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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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FEATURE ARTICLE

U.S. DISTRICT COURT VACATES TRUMP-ERA SECTION 401 CLEAN WATER ACT CERTIFICATION RULES

By Stephen J. Odell

The U.S. District Court for the Northern District of California rejected the U.S. Environmental Protection Agency's request to voluntarily remand a case without vacating the revisions to federal Clean Water Act (CWA) certification regulations subject to challenge, and instead vacated the revised regulations in remanding the matter to the agency for the further modifications it indicated it plans to adopt. [*In re Clean Water Act Rulemaking*, ___F.Supp.4th___, Case Nos. C 20-04636 *et seq.* (N.D. Cal. 2021).]

Background

On July 13, 2020, the U.S. Environmental Protection Agency (EPA) promulgated revisions to its rules under which states and authorized Tribes certify that activities requiring federal approval that may result in discharges of pollutants to U.S. navigable waters within their borders comply with all applicable water quality and related standards pursuant to Section 401 of the federal Clean Water Act. 85 Fed. Reg. 42,210 (July 13, 2020). The previous version of the regulations had been in effect since 1971, when EPA promulgated rules to govern certification under section 21(b) of the original Federal Water Pollution Control Act of 1948, which the CWA amended upon its enactment a year later, in 1972. *Id.* at 42,211. Because the rules apply to any activity requiring a federal license or permit that may result in discharge into navigable waters of the U.S., they have a wide berth of application, and therefore the 2020 rule revisions, again, the first to be made after nearly 50 years, attracted a lot of attention, eliciting more than 125,000 comments on the proposed version before going into effect in September 2020. *Id.* at 42,213.

As a substantive matter, perhaps the most important modification reflected in the revised certification rules was to explicitly define the scope of Section 401 certification as limited to ensuring that the discharge subject to federal approval complies with "water quality requirements," which the rules defined as encompassing those emanating from §§ 301, 302, 303, 306, and 307 of the CWA. *Id.* at 42,230-42,231. Another significant element of the revised rules clarified the scope of Section 401 certification only encompasses water quality impacts from the potential discharge associated with a federally licensed or permitted project, and may not include conditions related to the project's activities or operations, thereby rejecting the broader scope of such certifications that the Supreme Court upheld as a reasonable interpretation of Section 401 in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*). *Id.* at 42,232-42,234. Finally, the revised rules expressly confined Section 401 certification to point source discharges into navigable waters of the U.S., and therefore does not encompass non-point source discharges or discharges into other waters. *Id.* at 42,234-42,235.

With respect to procedural changes, the revised rules authorized EPA to establish the reasonable amount of time for a certifying authority to process a request for Section 401 certification and, importantly, clarified that this period could not exceed one year or be tolled for any reason. *Id.* at 42,235-42,236. They also authorized EPA to determine whether a certifying authority's denial has complied with the rule's procedural requirements, and to deem certifications waived if not.

Immediate Challenges Brought in the District Court

A series of environmental groups filed a complaint to challenge the revised Section 401 certification regulations the same day they were published in the Federal Register. *In re Clean Water Act Rulemaking*, Case nos. C 20-04636 et seq., 2021 WL 4924844, at *3 (N.D. Cal. Oct. 21, 2021). A group of twenty states and the District of Columbia followed up shortly thereafter by filing their own complaint to challenge the revised rules, as did several Tribes and a few other environmental groups, and all three cases were eventually consolidated. *Id.* Eight other states and a number of industry associations also intervened in the cases as defendant-intervenors. *Id.*

Less than a month after the Biden administration took office, the parties filed a joint motion for a 60-day stay on the ground that the revised regulations at issue were included within the purview of an Executive Order President Biden issued the day he took office directing agencies to review certain actions undertaken during the Trump administration for potential suspension, revision, or rescission. *Id.* (*citing* Exec. Order 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021)). The court granted the motion, as well as two follow-up motions of Federal Defendants to extend the stay by approximately two more months while EPA conducted its review of the revised certification rules and decided on a course of action. During the pendency of this stay in the litigation, EPA issued a Notice of Intent to further revise the Certification Rule. Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29541 (June 2, 2021).

Shortly thereafter, Federal Defendants moved the court to remand the revised certification regulations to EPA without *vacatur*, which plaintiffs opposed, setting the stage for the court's opinion on whether to grant the remand and, if so, with or without *vacatur* of the regulations.

The District Court's Decision

In addressing Federal Defendants' Motion, the District Court first set forth the rubric for evaluating an agency's request for a voluntary remand in *California Cmtys. Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012)(*CCAT*) (citing *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1027–28 (Fed. Cir. 2001)), in which the Ninth Circuit Court of Appeals concluded that "[g]enerally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *Id.* at *4 (quoting *CCAT*, 688 F.3d at 992).

Remand and *Vacatur*

Having dispensed with that question, the court turned to the much thornier issue of the standard for deciding whether any remand should be with or without *vacatur*.

In doing so, the court first grappled with what it found to be a split of authority among District Courts on whether a court may order *vacatur* of an agency action for which remand is sought without ruling on the merits of the claims challenging its validity. *Id.* After noting that the Ninth Circuit had not addressed the question directly, the District Court ultimately concluded that it had the authority to vacate an agency's action without first making a determination as to its validity when an agency seeks a voluntary remand. *Id.* at **4-5. It premised its conclusion in this regard on the rationale from a sister District Court within the Ninth Circuit that had reasoned that:

> . . .because *vacatur* is an equitable remedy, and because the APA [Administrative Procedure Act] does not expressly preclude the exercise of equitable jurisdiction, the APA does not preclude the granting of *vacatur* without a decision on the merits. *Id.* at *5 (quoting *Center for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011)).

Analysis under the *Allied-Signal* Decision

The court then pivoted to determining that the factors the Ninth Circuit has indicated courts should apply in considering whether to vacate agency actions found to be invalid should also be utilized in considering whether to vacate an agency action for which voluntary remand is sought, even without any conclusive determination as to its validity. *Id.* (*citing CCAT*, 688 F.3d at 992) (adopting factors set forth in *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993)). As set forth in *Allied-Signal*, the court quoted these factors as constituting:

> [1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed. *Id.* (quoting *Allied-Signal*, 988 F.2d at 150-51).

After briefly sloughing off Federal Defendants' and defendant-intervenors' arguments against its adoption of the *Allied-Signal* factors as the standard it should use in deciding whether to vacate the revised Section 401 certification regulations, *id.* at **5-6, and readily finding that remand was appropriate under the lenient *CCAT* standard of review applicable to that issue, *id.* at **6-7, the court engaged in an application of those factors.

In initially addressing the seriousness of the revised certification regulations' alleged deficiencies, the court homed in on the narrowing of the scope of the Section 401 certification they prescribed, and the attendant narrowing of the conditions that a state or authorized Tribe can therefore impose in providing such certifications. *Id.* at **7-8. The court found that this narrowing in the scope of certification represented "an antithetical position" to the Supreme court's interpretation of Section 401 in its opinion in *PUD No. 1* "without reasonably explaining the change." *Id.* at *7. On that basis, the court stated that it:

> . . .harbored significant doubts that EPA correctly promulgated the certification rule due to the apparent arbitrary and capricious changes to the rule's scope. *Id.*

The court also relied on a statement in an EPA official's declaration that one of the agency's purposes in requesting the remand to revise the challenged rule was to "restore" the principles of cooperative federalism inherent in the CWA, which the court read as an acknowledgment that the rule's scope "is inconsistent with and contravenes the design and structure of the Clean Water Act," and was therefore not entitled to judicial deference. *Id.* at *8. It also relied on a list of eleven "substantial concerns" EPA openly indicated it had with the revised certification regulations to quite easily conclude that significant doubt existed that the regulations were free from serious deficiencies. *Id.*

With respect to the second *Allied-Signal* factor, the potentially disruptive consequences of *vacatur*, the court relied principally on the fact that the revised certification regulations had only been in effect for 13 months in determining that "*vacatur* will not intrude on any justifiable reliance." *Id.*

The court also relied on the extent to which a faulty rule left in place without *vacatur* could result in possible environmental harm and concluded that such harm might be substantial, in particular in light of certain specific hydropower projects on the Skagit River in Washington for which Section 401 certification will be needed from the state in the near term. *Id.* at *9.

Having found that both *Allied-Signal* factors supported *vacatur*, the court vacated the revised certification regulations upon their remand to EPA, which the court noted would result in a temporary return to the previous version of such regulations until Spring 2023, by which time EPA has projected it intends to issue a new Section 401 certification rule. *Id.* at *10.

Conclusion and Implications

The import and potential impact of the District Court's decision can be deduced solely from the fact that the litigation involved more than half of the states in the country, as described above.

At the same time, as the court also noted, the revised certification regulations were only in effect for 13 months prior to their *vacatur*, and so it is unlikely that too many projects had commenced during that window in reliance on them, although it can be imagined that more projects would have sought to avail themselves of their narrower scope and receive the requisite certification under Section 401 if the court had left them in place pending EPA's issuance of a new set of regulations that, as noted above, the agency plans to accomplish by Spring 2023.

With respect to the court's analysis, it was relatively straightforward in most respects and its task was made considerably easier by the fact that EPA, the agency seeking the remand, itself identified a litany of "substantial concerns" it had with the regulations. Perhaps the most significant ruling was the court's determination that it need not engage in an evaluation of the merits of plaintiffs' claims in order to find *vacatur* appropriate, although there seems little doubt that the court would have ruled in favor of plaintiffs on at least one of their claims given the rather strong language it used in finding serious deficiencies existed in the regulations under the first *Allied-Signal* factor.

It is worth noting in conclusion that the court's opinion appears to reflect simply the latest example of the increasingly prevalent "ping-pong" trend in the environmental regulatory arena in which agency rules and policy pronouncements simply volley back and forth every time an administration of a different party assumes office. Such a trend, of course, makes it exceedingly difficult for agency officials and regulated entities to plan and evaluate projects, most of which take multiple years to successfully navigate the approval process, and new regulations most often take a new administration two years or more to promulgate through the Notice-and-Comment process.

The District Court's opinion is available at the following link: https://ecf.cand.uscourts.gov/doc1/035121199368 (PACER registration required)

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ENVIRONMENTAL NEWS

ARIZONA TAKES STEPS UNDER COLORADO RIVER PLAN TO SUPPORT LAKE MEAD LEVELS DURING UNPRECEDENTED DROUGHT

In December 2021, water agencies from California, Arizona, and Nevada, as well as the U.S. Bureau of Reclamation, executed a memorandum of understanding (MOU) to increase the amount of water stored in Lake Mead on the Colorado River by 500,00 acre-feet in both 2022 and 2023. In support of the so-called "500 + Plan," the MOU provides for a funding commitment from non-federal and federal parties totaling $200 million to participate in additional water projects that will result in a minimum of 1,000,000 acre-feet of water in Lake Mead by 2023. (*See:* 32 *Cal Water L & P'lcy* Rptr 88 (Jan. 2021).) The MOU contemplates semi-annual consultations among the parties to consider changing hydrological conditions within the Colorado River basin. Arizona recently took initial steps to meet target reductions in consumptive use through compensated conservation agreements with several tribal and irrigation district entities.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the United States Bureau of Reclamation (Bureau). The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. In response, Reclamation, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

In 2014, to support maintaining the elevation of Lake Mead, the Bureau and certain other lower and upper basin state participants funded a pilot system conservation program to reduce diversions from the Colorado River system through the voluntary, compensated, and temporary use reductions. Also that year, lower basin parties agreed to generate protection volumes through conservation measures to support Lake Mead elevations.

In 2019, the parties entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Operations rule set (LBOps). The LBOps provides that the lower basin states and the Bureau must consult and determine what additional measures will be taken by the Bureau of Reclamation and the lower basin states if lake levels are forecast to be at or below 1,030 feet during the

succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. The Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, Bureau of Reclamation releases operational studies called "24-Month Studies" that project future reservoir contents and releases.

As a result of the programs and agreements between the various parties, approximately 4.0 million acre-feet has been added to Lake Mead over the years, resulting in a 50-foot increase in Lake Mead's elevation at the end of 2020 than would have otherwise occurred. Despite the substantial efforts of the parties, Lake Mead levels are projected to continue to decline. The Bureau's August 2021 24-Month Study projected Lake Mead's elevation would be below 1,075 feet on January 1, 2022, and as provided for in the 2007 Interim Guidelines, a shortage declaration limiting deliveries of Colorado River water to Arizona and Nevada is in effect for 2022. In addition, the August 2021 24-Month Study projected Lake Mead would fall below 1,030 feet in July of 2023—a projection that remained unchanged in the September and October 2021 24-Month studies using the minimum probable inflow. Accordingly, the parties entered into discussions and formed technical working groups to determine how to protect against lake level declines to 1,020 feet or below, arriving at the conclusion that a minimum of 500,000 acre-feet would need to be conserved each year to support lake levels from dropping to 1,020 feet. This amount was memorialized in the MOU.

Memorandum of Understanding

At its core, the MOU provides that the parties will work together to establish appropriate means and methods to identify, consider, select, fund, administer, and validate additional water projects, with the key considerations being the total quantity of additional water that can be created in support of Lake Mead elevations, the cost of such water quantities, and the timing of implementation of any projects for additional water. The MOU defines "additional water" to mean water remaining in Lake Mead that is either 1) not attributable to shortage volumes under the 2007 Guidelines or any DCP contributions required in the LBOps; or 2) a net positive change in Intentionally Created Surplus (ICS) behavior assumed in the Bureau of Reclamation's June 2021, 24-month study Most Probable projection. ICS water is water that is made available by extraordinary conservation efforts, such as land fallowing. In short, "additional water" is water that is not the result of existing efforts or requirements under the 2007 Guidelines, the DCP, or the LBOps, The MOU expressly does not obligate any party to any specific contribution of funds or otherwise support any particular additional water project.

In the MOU, the parties agreed to fund participation in additional water projects up to $100 million. Additionally, target amounts of conserved water from the parties to meet the 500,000 acre foot minimum in 2022 are as follows: 223,000 acre-feet from Arizona, 215,000 acre-feet from California, and 62,000 acre-feet from the Bureau of Reclamation. According to the Central Arizona Water Conservation District (CAWCD), which operates the Central Arizona Project (CAP) that diverts Colorado River water for delivery to urban and agricultural users in the center and south of the state, 193,000 acre-feet of Arizona's 223,000 acre-foot target would come from CAP users, and the remaining 93,000 would come from on-river users, including tribal entities.

Arizona Takes Initial Step

Arizona recently took the initial step of issuing letters of intent to negotiate compensated conservation agreements with various tribes and irrigation districts located along the Colorado River, including the Colorado River Indian Tribes, Mohave Valley Irrigation and Drainage District, Wellton Mohawk Irrigation and Drainage District, and Yuma Mesa Irrigation and Drainage District. These agreements would, in effect, compensate on-river and Central Arizona Project users for reducing the amount of water each entity consumptively uses, as well as reduce historical consumptive use, totaling between 50,000 and 60,000 acre-feet. According to CAWCD, key terms of the agreements would provide that the agreements are voluntary and temporary, compensated (at $261.60 per acre foot in 2022 and $268.80 per acre-foot in 2023), and reductions in water use must be made against recent historical consumptive use. To date, agreements have not yet been reached.

Conclusion and Implications

The 500 + Plan is designed to achieve the short-term objective of keeping Lake Mead levels above 1,020 feet. It remains to be seen whether the plan will achieve that goal, and whether such efforts will be renewed in the future or if additional measures become necessary to support Lake Mead elevation levels. The Central Arizona Water Conservation District, Agenda Item 7a, 7b, is available *at*: https://civicclerk.blob.core.windows.net/stream/CAPAZ/c2a2d547-e73b-4001-b2df-62bd75d6b649.pdf?sv=2015-12-11&sr=b&sig=bqUiOGCSYyyEfctONWK7rHRPdZB%2F8c3T8S0yupenb54%3D&st=2022-01-19T22%3A28%3A27Z&se=2023-01-19T22%3A33%3A27Z&sp=r&rscc=no-cache&rsct=application%2Fpdf.
(Miles Krieger, Steve Anderson)

CAUSES OF LOW WINTER-RUN CHINOOK EGG SURVIVAL RATE DEBATED BY EXPERTS

In December 2021, a technical team formed under the California Interagency Ecological Program issued a draft letter to the California Department of Fish and Wildlife and the National Marine Fisheries Service suggesting that in 2021, only 2.6 percent of Sacramento River winter-run chinook salmon eggs successfully hatched due in part to the effects of higher water temperature and thiamine deficiency. The technical team's finding could have operational implications for the California State Water Project (SWP) and federal Central Valley Project (CVP). However, certain parties in ongoing litigation in federal court related to the impacts of SWP and CVP operations on listed species recently filed expert analyses of the technical team's egg survival finding, expressing differing views on the accuracy and causes of the low egg-to-fry survival rate. In particular, the parties disagree about the role played by higher water temperatures and thiamine levels on egg to fry life stages.

Background

The Interagency Ecological Program (IEP) was formed more than 50 years ago to provide and integrate ecological information for the management of the Sacramento-San Joaquin Delta (Delta) ecosystem and the water flowing through it. The IEP addresses high priority management and policy science needs to meet the purposes and fulfill responsibilities under state and federal regulatory requirements, including the California Endangered Species Act (CESA) and the federal Endangered Species Act (ESA).

Within the IEP, Project Work Teams that focus on specific areas are formed to organize new studies, review study plans and proposals, write scientific papers and reports, and promote collaboration among different groups working in a topic of interest. In particular, a Winter-Run Chinook Salmon PWT (Winter-Run PWT or PWT) coordinates research, monitoring, and management activities for the state and federally-listed endangered Sacramento River winter-run chinook salmon. A specific objective of the PWT is to develop and submit an annual recommendation letter to the National Marine Fisheries Service (NMFS) for the calculation of winter-run juvenile salmon production and the number of winter-run chinook that might be "taken" by the operations of the CVP and SWP for purposes of setting compliance parameters under CESA and the ESA. The PWT is composed of staff from the California Departments of Fish and Wildlife and Water Resources, Metropolitan Water District, National Marine Fisheries Service, U.S. Bureau of Reclamation, and the U.S. Fish and Wildlife Service, and other stakeholders.

The Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) operate two of the nation's largest water projects—the CVP and SWP, respectively. Together, these projects deliver millions of acre-feet of water to agricultural, municipal, and industrial water users throughout California. The CVP and SWP take water from the Sacramento and San Joaquin River systems, and the Delta that empties into San Francisco Bay. The river systems and Delta are migration, spawning, and critical habitat for several endangered and threatened fish species, including winter-run chinook salmon.

The federal ESA imposes requirements for the protection of listed endangered and threatened species

and their ecosystems. In 2008 and 2009, the U.S. Fish & Wildlife Service (FWS) and NMFS determined, in documents called Biological Opinions (BiOps) issued under the ESA, that the continued long-term operation of the CVP and SWP would jeopardize certain endangered or threatened species. The FWS and NMFS' BiOps included alternative project operations that effectively compelled the Bureau and DWR to operate many aspects of the CVP and SWP according to the direction of the federal wildlife agencies, rather than in compliance with the proposed operating plans offered by the Bureau and DWR.

On October 21, 2019, FWS and NMFS each issued new BiOps that found proposed CVP and SWP long-term operations through 2030 would not jeopardize federally listed threatened or endangered species, including winter-run chinook, nor would such operations adversely modify designated critical habitats, including those in the Sacramento-San Joaquin River Delta and in upstream tributaries. The Bureau of Reclamation's proposed action includes significant investment in protection of endangered fish, more robust hatchery operations, changes to cold water pool operations and other actions at Lake Shasta, and increased management oversight in the Delta. Various parties have sued to keep the 2019 biological opinions from becoming effective. In the meantime, the Bureau and DWR have proposed an interim operating plan for 2022 (2022 IOP) that pertains to, among other things, temperature management and water export constraints from Lake Shasta. Compliance with the 2022 IOP could provide legal protection for incidentally taking listed species, including winter-run chinook, under incidental take authorization issued for the SWP and CVP under CESA.

The Winter-Run PWT's letter estimating juvenile winter-run chinook production in 2021 could implicate how the SWP and CVP are operated in the near future to comply with incidental take limitations. The PWT estimated the number of winter-run chinook fry (newly hatched fish less than a year old) produced in 2021 to be 761,839. According to biologists, this is a relatively low number, although not as low as have occurred in prior years.

Recommendations and Debates

The PWT's draft letter to NMFS recommends that NMFS use a "juvenile production index" (JPI) in calculating the production of juvenile winter-run chinook in 2021 (JPE). The JPI is based on the number of fry equivalents passing the Red Bluff Diversion Dam (RDBB) on the Sacramento River, and is used to estimate the total number of juvenile winter-run chinook that survive each year to pass the RDBB trapping location. The JPI is also used to set take limits under the ESA for the SWP and CVP.

According to the Winter-Run PWT, the JPI best represents the response of fish to annual environmental conditions during spawning, egg incubation, and outmigration, as compared to the long-term average egg-to-fry survival rate, which was used in the JPE prior to 2014. The Winter-Run PWT notes in its letter that using the JPI is particularly important for 2021 because it accounts, in part, for lower-than-average egg-to-fry survival in naturally spawned winter-run chinook salmon due to thiamine deficiency in spawners and temperature-related mortality during egg incubation.

The PWT's draft letter recognizes that both water temperature and thiamine deficiency played a role in low egg-to-fry (ETF) survival. However, the primary dispute among the parties to the federal litigation relates to the respective role played by each of those factors. Some plaintiffs suggest that low ETF was due primarily to increased water temperatures in the Sacramento River, which has deleterious effects on salmon eggs and thus may result in egg mortality and lower juvenile salmon counts. Some defendants, on the other hand, suggest that thiamine deficiency played a large role in the ETF survival rate. For instance, thiamine changes may occur in returning female spawners due to foraging habits in the marine environment prior to immigration to spawning grounds. Thiamine deficiency reduces egg viability and fry survival, and leads to reduced JPI compared to what would have been observed absent thiamine deficiency impacts. Those defendants also point out that elevated water temperatures were not pervasive for the egg incubation period, and instead were only elevated above thresholds for egg viability after roughly half of the incubating eggs in the river hatched. In addition, defendants identify additional sources of uncertainty in the 2021 JPI and ETF survival due to trapping changes for juvenile chinook at RBDD and the non-operation of the traps during two days of high flows following significant weather events in the Sacramento River watershed during which tens of thousands of juvenile chinook may have out-migrated

but were uncounted by the traps. Thus, according to certain defendants, temperature impacts were unlikely to be the primary cause of reduced ETF production in 2021.

The outcome of this debate is important because it implicates how the "cold pool" in Lake Shasta—the cold water diverted to the upper Sacramento River from the bottom of a lake—is managed, which in turn implicates the availability of water for release for non-environmental, *e.g.* agricultural, purposes. Cold water releases during warm months when spawning and egg incubation occurs are important in keeping water temperatures in the river below the threshold at which incubating eggs could potentially be harmed (56 degrees Fahrenheit). Plaintiffs generally contend that water exports from Lake Shasta for agricultural purposes have compromised the availability of cold pool water for release during the hot months when salmon spawn and eggs are incubating, hence the low ETF survival rate. However, if water temperature was not a primary culprit in the low ETF survival rate (assuming it is accurate, which certain defendants argue it may not be), and if water releases for non-environmental purposes are not the primary reason for the lower ETF survival rate, then operational changes to the SWP and CVP under the incidental take authorization for the projects may not be warranted.

Conclusion and Implications

The Winter-Run PWT has yet to issue a final letter, and a final calculation of the juvenile production of winter-run chinook in 2021 has not yet been made. Thus, it remains to be seen whether operational changes to the SWP and CVP will be recommended for purposes of state and federal environmental law compliance. The Juvenile Production Estimate Letters are available at: https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/california-central-valley-water-operations-biological#juvenile-production-estimates-(jpe)-for-sacramento-river-winter-run-chinook-salmon
(Miles Krieger, Steve Anderson)

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REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS REISSUES AND MODIFIES NEW CLEAN WATER ACT SECTION 404 NATIONWIDE PERMITS

On December 27, 2021, the United States Army Corps of Engineers (Corps) finalized 40 nationwide permits and issued a new nationwide permit for water reclamation and reuse facilities. The 40 newly finalized nationwide permits follow 12 that were reissued and four new nationwide permits that were finalized in January 2021. The nationwide permits will go into effect on February 25, 2022 and all of the current nationwide permits will expire March 14, 2026. [U.S. Army Corps of Engineers, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73,522 (December 27, 2021).]

Factual and Procedural Background

Nationwide permits are general permits under Section 404 of the federal Clean Water Act authorizing placement of dredge or fill material into waters of the United States for recurring types of projects that have only minimal individual and cumulative adverse environmental effects. They also authorize activities that require Corps permits under Section 10 of the Rivers and Harbors Act of 1899, which regulates the placement of any structure in or over a navigable "water of the United States." Section 404(e) of the Clean Water Act authorizes the Corps to issue nationwide or regional general permits for up to five years for activities that are similar in nature and have minimal individual and cumulative adverse environmental effects. The Corps has issued nationwide permits at regular intervals since 1977.

Nationwide Permits expedite permitting and reviews for the projects that they cover by allowing an applicant to avoid the requirement for an individual Section 404 or Section 10 permit and the associated reviews under the National Environmental Policy Act (NEPA). Nationwide permits are used to authorize approximately 70,000 projects in a typical year. The Corps stated that the newly finalized Nationwide Permits support effective implementation of the recently passed bipartisan Infrastructure Investment and Jobs Act by providing infrastructure permit decisions with minimal delay and paperwork.

More on the Army Corps' Recent Actions

The Corps released a proposed rule in September 2020 to reissue the nationwide permits issued in 2017. In January 2021, the Corps published a final rule which reissued 12 nationwide permits, finalized four new nationwide permits, and made some adjustments to the general conditions and definitions for the nationwide permit program.

Reissuance of the 2017 Nationwide Permits

During the process of reissuance, the Corps made a relatively small number of changes to the 2017 permits. One of the most significant changes, which drew criticism from environmental groups, removed a 300-linear-foot limit for losses of streambed from ten nationwide permits that were finalized in January 2021, during the closing days of the Trump administration:

- *Nationwide Permit 21*, Surface Coal Mining; *Nationwide Permit 29*, Residential Developments; *Nationwide Permit 39*, Commercial and Institutional Developments; *Nationwide Permit 40*, Agricultural Activities; *Nationwide Permit 42*, Recreational Facilities; *Nationwide Permit 43*, Stormwater Management Facilities; *Nationwide Permit 44*, Mining Activities; *Nationwide Permit 50*, Underground Coal Mining; *Nationwide Permit 51*, Land Based Renewable Energy Generation Facilities; and *Nationwide Permit 52*, Water-Based Renewable Energy Generation Pilot Projects.

The Corps also took steps to expand three additional 2017 permits:

- *Nationwide Permit 27*, Aquatic restoration, enhancement, and establishment activities: The Corps added "releasing sediment from reservoirs to restore or sustain downstream habitat" and "coral restoration or relocation" to the list of examples of activities authorized by the permit;

•*Nationwide Permit 41*, Reshaping existing drainage ditches: The Corps expanded the nationwide permit to include reshaping of existing irrigation districts;

•*Nationwide Permit 48*, Commercial shellfish mariculture activities: The new permit changes its name from "aquaculture" to "mariculture" to more precisely reflect that it permits activities in coastal waters. It also removes a prior prohibition against new commercial shellfish mariculture activities directly affecting more than 1/2-acre of submerged aquatic vegetation.

New Nationwide Permits Issued in January 2021

In January 2021, the Corps also promulgated four new nationwide permits, described below:

•*Nationwide Permit 55*, Seaweed mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of seaweed mariculture activities and also allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•*Nationwide Permit 56*, Finfish mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of finfish mariculture activities. Similar to Nationwide Permit 55, this permit allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•*Nationwide Permit 57*, Electric utility line and telecommunications activities: this new permit allows activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States. These activities were previously covered by Nationwide Permit 12, which also permits oil and natural gas pipelines, but which was enjoined from use for a period in 2020 in litigation challenging the Keystone XL pipeline. By creating a separate nationwide permit for electric utility lines and telecommunications lines, the Corps will allow these projects to avoid oil and gas pipeline litigation impacts;

•*Nationwide Permit 58*, Utility lines for water and other non-hydrocarbon substances: this new permit allows activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. The new permit also allows associated utility line facilities, such as substations, access roads, and foundations for above-ground utility lines, in waters of the United States. These activities were previously covered by Nationwide Permit 12. Creating a separate nationwide permit for water utility activities avoids potential impacts from challenges to oil and gas pipelines, and also removes conditions that were focused on other types of pipelines or utilities.

New Nationwide Permit Issued in December 2021

In December 2021, the Corps reissued the remaining 40 nationwide permits and finalized a fifth new nationwide permit:

•*Nationwide Permit 59*, Water reclamation and reuse facilities: this new nationwide permit will help expedite and provide clarity for smaller water recycling, reuse, and groundwater recharge projects. The Corps limited its scope to projects that impact less than one half of an acre of waters, which will preclude its use for medium or large scale water recycling or recharge projects.

In its discussion of the new Nationwide Permit, the Corps cited the climate resilience and conservation benefits of water reclamation and reuse projects:

> Water reclamation and reuse facilities can be an important tool for adapting to the effects of climate change, such as changes in precipitation patterns that may affect water availability in areas of the country. Water reclamation and reuse facilities help conserve water, which may be beneficial as water availability changes or increases in water demand occur.

In response to comments filed by public water agencies and their representatives, the final rule's preamble includes language stating that the Corps will not consider the source of water when applying nationwide permits to water reclamation or reuse projects. It states:

> For water reclamation and reuse facilities, the Corps regulates discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of those facilities. In general, the Corps does not have the authority to regulate the operation of these facilities after they are constructed, expanded, or maintained through discharges of dredged or fill material into waters of the United States authorized by this nationwide permit. The Corps does not have the authority to regulate releases of water to recharge or replenish groundwater, to regulate the mixing of water from various sources, or to regulate the movement of water between watersheds.

This language clarifies that the Corps does not plan to withhold or condition this new nationwide permit in response to concerns about the water that will be used for the project – such as imported or recycled water.

Conclusion and Implications

The U.S. Army Corps of Engineers' new nationwide permit for water reclamation and reuse projects will expedite groundwater recharge projects that impact less than one-half an acre of waters or wetlands. The new permit and its discussion also demonstrate that the Biden administration views water recharge, reuse, and recycling as important tools for increasing water reliability and adapting to the impacts of climate change. The reissuance of existing nationwide permits provides continuity until March 2026 for a program that expedites permitting for infrastructure and other projects that have minor impacts on waters and wetlands regulated under the Clean Water Act. For more information on the general permits, *see:* https://www.federalregister.gov/documents/2021/12/27/2021-27441/reissuance-and-modification-of-nationwide-permits.
(Lowry Crook, Ana Schwab, Rebecca Andrews)

GREAT LAKES, COASTAL BEACHES, AND CERTAIN COASTAL WATERS FURTHER PROTECTED BY NEW FEDERAL PIPELINE RULE

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) published a new pipeline safety interim final rule (Rule) on December 27, 2021 that increases environmental protections to the Great Lakes, coastal beaches, and certain coastal waters. (86 Fed. Reg. 73173.) The Rule implements mandates from the Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016, as amended by the PIPES Act of 2020. Specifically, the Rule designates the three categories above as "Unusually Sensitive Areas" (USAs) and requires stricter pipeline Integrity Management Programs (IMPs) for nearby hazardous liquid pipelines in order to decrease spills. These more rigorous IMPs will implement measures like increasing standards for inspections, repairs, and safety protocols, as well as analyzing serious threats like corrosion.

Background

PHMSA's pipeline regulations set the safety requirements for pipelines that carry hazardous liquids, including crude oil and carbon dioxide. (49 C.F.R. § 195.) The regulations include enhanced requirements for pipelines in High Consequence Areas (HCAs) or in areas where a release could impact an HCA. Specifically, pipelines in or affecting HCAs are required to implement an IMP. HCAs are defined to include commercially navigable waterways, high population areas, other populated areas, and USAs. USAs were further defined as USA drinking water resources and USA ecological resources.

In the PIPES Act of 2016, Congress ordered PHMSA to include the Great Lakes, coastal beaches, and certain coastal waters as USAs. In the PIPES Act of 2020:

> Congress clarified that 'certain coastal waters' means the territorial sea of the United States, the Great Lakes, and marine and estuarine waters up to the head of tidal influence.

The Interim Final Rule Defining Unusually Sensitive Areas

In the December 27, 2021 interim final rule (IFR), PHMSA adopts the new USA definition as ordered by Congress in the PIPES Act of 2020. Thus, operators of hazardous liquid pipelines located in areas where a release may impact a territorial sea of the United States, the Great Lakes, and marine coastal estuaries must adopt an IMP. In addition, operators of onshore hazardous liquid pipelines submerged more than 150 feet below the surface of water that could affect an HCA must also comply with the more stringent requirements for submerged pipelines. Overall, an estimated 2,905 additional miles of hazardous liquid pipelines, largely in states along the Gulf of Mexico, will be covered under the Rule:

> This estimate reflects segments located within 1/4 mile of any of the newly defined USAs but are not located within 1/4 mile of the location of existing HCAs. . . . Based on this analysis, PHMSA anticipates that most affected operators have an existing IM program and will be able to extend that plan to include the newly covered segments. (86 Fed. Reg. 73181.)

Hazardous liquid IMP requirements work to lower the risks if a pipeline spill were to occur where it would have significant consequences. The ramifications of a pipeline spill can be extremely serious, as:

> . . .[a]ny release of petroleum, petroleum products, or other hazardous liquids can adversely affect human health and safety, threaten wildlife and habitats, impede commercial navigation, or damage personal or commercial property. Spills into bodies of water present increased risk because the water and water currents act as conveyances to increase the spread of the spill. . . . Major oil spills within the Great Lakes, shorelines, or coastal waters would have extreme, negative, and persistent impacts on shoreline ecology, benthic communities at the base of the ecosystem, fisheries, human health, and the economy of coastal communities. (86 Fed. Reg. 73177.).

"The Great Lakes are more than an economic engine and ecological treasure for Michigan—they provide drinking water for over 40 million people and are simply part of who we are as Michiganders," said Michigan Senator Gary Peters, a member of the Senate Commerce, Science, and Transportation Committee:

> We know a pipeline spill in the Great Lakes would be catastrophic. That's why I applaud PHMSA for formally implementing my provision subjecting the Great Lakes to higher standards for pipeline operators.

The comment period for the Rule ends on February 25, 2022, which is also its effective date. An IFR, such as this one, is a rule published without first receiving public comment, upon an agency finding cause to issue a final regulation:

> The Administrative Procedure Act (APA, 5 U.S.C. 551 *et seq.*) permits an agency to issue a final rule without first publishing a proposed rule for public comment when it demonstrates 'good cause' that notice and comment is 'impracticable, unnecessary, or contrary to the public interest.' 5 U.S.C. 552 (b)(3)(B). This exception is narrow, and PHMSA [proceeded] with an IFR only in light of the specific instructions from Congress in the PIPES Act of 2020 that render comment both unnecessary and impracticable. (86 Fed. Reg. 73176.)

While the Rule states the number of disasters it will prevent is unknowable, it lists past spills in the areas meant to be protected by the Rule, including a 2018 anchor strike that dented Enbridge Energy's Line 5 pipeline in Michigan.

Conclusion and Implications

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration's Rule that increases environmental protections to the Great Lakes, coastal beaches, and marine coastal waters recognizes the potential impacts that the release of a hazardous liquid could cause in such high consequence environments. "The Great Lakes and our coastal waters are natural treasures that deserve our most stringent protections," said Tristan Brown, the PHMSA Deputy Administrator. "This rule strengthens and expands pipeline safety efforts in these sensitive areas." The stricter pipeline IMPs to nearby hazardous liquid pipelines required by the Rule will assist to decrease spills in a variety of ways. While the estimated 2,905 additional miles of hazardous liquid pipelines affected by this Rule is not a small change, it appears that most affected operators already implement IMPs and should be able to extend these programs to the newly affected lines.

Although many are excited by the Rule's environmental potential, it may be cause for concern for corporations that operate pipelines effected by the Rule, like Enbridge Energy, a Canadian company. Enbridge Energy's Line 5 pipeline transports roughly 23 million gallons a day of crude oil and natural gas liquids between Wisconsin and Ontario. Line 5 is effected by the Rule and Enbridge states its goal is to protect the Great Lakes while also safely delivering energy to the region, and the pipeline's integrity management program meets the new requirements put in place by the Rule. Line 5 is also the subject of a lengthy legal battle in which a Michigan lawsuit currently seeks to shut down the pipeline. While corporations like Enbridge may find this Rule to be an obstacle, and some environmentalists find there is still a fight to be had in this pipeline arena, overall, the Rule is an additional step to ensure the protection of the Great Lakes, coastal beaches, and marine coastal waters. (Megan Unger, Darrin Gambelin)

CALIFORNIA STATE WATER BOARD AND DWR RELEASE REPORT OUTLINING NEW GROUNDWATER MANAGEMENT PRINCIPLES AND STRATEGIES FOR DRINKING WATER

The California Department of Water Resources (DWR), in coordination with the State Water Resources Control Board (SWRCB), recently released a plan (Plan) detailing new management principles and strategies for state action in supporting communities and individuals that depend on groundwater wells for drinking water.

Background

As California continues to grapple with frequent and intensifying droughts, groundwater becomes ever more important to supplement less-predictable supplies from precipitation, snowpack, and other surface water. The Plan reports that in some areas, domestic and community drinking water wells are particularly at risk of going dry during droughts due to overdraft and because many domestic wells tend to be relatively shallow. The Plan estimates that during the 2012 to 2016 drought, more than 3,500 domestic wells went dry, and that another 900 wells were similarly impacted from January to October 2021. The management principles published by the State of California in the Plan are intended to increase water supply reliability for those dependent on groundwater for domestic uses.

Groundwater Management Principles and Strategies

The state's Plan is organized into six overall principles, each of which is supported by several specific strategies. The principles are: 1) achieve drinking water resilience; 2) integrate principles of equity; 3) address underlying challenges; 4) lead with the best available data; 5) build trusted relationships; and, 6) implement lasting solutions.

Principle 1: Drinking Water Resilience

The first principle is focused on pre-drought planning and preparedness and post-drought emergency response. This principle focuses on coordination

with other agencies, from federal emergency response agencies, to counties and water systems developing drought contingency plans, to local and regional agencies, tribes, and non-governmental organizations (NGOs) that engage directly with drinking water well users. Another focus is implementing the Sustainable Groundwater Management Act (SGMA) in a way that helps minimize the impacts of future droughts on drinking water well users. The Plan calls for establishing a standing inter-agency task force to lead a proactive approach to implement this principle.

Principle 2: Equity

According to the Plan, the state recognizes that integrating principles of "equity" in drinking water management must be both practical in providing access to drought assistance, and procedural in maximizing participation in drought-related planning processes to inform positive outcomes. The strategies to implement this principle include outreach, education, and translation goals; guidance to consider impacts on water users before "red-tagging" homes for water quality or quantity issues; flexibility for groundwater trading; application of the "polluter pays" principle, to the extent possible and appropriate, so that the costs of solutions to benefit domestic well users are not borne by those users but by those who caused the issues; and aligning various state and local funding sources to maximize support for domestic well users.

Principle 3: Address Underlying Challenges

This principle provides guidance related to a wide range of matters that could potentially impact drinking water well users, including: best practices in well permitting; crop conversion, farming and land practices; energy impacts of time-of-use pumping practices; and local and regional land use planning. It also encourages counties to regulate and enforce efficient and appropriate water use during droughts. This principle further addresses certain financial impacts on domestic well users, and aims to improve contracting and procurement processes related to repair and rehabilitation of wells as well as providing assistance for capacity building where there are economic impacts on communities or domestic well users related to changes in groundwater conditions.

Principle 4: Best Available Data

To improve the "best available" data, the state focuses on improving both the data collected and access to that data. The state plans to improve its own monitoring of groundwater level, subsidence, and water quality; encourage others to increase their frequency of monitoring; promote metering of wells and collection of evapotranspiration data to capture groundwater use; and encourage Groundwater Sustainability Agencies (GSAs) and counties to collect data from drinking water well users. The state also plans to develop an information management system and to increase access to existing data platforms most relevant to drinking water well users, as well as working with local entities to publicly disclose well and water quality information, including during real estate transfers.

Principle 5: Relationship Building

The state recognizes benefits of effective coordination, communication, and decision-making and the free flow of knowledge and skills between groups. The state plans to engage drinking water well users in the development of solutions in the local communities, and, in turn, the state plans to offer training resources on testing water quantity and quality and to help connect users with local emergency services for drought response. The state also plans to engage government-to-government with Tribes and with the federal Indian Health Services to develop drought preparedness and response plans and assist drinking water well users.

Principle 6: Lasting Solutions

The final principle in the Plan is based on a recognition that no single solution will address every drinking water well challenge and that to be lasting, solutions need to be specific, effective, and supported with local engagement. The state proposes using funding incentives to encourage mitigation of water quality issues; encouraging regionalization and consolidation of drinking water systems; piloting alternative water supply projects, such as source cleanup or recycled water; and incentivizing recharge projects, among other things. The state also plans to report on progress made under existing regulatory state and federal water quality management programs.

Conclusion and Implications

The principles and strategies outlined in the Plan encompass a wide variety of action items, require coordination with a number of agencies beyond DWR and SWRCB, and build on a number of existing programs. As a result, they may impact water users beyond those dependent on drinking water wells. The Plan's principles and strategies will be further developed and implemented in the coming months and years. For the complete Plan document, including an implementation matrix, *see:* https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/DrinkingWater/Files/Final-Principles-and-Strategies-with-the-Implementation-Matrix.pdf.
(Jaclyn Kawagoe, Derek Hoffman)

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.aa

Civil Enforcement Actions and Settlements—Air Quality

•December 21, 2021 - The U.S. Environmental Protection Agency (EPA) announced settlements with two Arizona automotive parts distributors to resolve violations of the federal Clean Air Act. The companies illegally sold aftermarket auto parts that bypass or disable required emissions control systems, otherwise known as defeat devices. The distributors paid $54,814 in penalties. Dykstra Inc. dba Dykstra Machinery sold or installed aftermarket parts and tuning software designed to defeat emission control systems of heavy-duty diesel trucks and nonroad diesel tractors. Dykstra also tampered with such trucks and tractors. The company, located in Gilbert and Casa Grande, Arizona, paid a civil penalty of $29,814 to resolve the violations. This agreement was reached under EPA's expedited settlement policy, which is only used in certain circumstances to address minor, easily correctable violations. Dudu Oja Ije, LLC, dba RPM Outlet sold aftermarket parts and tuners designed to defeat the emission control systems of highway motor vehicles. The company, located in Phoenix, Arizona, agreed to pay a civil penalty of $25,000, which was reduced due to financial hardship, to resolve the violations.

•December 29, 2021—EPA lodged a proposed consent decree in U.S. District Court in which New Indy Catawba, LLC (New Indy) has agreed to robust injunctive relief designed to prevent hydrogen sulfide (H2S) concentrations above levels that endanger people's health from the company's Catawba, South Carolina paper mill. The company will also pay a civil penalty of $1,100,000. The proposed settlement follows an emergency order issued by EPA on May 13, 2021 to the New Indy Catawba mill to prevent imminent and substantial endangerment to surrounding communities. The proposed settlement requires New Indy to operate their steam stripper unit to control hazardous air emissions, monitor and treat sulfur-containing fuel condensate sent to the wastewater treatment system, and improve the functioning of the wastewater treatment system. New Indy must install and maintain a carbon filtration system on their post-aeration tank to minimize air emissions, and install and maintain a functioning secondary containment system around the by-product black liquor storage area to prevent uncontrolled black liquor releases from reaching the wastewater treatment system. New Indy must also continue to operate and maintain the H2S fence line monitors and comply with the health-based levels at the fence line.

•January 7, 2022—EPA and the Department of Justice announced a settlement with Derichebourg Recycling USA Inc. (Derichebourg) of Houston, Texas, to resolve Clean Air Act violations at 10 scrap metal recycling facilities in Texas and Oklahoma. The federal complaint filed simultaneously with the consent decree alleges that Derichebourg failed to recover refrigerant from appliances and motor vehicle air conditioners before disposal or verify with the supplier that the refrigerant had been properly recovered prior to delivery. Under the settlement, Derichebourg will prevent the release of ozone-depleting refrigerants and non-exempt substitutes from refrigerant-containing items during their processing and disposal processes.

•January 12, 2022—EPA proposed to disapprove the State of Wyoming's revised regional haze State Implementation Plan (SIP) to address haze-forming emissions from the Jim Bridger power plant, Units 1 and 2, in Sweetwater County, Wyoming. Wyoming's SIP revision would weaken existing requirements, which have been in place since 2014, to install and

operate emissions controls at the Jim Bridger units beginning this year. Emissions from the Jim Bridger power plant affect visibility in western National Parks and Wilderness Areas protected as "Class I Areas" under the Clean Air Act. EPA has found that Wyoming's revised regional haze plan fails to justify reversing the state's 2011 determination that the installation of Selective Catalytic Reduction (SCR) pollution control systems at Jim Bridger Units 1 and 2 is necessary under the Clean Air Act to make reasonable progress toward natural visibility conditions in Class I Areas. EPA is taking comment on this finding. EPA has been and remains open to finalizing a new plan, consistent with the Clean Air Act, that addresses current circumstances while protecting Wyoming's environment, its workers, and its communities.

•January 19, 2022—EPA announced a settlement with Par Hawaii Refining, LLC over Clean Air Act and Emergency Planning and Community Right-To-Know Act violations at its oil refining facility on Komohana Street in Kapolei, Hawaii. The facility will pay a $176,899 penalty and implement changes to improve safety and reduce the risk of accidental chemical releases. In March 2016, EPA inspectors found violations of the Clean Air Act's chemical accident prevention requirements under the facility's Risk Management Plan (RMP), as well as the Emergency Planning and Community Right-To-Know Act (EPCRA). Under the settlement, in addition to paying a penalty, Par Hawaii Refinery will complete a set of compliance tasks to ensure appropriate equipment operating conditions. Par Hawaii must certify completion of all tasks before December 2023.

Civil Enforcement Actions and Settlements—Water Quality

•December 21, 2021 - The United States and Commonwealth of Pennsylvania, Department of Environmental Protection (DEP), filed a civil lawsuit against the Bucks County Water and Sewer Authority (Authority), alleging violations of the federal Clean Water Act and Pennsylvania Clean Steams Law. The violations primarily consist of sanitary sewer overflows—typically in the form of wastewater overflowing from manholes—and operation and maintenance violations under its state-issued permits. At the same time the civil suit was filed, the United States and Commonwealth of Pennsylvania also filed a proposed consent decree that would resolve the lawsuit subject to the district court's approval. The Authority will pay a $450,000 penalty and will be obligated to devote substantial resources to evaluate and upgrade its sewer systems as part of the decree. The Authority owns and operates hundreds of miles of sewer pipes and associated treatment plants and wastewater collection and conveyance systems, largely situated in Bucks County. The Authority's service areas have historically suffered from sanitary sewer overflows, including over 100 that have occurred in Plumstead Township since 2014. In that timeframe, multiple overflows have also occurred in Bensalem, Richland, Doylestown Borough, Middletown, Upper Dublin and New Hope/Solebury. Along with the financial penalty, the Authority has agreed to evaluate its collection system and adopt extensive measures to ensure compliance with the federal and state requirements. These include monitoring water flow; modelling the collection system; conducting inflow and infiltration evaluations; identifying and remedying hydraulic capacity limitations; addressing illegal sewer connections; and improving its overall operation and maintenance program.

•December 28, 2021 - EPA has issued three emergency orders under the Safe Drinking Water Act to different mobile home park public water systems located on the Torres Martinez Desert Cahuilla Indian Tribe's Reservation in California. The orders require the owners of Mora Mobile Home Park, Valladares Mobile Home Park, and Toledo Mobile Home Park to comply with federal drinking water requirements and to identify and correct problems with their drinking water systems that present a danger to residents. Under the terms of the agency's emergency orders, the owners of the Mora Mobile Home Park, Valladares Mobile Home Park, and Toledo Mobile Home Park water systems are required to: 1) Inform all residents of EPA's sampling that identified high levels of arsenic in the systems' drinking water and instruct all residents to immediately stop consuming the drinking water; 2) Provide at least one gallon of drinking water per person per day at no cost for every individual served by the system; 3) Submit a long-term compliance plan for EPA approval; and 4) Properly monitor the systems' water and report findings to the EPA.

• January 6, 2022—EPA announced that Gardner-Gibson, Inc. has paid a $650,000 penalty to resolve violations of the federal Clean Water Act related to the release of 60,000 gallons of hot, liquid asphalt from its Gardner-Fields, Inc. facility in Tacoma. Washington. EPA cited the company for the release of petroleum products and for significant violations of the Clean Water Act's Spill Prevention, Control, and Countermeasures requirements discovered during follow-up inspections at the facility. The $650,000 penalty was deposited into the Oil Spill Liability Trust Fund, a fund used by federal agencies to respond to discharges of oil and hazardous substances. The requirements apply to all facilities where a potential spill could reach waters of the United States and that maintain above-ground oil storage capacity of greater than 1,320 gallons of oil or total below-ground storage capacity of greater than 42,000 gallons of oil. When EPA inspected the facility, total storage capacity was 4,234,275 gallons.

• January 12, 2022 - West Penn Power of Greensburg, Pennsylvania will pay a $610,000 penalty under a settlement to resolve water discharge violations at two coal ash impoundment landfills in southwestern Pennsylvania. According to the settlement, West Penn Power exceeded boron limits in discharges from the Mingo Landfill in Union Township, Washington County, and Springdale Landfill in Frazer Township, Allegheny County. Along with the penalty, the consent decree with EPA and PADEP requires West Penn Power to construct new gravity pipelines to new outfall locations in a new receiving waters for each landfill (Peters Creek for the Mingo pipeline and the Allegheny River for the Springdale pipeline). West Penn will also be required to collect data on instream boron levels in Peters Creek. The settlement addresses alleged violations of the federal Clean Water Act and Pennsylvania Clean Streams Law that threaten to degrade receiving streams, impact public health, and harm aquatic life.

• January 18, 2022—EPA is recognizing Lebanon, New Hampshire for completely eliminating all of its Combined Sewer Overflow (CSO) outfalls, therefore eliminating the need for the Consent Decree established between EPA and the City in 2009. CSO outfalls discharge a combination of wastewater and stormwater to nearby surface waters when the combined sewer system does not have the capacity to transmit all the flow of wastewater and stormwater to the treatment plant. On November 19, 2021, the U.S. District Court for the District of New Hampshire terminated the Consent Decree between the United States, the State of New Hampshire, and the City of Lebanon because the City satisfied the prerequisites for termination by eliminating all its CSO outfalls.

• January 19, 2022—EPA and Barber Valley Development, Inc. have settled a case the agency brought after the company illegally discharged sand, gravel, and rocks into wetlands adjacent to Council Spring Creek in Boise. In EPA orders issued in May and June 2021, EPA alleged the company failed to apply to the U.S. Army Corps of Engineers for a Clean Water Act permit for flood control work it was conducting on a transmission line corridor owned by Idaho Power. Council Spring Creek and its wetlands are connected to and provide flows to the Boise River. Barber Valley agreed to remove the unauthorized fill material, restore the site, and enhance important forested wetland habitat adjacent to the Boise River and Alta Harris Creek, and to pay a $7500 penalty. This work will support diverse and abundant wildlife, such as raptors, small mammals, deer, coyote, elk, and possibly the endangered yellow-billed cuckoo which may use the Snake River Valley for breeding purposes. The restoration work at the site and at the forested wetland will be completed by December 2022.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

• January 10, 2022 - EPA issued an Emergency Unilateral Administrative Order (Order) under Section 7003 of the Resource Conservation and Recovery Act (RCRA) to TAV Holdings, Inc. (TAV) located at 3311 Empire Blvd., SW. TAV claims to utilize separation technology to recover metals from auto shredder residue and other waste materials. TAV is located in an overburdened community and is adjacent to a school serving grades 6-8. The Order will require TAV and the property owners to cease activities that may result in releases of hazardous and solid wastes to the environment, and to take immediate steps to ensure that the facility is operating in a safe manner and in compliance with applicable regula-

tions. Some of these steps required to be taken under the Order include site security measures, containment of on-site material, and implementation of suitable storage, operations, and disposal plans. TAV will also be required to submit weekly updates to EPA. Separate from the Order, EPA has initiated an investigation into potential off-site contamination, which will include sampling soil and sediment downstream from the facility. This information will be used to evaluate potential off-site impacts and next steps.

Indictments, Sanctions, and Sentencing

•December 22, 2021 - Taylor Energy Company LLC (Taylor Energy), a Louisiana oil and gas company, has agreed to turn over all its remaining assets to the United States upon liquidation to resolve its liability for the oil spill at its former Gulf of Mexico offshore oil production facility—the source of the longest-running oil spill in U.S. history, ongoing since 2004. Under the proposed consent decree, Taylor Energy will transfer to the Department of the Interior (DOI) a $432 million trust fund dedicated to plugging the subsea oil wells, permanently decommissioning the facility, and remediating contaminated soil. The consent decree further requires Taylor Energy to pay over $43 million for civil penalties, removal costs and natural resource damages (NRD). The State of Louisiana is a co-trustee for natural resources impacted by the spill and the NRD money is a joint recovery by the federal and state trustees. Under the settlement, Taylor Energy will pay over $43 million—all of the company's available remaining assets—allocated as follows: $15 million as a civil penalty, $16.5 million for NRD, and over $12 million for Coast Guard removal costs. Likewise, Taylor Energy may not interfere in any way with the Coast Guard's oil containment and removal actions. Taylor Energy will turn over to DOI and the Coast Guard all documents (including data, studies, reports, etc.) relating to the site to assist in the decommissioning and response efforts. The settlement also requires the company to dismiss three lawsuits it filed against the United States, including two cases in the Eastern District of Louisiana.

•January 11, 2022 - Princess Cruise Lines Ltd. (Princess) has pleaded guilty to a second violation of probation imposed as a result of its 2017 criminal conviction for environmental crimes because it failed to establish and maintain an independent internal investigative office. Under the terms of a plea agreement, Princess was ordered to pay an additional $1 million criminal fine and required to undertake remedial measures to ensure that it and its parent Carnival Cruise Lines & plc establish and maintain the independent internal investigative office known as the Incident Analysis Group (IAG). Princess was convicted and sentenced in April 2017 and fined $40 million after pleading guilty to felony charges stemming from its deliberate dumping of oil-contaminated waste from one of its vessels and intentional acts to cover it up. Beginning with the first year of probation, there have been repeated findings that the Company's internal investigation program was and is inadequate. In November 2021, the Office of Probation issued a petition to revoke probation after adverse findings by the CAM and TPA. Failure to meet deadlines in the plea agreement will initially subject the defendant to fines of $100,000 per day, and $500,000 per day after 10 days.

•January 14, 2022 - Steven Michael Braithwaite, Adam Thomas Braithwaite and their company Nebraska Railcar Cleaning Services LLC (NRCS) were sentenced in Omaha, Nebraska, for willful violations of worker safety standards that resulted in two worker deaths, knowing violations of the Resource Conservation and Recovery Act (RCRA) involving hazardous waste and knowing endangerment to others, knowing submission of false documents to the Occupational Safety and Health Administration (OSHA) and perjury. Steven Braithwaite will serve 30 months in prison and pay $100,000 in restitution for his role in the offenses. Adam Braithwaite will serve one year and one day in prison and pay $100,000 in restitution. In addition, NRCS and the individual defendants must serve five years of probation and pay a $21,000 fine. According to court documents, on April 14, 2015, NRCS workers were inside and on top of a rail tanker car, removing petroleum residue from inside the tank, when flammable gases in the tanker car ignited and exploded. Two workers died and another was injured in the blast. NRCS took the job after receiving an inquiry from one of its customers in January 2015. The inquiry included a Safety Data Sheet (SDS) for the product in the railcar, describing it as "natural gasoline" with a "severe" class four flammability rat-

ing (the highest rating). As the defendants admitted in their plea agreements, prior to the explosion, OSHA officials conducted regulatory inspections of NRCS, and cited NRCS and its principals for violating OSHA safety regulations concerning confined space entries.
(Andre Monette)

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RECENT FEDERAL DECISIONS

NINTH CIRCUIT GRANTS CLEAN WATER ACT PETITION FOR REVIEW AND REMANDS NPDES PERMIT

Food & Water Watch v. U.S. Environmental Protection Agency, 20 F.4th 506 (9th Cir. 2021).

The U.S. Court of Appeals for the Ninth Circuit recently granted a petition to review a National Pollutant Discharge Elimination System (NPDES) permit (Permit) issued by the U.S. Environmental Protection Agency (EPA) to govern Concentrated Animal Feeding Operations (CAFOs) in Idaho under the federal Clean Water Act (CWA). The Court of Appeals determined the Permit was arbitrary, capricious, and in violation of the law, and remanded the Permit to the EPA.

Factual and Procedural Background

On May 13, 2020, EPA issued a general NPDES permit for CAFOs in Idaho, with an effective date of June 15, 2020. The Permit was based on findings that improper management of CAFO waste had resulted in serious water quality issues in Idaho. The Permit prohibited discharges from production areas unless they were designed, constructed, operated and maintained to contain all manure, litter, process wastewater and the runoff and direct precipitation from the 25-year, 24-hour storm event for the location of the CAFO. It required CAFOs to perform daily inspections of the production areas. The Permit also prohibited all discharges from land application areas during dry weather. Dry weather discharges from land application areas were known to occur during irrigation of fertilized CAFO fields. The Permit, however, contained no monitoring provisions for dry weather discharges from land-application areas.

Petitioners Food & Water Watch and Snake River Waterkeeper argued that issuance of the Permit was arbitrary, capricious, and in violation of the law because it did not require monitoring that would ensure detection of unpermitted discharges, and thus lacked sufficient monitoring provisions necessary to ensure compliance with its discharge limitations. EPA argued the monitoring provisions were sufficient, and that the petition was untimely.

The Court of Appeals' Decision

Timeliness

The court first considered and rejected EPA's argument that the petition was untimely. EPA argued the petition was untimely because the Permit and incorporated existing regulations adopted in 2003, and thus the petition needed to be brought within 120 days of that rule's issuance. The court disagreed, holding that the petitioners were challenging the monitoring requirements of the Permit itself, and not any provision of the 2003 rule. The petition was determined to be timely.

Production Areas

The court next considered whether the Permit contained sufficient monitoring provisions for discharges from production areas. Permits must assure compliance with permit limitations by including requirements to monitor the:

> . . .mass (or other measurement specified in the permit) for each pollutant limited in the permit, the volume of effluent discharged from each outfall, and other measurements as appropriate.

EPA argued the Permit contained sufficient monitoring requirements to ensure compliance, and that the court must defer to its expertise.

The court reasoned that the Permit's inspections requirements were sufficient to ensure compliance with the limitation on above-ground discharges from production areas. However, the court found that the Permit contained no monitoring provisions for underground discharges from production areas, despite the record before the EPA showing that leaky containment structures are sources of groundwater pollution and groundwater flow from agriculture is a primary contributor of nitrate in surface water. The court

noted that the EPA had rejected a proposal to include a requirement to monitor underground discharges in the 2003 rule because it believed that site-specific variables meant that requirements in local permits, rather than uniform national requirements, were the best means to address underground discharges. The court concluded there was no way to ensure that production areas complied with the Permit's prohibition on underground discharges because the Permit failed to include a requirement that CAFOs monitor waste containment structures for underground discharges. Thus, the court held that the Permit failed to ensure that its permittees monitored discharges in a manner sufficient to determine whether they were in compliance with the Permit.

Land-Application Areas

Finally, the court considered whether the Permit contained sufficient monitoring provisions for land application areas. The record before EPA showed that such discharges can occur during irrigation of fertilized CAFO fields. The court noted that the Permit assumed irrigation-produced runoff of pollutants would never occur from land application areas because the Permit required CAFOs to implement a nutrient management plan providing for the application of manure, litter, and process wastewater at agronomic rates. The court found that the record did not support this assumption, and concluded that, without monitoring, there was no way to ensure a CAFO complied with the Permit's dry weather zero-discharge requirement for land application areas. Thus, the court held that the Permit failed to ensure that its permittees monitored discharges in a manner sufficient to determine whether they are in compliance with the Permit.

Conclusion and Implications

The Ninth Circuit Court of Appeals granted the petition and remanded the Permit to the EPA for further proceedings, holding that the issuance of the Permit was arbitrary, capricious, and a violation of law because the Permit did not require monitoring of underground discharges from production areas and dry weather discharges from land-application areas that would ensure compliance with its effluent limitations. This case demonstrates that NPDES permits must contain monitoring provisions sufficient to ensure compliance with their terms. Where a permit contains no requirements to monitor discharges expressly prohibited by the permit, and the record before the EPA shows that such discharges occur and cause pollutants to enter waters of the United States, the issuance of the permit will likely be found to be arbitrary, capricious, and in violation of law. The court's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2021/12/16/20-71554.pdf (David Lloyd, Rebecca Andrews)

SECOND CIRCUIT FINDS AGENCY'S CLEARLY EXPRESSED INTENTION TO READOPT REGULATIONS FOLLOWING WITHDRAWAL IS NOT SUFFICIENT TO AVOID MOOTING OF LAWSUIT

Natural Resources Defense Council v. U.S. Environmental Protection Agency, 19 F.4th 177 (2nd Cir. 2021).

The Freedom of Information Act's (FOIA) disclosure mandate is not absolute—its exemption number 5 "excepts from disclosure 'inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The predecisional exemption is included within exemption number 5, protecting documentation of an agency's internal decision-making process. But is its scope limited to documentation of formal agency policy adoption, or does it extend to encompass an agency's day-to-day operational decisions and ongoing policy reconsideration?

Background

In 2017, the Natural Resources Defense Council (NRDC) sought from the U.S. Environmental Pro-

tection Agency (EPA) copies of documents regarding the activities of Dr. Nancy Beck, then the Deputy Assistant Administrator of the EPA's Office of Chemical Safety and Pollution Prevention, seeking "information about Beck's role in policymaking under the Toxic Substances Control Act (TSCA) and related pesticide matters."

EPA having failed to meet the statutory deadline to produce the documents, NRDC sued to compel disclosure. EPA then responded, identifying 1,350 responsive records and producing 277, withholding the rest on the basis of exemptions from disclosure under the Freedom of Information Act. The parties then agreed that the EPA would prepare a "*Vaughn* Index" describing 120 of the undisclosed records and justifying the EPA's nondisclosure decisions.

The U.S. District Court ordered EPA to produce 28 of the documents identified on the *Vaughn* Index; EPA's appeal challenges the district court's decision that the deliberative process privilege does not apply to 22 of the 28 documents ordered to be disclosed.

The Second Circuit's Decision

Eighteen of the documents in dispute consisted of "messaging records" that:

> . . .reflect[] internal deliberations by [agency] staff about how the agency should communicate its policies to people outside the agency.

The Deliberative Process Privilege

At issue in the appeal was whether the deliberative process privilege shields from disclosure records relating to an agency's decision about how to communicate its policies to people outside the agency, and, if the privilege can apply, whether it makes a difference if the messaging record relates to a finalized policy or to one not yet conclusively determined.

The court pointed out that:

> FOIA mandates the disclosure of documents held by a federal agency unless the documents fall within one of nine enumerated exemptions. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021); 5 U.S.C. § 552.

The deliberative process privilege:

> . . .shields from disclosure 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' *Ibid.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

Its scope is limited to "predecisional, deliberative documents." *Id.* at 785. Are documents reflecting the agency's process of deciding how to communicate its adopted policies to the public predecisional? The Second Circuit concluded they may be. NRDC conceded that the contested documents were generated before EPA had decided how to communicate its policies and were "'predecisional' with respect to those communications decisions." The Court of Apppeals found that "an agency's communications decisions necessarily implicate the agency's policies and must be informed by those policies." Communications:

> . . .decisions involve 'the formulation or exercise of policy-oriented judgment . . . even when [the] underlying decision or policy has already been established by the agency.'

On that basis, documents related to the formulation of communication decisions are predecisional and protected from disclosure under FOIA, but only to the extent that the records concern the "form and content" of communication decisions. Applying these principles, 11 of the documents ordered to be disclosed by the District Court were actually predecisional and shielded from disclosure.

Turning to the remaining contested documents, descried as "briefing documents," *i.e.*, records created to brief senior agency staff about various topics within the agency's purview, the Court of Appeals found that:

> . . .[r]equiring that a record 'relate to a specific decision facing the agency,' … places an unduly restrictive gloss on the deliberative process privilege's predecisional requirement.

The records at issue were produced to:

> . . .provid[e] [a] senior manager with information and supporting documentation in response to her questions and comments on the role

> of epidemiology data in [the agency's] human health risk assessments.

The court found that the scope of the privilege should encompass documentation of agency's "continuing process of examining their policies." Thus, the court held that:

> . . .a record is predecisional if it relates to a specific decision *or a specific decisionmaking process* and was generated before the conclusion of that decision or process.

Applying this holding, the court decided that the *Vaughn* Index descriptions were insufficiently detailed to assess whether they had been created as part of an identifiable, ongoing decision-making process.

Conclusion and Implications

The Second Circuit's broad interpretation of the predecisional exemption from the Freedom of Information Act's disclosure mandate recognizes the importance of protecting the free flow of intra-agency communications, and that day-to-day operational decisions on matters such as communication are inextricably bound up with substantive policy judgments. However, the opinion nonetheless puts the onus on the agency to clearly identify the actual decision-making process that led to the creation of the documents sought to be shielded from disclosure. The Second Circuit's November 2021 opinion is available online at: https://www.law.berkeley.edu/wp-content/uploads/2021/03/2021-12-02_IdExFOIA_NEF81_Plaintiff-AppelleeNtcOfSupplementalAuthority.pdf. (Deborah Quick)

TENTH CIRCUIT DECISION REINFORCES FEDERAL CLEAN AIR ACT CITIZEN SUITS AGAINST MOBILE SOURCES

Utah Physicians for a Healthy Environment v. Diesel Power Gear, LLC, et al., ___F.4th___, Case No. 20-4043 (10th Cir. Dec. 28, 2021).

In its recent decision in *Utah Physicians for a Healthy Environment (UPHE) v. Diesel Power Gear, LLC, et al.*, a matter involving the hosts of Discovery Channel's popular show "Diesel Brothers," the Tenth Circuit Court of Appeals unanimously upheld for the first time a successful citizen suit under the federal Clean Air Act (CAA) targeting mobile source emissions. While typically citizen suits under the CAA have only been successful against stationary sources, in *UPHE* the Tenth Circuit found that citizens and citizen groups could effectively demonstrate Article III standing to challenge mobile sources' violations of the CAA.

Background

In 2017, Utah Physicians for a Healthy Environment (UPHE), a nonprofit organization of Utah healthcare professionals and concerned citizens, filed suit in the U.S. District Court for Utah against a group of Utah companies and individuals involved with the Discovery Channel show "Diesel Brothers." The "Diesel Brothers" defendants bought and made custom modifications to large diesel trucks for resale and eventually featured these custom built trucks on its Discovery Channel show. UPHE claimed that the defendants violated the CAA and Utah's State Implementation Plan (SIP) by tampering with emissions-control devices and installing "defeat devices" on various vehicles that would allow the vehicles to evade emissions standards. UPHE further alleged these violations resulted in "the excessive emission of harmful pollutants from diesel vehicles" into the air shed of the Wasatch Front, an area in northern Utah with some of the most polluted air in the country.

The U.S. District Court found in favor of UPHE, ordering the defendants to pay over $760,000 in civil penalties and granting injunctive relief enjoining the defendants from installing defeat devices and owning or selling any vehicles with inoperable emissions control systems.

The Tenth Circuit's Decision

Article III Standing Argument on Appeal

On appeal, the Diesel Brothers defendants challenged UPHE's Article III and statutory standing, the District Court's inclusion of certain kinds of transactions in its tabulation of violations, and the District Court's penalty analysis.

To demonstrate Article III standing, UPHE must establish it has suffered an injury in fact that is: 1) concrete and particularized; 2) fairly traceable to the challenged action of the defendant; and 3) able to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, defendants challenged the second prong, arguing that the District Court erroneously determined that UPHE's injury was fairly traceable to defendants' violations by using an incorrect causation standard. The District Court found causation because defendants' violations merely contributed to the pollution in the Wasatch Front.

Defendants contended that in the context of air pollution, causation can only be met where a violation "meaningfully contributes" to the pollution. Thus, defendants argued that UPHE needed to show that its injury is substantially linked to defendants' misconduct beyond merely showing defendants contributed to the pollution. Defendants emphasized that there are a substantial number of third parties whose independent decisions collectively effected the pollution in the Wasatch Front. And, only a few dozen of defendants' trucks were briefly driven in Utah over the course of five years without required emissions control systems resulting in just 0.02 tons of pollutants, compared to the millions of tons of pollutants emitted from other sources like oil refineries and wildfires in the area.

Rejection of the Meaningful Contribution Standard

The Tenth Circuit rejected defendants' meaningful contribution standard. The Court of Appeals pointed out that the "meaningful contribution" standard first appeared in the U.S. Supreme Court decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). But the Tenth Circuit noted that the meaningful contribution standard in *Massachusetts v. EPA* applied to greenhouse gas emissions and could not be compared to the emissions of "noxious gases and harm to those who breathe the air into which the gases are emitted." Further, the court sided against the defendants for public policy reasons. According to the court, adopting the "meaningful contribution" standard would require "major surgery on the CAA's citizen-suit provision." Highlighting the citizen suit provision's purpose of increasing public enforcement where the government lacks resources, the court explained that without such a provision, the government could only realistically pursue the worst offenders. Citizens enforcing penalties on just a few motor vehicles, by contrast, would be a rare occurrence.

Judicial Precedent

Finally, the Court of Appeals pointed to precedent to support its opinion. The court drew attention to numerous cases in other Circuits in which plaintiffs were granted standing to enforce the provisions of the CAA or Clean Water Act after being injured by various pollutants. The court specifically cited to *Sierra Club v. EPA*, 964 F.3d 882, 887–88 (10th Cir. 2020) as possible "precedential mandate." In *Sierra Club*, the Tenth Circuit confirmed the Sierra Club's standing to sue the EPA to compel it to object to a CAA permit issued by Utah for an industrial plant merely because the plant's emissions contributed to air pollution, despite the existence of other third party polluters.

Conclusion and Implications

Although historically only the government has successfully pursued penalties against mobile sources for violations of the Clean Air Act, this Tenth Circuit Court of Appeals' decision opens the door for and may possibly encourage more citizen suits against mobile sources in the future. While the court's decision is a partial win for UPHE and others in its position, the court notably determined that standing may not exist where plaintiffs pursue claims against polluters that are "too distant." Thus, UPHE does not have standing to pursue violations for trucks that were driven out of the state of Utah. The court further determined that UPHE could not pursue penalties for defeat devices that were marketed but not actually sold. Finally, the Court of Appeals also vacated the District Court's determination of certain

penalties, finding that such penalties were too high, and remanded for reconsideration. The Tenth Circuit's opinion is available online at: https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110624784.pdf.
(Monica Browner, Hina Gupta)

NINTH CIRCUIT REVERSES DENIAL OF COMPANY'S REQUEST TO INTERVENE BY RIGHT IN CHALLENGE TO BLM'S ISSUANCE OF OIL LEASES

Western Watersheds Project v. Haaland, ___F.4th___, Case. No. 20-35780 (9th Cir. Jan. 5, 2022).

A three judge panel of the Ninth Circuit Court of Appeals reversed and remanded a decision by the U.S. District Court for the District Wyoming to deny an energy company's motion to intervene by right under Federal Rule of Civil Procedure Rule 24 (a). The litigation at issue involved an effort to invalidate oil leases issued under the Trump administration that plaintiffs argued violated an Obama-era policy disfavoring the issuance of such leases in sage-grouse habitat. The Ninth Circuit rejected the District Court's conclusions that the energy company's motion to intervene was untimely and that the company's interests would be adequately represented by existing parties, namely a trade association representing approximately 300 similar energy companies in the action. The case provides a helpful analysis in the land sue context of the factors involved in determining whether to grant a motion to intervene as of right under Rule 24 (a).

Factual and Procedural Background

In 2010 the U.S. Fish and Wildlife Service (FWS) also concluded that the greater sage-grouse warranted protection under the federal Endangered Species Act. A related policy required the Bureau of Land Management (BLM) to prioritize oil and gas leasing outside of sage-grouse habitats. After the 2016 presidential election, the federal government's land-use policies shifted. Under the new administration, the BLM accelerated oil and gas leasing on ecologically significant habitats, including those identified as sage-grouse habitat. Pursuant to these changed policies, the BLM auctioned oil and gas leases in Wyoming in March of 2018. Appellant, a national energy company, was the high bidder on seven leases for which it paid over $8.4 million.

Appellees, two environmental organizations sued BLM in 2018 to challenge the oil and gas leases in identified sage-grouse habitats. All-told, appellees challenged over 2,200 leases covering more than 2.39 million acres across multiple states.

After appellees filed their complaint, a regional trade association representing more than 300 member companies, including appellant, moved to intervene as defendant. The District Court granted the trade association's motion to intervene along with a similar motion filed by the State of Wyoming.

In December of 2018, the District Court issued a case management order dividing the litigation into discrete phases based on specific lease sales. In "Phase One" the District Court agreed to consider appellees' challenge to a subset of lease sales, including the leases acquired by appellant in 2018, and found that BLM improperly restricted public involvement in Phase One lease sales. As a result, the District Court issued a vacatur vacating these sales, but stayed its vacatur pending appeal.

The Motion to Intervene

A little over two weeks after the District Court issued its stay, appellant moved to intervene for the purpose of appealing the Phase One decision, and participating in any subsequent phases in which its remaining leases were to be considered.

The District Court denied appellant's motion to intervene in the Phase One or other stages. The District Court concluded that appellant was not a required party under Rule 19 of the Federal Rules of Civil Procedure because its "interests were adequately represented by an existing party in the suit" namely the trade association. The court also concluded that appellant was not entitled to intervene as of right un-

der Rule 24(a) because appellant was adequately represented by an existing party, and that its request for intervention was untimely for three reasons: 1) Phase One was nearly complete, 2) appellant's involvement would introduce new arguments and issues on appeal thus prejudicing existing parties, and 3) appellant was supposedly aware of the lawsuit and appellees' effort to vacate the Phase One leases but waited years to move to intervene.

Intervention under Rule 24(a)

The Ninth Circuit's Decision

The Ninth Circuit began by noting that a non-party is entitled to "intervene as of right" under Rule 24(a) when it: 1) timely moves to intervene, 2) has a significant protectable interest related to the subject of the action, 3) may have that interest impaired by the disposition of the action, and 4) will not be adequately represented by existing parties to the action. An applicant seeking intervention bears the burden of showing these four elements are met, however a Circuit Court interprets such requirements "broadly in favor of intervention.)" The court's decision focused on the timeliness and adequate representation by existing parties factors.

Timeliness

Regarding timeliness, the court first analyzed the stage of proceedings at which point appellant sought to intervene. On this point the court recognized that although "delay can strongly weigh against intervention… the mere lapse of time, without more, is not necessarily a bar to intervention." The general rule is that a post judgment motion to intervene is timely if filed within the time allowed for filing an appeal. Appellant filed its motion for intervention within the time to file a notice of appeal from the Phase One decision, and for that reason the court found that appellant's delay in filing a motion to intervene did not weigh against intervention into Phase One. Regarding the timeliness of appellant's motion to intervene in the remaining phases of litigation, the court found that the length of appellant's delay did not preclude intervention.

The court also looked to the prejudice that intervention by appellant would cause to existing parties, which is "the most important consideration in deciding whether a motion for intervention is untimely." With respect to Phase One, the court rejected the District Court's conclusion that appellees would face prejudice because intervention may require "additional briefing on appeal, including possible additional arguments not presented to or ruled upon by the District Court." The court noted:

> . . .that is a poor reason to deny intervention, given the possibility that [appellant]'s additional arguments could prove persuasive. That [appellant] might raise new, legitimate arguments is a reason to grant intervention, not deny it.

Regarding the subsequent phases, the court similarly found that the parties in the litigation would not suffer sufficient prejudice to warrant denial of intervention.

The court also considered the "length of, and explanation for, any delay in seeking intervention." Here, the Court of Appeals rejected the District Court's conclusion that appellant was aware of the lawsuit and that its leases were at issue from the date that the litigation was filed. The court highlighted uncontested evidence in the record, that the District Court apparently overlooked, indicating that appellant had no idea that its leases were involved in the instant litigation. The court recognized that although appellant intervened two years after the litigation had begun, it's motion to intervene actually came just three months after appellant discovered that its leases were involved in the litigation.

The Court of Appeals concluded under the totality of the circumstances that the District Court abused its discretion in finding that appellant's motion for intervention was untimely.

Adequacy of Representation

Under Rule 24 (a), an intervening party must show that its "interests will not be adequately represented by existing parties." The burden in making this showing of inadequate representation "is minimal and satisfied if the appellant can demonstrate that representation of its interest may be inadequate." To evaluate adequacy of representation, courts look to three factors: 1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments, 2) whether the present party is capable and willing to make such argu-

ments, and 3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

The court conceded that appellant and the existing trade association party both had the objective of upholding BLM's lease sales. This gave rise to a presumption that existing parties adequately represented appellant. To rebut this presumption appellant needed to make a "compelling showing" of inadequate representation. The court concluded that appellant had made this showing. First, the trade association party did not seek to raise several colorable arguments that appellant sought to raise. The trade association was also only given ten pages for its Phase One merits brief, despite the fact that there were 932 leases at issue. As a result, the court concluded that the trade association could not adequately represent the more specific interests that the appellant wanted to raise in the action. Appellant, as a party with legally protected contract rights with the federal government, would offer a necessary element to the proceeding that other parties would neglect. Here, appellant had a substantial due process interest in the outcome of the litigation by virtue of its contract with the BLM. Although the trade association intervened with the express purpose of representing companies like the appellant, it was charged with representing 300 such companies engaged in all aspects of oil and gas production. It is possible that appellant's more narrow interests would differ from those of the trade association.

The Court of Appeals concluded that appellant had satisfied the requirements for intervention as of right under Rule 24(a), and reversed and remanded the District Court's decision.

Conclusion and Implications

The *Western Watersheds Project* case provides a helpful overview in the land use context of the factors involved in determining whether a party is entitled to intervene in a federal action as of right under Rule 24(a). A copy of the court's opinion can be found online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/01/05/20-35780.pdf.
(Travis Brooks)

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