to treat over 1 billion pounds of acidic hazardous process wastewater over the next several years. The acidic hazardous process wastewaters will be contained in the phosphogypsum stack system and then treated in the newly constructed water treatment plant. The settlement also regulates the long-term closure of PCS Nitrogen's phosphogypsum stacks and surface impoundments for over 50 years and requires PCS Nitrogen to ensure that financial resources will be available for environmentally sound closure of the facility. PCS Nitrogen will provide over $84 million of financial assurance to secure the full cost of closure and pay a civil penalty of $1,510,023.

•August 4, 2022—EPA ordered Wilson's Pest Control to stop the sale and distribution of 10 unregistered and misbranded pesticides that EPA says are noncompliant with federal law and may represent a danger to consumers. On June 15, 2022, EPA inspectors discovered unlabeled, plastic zip-top baggies of rodent bait products and other improperly repackaged and mislabeled rodenticides offered for sale at Wilson's Pest Control's location at 2400 Grand Boulevard, St. Louis.

•August 9, 2022—EPA announced a settlement with Lighting Resources, LLC, a generator and commercial storer of polychlorinated biphenyls (PCBs), for violations of the Toxic Substances Control Act (TSCA) at its E. Victory Street facility in Phoenix, Arizona. The company will pay $68,290 in civil penalties. Based on a February 2020 inspection at the facility, EPA found that Lighting Resources had failed to comply with marking, dating, notification, and manifesting requirements for PCB waste. EPA also found that the company used areas in the facility that were contaminated with PCBs that it had not decontaminated prior to use. Finally, EPA found that Lighting Resources accepted unauthorized PCB liquid waste and stored excess PCB waste.

•August 9, 2022—EPA and DOJ announced an interim settlement order that requires the Municipality of Toa Alta to take a series of immediate actions to address serious issues at its landfill. The order, which has been approved by a federal judge, requires several immediate actions by the Municipality to address urgent human health and environmental concerns at the landfill. Notably, the order would require Toa Alta to stop receiving waste, cover exposed areas of the landfill and put plans into place to manage stormwater and leachate (contaminated liquid flowing from the landfill). The Municipality of Toa Alta has been operating its solid waste landfill since 1966. A majority of the landfill does not have a bottom protective liner and therefore is considered to be an "open dump." Regulations require that all open dumps be

closed by 1998 and that all landfills be appropriately operated, including daily and intermediate cover, leachate collection, and landfill gas and stormwater controls. In February 2021, DOJ filed a complaint in the federal court against Toa Alta on behalf of EPA, claiming that the conditions at the landfill constitute an "imminent and substantial endangerment." In July 2021, DOJ filed a request that the court issue an order requiring Toa Alta to address various urgent problems at the landfill immediately. In September 2021, DNER filed an administrative complaint against Toa Alta. Finally, in October 2021, DNER announced a plan to address the "open dumps" in Puerto Rico, including Toa Alta. The Municipality has since informed EPA and DOJ that it has stopped disposing waste at the landfill as of April 2022, and as of June continues to take action to meet the terms of the proposed preliminary injunction order in advance of the official filing of the order with the Court.

Indictments, Sanctions, and Sentencing

•June 17, 2022—Michelle M. Rousseff-Kemp, of Fort Wayne, Indiana, was sentenced in federal court in Fort Wayne after previously pleading guilty to falsifying a document and illegally storing hazardous waste. U.S. District Court Judge Holly A. Brady sentenced Rousseff-Kemp to 24 months' of probation and ordered her to pay a $5,500 fine. According to court documents filed in this case, Rousseff-Kemp was the president and owner of a Fort Wayne, Indiana, business which held itself out as an environmental services company providing comprehensive waste management services. Among other things, the business functioned as a hazardous waste transporter and broker. Neither Rousseff-Kemp nor her company possessed a permit to store hazardous waste. According to court documents, in June 2018, Rousseff-Kemp's company picked up hazardous waste from another company that generated the waste. In November 2018, the waste generator emailed Rousseff-Kemp requesting copies of manifests for recent hazardous waste shipments. At some point, Rousseff-Kemp asked an employee of her company to sign the name of a representative of the TSD facility on the manifest for the waste picked up in June. After the employee refused, Rousseff-Kemp forged the signature of the TSD facility representative on the manifest. Rousseff-Kemp then sent a copy of the falsified manifest to the waste generator. The manifest copy contained false information purporting to show that the hazardous waste had been delivered to the TSD facility on July 15, 2018, and signed for by a representative of the TSD facility on that date. In truth, and as known by Rousseff-Kemp, the waste had not been sent to the TSD facility and remained stored by Rousseff-Kemp's company.

•June 30, 2022—A federal grand jury in Florence, South Carolina returned a ten-count indictment alleging charges related to wildlife trafficking and money laundering against five individuals: Bhagavan Mahamayavi Antle, aka Kevin Antle, aka Doc Antle, 62, of Myrtle Beach; Andrew Jon Sawyer aka Omar Sawyer, 52, of Myrtle Beach; Meredith Bybee, aka Moksha Bybee, 51, of Myrtle Beach; Charles Sammut, 61, of Salinas, California; and Jason Clay, 42, of Franklin, Texas. According to the indictment and other court records, Antle is the owner and operator of The Institute for Greatly Endangered and Rare Species (T.I.G.E.R.S.), also known as the Myrtle Beach Safari. The Myrtle Beach Safari is a 50-acre wildlife tropical preserve in Myrtle Beach. Sawyer and Bybee are Antle's employees and business associates. Sammut is the owner and operator of Vision Quest Ranch, a for-profit corporation that housed captive exotic species and sold tours and safari experiences to guests. Clay is the owner and operator of the Franklin Drive Thru Safari, a for-profit corporation that housed captive exotic species and sold tours and safari experiences to guests. The indictment alleges that Antle, at various times along with Bybee, Sammut and Clay, illegally trafficked wildlife in violation of federal law, including the Lacey Act and the Endangered Species Act, and made false records regarding that wildlife. The filings allege that Antle had used bulk cash receipts to purchase animals for which he could not use checks, and that Antle planned to conceal the cash he received by inflating tourist numbers at the Myrtle Beach Safari. Antle and Sawyer each face a maximum of 20 years in federal prison for the charges related to money laundering, and up to five years in federal prison for the charges related to wildlife trafficking. Bybee, Sammut and Clay each face up to five years in federal prison for the charges related to the wildlife trafficking. Antle and Sawyer were previously granted a bond by a federal magistrate judge as a result of the charges in the federal complaint, and Bybee, Sammut and Clay are pending arraignment.

•August 1, 2022—FCA US LLC (FCA US), formerly Chrysler Group LLC, was sentenced in federal court in Detroit and ordered to pay a fine of $96,145,784; and a forfeiture money judgment of $203,572,892. The court also imposed a three-year term of organizational probation. The conviction results from the company's conspiracy to defraud U.S. regulators and customers by making false and misleading representations about the design, calibration, and function of the emissions control systems on more than 100,000 Model Year 2014, 2015, and 2016 Jeep Grand Cherokee and Ram 1500 diesel vehicles, and about these vehicles' emission of pollutants, fuel efficiency, and compliance with U.S. emissions standards. According to the company's admissions and court documents, beginning at least as early as 2010, FCA US developed a new 3.0-liter diesel engine for use in FCA US's Jeep Grand Cherokee and Ram 1500 vehicles (the Subject Vehicles) that would be sold in the United States. FCA US designed a specific marketing campaign to market these vehicles to U.S. customers as "clean EcoDiesel" vehicles with best-in-class fuel efficiency. However, according to court documents, FCA US installed software features in the Subject Vehicles and engaged in other deceptive and fraudulent conduct intended to avoid regulatory scrutiny and to fraudulently help the Subject Vehicles meet the required emissions standards, while maintaining features that would make them more attractive to consumers, including with respect to fuel efficiency, service intervals, and performance. Specifically, FCA US purposely calibrated the emissions control systems on the Subject Vehicles to produce less NOx emissions during the federal test procedures, or driving "cycles," than when the Subject Vehicles were being driven by FCA US's customers under normal driving conditions. FCA US then engaged in deceptive and fraudulent conduct to conceal the emissions impact and function of the emissions control systems from its U.S. regulators and U.S. customers by (a) submitting false and misleading applications to U.S. regulators to receive authorization to sell the vehicles, (b) making false and misleading representations to U.S. regulators both in person and in response to written requests for information, and (c) making false and misleading representations to consumers about the Subject Vehicles in advertisements and in window labels, including that the Subject Vehicles complied with U.S. emissions requirements, had best-in-class fuel efficiency as measured by EPA testing, and were equipped with "clean EcoDiesel engine[s]" that reduced emissions. Under the terms of FCA's guilty plea, which has been approved by the dourt, FCA has agreed to continue to cooperate with the Department of Justice in any ongoing or future criminal investigations relating to this conduct. In addition, FCA US has also agreed to continue to implement a compliance and ethics program designed to prevent and detect fraudulent conduct throughout its operations and will report to the department regarding remediation, implementation, and testing of its compliance program and internal controls. In the related criminal prosecution, three FCA employees, Emanuele Palma, Sergio Pasini, and Gianluca Sabbioni were indicted for conspiracy to defraud the United States and to violate the Clean Air Act and six counts of violating the Clean Air Act.

•August 9, 2022—New Trade Ship Management S.A. (New Trade), a vessel operating company, and vessel Chief Engineer Dennis Plasabas pleaded guilty in San Diego, California, for maintaining false and incomplete records relating to the discharge of oily bilge water from the bulk carrier vessel Longshore. New Trade and Plasabas admitted that oily bilge water was illegally dumped from the Longshore directly into the ocean without being properly processed through required pollution prevention equipment. The defendants also admitted that these illegal discharges were not recorded in the vessel's oil record book as required by law. Additionally, in order to create a false and misleading electronic record as if the pollution prevention equipment had been properly used, Plasabas directed lower-ranking crew members to pump clean sea water into the vessel's bilge holding tank in the same quantity as the amount of oily bilge water that he had ordered transferred to the sewage tank. Plasabas then processed the clean sea water through the vessel's pollution prevention equipment as if it was oily bilge water in order to make it appear that the pollution prevention equipment was being properly used when in fact it was not. The electronic records indicate that approximately 9,600 gallons of clean sea water were run through the pollution prevention equipment.
(Andre Monette)

Environmental, Energy, & Climate Change™
Law and Regulation Reporter

LAWSUITS FILED OR PENDING

D.C. CIRCUIT DISMISSES ENVIRONMENTAL INTEREST GROUPS' LAWSUIT CHALLENGING U.S. EPA'S APPROVAL OF OKLAHOMA'S COAL ASH PLAN UNDER RCRA

On July 26, 2022, a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit dismissed plaintiffs'—Waterkeeper Alliance, Local Environmental Action Demanded Agency, and Sierra Club—lawsuit challenging the U.S. Environmental Protection Agency (EPA)'s approval of Oklahoma's permitting program for coal ash facilities finding plaintiffs lacked standing. *Waterkeeper Alliance, Inc. et al., v. Regan*, 41 F.4th 654 (D.C. Cir. 2022).

Background

The Resource Conservation and Recovery Act (RCRA, 42 U.S.C. § 6901 *et seq.*), is the federal environmental law that creates a framework for managing hazardous and non-hazardous solid waste. Subtitle D of RCRA contains the provisions for non-hazardous waste requirements. In 2015, under the authority of Subtitle D, EPA adopted a rule for regulation of coal ash as non-hazardous waste (2015 Rule). The 2015 Rule established guidelines for building, maintaining, and monitoring coal ash disposal sites. By a statutory amendment, one year later, Congress passed the Water Infrastructure Improvements for the Nation Act (Improvements Act), which amended RCRA to specifically address coal ash disposal units and incorporated the 2015 Rule by reference. (*See*, 42 U.S.C. § 6945(d).) Under the amended Subtitle D, individual states can choose to develop their own permitting programs for in-state coal ash disposal units within their borders or submit to federal regulation. (*Id.* At § 6945(d)(1), (d)(2).) If a state chooses to develop and implement its own program, the program must be equal to or more stringent than the federal standards, and approved by the EPA Administrator. (*See id.* at § 6945(d)(1).)

Notably, RCRA also contains a provision requiring EPA to provide for public participation in the development, revision, implementation, and enforcement of RCRA programs. (*Id.* at § 6974(b).) RCRA also provides a citizen suit provision, allowing any person to commence a civil suit for violations of RCRA as well as the EPA Administrator for failure to perform a nondiscretionary duty imposed by RCRA. (*Id.* at § 6972(a)(2).)

Oklahoma's Coal Ash Disposal Unit Permitting Program

Shortly after Subtitle D was amended by Congress, Oklahoma submitted a coal ash disposal unit permitting program (Oklahoma Program) to EPA for approval. Pertinently, the Oklahoma Program created a tiered system of actions, which allows for varying levels of public participation. For example, actions in the lowest tier (Tier I) provide for the fewest or no opportunities for public comment, whereas those in the highest tier (Tier III) afford the greatest opportunities for public participation, such as public meeting and comment and for administrative hearings.

A second aspect of the Oklahoma Program is the permitting scheme grants permits for the "life" of a unit, or until the facility stops operations. The "life" permits are required to comply with state laws and rules as existing on the date of the permit application, or as afterwards changed. Practically, this means that a permit may need to be modified or re-issued if the state laws or rules change, but the Oklahoma Program is not tied to changes in federal standards.

In January 2018, EPA provided notice of intent to approve the Oklahoma Program. Plaintiffs submitted comments opposing the approval. As relevant here, the comments focused on: (1) that EPA must fulfill its obligation under RCRA's public participation provision before approving the Oklahoma Program; (2) that the Oklahoma Program did not provide sufficient opportunities for public participation in Tier I actions; and (3) that the "life" permits were not at least as protective as federal standards. Despite the comments, EPA approved the Oklahoma Program in June 2018, and Oklahoma passed its own regulations to begin implementing the Oklahoma Program under the state law.

Plaintiffs Suit Against EPA

After EPA approved the Oklahoma Program, plaintiffs sued the EPA Administrator in the U.S. District Court for the D.C. District, alleging seven claims—six of which were before the D.C. Circuit on appeal. The District Court analyzed each of those six claims. The first cause of action (Citizen Suit Claim) alleged that RCRA's public participation provision imposed a nondiscretionary duty on the EPA Administration to regulate public participation in state coal ash programs.

The remaining causes of action were based on the Administrative Procedure Act (APA). The second cause of action (Guidelines Claim) similarly alleged that EPA's approval was premature since public participation guidelines for state permitting programs were not yet promulgated. The third cause of action (Tier I Claim) challenged the Oklahoma Program's Tier I public participation opportunities. The fourth cause of action (Lifetime Permits Claim) alleged that lifetimes permits do not allow for compliance with standards at least as protective as the federal 2015 Rule. The sixth and seventh causes of action (Comment Claims) related to allegations that EPA failed to adequately respond to plaintiffs' comments.

The D.C. Circuit's Decision

Plaintiffs' Failed to Demonstrate Standing for any Cause of Action Raised on Appeal

Ultimately, the D.C. Circuit did not reach the merits of any of plaintiffs' six causes of action on appeal because the court found that plaintiffs lacked standing for each claim. While EPA did not challenge plaintiffs' standing, the D.C. Circuit characterized the analysis as "an independent obligation to assure ourselves of jurisdiction." Plaintiffs bear the burden of establishing the elements of standing— injury, causation, and redressability—in addition to the elements of organizational standing: (a) members having standing to sue in their own right; (b) the interests seeking protection are germane to the organization's purpose; and (c) neither the claim asserted nor relief requested requires individual member participation.

The D.C. Circuit analyzed each of the six causes of action on appeal for standing. With respect to the Citizen Suit Claim, the court compared plaintiffs' alleged injuries—*i.e.* lack of participation in the Oklahoma Program—to the requested relief—*i.e.* an order to direct the EPA Administrator to issue minimum guidelines for public participation in state permitting programs. The court reasoned that even if such an order was granted, there is no RCRA provision that would in fact bring about change in the Oklahoma Program, rather the agency would have to issue guidelines that may or may not cease the alleged injurious conduct. Plaintiffs thus failed to meet the redressability element of standing on the Citizen Suit Claim.

The Guidelines and Tier 1 Claims also failed on redressability grounds. The relief requested with respect to those claims was an order of vacatur of EPA's approval of the Oklahoma Program. The Court could not reconcile the effect of such vacatur with plaintiffs' alleged injuries. Even if the D.C. Circuit vacated EPA's approval of the Oklahoma Program, the default regulatory regime that Oklahoma would revert to is the federal 2015 Rule, as EPA had not adopted a federal permitting program for nonparticipating states as of the date of this opinion. It was undisputed that the 2015 Rule afforded even fewer opportunities for public participation than the Oklahoma Program. Thus, if plaintiffs' injury is limited participation, an order vacating approval of the Oklahoma Program, which would in effect submit Oklahoma to the federal regulatory oversight would not redress the injury of participatory opportunity.

Lifetime Claims

With respect to the Lifetime Permits Claim, the D.C. Circuit concluded that plaintiffs failed to demonstrate an imminent injury. Instead of being premised on a present injury, Plaintiffs' claim relied on the threat of a future injury and if the federal standards become stricter than the Oklahoma Program's standards. The D.C. Circuit reasoned that without concrete plans or any additional specification of when the injury might occur, plaintiffs did not establish standing.

Permit Claims

Finally, for the Comment Claims, the D.C. Circuit described the two causal chain "links" that must be alleged to bring a claim on a procedural right. The first link is between the procedural misstep and the agency action that invaded plaintiffs' concrete interest. The second link connects the particularized

injury plaintiffs suffered to the agency action that implicated the procedural requirement in question. Here, plaintiffs failed to establish the second link because the comments regarding public participation were not traceable to EPA's approval of the Oklahoma Program and the comments regarding lifetime permits were not imminent.

Conclusion and Implications

The entire basis for the D.C. Circuit Court of Appeals' decision was the analysis of the elements of standing. It is significant that neither EPA nor the Intervenors contested standing on appeal and yet this was the crucial reasoning for the opinion. Thus, *Waterkeeper Alliance* reminds litigants on both sides that the threshold elements of standing are critical.
(Alexandra Lizano and Hina Gupta)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REVISITS THE MEANING OF 'TRANSPORTATION' UNDER RCRA

California River Watch v. City of Vacaville, ___F.4th___, Case No. 20-16605 (9th Cir. July 1, 2022).

On July 1, 2022, the Ninth Circuit Court of Appeal filed a new, superseding opinion in the case of *California River Watch v. City of Vacaville*, revisiting its prior opinion from September of 2021 where the Court of Appeals previously held that the City of Vacaville (City) could potentially be held liable for transporting hexavalent chromium through its water supply due to the contaminant's presence in the City's groundwater source. With this newly filed opinion, however, the Ninth Circuit took the opportunity to reconsider the meaning of "transportation" for liability purposes under the federal Resource Conservation and Recovery Act (RCRA) and provide closure on the ultimate question of whether the City could be liable for transporting solid wastes incidental to its delivery of drinking water.

Background: *Vacaville I*

In the original complaint, California River Watch (River Watch) claimed that the City's water wells were contaminated with hexavalent chromium (also known as Chrom-6), a carcinogen known to cause significant health risks. The complaint further alleged that the City's delivery of such waters contaminated with Chrom-6 created an imminent and substantial endangerment to human health and the environment in violation of RCRA. The district court ultimately granted summary judgment in favor of the City, stating that the City's water deliveries did not qualify as discarding solid waste under RCRA. On appeal, however, the Ninth Circuit shifted the debate to focus on another question – whether the City's water deliveries constituted "transportation" under RCRA.

The Ninth Circuit's Decision

Reconsidering the meaning of 'Transportation:' *Vacaville II*

With the appeal shifting focus to consider whether the City's water deliveries constituted "transportation" under RCRA, the panel for the Ninth Circuit first discussed that in order to establish liability under RCRA, three elements must be satisfied: (1) that the defendant has contributed to the past or is contributing to the present handling, treatment, transportation, or disposal of certain material; (2) that this material constitutes "solid waste" under RCRA; and (3) that the solid waste may present an imminent and substantial endangerment to health or the environment. Although the district court ruled in favor of the City on the grounds that RCRA's "fundamental requirement that the contaminant be 'discarded'" was not satisfied, the panel for the Ninth Circuit held that River Watch did in fact create a triable issue on whether the Chrom-6 constitutes "discarded material" and therefore meeting RCRA's definition of "solid waste."

River Watch further argued that the City should be liable because it physically moved the waste—that waste being the water contaminated with Chrom-6—by pumping it through its water supply system. On this point, however, the panel for the Ninth Circuit concluded that:

> RCRA's context makes clear that mere conveyance of hazardous waste cannot constitute 'transportation' under the endangerment provision [of RCRA].

Citing to numerous examples of how the term "transport" is used throughout the text of RCRA, the panel for the Ninth Circuit explained that "transportation refers to the specific task of moving waste in connection with the waste disposal process." The panel further explained that the court has previously held that "disposal" as used in the endangerment provisions for citizen suits requires a defendant to be actively involved in the waste disposal process to be liable under RCRA. Accordingly, the panel concluded that the best reading of RCRA is that the

term "transportation" must also have a direct connection to the waste disposal process such as through the shipping of waste to hazardous waste treatment, storage, or disposal facilities.

Ultimately, the panel for the Ninth Circuit concluded that the City did not have the direct connection to the waste disposal process that it determined is necessary to be held liable for "transportation" under RCRA and affirmed the district court's grant of summary judgment for the City.

Conclusion and Implications

When the original complaint was filed, the potential for the case to have significant impact on water suppliers throughout the state was huge. With the final opinion coming down in early July, that was certainly proven to be true. Although the inverse of this story might have proven to be more groundbreaking news, the Ninth Circuit's opinion in *California River Watch v. City of Vacaville* provided clarification of the term "transportation" as used in RCRA that will almost certainly restrict citizen suits to some extent moving forward. By limiting the use of transportation to a specific process—*i.e.* the waste disposal process—the Court of Appeals has pulled back the reins on the liberal (even if laymen) interpretation of the term that River Watch had fought for in this case. The Ninth Circuit's 2022 opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/01/20-16605.pdf.
(Wesley A. Miliband, Kristopher T. Strouse)

D.C. CIRCUIT UPHOLDS FERC'S APPROVAL OF ADELPHIA PIPELINE ACQUISITION UNDER NEPA

Delaware Riverkeeper Network v. Federal Energy Regulatory Commission,
___F.4th___, Case No. 20-1206 (D.C. Cir. Aug. 2, 2022).

On August 2, 2022, the United States Court of Appeals for the D.C. Circuit upheld the Federal Energy Regulatory Commission's (FERC or Commission) approval of the acquisition of a natural gas pipeline located in Pennsylvania and Delaware. In *Delaware Riverkeeper Network v. FERC,* the Court of Appeals dismissed several claims brought by petitioners arguing that the environmental review performed for the project was inadequate under the National Environmental Policy Act (NEPA). The dismissed challenges included claims that the analysis of upstream, downstream and greenhouse gas impacts were deficient.

Background

Adelphia Gateway, LLC (Adelphia) applied to FERC for a certificate of public convenience and necessity to acquire an existing natural gas pipeline system located in Pennsylvania and Delaware. In addition, it sought FERC authorization to construct two lateral pipeline segments, connected to the existing pipeline and to construct facilities necessary to operate the pipeline, including a compressor station. FERC prepared an Environmental Assessment (EA) to analyze the pipeline acquisition's environmental effects under NEPA, including the effects of the project on greenhouse gases, air quality, noise and residential properties near the project. The EA found that the project would lead to global increases in greenhouse gases but declined to calculate upstream or downstream greenhouse gas emissions because it found that any impacts were not reasonably foreseeable. Based on the EA conclusion that the project would have no significant impact on the environment, FERC approved the project.

The D.C. Circuit's Decision

Delaware Riverkeeper challenged the FERC's approval of the pipeline acquisition by Adelphia alleging it violated NEPA. Riverkeeper argued that the EA was deficient in its analysis of the upstream and downstream impacts of the pipeline, the downstream impacts on climate change, the cumulative impacts of the pipeline, and the impacts of the proposed compressor station.

First, the Court of Appeals examined the FERC's conclusion in the EA that upstream impacts of the

pipeline, including possible increases in drilling of new natural gas wells, were not reasonably foreseeable and therefore, were not addressed. The EA noted that the project would receive gas from another interstate pipeline and that there was no evidence that additional wells would be drilled as a result of the project. That court upheld the EA's conclusions regarding upstream impacts, finding no evidence in the record that would have helped FERC consider the number of new wells that may be drilled, and finding that the petitioners did not point to any evidence questioning this finding.

Next, the court examined FERC's approach to the pipeline's downstream impacts. FERC analyzed the downstream emission impacts resulting from the use of much of the gas that would be delivered by the pipeline. However, FERC declined to analyze emissions from gas that would be delivered from the pipeline to the Zone South system. The EA concluded that because this Zone South gas would be further transported on the interstate grid, the final use of the gas was not foreseeable. The court found that FERC's analysis of downstream impacts was sound, based on the information that was available to the Commission. Petitioners argued that FERC should have requested Adelphia provide additional information on downstream users; however, the Court of Appeals dismissed this argument finding petitioners did not raise this issue in front of the Commission.

On the issue of the potential impacts of the project's greenhouse gas emissions on climate change, FERC concluded in the EA that there was no scientifically-accepted methodology available to correlate specific amounts of greenhouse emissions to discrete changes in the human environment. In addition, FERC rejected the Social Cost of Carbon methodology for assessing climate change impacts. Delaware Riverkeeper argued that the FERC was required to use the Social Cost of Carbon by NEPA regulations. Petitioners cited the requirement at 40 C.F.R. 1502.21(c)(4) which provides that where information is not available to perform an analysis regarding reasonably foreseeable impacts in an Environmental Impact Statement (EIS), an agency shall use generally accepted theoretical approaches or research methods. The court dismissed this argument, however, finding again that petitioners had failed to sufficiently raise this issue in front of FERC. Specifically, the court found that petitioners failed to raise the issue that FERC should have used the Social Cost of Carbon in an EA when the regulation cited provides that generally accepted theoretical approaches or research methods shall be used in the more rigorous EIS approach.

To round out its opinion, the court upheld FERC's analysis of the potential impacts of the proposed compressor station and noted that any potential errors resulting from FERC's failure to consider the cumulative impacts associated with the PennEast Pipeline were rendered moot by the cancellation of that project. The court also dismissed several claims unrelated to NEPA.

Conclusion and Implications

The D.C. Circuit Court of Appeals dismissed all claims brought by petitioners that FERC's environmental review of potential upstream and downstream impacts of a pipeline, as well as the impacts on climate change, was insufficient. However, because the petitioners failed to exhaust administrative remedies on several key topics during the administrative proceedings, the issues of whether FERC or another agency must solicit additional information from pipeline operators to determine the end use of the natural gas and whether agencies must use the Social Cost of Carbon to determine impacts on climate change from increases to greenhouse gas emissions were not resolved by this case. The D.C. Circuit's opinion is available online at: https://www.leagle.com/decision/infco20220802127.
(Darrin Gambelin)

FEDERAL CIRCUIT RECOGNIZES COGNIZABLE PROPERTY INTEREST IN FLOWAGE EASEMENT FOR PROPERTIES FLOODED IN HURRICANE HARVEY

Milton v. United States, 36 F.4th 1154 (Fed. Cir. 2022).

The United States Court of Appeals for the Federal Circuit recently reversed and remanded a decision by the Court of Federal Claims concerning property owners' interests in perfect flood control. The court held that the owners had a cognizable property interest in a flowage easement and defenses and exceptions do not negate this interest.

Factual and Procedural Background

In 1929 and 1935, Congress authorized the U.S. Army Corps of Engineers (Corps) to construct the Barker Dam and Addicks Dam on Buffalo Bayou in the City of Houston. By 1963, each dam held a large reservoir and had five gated outflowing conduits. The Corps adopted the Addicks and Barker Reservoirs Water Control Manual (Manual) in 2012. The Manual provides that if an inch of rain falls within a 24- hour period or if downstream flooding is expected, the Corps must close the dams' floodgates. If water in the reservoirs reaches set heights—101 feet behind Addicks Dam or 95.7 feet behind Barker Dam—a surcharge regulation kicks in. At this point, the Corps must monitor whether the inflow will continue to cause the reservoirs to rise. If inflow and pool elevation conditions dictate, the Corps releases water from the reservoir according to a set schedule. At the beginning of 2017, such induced surcharges had never been made.

On August 25, 2017, Hurricane Harvey poured more than thirty inches of water onto the city in four days. The conditions for the induced surcharge regulations were met. The Corps released up to 8,000 cubic feet per second of water from behind the dams. The following day, it increased the release to 12,000 cubic feet per second. On August 30, it again increased the release to 13,000 cubic feet per second, a rate the Corps maintained until September 4.

Substantial downstream flooding followed. Some properties were flooded for more than eleven days and some were flooded at a maximum depth greater than eight feet above the first finished floor. Hundreds of property owners filed complaints in the Court of Federal Claim alleging that the flooding constituted an uncompensated, physical taking of their property by the Government. The Court of Federal Claims joined all these cases into a Master Docket and split them into an Upstream Sub-Docket—for properties upstream of the dams—and a Downstream Sub-Docket—for properties downstream of the dams.

In this Downstream Sub-Docket, the Court of Federal Claims granted the Government's motions to dismiss and for summary judgment, holding that the property owners did not articulate a cognizable property interest that the Government could take because "neither Texas law nor federal law creates a protected property interest in perfect flood control in the face of an Act of God." The court further wrote that the U.S. Supreme Court has routinely held that the government cannot be held liable under the Fifth Amendment for property damages caused by events outside of the governments control. Property owners appealed this ruling.

The Federal Circuit Court's Decision

Immunity-Tucker Act

The appellate court first considered whether the Government was immune from suits alleging takings based on its flood control measures under the Flood Control Act. Congress enacted the Flood Control Act to ensure sovereign immunity would protect the Government from any liability associated with flood control. However, the court found that immunity did not exist because the Tucker Act grants the Court of Federal Claims jurisdiction over—and waived sovereign immunity from—any claim against the United States founded either upon the Constitution, or for liquidated or unliquidated damages in cases not sounding in tort. The court determined that there was no evidence in the text or legislative history of the Flood Control Act that Congress had withdrawn the Tucker Act grant of jurisdiction. Therefore, immunity does not exist.

Cognizable Property Interest

The court next considered whether appellants identified a cognizable property interest in flowage easements. The Fifth Amendment forbids the government from taking private property for public use, without just compensation. Courts must evaluate two prongs in determining whether a government action constitutes a taking. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was taken.

In analyzing the first prong, the court looked to Texas courts which recognized that property owners have interests in flowage easements under Texas Law. The Government argued that Texas law recognizes all property is held subject to the valid exercise of the police power by the government to provide for public health and safety, and that flood control is a such an exercise of the police power. The court rejected this argument based on a holding by the Texas Supreme Court which expressly tying this exercise of police power to the abatement of nuisances.

The Government also cited other cases it asserted rejected claims for taking from the controlled release of water from reservoirs in response to unprecedented rainfall consisted with the Government's understanding of the scope of the police power. However, the court distinguished each case because each concluded that plaintiffs had failed to present sufficient evidence that water released from the relevant dam flooded their property, it did not turn on whether the plaintiffs had a cognizable property interest.

Finally, the Government insisted that appellants did not have a cognizable property interest because Hurricane Harvey was an Act of God. The court disagreed, stating that Acts of God relate to whether a taking has occurred, not whether a party has a cognizable property interest.

For the second prong, the court declined to grant summary judgment for either party and remanded the case to the Court of Federal Claims. The court directed the lower court to consider: (1) whether appellants have shown that a temporary taking occurred under the test applicable to the flooding cases; (2) whether appellants have established causation when considering the impact of the entirety of government actions that address the relevant risk; and (3) whether the Government can invoke the necessity doctrine as a defense.

Conclusion and Implications

This case relies on state law to recognize that property owners in Texas have a cognizable property interest in flowage easements and that the Government is not immune from these issues. This case also provides reasoning that defenses and exceptions, such as "acts of God" and necessity, do not negate a cognizable property interest. The court's opinion is available online at: https://fedcircuitblog.com/wp-content/uploads/2022/01/21-1131-Milton-v.-US-Opinion.pdf. (Helen Byrens, Rebecca Andrews)

FOURTH CIRCUIT ALLOWS CLEAN WATER ACT CITIZEN SUIT TO PROCEED DESPITE ONGOING PROCEEDINGS AT THE STATE LEVEL

Naturaland Trust, et al. v. Dakota Finance, et al., 41 F.4th 342 (4th Cir. July 20, 2022).

The United States Court of Appeals for the Fourth Circuit recently added to a growing trend of appellate rulings clarifying when citizen suit enforcement cases can be filed under the federal Clean Water Act. The rule determines whether a state's issuance of a notice of violation bars a citizen suit as "diligent prosecution."

Factual and Procedural Background

The federal Clean Water Act (CWA) contains a citizen-suit provision that allows citizens to sue polluters in federal court. CWA also precludes a polluter from being subject to penalties in federal court if a state has "commences and is diligently prosecuting an action under a state law comparable" to the federal scheme for assessing civil penalties.

Here, Dakota Finance LLC operates Arabella Farm, a farm with an orchard and vineyard, doubling as an event barn for special events. Arabella Farm is bounded by three bodies of water –Clearwater Branch, Peach Orchard Branch, and an unnamed tributary of the Eastatoe River. In 2017, Dakota Finance began to clear 20 acres of land to create Arabella Farm. The process altered the steep mountain landscape and exposed the underlying soil. Typically, such extensive land disturbance would require a permit under CWA. Arabella Farm claimed it was not required to obtain a permit because its work fell within an agricultural exemption to CWA. Notably, Dakota Finance did not install sediment or stormwater control measures, which resulted in significant discharges of sediment-laden stormwater.

In April 2019, the South Carolina Department of Health and Environmental Control (Department) conducted an inspection to evaluate Arabella Farm's compliance with the National Pollutant Discharge Elimination System program. Subsequent site inspections revealed inadequate stormwater controls, significant erosion, and off-site impacts.

In August 2019, the Department sent a letter advising Arabella Farm that it was required to obtain an NPDES permit and instructed the farm:

> . . .to cease and desist any activity at the [s]ite other than the installation and maintenance of storm water, sediment and erosion control measures as directed by its design engineer.

In September 2019, the Department sent Arabella Farm a "Notice of Alleged Violation/Notice of Enforcement Conference" and informed the farm of a voluntary "informal" enforcement conference scheduled for the end of that month.

In November of the same year, Naturaland Trust and Trout Unlimited (appellants)—non-profit organizations dedicated to conserving land, water, and natural resources—sent a notice of intent to sue letter to Arabella Farm and its owners. The letter detailed various CWA violations. Sixty days later, appellants sued in federal court, seeking an injunction and civil penalties.

A month after appellants filed their complaint, Arabella Farm and the Department entered into a consent order. The order imposed a $6,000 penalty and required Arabella Farm to obtain an NPDES permit, submit a stormwater plan and site stabilization plan, and conduct a stream assessment.

The U.S. District Court dismissed appellants' complaint because, as relevant here, the court concluded that it lacked subject matter jurisdiction over appellants' CWA claims because the Department had commenced and was diligently prosecuting an action for the same violations.

The Fourth Circuit's Decision

The threshold issue is whether a state agency's notice of an alleged violation for failure to obtain a permit commences "diligent prosecution" by a state. CWA contains a judicial proceeding bar that precludes private action if a state or the Environmental Protection Agency is diligently prosecuting a civil or criminal case in court.

First, the court noted that the diligent prosecution bar does not implicate a court's jurisdiction because there was no "clear indication that Congress" wanted the rule to be jurisdictional. Here, the diligent prosecution bar was not clearly labeled "jurisdictional" and was not located in a "jurisdiction-granting provision.") Instead, the court noted, it merely prohibited certain violations from being the subject of a civil penalty action.

Second, the court turned to the text of CWA. CWA provides that the diligent prosecution bar is triggered by the state's "commence[ment]" of "an action under a state law" that is "comparable to" the federal statute addressing "administrative penalties" that the government may assess for violations. By contrast, CWA reads that the diligent prosecution bar "shall not apply" to citizen suits "filed prior to commencement of" such an action.

Here, the court found that the Department's notice of violation did not commence an "action" against Arabella Farms under CWA. The court noted that the notice of violation invited Arabella Farm to an informal, voluntary, private conference to discuss allegedly unauthorized discharges. The notice did not mention penalties or sanctions that would flow from the failure to attend the conference.

The court also reviewed how other Circuit Courts determine whether the diligent prosecution bar precludes a particular suit and noted that the availability of public participation and judicial review of the state action are important to determining whether an action under state law is comparable to an ac-

tion under the CWA. Here, public participation and judicial review were not available to Arabella Farm until after the issuance of the Department's consent order. Therefore, the comparable features were not yet available at the time the suit was filed because no comparable action had yet commenced.

The Court of Appeals reversed the U.S. District Court's judgment and remanded for further proceedings consistent with the ruling.

Conclusion and Implications

This case adds to recent appellate rulings clarifying when citizen suit cases under the Clean Water Act may proceed and when a state is already "diligently" prosecuting a violation. The growing consensus among circuit courts is to consider whether the comparable state law provides opportunities for public participation and judicial review. The court's opinion is available online at: https://casetext.com/case/naturaland-tr-v-dakota-fin.
(Marco Ornelas Lopez, Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA SUPREME COURT HOLDS FEDERAL POWER ACT DOES NOT PREEMPT APPLICATION OF CEQA TO STATE AUTHORITY OVER DAM LICENSING

County of Butte v. Department of Water Resources, ___Cal.5th___, Case No. C071785 (Cal. Aug. 1, 2022).

On August 1, 2022, the California Supreme Court issued its highly anticipated decision in *County of Butte v. Department of Water Resources*. In a 5-2 opinion, a divided court held that the Federal Power Act (FPA) does not entirely preempt the California Environmental Quality Act's (CEQA) application to the state's participation, as an applicant, in the FPA's licensing process for hydroelectric facilities. The Court agreed, however, that CEQA could not be used to challenge a settlement agreement prepared by the Department of Water Resources (DWR) as part of FPA proceedings conducted by the Federal Energy Regulatory Commission (FERC). Finally, the Court also held that claims challenging the sufficiency of an Environmental Impact Report (EIR) that DWR prepared pursuant to that agreement were not preempted because DWR's CEQA decisions concerned matters outside of FERC's jurisdiction.

Statutory Background

The Federal Power Act

The Federal Power Act facilitates development of the nation's hydropower resources, in part by removing state-imposed roadblocks to such development. Under the FPA, the construction and operation of a dam or hydroelectric power plant requires a license from the Federal Energy Regulatory Commission. A FERC license must provide for, among other things, adequate protection, mitigation, and enhancement of fish and wildlife, and for other beneficial public uses, such as irrigation, flood control, water supply, recreational, and other purposes. The FPA expressly grants FERC authority to require any project be modified before approval.

Federal Preemption

The Supremacy Clause of the U.S. Constitution provides that federal law is "the supreme Law of the Land." Congress may explicitly or implicitly preempt (*i.e.*, invalidate) a state law through federal legislation. Three types of preemption could preclude the effect of a state law: "conflict," "express," and "field" preemption. As relevant here, "conflict" preemption exists when compliance with both state and federal law is impossible, or where state law stands as an obstacle to achieving compliance with federal law. To prove a conflict exists, the challenging party must present proof that Congress had particular purposes and objectives in mind, such that leaving the state law in place would compromise those objectives. The inquiry is narrowly focused on whether the conflict is "irreconcilable"—hypothetical or potential conflicts are insufficient to warrant preemption.

Factual and Procedural Background

The California Department of Water Resources operates the Oroville Facilities—a collection of public works projects and hydroelectric facilities in Butte County. FERC issued DWR a license to operate the facilities in 1957. In anticipation of the license's expiration in 2007, DWR began the license application process under the FPA in October 1999.

At the time DWR undertook the relicensing process, FERC regulations allowed applicants to purpose the traditional licensing process or an "alternative licenses process" (ALP)—a voluntary procedure designed to achieve consensus among interested parties before the application is submitted. The ALP requires stakeholders with an interest in the project's operation to cooperate in a series of hearings, consultations, and negotiations, in order to identify and resolve areas of concern regarding the terms of the license. The process also combines the consultation and environmental review process required by the National Environmental Policy Act (NEPA), as well as the administrative processes associated

with the federal Clean Water Act (CWA) and other applicable federal statutes. Ideally, ALP participants conclude the process by entering into a settlement agreement that reflects the terms of the proposed license. That agreement becomes the centerpiece of the license application and serves as the basis for FERC's "orderly and expeditious review" in settling the terms of the license.

DWR elected to purse the ALP. FERC approved DWR's request in January 2001. The ALP process consumed the next five years. ALP participants included representatives from 39 organizations, including federal and state agencies, government entities, Native American tribes, water agencies, and nongovernmental organizations. In September 2001, DWR issued a document combining a CEQA notice of preparation (NOP) and a NEPA "scoping document," which sought comments on the scope of a preliminary draft environmental assessment (PDEA)—a document mandated by the ALP. DWR issued the PDEA for the Facilities in January 2005. Partially relying on the PDEA, FERC issued a draft environmental impact statement (EIS) in September 2006. And from April 2004 to March 2006, the ALP participants negotiated and ultimately signed a settlement agreement. The Counties of Butte and Plumas declined to sign the agreement because they were dissatisfied with its terms.

In May 2007, DWR issued a draft EIR that considered the same project and alternatives that FERC considered in its draft EIS. The EIR characterized the project under review as "implementation of the settlement agreement," which would allow "the continued operation and maintenance of the Oroville Facilities for electric power generation." DWR undertook CEQA procedures because the State Water Resources Control Board (Water Board) required preparation and certification of an EIR under the Clean Water Act, and the CEQA process could inform whether DWR would accept the license of the terms of the settlement agreement, or the alternative proposed by FERC in the EIS (both of which were analyzed in the EIR). DWR issued a NOD approving the EIR in July 2008; and the Water Board certified the Project's compliance under the CWA in December 2010.

At the Trial Court

In August 2008, the Counties of Butte and Plumas (Counties) filed separate petitions for writ of mandate challenging DWR's compliance with CEQA in connection with the relicensing. The Counties raised similar claims regarding the adequacy of the EIR's project description, analysis of environmental impacts and alternatives, and its adoption of feasible mitigation measures. In May 2012, after consolidating the two cases, the trial court rejected the Counties' claims and found the EIR complied with CEQA. The Counties appealed.

Initial Review by the Court of Appeal and California Supreme Court

On appeal, the Third District Court of Appeal declined to reach the merits of the Counties' CEQA claims. Instead, the court held the Counties' actions were preempted because FERC had exclusive jurisdiction over the settlement agreement. The court also deemed the claims premature to the extent they challenged the Water Board's certification, which had not been filed yet.

The Counties petitioned the California Supreme Court for review, which the Court granted in 2019. The Court subsequently transferred the matter back to the Third District for reconsideration in light of the Supreme Court's decision in *Friends of the Eel River v. North Coast Railroad Authority,* 3 Cal.5th 677 (2017) (*Friends of the Eel River*). The Court in *Friends of the Eel River* held that the Interstate Commerce Commission Termination Act (ICCTA) did not preempt a state railroad authority's application of CEQA to its own rail project, for such application "operates as a form of self-government" because the agency is, in effect, regulating itself.

Following the Supreme Court's remand, the Third District Court of Appeal considered the *Friends of the Eel River* ruling, and ultimately reached the same conclusion: the FPA preempts the Counties' challenge to the environmental sufficiency of the settlement agreement. Because FERC has sole jurisdiction over disputes concerning the licensing process, an injunction would be akin to prohibited "veto power." In light of this preemption, the Third District maintained the FPA preempted the Counties' CEQA challenges to the sufficiency of the EIR.

The California Supreme Court's Decision

The California Supreme Court, again, granted the Counties' petition for review to determine: (1)

whether the FPA fully preempts application of CEQA when the state is acting on its own behalf and exercising its discretion in relicensing a hydroelectric dam; and (2) whether the FPA preempts challenges in state court to an EIR prepared under CEQA to comply with the CWA. The Court concluded the second issue was not properly presented and thus declined to address it.

Turning to the first issue, the Court agreed with the Court of Appeal that the Counties' claims were preempted by the FPA to the extent they attempted to "unwind the terms of the settlement agreement reached through a carefully established federal process and seek to enjoin DWR from operating the Oroville Facilities under the proposed license." As to the Counties' claim against the EIR, the Court rejected the Third District's finding that those were also preempt, instead concluding that nothing "in the FPA suggests Congress intended to interfere with the way the state as owner makes these or other decisions concerning matters outside FERC's jurisdiction or compatible with FERC's exclusive licensing authority."

The FPA Does Not Categorically Preempt CEQA

To consider whether Congress intended for the FPA to categorically preempt CEQA, the Court applied a presumption that "protects against undue federal incursions into the internal, sovereign concerns of the states." In the absence of unmistakably clear language, the Court would presume that Congress did not intend to deprive the state of sovereignty over its own subdivisions to the point of upsetting the constitutional balance of state and federal powers, or intend to preempt a state's propriety arrangements in the marketplace, absent evidence of such a directive.

Here, the FPA's Savings Clause does not evince an "unmistakably clear" intent by Congress to preempt California's environmental review of its own project, as opposed to its regulation of a private entity. The issue here rests on whether Congress intended to preclude the state from trying to govern *itself*—therefore, it would be contrary to the "strong presumption against preemption" to assume the existence and/or scope of preemption based on statutory silence. In particular, neither the FPA's legislative history nor its language suggests that Congress intended it to be one of the "rare cases" where it has "legislative so comprehensively" that it "leaves no room for supplementary state legislation" on the issues at bar.

The fact that the FPA has a significant preemptive sweep says nothing about congressional intent to prohibit state action that is non-regulatory. Instead, CEQA operates as a form of self-government, therefore, application of CEQA to the public entity charged with developing state property is not classic "regulatory behavior," especially when there is no encroachment on the regulatory domain of federal authority or inconsistency with federal law. Rather, application of CEQA here constitutes self-governance on the part of a sovereign state and owner.

But the FPA Does Preempt CEQA Claims Against DWR and FERC's Settlement Agreement

Although the FPA does not *categorically* preempt CEQA, that does not mean that *no* applications of CEQA are preempted. To the contrary, CEQA—in this instance—cannot be used to challenge the terms of the settlement agreement.

The overriding purpose of the FPA is to facilitate the development of the nation's hydropower resources by centralizing regulatory authority in the federal government to remove obstacles posed by state regulation. Therefore, a CEQA challenge to the terms of the agreement would raise preemption concerns to the extent the action would interfere with the federal process prescribed by the ALP or with FERC's jurisdiction over those proceedings. Were the Court to enjoin DWR from executing the terms of the agreement, the injunction would stand as a direct obstacle to accomplishing Congress' objective of vesting exclusive licensing authority in FERC.

The FPA Does Not, However, Preempt CEQA Review of DWR's EIR

While the Court of Appeal correctly held the FPA preempted the Counties' challenge to the environmental sufficiency of the *settlement agreement*, the appellate court erred in also finding the FPA preempted the Counties' CEQA challenge to the environmental sufficiency of the *EIR*.

Here, the EIR explained that the project subject to CEQA was the implementation of the settlement agreement. It therefore analyzed the environmental impact of the settlement agreement, as well as the al-

ternative FERC identified in the related EIS. At this stage, review of DWR's EIR would not interfere with FERC's jurisdiction or its exclusive licensing authority. Federal law expressly allows applicants to amend their license application or seek reconsideration once FERC has issued a license. There is no federal law that limits an applicant's ability to analyze its options or the proposed terms of the license before doing so. Accordingly, DWR can undertake CEQA review, including permitting challenges to the EIR it prepares as part of that review, in order to assess its options going forward. Nothing about DWR's use of CEQA is incompatible with the FPA or FERC's authority.

Moreover, any preemption concerns related to DWR's ability to adopt additional mitigation measures in the EIR are premature. At this stage, the Counties challenge only the sufficiency of the EIR. They do not ask the Court to impose or enforce any mitigation measures, much less any that are contrary to federal authority. Therefore, a CEQA challenge to DWR's EIR is not inherently impermissible, nor is it clear that any mitigation measures will conflict with the terms of the license that FERC ultimately issues. If anything, federal law provides avenues for DWR to employ the mitigation measures identified in the EIR. If FERC concludes those measures interfere with the agency's federal authority, it has the discretion to dictate the scope and extent of those measures in the license it issues.

For these reasons, the majority affirmed the Third District Court of Appeal's ruling that the Counties could not challenge the environmental sufficiency of the settlement agreement or seek to unwind it, for doing so would pose an unnecessary obstacle to the exclusive authority Congress granted to FERC. That rationale does not, however, extend to the Counties' challenge to the environmental sufficiency of the EIR, insofar as a compliant EIR can still inform the state agency concerning actions that do not encroach on FERC's jurisdiction. Nothing precludes courts from considering a challenge to the sufficiency of an EIR in these circumstances and ordering the agency, such as DWR, to reconsider its analysis.

The Concurring and Dissenting Opinion

The Chief Justice of the Court, who also authored the *Friends of the Eel River* opinion, concurred, and dissented. The Chief Justice agreed that any CEQA challenge to FERC's licensing process, including the settlement agreement, was preempted. The Chief Justice disagreed, however, that broader CEQA challenges were not similarly preempted.

The dissenting opinion reasoned that, in addition to "field" and "conflict" preemption, state law that presents an obstacle to the purposes and objectives of federal law would be similarly preempted. Here, CEQA presents an obstacle to the FPA given standing federal precedent and the statute's "savings clause." The FPA's licensing process notably includes "CEQA-equivalents" via the ALP and NEPA, but does not contemplate the delays created by state court review of CEQA litigation.

Moreover, CEQA is subject to "field" preemption because CEQA does not involve state regulation of water rights. While federal FPA preemption cases addressed state-operated projects, the concept of "field" preemption is broad enough preempt all state regulation, regardless of who the operator is.

With respect to the *Friends of the Eel River* decision, the dissent explained that the opinion portrayed an example of "self-governance" when it held CEQA was exempt from ICCTA preemption. Because the ICCTA sought to deregulate railroads, and thus allow greater "self-governance" by railroad operators, the state's voluntary compliance with CEQA was not preempted. In contrast here, the FPA's purpose and objectives is to vest exclusive regulation of hydroelectric facilities to FERC and to exclude all state regulation, with the exception of water rights. Unlike the ICCTA, the language of the FPA made it "unmistakably clear" that *all* state regulation of hydroelectricity facilities (except regulation of water rights) is preempted.

Finally, the dissent noted that the majority's "partial preemption" determination was unworkable. Finding DWR's CEQA compliance deficient would still not impact FERC's decision to issue a license. Instead, forcing DWR to perform additional analyses, or consider additional mitigation or alternatives, would be an impractical paper-generating exercise. As the majority acknowledged, FERC retains complete discretion to deny or alter the terms of a license, regardless of whether those changes are necessary to comply with CEQA. Therefore, requiring CEQA compliance would merely be redundant given the environmental studies FERC performed pursuant to NEPA.

Post-Script

On August 24, 2022, the Supreme Court modified its opinion following a letter signed by numerous CEQA practitioners, which asked the court to correct an erroneous statement in its opinion about the topics an EIR is required to discuss. The Court's opinion previously stated that an EIR was required to discuss the "economic and social effects of [a] project." Following the practitioners' letter, the Court corrected the opinion to remove this phrase from its list of mandatory EIR discussions, but noted that an EIR may—but is not generally required to—discuss such topics.

Conclusion and Implications

The Supreme Court's long-awaited, but divided decision, clarifies the scope of CEQA and its concurrent relationship to federal environmental statutes. Here, the Court demonstrated that federal preemption must be explicit. Absent unmistakably clear language from Congress, federal statutes should not interfere with a state government's right to self-govern—particularly in matters concerning environmental protection. However, the scope of state regulation is not unlimited. Where such regulation would interfere with jurisdiction plainly vested in federal agencies, a state statute cannot serve as an obstacle thereto.

The Supreme Court's opinion is available at: https://www.courts.ca.gov/opinions/documents/S258574.PDF.
(Bridget McDonald)

CALIFORNIA COURT OF APPEAL FINDS WATER ALLOCATION DID NOT CONSTITUTE A NEW 'PROJECT' UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

County of Mono v. City of Los Angeles, 81 Cal.App.5th 657 (1st Dist. 2022).

Mono County and the Sierra Club filed a petition for writ of mandate directing the City of Los Angeles (City) to comply with the California Environmental Quality Act (CEQA) before curtailing or reducing deliveries of irrigation water to certain lands the City leased to agricultural operators in the County of Mono (County). The Superior Court granted the petition and the City appealed. The Court of Appeal reversed, finding that the City's reduction was permitted under the existing leases and did not otherwise constitute a new "project" subject to additional CEQA review. Thus, the County's new lawsuit was barred by CEQA's applicable statute of limitations.

Factual and Procedural Background

In 2010, the City approved a set of substantively identical leases (2010 Leases) governing about 6,100 acres of land it owned in Mono County. The 2010 Leases included various provisions regarding water, including irrigation. For instance, they stated they were:

> . . .given upon and subject to the paramount rights of [the City] with respect to all water and water rights" and that the City reserved "all water and water rights. . .together with the right to develop, take, transport, control, regulate, and use all such water and water rights.

They further provided that:

> . . .[t]he availability of water for use in connection with the premises leased herein . . . is conditioned upon the quantity in supply at any given time. . . . The amount and availability of water, if any, shall at all times be determined solely by [the City]. The availability of water is further dependent upon [the City's] continued rights and ability to pump [groundwater].

In addition, the 2010 Leases stated that:

> Lessee further acknowledges and agrees that pursuant to Section 220(3) of the City of Los

> Angeles City Charter, any supply of water to the leased premises by [the City] is subject to the paramount right of [the City] at any time to discontinue the same in whole or in part and to take or hold or distribute such water for the use of [the City] and its inhabitants. Lessee further acknowledges and agrees that there shall be no claim upon [the City] whatsoever because of any exercise of the rights acknowledged under this subsection.

The 2010 Leases' initial term ran from 2009 through 2013, but the leases allowed the lessees to hold over as tenants at will after the expiration of the initial term, and the City and the lessees proceeded under the 2010 Leases in this holdover status after 2013. From 2009-2010 through 2017-2018, the City allocated a certain amount of irrigation water under the 2010 Leases.

In March 2018, the City sent the lessees copies of a proposed new form of leases (Proposed Dry Leases). Regarding irrigation water, the Proposed Dry Leases stated that the City:

> . . .shall not furnish irrigation water to Lessee or the leased premises, and Lessee shall not use water supplied to the leased premises as irrigation water.

They also stated that from time to time, based on its "operational needs," the City might spread or instruct the lessees to spread excess water on the leased properties. Like the 2010 Leases, the Proposed Dry Leases also stated that any water spreading would be:

> . . .subject to the paramount right of [the City] at any time to discontinue the same in whole or in part and to take or hold or distribute such water for the use of [the City] and its inhabitants. Lessee further acknowledges and agrees that there shall be no claim upon [the City] whatsoever because of any exercise of" such rights.

In April 2018, the City sent letters to the lessees informing them that it was "performing an environmental evaluation" of the Proposed Dry Leases, and the 2010 Leases would be in holdover status until the evaluation was complete and the Proposed Dry Leases took effect. That same month, Mono County wrote to the City's mayor asking for reassurance that the lessees would receive sufficient irrigation water that season. In May 2018, the City sent the lessees an e-mail stating it had evaluated the snowpack and anticipated runoff and determined it would provide a certain, relatively low amount of water that year. The County in turn claimed that the decision to divert and export almost all the irrigation water the City had historically provided was affecting the lessees and the environment, including the sage grouse, without CEQA review.

The Petition for Writ of Mandate

The County filed a petition for writ of mandate shortly thereafter, alleging that the City's decision to curtail or reduce water deliveries to the lessees in order to export additional water to the City failed to comply with CEQA. Around that same time, the City issued a notice of preparation that it would prepare an environmental impact report for the Proposed Dry Leases. The County later filed a first amended petition in which the Sierra Club joined.

During Superior Court proceedings, after the court issued a tentative order granting the County's petition but before the hearing, the City filed a declaration from a manager at the Department of Water and Power asserting the City diverted higher amounts of water to the leased properties in 2019 and 2020. At the hearing, the parties disputed whether the Superior Court should consider the declaration.

On the merits, the Superior Court found the City implemented a "project" in 2018 without complying with CEQA when: (i) it proposed new leases that, unlike prior leases, would not provide or allow water to be used for irrigation; and (ii) while claiming it would study the environmental effects of the new leases, it still implemented that policy of reducing water for irrigation by allocating less water than usual under the prior leases that were still in effect. The City in turn appealed the Superior Court's grant of the petition for writ of mandate.

The Court of Appeal's Decision

Extra-Record Evidence

The Court of Appeal first considered the City's contention that the Superior Court erred in partially excluding the submitted declaration. The Court of

Appeal agreed with the City that the declaration was admissible, extra-record evidence, noting that while extra-record evidence is generally inadmissible in administrative *mandamus* cases, it may be admitted in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute. The court found this rule applied here. It also found the declaration was relevant to the consideration of the merits of the CEQA claims. The court, however, found the declaration was untimely. Nonetheless, because the Superior Court considered the declaration for some purposes, and because it had given the County an opportunity to respond, the Court of Appeal found that the timeliness concerns were not as significant and therefore considered the declaration.

CEQA Compliance

The Court of Appeal next considered the merits of the CEQA claim, characterizing the core question as whether the 2018 water allocation was part of the 2010 Leases project or a new, reduced water project (either on its own or as part of the Proposed Dry Leases). The court found that the 2018 allocation was part of the 2010 Leases, as it came after years of similar allocation actions under an ongoing leasehold relationship and was the latest in a string of discretionary water allocations that the 2010 Leases allowed the City to make. The court also rejected the County's claim that the lessees had reasonable expectations that the 2010 Leases obligated the City to continue to deliver water for sustainable grazing uses and did not allow it to curtail water deliveries for the purposes of increasing water deliveries to the City's residents. The Court of Appeal found that the plain language of the leases afforded the City this right. The court also noted that the City had increased the allocations in 2019 and 2020 (as set forth in the submitted declaration), refuting the claim that the 2018 allocation represented a new low- or zero-water delivery policy.

The Court of Appeal also rejected the claim that the 2018 water allocation constituted the City's improper implementation of the project embodied in the Proposed Dry Leases prior to completion of the requisite CEQA review. Contrary to this claim, the Court of Appeal found that the sequence of events supported the conclusion that the 2018 water allocation was within the scope of the 2010 Leases. The timing of the Proposed Dry Leases, the court also found, was consistent with the City's explanation that it issued the Proposed Dry Leases, agreed to complete the requisite environmental review for those leases, and committed to maintaining its allocation practice under the 2010 Leases while proceeding with the environmental review.

Statute of Limitations

Given its conclusion that the 2018 water allocation was part of the 2010 Leases, the Court of Appeal found that the County's writ petition challenging the 2018 implementation of that project was time-barred under CEQA's applicable statute of limitations. If the County believed that a decision to reduce the lessee's water allocation in a specific year would be a substantial change in practice and have significant effects on the environment, the Court of Appeal found, it should have raised that argument when the City approved the 2010 Leases giving the City the authority to make such reductions. The Court of Appeal therefore reversed the Superior Court decision.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the definition of a "project" for CEQA purposes and applicable statutes of limitations. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A162590.PDF.
(James Purvis)

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE
LAW AND REGULATION REPORTER

Environmental, Energy & Climate Change
Law and Regulation Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108