U.S. Climate Chart E-mail Updates
(in reverse chronological order)

December 7, 2021, Update #153

FEATURED CASE

Ninth Circuit Rejected NEPA Challenge to Air Cargo Facility at San Bernardino Airport; Dissent Said Project Disproportionately Impacts Communities of Color

The Ninth Circuit Court of Appeals denied two petitions seeking review of the Federal Aviation Administration's (FAA's) environmental review for the construction and operation of an air cargo facility at the San Bernardino International Airport in southern California. One petition was filed by Center for Community Action and Environmental Justice, Sierra Club, Teamsters Local 1932, and two individuals. The other petition was filed by the State of California. The majority rejected the petitioners' contentions that the FAA's geographical boundaries for study areas resulted in a failure to "appropriately capture the true environmental impacts of the project" such as air quality and socioeconomic impacts. The majority also was not persuaded that the analysis of cumulative impacts was deficient, that the FAA's calculations of truck trips associated with the project were erroneous, or that the FAA's review under the National Environmental Policy Act (NEPA) was required to "meaningfully address" issued raised in the California Environmental Quality Act (CEQA) review, which California argued had found that the project could result in significant impacts on air quality, greenhouse gas emissions, and noise. With respect to greenhouse gases, the majority found that California had not refuted the NEPA environmental assessment's rationale for finding no significant impact, which noted that the project's greenhouse gas emissions would "comprise … less than 1 percent" of U.S. and global emissions. The majority said the rationale was not refuted by the CEQA analysis's "cursory assumption" that a significant impact would result because the South Coast Air Quality Management District regional emissions thresholds would be exceeded, and that California had not articulated what impact might result from emissions exceeding this threshold. In addition, the Ninth Circuit rejected the petitioners' assertion that the FAA failed to consider the project's ability to meet state and federal air standards, including California's greenhouse gas emission standards. The majority noted that the CEQA analysis had itself found no conflict with state plans, policies, or regulations aimed at reducing greenhouse gas emissions. Judge Rawlinson dissented, writing that the case "reeks of environmental racism," and that the FAA's determination that the project would have no significant environmental impact "does not pass muster under NEPA." She wrote that "[o]ur children and grandchildren are looking to us to stem this tide of pollution that is contributing to increasingly disastrous climate change" and that "[t]his emissions-spewing facility that disproportionately impacts communities of color and was not properly vetted is a good place to start." *Center for Community Action v. Federal Aviation Administration*, No. 20-70272 (9th Cir. Nov. 18, 2021)

DECISIONS AND SETTLEMENTS

D.C. Circuit Vacated Greenhouse Gas and Fuel Economy Standards for Truck Trailers

In a challenge to 2016 greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles brought by the Truck Trailer Manufacturers Association, the D.C. Circuit Court of Appeals held that neither the U.S. Environmental Protection Agency (EPA) nor the National Highway Traffic Safety Administration (NHTSA) had authority to adopt standards that apply to trailers. With respect to the greenhouse gas emissions standards, the court concluded that trailers are not "motor vehicles" under Section 202 of the Clean Air Act because trailers are not "self-propelled." EPA therefore could not rely on Section 202(a)(1) to set emission standards for trailers and require trailer manufacturers to comply with the standards. With respect to the fuel efficiency standards, the court rejected NHTSA's argument that the term "vehicles" in the Energy Independence and Security Act of 2007 provision authorizing NHTSA to set fuel economy standards for "commercial medium- and heavy-duty on-highway vehicles" could reasonably be interpreted to include trailers. The majority determined that "[b]ecause a trailer uses no fuel, it doesn't have fuel economy" and that in the statutory context, "nothing is a vehicle unless it has fuel economy." Judge Millett dissented from the majority's conclusion that NHTSA lacked authority to issue fuel economy regulations that apply to commercial trailers. She wrote that NHTSA "acted well within its delegated regulatory authority in establishing fuel efficiency requirements for the trailer portion of tractor-trailers that regularly travel the Nation's highways." *Truck Trailer Manufacturers Association v. EPA*, No. 16-1430 (D.C. Cir. Nov. 12, 2021)

Environmental Groups Dropped Appeal of Decision that Rejected Greenhouse Gas/Climate Change Claims Regarding Utah Oil and Gas Leases

Environmental groups voluntarily dismissed their appeal of a December 2020 decision by a federal district court in Utah that rejected, in part, the groups' challenge to U.S. Bureau of Land Management (BLM) decisions to issue 59 oil and gas leases in northeast Utah. The district court found that BLM adequately considered greenhouse gas emissions and climate change impacts but remanded for additional analysis of alternatives. The federal defendants previously withdrew their appeal of the district court's decision. *Rocky Mountain Wild v. Bernhardt*, No. 21-4020 (10th Cir. Nov. 22, 2021)

Second Circuit Dismissed Challenges to Canceled Pipeline

The Second Circuit Court of Appeals granted the Federal Energy Regulatory Commission's (FERC's) motion to dismiss as moot petitions for review challenging the now-defunct Constitution Pipeline, which would have carried natural gas between Pennsylvania and New York. The developer canceled the project in 2020, and FERC's authorization for the pipeline lapsed in December 2020. The lawsuits that the Second Circuit found to be moot challenged FERC's certificate of public convenience and necessity for the project and also FERC's later determination that New York waived its water quality certification authority under Section 401 of the Clean Water Act. *Catskill Mountainkeeper, Inc. v. Federal Energy Regulatory Commission*, Nos. 16-345 (2d Cir. Nov. 18, 2021)

Jordan Cove LNG Terminal Developers Notified FERC They Would Not Proceed with Project

On November 1, 2021, the D.C. Circuit Court of Appeals remanded the record to FERC for consideration of whether to impose a stay of a pipeline certification authorization related to the Jordan Cove liquefied natural gas export terminal in Oregon. The D.C. Circuit took this step after the project's developers represented during oral argument that they were "reassessing" the project. On December 1, 2021, the developers notified FERC that they had decided not to move forward with the project due to concern "regarding their ability to obtain the necessary state permits." They asked FERC to vacate its authorizations. *Evans v. Federal Energy Regulatory Commission*, No. 20-1161 (D.C. Cir. Nov. 1, 2021)

Environmental Group Dropped Appeal of District Court Decision Upholding NEPA Review for New Mexico Oil and Gas Leases

On November 2, 2021, the Tenth Circuit Court of Appeals granted WildEarth Guardians' motion for voluntary dismissal of its appeal of a district court decision rejecting claims that BLM's sale of oil and gas leases in southeastern New Mexico did not comply with NEPA and other federal statutes. The district court upheld, among other things, BLM's analysis of cumulative climate change impacts and also found that use of the Social Cost of Carbon was not required. In June, the Tenth Circuit granted a motion by WildEarth Guardians and the federal defendants to abate the case to facilitate mediation of a potential resolution of the dispute. *WildEarth Guardians v. Haaland*, No. 20-2146 (10th Cir. Nov. 2, 2021)

Settlement Reached in Clean Air Act Citizen Suit Against Coal Mine Operators

Environmental groups and coal company defendants filed a joint motion to lodge a consent decree that would resolve the groups' citizen suit alleging that the companies violated the Clean Air Act by operating the West Elk coal mine without a Title V operating permit. The consent decree would require the defendants to flare emissions from the mine's ventilation boreholes in accordance with the Mine Safety and Health Administration Ventilation Plan for the mine until the Colorado Department of Public Health and Environment issues a final Title V permit. The defendants would also have to pay $135,000 to the plaintiffs' counsel for the costs of litigation. The plaintiffs cited both volatile organic compound and methane emissions as concerns during the litigation. *WildEarth Guardians v. Mountain Coal Co.*, No. 1:20-cv-1342 (D. Colo. Nov. 23, 2021)

Court Ordered Federal Defendants to Provide White House and Environmental Group Documents for Record in Challenge to Oil and Gas Leasing Pause

The federal district court for the Western District of Louisiana ordered federal defendants to complete the administrative record in a lawsuit brought by states challenging the Biden administration's pause on new offshore and onshore oil and gas leasing. The court found that the scope of actions challenged by the states included all canceled or postponed lease sales that followed President Biden's Executive Order 14008, including lease sales scheduled after the date of the complaint. The court ordered the federal defendants to provide all documents and materials directly or indirectly considered by agency decision-makers related to such lease sales, including documents and materials from the White House. In addition, the court required the

defendants to provide documents and materials related to environmental groups' involvement, including correspondence, text messages, phone calls, and other means of communication. The court said review of such items was "important … to determine whether there was improper influence, whether there was collusion, and/or whether the postponement or cancellation of these Lease Sales are pretextual." The court concluded that ruling on the plaintiff states' request for extra-record discovery would be premature until the administrative record was completed. The court gave the defendants 45 days to complete the record, and gave the states 30 days after the filing of the record to supplement or amend their motion for extra-record discovery. *Louisiana v. Biden*, No. 2:21-cv-00778 (W.D. La. Nov. 17, 2021)

Settlement Reached in Lawsuit Alleging Recycling Misrepresentations for Consumer Products

On November 15, 2021, The Last Beach Cleanup announced that it had reached a settlement with TerraCycle, Inc. and eight consumer product companies to resolve a lawsuit pending in the federal district court for the Northern District of California alleging that the companies' recycling claims were unlawful and deceptive. Last Beach Cleanup alleged, among other things, that plastic pollution contributes to global climate change and that the defendants advertised and marketed their products with an "unqualified representation" that their difficult-to-recycle plastic products were recyclable with TerraCycle, which the complaint said "prides itself on working with companies to offer free programs for consumers to recycle products that established municipal recycling programs are not capable of recycling." The complaint alleged that in practice "strict participation limits" prevented most consumers from participating in the free recycling programs, and also that it was "unclear" whether products accepted by the defendants were actually recycled. In the settlement agreement, Terracycle agreed to maintain records substantiating the validity of its recycling representations, including by developing and maintaining policies to ensure tracking of materials for recycling and by developing voluntary standards for third-party certifications and substantiations. TerraCycle also agreed not to license or permit its name to be used on labels or advertising of products without compliance with the substantiation requirements. In addition, TerraCycle may only license or permit its name to be used for products that are part of an "Unlimited" waste program for which no budget restrictions prevent TerraCycle from accepting all products. For products that are not part of an "Unlimited" program, TerraCycle must disclose the limits on the label or advertising. *Last Beach Cleanup v. Terracycle, Inc.*, No. 4:21-cv-06086 (N.D. Cal. Nov. 10, 2021)

Wisconsin Federal Court Barred Work on Transmission Line

The federal district court for the Western District of Wisconsin issued a "narrowly tailored" preliminary injunction in a lawsuit challenging a 101-mile transmission line extending from Iowa to Wisconsin. The plaintiffs allege, among other things, that the Rural Utilities Service did not adequately consider greenhouse gas emissions and climate impacts in its environmental impact statement (EIS). The court found that the plaintiffs established at least some likelihood of success on the merits of their arguments that the Utility Regional General Permit (URGP)—the only contested permit under which construction could currently proceed—was invalid, that the EIS defined the project's purpose and need too narrowly and therefore excluded alternatives such as solar energy and battery storage that would reduce the need for increased transfer capability,

and that the consideration of cumulative impacts was inadequate. The court also found that the plaintiffs established "real and irreparable impacts," that there would not be an adequate legal remedy to rectify those harms, and that the balance of equities favored an injunction. The court enjoined activities requiring permission under the URGP. The intervenor-defendants appealed the court's decision. *National Wildlife Refuge Association v. Rural Utilities Service*, No. 3:21-cv-00096 (W.D. Wis. Nov. 1, 2021)

Fish and Wildlife Service Agreed to Prepare Recovery Plan for Canada Lynx

The federal district court for the District of Montana dismissed a case challenging the U.S. Fish and Wildlife Service's (FWS's) decision to forgo recovery planning for the Canada lynx in the contiguous United States after the plaintiffs and the federal defendants agreed to a settlement pursuant to which the FWS will prepare a draft recovery plan by December 2023 and will finalize a final recovery plan within a year after publishing the draft plan. In their suit, the plaintiffs alleged that the December 2017 decision to forgo recovery planning based on the FWS's determination that the lynx in the contiguous United States were "recovered" and no longer threatened arbitrary and capricious and not in accordance with law. They asserted that deeming a species to be "recovered" was not a valid reason to forgo recovery planning and also that the recovery finding was "premature" and conflicted with best available science, which the plaintiffs said revealed threats to lynx, including increasing threats from climate change. The plaintiffs also alleged that the FWS failed to evaluate whether the lynx were recovered and no longer threatened in a "significant portion" of the species' range in the contiguous U.S. and that the FWS failed to properly identify and evaluate threats to the lynx within the "foreseeable future," which the FWS identified as 2050 but which the plaintiffs alleged extends to at least 2100. *Friends of the Wild Swan v. Haaland*, No. 9:20-cv-00173 (D. Mont. Nov. 1, 2021)

Transportation Company Settled Clean Air Act Citizen Suit, Agreed to Spend $1.8 Million to Transition to Electric Vehicles

The federal district court for the District of Connecticut entered a consent decree resolving a Clean Air Act citizen suit brought by Conservation Law Foundation against a transportation company that owned, managed, and operated a fleet of over 1,000 vehicles, including school buses, motor coaches, trolleys, shuttles, vans, and cars. The suit alleged that the company's vehicles idled unlawfully for extended periods of time, in violation of the Clean Air Act and the Connecticut State Implementation Plan. The consent decree's anti-idling requirements include requiring the company to review and update its anti-idling policy, to provide training to drivers, and to install automatic shut-off technology. The company must also spend $1.8 million over five years to advance its transition to zero emissions vehicles, including by purchasing at least five zero emissions buses. *Conservation Law Foundation v. DATTCO, Inc.*, No. 3:20-cv-00234 (D. Conn. Oct. 14, 2021)

Washington Appellate Court Said Attorney General Documents Were Exempt from Disclosure

The Washington Court of Appeals affirmed the dismissal of Energy Policy Advocates' complaint that sought to compel the Washington Office of the Attorney General to disclose certain

correspondence of attorneys in the office that included the names or email addresses of "two 'climate' activists who have campaigned for attorneys general to pursue opponents of their preferred policies, and to assist a private tort litigation campaign." The appellate court agreed with the trial court that the redacted documents at issue were work product and therefore exempt from disclosure and that the Attorney General's Office had not waived work product protection for the redacted materials. *Energy Policy Advocates v. Office of the Attorney General*, No. 55187-0-II (Wash. Ct. App. Nov. 30, 2021)

New York Appellate Court Upheld Approval for Onshore Wind Energy Facility

The New York Appellate Division upheld a certificate of environmental compatibility and public need issued by the New York State Board on Electric Generation Siting and the Environment for a wind-powered electric generating facilities in several Western New York counties. The court rejected contentions that the Board did not give sufficient weight to community character, "failed to balance the severe adverse impact on that character against the project's modest and theoretical benefits." The court also rejected the contention that the Board's conclusion that the project would have beneficial climate effects was based on speculation. In addition, the court ruled that the petitioners challenging the wind energy facility lacked standing to bring claims based on the First Amendment rights of Amish residents and rejected claims related to various local laws. *Coalition of Concerned Citizens v. New York State Board on Electrical Generation Siting & the Environment*, No. OP 20-01405 (N.Y. App. Div. Nov. 12, 2021)

NEW CASES, MOTION, AND OTHER DOCUMENTS

In Climate Cases Against Fossil Fuel Companies, Briefing Completed on Remand Order Appeals in Connecticut and Honolulu/Maui Cases

- On November 15, 2021, briefing was completed in ExxonMobil's (Exxon's) appeal of the remand order in the State of Connecticut's case alleging that Exxon engaged in deceptive and unfair business practices in violation of the Connecticut Unfair Trade Practices Act by misleading and deceiving consumers "about the negative effects of its business practices on the climate." Amicus briefs were filed in support of Connecticut by 13 other states and the District of Columbia, New York City, and Natural Resources Defense Council. *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. Nov. 15, 2021)
- Briefing on the fossil fuel companies' appeals of the remand orders in Honolulu's and Maui County's cases was completed on November 8. The Ninth Circuit announced that oral argument would be held on February 18, 2022 if the court decides to hear oral arguments. The companies also filed a motion for the Ninth Circuit to take judicial notice of two state court transcripts, which they said included statements by plaintiffs' counsel that the theory of liability in the plaintiffs' lawsuits encompassed increased combustion of fossil fuel products. The defendants said these statements had "a clear and 'direct' connection" to the jurisdictional questions at issue in these cases because the plaintiffs argued that the "allegedly exclusive focus on misrepresentation" as the basis for their theory of liability prevented federal-officer removal or removal based on the Outer

Continental Shelf Lands Act. The plaintiffs responded that the Ninth Circuit could take judicial notice of the existence of the transcripts but could not "take the additional step of drawing inferences against Appellees as to disputed issues based on the transcripts' contents." The plaintiffs stated that they had never "conceded" that their claims arose from defendants' products and not from their alleged misrepresentations. *City & County of Honolulu v. Sunoco LP*, No. 21-15313 (9th Cir.)

Other November developments in the climate cases against fossil fuel companies included the following:

- On November 15, 2021, fossil fuel company defendants-appellants filed their opening brief in their appeal of the remand order in the climate change lawsuit brought by the City of Hoboken, New Jersey. The defendants argued that Hoboken's claims were based on interstate and international emissions and therefore arise under common law, that removal was also proper because Hoboken's claims necessarily raised disputed and substantial federal issues, and that the district court had jurisdiction under the Outer Continental Shelf Lands Act or the federal-officer removal statute. Four amicus briefs were filed in support of the defendants by the U.S. Chamber of Commerce, 16 states led by Indiana, trade groups led by the National Association of Manufacturers, and two former chairmen of the Joint Chiefs of Staff, who argued that "important national and international policy issues" such as climate change should be addressed in federal courts. *City of Hoboken v. Exxon Mobil Corp.*, No. 21-2728 (3d Cir. Nov. 15, 2021)
- On November 12, 2021, Vermont filed its opposition to fossil fuel companies' motion to stay proceedings in the federal district court for the District of Vermont in the State's consumer protection lawsuit alleging climate change-related deception. The companies had argued that the Second Circuit's review of the remand order in *Connecticut v. Exxon Mobil Corp.* would "control, or at least inform," the result in Vermont's case. Vermont argued that the companies drew "a false equivalence" between Connecticut's and Vermont's claims because Vermont was not seeking monetary relief for climate change damages. In November, Vermont also filed its motion to remand to state court, with a memorandum of law to follow on or before December 17, 2021. *Vermont v. Exxon Mobil Corp.*, No. 2:21-cv-00260 (D. Vt. Nov. 12, 2021)
- On November 12, 2021, the federal district court for the Southern District of New York stayed New York City's consumer protection law climate change case against oil and gas companies and the American Petroleum Institute pending the Second Circuit's decision in *Connecticut v. Exxon Mobil Corp.* The district court noted that the Second Circuit had stayed the remand order in Connecticut's suit, which the court characterized as "a case similar to this action." *City of New York v. Exxon Mobil Corp.*, No. 1:21-cv-04807 (S.D.N.Y. Nov. 12, 2021)

D.C. Circuit Returned Challenge to Aircraft Greenhouse Gas Standards to Active Docket

The D.C. Circuit Court of Appeals returned cases challenging EPA's aircraft greenhouse gas standards to its active docket on December 2, 2021 after EPA decided not to commence a reconsideration proceeding or new rulemaking. The standards are challenged by 12 states and the

District of Columbia and by three environmental groups. The court also granted motions for leave to intervene filed by The Boeing Company and Aerospace Industries Association of America, Inc. and granted a motion by Airlines for America to file an amicus brief in support of EPA. The parties must submit a proposed briefing format by December 23. *California v. EPA*, No. 21-1018 (D.C. Cir. Nov. 15, 2021)

Juliana Plaintiffs Said Supreme Court Water Rights Decision Supported Their Request to Amend Complaint

In *Juliana v. United States*, the plaintiffs filed a notice of supplemental authority in which they argued that the Supreme Court's November opinion in *Mississippi v. Tennessee*—which concerned rights to groundwater underlying eight states—supported "the broad principle that even after a case is dismissed for failing to plead a viable remedy, a motion to amend could be brought to cure the pleading deficiency." The plaintiffs contended that the opinion therefore supported their motion for leave to file an amended complaint to address the Ninth Circuit's determination that they did not have standing. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Nov. 29, 2021)

Company Constructing Hydroelectric Facility in Chile Cited Climate Change as Factor in Bankruptcy Filing

On November 17, 2021, a company constructing a large run-of-river hydroelectric project in the Andes Mountains in Chile filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code in bankruptcy court in Delaware. The Board President and Chief Restructuring Office explained in a supporting declaration that "significant shifts both on the supply and demand side" had "rendered [the companies'] existing capital structure unsustainable." On the demand side, he cited low electricity prices due to increased generation capacity. On the supply side, he said that "climate change has significantly impacted the hydrology of the Maipo Valley, where the Project is being constructed, and lower precipitation levels reduce in turn the amount of power that the Project can produce." *In re Alto Maipo Delaware LLC*, No. 21-11507 (Bankr. D. Del. Nov. 17, 2021)

Suit Filed in New Mexico Federal Court Sought to Require Consideration of Global Warming in Interstate River Adjudications

New Mexico residents and an association of acequias, which are also known as "community ditches," filed a lawsuit in federal court in New Mexico against federal, Navajo Nation, and state defendants seeking declarations regarding the application of federal law to certain reclamation and irrigation projects. The plaintiffs alleged that certain state court rulings had "overthrow[n] the first principles of federal water law, so they must be corrected by the federal courts." Included in the relief sought by the plaintiffs were declarations that the Navajo Dam and Navajo Indian Irrigation Project (NIIP) are Bureau of Reclamation projects subject to the Reclamation Act of 1902, and to Section 8 of the Reclamation Act—which enacts a federal policy of water conservation—in particular. The plaintiffs also sought declarations that the Navajo Dam and NIIP are subject to the "practicably irrigable acreage standard"—which is the application of the beneficial use requirement to irrigation projects—and that when adjudicating claims to an

interstate river, courts must consider factors that include global warming. The plaintiffs alleged that a state court judge previously "refused to consider the dire and growing shortages of water in the Colorado River system caused by global warming and prolonged drought." *Clark v. Haaland*, No. 1:21-cv-01091 (D.N.M., filed Nov. 12, 2021)

Lawsuits Challenging Rio Grande National Forest Plan Cited Climate Change Threats to Protected Species

Two lawsuits filed in the federal district court for the District of Colorado challenge the U.S. Forest Service's authorization of the Rio Grande National Forest Land Management Plan (Revised Forest Plan) and associated actions. A lawsuit brought by Defenders of Wildlife (Defenders) focused on impacts on the Canada lynx, for which the Rio Grande National Forest "provides some of [Colorado's] most important habitat." Defenders alleged that the Revised Forest Plan rolled back protections for lynx habitat and that the Forest Service had failed to comply with NEPA, the Endangered Species Act, and the Administrative Procedure Act. Defenders characterized the lynx in the forest as "in dire straits," citing climate change as one of the threats, and said protecting lynx in the forest was "essential to arresting" the "alarming trend" toward extirpation in Colorado. In the second lawsuit, brought by four conservation groups, the complaint asserted claims under the National Forest Management Act, NEPA, and the Administrative Procedure Act. The plaintiffs alleged, among other things, that the Forest Service failed to disclose the Revised Forest Plans effects on the endangered Uncompahgre fritillary butterfly and the threatened Canada lynx, both of which face threats from climate change. *Defenders of Wildlife v. U.S. Forest Service*, No. 1:21-cv-2992 (D. Colo., filed Nov. 8, 2021); *San Luis Valley Ecosystem Council v. Dallas*, No. 1:21-cv-2994 (D. Colo., filed Nov. 8, 2021)

Conservation Law Foundation and ExxonM Briefed District Court on Relevance of New Developments in Climate Adaptation Case

In Conservation Law Foundation's (CLF's) citizen suit alleging that Exxon defendants violated the Clean Water Act and the Resource Conservation and Recovery Act (RCRA) by failing to account for climate change impacts at a petroleum terminal in Massachusetts, the parties filed responses to questions posed by the federal district court for the District of Massachusetts about various developments that occurred while CLF's successful appeal of the district court's stay order was pending. Exxon argued that recent Supreme Court decisions demonstrated that CLF lacked standing for its Stormwater Pollution Prevention Plan (SWPPP) and RCRA claims because alleged risk from flooding was too speculative. Exxon also contended that its revision of the SWPPP for the terminal rendered the SWPPP claims moot and that the SWPPP claims failed on the merits because in issuing the 2021 Multi-Sector General Permit (MSGP) EPA had rejected CLF's contention that the 2015 MSGP required consideration of flood risks due to heavy precipitation and flooding. CLF argued that while the 2021 MSGP might be "some evidence" to interpret the terminal's permit, the final 2021 MSGP in fact supported CLF's interpretation of the terminal's permit. CLF also argued that changes to the SWPPP were not material to CLF's claims and that Exxon's arguments regarding standing were "simply the latest in their continued effort to relitigate issues that the Court has already decided." The parties also weighed in on the need for extrinsic evidence and their plans for discovery. In September, Exxon informed the court that EPA had advised that it no longer expected to issue a draft permit in

September or October. Exxon also said it had begun to market the terminal for sale. *Conservation Law Foundation v. Exxon Mobil Corp.*, No. 1:16-cv-11950 (D. Mass.)

Lawsuit Filed to Compel Federal Government to Proceed with Oil and Gas Development on Alaska Coastal Plain

Alaska Industrial Development and Export Authority (AIDEA)—which was the successful bidder for the majority of leases sold in the January 2021 oil and gas lease sale on the Coastal Plain of Alaska—filed a lawsuit in federal court in Alaska seeking to compel the Biden administration to "carry out its congressionally prescribed duties to facilitate development of the Coastal Plain's oil and gas resources." AIDEA asserted that President Biden's Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis," which ordered a moratorium on implementation of the Coastal Plain Oil and Gas Leasing Program, was ultra vires and that the U.S. Department of the Interior's issuance and implementation of the moratorium violated the Administrative Procedure Act, Alaska National Interests Land Conservation Act, and Tax Cuts and Jobs Act of 2017, which directed the Secretary of the Interior to conduct lease sales. *Alaska Industrial Development & Export Authority v. Biden*, No. 3:21-cv-00245 (D. Alaska, filed Nov. 4, 2021)

Center for Biological Diversity Sought Listing Determinations on Fish Threatened by Climate Change

Center for Biological Diversity (CBD) sued the U.S Fish and Wildlife Service in the federal district court for the Central District of California for failing to determine whether the Santa Ana speckled dace and the Long Valley speckled dace warranted protection under the Endangered Species Act (ESA). CBD asserted that the failure to make these determinations violated nondiscretionary deadlines in the ESA. The complaint described the two species as "tiny fish" endemic to certain habitats in California that are at risk of extinction due to multiple significant threats, including climate change. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 2:21-cv-08660 (C.D. Cal., filed Nov. 3, 2021)

Conservation Groups Challenged Project in Boise National Forest that Allegedly Would Affect Bull Trout Critical Habitat

On November 1, 2021, four conservation groups filed a NEPA lawsuit in federal court in Idaho challenging the U.S. Forest Service's approval of the Sage Hen Integrated Restoration Project in the Boise National Forest. The complaint alleged that the project may include up to 19,900 acres of commercial timber harvest, up to 83.1 miles of temporary roads, prescribed fire treatments on between 35,000 and 45,000 acres, and hazardous fuels reduction and non-commercial thinking on 11, 200 acres. The allegations included that the project area contains critical habitat for bull trout, which are listed as threatened under the Endangered Species Act, and that the Forest Service failed to examine climate change impacts to bull trout critical habitat and bull trout populations. On November 15, the plaintiffs filed an amended complaint that added claims under the Endangered Species Act. *Wildlands Defense v. Brummett*, No. 1:21-cv-425 (D. Idaho, filed Nov. 1, 2021)

Energy Policy Advocates Asked Court to Compel Response to FOIA Request for John Kerry-Related Records

Energy Policy Advocates filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Department of State seeking records related to "the required ethics clearance and recusal process for Special Presidential Envoy for Climate Change John Kerry." Energy Policy Advocates alleged that "recent reports suggest that Mr. Kerry maintains certain investments which could compromise his ability to deal in a straightforward and non-conflicted manner with one of his primary targets for diplomacy, the Peoples Republic of China." *Energy Policy Advocates v. U.S. Department of State*, No. 1:21-cv-02878 (D.D.C., filed Nov. 1, 2021)

Exxon Argued that Trial Court Decision Denying Motion to Dismiss Massachusetts' Case Jeopardized First Amendment Protections

Exxon Mobil Corporation filed a brief in its appeal of a Massachusetts state trial court's denial of Exxon's special motion to dismiss the Commonwealth of Massachusetts' action alleging that Exxon systematically and intentionally misled investors and consumers about climate change. Exxon filed the special motion to dismiss under the Massachusetts anti-SLAPP (Strategic Litigation Against Public Participation) statute. In its appeal, Exxon argued that by denying its motion despite recognizing that some statements challenged by the Commonwealth constituted petitioning activity, the court's decision "jeopardizes foundational First-Amendment protections." Exxon argued that its statements were "made to influence policymakers and the public on energy policy" and therefore fell within the definition of petitioning. In addition, Exxon argued that the trial court improperly focused on Exxon's "motive for speaking rather than on the basis of the Commonwealth's claims." Exxon also contended that the trial court erred by holding that the anti-SLAPP law protects only statements, and not omissions—Exxon asserted the "omissions" in this case related to Exxon's "refusal to adopt the Commonwealth's preferred viewpoints on climate change" and that the Commonwealth could not use this case to compel Exxon "to publicly advocate for the Commonwealth's views on the exigency of climate change or the merits of energy policy [Exxon] does not support." Exxon further argued that the trial court should have at least dismissed the Commonwealth's claims to the extent the claims related to statements the court recognized as petitioning activity. *Exxon Mobil Corp. v. Commonwealth*, No. 2021-P-0860 (Mass. App. Ct. Nov. 8, 2021)

Company Constructing Transmission Line for Canadian Hydropower Challenged Maine Law

The owner of the New England Clean Energy Connection transmission line corridor (NECEC) and its parent company filed a lawsuit in state court in Maine challenging a state law passed via direct initiative in early November 2021 that would retroactively ban completion and operation of the NECEC. The plaintiffs asserted that the law deprives the owner of its vested rights under federal and state permits, violates the Maine Constitution's provision regarding separation of powers, and violates the prohibitions in the Maine and U.S. Constitutions on impairment of contracts. The plaintiffs alleged that the project, which would bring 1,200 megawatts of hydropower from Québec into Maine and the New England electric grid, would reduce greenhouse gas emissions "by the equivalent of removing 700,000 cars from the road each year

the Project is in service." The plaintiffs also filed a motion for a preliminary injunction. *NECEC Transmission LLC v. Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry*, No. BCD-CIV-2021-58 (Me. Super. Ct., filed Nov. 3, 2021)

Law Firm Argued that University of Minnesota Violated Data Practices Act by Failing to Respond to Requests

A law firm filed a summary judgment motion in its lawsuit under the Minnesota Government Data Practices Act (DPA) against the University of Minnesota, from which the law firm said it requested "government data on topics of great public interests—namely, the environmental impact of fossil fuel consumption and the University's involvement in promoting climate-related litigation"—in August 2020. The law firm argued that because the University had failed to produce responsive data and had refused to commit to a production schedule, it had failed to comply with the DPA's requirement that data be produced in an "appropriate and prompt manner" or within a "reasonable time." The law firm alleged that Attorney General Keith Ellison drew on memoranda by University faculty that compiled and developed the legal theories underlying the State of Minnesota's climate change lawsuit against fossil fuel entities, and that the firm's DPA requests were "aimed at learning more about two related topics: (i) the University's contributions to the public debate over climate change, and (ii) its involvement in developing General Ellison's legal theories." *Stinson LLP v. University of Minnesota*, No. 27-CV-21-6320 (Minn. Dist. Ct. Oct. 26, 2021)

Environmental Groups Alleged Inadequate Climate Change Analysis in Minneapolis Review of Riverfront Redevelopment Project

Two environmental groups filed a lawsuit in Minnesota district court challenging the City of Minneapolis's approval of an Alternative Urban Areawide Review (AUAR) for redevelopment of the Upper Harbor Terminal on the west bank of the Mississippi River. (An AUAR is "an accepted alternative form of environmental review for certain kinds of projects.") The plaintiffs asserted that the City failed to comply with the Minnesota Environmental Policy Act. They sought an order enjoining the City from taking further action related to the project until the AUAR process was complete and an AUAR analysis was deemed adequate. The complaint's allegations included that the final AUAR was inadequate because it failed to discuss the proposed project's contributions to climate change, mitigation of climate change, or the impacts of climate change on the proposed project. *Community Members for Environmental Justice v. City of Minneapolis*, No. 27-CV-21-13100 (Minn. Dist. Ct., filed Oct. 28, 2021)

November 4, 2021, Update #152

FEATURED CASE

Supreme Court Agreed to Hear Case Concerning EPA Authority to Regulate Carbon Emissions at Existing Power Plants

On October 29, 2021, the U.S. Supreme Court granted four petitions for writs of certiorari seeking review of the D.C. Circuit's January 2021 decision vacating the U.S. Environmental

Protection Agency's (EPA's) repeal and replacement of the Obama administration's Clean Power Plan regulations for controlling carbon emissions from existing power plants. One petition was filed by West Virginia and 18 other states. Two coal companies each filed a petition, and North Dakota filed a separate petition. The questions presented in the four petitions and accepted for review by the Supreme Court are as follows:

- In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements? *West Virginia v. EPA*, No. 20-1530 (U.S.)
- Whether 42 U.S.C. § 7411(d), which authorizes the EPA to impose standards "for any existing source" based on limits "achievable through the application of the best system of emission reduction" that has been "adequately demonstrated," grants the EPA authority not only to impose standards based on technology and methods that can be applied at and achieved by that existing source, but also allows the agency to develop industry-wide systems like cap-and-trade regimes. *North American Coal Corporation v. EPA*, No. 20-1531 (U.S.)
- Whether 42 U.S.C. § 7411(d) clearly authorizes EPA to decide such matters of vast economic and political significance as whether and how to restructure the nation's energy system. (The Court did not grant certiorari on a second question presented in this petition.) *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1778 (U.S.)
- Can EPA promulgate regulations for existing stationary sources that require States to apply binding nationwide "performance standards" at a generation-sector-wide level, instead of at the individual source level, and can those regulations deprive States of all implementation and decision making power in creating their Section 111(d) plans? *North Dakota v. EPA*, No. 20-1780 (U.S.)

DECISIONS AND SETTLEMENTS

Tenth Circuit Rejected NEPA Climate Change Challenges to Timber Project

The Tenth Circuit Court of Appeals rejected National Environmental Policy Act (NEPA) claims against the U.S. Forest Service's approval of a timber project in the White River National Forest. The Tenth Circuit found that dismissal of claims that the Forest Service failed to adequately consider the project's climate change impacts was warranted because the petitioners failed to cite the administrative record—they instead relied on extra-record materials including advocacy group websites and Wikipedia articles about wildfires. The Tenth Circuit also rejected claims that an environmental impact statement was required either because the failure to consider potential climate impacts was controversial (or the project itself was controversial) or because the project left "considerable uncertainty" about the project's impacts, including effects on climate change. *Swomley v. Schroyer*, No. 20-1335 (10th Cir. Oct. 15, 2021)

Chief Justice Declined to Stay D.C. Circuit Mandate Vacating Pipeline Approval

Chief Justice John Roberts denied pipeline companies' application seeking to stay issuance of the D.C. Circuit's mandate in a case in which the D.C. Circuit vacated the Federal Energy Regulatory Commission's (FERC's) authorization of a natural gas pipeline in the St. Louis area. The D.C. Circuit found that FERC acted arbitrarily and capriciously by failing to address evidence of self-dealing by the applicant. The court also faulted FERC for engaging in only a "cursory balancing" of public benefits and adverse impacts. *Spire Missouri Inc. v. Environmental Defense Fund*, No. 21A56 (U.S. Oct. 15, 2021)

D.C. Circuit Denied Rehearing of Decision Requiring Additional Climate Change Analysis for LNG Terminals

The D.C. Circuit Court of Appeals denied a company's petition for panel rehearing of the court's August 2021 decision that found that FERC failed to adequately analyze the climate change and environmental justice impacts of two liquefied natural gas (LNG) export terminals on the Brownsville Shipping Channel in Texas and two pipelines that would carry LNG to one of the terminals. The decision required FERC to consider whether a NEPA regulation required FERC to apply the social cost of carbon or another framework to evaluate the impacts of the pipeline's greenhouse gas emissions. *Vecinos para el Bienestar de la Comunidad Costera v. Federal Energy Regulatory Commission*, No. 20-1045 (D.C. Cir. Oct. 15, 2021)

Plaintiffs Voluntarily Dismissed Challenge to Groundwater Pumping Program

On October 28, 2021, the Ninth Circuit granted plaintiffs' motion to voluntarily dismiss their appeal of the denial of a preliminary injunction in their lawsuit challenging a program to incentivize groundwater pumping as an alternative to pumping water from the Sacramento River. The plaintiffs' allegations included that the federal defendants failed to take a hard look at the program's greenhouse gas emissions. Four days later, the plaintiffs filed a notice of voluntary dismissal in the federal district court for the Northern District of California. In September, the plaintiffs had asked the Ninth Circuit to enjoin the program pending appeal. The federal respondents opposed this request, noting that the program would end at the end of October and that there was no likelihood of immediate, irreparable harm, including because it was estimated that only one-third of the approved amount of groundwater might be used before the program ended. *AquAlliance v. U.S. Bureau of Reclamation*, No. 21-16539 (9th Cir. Oct. 28, 2021), No. 2:21-cv-01533 (E.D. Cal. Nov. 1, 2021)

Federal Court Said Complaint Did Not State Marine Mammals Protection Act Claim

The federal district court for the Northern District of California granted a motion to dismiss two conservation groups' lawsuit asserting that the U.S. Fish and Wildlife Service (FWS) failed to revise Stock Assessment Reports for nine stocks of sea otters, polar bears, walruses, and manatees protected under the Marine Mammals Protection Act (MMPA). The court found that the plaintiffs had representational standing to bring their claims based on their alleged lack of information, lack of opportunity to comment, and potential downstream effects of the defendants' failures to revise the Stock Assessment Reports. The court further found, however, that the plaintiffs had not sufficiently alleged a violation of the FWS's MMPA duties. Although

the MMPA requires annual or triennial reviews of stock assessments, the court said the plaintiffs had not adequately alleged that the FWS did not conduct them. To the extent claims were based on allegations that the defendants should have revised the Stock Assessment Reports due to alleged changes such as climate change-induced impacts on mammals' habitats, the court said the plaintiffs' allegations were not adequate to establish that revisions were required. The court gave the plaintiffs until November 5, 2021 to file an amended complaint addressing the deficiencies identified in its decision. *Center for Biological Diversity v. Haaland*, No. 3:21-cv-01182 (N.D. Cal. Oct. 20, 2021)

Colorado Federal Court Found Issues of Fact as to Whether Coal Mine's Emissions Counted Towards Permitting Threshold; Parties Announced Potential Settlement

On September 30, 2021, the federal district court for the District of Colorado found that four environmental groups had standing in their Clean Air Act citizen suit against the operators of a coal mine for operating without a Title V operating permit, but the court denied the groups' motion for summary judgment on the Title V claim. The court found that the plaintiffs had not established the absence of an issue of material fact as to whether the mine's emissions were "fugitive" emissions that did not count towards the permitting threshold. In their motion for summary judgment on the issue of standing, the plaintiffs argued that the relief they sought would redress their injuries, including because the permits would likely require reduction of emissions of both volatile organic compounds and methane, which are emitted from the mine's ventilation air system. On October 25, the parties filed a notice of their agreement in principle to settle the case. The court granted a motion to stay all deadlines in the litigation pending approval of the settlement and directed the parties to file the motion for approval or a report on the status of negotiations by November 19. *WildEarth Guardians v. Mountain Coal Co.*, No. 20-cv-01342 (D. Colo. Sept. 30, 2021)

Federal Court Set Schedule for Determinations on Endangered Species Act Listing of Four Freshwater Species

The federal district court for the District of Court accepted federal defendants' proposed schedule for fulfilling their statutory obligation under the Endangered Species Act to issue 12-month findings on whether listing of four freshwater aquatic species was warranted. The complaint alleged that the plaintiff submitted petition to list the species in 2013, 2014, and 2016; two of the four species—the Rio Grande chub and the Rio Grande sucker—were alleged to face threats from climate change. The plaintiff asked the court to require that the 12-month findings be completed within the nine months of the close of summary judgment briefing, but the court instead granted the defendants' request that they be given until September 30, 2023 to complete 12-month findings for the sicklefin chub and sturgeon chub, and until June 14, 2024 for the Rio Grande chub and the Rio Grande sucker. *WildEarth Guardians v. Haaland*, No. 20-cv-1035 (D.D.C. Sept. 30, 2021)

Federal Court Dismissed Energy Executive's Defamation Claims Against Writers Who Said He Was "Killing the Planet"

The federal district court for the Southern District of New York dismissed defamation and false light invasion of privacy claims brought by an individual who had been chief executive officer (CEO) of a coal company against two individual writers and a media company. The defendants published articles on their websites assigning blame for climate change to the plaintiff and 99 other CEOs and calling them "ecocidal planet killers" and the "top 100 people killing the planet." The court found that these conclusions were not actionable because they were "clearly hyperbolic and … readily understood as representing the authors' subjective viewpoints, not objective assertions of fact capable of being objectively disproven." The court also noted that the authors cited a report prepared by the nonprofit group CDP on the "2017 Carbon Majors" as the basis for their conclusions. The court was not persuaded by the plaintiff's argument that he was mistakenly identified as the CEO of the coal company, when the coal business had been spun off from his company after the period of time covered by the CDP report. The court also found that New York law would apply because its interest in regulating the allegedly tortious conduct was more significant than the interest of Pennsylvania, where the plaintiff was domiciled. Because New York does not recognize a tort of false light invasion of privacy, the court dismissed this claim. *DeIuliis v. Engel*, No. 20 Civ. 3252 (S.D.N.Y. Sept. 27, 2021)

Federal Court Denied Pro Se Plaintiff's Request for Order Barring U.S. from Reentering Paris Climate Accord

The federal district court for the Eastern District of Texas denied a pro se plaintiff's motions for preliminary injunctive relief in a lawsuit challenging the validity of the Paris Climate Accord. A magistrate judge characterized the plaintiff as alleging that President Biden did not have authority to reenter the United States into the Paris Climate Accord because it was a treaty requiring the Senate's advice and consent. In considering the motion for a temporary restraining order barring the U.S. from reentering the Paris Climate Accord, the magistrate found that the plaintiff had not shown a substantial likelihood that he would succeed on the merits since his case could raise jurisdictional questions regarding the political question doctrine and standing. The magistrate judge also found that the plaintiff's allegations regarding damage to his interests in minerals or fossil fuels from measures the United States would take if it rejoined the Paris Climate Accord did not establish existence of a substantial threat or irreparable harm. Nor did the plaintiff show how this alleged harm would outweigh the harm of an injunction that would disrupt the U.S.'s international policy on climate change. The district court overruled the plaintiff's objections to the magistrate's report and denied the request for preliminary relief. *Pruitt v. Biden*, No. 9:21-cv-00013 (E.D. Tex. Sept. 17, 2021)

Washington High Court Declined to Hear Youth Plaintiffs' Climate Case

The Washington Supreme Court denied a petition by youth plaintiffs seeking review of the dismissal of their case alleging that the State of Washington and State agencies and officials infringed on the plaintiffs' fundamental right to a stable climate system. The Chief Justice dissented, joined by one other justice. The Chief Justice wrote that he would have granted review so that the court could decide the question of whether climate change impacts are harms that are remediable under Washington's laws and constitution. He noted that the Court of Appeals had concluded that the youth plaintiffs' claims were not justiciable because there was no remedy the court could provide. The Chief Justice viewed this as "a debatable issue" because a judicial

declaration of rights "would be a final and conclusive determination of the controversy irrespective of whether any other relief is requested or granted." The Chief Justice stated that "[a] declaration of rights from this court is meaningful relief, even if it is not a magic wand that will eliminate climate change." *Aji P. v. State of Washington*, No. 99564-8 (Wash. Oct. 6, 2021)

California Appellate Court Rejected Carbon Offset Mitigation Measures for Development Project

The California Court of Appeal ruled that greenhouse gas mitigation measures imposed by San Diego County for a 111-acre mixed-use development lacked objective performance criteria to ensure their effectiveness and that they improperly deferred mitigation. The court found that the mitigation measures—which required the project applicant to purchase and retire carbon credits to offset the project's construction and operations emissions—shared some of the same deficiencies that the Court of Appeals identified in a case in which it invalidated mitigation measures provided for in the County's Climate Action Plan. In particular, the court said the absence of protocols to ensure that carbon offsets were real, permanent, quantifiable, verifiable, and enforceable was a "fatal deficiency." Because the measures did not provide reasonable assurance that emissions reductions would occur, the court found they were invalid under the California Environmental Quality Act. *Elfin Forest Harmony Grove Town Council v. County of San Diego*, Nos. D077611, D078101 (Cal. Ct. App. Oct. 14, 2021)

California Court of Appeal Declined to Consider Greenhouse Gas Emissions Issue in Review of Pest Management Program

In an appeal concerning the California Environmental Quality Act (CEQA) review for the Statewide Plant Pest Prevention and Management Program, the California Court of Appeal declined to take up claims that CEQA review documents failed to address increased impacts on greenhouse gas emissions. The appellate court noted that the petitioners raising these claims did not file an appeal or cross-appeal of the trial court's ruling (which did not address impacts on greenhouse gas emissions), and that the petitioners had not shown that review of their claims was otherwise necessary. *North Coast Rivers Alliance v. Department of Food & Agriculture*, No. C086957 (Cal. Ct. App. Oct. 15, 2021)

California Appellate Court Said San Diego Failed to Determine Significance of Greenhouse Gas Emissions from Utility Line Project

The California Court of Appeal remanded a CEQA review for a project to convert overhead utility wires to an underground system in certain San Diego neighborhoods. The appellate court found that the City of San Diego had not completed the review process required to determine whether the project's greenhouse gas emissions were consistent with the City's Climate Action Plan. The court said a checklist used by the City to evaluate the project's consistency was not sufficient for infrastructure projects such as the utility wire conversion project, and that the City's determination that the project would not have a significant impact therefore was not supported by substantial evidence. The appellate court indicated, however, that this conclusion did not necessarily mean that the City would have to complete an environmental impact report since the additional analysis the court was requiring could show that the project was consistent

with the Climate Action Plan. *McCann v. City of San Diego*, No. D077568 (Cal. Ct. App. Oct. 8, 2021)

California Court Found Fault with Greenhouse Gas Mitigation Measures and Consideration of Wildfire Risk for San Diego County Project

A California Superior Court ruled that greenhouse gas mitigation measures approved for a residential development in San Diego County were insufficient under the California Court of Appeals' decision in *Golden Door Properties, LLC v. County of San Diego*, which requires that carbon offsets be real, permanent, quantifiable, verifiable, and enforceable. The court also found that the respondents failed to comply with CEQA because the consideration of wildfire risks improperly "compress[ed]" analysis of impacts and mitigation measures by characterizing mitigation measures as part of the project. *Sierra Club v. County of San Diego*, No. 37-2019-00038820-CU-TT-CTL (Cal. Super. Ct. Oct. 7, 2021)

New York Court Rejected Challenge to Renewable Energy Siting Standards

Sixteen days after denying a preliminary injunction, a New York trial court issued a second decision dismissing a challenge to New York State Office of Renewable Energy Siting (ORES) regulations setting forth procedural and substantive requirements for major renewable energy facilities. The court found that ORES fulfilled its obligations under the State Environmental Quality Review Act when it issued a negative declaration for the regulations, and rejected other claims raised by the petitioners. *Town of Copake v. New York State Office of Renewable Energy Siting*, No. 905502-21 (N.Y. Sup. Ct. Oct. 7, 2021)

NEW CASES, MOTION, AND OTHER DOCUMENTS

Supreme Court Review Sought of Ninth Circuit Decision Rejecting NEPA Challenge to Immigration Policies

Parties filed a petition for writ of certiorari after the Ninth Circuit Court of Appeals rejected their claims that the federal government failed to comply with the National Environmental Policy Act in connection with certain immigration programs and policies, including Deferred Action for Childhood Arrivals. The petitioners asserted, among other things, that "[i]mmigrants and their children almost universally are responsible for significantly more greenhouse gas emissions than they would have been if they never emigrated from their home countries," and that the Biden administration's "heightened focus on greatly augmenting the population through the expansion of the pathways of immigration to the U.S." was "at crosspurposes with" the administration's greenhouse gas emissions reduction goals. The certiorari petition raised the question of whether the Department of Homeland Security's NEPA procedures constituted reviewable final agency action. The petition also presented the question of whether the Ninth Circuit improperly denied standing to the petitioners based on an erroneous standard. *Whitewater Draw Natural Resource Conservation District v. Mayorkas*, No. 21-574 (U.S. Oct. 18, 2021)

Second Circuit Stayed Remand Order in Connecticut's Climate Case Against Exxon; New York City and Vermont Cases May Be Put on Pause

- On October 5, 2021, the Second Circuit Court of Appeals stayed the district court's remand order pending appeal in the State of Connecticut's unfair trade practices case against Exxon Mobil Corporation (Exxon). The Second Circuit found that Exxon had made a sufficient showing that it was entitled to a stay. Connecticut was ordered to file its brief within 30 days (by November 4), and Exxon's reply brief is due 10 days after Connecticut files its brief. *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. Oct. 5, 2021).

- On October 6, 2021, the federal district court for the Southern District of New York issued an order to show cause directing New York City to show cause why the City's action against Exxon Mobil Corporation and other defendants under the City's consumer protection law should not be stayed pending the Second Circuit's decision in Exxon's pending appeal of the remand order in Connecticut's case. The City submitted a letter noting that its motion to remand was fully briefed and ready to be decided. The City said it believed the Second Circuit in *Connecticut v. Exxon Mobil Corp.* would benefit from the district court's analysis of the removal issues in this case, but that the City understood that the district court might prefer to wait for further guidance in *Connecticut* before proceeding. *City of New York v. Exxon Mobil Corp.*, No. 1:21-cv-04807 (S.D.N.Y. Oct. 6, 2021)

- On October 22, 2021, defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation (Exxon) removed the State of Vermont's consumer protection suit alleging climate change-related deception to federal court. Exxon said that "[c]limate change, fossil fuel's alleged contributions to climate change, and statements promoting fossil fuel form the heart" of Vermont's complaint and that "[s]uch lawsuits are properly removed to federal court because the claims asserted are governed by federal, not state, law." The notice of removal cited the Second Circuit's opinion in *City of New York v. Chevron Corp.* in support of Exxon's contention that federal common law governs claims such as those brought by Vermont. The notice of removal also identified five other grounds for removal: *Grable* jurisdiction (because the complaint "necessarily raises several substantial and disputed federal questions concerning federal environmental standards, regulations, and international treaties striking a balance between the use of fossil fuels and the reduction of greenhouse gas emissions"); the federal officer removal statute, the Outer Continental Shelf Lands Act, federal enclave jurisdiction, and diversity jurisdiction. On October 29, Exxon and the other defendants filed a motion to stay the proceedings while the Second Circuit considers *Connecticut v. Exxon Mobil Corp.*, which the defendants said would "control, or at least inform," the result in this case. *Vermont v. Exxon Mobil Corp.*, No. 2:21-cv-00260 (D. Vt. Oct. 22, 2021)

Juliana **Plaintiffs Announced End of Settlement Talks**

On November 1, 2021, the law firm representing the youth plaintiffs in *Juliana v. United States*, announced that settlement talks with the U.S. Department of Justice had ended the previous week without resolution. The announcement said the plaintiffs and their attorneys had concluded that

there was no reason to continue the settlement discussions "until decision-makers for the federal defendants come to the settlement table." The plaintiffs' attorney said the plaintiffs would await a ruling from the district court on their motion to amend their complaint. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Oct. 29, 2021)

Parties Asked Court to Pause Litigation to Allow Negotiation of Long-Term Solution for Management of Columbia River System

Environmental and conservation groups, the State of Oregon, and federal defendants asked the federal district court for the District of Oregon to stay litigation in a long-running case challenging management of the Columbia River System, a system of hydroelectric dams and reservoirs on the Columbia and Snake Rivers. In January 2021, plaintiffs filed an eighth supplemental complaint alleging that actions finalized in 2020 did not cure defects identified by the court in 2016. Among other shortcomings, the January 2021 complaint alleged a failure to fully assess the impacts of climate change on salmon, and failure to consider climate change threats to the Southern Resident killer whale. In their motion to stay litigation, the moving parties said they had reached an agreement for short-term operations of the Columbia River System that would provide "an interim compromise" while the parties worked towards "a long-term comprehensive solution that, if successful, may resolve all claims in this litigation." *National Wildlife Federation v. National Marine Fisheries Service*, No. 3:01-cv-00640 (D. Or. Oct. 21, 2021)

Gulf Oil Moved to Dismiss Climate Adaptation Case in Connecticut

Gulf Oil Limited Partnership (Gulf) filed a motion to dismiss Conservation Law Foundation's (CLF's) citizen suit that alleges that Gulf failed to prepare a coastal petroleum terminal in New Haven, Connecticut, for the impacts of climate change. Gulf argued that CLF did not have standing because CLF's claims were based on "speculative, future, and distant harms." Gulf also argued that CLF's factual allegations did not plausibly support many of its claims that Gulf violated the Clean Water Act or the Resource Conservation and Recovery Act (RCRA). In particular, Gulf contended that the plaintiffs' allegations regarding inadequacies in the facility's Stormwater Pollution Prevention Plan were not specific enough, that CLF did not identify information related to climate change risk that Gulf failed to disclose in violation of the Clean Water Act, and that CLF did not plead facts describing what design or engineering changes were required for the facility to comply with RCRA. *Conservation Law Foundation v. Gulf Oil LP*, No. 3:21-cv-00932 (D. Conn. Oct. 20, 2021)

Lawsuit Said Marine Highway Program Required Endangered Species Act Consultation

The Center for Biological Diversity (CBD) filed an Endangered Species Act citizen suit against the U.S. Maritime Administration (MARAD), the Secretary of Transportation, and the Acting Administrator of MARAD, alleging that MARAD's adoption and continued implementation of America's Marine Highway Program required programmatic consultation under Section 7 of the Endangered Species Act. The complaint also alleged that project-specific consultation was required for the James River Expansion Project, one of the actions funded through the Marine Highway Program, which was established by the Energy Independence and Security Act of

2007. Through the Program, MARAD provides grants to increase utilization of domestic freight and passenger transportation on marine highway routes between U.S. ports. CBD alleged that the Program funds activities that increase vessel traffic on waterways that provide essential habitat for protected species, and that the Program adversely affects protected species by contributing to climate change, including by subsidizing use of marine routes for fossil fuel transport. *Center for Biological Diversity v. U.S. Maritime Administration*, No. 4:21-cv-00132 (E.D. Va., filed Oct. 12, 2021)

Lawsuit Filed to Compel Finding on Listing Giraffes as Endangered or Threatened

Three organizations filed an action in the federal district court for the District of Columbia to compel the U.S. Fish and Wildlife Service to make a 12-month finding on their April 2017 petition to list giraffes under the Endangered Species Act. The complaint alleged that giraffes face a number of ongoing threats, including increased frequency and magnitude of droughts associated with climate change. *Center for Biological Diversity v. Haaland*, No. 1:21-cv-02660 (D.D.C., filed Oct. 12, 2021)

Federal Lawsuit Challenged Biden Administration's Reconstitution of Clean Air Scientific Advisory Committee and Science Advisory Board

On October 7, 2021, a statistician and former member of EPA's Science Advisory Board filed a lawsuit against EPA in the federal district court for the District of Columbia alleging that EPA violated the Administrative Procedure Act, the Federal Advisory Committee Act, and federal regulations when EPA reconstituted the Science Advisory Board and the Clean Air Scientific Advisory Committee in 2021. The complaint alleged that EPA Administrator Michael Regan "abruptly fired" all members of the Board and Committee in March 2021 and "rapidly proceeded to pack the new committees with academics receiving multi-million dollar research grants from EPA," with none of the new members affiliated with regulated industries. The plaintiff sought injunctive relief requiring that the Board and Committee be reconstituted "with fairly balanced membership and adequate protections against inappropriate influence." In a motion for preliminary injunction filed on October 21, the plaintiff contended that EPA "has moved to sideline anyone who might dissent from the President's climate-change agenda," and that immediate relief was necessary to pause the Committee's work before it was asked to "rubberstamp" EPA staff's policy assessment regarding stricter standards for particulate matter. On October 28, an amended complaint was filed, adding the former chair of the Committee as a plaintiff. *Young v. EPA*, No. (D.D.C., filed Oct. 7, 2021).

Stockholder Derivative Complaint Alleged Misleading Statements Regarding Plastic Alternative's Biodegradability

A stockholder derivative action was filed in federal district court in Delaware against members of the board of directors and upper management for Danimer Scientific, Inc., a company that produces polyhydroxyalkanoates (PHAs), which the complaint described as "a purportedly biodegradable plastic alternative used in a range of plastic applications." The complaint alleged that the defendants breached their fiduciary duties by failing to correct false and misleading statements and omissions of material fact that, among other things, overstated the products'

biodegradability. The complaint cited a report released by an investment firm in April 2021 that noted "inconsistencies" in Danimer's claims regarding its business and operations. Among other things, the report stated that PHA bioplastics in anaerobic environments release the greenhouse gas methane. The complaint alleged that Danimer's stock price fell after release of this report, as well as after the publication of a second report. The complaint asserted claims of violations of the Securities and Exchange Act, breach of fiduciary duties, unjust enrichment, and waste of corporate assets. The suit's allegations are similar to those in a securities class action brought in the federal district court for the Eastern District of New York. *Perri v. Croskrey*, No. 1:21-cv-01423 (D. Del., filed Oct. 6, 2021)

Environmental Groups Challenged Air Permit for New Montana Power Plant and Constitutionality of MEPA Provision

Two environmental groups filed a lawsuit in Montana state court challenging the decision by the Montana Department of Environmental Quality (DEQ) to issue an air quality permit for construction and operation of the Laurel Generating Station, a 175-megawatt gas-fired power plant on the Yellowstone River in eastern Montana. The plaintiffs alleged that DEQ failed to fully evaluate the environmental consequences of the power plant, including "significant greenhouse gas pollution that contributes to climate change." The complaint asserted that approval of the plant violated the Montana Environmental Policy Act (MEPA). In a second cause of action, the plaintiffs contended that a 2011 amendment to MEPA violated Montana's constitutional environmental protections. The amendment provided that environmental review under MEPA could not include "a review of actual or potential impacts beyond Montana's borders [and] may not include actual or potential impacts that are regional, national, or global in nature." DEQ interpreted the provision to limit its ability to review climate change impacts. The plaintiffs asked the court to vacate the air permit or, in the alternative, to declare the MEPA provision unconstitutional. *Montana Environmental Information Center v. Montana Department of Environmental Quality*, No. DV21-01307 (Mont. Dist. Ct., filed Oct. 21, 2021)

Community Group Filed CEQA Challenge to UC Berkeley's Long Range Development Plan

A community group filed a lawsuit in California Superior Court challenging the California Environmental Quality Act review for the University of California, Berkeley's 2021 Long Range Development Plan (LRDP). The final environmental impact report (FEIR) for the LRDP also considered two construction projects, which the petitioner contended should have been subject to separate environmental review after review of the LRDP was completed. Among the petitioner's claims was that the FEIR was "materially deficient" because it failed to examine the LRDP's proposed population increase. Greenhouse gas emissions were one of the impacts that the petitioner alleged were not adequately discussed in the FEIR. *Berkeley Citizens for a Better Plan v. Regents of the University of California*, No. 2ICV000995 (Cal. Super. Ct., filed Oct. 27, 2021).

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FEATURED CASE

Federal Court Vacated Decision Not to List Joshua Trees as Threatened Due to Inadequate Consideration of Climate Change Effects

The federal district court for the Central District of California set aside the U.S. Fish and Wildlife Service's (FWS's) 2018 determination that listing the Joshua tree as threatened or endangered under the Endangered Species Act was not warranted. The court found that the FWS "selectively relied on beneficial data and failed to consider and evaluate the contrary data" regarding climate change's adverse impacts on Joshua trees. In addition, the court found that the FWS's findings regarding the threats posed by climate change and wildfire were "unsupported, speculative, or irrational," including the FWS's findings that Joshua trees would be able to persist at 138°F and would be able to migrate to climate refugia. Because the FWS failed to consider contrary data on climate change's adverse effects or explain its decision not to consider such data, the FWS's conclusion that Joshua trees were not threatened in a significant portion of their range was also arbitrary and capricious. Because the FWS's conclusion that existing regulatory mechanisms were adequate to protect Joshua trees was based on the arbitrary and capricious determination that they did not warrant listing, the court also found the conclusion regarding the adequacy of regulatory mechanisms to be arbitrary and capricious. Although the court's finding on this point was not based on the FWS's alleged failure to consider the threat posed to Joshua trees by inadequate regulatory mechanisms addressing climate change, the court said the FWS should consider this issue on remand. *WildEarth Guardians v. Haaland*, No. 2:19-cv-09473 (C.D. Cal. Sept. 20, 2021).

DECISIONS AND SETTLEMENTS

Louisiana Federal Court Allowed States to Proceed with Challenge to "Pause" on Onshore and Offshore Leasing

On September 22, 2021, the federal district court for the Western District of Louisiana denied the Biden administration's motion to dismiss claims by Louisiana and 12 other states challenging the administration's "pause" on new offshore and onshore oil and gas leasing. The court agreed with the entirety of a magistrate judge's report and recommendation that recommended denial of the motion. First, the magistrate found that the plaintiffs sufficiently alleged facts demonstrating that President Biden's Executive Order 14008—which ordered the pause—exceeded the President's statutory or constitutional authority and that the states therefore stated a claim against the President for *ultra vires* review. Second, the magistrate found that the states' allegations of economic harm established their entitlement to an exception to the Outer Continental Shelf Lands Act's (OCSLA's) 60-day notice requirement. The magistrate further found that the states' claims that the defendants violated the OCSLA and the Mineral Leasing Act were reviewable under the Administrative Procedure Act (APA). The magistrate was not persuaded by the defendants' arguments that the claims were improper programmatic challenges and that agency actions were not final. *Louisiana v. Biden*, No. 21-cv-778 (W.D. La. Sept. 22, 2021).

D.C. Circuit Denied Rehearing of Decision Vacating FERC Authorization for St. Louis Pipeline

On September 7, 2021, the D.C. Circuit Court of Appeals denied respondent-intervenors' petitions for panel rehearing and rehearing en banc of the court's June 2021 decision vacating Federal Energy Regulatory Commission (FERC) orders authorizing a natural gas pipeline in the St. Louis area. The June 2021 decision held that FERC acted arbitrarily and capriciously by failing to address arguments and evidence regarding self-dealing by the applicant and an affiliate and by failing to conduct an adequate balancing of public benefits and adverse impacts. *Environmental Defense Fund v. Federal Energy Regulatory Commission*, No. 20-1016 (D.C. Cir. Sept. 7, 2021).

King County Voluntarily Dismissed Climate Change Suit Against Fossil Fuel Companies

On September 28, 2021, King County filed a notice of voluntary dismissal in its climate change case against fossil fuel companies. On August 23, the defendants had filed motions to dismiss the lawsuit for lack of personal jurisdiction and for failure to state a claim. Proceedings in the case had been stayed between October 2018 and July 2021 while the appeal of the district court's dismissal of Oakland and San Francisco's cases was pending. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash. Sept. 28, 2021).

Federal Court Again Dismissed Religious Order's Religious Freedom Restoration Act Claims Against Pipeline Company

For a second time, the federal district court for the Eastern District of Pennsylvania dismissed an action brought by a vowed religious order of Roman Catholic women and individual members of the order against the developer of the Atlantic Sunrise Pipeline under the Religious Freedom Restoration Act (RFRA). The plaintiffs asserted that the pipeline—which was constructed across their property—"substantially burdened [their] exercise of their deeply-held religious beliefs to use and protect their land as part of God's creation." They cited a "Land Ethic" adopted by the order in 2005, as well as Pope Francis's 2015 encyclical letter Laudato Si. The federal court previously dismissed the plaintiffs' earlier RFRA action, and the Third Circuit affirmed, on the grounds that the Natural Gas Act foreclosed judicial review of a Federal Energy Regulatory Commission (FERC) certificate in district court, and that the plaintiffs had foreclosed judicial review of their claims because they failed to bring them before FERC initially. In the instant case, the district court found that the fact that the plaintiffs were now seeking money damages instead of injunctive relief did not cure the jurisdictional defect. *Adorers of the Blood of Christ v. Transcontinental Gas Pipe Line Co.*, No. 5:20-cv-05627 (E.D. Pa. Sept. 30, 2021).

Federal Court Required BLM to Undertake Additional Review for Oil and Gas Lease Sales in Colorado

The federal district court for the District of Colorado found that the U.S. Bureau of Land Management's (BLM's) 2018 lease sales in and around the Uinta Basin in northwestern Colorado did not comply with the National Environmental Policy Act and the Administrative Procedure Act. The court remanded to BLM without vacating the leases. The court found that BLM should have considered air modeling that became available before it made the 2018 decision and that BLM failed to consider whether the discovery of wilderness character in certain lands warranted a change in management priorities. The court did not address the complaint's

climate change-related allegations. *Rocky Mountain Wild v. Haaland*, No. 18-cv-02468 (D. Colo. Sept. 28, 2021).

Federal Court Allowed Louisiana to Intervene in Environmental Groups' Challenge to Gulf of Mexico Lease Sale

The federal district court for the District of Columbia held that the State of Louisiana could intervene as of right in environmental organizations' lawsuit challenging the Interior Department's decision to hold an offshore oil and gas lease sale for portions of the Gulf of Mexico. The court found that there was "sufficient doubt" about the adequacy of the federal government's representation of Louisiana's interests, given the litigation between Louisiana and the federal government in the Western District of Louisiana concerning the Biden administration's "pause" on federal oil and gas leasing. *Friends of the Earth v. Haaland*, No. 1:21-cv-02317 (D.D.C. Sept. 22, 2021).

Federal Court Said Greenpeace Lacked Standing for Claims that Walmart's Marketing of Plastic Products as Recyclable Violated California Unfair Competition Law

The federal district court for the Northern District of California ruled that Greenpeace did not have standing to bring claims under California's Unfair Competition Law related to Walmart's sale of plastic and plastic-packaged products under its private label brands. Greenpeace alleged that Walmart advertised and marketed products and packaging made from plastics #3-7 or unidentified plastic as "recyclable" when they are not recyclable. Greenpeace alleged that consumers "concerned with the proliferation of plastic pollution" and its environmental impact—including methane emissions—actively seek products that are recyclable, and that Walmart's representations were likely to deceive the public. In addition, Greenpeace alleged that Walmart violated California's policy against misrepresenting the environmental attributes of products. The court found that none of Greenpeace's allegations demonstrated that Greenpeace took action in reliance on the truth of Walmart's representations and that Greenpeace therefore did not meet the Unfair Competition Law's requirements for standing. The court said Greenpeace could file an amended complaint if it did so by October 15, 2021. *Greenpeace, Inc. v. Walmart Inc.*, No. 21-cv-00754 (N.D. Cal. Sept. 20, 2021).

California Federal Court Declined to Stop Groundwater Pumping Program

The federal district court for the Eastern District of California denied a motion for a preliminary injunction barring the U.S. Bureau of Reclamation from implementing a program to incentivize groundwater pumping as an alternative to obtaining water from the Sacramento River. The court found that the plaintiffs failed to meet their burden of establishing irreparable harm and that they failed to show a likelihood of success on the merits, including on their claim that the defendants failed to take a hard look at the effects of the program's greenhouse gas emissions. The court also concluded that allowing the program to go forward was in the public interest. The plaintiffs appealed the court's decision. *AquAlliance v. U.S. Bureau of Reclamation*, No. 2:21-cv-01533 (E.D. Cal. Sept. 14, 2021).

Mississippi Federal Court Dismissed Claims Seeking Environmental Review of More Frequent Opening of Spillway

In two related lawsuits, the federal district court for the Southern District of Mississippi dismissed claims under the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA) against the Mississippi River Commission (MRC) and the U.S. Army Corps of Engineers in connection with the operation of the Bonnet Carré Spillway, which is "designed to divert water from the Mississippi River into Lake Pontchartrain in an effort to prevent flooding in the city of New Orleans." The plaintiffs alleged that the defendants failed to conduct an adequate environmental impact analysis and to supplement the analysis "to reflect the changed circumstances and additional impacts resulting from the greater and more damaging Mississippi River flooding and resulting operation" of the spillway. Over an 89-year period, the spillway had been opened 15 times, with six of the openings occurring in the past 10 years and 4 openings occurring between 2018 and 2020. The court concluded that the MRC did not qualify as an "agency" under the APA because it only had the authority to make recommendations, not to make decisions, and that the plaintiffs therefore could not bring claims against the MRC under the APA. The court also dismissed the APA and NEPA claims against the Corps, finding that some claims were time-barred (e.g., challenges to a 1976 environmental impact statement) and that because there was no remaining "major federal action" it lacked jurisdiction over the claim that supplementation was required. The court also found that it could not compel the Corps to open a separate spillway more frequently. *Watson v. U.S. Army Corps of Engineers*, No. 1:19-cv-00989 (S.D. Miss. Sept. 14, 2021); *Harrison County v. Mississippi River Commission*, No. 1:19-cv-00986 (S.D. Miss. Sept. 13, 2021).

Vermont Supreme Court Reversed Denial of Approval for Solar Facility

The Vermont Supreme Court reversed and remanded the Vermont Public Utility Commission's (PUC's) denial of a certificate of public good for construction of a 2.0 megawatt solar facility in the Town of Bennington. The court rejected "significant portions" of the PUC's rationale for denial—including the PUC's conclusions that the project would violate "clear community standards"—but rejected the argument that Vermont law required the PUC to balance beneficial greenhouse gas impacts against other factors in the analysis of aesthetic effects. *In re Petition of Apple Hill Solar LLC*, No. 2020-232 (Vt. Sept. 3, 2021).

D.C. Appellate Court Upheld Climate Protesters' Convictions

The District of Columbia Court of Appeals affirmed two individuals' convictions for crowding, obstructing, or incommoding a street after being warned to cease. A witness testified that the individuals were participating in a climate change protest directed at the Republican National Committee. The court held that provisions of D.C.'s First Amendment Assemblies Act on which the defendants relied did not apply to the Capitol Police. The provisions required the Metropolitan Police Department (MPD) to seek voluntary compliance when enforcing time, place, and manner restrictions and limited circumstances in which MPD could issue general orders to disperse. The appellate court also found that evidence was sufficient to support the convictions and rejected the argument that their convictions required proof of breach of the peace. *Ochs v. District of Columbia*, Nos. 19-CT-625 and 19-CT-648 (D.C. Sept. 2, 2021).

California Appellate Court Rejected Climate Change Claims in CEQA Challenge to Olympic Valley Resort

The California Court of Appeal rejected challenges to the analysis of the climate change impacts of a proposed resort in Olympic Valley but found certain other elements of the California Environmental Quality Act (CEQA) review for the project to be inadequate. Regarding the climate change analysis, the appellate court found that the County of Placer's modification of the analysis in the final environmental impact report (EIR) in response to a California Supreme Court decision did not require recirculation of the EIR. The appellate court also rejected the argument that the County failed to reconsider climate change mitigation in light of the revised analysis in the final EIR. The court noted not only that the County had reconsidered mitigation measures but also that the project could no longer result in the emissions levels that might have warranted reconsideration of mitigation. The court found that the plaintiff forfeited two other climate change arguments. *Sierra Watch v. County of Placer*, No. C088130 (Cal. Ct. App. Aug. 24, 2021).

New York Court Denied Preliminary Injunction in Challenge to Renewable Energy Siting Regulations

A New York State Supreme Court denied a motion for a preliminary injunction barring the New York State Office of Renewable Energy Siting (ORES) from implementing regulations that set forth procedural and substantive requirements for permit applications for major renewable energy facilities. Under the Accelerated Renewable Energy Growth and Community Benefit Act, such facilities are exempt from the State Environmental Quality Review Act (SEQRA), and ORES has authority to waive local laws. The court found that there was little likelihood that the petitioners challenging the regulations—which included a number of towns and bird conservation organizations—would succeed on the merits of their claims that adoption of the regulations violated SEQRA. The court also found that the record did not support a finding of irreparable harm in the absence of specific project approvals and that the equities did not balance in the petitioners' favor, "for it is manifest that development of major renewable energy facilities based on wind and solar resources to provide electrical generation is a reasoned means to combat climate change, and wholly compatible with the public interest to 'protect the environment for the use and enjoyment of this and all future generations.'" *Town of Copake v. New York State of Office of Renewable Energy Siting*, No. 905502-21 (N.Y. Sup. Ct. Sept. 21, 2021).

Southern California Gas Settled Lawsuit Challenging California Energy Commission's "Anti-Natural Gas Policy"

Southern California Gas Company (SoCalGas) and the California Energy Commission (CEC) agreed to settle a lawsuit in which SoCalGas contended that the CEC was unlawfully implementing a policy to eliminate use of natural gas. Details of the settlement were not available, but a CEC spokesperson said the CEC had not taken, and did not have plans to take, the steps SoCalGas sought in the lawsuit, which included preparation of certain new reports. *Southern California Gas Co. v. California State Energy Resources Conservation and Development Commission*, No. __ (Cal. Super. Ct. Aug. 26, 2021).

Vermont Court Said Attorney General Communications Under Climate Litigation Common Interest Agreements Were Shielded from Disclosure

In a lawsuit brought by Energy Policy Advocates, a Vermont Superior Court ordered the Vermont Attorney General to produce seven common interest agreements concerning "the general subject of combatting global warming in some fashion," but concluded that communications related to the common interest agreements were attorney work product that was shielded from disclosure under Vermont's Public Records Act. The common interest agreements were with other state attorneys general (and, in one case, with auto manufacturers) and related to automobile greenhouse gas standards, California's cap-and-trade policy, climate change public nuisance litigation, potential litigation to compel action concerning greenhouse gas emissions, NEPA regulations, and oil and gas development in the Arctic. The court concluded that the agreements themselves had to be produced so that the State could use them to document the refusal to produce subsequent communications within the scope of the agreements. The court rejected the argument that the communications were not protected because the lawsuits might have a political component or motivation. *Energy Policy Advocates v. Attorney General's Office*, No. 173-4-20 Wncv (Vt. Super. Ct. July 16, 2021).

NEW CASES, MOTIONS, AND OTHER FILINGS

Vermont Filed Consumer Protection Suit Against Oil and Gas Companies Alleging Deception over Climate Change

On September 14, 2021, Vermont filed a lawsuit against oil and gas companies under its Consumer Protection Act (VCPA). The lawsuit was filed in Vermont Superior Court and asserts that the defendants have misled Vermont consumers about the risks posed by their products, including the causal connection between their products and climate change, and have thereby denied Vermont consumers of the opportunity to make informed decisions about their fossil fuel purchases and consumption. The complaint alleges that the defendants took "extraordinary steps" to keep information about the connection between use of their products and climate change secret despite being "fully aware for decades of the causal link." The state also contends that the defendants have in more recent years "sought to adjust to shifting public perception through their 'greenwashing' campaigns'" in which they "falsely hold themselves out as responsible stewards of the environment." Vermont seeks a permanent injunction prohibiting the companies from engaging in unfair or deceptive acts and practices and requiring disclosure of fossil fuels' role in climate change at every point of sale in the state. The state also seeks disgorgement of funds acquired or retained as a result of any unlawful practices, civil penalties of $10,000 for each violation of the VCPA, and investigative and litigation costs and fees. *Vermont v. Exxon Mobil Corp.*, No. __ (Vt. Super. Ct., filed Sept. 14, 2021).

Second Circuit to Hear Oral Argument in Appeal of Remand Order in Connecticut Case Against Exxon; Supplemental Briefing Completed in Appeals of Remand Orders in Baltimore and Rhode Island Cases

In addition to the new case filed by Vermont and the voluntary dismissal of King County's case (discussed above), the following developments have taken place over the past month in state and local government climate change cases against the fossil fuel industry.

- The Second Circuit scheduled oral argument for October 5, 2021 on Exxon Mobil Corporation's motion to stay the remand order in Connecticut's case against the company. On September 21, Exxon filed its opening merits brief. *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. Sept. 20, 2021).
- Honolulu and Maui filed their answering brief in the Ninth Circuit urging the court to affirm the remand orders in their cases. They argued that none of the requirements for removal under the federal-officer removal statute were met, and that neither the Outer Continental Shelf Lands Act nor federal enclave jurisdiction provided a basis for federal jurisdiction. Six amicus briefs were filed in support of Honolulu and Maui. *City & County of Honolulu*, Nos. 21-15313, 21-15318 (9th Cir. Sept. 17, 2021).
- The parties have submitted all of their supplemental briefs in fossil fuel companies' appeal of the remand order in Rhode Island's case. The First Circuit—which limited its review to the federal-officer removal statute when it initially heard the appeal—is considering whether any of the companies' other grounds provide a basis for removal after the Supreme Court ruled in Baltimore's case that courts of appeal have a broader scope of review of remand orders when federal-officer removal is one basis for removal. *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.).
- In Baltimore's case, supplemental briefing on remand from the Supreme Court has also been completed in the Fourth Circuit, including the filing of five amicus briefs supporting affirmance of the district's order remanding the case to state court. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir.).
- Fossil fuel companies appealed the order remanding the City of Hoboken's case to state court and asked the district court to stay the remand order pending appeal. A temporary stay of the remand order is currently in effect. *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J.).

Petitioners Detailed Shortcomings in FERC's Review of Alaska LNG Project's Climate Impacts

Center for Biological Diversity and Sierra Club filed their opening brief in their lawsuit challenging the Federal Energy Regulatory Commission's authorization of the Alaska LNG Project, which the organizations described as including a gas treatment plant, eight compressor stations, liquefaction facilities, a marine terminal, and an 807-mile pipeline. The organizations assert claims under the NEPA and the Natural Gas Act. Under NEPA, their arguments include that FERC failed to consider the significance of the project's substantial direct greenhouse gas emissions and that FERC segmented the environmental review, obscuring the project's full impacts on climate. The organizations also argued that because FERC violated NEPA, its determination under the Natural Gas Act that the project was in the public interest was also invalid. *Center for Biological Diversity v. Federal Energy Regulatory Commission*, No. 20-1379 (D.C. Cir. Sept. 13, 2021).

Plaintiffs Argued that Roadway Project Required Environmental Review, Including Assessment of Potential Impacts of Climate Change on the Project

Plaintiffs filed a motion for summary judgment in their case challenging the Bayfront Parkway Project, a roadway project in the City of Erie, Pennsylvania, which they argued did not meet requirements for a categorical exclusion under NEPA. The plaintiffs contended that the Pennsylvania Department of Transportation (PennDOT) failed to examine a number of potentially significant impacts, including impacts from climate change—both the project's impact on climate change due to increased greenhouse gas emissions and the potential impact of climate change on the project. Regarding the impact of climate change on the project, the plaintiffs argued that PennDOT should have assessed the project and alternatives for impacts such as soil moisture levels affecting the structural integrity of roads and bridges, damage to culverts and roads during heavy precipitation events, the need for higher design standards to improve resiliency, and an evaluation of historic flooding events and impacts in the study area. *National Association for the Advancement of Colored People v. Federal Highway Administration*, No. 1:20-cv-00362 (W.D. Pa. Sept. 24, 2021).

Exxon Sought Dismissal of Shareholder Derivative Action Alleging Climate Change-Related Misconduct

Exxon Mobil Corporation and individual defendants (Exxon) moved to dismiss a shareholder derivative action in which the plaintiffs alleged misconduct related to Exxon's use of and statements regarding proxy costs of carbon or greenhouse gas costs—including their use in the company's asset impairment analyses and proved reserves estimates—as well as assertions that the company's assets would be stranded due to governmental climate change policies. Exxon argued that the case should be dismissed because the company's independent directors had determined in good faith after a reasonable inquiry that the shareholder derivative lawsuit was not in Exxon's best interests. Exxon further argued that additional theories of wrongdoing raised in the plaintiffs' recently filed consolidated complaint were procedurally improper because the plaintiffs had never asked Exxon's board to investigate the allegations. Exxon said the plaintiffs had added the new theories—which included allegations of misrepresentation of the environmental benefits of the company's products and "greenwashing campaigns" about the company's steps to mitigate climate change—in reliance on theories in an action filed by the Massachusetts Attorney General in October 2019 and after a New York court "discredited" the plaintiffs' core allegations in a December 2019 decision dismissing the New York Attorney General's fraud action against Exxon Mobil Corporation. *In re Exxon Mobil Corp. Derivative Litigation*, No. 3:19-cv-1067 (N.D. Tex. Sept. 24, 2021).

Facebook and Fact-Checkers Sued for Defamation for Labels Applied to Climate Change Videos

The journalist John Stossel, who currently publishes weekly news videos on social media, filed a defamation lawsuit against Facebook, Inc. and two French non-profit organizations that provide fact-checking services to Facebook. Stossel alleged that Facebook on two occasions placed labels over videos concerning climate change that mischaracterized the content of statements in the videos. He alleged that on one of these occasions the defendants falsely attributed to him a

statement that climate change does not cause wildfires, and that on the second occasion a "Partly False Information" label was affixed to a video in which Stossel questioned claims made by people he referred to "environmental alarmists." Stossel asserted that the defendants' actions injured him in his profession and occupation, and that the defendants acted with malice and that Facebook acted with reckless disregard of the truth or falsity of the statements on the labels. Stossel requested injunctive and declaratory relief; general, special, and compensatory damages to make him whole for actual damages and reputational damages (estimated to exceed $1 million); exemplary and punitive damages (estimated to exceed $1 million); and costs of suit. *Stossel v. Facebook, Inc.*, No. 5:21-cv-07385 (N.D. Cal., filed Sept. 22, 2021).

Organizations Cited Failure to Consider Climate Impacts on Protected Species in Challenge to Approvals of Plans for California Desert Conservation Area

Center for Biological Diversity and five other organizations filed a lawsuit in the federal district court for the Northern District of California asserting that federal defendants failed to comply with NEPA, the Federal Land Policy and Management Act, and the Endangered Species Act in their management of the West Mojave Planning Area of the California Desert Conservation Area. The actions challenged by the plaintiffs included adoption of the "Route Network Project" that increased the number of miles designated for off-highway vehicle use and approval of continued livestock grazing within Desert Tortoise critical habitat. The plaintiffs' allegations included that the U.S. Fish and Wildlife Service incompletely assessed cumulative effects, especially the impacts of climate change, in a 2015 biological assessment, and that a 2019 biological opinion failed to accurately assess whether the action, taken together with cumulative effects (including climate change), was likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. The plaintiffs said this assessment should have included a "tipping point analysis." They also alleged a failure to utilize "the best available scientific and commercial data to assess the current status and trend of the species in the face of climate change." *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 3:21-cv-7171 (N.D. Cal., filed Sept. 16, 2021).

Groups Said TVA Failed to "Meaningfully Respond" to Petition Requesting that It Curtail Payments to Third-Party Organizations that Opposed Greenhouse Gas Regulations

Center for Biological Diversity and five other organizations filed a lawsuit in the federal district court for the Eastern District of Tennessee challenging the Tennessee Valley Authority's (TVA's) response to their petition requesting that TVA adopt regulations limiting its ability to pay funds to third-party organizations such as trade associations and industry groups that the plaintiffs allege work against the interests of TVA ratepayers. The plaintiffs alleged that TVA had paid certain "Utility Regulatory Groups" millions of dollars for advocacy work and that the groups' actions included opposition to the U.S. Environmental Protection Agency's authority to regulate greenhouse gas emissions as well as opposition to specific greenhouse gas emission regulations. The plaintiffs asserted that TVA's response to their petition violated the Administrative Procedure Act because it failed to "meaningfully respond" to the petition and because its delay in resolving the matters raised by the petition amounted to action unreasonably delayed or withheld. *Center for Biological Diversity v. Tennessee Valley Authority*, No. 3:21-cv-00319 (E.D. Tenn., filed Sept. 9, 2021).

Federal Government Sought Final Judgment Against Organizational Plaintiff in *Juliana*

After the organization Earth Guardians declined to join other plaintiffs in a motion to file an amended complaint in *Juliana v. United States*, the federal government filed a motion requesting entry of judgment against Earth Guardians. The government argued that because the Ninth Circuit had ordered that claims of all plaintiffs be dismissed and because Earth Guardians no longer was part of the plaintiffs' efforts to amend the complaint, Earth Guardians' claims should be dismissed for lack of standing. The plaintiffs opposed the motion, arguing that instead Earth Guardians should be dropped as a plaintiff, at its request, pursuant to Rule 21. The plaintiffs asserted that the defendants' motion "appears to be part of a broader strategy to set up another early appeal or review by way of mandamus in connection with the pending Motion to Amend." They contended that the court should issue "one final judgment at the conclusion of the case to avoid any further unnecessary early appeals." *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Sept. 9, 2021).

Class Action Filed Against Electricity Provider for Damages Sustained in Louisiana During and After Hurricane Ida

Property owners, lessees, and occupants of four parishes in Louisiana filed a class action in Louisiana Civil District Court seeking damages from Entergy Corporation and related defendants for damages sustained as a result of the "foreseeable failure" of Entergy's distribution and transmission equipment and systems during Hurricane Ida. The plaintiffs alleged that the failure had occurred "despite evidence which demonstrated the weakness and perilous condition of their equipment and systems which was well known to Entergy." The plaintiffs also alleged that Entergy "has become aware that the climate of the world (including southeast Louisiana) is changing" and that Louisiana was experiencing more hurricanes, other severe tropical storms, and periods of heat and flooding. They contended that studies, including a 2007 "Hardening Study," had put Entergy on notice of the deficiencies in its systems but that Entergy had failed to take action in response and had cut funding for operations and maintenance expenses. The plaintiffs asserted claims of negligence and strict liability, as well as breaches of express and implied contracts. *Stewart v. Entergy Corp.*, No. 2021-07365 (La. Dist. Ct., filed Sept. 18, 2021).

Exxon and Texas Governor Argued that Texas Supreme Court Should Hear Case Concerning Jurisdiction over California Municipalities

Exxon Mobil Corporation filed a brief in the Texas Supreme Court arguing that the court should review the decision of an intermediate appellate court that held that Texas courts did not have personal jurisdiction over California municipalities and municipal officials and an attorney who originally represented San Francisco and Oakland in their climate lawsuits against fossil fuel companies. Exxon had filed a petition seeking pre-suit discovery against these parties to determine whether their lawsuits were "baseless and brought in bad faith as a pretext to suppress the Texas energy sector's Texas-based speech and associational activities regarding climate change and to gain access to documents that Exxon keeps in Texas." Exxon's arguments included that the Texas Supreme Court should hear the case to confirm that the municipalities' lawsuits were aimed at chilling speech by the Texas energy sector on climate change and that

this constituted meaningful contacts with the Texas forum. Texas Governor Greg Abbott submitted a letter brief as amicus curiae in support of granting review, writing that "[w]hen out-of-state officials try to project their power across our border, as respondents have done by broadly targeting the speech of an industry crucial to Texas, they cannot use personal jurisdiction to scamper out of our courts and retreat across state lines." *Exxon Mobil Corp. v. City of San Francisco*, No. 20-0558 (Tex. Sept. 10, 2021).

Environmental Groups Filed Suit Against Local Clean Air Agencies in Washington

Environmental groups filed a lawsuit in Washington Superior Court alleging that local clean air agencies were unlawfully shifting decision-making authority for new source approval from their boards of directors to technical staff and treating such approvals as ministerial decisions. The plaintiffs alleged that the effect of these actions was to undermine the Washington State Clean Air Act's "ability to protect the public health of Washington residents and the State's ability to achieve greenhouse gas (GHG) emissions reduction targets." *350 Seattle v. Puget Sound Clean Air Agency*, No. 21-2-09958-7 SEA (Wash. Super. Ct., filed July 28, 2021).

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FEATURED CASE

D.C. Circuit Found Deficiencies in Climate Change and Environmental Justice Analyses for Texas LNG Export Terminals

The D.C. Circuit Court of Appeals found that the Federal Energy Regulatory Commission (FERC) failed to adequately analyze the climate change and environmental justice impacts of two liquefied natural gas (LNG) export terminals on the Brownsville Shipping Channel in Texas and two pipelines that would carry LNG to one of the terminals. The court dismissed a challenge to a third LNG terminal on the Channel as moot after the developer informed FERC that the project would not go forward. With respect to climate change, the D.C. Circuit found that FERC failed to address the significance of a National Environmental Policy Act (NEPA) regulation that the petitioners argued required use of the social cost of carbon or another methodology to assess the impacts of the projects' greenhouse gas emissions. The regulation provides that "[i]f … information relevant to reasonably foreseeable significant adverse impacts cannot be obtained … because the means to obtain it are not known, the agency shall include within the environmental impact statement … [t]he agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." The D.C. Circuit agreed with the petitioners that FERC was required to address the significance of this regulation and directed FERC to explain on remand whether the regulation calls for application of the social cost of carbon protocol or another framework. The D.C. Circuit also found that FERC arbitrarily limited the scope of its environmental justice analysis to communities within two miles of the facilities despite acknowledging that impacts would extend beyond a two-mile radius. Because of the deficiencies in the NEPA analyses, the court also found that FERC's determinations of public interest and convenience under the Natural Gas Act (NGA) were deficient. The court remanded without vacatur, finding that it was reasonably likely that FERC could redress the

deficiencies under NEPA and the NGA on remand and that vacating FERC's orders "would needlessly disrupt completion of the projects." In an unpublished judgment, the court rejected the petitioners' other NEPA arguments regarding project design and capacity and cumulative ozone impacts. *Vecinos para el Bienestar de la Comunidad Costera v. Federal Energy Regulatory Commission*, No. 20-1045 (D.C. Cir. Aug. 3, 2021); *Vecinos para el Bienestar de la Comunidad Costera v. Federal Energy Regulatory Commission*, Nos. 20-1093, 20-1094 (D.C. Cir. Aug. 3, 2021).

DECISIONS AND SETTLEMENTS

New Jersey Federal Court Remanded Hoboken's Climate Case Against Fossil Fuel Companies to State Court

On September 8, 2021, a federal district court in New Jersey granted the City of Hoboken's motion to remand to state court its climate change lawsuit against oil and gas companies. On September 9, the court granted the defendants' request for a temporary stay of execution of the remand order. As a threshold matter, the court found that it would not be prudent to wait for federal courts of appeal to issue decisions in fossil fuel companies' appeals of remand orders in other climate change cases. The court noted that it had no indication of when the courts of appeal would address the issues and, "[c]ritically," that no such appeal was pending in the Third Circuit. On the merits of removal, the court first found that none of the exceptions to the well-pleaded complaint rule applied. The court held that the City's claims were not completely preempted by the Clean Air Act and also was not persuaded by the companies' argument that the claims necessarily arose under federal common law. The court found that, as pled, the complaint was "premised solely on state law" and that *City of New York v. Chevron Corp.*—in which the Second Circuit affirmed dismissal of New York City's climate change case against oil and gas companies—"merely suggests that Defendants may ultimately prevail with their federal preemption defense argument," not that there was a basis for federal subject matter jurisdiction. The New Jersey court also found no basis for *Grable* jurisdiction, rejecting the companies' arguments that the City's claims necessarily raised substantial and actually disputed issues of federal law such as First Amendment issues or issues addressed by federal environmental statutes. The court also found that the "chain of causation" between the defendants' activities on the outer continental shelf and the City's claims was "too attenuated" for the Outer Continental Shelf Lands Act to provide a basis for jurisdiction. In addition, the court rejected the federal-officer removal statute, federal enclave jurisdiction, and the Class Action Fairness Act as grounds for removal. *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J. Sept. 8, 2021).

Federal Court Stayed Remand Order in Minnesota's Climate Case Against Fossil Fuel Industry, Denied Attorney Fees

The federal district court for the District of Minnesota stayed its order remanding Minnesota's climate change lawsuit against the fossil fuel industry. The court found that a stay was prudent both due to uncertainty about the impacts on the Eighth Circuit's consideration of the remand order of the Supreme Court's decision in *Mayor & City Council of Baltimore v. BP p.l.c.* and the Second Circuit's decision in *City of New York v. Chevron Corp.* and also because it was possible

there might be a final disposition in state court prior to resolution of the Eighth Circuit's appeal, which would be a "concrete and irreparable" injury to the defendants. The court also found that judicial economy and conservation of resources weighed in favor of a stay. Because the balance of factors was likely to shift over time, the court said it would reevaluate the stay if the Eighth Circuit appeal was not resolved in 12 months. The court also denied Minnesota's motion for attorney fees, concluding that "removal advanced critical legal questions that have not yet been resolved by the higher courts." In the Eighth Circuit, Minnesota filed its response brief supporting affirmance of the remand order, and six amicus briefs were filed in support of affirmance. The amicus briefs were filed by 16 states and the District of Columbia; organizations representing local governments; Natural Resources Defense Council; Public Citizen; scholars of federal relations and federal courts; and individual "scholars and scientists with strong interests, education, and experience in the environment and the science of climate change," along with non-profit environmental and science organizations. *Minnesota v. American Petroleum Institute*, No. 0:20-cv-01636 (D. Minn. Aug. 20, 2021), No. 21-1752 (8th Cir.).

Alaska Federal Court Vacated Federal Approvals of Major Oil Development Project in National Petroleum Reserve

The federal district court for the District of Alaska found deficiencies in federal defendants' reviews and approvals of ConocoPhillips Alaska, Inc.'s (ConocoPhillips') Willow Master Development Plan in the National Petroleum Reserve in Alaska, which was anticipated to produce approximately 586 million barrels of oil over a 30-year life. The court therefore vacated the U.S. Bureau of Land Management's (BLM's) approval of the project and the U.S. Fish and Wildlife Service's (FWS's) biological opinion. Under NEPA, the court first found that the Naval Petroleum Reserves Production Act's 60-day time limit for seeking judicial review of environmental impact statements did not apply and that NEPA claims were therefore timely. The court then found that BLM's exclusion of foreign emissions in its alternatives analysis was arbitrary and capricious because its rationale "suffers from the same flaws the Ninth Circuit identified" in a December 2020 decision involving offshore drilling in the Beaufort Sea. Although the district court acknowledged that BLM provided "a lengthier explanation" of its reasons for not quantifying foreign emissions than the Bureau of Ocean Energy Management provided in the earlier case, the court found that BLM still did not "thoroughly explain" why an estimate of foreign emissions was impossible. The district court also rejected the defendants' and ConocoPhillips' assertion that the failure to quantify foreign emissions was inconsequential because BLM could not have adopted the no-action alternative given ConocoPhillips' existing leasing rights. In addition, the court found that BLM acted contrary to law by failing to consider a statutory directive to give "maximum protection" to surface values in the Teshekpuk Lake Special Area. Under the Endangered Species Act, the court vacated the FWS's biological opinion because the incidental take statement lacked "the requisite specificity of mitigation measures for the polar bear" and because the take finding for the polar bear was arbitrary and capricious. The court ruled for the federal defendants under other claims under NEPA and the Clean Water Act, including an argument that the defendants did not take a hard look at cumulative impacts of oil and gas development activities and climate change on fish and polar bears. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management*, No. 3:20-cv-00290 (D. Alaska Aug. 18, 2021).

Ninth Circuit Said Appeals in Keystone XL Nationwide Permit Case Were Moot

Because the U.S. Army Corps of Engineers had issued a new nationwide permit (NWP) superseding NWP 12, the Ninth Circuit Court of Appeals dismissed, for lack of jurisdiction, appeals of a district court ruling that NWP 12's issuance did not comply with Endangered Species Act consultation requirements and that the Corps could not rely on NWP 12 to authorize the Keystone XL pipeline. The Ninth Circuit said the new issuance of NWP 12 rendered the appeals moot and ordered the district court to dismiss the underlying claim. The Ninth Circuit declined, however, to take a position on whether the underlying cases were moot in their entirety and also declined to vacate any district court decisions. The federal district court for the District of Montana is to consider these issues on remand. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 20-35412 (9th Cir. Aug. 11, 2021).

Federal Court in Missouri Dismissed States' Challenges to Biden Actions on Social Cost of Greenhouse Gases

The federal district court for the Eastern District of Missouri held that Missouri and 12 other states lacked standing for their claims challenging executive actions related to establishing a social cost of greenhouse gas emissions. The court also held that these claims were not ripe. The court found that due to the "inherently speculative nature" of their alleged harm, the plaintiff states failed to establish any of the three elements of standing: injury in fact, causation, or redressability. The court was not persuaded that the states were "entitled to special solicitude" that would excuse them from meeting these standing requirements, or that their inability to file comments on interim estimates for the social cost of greenhouse gases was a "procedural injury" that afforded them standing. With respect to ripeness, the court found that any impact of the executive actions could not be felt immediately and that the states would have "ample opportunity to bring legal challenges to particular regulations" that allegedly inflicted an imminent, concrete, and particularized injury. The states appealed the dismissal of the case. *Missouri v. Biden*, No. 4:21-cv-00287 (E.D. Mo. Aug. 31, 2021).

Tennessee Federal Court Allowed Conservation Groups to Proceed with Challenge to TVA Long-Term Contracts

The federal district court for the Western District of Tennessee denied the Tennessee Valley Authority's (TVA's) motion to dismiss a lawsuit challenging long-term contracts for electricity between TVA and local utilities. The court concluded that the plaintiffs—three conservation groups—had standing for their claims under the TVA Act of 1933 and NEPA, and also that the court had the authority to review whether the long-term contracts violated the TVA Act. The plaintiffs' allegations include that the long-term agreements will result in greater emissions of greenhouse gases and other pollutants because insulation from a competitive market will constrain development of renewable energy. The complaint also alleges that the long-term agreements are likely to result in increased energy consumption and will therefore exacerbate greenhouse gas emissions and other impacts. *Protect Our Aquifer v. Tennessee Valley Authority*, No. 2:20-cv-02615 (W.D. Tenn. Aug. 12, 2021).

Tribal Sovereign Immunity Compelled Dismissal of Challenge to Wind Energy Lease in California

The federal district court for the Southern District of California dismissed a lawsuit challenging the U.S. Bureau of Indian Affairs' (BIA's) approval of a lease between the Campo Band of Diegueno Mission Indians (the Tribe) and a renewable energy company for development of a wind energy project. The plaintiffs alleged, among other things, that the environmental impact statement failed to consider the project's entire life cycle greenhouse gas emissions. In its order dismissing the case, the court concluded that the Tribe was a necessary party that could not be joined due to tribal sovereign immunity. The court further found that allowing the case to proceed absent the Tribe would prejudice the Tribe, and that the developer and BIA could not adequately represent the Tribe's interests. Given this "unmitigable prejudice," the court concluded "that this litigation cannot, in good conscience, continue in the Tribe's absence." The court rejected the plaintiffs' contention that the action should be allowed to proceed under the "public rights" exception for litigation that transcends private interests and seeks to vindicate a public right. The plaintiffs appealed the court's decision, which also overruled certain evidentiary objections and a motion to strike by the plaintiffs. *Backcountry Against Dumps v. U.S. Bureau of Indian Affairs*, No. 3:20-cv-02343 (S.D. Cal. Aug. 6, 2021).

New Mexico Federal Court Rejected New NEPA Challenge to Drilling Approvals in Mancos Shale

The federal district court for the District of New Mexico dismissed a lawsuit challenging BLM's NEPA review of 370 applications for permits to drill (APDs) in the Mancos Shale/Gallup Sandstone formation of the San Juan Basin. The court noted that this case "originated from a separate, extensively litigated case" (see here) challenging more than 300 APDs in which the Tenth Circuit ultimately found that BLM failed to adequately consider cumulative impacts on water resources in five environmental assessments (EAs) but otherwise rejected the plaintiffs' claims. BLM subsequently completed an "EA Addendum" to supplement the NEPA analysis and concluded for all APDs that the supplemental analysis in conjunction with the earlier analysis "did not demonstrate that the APDs in question would affect the human environment or result in cumulative impacts not already disclosed." The district court found that BLM had not predetermined its decision to grant the subject APDs and also concluded that BLM's supplementation was permissible. The district court noted that the EA Addendum reanalyzed several factors, including cumulative effects of greenhouse gas emissions, "though the Tenth Circuit did not explicitly require it to do so." The plaintiffs contended that the analysis of greenhouse gas emissions was flawed in several ways, and the court rejected each of these contentions. First, the court said the plaintiffs' argument that BLM merely quantified greenhouse gas emissions without analyzing them was without merit. Second, the court found that BLM's decision to use a 100-year time horizon instead of a 20-year timeframe to analyze the impacts of greenhouse gas emissions "does not misrepresent or diminish the impact of its environmental conclusions, and is consistent with the law and other similar federal emissions practices." Third, the court found that the plaintiffs did not establish that BLM failed to consider the APDs' cumulative impacts on greenhouse gas emissions. The court characterized the plaintiffs' argument as a request that the court "require an agency to codify Plaintiffs' beliefs about climate change and its origins in federal oil drilling in the agency's NEPA documentation." Fourth, the

court found that NEPA did not require that BLM evaluate greenhouse gas emissions in the context of carbon budgets. The court's analysis of the merits was conducted in the context of a preliminary injunction motion, but the court said further analysis or argumentation would not change its disposition as to the merits and therefore granted the defendants' request that the plaintiffs' claims be dismissed with prejudice. *Diné Citizens Against Ruining Our Environment v. Bernhardt*, No. 1:19-cv-00703 (D.N.M. Aug. 3, 2021).

Rehearing Denied in St. Louis Gas Pipeline Case

The D.C. Circuit Court of Appeals denied pipeline developers' petitions for panel rehearing and rehearing en banc of the court's decision vacating the Federal Energy Regulatory Commission's approvals for a natural gas pipeline in the St. Louis area. *Environmental Defense Fund v. Federal Energy Regulatory Commission*, No. 20-1017 (D.C. Cir. Aug. 5, 2021).

Minnesota Court Affirmed Water Quality Certification for Line 3 Replacement Project

The Minnesota Court of Appeals affirmed the issuance of a water quality certification under Clean Water Act Section 401 for the Line 3 replacement project proposed by Enbridge Energy LP. The project involves replacing an existing pipeline that transports crude oil with a new pipeline using a different route. As a threshold matter, the Court of Appeals rejected the argument that the issuance of a final Section 404 permit for the Line 3 project mooted the appeal. On the merits, the court found that the Section 401 certification was not affected by legal error and was supported by substantial evidence in the record. Among the arguments rejected by the court was the contention that the Minnesota Pollution Control Agency erred by failing to consider the effects of climate change in its analysis of whether the project would violate state water quality standards. The court said this argument did not identify a rule that was allegedly violated but instead challenged "the adequacy of the agency's analysis of relevant facts in evaluating potential environmental effects." The court therefore found that it was required to defer to the agency's application of technical knowledge and expertise. *In re Enbridge Line 3 Replacement Project Section 401 Water Quality Certification*, No. A20-1513 (Minn. Ct. App. Aug. 30, 2021).

Minnesota Court of Appeals Upheld Approvals for Utility's Stake in Wisconsin Power Plant

The Minnesota Court of Appeals affirmed the Minnesota Public Utilities Commission's approval of a utility's affiliated-interest agreements related to the utility's stake in a new natural gas-fired power plant in Wisconsin. In a previous decision, the Court of Appeals found that the Commission erred by approving the agreements without complying with the Minnesota Environmental Policy Act. The Minnesota Supreme Court reversed this ruling. On remand from the Supreme Court, the Court of Appeals addressed the remaining issues of whether substantial evidence supported the Commission's determinations that the power plant was needed and that the power plant would serve the public interest better than a renewable-resource alternative. The Court of Appeals found that substantial evidence supported the Commission's determinations that the power plant was needed as a low-cost source of energy and because its dispatchable capacity provided a hedge against market pricing. The Court of Appeals also rejected the

argument that the Commission's conclusion that the power plant's impact on overall system costs would be less than the comprehensive costs of wind or solar alternatives was not supported with sufficient detail and evidence. *In re Minnesota Power's Petition for Approval of Energy*Forward *Resource Package*, Nos. A19-0688, A19-0704 (Minn. Ct. App. Aug. 23, 2021).

Montana Court Allowed Youth Plaintiffs to Proceed with Constitutional and Public Trust Climate Claims

A Montana District Court concluded that youth plaintiffs had standing for their claims that the Montana State Energy Policy and the "Climate Change Exception" to the Montana Environmental Policy Act (MEPA) violate the Montana Constitution—which includes provisions declaring that Montana citizens possess an inalienable right to a clean and healthful environment—and the public trust doctrine. The Climate Change Exception provides that environmental review under MEPA may not include "actual or potential impacts that are regional, national, or global in nature." The court found that the plaintiffs sufficiently alleged that their alleged harms were caused by carbon emissions for which the State defendants were responsible, that they had "sufficiently raised a factual dispute as to whether the State Energy Policy was a substantial factor in causing Youth Plaintiffs' injuries," and that the plaintiffs sufficiently alleged that actions pursuant to the Climate Change Exception implicated their right to a clean and healthful environment. The court further found that the harms would be redressable by declaratory relief. The court agreed with the defendants, however, that injunctive relief ordering a remedial plan or an accounting of greenhouse gas emissions would violate the political question doctrine. The court rejected the argument that the plaintiffs failed to exhaust administrative remedies, finding that the plaintiffs could bring a direct action in court without first seeking administrative review. *Held v. State*, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 4, 2021).

NEW CASES, MOTIONS, AND OTHER FILINGS

Supreme Court to Consider Whether to Hear Appeals of D.C. Circuit Decision Vacating Trump Administration's Repeal and Replacement of Clean Power Plan

Briefing was completed on August 24, 2021 on the four petitions for writ of certiorari seeking review of the D.C. Circuit's January 2021 decision vacating the U.S. Environmental Protection Agency's repeal and replacement of the Obama administration's Clean Power Plan regulations for controlling carbon emissions from existing power plants. The petitions were distributed for the justices' conference of September 27. *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780 (U.S. Aug. 5, 2021).

Supplemental Appellate Briefing Continued on Removal Issues in Baltimore and Rhode Island Cases; Fossil Fuel Companies Moved to Dismiss King County's Case in Washington Federal Court

In addition to the remand of the City of Hoboken's climate change case and the order staying the remand order in Minnesota's case (both of which are discussed above), the following

developments have occurred in the climate change cases brought against the fossil fuel industry by state and local governments:

- In Baltimore's case, both the fossil fuel companies and Baltimore have filed supplemental briefs in the Fourth Circuit Court of Appeals in the companies' appeal of the order remanding the case to state court. The fossil companies argue that Baltimore's claims arise under federal law and also that the action was removable pursuant to the Outer Continental Shelf Lands Act because it has a connection with the companies' activities on the outer continental shelf. Several amicus briefs were filed in support of the companies by states led by Indiana, the U.S. Chamber of Commerce, trade groups led by the National Association of Manufacturers, and Energy Policy Advocates. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir.).
- In Rhode Island's case, briefing also continued in the companies' appeal of the remand order. As in Baltimore's appeal, states led by Indiana, trade groups, and the U.S. Chamber of Commerce filed amicus briefs in support of the companies. After Rhode Island filed its supplemental brief on August 27, in which it argued that its claims did not arise under federal common law, and were not subject to removal under the Outer Continental Shelf Lands Act, amicus briefs were filed in support of remand by other states and by Natural Resources Defense Council, organizations representing local governments, and foreign relations and federal court scholars. *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.).
- On August 23, 2021, fossil fuel companies filed motions to dismiss King County's lawsuit in the federal district court for the Western District of Washington. In their motion to dismiss for failure to state a claim, the companies argued that King County's case was "virtually identical" to New York City's case, and that the district court should therefore dismiss it for the same reasons that the Second Circuit affirmed dismissal of New York's case (i.e., because federal common law applied but was displaced by the Clean Air Act with respect to domestic emissions and because foreign policy considerations foreclosed any federal common law remedy for claims related to foreign emissions). The companies argued that even if state law did apply, the Clean Air Act and foreign affairs doctrine would preempt the claims. In their second motion, the companies argued that they were not subject to personal jurisdiction in Washington. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash.).
- On August 4, 2021, the federal district court for the Northern District of California stayed proceedings in Oakland's and San Francisco's cases, in which a renewed motion to remand and motion to amend are pending. The court directed counsel to inform the court when the Ninth Circuit issues a ruling in *County of San Mateo v. Chevron Corp.*, in which the Ninth Circuit is considering the fossil fuel companies' additional grounds for removal on remand from the Supreme Court's ruling that the scope of appellate review of remand orders extends beyond federal-officer removal when federal-officer removal is one of the removing defendants' bases for removal. *People of State of California v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal. Aug. 4, 2021).
- Briefing was completed on New York City's motion to remand its consumer protection lawsuit against the fossil fuel industry to state court. *City of New York v. Exxon Mobil Corp.*, No. 1:21-cv-04807 (S.D.N.Y.).

Environmental Groups Challenged Environmental Review for Offshore Oil and Gas Lease Sale

Four environmental groups filed a lawsuit in federal court in the District of Columbia challenging federal defendants' decision to hold an offshore oil and gas lease sale in the Gulf of Mexico. The complaint asserted claims under NEPA and the Administrative Procedure Act, alleging, among other flaws, that the NEPA analysis "incredulously asserts that burning" up to 1.12 billion barrels of oil and 4.4 trillion cubic feet of natural gas that would result from the lease sale "will *not* contribute to climate change" and will "*reduce* greenhouse gas emissions" compared to a no-action alternative. The plaintiffs alleged that this "irrational conclusion" was based "on the idea that foreign substitution effects would increase emissions if the U.S. did not hold a lease sale," an assumption that the plaintiffs was not supported by available information. The plaintiffs also contended that the defendants should have updated the almost five-year-old NEPA analysis to include "new information that demonstrates additional oil and gas leasing will exacerbate the climate crisis to an extent that the Bureau did not consider in its previous NEPA analysis." The complaint also alleged that new information revealed other risks and threats, including safety issues and harms to frontline communities and endangered species. *Friends of the Earth v. Haaland*, No. 1:21-cv-02317 (D.D.C., filed Aug. 31, 2021).

Nantucket Residents Challenged Federal Approvals of Offshore Wind Project

Nantucket residents filed a lawsuit in federal court in Massachusetts alleging that the Bureau of Ocean Energy Management's environmental review of the Vineyard Wind 1 offshore wind project did not comply with NEPA. The complaint alleged deficiencies in the environmental impact statement's consideration of greenhouse gases (GHG) , including inadequate analysis and disclosure of construction-related emissions and operational emissions. The complaint also alleged that BOEM failed to account for "GHG reduction benefits of whales and how the Project and the other offshore wind projects, by causing whale mortality, will cause those benefits to disappear." In addition to their NEPA claim, the plaintiffs asserted that the federal defendants violated the procedural and substantive requirements of the Endangered Species Act by failing to ensure that the project would not jeopardize the survival of the North Atlantic Right Whale and other federally listed species. *ACK Residents Against Turbines v. U.S. Bureau of Ocean Energy Management*, No. 1:21-cv-11390 (D. Mass., filed Aug. 25, 2021).

Environmental Groups' Challenge to Development Project in California Cited Protected Species' Vulnerability to Climate Change

Two environmental groups filed a lawsuit in the federal district court for the Eastern District of California challenging federal authorizations for a 314-acre multi-use development in the City of Chico. They asserted claims under the Endangered Species Act, NEPA, the Clean Water Act, and the Administrative Procedure Act. The allegations in support of their Endangered Species Act claims included that the U.S. Fish and Wildlife Service had ignored best available science when establishing the environmental baseline for its jeopardy analysis for listed species (vernal pool shrimp and meadowfoam), including information that the species' habitats were adversely

affected by and increasingly vulnerable to climate change. *AquAlliance v. U.S. Fish & Wildlife Service*, No. 2:21-cv-01527 (E.D. Cal., filed Aug. 25, 2021).

Lawsuit Challenged Determination that Freshwater Minnow Did Not Warrant Protection as Endangered or Threatened Species

Center for Biological Diversity filed a lawsuit challenging the U.S. Fish and Wildlife Service's determination that the Clear Lake hitch—a large freshwater minnow native to Clear Lake in Lake County, California—was not warranted for listing under the Endangered Species Act. The complaint alleged that the decision was unlawful and failed to rely on the best scientific and commercial data available, including by arbitrarily ignoring the FWS's own analysis that hitch "are critically vulnerable to climate change." The complaint asserted claims under the Endangered Species Act and the Administrative Procedure Act. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 3:21-cv-06323 (N.D. Cal., filed Aug. 17, 2021).

Trade Groups Filed New Lawsuit Challenging Moratorium on Federal Oil and Gas Lease Sales

American Petroleum Institute and other national, international, and regional trade groups filed a lawsuit in federal district court in Louisiana seeking to compel federal defendants to proceed with onshore and offshore oil and gas lease sales. The trade groups alleged that the defendants had implemented a moratorium on the lease sales in violation of the Administrative Procedure Act, the Mineral Leasing Act, the Federal Land Policy and Management Act, the Outer Continental Shelf Lands Act, and NEPA. *American Petroleum Institute v. U.S. Department of the Interior*, No. 2:21-cv-02506 (W.D. La., filed Aug. 16, 2021).

Challenge to Crude Oil Pipeline Voluntarily Dismissed After Developer Abandoned Project

On August 13, 2021, three environmental organizations voluntarily dismissed their federal lawsuit challenging the U.S. Army Corps of Engineers' authorization of the Byhalia crude oil pipeline under Nationwide Permit 12. The organizations' notice reported that the pipeline developer had abandoned the project and the approvals at issue in the litigation. *Memphis Community Against Pollution Inc. v. U.S. Army Corps of Engineers*, No. 2:21-cv-02201 (W.D. Tenn. Aug. 13, 2021).

Plaintiffs Reported Agreement in Principle Regarding Settlement of Challenges to Oil and Gas Lease Sales in Western U.S.

In three cases challenging oil and gas lease sales in the western United States, the plaintiffs asked the federal district court for the District of Columbia to stay the proceedings for 60 days to facilitate a negotiated final resolution of the cases. They reported that they had reached "an agreement in principle on a framework for a settlement agreement that would result in the stipulated dismissal" of the cases. The federal defendants did not oppose the motion, but certain intervenors opposed the stays on the grounds that challenges to some of the lease sales were untimely and that the court therefore should resolve intervenor American Petroleum Institute's motions to dismiss those claims in the interests of vindicating the purposes served by the Mineral

Leasing Act's 90-day limitations period for review of decisions involving oil and gas leases. The federal defendants previously sought voluntary remand of the cases. *WildEarth Guardians v. Haaland*, No. 16-cv-1724 (D.D.C.), *WildEarth Guardians v. Haaland*, No. 21-cv-175 (D.D.C.), *WildEarth Guardians v. Haaland*, No. 20-cv-56 (D.D.C.).

Federal Government Proceeded with Offshore and Onshore Oil and Gas Leasing but Appealed Louisiana Federal Court Injunction

On August 16, 2021, federal defendants filed a notice of their appeal of a Louisiana federal district court's decision granting plaintiff states' motion for a preliminary injunction barring the Biden administration from implementing a pause on new oil and natural gas leases on public lands or in offshore waters. A week earlier, the plaintiff states filed a motion for order to show cause and to compel compliance with the preliminary injunction, arguing that the defendants violated the court's order by refusing to hold new onshore lease sales and move forward with offshore lease sales. The defendants opposed this motion, contending that they had been working over the last 10 weeks to prepare to hold onshore and offshore leases, and that they were "on track" to publicly announce onshore and offshore leasing activity by August 31. In a press release on August 24, the Interior Department announced steps to comply with the district court's injunction and also said it would undertake "a programmatic analysis to address what changes in the Department's programs may be necessary to meet the President's targets of cutting greenhouse gas emissions in half by 2030 and achieving net zero greenhouse gas emissions by 2050." On August 31, BOEM issued a record of decision for Lease Sale 257. Also on August 31, BLM sought public input on parcels proposed for potential oil and gas leasing. *Louisiana v. Biden*, No. 2:21-cv-00778 (W.D. La.).

Lawsuit Alleged that Air Quality Management District's Rule Was Unlawful Regulation of Truck Emissions

California Trucking Association (CTA) filed a lawsuit in federal court in California seeking to block implementation of a rule adopted by the South Coast Air Quality Management District (SCAQMD). CTA alleged the rule was intended "to control mobile source emissions by imposing preempted [zero emission or near zero emission (ZE/NZE)] emissions standards on medium to heavy-duty trucks used at warehouses, backed by the threat of economic sanctions styled as a mitigation fee." The complaint alleged that the rule imposed compliance obligations on warehouses based on the number, type, and emission characteristics of trucks that visit the warehouse facilities. CTA said SCAQMD had styled the rule as a lawful indirect source review rule but that it was "not truly concerned with indirect sources" such as vehicle trips by workers traveling to and from warehouse, construction equipment used to construct new warehouses, or direct emissions from warehouses. Instead, CTA alleged, the rule was "entirely about the trucks" and was therefore preempted by the Clean Air Act and the Federal Aviation Administration Authorization Act of 1994. CTA also alleged that the rule violated state air laws and constituted an unlawful tax. *California Trucking Association v. South Coast Air Quality Management District*, No. 2:21-cv-06341 (C.D. Cal., filed Aug. 5, 2021).

Lawsuit Challenged Removal of Seasonal Restrictions on "Hopper Dredging" in North Carolina Harbors

A lawsuit filed in the federal district court for the Eastern District of North Carolina alleged that the U.S. Army Corps of Engineers acted in violation of NEPA and the Administrative Procedure Act when it ended seasonal restrictions on hopper dredging at Wilmington and Morehead City Harbors in North Carolina. The complaint alleged that hopper dredges were "massive vessels that operate like a vacuum cleaner" by sucking up bottom sediment and discharging it into a "hopper" within the vessel until disposal, and that such dredging "poses a unique and often fatal risk to aquatic wildlife." The complaint alleges that the Corps failed to adequately address or disclose impacts of eliminating the restrictions, including climate change impacts such as "the compounding impacts climate change will have on species, water quality, water temperatures, or the affected project area." *Cape Fear River Watch v. U.S. Army Corps of Engineers*, No. 7:21-cv-138 (E.D.N.C., filed Aug. 4, 2021).

Tribe and Nonprofit Groups Challenged Corps of Engineers Permit for Oil Export Terminal Expansion Project in Texas

The Karankawa Kadla Tribe of the Texas Gulf Coast and two nonprofit organizations filed a lawsuit against the U.S. Army Corps of Engineers in the federal district court for the Southern District of Texas challenging issuance of a Clean Water Act Section 404 permit for expansion of the Moda Ingleside Energy Center, a crude oil export terminal in the Corpus Christi Ship Channel. The plaintiffs asserted violations of the Clean Water Act, NEPA, and the Administrative Procedure Act, including a failure to consider the expansion's contribution to climate change. *Indigenous Peoples of the Coastal Bend v. U.S. Army Corps of Engineers*, No. 2:21-cv-00161 (S.D. Tex., filed Aug. 3, 2021).

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FEATURED CASE

Washington Supreme Court Said Climate Activist Was Entitled to Present Necessity Defense Based on Evidence that Legal Alternatives Were Not "Truly Reasonable"

The Washington Supreme Court ruled that a climate activist should be permitted to present a necessity defense to charges of criminal trespass and unlawful obstruction of a train in connection with a 2016 protest on railroad tracks used by trains carrying coal and oil products. The Supreme Court reversed an intermediate appellate court's decision affirming a superior court determination that the defendant could not present a necessity defense. The intermediate appellate court held that the defendant was not entitled to present the defense because he had "reasonable legal alternatives" to trespass and obstruction even if those alternatives were not effective. The Supreme Court called the appellate court's conclusion that there are always reasonable legal alternatives to disobeying constitutional laws "untenable," and held that "reasonable legal alternatives" must be effective. Whether a legal alternative was "truly reasonable" would be a fact-dependent determination, and "[i]f the defendant offers evidence that they have actually tried the alternative, had no time to try it, or have a history of futile attempts with the alternative, they have created a question of fact for the jury regarding whether there are reasonable legal alternatives." In this case, the defendant had presented a question of

fact as to whether reasonable legal alternatives existed with evidence of his efforts over the years to "call[] attention to the harms of climate change through lawful methods." The Supreme Court also noted the testimony of the defendant's expert on nonviolent resistance "that peaceful civil disobedience is essential to combating climate change." In the interests of judicial economy, the Supreme Court also held that the defendant satisfied the other three elements of the necessity defense: (1) he presented sufficient evidence to reach a jury on the question of whether he believed his actions were necessary to avoid or minimize harms; (2) he did not bring about the threatened harms; and (3) he presented sufficient facts to support a conclusion that the harms he sought to avoid were greater than the harm caused by violation of the law, including evidence that he planned the protest for a time when trains were not scheduled to approach and that he notified the railway company. *State of Washington ex rel. Haskell v. Spokane County District Court*, No. 98719-0 (Wash. July 15, 2021).

DECISIONS AND SETTLEMENTS

First Circuit Vacated Stay Order in Lawsuit Alleging Exxon Failed to Prepare Petroleum Terminal for Climate Change

The First Circuit Court of Appeals ruled that a federal district court in Massachusetts improperly stayed Conservation Law Foundation's citizen suit charging Exxon Mobil Corporation (Exxon) with violating its National Pollutant Discharge Elimination System (NPDES) permit as well as the Resource Conservation and Recovery Act by failing to account for climate change factors at a petroleum storage and distribution terminal in Everett, Massachusetts. The district court had granted Exxon's motion to stay the case under the doctrine of primary jurisdiction to allow the U.S. Environmental Protection Agency (EPA) to issue a decision on Exxon's application to renew the NPDES permit, which had expired in 2014. The First Circuit found that it had appellate jurisdiction even though the stay order was not a final decision because the stay order rendered Conservation Law Foundation "effectively out of court" due to the length of the stay and its indefinite nature. The First Circuit further found that the stay was unnecessary because abstention under the primary jurisdiction doctrine was improper. The First Circuit concluded that two of the three factors for application of the primary jurisdiction doctrine could weigh in favor of a stay—(1) issuing the permit was "at the heart" of the task assigned to EPA by Congress, and (2) the court assumed for the sake of argument that "agency expertise would be helpful to unravel which climate models most accurately capture the effects of the climate change factors" that Exxon allegedly failed to take into account. The First Circuit concluded, however, that the third factor—whether EPA's decision would materially aid the court—outweighed the other factors and that EPA's determination on the permit application "seems to us largely irrelevant to whether ExxonMobil has violated the conditions of the permit currently in effect" and that it was "wholly speculative whether the issuance of the permit will illuminate EPA's beliefs as to the best climate change models or how good engineers would respond to them." The court also found that a need for "national uniformity" was not at issue in this case. The First Circuit therefore disagreed with the district court's determination that EPA's decision on the permit could render much of the case moot, as well as the district court's belief that deferring to EPA would not delay resolution of the case. The First Circuit vacated the stay order and remanded to the district court. *Conservation Law Foundation v. Exxon Mobil Corp.*, No. 20-1456 (1st Cir. July 1, 2021).

Ninth Circuit Affirmed Rejection of NEPA Challenges to Immigration Policies

The Ninth Circuit Court of Appeals affirmed judgment in favor of the Secretary of the Department of Homeland Security on claims that the Department violated the National Environmental Policy Act (NEPA) by failing to consider environmental impacts of certain immigration programs and policies. The plaintiffs—identified as environmentalists, environmental groups, natural resource conservation groups, and cattle ranchers—alleged, among other things, that the immigration actions resulted in increased greenhouse gas emissions. The Ninth Circuit found that a manual that described how the Department would implement NEPA was not a final agency action subject to review under the Administrative Procedure Act, and that immigration "programs" challenged by the plaintiffs, including Temporary Protective Status and long-term nonimmigrant visas, were not discrete agency actions subject to review. The Ninth Circuit ruled that the plaintiffs did not have standing for their remaining claims. *Whitewater Draw Natural Resource Conservation District v. Mayorkas*, No. 20-55777 (9th Cir. July 19, 2021).

D.C. Circuit Said EPA Endangered Species Determinations for 2019 Renewable Fuel Rule Were Arbitrary and Capricious

The D.C. Circuit largely rejected challenges to the U.S. Environmental Protection Agency's (EPA's) 2019 rule setting renewable fuel volumes in the Clean Air Act's Renewable Fuel Standard Program. The court rejected all arguments by obligated parties and renewable fuel producers but agreed with environmental petitioners that EPA's (1) determination that the rule would have no effect on endangered species or their critical habitat and (2) decision not to reduce applicable volumes to prevent severe environmental harm were at odds with the evidence in the administrative record. *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir. July 16, 2021).

Ninth Circuit Dismissed Appeal of Denial of Environmental Groups' Preliminary Injunction Motion in Keystone XL Case; District Court Denied Motion to Dismiss Challenge to 2019 Presidential Permit as Moot

After the developers terminated the Keystone XL pipeline project, the Ninth Circuit Court of Appeals on July 16, 2021 dismissed for lack of jurisdiction an appeal of the district court's denial of a motion for a preliminary injunction barring work on the pipeline. The Ninth Circuit declined to remand with instructions for dismissal of the underlying action and also declined to vacate any district court decisions. In addition, the Ninth Circuit took no position on whether the underlying action was moot or whether vacatur was appropriate, instead leaving those matters to the district court. On July 21, the plaintiffs filed their opposition in district court in Montana to the developers' motion to dismiss the action as moot. The plaintiffs cited three reasons that the case was not moot: (1) President Biden's revocation of the presidential permit could be vacated in the pending *Texas v. Biden* litigation in the Southern District of Texas and President Biden or a future president could reinstate the permit; (2) the developers had not committed to address the harmful effects of the uncompleted construction of the pipeline project; and (3) the developers could revive the project if they are unsuccessful in a $15 billion claim under the arbitration provision of the North American Free Trade Agreement based on economic harm from President

Biden's revocation. The developers announced their filing of a notice of intent to pursue such a claim on July 2. The plaintiffs argued that these factors make the lawfulness of the presidential permit granted by President Trump "anything but a moot question." On July 30, 2021, the district court (which previously determined that the revocation of the permit did not render the case moot) denied the developers' motion to dismiss. The court found that nothing in the developers' announcement of the termination of the project altered its earlier decision on mootness. The court said the 2019 permit continued to present a live controversy, and that, even if it did not, it met the mootness exception for voluntary cessation of unlawful activity. *Indigenous Environmental Network v. Biden*, No. 20-36068 (9th Cir. July 16, 2021); *Indigenous Environmental Network v. Trump*, No. 4:19-00028 (D. Mont. July 30, 2021).

In the case challenging President Biden's revocation of the presidential permit, the federal government moved to dismiss, arguing that the case was moot, that the court lacked jurisdiction to grant relief against the president and the agency defendants, and that the states lacked standing, which also made venue improper. The defendants also argued that the states failed to state a separation of powers claim or a non-delegation claim. On July 13, the federal district court for the Southern District of Texas stayed discovery until the motion to dismiss was decided, citing "unique circumstances" due to separate of powers concerns related to seeking discovery against the president and vice president, and also due to the "expansive scope" of proposed discovery, especially since the case appeared to involve a "purely legal question" about the scope of presidential authority. *Texas v. Biden*, No. 3:21-cv-00065 (S.D. Tex. July 12, 2021).

Pipeline Company Voluntarily Dismissed Appeal in Case Challenging South Portland Ordinance

On July 15, 2021, a company that operates a crude oil pipeline system running from South Portland, Maine, to oil refineries in Quebec filed a stipulation of voluntary dismissal in the First Circuit Court of Appeals to voluntarily dismiss its appeal of a district court decision upholding a South Portland ordinance that prohibited bulk loading of crude oil onto marine tank vessels. The *Portland Press Herald* reported that the pipeline company said its parent company decided to dismiss the appeal because the company did not have current plans to reverse the flow in the pipeline to bring crude oil from Canada to South Portland for export. *Portland Pipe Line Corp. v. City of South Portland*, No. 18-2118 (1st Cir. July 15, 2021).

Parties Agreed to Dismissal of Lawsuit After Interior Department Withdrew 2019 Interpretation that Allegedly Expanded Potential Sand Mining of Coastal Barriers

National Audubon Society, Secretary of the Interior Deb Haaland, other federal defendants, and New Jersey localities who intervened as defendants agreed to the dismissal of National Audubon Society's lawsuit challenging a 2019 Interior Department memorandum that interpreted the Coastal Barrier Resources Act to allow use of sand removed from within the Coastal Barrier Resources System for shoreline stabilization projects outside the System. National Audubon Society alleged that the rule "vastly expands potential sand mining projects in delicate coastal barriers" and further alleged that coastal barriers would become even more important due to climate change and were expected to mitigate $108 billion of sea level rise and flooding damages over the next 50 years. On June 22, 2021, the federal defendants informed the court that they

anticipated that they would revise the 2019 interpretation and issue a new interpretation. In July, the Interior Department rescinded the 2019 memorandum, reinstating the interpretation that had been in place from 1994 to 2019, which required that sand from the System be used only in shoreline stabilization projects within the System. The Biden-Harris administration had identified the 2019 interpretation as an action to be reviewed under President Biden's Executive Order 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." *National Audubon Society v. Haaland*, No. 1:20-cv-05065 (S.D.N.Y. July 23, 2021).

Federal Court Rejected Federal Preemption Challenge to Berkeley Natural Gas Ban

The federal district court for the Northern District of California ruled that a restaurant trade association failed to state a claim that the federal Energy Policy and Conservation Act (EPCA) preempted the City of Berkeley's ordinance prohibiting natural gas infrastructure in new construction. The court rejected Berkeley's jurisdictional grounds for dismissal (standing and ripeness) but found that the association failed to demonstrate that EPCA expressly preempted Berkeley's ordinance because the ordinance "does not directly regulate either energy use or energy efficiency of covered appliances." The court further found that EPCA's legislative history did not support the plaintiff's "expansive interpretation." The court also noted that states and localities "expressly maintain control over the local distribution of natural gas under related federal statutes" such as the Natural Gas Act. The court declined to exercise supplemental jurisdiction over the plaintiff's state law claims and dismissed them without prejudice. Sabin Center Senior Fellow Amy Turner discussed the court's decision in a post on the *Climate Law Blog*. *California Restaurant Association v. City of Berkeley*, No. 4:19-cv-07668 (N.D. Cal. July 6, 2021).

"Valve Turner" Defendants Convicted of Aiding and Abetting Criminal Damage to Property

On July 8, 2021, a jury in Minnesota state court found four activists guilty of aiding and abetting fourth degree criminal damage to property, a misdemeanor offense. The defendants were arrested in February 2019 after they entered an Enbridge pipeline valve site and turned valves on a pipeline. The defendants were sentenced to 15 days in jail, with credit for time served, and to pay fees and fines of $75. The court also ordered a one-year probation term and directed them not to enter any Enbridge property or facility. The Climate Defense Project's Climate Necessity Defense Case Guide indicates that in August 2019 the court granted in part the State's motion to exclude evidence for a necessity defense, finding that the "Four Necessity Valve Turners" had legal alternatives and failed to show that climate change harms were imminent; the court found, however, that the defendants presented sufficient evidence of a direct causal connection between violating the law and preventing harm. The Case Guide reports that the court excluded expert testimony but allowed a limited necessity defense. *State v. Yildirim*, No. 31-CR-19-395 (Minn. Dist. Ct. July 8, 2021).

Maryland Appellate Court Affirmed Ruling for Baltimore in Case Seeking Correspondence and Agreements Related to City's Climate Case

The Maryland Court of Special Appeals affirmed a decision granting summary judgment to the Mayor and City Council of Baltimore (the City) in a case brought by Energy Policy Advocates under the Maryland Public Information Act to compel the City to disclose correspondence between City attorneys and outside environmental groups, as well as correspondence and agreements with the law firm that represents the City in its lawsuit seeking to hold fossil fuel companies liable for their contributions to climate change. The appellate court found that the circuit court did not abuse its discretion when it granted summary judgment to the City based on the City's pleadings and an affidavit. The appellate court noted that the judge had found that *in camera* review or a *Vaughn* index were not necessary because the information requested by Energy Policy Advocates was protected from disclosure given that there was ongoing litigation. *Energy Policy Advocates v. Mayor & City Council of Baltimore*, No. 1059 (Md. Ct. Spec. App. July 15, 2021).

D.C. Court Said Climate Scientist Provided Sufficient Evidence of Actual Malice for Blog Authors but Not for Publisher

In climate scientist Michael Mann's defamation lawsuit against individuals and organizations that published blog posts that characterized his work as fraudulent and attributed misconduct to him, a District of Columbia Superior Court denied summary judgment motions by the defendants on the issue of the individual authors' "actual malice" and by Mann on the issue of the falsity of the blog posts. The court found, however, that Mann failed to offer evidence establishing that Competitive Enterprise Institute (CEI)—which published one of the blogs—acted with "actual malice." (The court made a similar ruling in March 2021 with respect to National Review, Inc. the publisher of the other blog.) The court said this failure to establish actual malice was the result of the nature of the blog, which was "designed for low-effort management on the part of CEI, where outside writers enjoy a platform for their opinions, with only cursory review by a relatively low-ranking CEI employee prior to publication." With respect to the author of the post on CEI's blog, the court found that Mann offered "significant evidence" that would allow a reasonable jury to find that the author acted with actual malice. The court denied summary judgment on the issue of whether the article was false. In a separate decision, the court denied a motion by the author of the blog post on the National Review's website for summary judgment on the issues of protected speech concerning public opinions, actual malice, truth, and whether Mann should be awarded damages. The court also denied Mann's motion for summary judgment on the issue of whether statements in the blog post were false. *Mann v. National Review, Inc.*, 2012 CA 008263 B (D.C. Super. Ct. July 22, 2021).

NEW CASES, MOTIONS, AND OTHER FILINGS

Courts of Appeal Received New Briefs on Removal Issues in State and Local Climate Cases

Supplemental briefing began in federal courts of appeal in cases remanded by the Supreme Court after the Court issued its decision in *Mayor & City Council of Baltimore v. BP p.l.c.* holding that the scope of appellate review of remand orders extended beyond review of removal based on the federal-officer removal statute.

- In Rhode Island's case, the defendants submitted their principal supplemental brief on July 28, arguing that removal of the case was proper because Rhode Island's claims necessarily arose under federal law and also because the case had a connection with the defendants' activities on the outer continental shelf. The Chamber of Commerce of the United States of America filed an amicus brief in support of the defendants, arguing that federal courts had original jurisdiction over cases with claims that have an "inherently federal basis" and that the artful pleading doctrine applied to Rhode Island's state law claims "about the inherently global problem of climate change." *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.).
- In the Tenth Circuit, both fossil fuel companies and local government entities filed supplemental briefs on July 16. The local governments argued that the court should reject the companies' remaining arguments for removal (federal common law, *Grable* (substantial federal question), complete preemption, federal enclave jurisdiction, and the Outer Continental Shelf Lands Act). The fossil fuel companies' supplemental brief focused on their argument that federal common law necessarily governed the local governments' claims because the claims concerned injuries allegedly caused by interstate emissions. The companies argued that the Second Circuit's recent decision affirming the dismissal of New York City's climate case supported their position because New York's claims were "indistinguishable" from the claims in this case. The local governments took the position that the Second Circuit's decision regarding the application of federal common law was distinct from the jurisdictional question at issue in this case; the local governments also argued, however, that the Second Circuit's decision was incorrect. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, No. 19-1330 (10th Cir. July 16, 2021).
- In Baltimore's case, the fossil fuel companies' supplemental opening brief is due August 6, the supplemental response brief is due September 7, and any supplemental reply brief is due September 28. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir. July 26, 2021).

In addition, briefing began in fossil fuel companies' appeals of the remand orders in cases brought by the City and County of Honolulu and the County of Maui. The companies argued that the actions were removable under the federal-officer removal statute, the Outer Continental Shelf Lands Act, and federal enclave jurisdiction. They also preserved their argument that Honolulu's and Maui's claims necessarily arose under federal law because they related to interstate and international air emissions, an argument rejected by the Ninth Circuit in *City of Oakland v. BP p.l.c.*, as well as the argument that the plaintiffs' claims depend on the resolution of substantial federal questions related to the federal government's exclusive control over navigable waters of the United States, issues of treaty interpretation, issues of constitutional law, and federal relations. Two amicus briefs were filed in support of the companies, one by the U.S. Chamber of Commerce and the other by a retired general and a retired admiral, who wrote that they "strongly believe … important national and international policy issues should be addressed to Congress and the Executive Branch, not adjudicated piecemeal across the country in a multitude of state courts." *City & County of Honolulu v. Sunoco LP*, Nos. 21-15313, 21-15318 (9th Cir.).

Developments in other local government climate cases pending in federal district courts included the following:

- In Oakland and San Francisco's case, a fully briefed renewed motion to remand is pending before the federal district court for the Northern District of California. The parties submitted a joint case management statement on July 9 in which they indicated they were ready to proceed with the remand motion if the court was inclined to do so, but that they would understand if the district court preferred to wait until the Ninth Circuit ruled on the issues of remand under the Outer Continental Shelf Lands Act and federal enclave jurisdiction. The defendants believed it would be reasonable to proceed on the remand motion because two other grounds for removal were at issue in this case—(1) *Grable* jurisdiction because Oakland and San Francisco's misrepresentation claims "necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment" and (2) a "more robust" basis for federal-officer removal than the Ninth Circuit considered in rejecting federal-officer removal in *San Mateo*. The cities took the position that the Ninth Circuit's previous decisions in *San Mateo* and *Oakland* bound the district court on these issues but did not object to proceeding. *County of San Mateo v. Chevron Corp.* *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal.).
- On July 7, New York City filed its memorandum of law in support of its motion to remand. The defendants' opposition to the motion is due by August 16. *City of New York v. Exxon Mobil Corp.*, No. 1:21-cv-04807 (S.D.N.Y. July 7, 2021).
- In King County's case, which has been stayed since October 2018, the court granted the parties' stipulated motion regarding deadlines for the defendants' renewed motions to dismiss. Within 45 days, the defendants must file their motions to dismiss for failure to state a claim and for lack of personal jurisdiction. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash. July 7, 2021).

After Congressional Review Act Disapproval, Petitioners Sought Voluntary Dismissal of Challenges to Trump EPA Amendments to Oil and Gas New Source Standards

Petitioners challenging the September 2020 EPA rule that repealed significant portions of the new source performance standards (NSPS) for the oil and natural gas sector moved for voluntary dismissal of their petitions for review in the D.C. Circuit after President Biden signed a joint resolution under the Congressional Review Act disapproving the September 2020 rule. The rule removed sources in the transmission and storage segment from the source category, rescinded the NSPS applicable to such sources, and also rescinded methane-specific requirements applicable to production and processing sources. The final rule also adopted an interpretation of Clean Air Act Section 111 that required, as a predicate to establishing NSPS, a determination by EPA that a pollutant causes or contributes significantly to dangerous air pollution. In a related case seeking to compel EPA to establish emission guidelines for methane emissions from existing sources in the oil and gas sector, the federal district court for the District of Columbia accepted the parties' proposal that the parties submit a joint status report regarding how they wished to proceed after EPA issues a proposed rule for the emission guidelines. *California v. Regan*, Nos. 20-1357, 20-1359, 20-1363 (D.C. Cir. July 29, 2021); *New York v. EPA*, No. 1:18-cv-00773 (D.D.C. July 7, 2021).

Environmental Groups Appealed Dismissal of NEPA Regulations Lawsuit

Environmental groups filed a notice of appeal of the order of the federal district court for the Western District of Virginia dismissing their lawsuit challenging the Trump administration's amendment of the Council on Environmental Quality's regulations implementing NEPA. The district court held that the plaintiffs did not have standing and that their claims were not ripe. *Wild Virginia v. Council on Environmental Quality*, No. 3:20-cv-00045 (W.D. Va. July 30, 2021).

BLM Sought Remand Without Vacatur of NEPA Documents in Western State Oil and Gas Leasing Challenges

On July 30, 2021, the U.S. Bureau of Land Management (BLM) asked the federal district court for the District of Columbia for voluntary remand without vacatur of environmental assessments and findings of no significant impact in three cases challenging oil and gas lease sales in Colorado, Montana, New Mexico, Utah, and Wyoming. The cases were filed in 2016, 2020, and 2021. The federal defendants told the court that they had determined that remand was appropriate to allow additional analysis under NEPA in light of the court's November 2020 decision in the 2016 case that found shortcomings in the analysis of greenhouse gas emission associated with the Wyoming leases at issue in that case. The federal defendants asserted that remand without vacatur was appropriate because there was "at least a serious possibility" that BLM would be able to substantiate its decision on remand, because the court lacked authority to order vacatur without an independent determination that the leasing decisions did not comply with NEPA, and because the plaintiffs and intervenors would have an opportunity to challenge any decisions the agency made on remand. American Petroleum Institute, which intervened as a defendant in all three cases, filed motions to dismiss in the 2020 and 2021 lawsuits, arguing that challenges to some of the leases in the lawsuits were time-barred. In the 2021 case, API also argued that res judicata or the doctrine of laches should bar the plaintiffs from challenging leasing decisions issued prior to the plaintiffs' filing of their 2020 lawsuit. *WildEarth Guardians v. Haaland*, No. 1:21-cv-00175 (D.D.C. July 30, 2021); *WildEarth Guardians v. Haaland*, No. 1:20-cv-056 (D.D.C. July 30, 2021); *WildEarth Guardians v. Haaland*, No. 1:16-cv-01724 (D.D.C. July 30, 2021).

Federal Securities Actions Against Oatmilk Company Included Greenwashing Allegations

Two securities class actions filed in the federal district court for the Southern District of New York alleged that Oatly Group AB, the oatmilk company, and Oatly officials and directors made false statements and failed to disclose adverse facts that deceived the investing public and artificially inflated the prices of Oatly stock shares between the time of the company's initial public offering in the United States in May 2021 and July 2021, when a short seller issued a report on "a number of improprieties at Oatly, including improper accounting practices and greenwashing (making the Company's product appear more sustainable than it actually is)." The complaint alleged that Oatly's statements in the registration statement filed with the Securities and Exchange Commission and in an investor presentation including misleading statements related to the greenhouse gas emissions and energy consumption associated with its product.

Bentley v. Oatly Group AB, No. 1:21-cv-06485 (S.D.N.Y., filed July 30, 2021); *Jochims v. Oatly Group AB*, No. 1:21-cv-06360 (S.D.N.Y., filed July 26, 2021).

States Moved for Preliminary Injunction in Social Cost of Carbon Lawsuit in Louisiana

Louisiana and the nine other states challenging the Biden administration's social cost of greenhouse gases estimates in the federal district court for the Western District of Louisiana filed a motion for a preliminary injunction. The states argued that they were likely to succeed on the merits of their claims that promulgation of the estimates was beyond the authority of President Biden and the Interagency Working Group that released the estimates and that the estimates violated the Administrative Procedure Act, as well as the Energy Policy and Conservation Act, the Clean Air Act, NEPA, the Mineral Leasing Act, and the Outer Continental Shelf Lands Act. The states also contended that the estimates would cause irreparable harm to their sovereign, proprietary, and parens patriae interests. Landmark Legal Foundation filed a motion for leave to file an amicus brief in support of the preliminary injunction motion. The brief would focus on separation of powers and Administrative Procedure Act issues. *Louisiana v. Biden*, No. 2:21-cv-01074 (W.D. La. July 29, 2021).

In a separate lawsuit pending in the federal district court for the Eastern District of Missouri, briefing was completed during July on both the motion for preliminary injunction filed by 13 other states to block the social cost of greenhouse gases and the motion to dismiss filed by the Biden administration. *Missouri v. Biden*, No. 4:21-cv-00287 (E.D. Mo.).

Solar Company Challenged Federal Approvals for Offshore Wind Project

Two related companies that own, operate, and develop solar electric generating facilities and the president and senior general counsel (also a part-time resident of Edgartown, Massachusetts) filed a lawsuit in the federal district court for the District of Massachusetts challenging the Vineyard Wind Project, an 800-megawatt offshore wind farm that would be the first commercial-scale offshore wind farm in the United States. The plaintiffs alleged that the defendants violated NEPA, the Outer Continental Shelf Lands Act, the Clean Water Act, and the Marine Mammal Protection Act. The complaint's allegations included that the final environmental impact statement (FEIS) failed to analyze the cumulative and lifecycle greenhouse gas impacts of offshore wind projects, and that the FEIS assumed, without analysis, that offshore wind generation would not itself add to global warming over the next 10 years and that offshore wind would displace natural gas generation and not other forms of renewable energy generation. The complaint also alleged that the FEIS did not take a hard look at warming generated by the project's alteration of wind flow. The plaintiffs contended that the defendants should have evaluated a no-action alternative's climate effects and effects on onshore renewable energy. In addition, the complaint alleged that the FEIS failed to properly analyze climate change effects on hurricanes that may impact the project and that the FEIS was "riddled with over-assessments of the purported benefits" of the project, including climate benefits. Another climate change-related allegation was an alleged failure to consider the impacts of the project and climate change on the food supply for the North Atlantic Right Whale. *Allco Renewable Energy Ltd. v. Haaland*, No. 1:21-cv-11171 (D. Mass., filed July 18, 2021).

Short-Term Measures Sought to Protect Steelhead and Salmon

Environmental groups and the State of Oregon filed motions for preliminary injunctions in the long-standing lawsuit challenging biological opinions prepared under the Endangered Species Act for the continued operation and maintenance of the Columbia River System. The most recent biological opinion (BiOp) and related record of decision (ROD) were issued in September 2020 after district courts invalidated six earlier biological opinions. Oregon argued that many errors identified by the court when it invalidated prior BiOps were repeated in the 2020 BiOp and ROD and that the "precarious" status quo of salmon and steelhead fish had worsened because of low population abundances and climate change. Oregon requested short-term measures to protect listed fish while the federal defendants comply with legal obligations. The environmental groups argued that a preliminary injunction was "urgently needed to reduce irreparable harm" to listed steelhead and salmon. They contended that they were likely to succeed on the merits of their claims, including their claim that the defendants failed "to rationally or legally account for the effect of advancing climate change." *American Rivers v. National Marine Fisheries Service*, No. 3:01-cv-00640 (D. Or. July 16, 2021).

Other States and NRDC Weighed in on States' Requested Intervention as Defendants in *Juliana* Case; Plaintiffs Said They Would Not Seek Nominal Damages

In *Juliana v. United States*, briefing was completed on the motion by states led by Alabama to intervene as defendants for the limited purpose of contesting the district court's jurisdiction and to prevent a potential "collusive settlement" between the plaintiffs and the federal defendants. Six other states, led by New York, filed a motion for leave to file a brief as amici in support of the plaintiffs; they asserted an "interest in correcting proposed intervenors' erroneous assertions about purported collusion between the parties" in two lawsuits referenced in the motion to intervene, as well as an interest in correcting the proposed intervenor states' "incomplete picture of the effects that federal action to address climate change will have on States and state residents." Natural Resources Defense Council (NRDC) also sought to file an amicus brief that argued that the court should deny the intervention motion without prejudice. NRDC reasoned that the states would not be prejudiced if intervention were deferred until the time of any proposed consent decree that might affect the states' interests. Other developments in the case included the plaintiffs' filing of a supplement to their motion for leave to file an amended complaint. The modifications removed a plaintiff and substituted Biden administration officials as defendants. The plaintiffs also informed the court in the motion that they had decided not to seek to add nominal damages to their request for relief. On July 16, the federal defendants filed a response to plaintiffs' notice of supplemental authority regarding four recent Supreme Court decisions that the plaintiffs argued supported their standing; the defendants said the decisions did not affect the Ninth Circuit's determination that declaratory relief could not on its own redress an injury, and that the court therefore should deny the plaintiffs' motion for leave to amend. In addition, July 12 was the deadline for the *Juliana* plaintiffs to file a petition for certiorari in the Supreme Court to seek review of the Ninth Circuit's decision finding that they lacked standing. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or.). [*Editor's Note:* Due to a technical issue, some recent updates for *Juliana v. United States* are currently not available on the website.]

North Dakota Challenged Oil and Gas Leasing Moratorium

The State of North Dakota filed a lawsuit in the federal district court for the District of North Dakota seeking review of the Biden administration's moratorium on federal oil and gas lease sales. North Dakota asserted violations of the Mineral Leasing Act, the Federal Land Policy and Management Act, NEPA, and the Administrative Procedure Act. The State asked the court to compel the federal defendants to hold quarterly lease sales and to prohibit the defendants from canceling lease sales in North Dakota. Two other lawsuits had previously been filed to challenge the pause on leasing, and the Western District of Louisiana issued an order in June blocking the pause on new onshore and offshore leasing. *North Dakota v. U.S. Department of the Interior*, No. 1:21-cv-00148 (D.N.D., filed July 7, 2021).

Two New Citizen Suits Asserted Failure to Prepare Fuel Terminals for Climate Change

On July 7, 2021, Conservation Law Foundation filed two citizen suits asserting that the defendants' bulk storage and fuel terminals in New Haven, Connecticut violated the Clean Water Act and Resource Conservation and Recovery Act. The complaints alleged that the defendants had not designed, maintained, modified, or operated their terminals to account for "the numerous effects of climate change," including sea-level rise and more frequent and more severe storms. Conservation Law Foundation sought declaratory and injunctive relief, civil penalties, environmental restoration and compensatory mitigation, and costs of litigation, including attorney and expert witness fees. *Conservation Law Foundation v. Shell Oil Co.*, No. 3:21-cv-00933 (D. Conn., filed July 7, 2021); *Conservation Law Foundation v. Gulf Oil LP*, No. 3:21-cv-00932 (D. Conn., filed July 7, 2021).

Pro Se Constitutional Climate Suit Filed in Colorado Federal Court

A Colorado resident filed a pro se lawsuit in the federal district court for the District of Colorado alleging that the United States and other federal defendants violated his fundamental constitutional rights by causing and contributing to the accumulation of greenhouse gases in the atmosphere. The plaintiff previously filed a similar lawsuit in the federal district court for the District of Arizona, which administratively closed the case in August 2019 pending completion of *Juliana v. United States*. *Komor v. United States*, No. 1:21-cv-01560 (D. Colo., filed June 9, 2021).

Lawsuit Alleged Failure to Consider Cumulative Climate Change Effects in Grazing Analysis

A lawsuit filed in the federal district court for the District of Arizona alleged that the environmental review for BLM's revised livestock grazing analysis for the Sonoran Desert National Monument Resource Management Plan failed to address problems with prior analysis identified by the court in an earlier case. The plaintiffs alleged that BLM's new decision violated the Federal Land Policy and Management Act, the National Landscape Conservation System Act, NEPA, and the National Historic Preservation Act. Among the alleged shortcomings in the NEPA review was an alleged failure to analyze how proposed grazing, combined with the impacts of drought, climate change, and other factors would affect the Monument's biological

and cultural objects. *Western Watersheds Project v. U.S. Bureau of Land Management*, No. 2:21-cv-01126 (D. Ariz., filed June 29, 2021).

Petitioners Sought Minnesota High Court Review of Enbridge Replacement Pipeline Approvals

Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and Sierra Club requested that the Minnesota Supreme Court review the June decision of the Minnesota Court of Appeals that upheld a certificate of need and revised environmental impact statement for Enbridge's Line 3 Replacements Project. They sought review of two issues: the alleged failure to evaluate the accuracy of long-range energy demand forecasts and the Public Utilities Commission's finding that the existing Line 3 was in urgent need of replacement for safety reasons. *In re Enbridge Energy, LP*, Nos. A20-1071, A20-1072, A20-1074, A20-1075, A20-1077 (Minn. July 14, 2021).

Suit Alleged Violations of Hawai'i Environmental Policy Act in Approvals for Commercial Aquarium Collection

A lawsuit filed in Hawai'i state court alleged that a revised environmental impact statement for commercial aquarium fishing violated the Hawai'i Environmental Policy Act. Among other things, the plaintiffs contended that the Board of Land and Natural Resources rejected an initial final environmental impact statement on numerous grounds, including a failure to discuss "the extreme threat of climate change" on reefs and the potential for mitigating harm if the proposed fishery had unanticipated or greater negative effects with climate change—but that the Board failed to reject a revised FEIS that repeated the inadequacies. *Kaupiko v. Board of Land & Natural Resources*, No. 1CCV-21-0000892 (Haw. Cir. Ct., filed July 13, 2021).

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FEATURED CASE

Louisiana Federal Court Blocked Biden Administration "Pause" on New Oil and Gas Leases

The federal district court for the Western District of Louisiana issued a nationwide preliminary injunction barring the Biden administration from implementing a "Pause" on new oil and natural gas leases on public lands or in offshore waters. President Biden ordered the pause in Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," to allow completion of a "comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior's broad stewardship responsibilities …, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters." Although the states challenging the pause based their request for a preliminary injunction on federal agencies' violations of the Administrative Procedure Act, the court found as an initial matter that the states had made a showing that President Biden had exceeded his powers when he ordered the "Pause" because the Outer Continental Shelf Lands Act (OCSLA) does not grant specific authority for the President to pause offshore oil and gas

leases. The court then proceeded to conclude that the states had alleged standing, with allegations of particularized and concrete injuries based on loss of proceeds from new leases, as well as from loss of jobs and economic damages. The court found that those alleged injuries were fairly traceable to the pause and that a favorable ruling would redress the injuries. The court also found that the states could establish standing as a result of "special solicitude." In addition, the court found that the states' claims under the Administrative Procedure Act (APA) were within the "zone of interests," as were their citizen suit claim under OCSLA and their ultra vires claim. The court rejected the government's contention that the "Pause" and related actions—the cancellation and stoppage of offshore lease sales and the cancellation or postponement of "eligible lands" under the Mineral Leasing Act (MLA)—were not final agency actions reviewable under the APA. The court cited cases finding actions that were not permanent to be final agency actions. In addition, the court rejected the contention that these actions were committed to agency discretion and therefore not reviewable; the court held that the pausing of a lease sale was not within the discretion of agencies under either the OCSLA or the MLA. With respect to the criteria for a preliminary injunction, the court found that the states had a substantial likelihood of success on the merits on proving that the federal agencies implemented the "Pause" as directed by the executive order both to sales under the MLA and the OCSLA. The court concluded that the states had a substantial likelihood of success on the merits of their claims that the federal agencies' actions were contrary to law (the OCSLA and MLA), that their actions were arbitrary and capricious, that the agencies failed to provide notice and an opportunity to comment, and that they unreasonably withheld or unreasonably delayed action they were required to take. The court also found that the states demonstrated a substantial threat of irreparable injury in the form of "very substantial damages" from lost ground rents and bonuses that would be difficult or impossible to recover due to sovereign immunity. In addition, the court found that equity and the public interest weighed in favor of the plaintiff states. Having found that the factors for a preliminary injunction were satisfied, the court also found that the injunction should be nationwide in scope due to the need for uniformity. *Louisiana v. Biden*, No. 2:21-cv-00778 (W.D. La. June 15, 2021).

After the Louisiana federal court issued the nationwide injunction, the federal district court for the District of Wyoming issued a sua sponte order in a separate case challenging the pause on new onshore leasing. The order directed the parties to submit briefs on whether the court should stay proceedings in light of the Louisiana court's order. The parties all opposed staying the proceedings, though the trade group petitioners said the court could temporarily defer ruling on their motion for a preliminary injunction. On June 30, the Wyoming federal court denied the motions without prejudice, finding that they were "materially moot." *Western Energy Alliance v. Biden*, No. 0:21-cv-00013 (D. Wyo. June 16, 2021).

DECISIONS & SETTLEMENTS

Supreme Court Declined to Review Ninth Circuit Reversal of Denial of Remand in Oakland and San Francisco Climate Cases

On June 14, 2021, the U.S. Supreme Court denied fossil fuel companies' petition for writ of certiorari seeking review of the Ninth Circuit's decision reversing the district court's 2018 denial of Oakland's and San Francisco's motions to remand their climate change nuisance cases to

California state court. The petition had requested that the Court consider the questions of "[w]hether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law" and "[w]hether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment." The cities' renewed motion for remand is currently pending in the district court, with the cities arguing against the companies' remaining grounds for removal: federal-officer removal, Outer Continental Shelf Lands Act, enclave jurisdiction, and bankruptcy removal. The cities also have filed a motion to amend their complaints to withdraw federal common law public nuisance claims that they added after the district court denied remand. On June 23, 2021, Chevron Corporation filed notice in the district court of its voluntary dismissal of third-party complaints against the energy company Equinor ASA (formerly Statoil ASA). Chevron filed the third-party complaint in December 2017 against the company—of which the Norwegian State is majority stakeholder—for indemnity and contribution. The third-party complaint asserted that while the plaintiffs' claims were meritless, Statoil, "as well as potentially the many other sovereign governments that use and promote fossil fuels," must be joined as third-party defendants. Chevron filed similar notices of withdrawal in other cases brought by California localities. *Chevron Corp. v. City of Oakland*, No. 20-1089 (U.S. June 14, 2021).

Supreme Court Denied Montana and Wyoming's Challenge to Washington Actions that Barred Coal Exports

The U.S. Supreme Court denied Montana and Wyoming's motion for leave to file a bill of complaint that asserted that the State of Washington denied access to its ports for shipments of Montana and Wyoming's coal to Asia in violation of the dormant Commerce Clause and the Foreign Commerce Clause. Justices Thomas and Alito would have granted the motion. *Montana v. Washington*, No. 22O152 (U.S. June 28, 2021).

Supreme Court Upheld Renewable Fuel Exemptions for Small Refineries

In a 6-3 decision, the U.S. Supreme Court reversed the Tenth Circuit and upheld "extension[s]" of exemptions from renewal fuel program requirements for three small refineries. EPA granted the extensions after a "lull" during which the refineries were not subject to exemptions. The Clean Air Act provision at issue authorizes small refineries to petition EPA "for an extension of the exemption … for the reason of disproportionate economic hardship." The Court held that the provision used "extension" in its "temporal sense," but that the statute did not impose a "continuity requirement" and instead allowed small refineries to apply for hardship extensions "at any time." The Court therefore held that renewable fuel producers who challenged EPA's approvals of the refineries' extension requests had not shown that EPA acted in excess of its statutory authority. Justice Barrett dissented, joined by Justices Sotomayor and Kagan. In their view, the majority's interpretation "caters to an outlier meaning of 'extend' and clashes with statutory structure." *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, No. 20-472 (U.S. June 25, 2021).

D.C. Circuit Vacated Approval for Natural Gas Pipeline in St. Louis Due to FERC's Failure to Address Applicant's Self-Dealing

The D.C. Circuit vacated Federal Energy Regulatory Commission (FERC) orders authorizing a natural gas pipeline in the St. Louis area. The court concluded that FERC acted arbitrarily and capriciously because FERC "declined to engage with" Environmental Defense Fund's arguments and underlying evidence regarding self-dealing by the applicant and the affiliate with which the applicant entered into a "precedent agreement" for pipeline capacity. The D.C. Circuit further found that in determining that the pipeline was required by public convenience and necessity, FERC engaged in only a "cursory balancing" of public benefits and adverse impacts and that this balancing was therefore arbitrary and capricious. The D.C. Circuit did not address arguments regarding the adequacy of FERC's environmental review of the project, including FERC's treatment of climate change, because the court found that the individual petitioner who asserted National Environmental Policy Act claims did not have standing. The court said the petitioner's "alleged aesthetic injuries reflect nothing more than generalized grievances," that her allegations regarding traffic hazards did not meet her causation burden, and that alleged construction-related injuries were not redressable because construction was complete. An analysis of the case by Sabin Center Senior Fellow Jennifer Danis is available on the *Climate Law Blog*. *Environmental Defense Fund v. Federal Energy Regulatory Commission*, No. 20-1016 (D.C. Cir. June 22, 2021).

BLM Dropped Appeal of Adverse Decision on Environmental Review for Utah Coal Mine Expansion

The Tenth Circuit Court of Appeals granted the federal government's unopposed motion for voluntary dismissal of its appeal of a March 2021 District of Utah decision that found that the U.S. Bureau of Land Management failed to take a hard look at the indirect and cumulative impacts of greenhouse gases associated with a coal lease that authorized expansion of a coal mine. *Utah Physicians for a Healthy Environment v. U.S. Bureau of Land Management*, No. 21-4069 (10th Cir. June 21, 2021).

After Developers Terminated Methanol Terminal Project, Ninth Circuit Granted Motions to Dismiss Appeals

On June 16, 2021, the Ninth Circuit Court of Appeals granted a joint motion to dismiss appeals of a November 2020 order vacating U.S. Army Corps of Engineers permits for construction of a methanol refinery and export terminal at the Port of Kalama in Washington State. The federal defendants-appellants and intervenor defendant-appellant Port of Kalama filed the joint motion several days after the project's developer notified the Port that it would terminate its lease. *Columbia Riverkeeper v. U.S. Army Corps of Engineers*, No. 21-35053, 21-35054 (9th Cir. June 16, 2021).

Federal Defendants Abandoned Appeal of Decision Requiring Additional Alternatives Analysis

On June 11, 2021, the Tenth Circuit Court of Appeals granted federal defendants-appellants' motion to voluntarily dismiss their appeal of a December 2020 District of Utah decision remanding a case challenging the issuance of oil and gas leases in the Uinta Basin. The district court found the analysis of greenhouse gas and climate change impacts to be adequate but

remanded for consideration of alternatives that did not involve leasing all nominated parcels. The conservation groups' appeal of the district court decision is still pending, with the opening brief due on July 12. The Tenth Circuit directed the conservation groups "to address with specificity … whether this court has jurisdiction over their appeal." *Rocky Mountain Wild v. Bernhardt*, Nos. 21-4019, 21-4020 (10th Cir. June 11, 2021).

Federal Court Allowed NEPA Claim to Proceed Against USDA Hog Slaughter Rule

The federal district court for the Western District of New York denied a motion to dismiss a lawsuit challenging a U.S. Department of Agriculture (USDA) final rule establishing an optional new inspection system for hog slaughter establishments. The court concluded that the plaintiffs had sufficiently established standing at this stage of the litigation, including for their National Environmental Policy Act (NEPA) claim, which asserted that USDA should not have relied on a categorical exclusion, including because "extraordinary circumstances" required preparation of an environmental assessment or environmental impact statement. The alleged extraordinary circumstances related to the potential adverse environmental effects, including "supply-level" effects such as the risk of climate change due to increases in emissions of the greenhouse gases methane and nitrous oxide at concentrated animal feeding operations. *Farm Sanctuary v. U.S. Department of Agriculture*, No. 6:19-cv-06910 (W.D.N.Y. June 28, 2021).

Federal Court Kept Forest Plan in Place but Remanded for More Consideration of Grizzly Bear Impacts and Other Issues

The federal district court for the District of Montana largely rejected challenges to federal approvals of revisions to the Flathead National Forest Land Management Plan in northwestern Montana but remanded without vacatur for additional analysis of certain issues under the Endangered Species Act. Those issues included the revised plan's impact on the national grizzly bear population. The opinion did not specifically address the plaintiffs' allegations that the federal defendants failed to account for climate change impacts on grizzly bears. *WildEarth Guardians v. Steele*, No. 9:19-cv-00056 (D. Mont. June 24, 2021).

Virginia Federal Court Said Challenge to NEPA Regulations Was Not Justiciable

The federal district court for the Western District of Virginia dismissed without prejudice a lawsuit brought by environmental groups to challenge the Council on Environmental Quality's (CEQ's) 2020 amendments to the National Environmental Policy Act (NEPA) regulations. The court concluded that the groups' claims were not justiciable both because the claims were not ripe and because the groups did not have standing. With respect to ripeness, the court found that "[t]he potential applications and outcomes of the regulatory changes adopted are simply too attenuated and speculative to allow for a full understanding and consideration of how they may impact the plaintiffs." The court noted that each federal agency would have to adopt its own NEPA procedures before CEQ's regulatory amendments could be applied to any particular federal action, and further noted that following the change in administrations, CEQ was "actively reconsidering" the 2020 amendments and had directed agencies not to use resources to develop their own procedures. With respect to standing, the court found that the environmental groups' alleged environmental, procedural, and information injuries were too speculative to satisfy the

constitutional injury-in-fact requirement. *Wild Virginia v. Council on Environmental Quality*, No. 3:20-cv-00045 (W.D. Va. June 21, 2021).

Utah Federal Court Said Suspension of Oil and Gas Leases Was Not Subject to NEPA

The federal district court for the District of Utah dismissed without prejudice conservation groups' lawsuit challenging the U.S. Bureau of Land Management's (BLM's) suspension of 82 oil and gas leases issued in 2018. BLM suspended the leases after a federal court in Washington, D.C. ruled in 2019 that BLM had failed to adequately assess the potential impacts of greenhouse gas emissions for certain oil and gas leases in Wyoming. The District of Utah held that the lease suspensions merely maintained the status quo and therefore were not major federal actions subject to NEPA; the conservation groups therefore lacked standing. The court also concluded that the groups' argument that BLM should have canceled the leases instead of suspending them was not relevant to its cause of action alleging that the lease suspensions violated NEPA. *Living Rivers v. Hoffman*, No. 4:19-cv-00057 (D. Utah June 21, 2021).

Hawai‘i Supreme Court Upheld Denial of Request to Re-Open Order Approving Wind Power Purchase Agreement

The Hawai‘i Supreme Court held that the state's Public Utilities Commission (PUC) did not abuse its discretion when it declined to re-open a 2014 order that approved a Purchase Power Agreement for wind energy. One of the allegations made by the nonprofit organization that sought to re-open the order was that the 2014 order did not analyze the project's impact on greenhouse gas emissions as required by the public utilities law. The court found that the PUC properly declined to re-open the order to address this issue since the organization could have raised the issue earlier since the absence of an analysis of greenhouse gas emissions was "readily apparent." *In re Hawaiian Electric Co.*, No. SCOT-20-0000309 (Haw. June 29, 2021).

Massachusetts High Court Upheld Transmission Line Approval

The Massachusetts Supreme Judicial Court affirmed the Energy Facilities Siting Board's approval of a proposal for a new underground electrical transmission line running between substations in the Towns of Sudbury and Hudson. The court noted that the Board was required to balance three objectives—reliability, environmental impact, and cost—by maximizing reliability and minimizing environmental impact and cost; that a proposal was not required to "be the best in each of the three categories"; and that the factors were to be "considered in combination with each other," with no single factor prioritized over another. In this case, the court found no basis for disturbing the Board's determinations, given the Board's "careful and reasoned decision." Citing the importance of a reliable electrical system, the court rejected arguments by the Town of Sudbury that the Board's determination regarding the need for additional energy resources was too conservative. The court also rejected the Town's argument that the project was not consistent with current health, environmental protection, and resource use and development policies in Massachusetts. The court noted that the Board had determined that the project was consistent with the Commonwealth's environmental protection policies, including the Global Warming Solutions Act of 2008, because the project would generate minimal greenhouse gases and have no adverse climate change impacts and would facilitate integration of renewable energy

resources by increasing the transmission system's reliability. Although the Town argued that a non-transmission alternative solution would have been more consistent with more recent policies, including climate and environmental policies, the court found that the Town did not provide a basis for reversing the Board's assessment. *Town of Sudbury v. Energy Facilities Siting Board*, No. SJC-12997 (Mass. June 25, 2021).

Washington Appellate Court Sent CAFO Permits Back to Agency for Consideration of Climate Impacts and Other Issues

The Washington Court of Appeals held that the Pollution Control Hearing Board erred when it approved the Washington Department of Ecology's general permits for concentrated animal feeding operations (CAFOs). Among the inadequacies found by the court was Ecology's failure to consider climate change in drafting the permits. The court agreed with environmental groups that Ecology had a responsibility under the State Environmental Policy Act (SEPA) to consider climate change impacts "to the extent that it must interpret its rules and statutes consistently with SEPA's mandates." The approval of the permit was therefore contrary to law because climate change had to be considered "to some extent" in order for Ecology to act consistently with implementing regulations under the Clean Water Act and the Water Pollution Control Act. *Washington State Dairy Federation v. Washington Department of Ecology*, No. 52952-1-II (Wash. Ct. App. June 29, 2021).

California Appellate Court Said Substantial Evidence Supported Setback Requirement for Coastal Residence

The California Court of Appeal upheld conditions imposed by the California Coastal Commission on the construction of a single-family residence on a bluff adjacent to the Pacific Ocean in the City of Encinitas. The Commission required the home to be set back 79 feet from the bluff edge, required the elimination of a basement, and provided that the homeowners could not build any bluff or shoreline armoring device to protect the home. Regarding the setback, the Court of Appeal noted that the court had "explicitly resolved the same setback question" in an earlier case, *Lindstrom v. California Coastal Commission*, and the Court of Appeal was not persuaded by the homeowners' arguments that it should revisit its determination in *Lindstrom.* The Court of Appeal further found that substantial evidence supported the imposition of the 79-foot setback requirement. The court said the Commission's staff "used well-accepted scientific methodology" and that the Commission "provided ample explanation" for the conclusion that a higher projected level of sea-level rise was more appropriate than the level for which homeowners' consultant advocated. The Court of Appeal noted that the Commission staff used more recent sea level rise data and recommendations, which the homeowners' consultant acknowledged provided current sea level rise estimates. Regarding the basement, the Court of Appeal rejected the homeowners' contention that the City's requirement that new construction be designed and constructed for future removal applied only to construction within 40 feet of the bluff's edge; the court further found that substantial evidence supported the finding that a basement could not be safely removed. Regarding the bar on any armoring device to protect the home, the Court of Appeal agreed with the Commission that the trial court's invalidation of the condition should be reversed because the homeowners had abandoned their challenge to the

condition on appeal. *Martin v. California Coastal Commission*, No. D076956 (Cal. Ct. App. June 23, 2021).

Minnesota Court of Appeals Upheld State Approvals for Enbridge Crude Oil Replacement Pipeline

The Minnesota Court of Appeals upheld the Minnesota Public Utilities Commission's determination that a revised final environmental impact statement (EIS) for the Line 3 replacement crude oil pipeline was adequate, as well as the Commission's decisions to issue a certificate of need and a routing permit for the project. The court concluded that it must defer to the Commission's determination that Enbridge Energy, Limited Partnership demonstrated need for a replacement pipeline because the Commission's decision was "adequately explained and reasonable, based on the record." It noted that the Commission "balanced a plethora of factors and criteria … against the backdrop of an existing, deteriorating pipeline" and "based upon a public record developed over multiple years with extraordinary public participation." Regarding the Commission's consideration of greenhouse gas emissions and climate change as part of its assessment of the project's relationship to overall state energy needs, the court rejected the contention that it was arbitrary and capricious not to attach a dollar figure to greenhouse gas emissions from the project. The court found that the Commission adequately explained its rationale for rejecting the dollar figure adopted by the administrative law judge. The court also said it was not arbitrary and capricious for the Commission to reason that the replacement project was not expected to increase crude oil demand. The court also found that the Commission addressed the court's earlier concern that the EIS had not adequately addressed the impact of an oil spill on Lake Superior and its watershed. In addition, the court found that the selection of a pipeline route was reasonable and "based upon respect for tribal sovereignty, while minimizing environmental impacts." One judge dissented, writing that the certificate of need was unsupported by substantial evidence and based on erroneous interpretations of the governing statute. He agreed with relators that the Commission acted arbitrarily and capriciously by failing to consider the project's lifecycle greenhouse gas emissions. *In re Enbridge Energy, LP*, Nos. A20-1071, A20-1072, A20-1074, A20-1075, A20-1077 (Minn. Ct. App. June 14, 2021).

Massachusetts Court Declined to Dismiss Massachusetts Investor and Consumer Protection Action Against Exxon

In two decisions, a Massachusetts Superior Court denied Exxon Mobil Corporation's (Exxon's) motions to dismiss an action brought by the Massachusetts Attorney General asserting that Exxon systematically and intentionally misled investors and consumers about climate change. In the first decision, the court declined to dismiss the action on personal jurisdiction grounds or for failure to state a claim. With respect to personal jurisdiction, the court found that the Commonwealth sufficiently alleged that its investor deception claim arose from Exxon's contacts with Massachusetts. Regarding the consumer deception claims, the court found that the claims arose from Exxon's advertisements through its Massachusetts franchisees, and that the court therefore could assert personal jurisdiction over Exxon based on the Supreme Judicial Court's previous determination that Exxon's franchise network of retail service stations satisfied the "transacting any business" prong of the Massachusetts personal jurisdiction statute. The court also found that the exercise of jurisdiction over Exxon satisfied the Massachusetts long-arm

statute and due process requirements. In rejecting Exxon's arguments that Massachusetts failed to state a claim, the court found that Massachusetts's allegations regarding statements to investors that climate change risks did not pose a meaningful threat were sufficient to survive a motion to dismiss. The court rejected Exxon's characterization of the allegations as based on failures to disclose information readily available to the public. The court also found that the allegations plausibly alleged that Exxon deliberatively misrepresented and omitted information about the risks of climate change and that Exxon was engaged in trade or commerce when it made the allegedly deceptive statements. The court also found that the Commonwealth's deceptive advertising claims did not have to be based on allegations that Exxon's representations about particular fuel products were false, only that the representations were misleading. In addition, the court found that it could not conclude at this stage of the litigation that Exxon's representations would not mislead a "reasonable consumer"; the court also was not persuaded by Exxon's argument that the claims involved a "pure omission" not subject to liability. Regarding the Commonwealth's "greenwashing" claims, the court concluded that it would not be appropriate to determine at the motion to dismiss stage whether the alleged misrepresentations were "inactionable puffery." The court also declined to rule at this stage on whether any of the allegedly misleading statements to investors and customers constituted speech protected by the First Amendment.

In the second decision, the court denied Exxon's special motion to dismiss under the Massachusetts anti-SLAPP (Strategic Litigation Against Public Participation) statute. The court found that Exxon failed to meet the threshold burden of showing that the Commonwealth claims were based on "petitioning activity" protected by the anti-SLAPP law. The court was not persuaded by Exxon's contentions that its statements to investors were issued in a manner likely to reach or influence regulators and members of the public, and that its allegedly deceptive statements about its products constituted advocacy of climate policy choices and attempts to enlist public participation in policy debate. The court found that Exxon did not show that it made the statements "solely, or even primarily, to influence, inform, or reach any governmental body, directly or indirectly. Instead, the statements appear to be directed at influencing investors to retain or purchase Exxon's securities or inducing consumers to purchase Exxon's products and thereby increase its profits." *Commonwealth v. Exxon Mobil Corp.*, No. 1984CV03333-BLS1 (Mass. Super. Ct. June 22, 2021).

NEW CASES, MOTIONS, AND OTHER FILINGS

North Dakota and Second Coal Company Asked for Review of D.C. Circuit Decision on Affordable Clean Energy Rule

On June 23, 2021, two additional petitions for writ of certiorari were filed seeking Supreme Court review of the D.C. Circuit's January 2021 decision vacating the Trump administration's Affordable Clean Energy (ACE) Rule for carbon dioxide emissions from existing coal-fired power plants. The ACE Rule replaced the Obama administration's Clean Power Plan. The June certiorari petitions were filed by a coal mining company and by North Dakota. Both North Dakota and the coal mining company asked the Court to review the question of the scope of EPA's regulatory authority under Section 111(d) of the Clean Air Act. The coal mining company also sought review of the question of EPA's authority to regulate stationary sources such as

power plants under Section 111(d) if hazardous pollutant emissions from such sources are already regulated under Section 112. Nineteen other states and another coal company previously filed petitions seeking review of the D.C. Circuit's decision, which held that the ACE Rule was grounded in an interpretation of the statute that erroneously limited EPA's authority. EPA's response to the petitions is due on August 5, 2021. *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1778 (U.S. June 23, 2021); *North Dakota v. EPA*, No. 20-1780 (U.S. June 23, 2021).

State and Local Government Climate Cases Returned to Federal Courts of Appeal; Remand Motions Filed in Anne Arundel County and New York City Cases

Following the Supreme Court's decision holding that federal courts of appeal have broader jurisdiction to review remand orders when one ground for removal is the federal-officer removal statute, cases brought by Baltimore, Rhode Island, and local governments in California and Colorado have returned to the First, Fourth, Ninth, and Tenth Circuit Courts of Appeal.

- In Rhode Island's case, the First Circuit ordered the parties to file additional briefs addressing the impact of the Supreme Court's decision. The fossil fuel company defendants-appellants' supplemental brief is due July 28. *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.).

- In Baltimore's case, the fossil fuel companies filed a consent motion on June 22 requesting that the Fourth Circuit set a schedule for supplemental briefing and oral argument. The companies suggested a schedule consistent with the one adopted by the First Circuit. The companies contended that additional briefing was necessary both because their initial briefing before the Fourth Circuit in support of their grounds for remand was constrained by the need to address the now-resolved issue of the scope of appellate review and also because there have been significant legal developments since the initial briefing was completed. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir. June 22, 2021).

- In the cases brought by County of San Mateo and other California local governments, the Ninth Circuit on July 1 denied a similar motion filed by fossil fuel companies requesting that the court set a schedule for supplemental briefing and oral argument. *County of San Mateo v. Chevron Corp.*, No. 18-15499, 18-15502, 18-15503, 18-16376 (9th Cir. June 23, 2021).

- In the case brought by Boulder and San Miguel Counties and the City of Boulder, the Tenth Circuit recalled the mandate and vacated its earlier judgment. The Tenth Circuit directed the parties to file supplemental briefs simultaneously on July 16 to address the import of the Supreme Court's decision. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, No. 19-1330 (10th Cir. June 25, 2021).

The following developments have taken place in the last month in other climate cases brought by state and local governments:

- In King County's case in Washington federal court, which has been stayed since October 2018, the parties informed the court that they had been discussing next steps in light of the Supreme Court's denial of the petition for writ of certiorari in *City of Oakland v. BP p.l.c.*, and that they hoped to reach an agreement soon on next steps. They requested a continuation of the stay, with a joint status report and proposal for next steps to be due by July 6. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash. June 28, 2021).

- Anne Arundel County, Maryland filed a motion in federal court in Maryland to remand its case to state court. The County acknowledged that proceedings had been stayed but said it was filing the motion "out of abundance of caution and to avoid inadvertent waiver." The County said it would file a memorandum in support of the motion after the stay was lifted. The motion previewed the County's arguments, including that the federal court lacked jurisdiction because the County asserted only state law claims, and that the case was not removable under the Outer Continental Lands Shelf Act or the federal-officer removal statute or based on federal enclave jurisdiction. *Anne Arundel County v. BP p.l.c.*, No. 1:21-cv-01323 (D. Md. June 28, 2021).

- New York City filed a motion to remand in its suit asserting violations of the City's consumer protection law. The City contended that the defendants failed to establish that the federal district court for the Southern District of New York had jurisdiction based on any of the grounds cited in the notice of removal. The City said it solely alleged violations of state law, and that the complaint did not necessarily raise a substantial and disputed question of federal law (*Grable* jurisdiction). The City also asserted that there was no federal jurisdiction under the federal-officer removal state, the Outer Continental Shelf Lands Act, or the Class Action Fairness Act, or based on federal enclave or diversity jurisdiction. The City requested costs and fees incurred as a result of the allegedly improper removal. New York City is to file its opening brief in support of the remand motion on July 7, 2021, with the opposition brief due on August 16, and the reply brief due September 6. *City of New York v. Exxon Mobil Corp.*, No. 1:21-cv-04807 (S.D.N.Y. June 25, 2021).

- On June 17, 2021, the fossil fuel industry defendants-appellants filed their opening brief in the Eighth Circuit Court of Appeals for their appeal of the remand order in the State of Minnesota's lawsuit. They argued that removal was proper because Minnesota's claims arose under federal law and necessarily raised substantial and disputed federal issues, and also based on the federal-officer removal statute, the Outer Continental Shelf Lands Act, and the Class Action Fairness Act. On June 23, the nonprofit corporation Energy Policy Advocates filed a motion for leave to file amicus brief in support of the defendants-appellants. The amicus brief said Energy Policy Advocates had made "tenacious use of public-records laws" to document the "troubling origin" of the State's lawsuit. The group argued that the case originated with "activists and lobbyists who desire to impact national climate policy," and that federal courts therefore should adjudicate the case. The group also argued that concerns about state court bias were amplified in this case. *Minnesota v. American Petroleum Institute*, No. 21-01752 (8th Cir.).

- On June 8, 2021, Exxon Mobil Corporation appealed the remand order in the State of Connecticut's climate lawsuit. On June 11, the federal district court for District of Connecticut granted a temporary stay of the remand order pending the Second Circuit's decision on Exxon's motion to stay, which Exxon filed on June 18. The district court said it did not view Exxon's arguments in support of its motion to stay execution of the remand order "as showing a strong likelihood of success on the merits, or even a likelihood of success with the balance of the equities in the defendants [sic] favor." *Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-01555 (D. Conn.), No. 21-1446 (2d Cir.).

Opening Brief Filed in Appeal of Dismissal of "Right to Wilderness" Case

Nonprofit organizations and individuals filed their opening brief in their Ninth Circuit appeal of a District of Oregon decision dismissing their lawsuit asserting a constitutional "right to wilderness" that the federal government violated by failing to protect public wild lands from climate change. The plaintiffs-appellants argued that the district court erred when it found that the plaintiffs lacked standing and ruled that no plaintiff can suffer a particularized injury due to climate change. The plaintiffs also contended that they had specifically alleged the particular remedies they sought to protect public lands from the adverse impacts from climate change. In addition, the plaintiffs argued that they had pled sufficient facts to state "a substantive due process right to be let alone … , expressed through solitude in wilderness." *Animal Legal Defense Fund v. United States*, No. 19-35708 (9th Cir. June 21, 2021).

EPA Requested Continuation of Abeyance in Case Challenging Repeal of Oil and Gas Sector Regulations

On June 14, 2021, EPA filed a status report in the case challenging the 2020 rule that repealed portions of EPA's Clean Air Act regulations for emissions from the oil and gas sector. EPA reported on actions it had taken in its review of the 2020 rule, including opening a public docket, holding training sessions on the rulemaking process, and scheduling listening sessions for June 15-17. EPA said it also was monitoring congressional action on S.J. Res. 14, which would disapprove the 2020 rule under the Congressional Review Act. EPA reported that the Senate passed S.J. Res. 14 on April 28, and that the House Committee on Energy and Commerce approved it on June 10. EPA said it would notify the court if the resolution was signed into law since it would have the effect of terminating EPA's administrative reconsideration of the rule. In light of these developments, EPA requested that the case continue to be held in abeyance. The House of Representatives subsequently passed the resolution on June 25, and President Biden signed it on June 30. *California v. Regan*, No. 20-1357 (D.C. Cir. June 14, 2021).

Tenth Circuit Abated WildEarth Guardians' Appeal of Decision Upholding NEPA Review for New Mexico Oil and Gas Leases

The Tenth Circuit Court of Appeals granted a motion by federal defendants-appellees and WildEarth Guardians to abate WildEarth Guardians' appeal of a 2020 district court decision that largely rejected the organization's claims that the NEPA review for oil and gas leases in southeastern New Mexico was inadequate. The arguments rejected by the district court included that the U.S. Bureau of Land Management failed to consider cumulative climate change effects

and that BLM should have applied the social cost of carbon. In their request for abatement, the federal defendants and WildEarth Guardians said abatement was necessary to facilitate further mediation of a potential resolution that would avoid the need for further litigation. American Petroleum Institute opposed abatement, arguing that it would delay final resolution of the claims and undermine national policies favoring development of oil and gas resources as well as private investments in the issued leases. The court abated the case for an initial 180-day period and said continuation of the abatement beyond that time would require agreement of all parties or an order of the court. *WildEarth Guardians v. Haaland*, No. 20-2146 (10th Cir. June 11, 2021).

Keystone XL Developers Said Termination of Project Rendered Challenge to Presidential Permit Moot; Other Keystone Lawsuits Delayed or on Hold

In the case challenging President Trump's issuance of a presidential permit for the Keystone XL Pipeline project, the Keystone XL developers on June 9, 2021 notified the federal district court for the District of Montana of the project's termination. The developers contended that the project's termination was a material change of circumstances that warranted reconsideration of the court's May 28 ruling that the case was not moot despite President Biden's revocation of the permit. The developers said they would confer with the parties to determine whether they agreed the case was now moot and that if any party disagreed, the developers would file a motion to dismiss. The developers filed their motion to dismiss on June 30. *Indigenous Environmental Network v. Trump*, No. 4:19-cv-00028 (D. Mont. June 9, 2021).

In an appeal in the case challenging the U.S. Army Corps of Engineers' reliance on the 2017 Nationwide Permit (NWP) 12 to authorize the Keystone XL project, the project's developers told the Ninth Circuit that the termination of the project made the challenge of the application of NWP 12 to Keystone XL moot. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Nos. 20-35412, 20-35414, and 20-35432 (9th Cir. June 25, 2021).

Two separate lawsuits challenging BLM's approval of a right-of-way for the Keystone XL project were stayed until August 6, 2021 at the parties' request to allow them to consider next steps. *Bold Alliance v. U.S. Department of the Interior*, No. 4:20-cv-00059 (D. Mont. June 16, 2021); *Rosebud Sioux Tribe v. U.S. Department of Interior*, No. 4:20-cv-00109 (D. Mont. June 7, 2021).

In a lawsuit brought by Texas and 22 other states in the federal district court for the Southern District of Texas, the court granted the federal defendants' requests for extensions of time to file their motion to dismiss, which will argue that the case is moot. The defendants requested the extensions with the consent of the states, who said they were evaluating the issue. The motion to dismiss is currently due on July 13. *Texas v. Biden*, No. 3:21-cv-00065 (S.D. Tex.).

Chicago Residents Asserted Parking Meter Monopoly Would Inhibit Carbon-Free Transportation Alternatives

Three Chicago residents filed a lawsuit challenging an agreement under which the City of Chicago granted a private company "monopoly control over the City's parking meter system for an astonishing 75-year-long period." The plaintiffs alleged the agreement was made "without

regard for changes in transportation resulting from climate change and the imperative need to reduce greenhouse gas emissions." They also alleged that they faced loss or damage from paying for "an increasingly outmoded parking system" that "delays or inhibits the increased use or availability of better carbon free means of transportation." They asserted that the agreement and the company's monopoly control over City parking meters violated the Sherman Act and that the company's operations under the agreement constituted an unfair trade practice in violation of the Illinois Consumer Fraud and Deceptive Practices Act. *Uetricht v. Chicago Parking Meters, LLC*, No. 1:21-cv-03364 (N.D. Ill., filed June 23, 2021).

Plaintiffs Alleged that True Reason for SEC Shareholder Proposal Rule Amendments Was Management Opposition to Environmental and Social Issue Proposals

A lawsuit filed in federal district court in the District of Columbia challenged the U.S. Securities and Exchange Commission's (SEC's) adoption of amendments to Rule 14a-8, which governs the submission of shareholder proposals for inclusion in a company's proxy statement. The plaintiffs—a coalition of institutional investors, an individual shareholder advocate, and a nonprofit corporation described as "one of the nation's leading practitioners of corporate engagement and shareholder advocacy"—asserted that the SEC violated the Administrative Procedure Act because the amendments were arbitrary, capricious, and not in accordance with law; because the SEC acted in excess of its statutory authority and failed to observe required procedures; and because the SEC used a pretextual justification for the amendments (reducing costs) when its "true reason … was corporate management opposition to the substance of many types of shareholder proposals, particularly those addressing environmental and social issues." The complaint alleged that climate change had become "an increasing focus" of shareholder proposals. *Interfaith Center on Corporate Responsibility v. U.S. Securities and Exchange Commission*, No. 1:21-cv-01620 (D.D.C., filed June 15, 2021).

Settlement Talks and Hearing Held in *Juliana*; States Sought to Intervene to Oppose Settlement

On June 23, 2021, the parties in *Juliana v. United States* met with the magistrate judge for an initial settlement conference. Two days later, the district court heard oral argument on the plaintiffs' motion to file an amended complaint and took the matter under advisement. The youth plaintiffs seek to amend their complaint to add a request for declaratory relief after the Ninth Circuit ruled that they lacked standing because they did not establish the redressability element of Article III standing. Earlier in June, 17 states filed a motion for limited intervention on behalf of the defendants. They argued that intervention was necessary to allow them "to ensure their interests are not undermined through settlement of a dispute that this Court lacks jurisdiction to adjudicate." An eighteenth state, Kansas, filed a similar motion for limited intervention two weeks later. The plaintiffs' response to the 17 states' motion is due on July 6. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. June 8, 2021). [*Editor's Note:* Due to a technical issue, recent updates for *Juliana v. United States* are currently not available on the website.]

Biden Administration Asked Missouri Federal Court to Dismiss States' Challenge to Actions on Social Cost of Greenhouse Gases

Federal defendants filed a motion to dismiss in the lawsuit brought by Missouri and other states to challenge the Interim Values for the Social Cost of Carbon, Methane, and Nitrous Oxide, which were released in response to a directive in President Biden's Executive Order 13990, which the states also challenge. The defendants argued that the states did not have standing because any possibility of an injury caused by the challenged actions was speculative and any injury would be the result of "future, hypothetical agency actions," not the actions challenged in this case. The defendants also contended the alleged injuries were not redressable. In addition, the defendants argued that the claims were not ripe, that the states lacked a cause of action, and that their claims were meritless. The defendants also responded to the states' motion for a preliminary injunction, arguing that they had failed to show imminent, irreparable harm, that a preliminary injunction would disserve the public interest, and that any relief should be limited to declaring the Interim Values non-binding. *Missouri v. Biden*, No. 4:21-cv-00287 (E.D. Mo. motion to dismiss June 4, 2021).

Developer Appealed California Court's Rejection of Challenge to "Reach Code"

A developer who unsuccessfully challenged the City of Santa Rosa's adoption of a "Reach Code" appealed the denial of his petition/complaint in the California Court of Appeal. The Reach Code requires new low-rise residential construction to provide a permanent electricity supply for space heating, water heating, cooking, and clothes drying, and bans plumbing for natural gas. A California trial court rejected the plaintiff's claims that the City's adoption of the Reach Code violated the California Environmental Quality Act and laws governing reach codes. *Gallaher v. City of Santa Rosa*, No. SCV-265711 (Cal. Super. Ct. June 21, 2021).

Consumer Protection Lawsuit Against Coca-Cola Cited Climate Impacts of Plastic

Earth Island Institute—a "public-interest organization" whose mission includes "educating consumers … and engaging in advocacy related to environmental and human health issues"—brought a lawsuit in the Superior Court of the District of Columbia against The Coca-Cola Company alleging that Coca-Cola engaged in false and deceptive marketing by representing itself as a "sustainable and environmentally friendly company, despite being one of the largest contributors to plastic pollution in the world." The complaint asserted violations of D.C. Consumer Protection Procedures Act. Among the harmful impacts of plastic pollution alleged by the plaintiff were plastics' "incredibly carbon-intensive life cycles." *Earth Island Institute v. Coca-Cola Co.*, No. 2021 CA 001846 B (D.C. Super. Ct., filed June 8, 2021).

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FEATURED CASE

In Baltimore's Climate Case Against Fossil Fuel Companies, Supreme Court Held that Appellate Review of Remand Order Extends to All Grounds for Removal

In a 7-1 decision, the U.S. Supreme Court held that the Fourth Circuit Court of Appeals erred when it concluded that its review of the remand order in Baltimore's climate change case against fossil fuel companies was limited to determining whether the defendants properly removed the

case under the federal officer removal statute. The Court declined to review the companies' other grounds for removal, finding that the "wiser course" was to allow the Fourth Circuit to address them in the first instance. The Court's decision concerned the interpretation of 28 U.S.C. § 1447(d), which provides that "an order remanding a case to the State court from which it was removed pursuant to section 1442 [the federal officer removal statute] or 1443 [removal statute for civil rights cases] of this title shall be reviewable by appeal." The Court concluded that the ordinary meaning of "order" in Section 1447(d) would include "the whole of a district court's 'order,' not just some of its parts or pieces." The Court was not persuaded by arguments that exceptions to the general bar on appellate review of remand orders should be construed narrowly or that Congress would have expressly directed that appellate courts should review all aspects of remand orders had that been its intention. In addition, the Court cited its decision in *Yamaha Motor Corp., U. S. A. v. Calhoun*, 516 U. S. 199 (1996)—which concerned the scope of appellate review of orders certified for appeal by district courts—as its "most analogous precedent." The Court found that *Yamaha* resolved any doubts about Section 1447(d)'s interpretation with its holding that appellate courts could address any questions contained in a district court order certified for appeal. The Court said other precedents cited by Baltimore "were driven by concerns unique to their statutory contexts." Nor was the Court persuaded by the argument that Congress ratified lower appellate court interpretations limiting the scope of review for remand orders cases removed under Section 1443 when it enacted the exception for the federal officer removal statute. The Court stated that "[i]t seems most unlikely to us that a smattering of lower court opinions could ever represent the sort of 'judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it.'" Responding to policy concerns regarding efficiency raised by Baltimore, the Court first noted that policy arguments could not prevail over "a clear statutory directive" and found, moreover, that Section 1447(d) "tempers its obvious concern with efficiency" by providing for the exceptions to the bar on appellate review in the first place. The Court also suggested that a "fuller form of appellate review" could serve the cause of efficiency. In response to the concern that its interpretation would "invite gamesmanship," the Court again said policy concerns could not override plain meaning and also noted that in any event Congress had addressed this policy concern by allowing courts to sanction frivolous arguments. Justice Sotomayor dissented, writing that she believed the Court's interpretation would allow defendants to "sidestep" the general bar on appellate review by "shoehorning" a civil rights or federal officer removal argument into their case for removal. She also was persuaded that Congress had ratified the lower appellate court decisions holding that there was a narrower scope of review. Justice Alito did not take part in the case. On May 28, the Maryland state court hearing Baltimore's case stayed the proceedings pending the Fourth Circuit' review of the defendants' other grounds for appeal. *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. May 17, 2021).

DECISIONS AND SETTLEMENTS

Supreme Court Sent Other Climate Cases Back to Lower Appellate Courts for Review of Other Grounds for Removal

In three other cases brought by local and state governments against fossil fuel companies, the Supreme Court granted petitions for writ of certiorari seeking review of decisions affirming remand orders. The Court vacated the judgments in the three cases and remanded them for

further consideration in light of its decision in *BP p.l.c. v. Mayor & City Council of Baltimore*. Justice Alito did not take part in the consideration of these cases. *Chevron Corp. v. County of San Mateo*, No. 20-884 (U.S. May 24, 2021); *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 20-783 (U.S. May 24, 2021); *Shell Oil Products Co., L.L.C. v. Rhode Island*, No. 20-900 (U.S. May 24, 2021).

Connecticut Federal Court Granted State's Motion to Remand Unfair Trade Practices Lawsuit Against Exxon

The federal district court for the District of Connecticut granted the State of Connecticut's motion to remand its lawsuit against Exxon Mobil Corporation (Exxon) in which the State asserts claims under the Connecticut Unfair Trade Practices Act (CUTPA) arising from Exxon's alleged false or misleading statements about connections between its products and climate change, as well as alleged interference with the marketplace for renewable energy and alleged "greenwashing." Citing the well-pleaded complaint rule, the court characterized Connecticut's claims as alleging that Exxon "lied to Connecticut consumers and that these lies affected the behavior of those consumers"; the court said that "[t]he fact that the alleged lies were about the impacts of fossil fuels on the Earth's climate does not empower the court to rewrite the Complaint and substitute other claims" such as the common law nuisance and trespass claims asserted against fossil fuel companies in other cases. The court then concluded that none of the exceptions to the well-pleaded complaint rule applied. First, the court found that Exxon failed to show that federal common law justified removal, even if it might provide a defense. Second, the court concluded that CUTPA claims did not "necessarily raise" federal issues, as would be required for the *Grable* exception to the well-pleaded complaint rule. In addition, the court found that neither the federal officer removal statute, the Outer Continental Shelf Lands Act, federal enclave jurisdiction, nor diversity jurisdiction provided grounds for removal. The court denied, however, Connecticut's motion for costs and fees, noting that several issues raised by Exxon were novel in the Second Circuit and that many relevant portions of district court rulings in other circuits had not been subject to appellate review until the Supreme Court's recent decision in the *Baltimore* case. *Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-01555 (D. Conn. June 2, 2021).

District Court Stayed Briefing of Motion to Remand in Annapolis's Climate Case

After the Supreme Court's decision in *BP p.l.c. v. Mayor & City Council of Baltimore*, the federal district court for the District of Maryland stayed proceedings in a case brought by the City of Annapolis against fossil fuel companies and a trade association. The fossil fuel companies removed the case in March 2021, citing five grounds for removal, including the federal officer removal statute. The City filed a motion to remand on April 23, 2021, and the defendants had not yet filed their response when the court stayed the proceedings. The court noted that it was undisputed that the Fourth Circuit's determination regarding the fossil fuel companies' remaining jurisdictional claims in the *Baltimore* case would have a "direct bearing" on the defendants' arguments in this case; the district court also said the Fourth Circuit's decision on these remaining issues "is not a foregone conclusion" since some of the jurisdictional arguments raise "novel questions of law." Regarding prejudice to the parties, the district court wrote that "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly helped set in motion" and that

"[t]he urgency of the threat of climate change writ large is distinct from plaintiff's interest in a speedy determination of federal jurisdiction in this suit." The court concluded that the guidance the Fourth Circuit would "surely provide" would be "worth the wait." *City of Annapolis v. BP p.l.c.*, No. 21-cv-772 (D. Md. May 19, 2021).

Ninth Circuit Sent Decision that Pacific Walrus No Longer Qualified as Threatened Back to Agency

The Ninth Circuit Court of Appeals found that the U.S. Fish and Wildlife Service (FWS) did not sufficiently explain why it reversed a previous determination that the Pacific walrus qualified for listing as endangered or threatened under the Endangered Species Act. The Ninth Circuit therefore reversed a district court judgment upholding the FWS's reversal and directed the district court to remand to the FWS "to provide a sufficient explanation of its new position." After concluding in 2011 that listing of the Pacific walrus was warranted due to threats that included sea-ice loss through 2100, the FWS issued a final decision in October 2017 that the Pacific walrus no longer qualified as a threatened species. The 2017 decision found that although there would be a reduction in sea ice, there was not "reliable information showing that the magnitude of this change could be sufficient to put the subspecies in danger of extinction now or in the foreseeable future." The FWS also recharacterized the scope of "foreseeable future," finding that "beyond 2060 the conclusions concerning the impacts of the effects of climate change and other stressors on the Pacific walrus population are based on speculation, rather than reliable prediction." The Ninth Circuit said the "essential flaw" in the 2017 decision—which it characterized as a "spartan document" in contrast to the 2011 decision, which was "45 pages in length, contained specific findings, replete with citations to scientific studies and data"—was the "failure offer more than a cursory explanation of why the findings underlying its 2011 Decision no longer apply." Although the 2017 decision incorporated a final species status assessment that contained new information, the Ninth Circuit found that the "actual decision document does not explain why this new information resulted in an about-face" on whether the Pacific walrus met statutory listing criteria. The Ninth Circuit also found that the 2017 decision did not provide an explanation for decision to recharacterize the "foreseeable future." *Center for Biological Diversity v. Haaland*, No. 19-35981 (9th Cir. June 3, 2021).

Courts Dismissed Challenges to Small Refinery Exemptions from Renewable Fuel Standard Requirements After EPA Obtained Vacatur and Voluntary Remand

After the Tenth Circuit Court of Appeals vacated and remanded three small refinery exemption extensions from Renewable Fuel Standard requirements granted by the U.S. Environmental Protection Agency on January 19, 2021, Renewable Fuels Association moved to voluntarily dismiss its petitions for review challenging the exemptions in the Tenth Circuit and the D.C. Circuit. The Tenth Circuit granted the motion on May 25, 2021, and the D.C. Circuit granted the motion on May 26, 2021. The Tenth Circuit vacated and remanded the exemptions after EPA moved for vacatur and voluntary remand, conceding that it did not analyze determinative legal questions regarding the refineries' eligibility for the extensions. *Renewable Fuels Association v. EPA*, No. 21-9518 (10th Cir. May 25, 2021); *Renewable Fuels Association v. EPA*, No. 21-1032 (D.C. Cir. May 26, 2021).

Second Circuit Declined to Stay Department of Energy Rule Creating New Product Classes for Short-Cycle for Washers and Dryers

The Second Circuit Court of Appeals denied a motion to stay a U.S. Department of Energy (DOE) rule adopted in December 2020 that created new product classes for short-cycle washers and dryers in the energy conservation program. The court found that the petitioners—who had argued that excessive consumption of energy and water by short-cycle washers and dryers sold due to the rule would constitute substantial and irreparable harm—did not make a sufficient showing of irreparable injury absent a stay. The Second Circuit also granted the petitioners' motion to stay briefing until October 1, 2021 to allow DOE to proceed with reconsideration of the rule. DOE represented that it expected to complete reconsideration by the end of 2021. *California v. U.S. Department of Energy*, Nos. 21-108, 21-428, 21-564 (2d Cir. May 18, 2021).

First Circuit Declined to Bar Construction of Power Line in Maine

The First Circuit Court of Appeals affirmed the denial of a preliminary injunction to block construction of a segment of an electric transmission power corridor in Maine that would be part of a project to carry electricity from Quebec to Massachusetts, including electricity generated by hydropower. The First Circuit found that the plaintiffs did not show a likelihood of success on the merits of any of their claims under the National Environmental Policy Act (NEPA), including their claim that the U.S. Army Corps of Engineers acted arbitrarily and capriciously when it concluded that the overall project was not a "major federal action" pursuant to NEPA. Because the First Circuit rejected the plaintiffs' arguments regarding the scope of the NEPA review, the court also concluded that the plaintiffs' contention that the greenhouse gas reductions from the overall project were overstated did not show "controversy" that would require the Corps to prepare an environmental impact statement. *Sierra Club v. U.S. Army Corps of Engineers*, No. 20-2195 (1st Cir. May 13, 2021).

Montana Federal Court Declined to Stay Proceedings in Environmental Groups and States' Challenge to Lifting of Moratorium on Federal Coal Leasing

The federal district court for the District of Montana denied federal defendants' request for a 90-day stay in proceedings challenging the Trump administration's lifting of the Obama administration's moratorium on federal coal leasing. Briefing is currently underway on summary judgment motions regarding the adequacy of the U.S. Bureau of Land Management's (BLM's) environmental assessment (EA) and finding of no significant impact (FONSI) for the lifting of the moratorium. BLM issued the EA and FONSI in response to the court's 2019 decision finding that the lifting of the moratorium was a "major federal action" requiring review under NEPA. In April 2021, Secretary of the Interior Deb Haaland issued Secretarial Order 3398, which revoked former Secretary Ryan Zinke's order that lifted the moratorium. Secretary Haaland's order directed agencies to prepare a report with a plan for reversing, amending, or updating the policies implementing the Zinke order. The court found, however, that there was a "fair possibility" that previous and ongoing implementation of the Zinke order's policies would cause damage to the plaintiffs' interests in air quality, water quality, wildlife habitat, cultural sites, and mitigation of climate change impacts. The court further found that the federal defendants failed to establish that they would suffer hardship if the case proceeded and that "the orderly course of justice

further weighs in favor of the Court maintaining the current schedule" since it "remains doubtful that Federal Defendants can complete their agency review and related policy change within a reasonable time." *Citizens for Clean Energy v. U.S. Department of the Interior*, No. 4:17-cv-00030 (D. Mont. June 3, 2021).

Montana Federal Court Said Biden Revocation of Keystone XL Permit Did Not Moot Pipeline Challenge; Parties in Separate Case Agreed to Dismissal of Challenge to Permit

In the lawsuit challenging President Trump's 2019 issuance of a presidential permit for the U.S.-Canada border segment of the Keystone XL pipeline, the federal district court for the District of Montana concluded that President Biden's revocation of the permit did not render the plaintiffs' claims moot. First, the court concluded that the case presented a live controversy because the court could order removal of the pipeline segment. In addition, the court found that the exception to mootness for voluntary cessation of unlawful activity would apply because the court could prevent President Biden or a future president from unilaterally issuing another permit. The court said it would issue an order on pending summary judgment motions "in due course." *Indigenous Environmental Network v. Trump*, No. 4:19-cv-00028 (D. Mont. May 28, 2021).

In a separate lawsuit challenging the 2019 presidential permit, the parties jointly submitted a stipulation of dismissal without prejudice. The parties—which included the plaintiffs (Rosebud Sioux Tribe and Fort Belknap Indian Community), the defendant agencies and officials, and the pipeline developers—agreed that President Biden's revocation of the permit made the case moot. The court ordered the case dismissed on May 17, 2021. *Rosebud Sioux Tribe v. Biden*, No. 4:18-cv-00118 (D. Mont. May 17, 2021).

Challenge to Biological Opinion for Oil and Gas Activity in Gulf of Mexico Will Remain in Maryland Federal Court

In a lawsuit challenging the National Marine Fisheries Service's 2020 biological opinion concerning oil and gas activities on the outer continental shelf in the Gulf of Mexico, the federal district court for the District of Maryland denied a motion to transfer venue to the Eastern District of Louisiana or the Southern District of Texas. One of the four failings alleged by the plaintiffs was failure to consider the compounding effects of climate-related population shifts on threats to endangered species posed by leasing activity. Although the court found that either proposed transferee district would be a proper venue, it concluded that the defendants failed to demonstrate that either district would provide "a more convenient or equitable stage for litigating this matter." *Sierra Club v. National Marine Fisheries Service*, No. 20-cv-3060 (D. Md. May 24, 2021).

Federal Court Upheld Environmental Review for Forest Thinning Project

The federal district court for the Eastern District of California rejected challenges to the NEPA review for a forest thinning project. The court found that the U.S. Forest Service took a hard look at the project's probable environmental consequences. Among the arguments rejected by the court were claims that the Forest Service's consideration of the project's greenhouse gas effects in the final environmental impact statement (EIS) was deficient. The court ruled that the

plaintiffs were precluded from raising this argument because they did not raise greenhouse gas issues during the administrative process. The court also found that the plaintiffs failed to show that the Forest Service's updated guidance for assessing greenhouse gas emissions constituted new information that affected the final EIS's assessment of greenhouse gas emissions and therefore did not show that a supplemental EIS was required. The court also rejected claims under the National Forest Management Act, the Healthy Forest Restoration Act, and the Endangered Species Act. *Conservation Congress v. U.S. Forest Service*, 2:13-cv-00934 (E.D. Cal. May 17, 2021).

Wyoming Federal Court Allowed Conservation Groups and Business Coalition to Intervene in Cases Challenging Suspension of Oil and Gas Leasing

The federal district court for the District of Wyoming granted motions by conservation groups and a business coalition to intervene as respondents in the lawsuits challenging the Biden administration's pause on new oil and gas leasing on public lands. The business coalition is made up of ski resort companies, a hunting and fishing apparel and education business, a biking outfitter, a ranch, and a farm. The court also consolidated the two lawsuits challenging the leasing suspension, one brought by the State of Wyoming and the other brought by the Western Energy Alliance. Briefing on preliminary injunction motions is scheduled to be completed on June 17, 2021. *Western Energy Alliance v. Biden*, Nos. 0:21-cv-00013, 0:21-cv-00056 (D. Wyo. May 12, 2021).

Louisiana Federal Court Denied Conservation Groups' Motion to Intervene and Government's Motion to Transfer in Challenge to Pause on Oil and Gas Leasing

On May 10, 2021, the federal district court for the Western District of Louisiana denied conservations groups' motion to intervene in a lawsuit challenging the Biden administration's suspension of oil and gas lease sales on public lands and offshore. With respect to intervention as of right, the court found that the conservation groups did not overcome the presumption that the government defendants' representation of their interests would be adequate. The court said the government and the groups shared the "same ultimate objective," which in this case was about the government's "constitutional and statutory authority, not about climate policy." In denying permissive intervention, the court again cited the government's adequate representation of the groups and also said allowing the groups to intervene "could expand the case to issues not before this Court" that were not necessary to decide. The court invited the conservation groups to seek amicus curiae status. Also on May 10, the court denied the government defendants' motion to transfer the case to the District of Wyoming pursuant to the first-to-file rule. The court concluded that although there was "some overlap" between the two cases, there was not "substantial overlap." The court noted that the federal agencies and the statutory authority were not the same, with the Wyoming suit being a "much narrower challenge to one agency decision, while the Louisiana suit is a much broader claim against several agencies, and President Biden." In the absence of complete overlap, the court concluded that factors such as the plaintiff states' interests in having the suits heard in a forum that handles both the Mineral Leasing Act and the Outer Continental Shelf Lands Act, the states' "substantial financial interest," and the potential burden to the District of Wyoming all weighed in favor of denying the motion to transfer. The court also declined to sever and transfer the land-based portion of the lawsuit. Briefing on the

plaintiffs' motion for a preliminary injunction was completed on May 28. The conservation groups submitted an amicus brief opposing the motion; counties in Utah and Colorado submitted an amicus brief in support of the motion. *Louisiana v. Biden*, No. 2:21-cv-00778 (W.D. La. May 10, 2021).

Louisiana Federal Court Allowed Pipeline Protesters to Proceed with Constitutional Challenge to Critical Infrastructure Statute

In a lawsuit challenging the constitutionality of a Louisiana criminal statute that identified pipelines as critical infrastructure, the federal district court for the Western District of Louisiana ruled that organizational and landowner plaintiffs lacked standing but allowed plaintiffs who had been arrested while protesting construction of the Bayou Bridge Pipeline to proceed with their claims. Although the court found that at least some of the organizational plaintiffs had alleged injury-in-fact with allegations that included specific examples of members being charged with misdemeanors or threatened while protesting near pipelines as well as allegations of the organizations' involvement in organizing pipeline protests, the court concluded that none of the organizations or their members had alleged causation or redressability since the alleged injuries did not pertain to protest activities under the enforcement and prosecutorial authority of the remaining two defendants. With respect to the landowner plaintiffs, who had granted permission for the arrestee plaintiffs to protest on their property, the court found that neither the landowners' allegations regarding their concern about environmental and health impacts in communities affected by the Bayou Bridge Pipeline and about threats posed by climate change nor their allegations that the law limited their use and enjoyment of their property satisfied the injury-in-fact standard. The court also ruled that the claims against the former sheriff of St. Martin Parish were not mooted by the fact that he no longer held the office; instead, since he was sued in his official capacity, his successor should be substituted. The court also concluded that the *Younger* abstention doctrine did not apply because there was no ongoing state proceeding in which the arrestee plaintiffs could challenge their prosecution. *White Hat v. Landry*, No. 6:20-cv-00983 (W.D. La. May 5, 2021).

Hawai‘i Supreme Court Again Returned Biomass Power Purchase Agreement to Public Utilities Commission for Consideration of Greenhouse Gas Emissions

On May 24, 2021, the Hawai‘i Supreme Court vacated the Hawai‘i Public Utilities Commission's (PUC's) purported denial of a competitive bidding waiver to a utility. The PUC denied the waiver after the Supreme Court issued a decision in 2019 that vacated the PUC's decision and order approving the utility's amended power purchase agreement (PPA) for construction and operation of a biomass power facility. The Supreme Court found that the PUC failed to expressly consider greenhouse gas emissions and had denied an environmental organization due process. In its 2021 decision, the Supreme Court indicated that the PUC misread its 2019 decision as having an impact on the competitive bidding waiver issued by the PUC in 2017. The Supreme Court remanded to the PUC for a hearing on the amended PPA that included the express consideration of greenhouse gas emissions and afforded the environmental organization an opportunity to address the amended PPA's impacts on the organization's right to a clean and healthful environment. *In re Hawai‘i Electric Light Co.*, No. (Haw. May 24, 2021).

Florida Appellate Court Affirmed Dismissal of Young People's Climate Case

The Florida Court of Appeal affirmed the dismissal of a lawsuit brought by eight young people alleging that the State of Florida and state officials and agencies violated their fundamental rights to a stable climate system under Florida common law and the Florida constitution. The appellate court agreed with the court below that the lawsuit raised nonjusticiable political questions. *Reynolds v. State*, No. 1D20-2036 (Fla. Ct. App. May 18, 2021).

NEW CASES, MOTIONS, AND OTHER FILINGS

Supreme Court to Consider Whether to Grant Certiorari in Oakland and San Francisco Climate Cases; Fossil Companies Removed New York City and Maryland County Cases

In addition to the Supreme Court's decision in *BP p.l.c. v. Mayor & City of Baltimore* on the scope of appellate review of remand orders and the other decisions discussed above, the following developments have occurred in the past month in climate change cases brought by local and state governments against fossil fuel companies:

- In Oakland and San Francisco's case, briefing was completed on the fossil fuel companies' petition for writ of certiorari, and briefs were distributed for the justices' June 10, 2021 conference. In their brief opposing certiorari, the cities framed the questions presented as "[w]hether a California state law public nuisance claim alleging wrongful and deceptive promotion of hazardous consumer goods 'arises under' a congressionally displaced body of federal common law regarding interstate air pollution for purposes of removal jurisdiction" and "[w]hether respondents waived their right to appeal an erroneously denied remand motion by filing an amended complaint to conform to that erroneous ruling while expressly preserving their appellate rights, and then opposing petitioners' motion to dismiss that amended complaint." The cities argued that no existing federal common law "governs" their claims under the California representative public nuisance law, and that the Ninth Circuit's application of the well-pleaded complaint rule did not warrant review. The cities also contended that the Ninth Circuit's application of the Court's precedent concerning whether post-removal amendment of complaints waived objections did not warrant review. In addition, the cities argued that the questions were not "certworthy" because they "arise in only a tiny category of cases" and because the petition was a "poor vehicle" to review the questions since there had been no final determination on the jurisdictional issue raised. *Chevron Corp. v. City of Oakland*, No. 20-1089 (U.S.).
- On May 24, 2021, the mandate issued for the Second Circuit's judgment affirming dismissal of New York City's tort law-based case against fossil fuel companies. *City of New York v. Chevron Corp.*, No. 18-2188 (2d Cir. May 24, 2021).
- Exxon Mobil Corporation and ExxonMobil Oil Corporation removed New York City's case under the City's consumer protection law to federal court. *City of New York v. Exxon Mobil Corp.*, No. 1:21-cv-04807 (S.D.N.Y. May 28, 2021).
- The Ninth Circuit granted fossil fuel companies' motion to extend their time for filing opening briefs in their appeals of remand orders in cases brought by the County of Maui

and the City and County of Honolulu. The parties agreed that the deadline for opening briefs should be extended to July 19, 2021 because the Supreme Court's decision in *Baltimore* would determine the scope of issues before the Ninth Circuit. *County of Maui v. Chevron USA Inc.*, No. 21-15318 (9th Cir.); *City & County of Honolulu v. Sunoco LP*, No. 21-15313 (9th Cir.).

- In the State of Minnesota's case, the Eighth Circuit also extended the fossil fuel industry appellants' time to file their opening brief in their appeal of the district court's remand order to take into account the Supreme Court's decision in *Baltimore*. The opening brief is due June 16. *Minnesota v. American Petroleum Institute*, No. 21-1752 (8th Cir.).
- On May 27, the federal district court for the District of South Carolina stayed proceedings in the City of Charleston's lawsuit against fossil fuel companies pending the Fourth Circuit's decision on remand in the *Baltimore* case. Briefing on the City of Charleston's motion to remand was completed earlier in May. As set forth in a joint stipulation filed by the parties on May 25, the court directed them to file a joint submission regarding the next steps in the case within 14 days of the Fourth Circuit's decision on remand. *City of Charleston v. Brabham Oil Co.*, No. 2:20-cv-03579 (D.S.C. May 27, 2021).
- On May 27, Chevron Corporation and Chevron U.S.A. Inc. removed Anne Arundel County's case to the federal district court for the District of Maryland. On June 1, 2021, the district court so-ordered the parties' stipulation to a stay of the proceedings pending the Fourth Circuit's decision on remand in the *Baltimore* case. *Anne Arundel County v. BP p.l.c.*, No. 1:21-cv-01323 (D. Md.).
- On May 19, 2021, the federal district court for the District of Delaware heard oral argument on Delaware's motion to remand. *Delaware v. BP America Inc.*, No. 1:20-cv-01429 (D. Del. May 19, 2021).

Parties Filed Briefs Supporting Supreme Court Review of D.C. Circuit Decision on Affordable Clean Energy Rule

In late May and early June 2021, five responses and briefs were filed in support of certiorari petitions seeking review of the D.C. Circuit's January opinion vacating EPA's repeal and replacement of the Obama administration's Clean Power Plan regulations for controlling carbon emissions from existing power plants. The D.C. Circuit held that the Trump administration's Affordable Clean Energy Rule (ACE Rule) rested on an erroneous interpretation of the Clean Air Act that barred EPA from considering measures beyond those that apply at and to an individual source. Three of the responses and briefs supporting certiorari were filed by parties that intervened to defend the ACE Rule in the D.C. Circuit: National Mining Association; Basin Electric Power Cooperative, a not-for-profit regional wholesale electric generation and transmission cooperative; and America's Power, a trade association comprising companies involved in the production of electricity from coal. In addition, two amicus briefs were filed, one by the Commonwealth of Kentucky and the other by New England Legal Foundation, a nonprofit law firm with a mission of "promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property." The federal government's response is due by July 6. *West Virginia v. EPA*, No. 20-1530 (U.S.).

U.S. Recommended Denial of Montana and Wyoming's Motion to File Bill of Complaint Against Washington for Blocking Coal Exports

The Acting Solicitor General filed a brief in the Supreme Court expressing the United States' view that the Court should deny Montana and Wyoming's motion for leave to file a bill of complaint against the State of Washington for allegedly unconstitutional actions blocking export of coal mined in Montana and Wyoming from Washington ports. The U.S. contended that because the developer of the proposed coal export terminal at issue in the case had filed for bankruptcy and would not be building the terminal, this proceeding would not redress Montana and Wyoming's asserted injury and there was therefore no Article III case or controversy. *Montana v. Washington*, No. 22O152 (U.S. May 25, 2021).

Federal Government Defended Review of Willow Project in National Petroleum Reserve

On May 26, 2021, the federal government and the oil and gas company developing the Willow Master Development Plan Project in the National Petroleum Reserve in Alaska filed briefs opposing the plaintiffs' motions for summary judgment on claims that project approvals violated the Clean Water Act, NEPA, and the Endangered Species Act. With respect to climate change, the federal defendants argued that the U.S. Bureau of Land Management's analysis of lifecycle greenhouse gas emissions associated with the project had adequately explained why the agency "lacked the data necessary for a reliable quantitative estimate of downstream emissions in foreign countries," and therefore did not suffer from inadequacies identified by the Ninth Circuit it its December 2020 decision in *Center for Biological Diversity v. Bernhardt*. Other climate change-related arguments included that the EIS had adequately analyzed the project's cumulative effects on fish and polar bears when combined with impacts resulting from climate change and other factors. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management*, No. 3:20-cv-00290 (D. Alaska May 26, 2021).

Oregon Federal Court Ordered Settlement Negotiations Between Federal Government and *Juliana* Plaintiffs

At a telephonic status conference on May 13, 2021, the federal district court for the District of Oregon scheduled oral argument on the *Juliana* plaintiffs' motion to amend their complaint for June 25 but also referred the matter to a magistrate judge for a settlement conference, which was scheduled for June 23, with settlement documents due on June 18. The district court judge stated at the status conference that the case was "in a position, given many things that have intervened in the year[s] that this case was on appeal and changes that have taken [place] legally and in the world, that it's a moment in time that I think people should take advantage of." She urged the parties to "take a look at what this case is about and … the best way to move it forward and how to take advantage of a couple of branches of government—maybe all three—working together to resolve disputes" and to take "this opportunity to look globally at how this case may be resolved that moves forward" to address "a crisis" and to "make progress that will best address the rights that have been acknowledged in the Ninth Circuit's opinion." She indicated that she would be willing to "bump" the oral argument to allow continuing negotiations. The plaintiffs' attorneys stated that they intended to request a 60-day extension of the July 12 deadline for filing a petition

for writ of certiorari in the Supreme Court and that they would keep the district court informed about that application. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. May 13, 2021). [*Editor's Note:* Due to a technical issue, recent updates for *Juliana v. United States* are currently not available on the website.]

Lawsuit Challenged Master Development Plan for Oil and Gas Development in Colorado

Five environmental groups filed a lawsuit in the federal district court for the District of Colorado challenging federal defendants' approval of the North Fork Mancos Master Development Plan (MDP), which allowed drilling of 35 horizontal gas wells in an area on the Western Slope of the Rocky Mountains. The groups alleged that "[t]here remains a fundamental disconnect between public land management for energy production, particularly in the West, … and the scientific consensus on the climate crisis and what must be done in the near future to mitigate its worst effects." They asserted that the federal defendants failed to take a hard look at greenhouse gas emissions, including downstream indirect impacts, cumulative impacts of project emissions, and the context and intensity of emissions. The plaintiffs said the defendants should have employed the Social Cost of Greenhouse Gases or carbon budgeting to evaluate the impacts of greenhouse gas emissions. The plaintiffs also alleged a failure to take a hard look at methane waste, including by using an outdated global warming potential for methane. In addition, the plaintiffs alleged that the defendants did not consider alternatives or conditions to reduce impacts such as methane reduction technologies or best management practices. *Citizens for a Healthy Community v. U.S. Department of Interior*, No. 1:21-cv-01268 (D. Colo., filed May 10, 2021).

Conservation Groups Challenged Corps of Engineers' Approvals for Midwest Transmission Line

National Wildlife Refuge Association and three other conservation groups filed a lawsuit in the federal district court for the Western District of Wisconsin challenging U.S. Army Corps of Engineers actions in connection with approvals for a 101-mile high-voltage transmission line running from Iowa to a substation in Wisconsin. The Corps used general permits rather than individual permits for the project. The conservation groups asserted claims under NEPA, the Clean Water Act, and Endangered Species Act, and the Administrative Procedure Act. Under NEPA, the plaintiffs alleged, among other things, that the final EIS for transmission line did not adequately analyze additional greenhouse gas emissions and climate impacts that would be attributable to the line's construction and the electricity it would carry. *National Wildlife Refuge Association v. U.S. Army Corps of Engineers*, No. 3:21-cv-00306 (W.D. Wis. May 5, 2021).

Lawsuit Sought Protection for 10 Species Under Endangered Species Act

Center for Biological Diversity filed a lawsuit in federal district court in the District of Columbia requesting that the court order the U.S. Fish and Wildlife Service to publish proposed rules to list 10 species as endangered or threatened. The FWS previously determined that listing of each species was "warranted but precluded." For two of the species, the plaintiff's allegations include that climate change is one of the factors imperiling the species. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 1:21-cv-00884 (D.D.C., filed Apr. 1, 2021).

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FEATURED CASE

States and Coal Company Sought Review of D.C. Circuit Decision Vacating Affordable Clean Energy Rule

Two petitions for writ of certiorari were filed in the U.S. Supreme Court seeking review of the D.C. Circuit's January opinion vacating EPA's repeal and replacement of the Obama administration's Clean Power Plan regulations for controlling carbon emissions from existing power plants. The first petition was filed by West Virginia and 18 other states that had intervened to defend the repeal and replacement rule, known as the Affordable Clean Energy rule. The states' petition presented the question of whether Section 111(d) of the Clean Air Act constitutionally authorizes EPA "to issue significant rules—including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements." They argued that Congress had not clearly authorized EPA to exercise such "expansive" powers and that the D.C. Circuit majority opinion's interpretation was foreclosed by the statute and violated separation of powers. The states argued that the Supreme Court's stay of the Clean Power Plan while it was under review by the D.C. Circuit in 2016 signaled that the legal framework for the Clean Power Plan "hinges on important issues of federal that EPA then—and the court below now—got so wrong this Court was likely to grant review." The states contended that further delay in the Court's resolution of these "weighty issues" would have "serious and far-reaching costs." The second petition was filed by a coal mining company. The coal company's petition presented the question of whether Section 111(d) "grants the EPA authority not only to impose standards based on technology and methods that can be applied at and achieved by that existing source, but also allows the agency to develop industry-wide systems like cap-and-trade regimes." The company argued that the D.C. Circuit erred by "untethering" Section 111(d) standards from the existing source being regulated. Like the states, the company contended that Supreme Court had already recognized the critical importance of this question when it stayed the Clean Power Plan. The company argued that debates regarding climate change and policies to address climate change "will not be resolved anytime soon" but that "what *must* be resolved as soon as possible is who has the authority to decide those issues on an industry-wide scale—Congress or the EPA." EPA's response to the petitions is due June 3, 2021. *West Virginia v. EPA*, No. 20-1530 (U.S. Apr. 29, 2021); *North American Coal Corp. v. EPA*, No. 20-1531 (U.S. Apr. 30, 2021).

DECISIONS AND SETTLEMENTS

Parties Voluntarily Dismissed Appeals of Federal Court Decision Requiring More Climate Change Analysis for Wyoming Oil and Gas Leases

On April 15, 2021, federal defendants, defendant-intervenors, and environmental groups filed a stipulation for dismissal of appeals of a district court's November 2020 decision finding that the U.S. Bureau of Land Management's (BLM's) supplemental environmental assessment (EA) for

oil and gas leases in Wyoming did not comply with the National Environmental Policy Act because it failed to adequately consider climate change impacts. BLM prepared the supplemental EA in response to the court's decision in March 2019 that identified shortcomings in BLM's original climate change analysis for the leases. The federal defendants, the States of Wyoming and Utah, and several trade groups appealed the district court's November 2020 decision. *WildEarth Guardians v. Haaland*, Nos. 21-5006, 21-5020, 21-5021, 21-5023, 21-5024 (D.C. Cir. Apr. 28, 2021).

D.C. Circuit Denied Appeal of Remand Order in Nonprofit's Consumer Protection Case Against Exxon

The D.C. Circuit Court of Appeals denied Exxon Mobil Corporation's (Exxon's) petition for permission to appeal pursuant to the Class Action Fairness Act from the district court order remanding the nonprofit organization Beyond Pesticides' lawsuit alleging Exxon violated the District of Columbia Consumer Protection Procedures Act by falsely marketing and advertising its products as clean energy. The D.C. Circuit found that it was "unclear as a matter of District of Columbia law" whether Beyond Pesticides' action was required to be litigated as a class action and that District of Columbia courts should determine how the action should proceed. *In re Exxon Mobil Corp.*, No. 21-8001 (D.C. Cir. Apr. 23, 2021).

Ninth Circuit Granted Voluntary Dismissal of Remaining Appeal of Order Vacating Negative Jurisdictional Determination for Salt Ponds on San Francisco Bay

Seven weeks after the U.S. Environmental Protection Agency (EPA) withdrew its appeal of a district court's order that vacated a negative jurisdictional determination under the Clean Water Act for the Redwood City Salt Ponds along San Francisco Bay, the Ninth Circuit Court of Appeals granted a motion for voluntary dismissal filed by the limited liability company that requested the jurisdictional determination. San Francisco Baykeeper and other plaintiffs' complaint alleged that the negative jurisdictional determination would exacerbate the consequences of sea level rise and impair California's ability to mitigate sea level rise impacts, though the district court's decision did not address this issue, focusing instead on EPA's determination that the salt ponds had been transformed into "fast land" prior to enactment of the Clean Water Act. *San Francisco Baykeeper v. EPA*, No. 20-17367 (9th Cir. Apr. 19, 2021).

United States Agreed to Dismissal of Appeal in Unsuccessful Trump-Era Challenge to California-Quebec Cap-and-Trade Linkage

The United States, the State of California, and other defendants and intervenor-defendants stipulated and agreed to the voluntary dismissal of the United States' appeal of a California federal court's judgment in favor of California and the other defendants in the U.S.'s challenge to the constitutionality of the linkage between California's greenhouse gas emissions cap-and-trade program and Quebec trading program. *United States v. California*, No. 20-16789 (9th Cir. Apr. 21, 2021).

Ninth Circuit Said Biden Action Mooted Case Challenging Trump Revocation of Withdrawal of Oceans Lands from Oil and Gas Leasing

The Ninth Circuit Court of Appeals vacated the judgment of an Alaska federal district court that held that President Trump exceeded presidential authority granted by the Outer Continental Shelf Lands Act when he issued an executive order revoking President Obama's withdrawals of certain areas in the Arctic and Atlantic Oceans from oil and gas leasing. The Ninth Circuit agreed with the parties that President Biden's revocation of President Trump's executive order rendered the case moot. The Ninth Circuit directed the district court to dismiss the case without prejudice. *League of Conservation Voters v. Biden*, No. 19-35460 (9th Cir. Apr. 13, 2021).

D.C. Federal Court Allowed Trade Group and Wyoming to Intervene in Challenge to Oil and Gas Leases

The federal district court for the District of Columbia allowed American Petroleum Institute and the State of Wyoming to intervene as defendants in a lawsuit filed earlier in 2021 in which environmental groups challenge BLM's approval of 1,153 oil and gas leases on public lands in Colorado, New Mexico, Utah, and Wyoming. The court found that both parties were entitled to intervene as of right. *WildEarth Guardians v. Haaland*, No. 1:21-cv-00175 (D.D.C. Apr. 20, 2021).

Montana Federal Court Vacated Approvals for Mining Project

The federal district court for the District of Montana held that it was arbitrary and capricious for federal agencies not to consider the environmental effects of Phase II of a mine project in northwest Montana in connection with the approval of Phase I of the project, or to adequately explain why they could omit the effects of Phase II. The plaintiffs asserted Endangered Species Act claims, focusing on the federal agencies' consideration of impacts on grizzly bears and bull trout; the plaintiffs alleged that bull trout are "particularly vulnerable" to climate change because they require cold water to spawn and rear. The court vacated and remanded the approvals for the project. *Ksanka Kupaqa Xaʾłɬin v. U.S. Fish & Wildlife Service*, No. 9:19-cv-00020 (D. Mont. Apr. 14, 2021).

Fish and Wildlife Service Agreed to Deadline for Response to Request for New Critical Habitat for Mount Graham Red Squirrel

The U.S. Fish and Wildlife Service, the Secretary of the Interior, and two environmental groups agreed to a settlement resolving the groups' lawsuit to compel a 12-month finding on their petition to revise the Mount Graham red squirrel's critical habitat. The FWS agreed to submit a 12-month finding for publication in the *Federal Register* by July 29, 2021. The finding must indicate how the FWS intends to proceed with the requested revision of the critical habitat designation. The plaintiffs alleged that the squirrel's currently designated critical habitat had been degraded or destroyed by climate change-influenced factors such as wildfire and drought, and that revision of the designation to include lower-elevation areas was essential to the squirrel's survival. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 4:20-cv-00525 (D. Ariz. Apr. 12, 2021).

Arizona Federal Court Declined to Put Challenge to Trump "Waters of the United States" Rule on Hold

The federal district court for the District of Arizona denied EPA and the U.S. Army Corps of Engineers' motion to hold in abeyance a case challenging the Trump administration's rules defining "waters of the United States" under the Clean Water Act. The court was persuaded by the plaintiffs' arguments that ongoing implementation of the Trump administration's 2020 rule defining "waters of the United States" would cause damage to the plaintiffs "with an interest in the integrity of the nation's waters" and that the federal defendants failed to establish "a clear case of hardship or inequity in being required to go forward." Therefore, "[b]ecause an abeyance of this litigation may result in damage to Plaintiffs or others and there is no indication that agency review of the challenged rule will be completed within a reasonable time, the Court does not find that an abeyance is appropriate." *Pasqua Yaqui Tribe v. EPA*, No. 4:20-cv-00266 (D. Ariz. Apr. 12, 2021).

Challenge to Previous Summer Flounder Quota Dismissed; Summary Judgment Motions Pending in Challenges to Revised Quota Rules

The federal district court for the Southern District of New York ruled that a lawsuit brought in 2019 by the New York State Department of Environmental Conservation and its Commissioner (NYSDEC) to challenge the National Marine Fisheries Services' rules establishing summer flounder quotas were made moot by subsequent rules that revised the rules at issue. The court declined NYSDEC's request for administratively closure instead of dismissal of the case to allow for reopening if the challenged rules were reinstated, finding that the federal defendants' power to reenact the original rules was "not enough to keep this controversy alive." The court noted that the plaintiffs were not without recourse since they had already filed a suit challenging the revised rules. Briefing on summary judgment motions in the case challenging the revised rules was completed on April 30. In both cases, the New York plaintiffs argue that the allocation of the summer flounder quota is based on obsolete data that does not reflect the fishery's northeast shift, which may be due in part to ocean warming. *Seggos v. Raimondo*, No. 1:19-cv-09380 (S.D.N.Y. Apr. 9, 2021); *New York v. Raimondo*, No. 1:21-cv-00304 (S.D.N.Y.).

Environmental Review Not Required for Approval of Minnesota Utility's Agreements to Purchase Power from New Subsidiary-Owned Gas Plant in Wisconsin

Reversing an intermediate appellate court's decision, the Minnesota Supreme Court held that the Minnesota Public Utilities Commission's consideration of affiliated-interest agreements governing construction and operation of a natural gas power plant in Wisconsin by a Minnesota utility's affiliate did not require review under the Minnesota Environmental Policy Act (MEPA). Under the utility's agreements with the affiliate—which owned half of the Wisconsin power plant and half of the power generated by the plant—the affiliate agreed to sell 48% of capacity produced by the plant to the utility. First, the Supreme Court concluded that the statute requiring Commission approval of affiliated-interest agreement did not require environmental review. The court acknowledged that the Commission's determination of whether an affiliated-interest agreement was "reasonable and consistent with the public interest" could take environmental impacts into account, but the court found that this "focused consideration" was "narrower than

the broad consideration of the environmental impact of a utility action" in an environmental review under MEPA. Second, the Supreme Court rejected the intermediate appellate court's conclusion that the Commission's approval of the agreements was an "indirect cause" of the physical activities of constructing and operating the power plant and therefore a "project" under MEPA. The Minnesota Supreme Court adopted the U.S. Supreme Court's causation standard for the National Environmental Policy Act in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), and concluded that "in light of the informational role served by MEPA review, the line that must be drawn requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause." In this case, the Minnesota Supreme Court found that MEPA review did not apply to the Commission's decision because it did not have the authority to permit construction and operation of the power plant, which the utility said would be built and run without the Commission's approval. The court remanded for the Court of Appeals to determine whether the Commission's approval of the affiliated-interest agreements was supported by substantial evidence because the Court of Appeals had not yet addressed that issue. A dissenting justice would have held that MEPA's plain language encompassed the Commission's approval of the agreements and that application of MEPA would not regulate interstate commerce in violation of the Commerce Clause. *In re Minnesota Power's Petition for Approval of EnergyForward Resource Package*, Nos. A19-0688 & A19-0704 (Minn. Apr. 21, 2021).

Minnesota Court Said City Failed to Consider Cumulative Climate Change Effects in Review of Motorsports Park

The Minnesota Court of Appeals reversed the City of Eagle Lake's determination that a proposed motorsports park did not require an environmental impact statement (EIS) under the Minnesota Environmental Policy Act. The court found that the City failed to address agency and county concerns about potential cumulative effects from greenhouse gas emissions and did not rely on substantial evidence with respect to the action's potential effects on wildlife. With respect to climate change, both the Minnesota Department of Natural Resources and the Blue Earth County Property and Environmental Resources Department commented regarding the absence of consideration of potential climate change effects and that the City failed to respond substantively. The court rejected other arguments related to noise impacts, waste storage and disposal, land alterations, wetlands, and procedure. The court remanded for a new determination of whether an EIS was required. *In re Determination of the Need for an Environmental Impact Statement for the Mankato Motorsports Park*, No. A20-0952 (Minn. Ct. App. Apr. 26, 2021).

Developers of Southern California Warehouse Project Agreed to Greenhouse Gas Mitigation Measures to Resolve CEQA Claims

Environmental groups and the developer of a 2,610-acre warehouse project in the City of Moreno Valley in southern California reached an agreement that resolves pending California Environmental Quality Act (CEQA) claims of the environmental groups. Claims brought by other parties are still pending, but the environmental groups agreed not to oppose the project should the courts require reconsideration of its approvals. The settlement agreement requires the developer to ensure that specified actions to address greenhouse gas emissions and air quality are carried out, as well as actions related to biological resources and community benefits. The

greenhouse gas emissions and air quality measures include grant programs for electric trucks and cars; on-site solar generation commitments; contributions to a solar advocacy fund; on-site electric vehicle chargers; electrification of equipment; and provision of lower-carbon hydrogen to tenants if available under commercially reasonable terms. *Center for Community Action & Environmental Justice v. City of Moreno Valley*, No. RIC1511327 (Cal. Super. Ct.).

California Dismissed Challenges to Transit-Oriented Development Plans in San Diego

A California Superior Court dismissed two lawsuits challenging the City of San Diego's approvals of two land use plans—the Morena Corridor Specific Plan, which addressed approximately 280 acres and was intended to create a "pedestrian-oriented village" and increase housing near transportation facilities, and the Balboa Avenue Station Area Specific Plan, which affects approximately 210 acres and also was intended to provide a framework for transit-oriented development. The court rejected neighborhood groups' claims that the City failed to comply with the California Environmental Quality Act and that the plans violated the City's General Plan and Climate Action Plan as well as community plans. *Morena United v. City of San Diego*, No. 37-2019-00053964-CU-TT-CTL (Cal. Super. Ct. Apr. 9, 2021); *Friends of Rose Creek v. City of San Diego*, No. 37-2019-00053679-CU-TT-CTL (Cal. Super. Ct. Apr. 9, 2021).

NEW CASES, MOTIONS, AND OTHER NOTICES

New York City Filed Consumer Protection Lawsuit Against Oil and Gas Companies and Trade Group

New York City filed a lawsuit in New York State Supreme Court against three oil and gas companies and American Petroleum Institute alleging that the defendants violated the City's Consumer Protection Law (CPL) by systematically and intentionally misleading New York City consumers about their products' role in causing climate change. The City's complaint alleged that the companies violated the CPL by "affirmatively misrepresenting the environmental benefits of various fossil fuel products sold at their gasoline stations in New York City" in advertisements and promotional materials by portraying the products as good for the climate and environment without disclosing the products' impacts on greenhouse gas emissions levels and climate change. The City also alleged that the companies engaged in a "greenwashing" campaign by creating misleading impressions of the role of renewable energy in the companies' businesses and of their efforts to reduce their carbon footprints. In addition, the City alleged that American Petroleum Institute engaged in greenwashing by exaggerating and misrepresenting the environmental benefits of its members' products and by misrepresenting its members' investments in clean energy as well as oil and gas's role in combatting climate change. The City sought injunctive relief, civil penalties ($350 for each violation or $500 for each knowing violation), and attorney fees and costs. *City of New York v. Exxon Mobil Corp.*, No. 451071/2021 (N.Y. Sup. Ct., filed Apr. 22, 2021).

Maryland County Filed Climate Change Lawsuit Against Fossil Fuel Companies and Trade Group

Anne Arundel County, Maryland filed a lawsuit in state court against fossil fuel companies and American Petroleum Institute seeking to hold them liable for the physical, environmental, social, and economic consequences of climate change in Anne Arundel County. (Annapolis, a city in the county, previously filed a separate lawsuit against fossil fuel companies.) In its lawsuit, the County asserted claims of public nuisance, private nuisance, strict liability for failure to warn, negligent failure to warn, trespass, and violations of the Maryland Consumer Protection Act. The County alleged that the defendants, despite knowing for more than 50 years that greenhouse gas emissions from their fossil fuel products would have significant adverse impacts on climate and sea levels, concealed the risks of climate change and promoted false and misleading information, including campaigns targeted at County residents to create doubts regarding the impacts of fossil fuels. The County asserted that the defendants were "directly responsible for a substantial portion of the climate crisis-related impacts in Anne Arundel County," including sea level rise, storm surge, and flooding, as well as more frequent, longer-lasting, and more severe extreme weather events. The County seeks compensatory and punitive damages, equitable relief, attorney fees and costs of suit, and disgorgement of profits, as well as recovery for injury or loss sustained as a result of practices barred by the Consumer Protection Act. *Anne Arundel County v. BP p.l.c.*, No. C-02-CV-21-000565 (Md. Cir. Ct., filed Apr. 26, 2021).

Other developments in climate change cases brought by local and state governments in the past month include:

- Fossil fuel companies appealing the District of Hawaii's remand order in cases brought by the City and County of Honolulu and the County of Maui asked the Ninth Circuit for a 60-day extension of time in which to file their opening brief. They sought the extension to allow them to address the Supreme Court's forthcoming decision in *BP p.l.c. v. Mayor & City Council of Baltimore*, which the companies said would determine whether the defendants were limited to contesting only the district court's rejection of jurisdiction under the federal-officer removal statute. Maui and Honolulu oppose the extension request. *County of Maui v. Chevron USA Inc.*, No. 21-15318 (9th Cir. Apr. 30, 2021); *City & County of Honolulu v. Sunoco LP*, No. 21-15313 (9th Cir. Apr. 30, 2021).
- In Minnesota's case against American Petroleum Institute and fossil fuel companies, briefing was completed on April 14, 2021 for the defendants' motion to stay execution of the remand order pending appeal. A temporary stay remained in place. On April 15, Minnesota filed a motion for costs and expenses, including attorney fees, incurred as a result of defendants' "improper removal." *Minnesota v. American Petroleum Institute*, No. 20-cv-1636 (D. Minn.).
- The federal district court for the District of Delaware scheduled oral argument on Delaware's motion to remand on May 19, 2021, allocating each side up to 75 minutes for its arguments. On April 13, 2021, the defendants wrote to inform the court of the Second Circuit's decision affirming dismissal of New York City's climate change case against fossil fuel companies. *Delaware v. BP America Inc.*, No. 1:20-cv-01429 (D. Del.).
- Fossil fuel company defendants also filed notices about the Second Circuit decision in other cases where motions to remand are pending, including in cases brought by the District of Columbia, City of Hoboken, City of Oakland, and City and County of San Francisco. The defendants argued that the Second Circuit's decision confirmed that the

plaintiff's claims necessarily arise under federal law. The defendants also argued that the decision supported their other grounds for federal jurisdiction, including the federal officer removal statute, the Outer Continental Shelf Lands Act, federal enclave jurisdiction, and *Grable* jurisdiction. In Oakland and San Francisco's case, the defendants also argued that the Second Circuit's decision made it more likely that the Supreme Court would grant certiorari. In response, Oakland and San Francisco argued that the Second Circuit opinion did not address removal jurisdiction and that the Second Circuit's preemption analysis was not relevant to the claims in these cases, which the plaintiffs characterized as based on allegations of "wrongful promotion" of fossil fuels. In Hoboken's case, the City argued that the Second Circuit itself had said that it was addressing a different question than the removability question at issue in a motion for remand. Hoboken also noted the district court's decision in *Minnesota v. American Petroleum Institute* and a decision by the Central District of California as recent cases that had recently joined "the ever-growing chorus of courts" rejecting the defendants' arguments for removal. The District of Columbia argued that the Second Circuit's opinion addressed a different issue than the issue before the court; that the Second Circuit expressly distinguished the "fleet" of climate cases in which federal courts had granted remand; and that D.C.'s case would be distinguishable in any event because it was based on a statutory consumer protection claim. *District of Columbia v. Exxon Mobil Corp.*, No. 1:20-cv-01932 (D.D.C.); *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J.); *City of Oakland v. BP p.l.c.*, 3:17-cv-06011 (N.D. Cal.).

- In King County's case, the federal district court for the Western District of Washington accepted the parties' joint proposal that the stay of the action continue pending the resolution of the petition for writ of certiorari filed in the Supreme Court in *Chevron Corp. v. City of Oakland*. The defendants subsequently filed a notice about the Second Circuit's opinion in *City of New York v. BP p.l.c.*, stating that they intended to request supplemental briefing to address the case once the stay was lifted. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash.).

Oregon LNG Project Developers Sought Abeyance to Reassess After Unfavorable Regulatory Determinations

On April 22, 2021, the developers of the Jordan Cove Liquefied Natural Gas (LNG) Project moved to suspend merits briefing and hold cases challenging the Federal Energy Regulatory Commission's (FERC) authorization of the project in abeyance. The developers argued that abeyance was warranted to allow the developers to assess the impact of recent regulatory decisions under the Clean Water Act and Coastal Zone Management Act that would prevent the project from commencing. Also on April 22, FERC filed its merits brief, arguing that it had complied with the National Environmental Policy Act, including with respect to the analysis of greenhouse gas emissions. FERC also argued that the petitioners did not have standing and that the challenges were not ripe for review since it was not clear the project would proceed. FERC also argued that it appropriately found that the pipeline portion of the project would service the public convenience and necessity under Section 7 of the Natural Gas Act and that its conditional authorizations for the project were lawful. *Evans v. Federal Energy Regulatory Commission*, No. 20-1161 (D.C. Cir. Apr. 22, 2021).

Lawsuit Challenged 2021 Reissuance of Nationwide Permit for Oil and Gas Projects

Center for Biological Diversity and four other environmental groups filed a lawsuit in the federal district court for the District of Montana challenging the 2021 reissuance of Nationwide Permit (NWP) 12, a general permit covering oil and gas pipeline projects under Section 404(e) of the Clean Water Act. The groups alleged that the U.S. Army Corps of Engineers did not comply with the Endangered Species Act, the National Environmental Policy Act, the Clean Water Act, or the Administrative Procedure Act, including because the Corps failed to adequately evaluate pipeline projects' contribution to climate change. In particular, the groups alleged that the Corps failed to consider potential increased greenhouse gas emissions caused by pipeline construction and lifecycle emissions associated with oil and gas transported by pipeline projects. The court previously ruled that the 2017 issuance of NWP 12 violated the Endangered Species Act because the Corps failed to undertake Section 7 consultation. In the appeal of that earlier series of decisions, the Corps and other federal appellants have asked the Ninth Circuit to vacate the district court's decisions because the case is now moot due to the reissuance of NWP 12 and President Biden's revocation of the presidential permit for the Keystone XL pipeline—the focal point of the earlier litigation. Keystone XL was authorized under the 2017 NWP 12. *Center for Biological Diversity v. Scott*, No. 4:21-cv-00047 (D. Mont., filed May 3, 2021); *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Nos. 20-35412, 20-35414, 20-35415, 20-35432 (9th Cir.).

Lawsuit Cited Forest Service's Failure to Contend with Recent Climate Change Studies in Approvals of Logging Projects

A lawsuit filed in the federal district court for the District of Idaho asserted that the U.S. Forest Service's approvals of two "massive" logging projects in the Nez Perce-Clearwater National Forests violated the National Environmental Policy Act (NEPA), the National Forest Management Act, the Endangered Species Act, and the Administrative Procedure Act. Under NEPA, the plaintiff alleged that the Forest Service failed to address "mounting scientific evidence" that undermined the agency's assumptions about logging, forest health, fire, and climate change. According to the complaint, a purpose of the projects was to improve resilience so as to better address climate change, but the plaintiff alleged it had submitted numerous studies that questioned the Forest Service's rationale for the logging, especially logging in old growth, which the plaintiff alleged was particularly important for resilience. The plaintiff contended that an environmental impact statement should be required to address "[t]he highly controversial, unknown, and/or uncertain direct, indirect, and cumulative impacts of approved logging and other activities on wildfire risk, forest health, and climate change." *Friends of the Clearwater v. Probert*, No. 3:21-cv-189 (D. Idaho, filed Apr. 28, 2021).

States Sought to Block Use of Interim Values for Social Cost of Greenhouse Gases

Missouri and 12 other states filed a motion for a preliminary injunction in the federal district court for the Eastern District of Missouri seeking to block the Biden administration from using the social cost of greenhouse gases released in February 2021 by the Interagency Working Group on Social Cost of Greenhouse Gases. The Working Group was created by President Biden's Executive Order 13990, which also directed the Working Group to issue an interim social cost of

greenhouse gases for use by federal agencies in their rulemaking and other agency actions until final values are issued. The states argued they were likely to succeed on their separation of powers and Administrative Procedure Act claims. They also argued that use of the interim values for social cost of carbon would irreparably injure them, including by depriving them of the opportunity to participate in notice-and-comment rulemaking and by injuring their sovereign interests by compelling them to use the social cost of greenhouse gases in their implementation of cooperative-federalism programs. *Missouri v. Biden*, No. 4:21-cv-00287 (E.D. Mo. May 3, 2021).

More States Challenged Interim Estimates for Social Cost of Greenhouse Gases

In a lawsuit filed in the federal district court for the Western District of Louisiana, Louisiana and nine other states asked the court to hold that interim estimates for the social cost of greenhouse gases released by the Interagency Working Group on Social Cost of Greenhouse Gases in February 2021 are invalid, arbitrary and capricious, and contrary to law, and to bar federal agencies from using the interim estimates. The states asserted counts under the Administrative Procedure Act and of ultra vires action. The allegations include that the interim estimates contravene federal statutes—the Energy Policy and Conservation Act, the Clean Air Act, NEPA, the Mineral Leasing Act, and the Outer Continental Shelf Lands Act—by directing agencies to consider global effects of greenhouse gases. The states also alleged that no statute authorized a global-effects measure or discount rates that deviated from "the standard 3 percent and 7 percent." They contended the interim estimates ignored positive externalities of energy production, and that the interim estimates were substantive rules that required notice and comment. *Louisiana v. Biden*, No. 2:21-cv-01074 (W.D. La., filed Apr. 22, 2021).

Wyoming Asked Court to Restart Federal Oil and Gas Leasing; Federal Defendants Sought to Move Louisiana Case to Wyoming

On May 3, 2021, Wyoming filed a motion in the federal district court for the District of Wyoming seeking a preliminary injunction to enjoin the Biden administration's suspension of new oil and gas leasing on public lands and in offshore waters while agencies review leasing practices. Wyoming argued it was likely to succeed on the merits of its claims under the Federal Land Planning and Management Act, the Mineral Leasing Act, the Administrative Procedure Act, and the National Environmental Policy Act. Wyoming also contended it would suffer irreparable harm on four fronts: loss of revenue from federal lease sales, los of revenue from minerals Wyoming cannot recover, environmental consequences such as increased emissions from less efficient environmental controls, and procedural injury. Wyoming argued that the "purported unsubstantiated greenhouse gas benefits do not outweigh the public interest in ensuring compliance with federal law which, in turn, generates substantial revenue for the federal government." In April, conservation groups filed a motion to intervene on behalf of the defendants. *Wyoming v. U.S. Department of Interior*, No. 0:21-cv-00056 (D. Wyo.).

In a separate case brought in the Western District of Louisiana challenging the alleged moratorium on federal oil and gas leasing, the defendants asked the court to transfer the case to the District of Wyoming under the Fifth Circuit's first-to-file rule, which the defendants said was applicable given the "potential significant overlap" between the two cases. Alternatively, the

defendants asked the court to consider severing and transferring the claims concerning onshore leasing while allowing the offshore leasing claims to remain in the Louisiana federal court. The plaintiffs—Louisiana and other states—opposed the motion to transfer. They also opposed a motion by conservation groups to intervene in the case. *Louisiana v. Biden*, No. 2:21-cv-00778 (W.D. La.).

Lawsuit Sought to Compel Response to Petition for Reconsideration of 2009 Greenhouse Gas Endangerment Finding

Four California businesses, a trade association, and an individual business owner filed a lawsuit in the federal district court for the Eastern District of California to compel EPA to respond to their 2017 Petition to Reconsider Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15,2 2009). EPA denied the petition on January 19, 2021, but on March 23, 2021, EPA withdrew the denial. EPA stated that the January denial did not provide an adequate justification for denial and that it intended to reassess the petition. *Liberty Packing Co. v. EPA*, No. 2:21-cv-00724 (E.D. Cal., filed Apr. 22, 2021).

Center for Biological Diversity Sought Action on Climate Change-Threatened Species

Center for Biological Diversity filed an Endangered Species Act lawsuit in federal court in the District of Columbia to compel the U.S. Fish and Wildlife Service to classify nine species as endangered or threatened and to designate critical habitat for 10 listed species. The complaint alleged that the 19 species (five insects, 11 plants, a mammal, and two aquatic species) "are at risk of extinction due to habitat degradation and destruction, climate change, and other threats." *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 1:21-cv-01045 (D.D.C., filed Apr. 15, 2021).

Challenge to Federal Approvals of Obama Presidential Center Alleged Violations in Connection with Modifications to Resilience Project

Two not-for-profit organizations and five individuals filed a lawsuit in the federal district court for the Northern District of Illinois asserting that federal approvals of the construction of the Obama Presidential Center in Jackson Park in Chicago failed to comply with "the letter and spirit" of federal statutes, including Section 4(f) of the Department of Transportation Act, Section 106 of the National Historic Preservation Act, the Urban Park and Recreation Recovery Act, and the National Environmental Policy Act. The plaintiffs' allegations also included that the Obama Presidential Center would have significant and permanent impacts on the Great Lakes Fishery and Ecosystem Restoration Project at Jackson Park, a large project led by the U.S. Army Corps of Engineers and designed to address climate change's impacts on the South Side of Chicago, among other environmental functions. The plaintiffs asserted that the Corps' approval of modifications to the project violated the Rivers and Harbors Act and the Clean Water Act. *Protect Our Parks, Inc. v. Buttigieg*, No. 1:21-cv-02006 (N.D. Ill., filed Apr. 14, 2021).

Lawsuit Challenging High-Speed Rail Rule Cited Failure to Consider Impacts Associated with Increasing Rainfall

In a lawsuit challenging the Federal Railroad Administration's (FRA's) approval of a "Rule of Particular Applicability" for a high-speed rail technology proposed for use in Texas, the plaintiffs included a claim under the National Environmental Policy Act that alleges that the defendants failed to consider how the potential rail project's design would account for increasing rainfall levels resulting from climate change. The plaintiffs alleged that "every flood plain crossing, wetland area, creek crossing, and drainage swell" would be affected by increased rainfall events and that despite the project being "essentially a levee extending across 240 miles of rural countryside," the FRA failed to disclose hydrologic impacts on properties along the route. *Texas Against High-Speed Rail, Inc. v. U.S. Department of Transportation*, No. 6:21-cv-00365 (W.D. Tex., filed Apr. 14, 2021).

Arizona Alleged that Halting Border Wall Construction and Ending "Remain in Mexico" Program Required NEPA Review

The State of Arizona filed a lawsuit in federal court in Arizona asserting that federal defendants should have complied with the National Environmental Policy Act before they changed course on immigration policies such as the border wall and halting the "Remain in Mexico" program. The State alleged that the policy changes would result in additional migrants entering the United States and Arizona, which would have a "direct and substantial impact on the environment in Arizona," including increases in "the release of pollutants, carbon dioxide, and other greenhouse gases into the atmosphere, which directly affects air quality." The State contended that population grown was a reasonably foreseeable consequence of the defendants' actions and that the actions therefore should be held unlawful for failure to comply with NEPA. *Arizona v. Mayorkas*, No. 2:21-cv-00617 (D. Ariz., filed Apr. 11, 2021).

Challenge to Utah Oil and Gas Leases Raised Issue of Climate Change Impacts on Cultural Resources

A conservation nonprofit organization filed a lawsuit in the federal district court for the District of Columbia alleging that federal defendants' approval of oil and gas leases in southeastern Utah failed to comply with the National Historic Preservation Act, NEPA, the Administrative Procedure Act, and the Endangered Species Act. The organization's NEPA allegations included that the U.S. Bureau of Land Management "utterly ignored the cumulative impacts of climate change on cultural resource degradation," citing public comments, including by the plaintiff, that "climate change trends will impact both exposed and buried cultural resources by increasing erosion, flooding, dust deposition, wildfire, and thermal stress—all of which are known to deteriorate cultural resources." The complaint alleged that BLM failed to acknowledge or study these impacts in either a March 2018 environmental assessment (EA) or a 2021 supplemental EA prepared in response to a July 2019 court decision finding that BLM did not adequately consider greenhouse gas impacts in its review of oil and gas leases in Wyoming. *Friends of Cedar Mesa v. Department of the Interior*, No. 21-cv-971 (D.D.C., filed Apr. 8, 2021).

Challenge to Portland Highway Project Contended that Environmental Impact Statement Should Have Been Prepared Due to Greenhouse Gas Impacts and Other Factors

A lawsuit filed in the federal district court for the District of Oregon asserted that the U.S. Department of Transportation and the Federal Highway Administration and its administrator violated NEPA, Section 4(f) of the Department of Transportation Act, and the Administrative Procedure Act in connection with their approval a highway project in Portland. Among other things, the plaintiffs contended that the project should have been found significant under NEPA because it would result in increased congestion and increased greenhouse gases and because its impacts on the environment were "highly uncertain" because conclusions regarding a number of impact areas, including "climate emissions," were contingent on transportation modeling that had not been disclosed. The plaintiffs alleged that the defendants' environmental assessment understated traffic levels as well as carbon emissions. *No More Freeways v. U.S. Department of Transportation*, No. 3:21-cv-00498 (D. Or., filed Apr. 2, 2021).

Lawsuit Challenged Environmental Review for Air Permit for Gas Facility Expansion in Brooklyn

Petitioners challenged the New York State Department of Environmental Conservation's (NYSDEC's) issuance of a negative declaration finding that an air permit application for expansion of the Greenpoint Energy Center facility in Brooklyn, a provider of gas service, would not have significant environmental impacts. The expansion project involved two new LNG vaporizers. The petition alleged that NYSDEC segmented its State Environmental Quality Review Act review by failing to examine related projects such as a gas transmission pipeline, a new LNG truck station, and LNG trucking operations. The petition's allegations also included that the negative declaration was not consistent with the greenhouse gas emissions reduction mandates of the Climate Leadership and Community Protection Act. *Sane Energy Project v. New York State Department of Environmental Conservation*, No. 706273/2021 (N.Y. Sup. Ct., filed Mar. 18, 2021).

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FEATURED CASE

Second Circuit Rejected New York City's State Law Climate Claims Against Oil Companies

The Second Circuit Court of Appeals affirmed the dismissal of New York City's lawsuit seeking climate change damages from oil companies. The Second Circuit's decision largely followed the reasoning of the district court's 2018 decision. First, the Second Circuit held that federal common law displaced the City's state-law public nuisance, private nuisance, and trespass claims because the lawsuit would regulate cross-border greenhouse gas emissions, albeit "in an indirect and roundabout manner," and because state law claims "would further risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." The Second Circuit then held that the Clean Air Act, in turn, displaced federal common law claims related to domestic emissions. The Second Circuit cited *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), as establishing "beyond cavil" that the Clean Air Act displaced federal common law

nuisance suits to abate domestic transboundary greenhouse gas emissions, and found that *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), provided "sound reasoning" for determining that the Clean Air Act also displaced federal common law damages claims. The Second Circuit also rejected New York City's contention that the Clean Air Act's displacement of federal common law claims resuscitated its state law common law claims. Finally, the Second Circuit held that although the Clean Air Act did not displace New York's federal common law claims addressing emissions outside the United States, foreign policy concerns foreclosed such claims. The Second Circuit said holding the oil companies liable for "purely foreign activity" would "sow confusion and needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." *City of New York v. BP p.l.c.*, No. 18-2188 (2d Cir. Apr. 1, 2021).

DECISIONS AND SETTLEMENTS

Ninth Circuit Declined to Stay Remand Order in Honolulu and Maui Cases

The Ninth Circuit Court of Appeals denied fossil fuel companies' emergency motions for stay pending appeal of a district court order remanding cases brought by the City and County of Honolulu and the County of Maui seeking climate change damages. The Ninth Circuit found that the companies failed to establish irreparable injury with arguments regarding increased litigation burdens, possible inefficiencies, and the possibility that a state court could "irrevocably" adjudicate the plaintiffs' claims while the appeals were pending. The Ninth Circuit also found that the companies did not make a sufficient showing on the merits, given the Ninth Circuit's decisions in *County of San Mateo v. Chevron Corp.* and *City of Oakland v. BP p.l.c. City & County of Honolulu v. Sunoco LP*, No. 21-15313 (9th Cir. Mar. 13, 2021); *County of Maui v. Chevron USA Inc.*, No. 21-15318 (9th Cir. Mar. 13, 2021).

D.C. and Minnesota Federal Courts Remanded Climate Cases Against Fossil Fuel Industry

Two federal district courts—in Minnesota and the District of Columbia—granted motions to remand cases brought by plaintiffs against the fossil fuel industry.

- In Minnesota, the district court granted the State of Minnesota's motion to remand its case, which asserts state law claims under common law and consumer protection statutes. The district court found that the defendants failed to establish that federal jurisdiction was warranted on any of the seven independent grounds they asserted: federal common law; presence of disputed and substantial federal issues (the *Grable* doctrine); the federal officer removal statute; the Outer Continental Shelf Lands Act; federal enclaves; the Class Action Fairness Act; and diversity. The companies filed an emergency motion for a temporary stay of execution of the remand order on the same day (March 31) that the district court issued the order. On April 7, the court granted the emergency motion pending briefing on the companies' motion to stay, which was filed on April 7. *Minnesota v. American Petroleum Institute*, No. 0:20-cv-01636 (D. Minn. Mar. 31, 2021).

- In the District of Columbia, the district court remanded a case brought against Exxon Mobil Corporation (Exxon) by the nonprofit organization Beyond Pesticides under D.C.'s consumer protection statute. The court rejected Exxon's arguments that the diversity jurisdiction statute or the Class Action Fairness Act provided a basis for federal jurisdiction. On March 26, 2021, the court denied Exxon's emergency motion for a temporary stay of the remand order. Exxon subsequently filed a motion in the district court to stay execution pending appeal and filed a petition for permission to appeal in the D.C. Circuit under 28 U.S.C. § 1453(c), which provides for expedited appeals of district court orders granting or denying motions to remand class actions. Exxon also filed an emergency motion for stay in the D.C. Circuit. On April 6, the D.C. Circuit ordered that the case be administratively stayed to allow the court an opportunity to consider the petition and emergency motion. *Beyond Pesticides v. Exxon Mobil Corp.*, No. 20-cv-1815 (D.D.C. Mar. 22, 2021), *In re Exxon Mobil Corp.*, No. 21-8001 (D.C. Cir. Apr. 1, 2021).

Supreme Court Said Florida Failed to Prove Georgia's Overconsumption of Water Caused Injuries

The U.S. Supreme Court dismissed Florida's original jurisdiction case seeking an equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin. The Court unanimously found that Florida had not met its heavy burden of proving by clear and convincing evidence that Georgia's overconsumption of the Basin waters caused the collapse of Florida's oyster fisheries and harm to Florida's river ecosystem. The Court pointed to documents and witnesses presented by Florida that supported Georgia's contention that Florida's mismanagement of the fishery caused its collapse; the Court also cited evidence that "the unprecedented series of multiyear droughts, as well as changes in seasonal rainfall patterns, may have played a significant role" in the conditions that led to the fishery's collapse. *Florida v. Georgia*, No. 142 (U.S. Apr. 1, 2021).

D.C. Circuit Vacated Trump EPA's Significant Contribution Rule

The D.C. Circuit Court of Appeals granted the U.S. Environmental Protection Agency's (EPA's) motion for voluntary vacatur of a final rule published on January 13, 2021 that adopted a numerical threshold and other criteria for determining when a source category's greenhouse gas emissions significantly contribute to air pollution that endangers public health or welfare, making the source category subject to new source performance standards. EPA acknowledged in its motion that it had promulgated the rule without providing notice and opportunity to comment on the rule's central elements. Because the rule therefore was unlawful and EPA did not intend to cure the procedural defect, EPA requested vacatur and remand. *California v. EPA*, No. 21-1035 (D.C. Cir. Apr. 5, 2021).

D.C. Circuit Vacated Rule Extending Implementation Deadlines for Landfill Emission Guidelines

The D.C. Circuit Court of Appeals granted EPA's request for voluntary vacatur and remand of a final rule delaying implementation of emission guidelines for municipal solid waste landfills under Clean Air Act Section 111(d). EPA requested vacatur based on the D.C. Circuit January

2021 opinion in *American Lung Association v. EPA*, which addressed the repeal and replacement of the Clean Power Plan and also found that the justifications for extending Section 111(d) implementation timelines were inadequate. The landfill regulations incorporated the deadlines found to be invalid in *American Lung Association.* *Environmental Defense Fund v. EPA*, No. 19-1222 (D.C. Cir. Apr. 5, 2021).

Bankrupt Coal Export Terminal Developer's Appeal Dismissed in Lawsuit Against Washington Officials

After the developer of a proposed coal export terminal in Washington filed for bankruptcy and rejected its rights to the development site, the Ninth Circuit Court of Appeals dismissed the developer's appeal of a district court decision in the developer's lawsuit asserting that Washington officials' actions denying a Section 401 water quality certification and a sublease of aquatic lands were preempted by federal law and in violation of the dormant Commerce Clause. The district court dismissed the preemption claims and abstained from considering the dormant Commerce Clause claims. In their motion to dismiss the appeal, the Washington officials and environmental groups that intervened on their behalf argued that the developer's bankruptcy made the case moot. *Lighthouse Resources, Inc. v. Inslee*, No. 19-35415 (9th Cir. Mar. 23, 2021).

Seventh Circuit Declined to Stay Trump Administration Revisions to Showerhead Conservation Standard

The Seventh Circuit Court of Appeals denied petitioners' motion for a stay pending appeal in the case challenging the U.S. Department of Energy (DOE) final rule revising the definition for "showerhead" and adding definitions for "body spray" and "safety shower showerhead" in the energy conservation standards for consumer products. DOE has indicated that it is reviewing the rule pursuant to President Biden's Executive Order 13990. *Alliance for Water Efficiency v. U.S. Department of Energy*, No. 21-1167 (7th Cir. order denying stay Mar. 18, 2021).

Fifth Circuit to Hold Pipeline Permit Challenge in Abeyance While Corps Considers Project Changes

The Fifth Circuit Court of Appeals held in abeyance a petition challenging a U.S. Corps of Engineers permit for a natural gas pipeline in Texas until the Corps completes reconsideration of the permit. The Corps suspended the permit after modifications to the plan for the liquefied natural gas terminal to which the pipeline was related. *Shrimpers & Fishermen of the RGV v. U.S. Army Corps of Engineers*, No. 20-60281 (5th Cir. Mar. 9, 2021).

Work on Willow Project on Hold After Parties Reach Agreement

The Ninth Circuit Court of Appeals dismissed without prejudice an appeal of the district court's denial of a preliminary injunction in cases challenging the Willow project, a major oil development project in the National Petroleum Reserve-Alaska. In February, the Ninth Circuit temporarily enjoined certain construction work for the duration of the appeal. The plaintiffs agreed to dismissal of the appeal after the oil and gas company agreed not to take certain actions

until December 1, 2021. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management*, No. 21-35085 (9th Cir. Mar. 9, 2021).

D.C. Circuit Dismissed Challenge to Renewal of Florida Nuclear Plant Licenses

The D.C. Circuit Court of Appeals dismissed a challenge to license renewals for the Turkey Point nuclear generating station in Florida as "incurably premature." The court concluded that it lacked jurisdiction because administrative appeals that raised the same legal issues were still pending before the Nuclear Regulatory Commission. Among the issues raised by the petitioners was whether the plan for protecting groundwater would be effective in a changing climate. *Friends of the Earth v. U.S. Nuclear Regulatory Commission*, No. 20-1026 (D.C. Cir. Mar. 4, 2021).

District Court Said Plaintiffs Could Proceed with Title V Permit Claim Against Coal Mine Operator

The federal district court for the District of Colorado allowed WildEarth Guardians to proceed with their claim that a coal mine owner and operator failed to obtain a Title V operating permit for the mine but accepted a magistrate judge's recommendation that a claim alleging that the defendants should have obtained a Prevention of Significant Deterioration construction permit for the expansion should be dismissed. The district court concluded that the plaintiffs had sufficiently alleged that the Title V permit claim was not time-barred. *WildEarth Guardians v Mountain Coal Co.*, No. 20-cv-1342 (D. Colo. Mar. 30, 2021).

Federal Court Dismissed Challenge to Colorado Dam Project Authorizations for Lack of Jurisdiction

The federal district court for the District of Colorado agreed with federal respondents that the Federal Power Act (FPA) required that petitioners' challenges to U.S. Army Corps of Engineers and U.S. Fish and Wildlife Service (FWS) actions authorizing a dam project in Colorado be brought in a federal court of appeal. The district court noted that the FPA vests federal courts of appeal with exclusive jurisdiction to review not only the licensing orders of the Federal Energy Regulatory Commission (FERC) but also "all issues inhering in the controversy" related to a FERC order. In this case, the court found that the Corps, FERC, and FWS decisions were "inextricably intertwined." The court therefore dismissed the case—which alleged, among other things, that the federal agencies failed to take into account climate change impacts and future climate change models—for lack of jurisdiction. *Save the Colorado v. Semonite*, No. 18-cv-03258 (D. Colo. Mar. 31, 2021).

Alaska Federal Court Said Consideration of Oil and Gas Activities' Impacts on Beluga Whales in Cook Inlet Was Inadequate but Upheld Cumulative Effects Analysis

The federal district court for the District of Alaska rejected plaintiffs' contention that the National Marine Fisheries Service's (NMFS's) cumulative effects analysis for incidental take regulations authorizing oil and gas exploration and production activities in Cook Inlet was inadequate, but found that NMFS failed to consider the direct impacts of tugs towing the drill rig

on Cook Inlet beluga whales. Regarding the cumulative effects analysis, the court found that NMFS's environmental assessment catalogued "a wide variety of potential impacts," including climate change, and plaintiffs failed to identify individual impacts ignored by NMFS. The court found that NMFS "provided a well-developed discussion of the various impacts," rejecting the plaintiffs' argument that NMFS merely listed the impacts. *Cook Inletkeeper v. Raimondo*, No. 3:19-cv-00238 (D. Alaska Mar. 30, 2021).

Colorado Federal Court Granted BLM's Request for Remand of Resource Management Plan to Conduct Additional Analysis

The federal district court for the District of Colorado granted federal respondents' motion for voluntary remand of a case challenging the Resource Management Plan (RMP) and Environmental Impact Statement for the Grand Junction Field Office. The case was similar to a prior case in which the court held in 2018 that the U.S. Bureau of Land Management (BLM) violated the National Environmental Policy Act by failing to take a hard look at indirect emissions from oil and gas development and to consider reasonable alternatives to making lands available for oil and gas leasing. Based on the 2018 decision, BLM determined that it would prepare a supplemental analysis for the Grand Junction RMP. The court denied the petitioners' request that the court define the scope of analysis on remand, as well as their request that the court order the respondents not to hold oil and gas lease sales until a new decision document was released. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 1:19-cv-02869 (D. Colo. Mar. 26, 2021).

Utah Federal Court Said Analysis of Coal Mine Expansion's Greenhouse Gas Impacts Was Inadequate

The federal district court for the District of Utah found that BLM failed to adequately consider greenhouse gas and climate change impacts of a proposed coal lease authorizing the expansion of a coal mine. Although the court rejected the plaintiffs' claim that BLM performed only a "bare arithmetic emissions calculation" of greenhouse gas emissions, the court agreed with the plaintiffs that BLM could not set forth the project's potential economic benefits in the socioeconomics section of the environmental impact statement (EIS) without analyzing the socioeconomic costs of greenhouse gas emissions together with climate change. The court did not, however, direct BLM to use the social cost of carbon in this analysis, finding that BLM was "owed some deference on the tools it uses." The court also said it was not adopting a "categorical test that if economic benefits are quantified then economic costs always must be too, because, among other things, some costs may not accurately be reduced to numbers." In addition, the court found that BLM failed to take a sufficiently hard look at cumulative impacts of greenhouse gas emissions because it did not substantively analyze present and reasonably foreseeable future sources of greenhouse gas emissions. The court declined, however, to impose a requirement that all federal or Department of Interior mining approvals be included in the cumulative impact analysis, leaving the determination of the scope to the agency's discretion. The court rejected the argument that BLM did not take a hard look at mercury emissions. The court remanded to BLM but did not vacate the EIS or record of decision. *Utah Physicians for a Healthy Environment v. U.S. Bureau of Land Management*, No. 2:19-cv-00256 (D. Utah Mar. 24, 2021).

Parties Settled Suit Concerning Protections for Endangered New Mexico Meadow Jumping Mouse

Center for Biological Diversity and Maricopa Audubon Society agreed to a settlement resolving their claims that federal defendants failed to take actions to protect the endangered New Mexico meadow jumping mouse in the Apache-Sitgreaves National Forest. The U.S. Forest Service agreed to certain steps to inspect, maintain, and repair a boundary fence, and also to inspect riparian fencing and exclosures within jumping mouse critical habitat and to remove horses and cattle when they are found within exclosures. The U.S. Fish and Wildlife Service agreed to prepare a draft recovery plan for the jumping mouse by the end of January 2022, and to finalize the plan by the end of January 2023. The plaintiffs alleged that the jumping mouse's habitat was threatened by drought and wildfires, both exacerbated by climate change; the Forest Service viewed climate change effects as part of the baseline, not as a result of the management plan for the national forest. *Center for Biological Diversity v. de la Vega*, No. 4:20-cv-00075 (D. Ariz. Mar. 17, 2021).

Federal Court Upheld NEPA Review of Colorado Predator Management Program

The federal district court for the District of Colorado found that the U.S. Department of Agriculture's Animal and Plant Health Inspection Service–Wildlife Services (Wildlife Services) took a hard look at the impacts of continuing its Colorado branch's predator damage management program. The court noted that the program is intended to reduce conflicts with predators such as bears and coyotes that impact livestock, agricultural and natural resources, property, and human and health safety. One of the arguments rejected by the court was that Wildlife Services relied on inaccurate data in assessing impacts on black bear and coyote populations, including by failing to analyze human population growth and climate change as factors contributing to increased levels of black bear and human conflicts in Colorado. The court found that the review of these factors was sufficient. *WildEarth Guardians v. Wehner*, No. 1:17-cv-00891 (D. Colo. Mar. 10, 2021).

Oil and Gas Company Sought Voluntary Dismissal of Action to Compel Biden Administration Action on Drilling Permits

The federal district court for the District of North Dakota dismissed without prejudice a lawsuit brought by an oil and gas exploration and production company in February 2021 to compel BLM to act on applications for permit to drill (APDs) submitted in 2020 for oil and gas leases in North Dakota. The company submitted a notice of voluntary dismissal after BLM granted the APDs in February and March 2021. *Continental Resources, Inc. v. de la Vega*, No. 1:21-cv-00034 (D.N.D. Mar. 10, 2021).

D.C. Federal Court Directed Department of Interior to Search for Drafts of Zinke Order Rescinding Moratorium on Coal Leasing Program

The federal district court for the District of Columbia directed the U.S. Department of the Interior (DOI) to undertake additional searches for records in response to Center for Biological Diversity's (CBD's) requests under the Freedom of Information Act (FOIA) for records of

discussions and correspondence related to President Trump's March 2017 executive order directing the Secretary of the Interior to lift the moratorium on the federal coal leasing program. The court agreed with CBD that the absence of drafts of then-Secretary Ryan Zinke's order implementing the executive order, along with the absence of Secretary-level communications about the order, gave rise to "material doubt" about the adequacy of the agency's declarations regarding the searches it conducted. The court determined that DOI must either supplement its declarations or take additional steps to confirm it completed an adequate search for Secretary-level communications and drafts of the order, including by requesting that Zinke search his own files and asking him whether he used additional personal platforms beyond the email address already searched to conduct agency business. In addition, the court concluded that FOIA obligated DOI to take additional steps to search Zinke's government-issued phone. The court rejected CBD's contention that DOI should undertake a specific search of Trump transition team records but directed DOI to clarify the extent to which its searches encompassed and identified correspondence between DOI and the transition team, or to expand its search to include such records. *Center for Biological Diversity v. Bureau of Land Management*, No. 17-cv-1208 (D.D.C. Mar. 9, 2021).

Ohio Federal Court Remanded Environmental Assessment for Additional Analysis of Hydraulic Fracturing Impacts in Wayne National Forest

A year after finding that the U.S. Forest Service and BLM failed to take a hard look at the impacts of hydraulic fracturing in the Wayne National Forest, the federal district court for the Southern District of Ohio remanded without vacatur the environmental assessment, finding of no significant impact, and consent to lease for additional analysis of surface area disturbance, cumulative impacts on the Indiana Bat and Little Muskingum River, and air quality impacts. The complaint alleged failure to consider climate change effects on the forest and protected species, but the court's decisions did not address those issues. *Center for Biological Diversity v. U.S. Forest Service*, No. 2:17-cv-00372 (S.D. Ohio Mar. 8, 2021).

California Appellate Court Rejected CEQA Challenge to Approval of Aggregate Operation Expansion

The California Court of Appeal affirmed the denial of a challenge to the California Environmental Quality Act review for expansion of an aggregate operation in Napa County. The appellate court reviewed five impact areas raised by the petitioner on appeal, including the claim that the environmental impact report (EIR) insufficiently addressed and mitigated greenhouse gas emission impacts caused by loss of oak woodland. The court found that the petitioner had failed to apprise the Napa County Board of Supervisors of the carbon sequestration issue. The court also addressed the merits of the argument, noting that the petitioner did not cite authority requiring "mathematical calculations concerning carbon sequestration mitigation." The court further concluded that the EIR contained "ample discussion" of greenhouse gas issues actually raised by the petitioner, and that "appropriate mitigation measures" were required. *Stop Syar Expansion v. County of Napa*, No. A158723 (Cal. Ct. App. Mar. 25, 2021).

New Jersey Upheld Approval of Zero Emission Certificates for Nuclear Power Plants

The Appellate Division of the New Jersey Superior Court affirmed the Board of Public Utilities' approval of applications by three nuclear power plants under the Zero Emission Certificate (ZEC) program. The court found that the Board's decision was adequately supported by the record and consistent with the language and legislative intent of the 2018 statute that established the ZEC program. The court noted that the ZEC statute was intended to help New Jersey achieve its clean energy goals by subsidizing nuclear power generators to keep them operational in the face of competition from carbon-emitting generators. *In re Implementation of L. 2018, C. 16 Regarding Establishment of Zero Emission Certification Program for Eligible Nuclear Power Plants*, No. A-3939-18 (N.J. Super. Ct. App. Div. Mar. 19, 2021).

California Appellate Court Said Greenhouse Gas Credits Did Not Reduce City's Electricity Users' Tax Base

The California Court of Appeal reversed the dismissal of the City of Torrance's lawsuit that alleged that Southern California Edison Company (Edison)—the sole electricity provider in the city—impermissibly reduced the amount of the electricity users' tax that it remitted to the City after collecting it from residents and businesses. Edison reduced the tax base by the amount of an annual "industry assistance credit" established by the California Public Utilities Commission that rewards businesses that implement energy-efficient programs that reduce greenhouse gas emissions. The appellate court agreed with the City that the credits should not affect the tax base. The appellate court further concluded, however, that Edison was not directly liable for the uncollected electricity users' taxes but that the City had to be given the opportunity to amend its complaint to seek unpaid taxes from consumers that underpaid the electricity users' tax due to Edison's use of an incorrect tax base. *City of Torrance v. Southern California Edison Co.*, No. B300296 (Cal. Ct. App. Mar. 17, 2021).

Maryland Appellate Court Allowed Redaction of Attorney General's Application to Participate in Special Assistant AG Program

The Maryland Court of Special Appeals affirmed the dismissal of a lawsuit seeking to compel disclosure under the Maryland Public Information Act of the entirety of the Maryland Office of the Attorney General's (OAG's) application to participate in a program of the State Energy & Environmental Impact Center at New York University (NYU) Law School. If selected for the program, the Impact Center hired an NYU Fellow to serve as special assistant attorney general to work in the attorney general's (AG's) office on matters related to the "advancement and defense of progressive clean energy, climate change, and environmental matters." The appellate court agreed with the OAG that redacted portions of the application were privileged as "preliminary communications made between a client and its prospective counsel while seeking legal assistance." The redacted sections were therefore exempt from disclosure due to attorney-client privilege. *Government Accountability & Oversight, P.C. v. Frosh*, No. 2ndd (Md. Ct. Spec. App. Mar. 1, 2021).

California Court Said Change in Water Use to Adapt to Climate Change Was CEQA "Project"

The California Superior Court granted a petition for writ of mandate requiring the Los Angeles Department of Water and Power (LADWP) to conduct a California Environmental Quality Act (CEQA) review for its change in use of water on 6,400 acres owned by LADWP in Mono County. The court noted that the changes in water use were "driven by the appropriate goal of planning for how the LADWP will adapt to the challenges of climate change." Based on its independent review of the evidence, the court concluded that the change in water use was a CEQA "project" because it was "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." *County of Mono v. City of Los Angeles*, No. RG18-923377 (Cal. Super. Ct. Mar. 8, 2021).

Louisiana Appellate Court Reversed Remand of Chemical Plant Air Permits to Agency

The Louisiana Court of Appeal concluded that a district court abused its discretion by remanding to the Louisiana Department of Environmental Quality (DEQ) a lawsuit challenging air permits for a chemical complex. The appellate court cited the timing of the remand, which occurred before any merits briefing, and also found that the court exceeded statutory authority that authorizes remand so that the agency may consider additional evidence. In this case, the appellate court said the court remanded not only for consideration of additional evidence (updated EJSCREEN data) but also ordered DEQ to undertake more thorough environmental justice analysis and open a public comment period to accept comment pollution and health risks. The plaintiffs' allegations in the lawsuit include that given Louisiana's vulnerability to climate change impacts, DEQ failed to fulfill its obligations as a public trustee by not considering the environmental effects of the project's contribution to greenhouse gas emissions, or the adverse costs of greenhouse gas emissions. *Rise St. James v. Louisiana Department of Environmental Quality*, No. 2021 CW 0032 (La. Ct. App. Mar. 15, 2021).

NEW CASES, MOTIONS, AND OTHER NOTICES

Amicus Briefs Filed in Support of Supreme Court Review of Jurisdiction Question in San Francisco and Oakland Cases, Colorado Localities Agreed to Await Supreme Court's Decision in Baltimore Case, and Other Climate Nuisance Case Developments

In addition to the decisions and orders discussed above, there have been a number of developments in other climate change cases against the fossil fuel industry.

- On March 11, 2021, four amicus briefs were filed in support of fossil fuel companies' petition for writ of certiorari seeking review of the Ninth Circuit's decision that reversed the district court's denial of Oakland's and San Francisco's motions to remand their climate change nuisance cases. The amicus briefs were filed by American Petroleum Institute, National Association of Manufacturers, the Chamber of Congress of the United States of America, and 18 states, led by Indiana. The petition requested that the Court consider the questions of "[w]hether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law" and "[w]hether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment." In the district court, briefing was completed on March 18 for San Francisco and Oakland's motion to amend

their complaints to remove federal claims and their renewed motion to remand. *Chevron Corp. v. City of Oakland*, No. 20-1089 (U.S. Mar. 11, 2021); *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal. Mar. 18, 2021).

- On March 5, 2021, the Boards of County Commissioners of Boulder County and San Miguel County and the City of Boulder (plaintiffs) filed their opposition to fossil fuel companies' petition for writ of certiorari seeking review of the district court order remanding their climate change case. The plaintiffs agreed with the companies that this case presents the same question regarding the scope of appellate review of remand orders as *BP p.l.c. v. Mayor & City Council of Baltimore*, in which the Court heard oral argument in January. The plaintiffs did not object to the companies' position that the petition should be held pending the decision in *Baltimore* and then disposed of pursuant to the *Baltimore* decision. The Court distributed the petition for its April 16 conference. *Suncor Energy (U.S.A.), Inc. v. Board of County Commissioners of Boulder County*, No. 20-783 (U.S. Mar. 5, 2021).

- On March 25, 2021, defendants Chevron Corporation and Chevron U.S.A., Inc. (Chevron) removed the City of Annapolis's climate change case against Chevron and other fossil fuel companies to federal court. All other defendants consented to removal. The notice of removal identified the following grounds for removal: Annapolis's claims necessarily arise under federal law; the claims necessarily raise disputed and substantial federal issues; the Outer Continental Shelf Lands Act; the federal officer removal statute; and federal enclave jurisdiction. Chevron also asserted that Annapolis's allegations that the companies concealed and misrepresented their products' contributions to climate change were "a strained attempt to evade federal jurisdiction." Chevron further contended that these allegations "ignore the vast public record establishing that the risks of climate change, including its potential impacts on Maryland, have been discussed publicly since at least the 1950s." *City of Annapolis v. BP p.l.c.*, No. 1:21-cv-00772 (D. Md. Mar. 25, 2021).

- In the City of Hoboken's case against fossil fuel companies, the companies filed a motion on March 17, 2021 to strike arguments regarding collateral estoppel and a request for fees in Hoboken's reply because they were raised for the first time. *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J. Mar. 17, 2021).

D.C. Circuit Held Challenge to Trump-Era Vehicle Standards in Abeyance

On April 2, 2021, the D.C. Circuit Court of Appeals granted the motion by EPA and the National Highway Traffic Safety Administration to hold in abeyance the proceedings challenging the Trump administration's greenhouse gas emission and fuel economy standards for passenger cars and light trucks (the Safer Affordable Fuel-Efficiency (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks). The court ordered that the cases be held in abeyance pending further order of the court, with status reports on the agencies' review of the rule to be filed every 90 days. On April 6, it was reported that EPA Administrator Michael Regan had said the Biden administration was on track to propose new standards by the end of

July 2021 (as directed by President Biden's Executive Order 13990). *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, No. 20-1145 (D.C. Cir. Apr. 2, 2021).

Second Circuit Held Challenge to Fuel Economy Penalty Increase Delay in Abeyance

The Second Circuit Court of Appeals granted the National Highway Traffic Safety Administration's motion to hold in abeyance challenges to an interim final rule published on January 14, 2021 that delayed an inflation adjustment to the civil penalty for violations of fuel economy standards. Petitioners had moved for expedited review, but the court denied that request. The court also referred to the merits panel a motion by Tesla, Inc. for summary vacatur or a stay pending judicial review. Tesla originally sought to intervene in the proceedings, but then filed its own petition for review. The Second Circuit denied its motion to intervene as moot and granted a motion to intervene by Alliance for Automotive Innovation, which submitted the rulemaking petition to which the interim final rule responded. *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, No. 21-139 (2d Cir. Mar. 4, 2021).

***Juliana* Plaintiffs Sought to Amend Complaint to Add Request for Declaratory Relief**

After the Ninth Circuit denied rehearing en banc of its decision that youth plaintiffs lacked standing to pursue their constitutional climate change claims against the federal government, the plaintiffs filed a motion in the federal district court in Oregon seeking leave to amend their complaint. The plaintiffs argued that the amended complaint cured the redressability issue that formed the basis for the Ninth Circuit's decision. The plaintiffs contended that their amended complaint sought "only relief … that is traditionally granted and well within this Court's Article III authority." Specifically, the proposed amended complaint sought relief pursuant to the Declaratory Judgment Act and omitted requests for "specific relief," including a remedial plan, that the Ninth Circuit determined would be outside the authority of Article III courts. The defendants opposed the motion, arguing that it was barred by the Ninth Circuit's mandate, which included "unambiguous" instructions to the district court to dismiss the case, and that amendments would be futile. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. motion for leave to amend Mar. 9, 2021).

Briefing in Mountain Valley Pipeline Case Addressed Consideration of Potential Climate Impacts on Protected Species

Briefing was completed in environmental groups' lawsuit seeking review, for a second time, of the U.S. Fish and Wildlife Service's approvals for the Mountain Valley Pipeline. The petitioners' arguments include contentions that the FWS failed to meaningfully analyze climate impacts on the Roanoke logperch and the candy darter, and also failed to specify impact for the Indiana bat, whose habitat is threatened by climate change. The petitioners argued that currently unoccupied bat habitat cleared for the pipeline would no longer be suitable for future use by the bat. The respondents argued that they properly accounted for potential impacts on the logperch and darter and that climate change was not anticipated to limit the availability of Indiana bat habitat in the bat's Appalachian Mountain Recovery Unit. *Appalachian Voices v. U.S. Department of Interior*, No. 20-2159 (4th Cir. Mar. 19, 2021).

Environmental Groups Challenged Use of Nationwide Permit 12 to Authorize Crude Oil Pipeline

Three environmental organizations filed a lawsuit in federal district court for the Western District of Tennessee challenging the U.S. Army Corps of Engineers' 2017 issuance of Nationwide Permit 12 (NWP 12), as well as the Corps' verification of use of NWP 12 for the Byhalia crude oil pipeline. The organizations asserted claims under the National Environmental Policy Act, the Clean Water Act, and the Administrative Procedure Act. The complaint alleged, among other things, that the Corps failed to take a hard look at the climate change impacts of the 2017 issuance of NWP 12—which covered utility lines, including pipelines. The organizations alleged that potential climate impacts included increased life-cycle greenhouse gas emissions from oil and gas pipeline approval under NWP 12. *Memphis Community Against Pollution, Inc. v. U.S. Army Corps of Engineers*, No. 2:21-cv-02201 (W.D. Tenn. Apr. 1, 2021).

Lawsuit Cited Climate Change Threat in Challenge to Reclassification of Beetle from "Endangered" to "Threatened"

Center for Biological Diversity filed a lawsuit against the U.S. Fish and Wildlife Service in federal court in the District of Columbia challenging the reclassification of the American burying beetle from "endangered" to "threatened" under the Endangered Species Act. CBD alleged that the reclassification "eliminates key substantive protections" while the species faces the "same dire threats" it faced when it was listed in 1989, and that the species was now "at even greater risk of extinction due to climate change." The complaint alleged that the beetle was at most risk from climate change in the Southern Plains due to increased average soil temperatures that will make large areas of potential habitat uninhabitable, and that there were also threats to other geographical populations, including the New England population, in the longer term. The complaint asserted claims under the Endangered Species Act and the Administrative Procedure Act. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 1:21-cv-00791 (D.D.C., filed Mar. 25, 2021).

Groups Sought Critical Habitat Designation for Climate-Threatened Rusty Patch Bumble Bee

Three organizations filed a lawsuit in federal court in the District of Columbia to compel the U.S. Fish and Wildlife Service to designate critical habitat for the rusty patch bumble bee, which was listed as endangered in 2017. The plaintiffs alleged that the bee, "[o]nce common throughout the midwestern and northeastern United States, northward into Canada, the bee has disappeared from the vast majority of its native range and now stands on the brink of extinction, owing to habitat loss and destruction, pesticide use, disease, parasites, and climate change." The plaintiffs asserted that the FWS's reasons for determining that designation of critical habitat would not be prudent violated the Endangered Species Act and the Administrative Procedure Act, as well as FWS regulations. *Natural Resources Defense Council, Inc. v. U.S. Fish & Wildlife Service*, No. 1:21-cv-00770 (D.D.C., filed Mar. 24, 2021).

States Filed Lawsuits Challenging Pause on Federal Oil and Gas Leasing Activities

Thirteen states filed a lawsuit in federal court in Louisiana challenging actions taken pursuant to President Biden's Executive Order 14008, which directed the Secretary of the Interior to pause new oil and natural gas leasing activities on public lands and in offshore waters. The states asserted that actions implementing this moratorium on leasing activities violated the Outer Continental Shelf Lands Act, the Mineral Leasing Act, and the Administrative Procedure Act. On March 31, the states asked the court for a preliminary injunction ordering the defendants "to execute the statutory duties of the offices regarding and gas leasing as if the Moratoriums did not exist" and enjoining the defendants from implementing the rescission of a lease sale in the Gulf of Mexico and postponements of a lease sale in Cook Inlet in Alaska as well as quarterly lease sales on public lands. The State of Wyoming filed a separate lawsuit in federal court in Wyoming asserting that the moratorium violated the Mineral Leasing Act, the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Administrative Procedure Act. *Louisiana v. Biden*, No. 2:21-cv-00778 (W.D. La., filed Mar. 24, 2021); *Wyoming v. U.S. Department of Interior*, No. 0:21-cv-00056 (D. Wyo., filed Mar. 24, 2021).

Environmental Groups Challenged Environmental Review for California Oil and Gas Lease Sale

Three environmental groups filed a lawsuit in the federal district court for the Eastern District of California asserting that the U.S. Bureau of Land Management violated the National Environmental Policy Act when it proceeded with a lease sale in Kern County, California, which the complaint described as "an area already overwhelmed by oil and gas extraction and suffering from some of the worst air and water pollution problems in the country." The groups alleged that BLM's "rushed analysis" of the Kern County sale's impact suffered from similar defects as the environmental review of hydraulic fracturing that the Central District of California found lacking in 2016. The groups contended that the environmental assessment for the Kern County lease sale improperly tiered to the deficient analysis addressed by the Central District in 2016 and failed to adequately analyze cumulative air quality and climate impacts. The plaintiffs also alleged that BLM failed to consider reasonable alternatives that would have prevented or minimized climate impacts. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 1:21-cv-00475 (E.D. Cal., filed Mar. 22, 2021).

States Said Biden's Revocation of Keystone XL Permit Violated Separation of Powers

A lawsuit filed by 21 states in the federal district court for the Southern District of Texas asserted that President Biden's revocation of the presidential permit for the Keystone XL pipeline and associated actions by cabinet officials violated the Constitution and the Administrative Procedure Act. The states contended that President Biden's actions encroached on congressional power over interstate and international commerce and therefore violated the Constitution's separation of powers. They alleged that although Biden invoked a "climate crisis," " 'imperatives of events' have not prevailed such that the President's unenumerated powers entitle him to supersede the enumerated power of Congress to regulate … foreign and interstate commerce." In addition, the complaint asserted that the cabinet officials acted outside their statutory authority, that the revocation of the permit violated the non-delegation doctrine, that it was arbitrary and capricious,

and that it should have gone through notice and comments. *Texas v. Biden*, No. 3:21-cv-00065 (S.D. Tex., filed Mar. 17, 2021).

CEQ Sought Remand Without Vacatur of Trump Administration Amendments of NEPA Regulations

The Council on Environmental Quality (CEQ) requested that the federal district court for the Western District of Virginia remand, without vacatur, CEQ's 2020 amendments to the regulations implementing the National Environmental Policy Act (NEPA). CEQ argued that voluntary remand was appropriate because CEQ had identified numerous concerns with the rule—including concerns about whether the rule may adversely affect climate change or climate resilience—and had already begun reconsidering the rule. CEQ also argued that remand without vacatur would not prejudice the plaintiffs because CEQ had committed to reconsider the rule along lines that implicated the same concerns that the plaintiffs raised in this action and the lengthiness of the rulemaking process would not directly affect the plaintiffs or defendant-intervenors. The plaintiffs opposed remand without vacatur, arguing that further delay would allow a rule that was actively harming them to remain in effect. The court scheduled oral argument on the motion for remand without vacatur for April 21 but indicated the parties could also argue the pending motions for summary judgment. *Wild Virginia v. Council on Environmental Quality*, No. 3:20-cv-00045 (W.D. Va. Mar. 17, 2021).

Harris County Challenged Houston Highway Project, Including Failure to Disclose Climate Impacts

Harris County, Texas filed a suit in federal court asserting that the Texas Department of Transportation (TxDOT) failed to comply with NEPA and Section 4(f) of the Department of Transportation Act when it decided to reroute an interstate in Houston. Harris County's allegations included that the final environmental impact statement (EIS) did not include discussions of disproportionate impacts on minority and low-income populations and climate change impacts that had appeared in the draft EIS. As a result, the County alleged, TxDOT failed to fully disclose such impacts. *Harris County v. Texas Department of Transportation*, No. 4:21-cv-00805 (S.D. Tex., filed Mar. 11, 2021). (Note: On March 8, the Federal Highway Administration asked TxDOT to pause activity on the project pending investigation of civil rights concerns such as those raised in this lawsuit.)

Challenge to Placement of F35-A Aircraft at Airfield Raised Climate Change Issue

In a lawsuit filed in federal court in the District of Columbia, a plaintiff challenged the decision by the U.S. Air Force to replace F-16 fighter jets with F35-A aircraft at an Air National Guard location in Madison, Wisconsin. The plaintiff asserted claims under the National Environmental Policy Act and the Administrative Procedure Act, including that the defendants failed to adequately consider climate change. The plaintiff alleged that although the defendants disclosed the volume of greenhouse gas emissions (22,000 tons/year of carbon dioxide, compared to 9,263 tons/ year for F-16s), they did not conduct "actual analysis of the incremental impacts" to make it possible "to know whether a change in GHG emissions will be a significant step toward

averting the tipping point and irreversible adverse climate change." *Safe Skies Clean Water Wisconsin, Inc. v. U.S. Air Force*, No. 1:21-cv-00634 (D.D.C., filed Mar. 10, 2021).

States Challenged Executive Order on Social Cost of Carbon

Thirteen states filed a lawsuit in the federal district court for the Eastern District of Missouri asserting that the portion of President Biden's Executive Order 13990 that prescribed steps for development and application of the social cost of carbon violated separation of powers, as did the interim values for the social cost of carbon, methane, and nitrous oxide that the order directed the Interagency Working Group on the Social Cost of Greenhouse Gases to develop. The states also asserted that the executive order and the interim values violated agency statutes such as the Clean Air Act that the states alleged conferred authorities on specific federal agencies that the executive order unlawfully arrogated to the Working Group. The states also alleged procedural and substantive violations of the Administrative Procedure Act by the Working Group. *Missouri v. Biden*, No. 4:21-cv-00287 (E.D. Mo., filed Mar. 8, 2021).

Youth Petitioners Asked Washington High Court to Review Dismissal of Climate Change-Based Constitutional Challenge to State Policies

Washington State youth petitioned the Washington Supreme Court for discretionary review of a lower appellate court's decision rejecting their constitutional challenge to Washington's energy and transportation policies that result in high levels of greenhouse gas emissions. The questions presented in their petition included whether the lower appellate court erred in expanding the political question doctrine to preclude review of a constitutional controversy involving government conduct that causes climate change and whether the court below erred in holding that the right to a healthful and pleasant environment is not a fundamental right. *Aji P. v. State of Washington*, No. 80007-8-I (Wash. Mar. 10, 2021).

California Attorney General Sought to Intervene to Oppose Residential Projects in Areas Vulnerable to Wildfire

In February and March 2021, the California Attorney General filed motions to intervene on behalf of the People of the State of California in lawsuits challenging residential developments that the Attorney General argued would result in adverse environmental effects that could affect the public generally. In the case challenging a proposed residential and resort development in Lake County, the petition attached to the attorney general's motion alleged that the project would be located in an area where the "frequency, scale, and severity of … wildfires has increased in recent years, exacerbated by climate change and by high-risk development and human activity encroaching into the wildland-urban interface." The petition also alleged that the environmental impact report for the project failed to adequately analyze and disclose the direct, indirect, and cumulative impacts of the Project on greenhouse gas emissions and climate change. Similarly, in its motions to intervene in two cases challenging resort and residential developments in San Diego County, the attorney general made similar allegations regarding wildfire risk and the analysis of greenhouse gas emissions and climate change. *Center for Biological Diversity v. County of Lake*, No. CV 421152 (Cal. Super. Ct. Feb. 1, 2021); *Center for Biological Diversity v.*

County of San Diego, No. 37-2020-00046553 (Cal. Super. Ct. Mar. 17, 2021); *Sierra Club v. County of San Diego*, No. 37-2019-00038820 (Cal. Super. Ct. Mar. 17, 2021).

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FEATURED CASE

Hawai‘i Federal Court Sent Honolulu’s and Maui’s Climate Cases Back to State Court; Fossil Fuel Companies Appealed

The federal district court for the District of Hawai‘i remanded cases brought by the City and County of Honolulu and the County of Maui seeking to hold fossil fuel companies liable for climate change-related damages. The court rejected three grounds for federal jurisdiction because the Ninth Circuit rejected them in *City of Oakland v. BP p.l.c.*, 969 F.3d 895 (9th Cir. 2020): (1) that the plaintiffs’ claims arose under federal common law; (2) that federal law preempted the claims; and (3) that the claims necessarily raised disputed and substantial federal issues (*Grable* jurisdiction). The court then concluded that because the plaintiffs elected to pursue claims based on the companies’ alleged concealment of the climate change risks of fossil fuels and not on the defendants’ extraction and production of fossil fuels, their claims did not relate to the companies’ activities on the Outer Continental Shelf, under the direction of federal officers, or on federal enclaves, and the companies therefore established no other basis for federal jurisdiction. With respect to federal-officer jurisdiction, the district court noted that this case was similar to *County of San Mateo v. Chevron Corp*. in which the Ninth Circuit affirmed a district court finding that the federal-officer removal statute did not provide jurisdiction. The Hawai‘i district court found that any additional evidence provided by the companies in these cases did not establish that the companies acted under a federal officer with respect to oil and gas leases, operation of a National Petroleum Reserve, or supplying to the strategic petroleum reserve; the court also found no causal connection between the plaintiffs’ concealment-based claims and actions the companies contended were taken at the direction of a federal officer. In addition, the court found that the companies made only conclusory assertions that colorable federal defenses existed. On March 5, 2021, the court denied the companies’ motions to stay the remand order but delayed transmission of the order to the state courts for 10 days to allow the companies to seek relief in the Ninth Circuit. *City & County of Honolulu v. Sunoco LP*, No. 1:20-cv-00163 (D. Haw. Feb. 12, 2021); *County of Maui v. Chevron U.S.A. Inc.*, No. 20-cv-00470 (D. Haw. Feb. 12, 2021), Nos. 21-15313 & 21-15318 (9th Cir.).

DECISIONS AND SETTLEMENTS

Ninth Circuit Denied Rehearing in Youth Plaintiffs’ Constitutional Climate Case Against Federal Defendants

On February 10, 2021, the Ninth Circuit Court of Appeals denied youth plaintiffs’ petition for rehearing en banc of the court’s January 2020 ruling that the plaintiffs lacked standing to pursue their constitutional claims against the United States and other federal defendants for infringing on the plaintiffs’ right to a life-sustaining climate system. A week later the plaintiffs filed a

motion to stay the mandate pending the filing and disposition of a petition for writ of certiorari in the Supreme Court. The plaintiffs contended that their certiorari petition would present substantial questions meriting Supreme Court review regarding the rights of children, and that there was good cause to stay the mandate due to the irreparable harm that would result from dismissal of the case. The plaintiffs' arguments included that the Biden-Harris administration should be allowed the opportunity to decide whether to engage in settlement negotiations. On March 1, the federal defendants filed their opposition to the motion to stay the mandate, arguing that the Supreme Court was unlikely to grant the petition, "much less reverse this Court's judgment," because the Ninth Circuit had applied settled precedent. The U.S. defendants also contended that the plaintiffs would not suffer irreparable harm, given that they would be able to obtain relief if the Supreme Court ruled in their favor. The defendants also noted that issuance of the mandate "is no impediment to settlement" since settlement remained possible so long as a case was pending, even if pending before the Supreme Court. On March 5, the plaintiffs withdrew their motion to stay "[b]ecause Defendants' position is clear that the issuance of the mandate does not preclude settlement or Plaintiffs' ability to seek future relief from the issuance of the mandate." The Ninth Circuit issued the mandate the same day. *Juliana v. United States*, No. 18-36082 (9th Cir. order Feb. 10, 2021; motion to stay mandate Feb. 17, 2021).

Washington Appellate Court Affirmed Dismissal of Youth Climate Case Against State

Although its opinion stated that "[w]e firmly believe that the right to a stable environment should be fundamental," the Washington Court of Appeals nonetheless affirmed the dismissal of a lawsuit brought by 13 youths who asserted that the State of Washington and State agencies and officials infringed on their fundamental right to a stable climate system by creating and maintaining transportation and energy systems that relied on fossil fuels and resulted in greenhouse gas emissions. The court concluded that judicial resolution of the youths' claims would violate the separation of powers doctrine and also rejected the youths' substantive due process, equal protection, state-created danger, and public trust doctrine claims on the merits. With respect to separation of powers, the Court of Appeals found that to provide the relief sought by the youths—an order requiring the State to develop an enforceable "climate recovery plan"—the court would have to order the legislative and executive branches to create and implement the plan, which would contravene the Washington Constitution's commitment of legislative power to the legislative branch. The court further found that there was no judicially manageable standard by which it could resolve the claims, noting that scientific expertise would be required to determine the appropriate amount of greenhouse gas emission reductions. In addition, the court found that the State had already made policy determinations regarding climate change and established and implemented a regulatory regime, and that judicial resolution of the lawsuit would "usurp the authority and responsibility of the other branches." The court also rejected the youths' argument that their claims were justiciable under the Uniform Declaratory Judgments Act (UDJA). The court reasoned that any remedy it granted would not be final and conclusive—and the claims therefore would not be justiciable under the UDJA—since the remedy would require the court to retain jurisdiction to oversee implementation of the climate recovery plan. In its consideration of the merits of the youths' claims, the court held that neither the Washington Constitution nor Washington statutes provided a fundamental right to a healthful and peaceful environment or to a stable climate system. In addition, the court rejected the youths' claims that the defendants violated their equal protection rights, both because they failed to establish that a

fundamental right was implicated and also because they failed to establish youth as a suspect or quasi-suspect class with immutable characteristics. The court also found that the youths could not show that the State acted affirmatively to create a danger but instead alleged that their injuries resulted from a failure to act. Finally, the court rejected the youths' public trust doctrine claim because it was based on the "climate system as a whole, including the atmosphere," and Washington's public trust doctrine had not been expanded to encompass the atmosphere. *Aji P. v. State*, No. 80007-8-I (Wash. Ct. App. Feb. 8, 2021).

D.C. Circuit Granted EPA Request to Stay Issuance of Mandate Vacating Repeal of Clean Power Plan

On February 22, 2021, the D.C. Circuit Court of Appeals granted the U.S. Environmental Protection Agency's (EPA's) motion for a partial stay of the issuance of the mandate in the lawsuit challenging the Trump administration's final rule repealing and replacing the Obama administration's Clean Power Plan, which regulated greenhouse gas emissions from existing power plants under Section 111(d) of the Clean Air Act. On January 19, the D.C. Circuit vacated both the repeal and replacement components of the final rule, finding that the rule was based on an erroneous reading of the Clean Air Act. In its February 12 motion for partial stay of the mandate, EPA indicated that it "strongly" believed that no Section 111(d) rule should go into effect until EPA conducted new rulemaking in response to the January 19 decision. In its February 22 order, the court withheld issuance of the mandate with respect to the repeal of the Clean Power Plan and directed issuance of the mandate "in the normal course" for the vacatur of the replacement portion of the rule as well as timing provisions in the implementing regulations. EPA was directed to file status reports at 90-day intervals. *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir. Feb. 22, 2021).

EPA Withdrew Appeal of Order Vacating Negative Jurisdictional Determination for Salt Ponds

On February 26, 2021, EPA moved to voluntarily dismiss its appeal of a district court's order that vacated a negative jurisdictional determination under the Clean Water Act for the Redwood City Salt Ponds along San Francisco Bay. The plaintiffs alleged that the negative jurisdictional determination would exacerbate the consequences of sea level rise and impair California's ability to mitigate sea level rise impacts, though the district court's decision did not address this issue, focusing instead on EPA's determination that the salt ponds had been transformed into "fast land" prior to enactment of the Clean Water Act. The district court remanded the matter to EPA for evaluation of factors including the nexus between the salt ponds and the Bay and the extent to which the salt ponds "significantly affect the chemical, physical, and biological integrity of the Bay." *San Francisco Baykeeper v. EPA*, No. 20-17359 (9th Cir. Feb. 26, 2021).

In Challenge to Oil and Gas Development Project in National Petroleum Reserve, Ninth Circuit Enjoined Construction Activities for Duration of Appeal

The Ninth Circuit Court of Appeals ordered the continuation of a temporary injunction on certain construction activities related to a major oil and gas development project in the National Petroleum Reserve-Alaska while the plaintiffs appeal the district court's denial of their motions

for a preliminary injunction. The district court concluded that the plaintiffs were unlikely to succeed on their National Environmental Policy Act (NEPA) claims because the claims were time-barred under the Naval Petroleum Reserves Production Act (NPRPA). The Ninth Circuit found that the plaintiffs raised a serious question regarding whether the NPRPA's time limit on filing claims for judicial review applied in this case. The Ninth Circuit further found that the plaintiffs would suffer irreparable harm in the absence of an injunction, that at least one of their NEPA claims was likely to succeed if timely, that the balance of equities favored relief, that the balance of hardships tipped sharply in the plaintiffs' favor, and that an injunction was in the public interest. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management*, No. 21-35085 (9th Cir. Feb. 13, 2021).

Citing "Unique Background" of Case, Montana Federal Court Rejected Transfer of Claims Regarding Public Lands in Wyoming

The federal district court for the District of Montana denied the U.S. Bureau of Land Management's (BLM's) request that the court dismiss or transfer claims challenging a resource management plan amendment for federal lands in Wyoming. The suit also involved a challenge to a resource management plan amendment for lands in Montana. All of the lands at issue in the case are located in the Powder River Basin. In 2018, the Montana federal court invalidated the previous resource management plans for the same areas, finding that the environmental reviews were inadequate. This suit involves the plaintiffs' claims that the resource management plan amendments developed in response to the court's previous orders failed to comply with those orders or with federal law. The court—which also rejected BLM's motion to dismiss and sever or transfer the Wyoming-related claims in the earlier case—again found that venue was proper in the District of Montana because the case did not involve real property, the plaintiffs reside in the district, and a substantial part of the events giving rise to this case (including the court's prior decisions) occurred in the district. The court also declined to exercise its discretion to sever and transfer the Wyoming RMP claims, finding that the plaintiffs' "elevated interest in prevention of inconsistent judgments and judicial economy rooted in the unique background of this case outweigh the interest in having localized controversies decided at home." *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, No. 4:20-cv-00076 (D. Mont. Feb. 24, 2021).

Federal Court Allowed Challenge to FDA Approval of Cattle Drug to Proceed

The federal district court for the Northern District of California denied motions to dismiss a lawsuit challenging the Food and Drug Administration's (FDA's) approval of a drug intended to reduce releases of ammonia gas from the waste of cattle raised for beef. The plaintiffs' claims include that FDA failed to consider the drug's environmental impacts, including impacts from air emissions from concentrated animal feeding operations. The court rejected arguments that the plaintiffs did not have standing or that they failed to exhaust administrative remedies. *Animal Legal Defense Fund v. Azar*, No. 3:20-cv-03703 (N.D. Cal. Feb. 23, 2021).

Federal Court Dismissed Case that Sought to Prevent Minnesota from Regulating Vehicle Greenhouse Gas Emissions

The federal district court for the District of Minnesota granted the State of Minnesota's motion to dismiss a lawsuit seeking to block the state from conducting rulemaking to regulate greenhouse gas emissions from motor vehicles. The court concluded that sovereign immunity barred the plaintiff's claims; that the plaintiff—a "corporation that advocates for the interests of retail motor vehicle dealerships in Minnesota"—had not alleged facts sufficient to establish standing; and that the claims were not ripe for judicial review. *Minnesota Auto Dealers Association v. Minnesota*, No. 21-cv-0053 (D. Minn. Feb. 17, 2021).

Arizona Federal Court Denied Motion to Add Documents to Record in Challenge to Long-Term Plan for Glen Canyon Dam

The federal district court for the District of Arizona denied plaintiffs' motion to complete the record in their challenge to the Glen Canyon Dam Long-Term Experimental Management Plan, a 20-year plan for releases from the dam that the plaintiffs alleged did not consider climate change impacts. The court found that the Department of the Interior properly excluded deliberative documents from the record. The court also rejected the plaintiffs' contention that the Interior Department should have included articles on climate change impacts on future Colorado River basin water supplies that were referenced in two foundational studies of the Colorado River basin that were in the record. The court concluded that such underlying documents did not belong in the record and further found that the plaintiffs did not meet its burden of demonstrating that a Department of the Interior subordinate relied on the referenced materials. *Save the Colorado v. U.S. Department of the Interior*, No. CV-19-08285 (D. Ariz. Feb. 4, 2021).

Minnesota Supreme Court Said Challenge to Minneapolis Comprehensive Plan Could Proceed

The Minnesota Supreme Court reinstated claims that the City of Minneapolis's adoption of a municipal comprehensive plan violated the Minnesota Environmental Rights Act (MERA). The court held that an administrative rule that exempted comprehensive plans from Minnesota Environmental Policy Act review did not bar claims under MERA. The Supreme Court also found that the district court should not have dismissed the MERA claim because the complaint adequately alleged a causal link between adoption of the comprehensive plan and purported materially adverse environmental effects. The plaintiffs' complaint alleged, among other things, that there were questions regarding whether the "upzoning" for higher-density development proposed in the comprehensive plan would result in a reduced carbon footprint. *Minnesota by Smart Growth Minneapolis v. City of Minneapolis*, No. A19-0999 (Minn. Feb. 10, 2021).

California Appellate Court Rejected Challenges to Environmental Review for Expanded Landfill Operations

The California Court of Appeal affirmed the denial of a petition challenging the County of Los Angeles's approval of a master plan revision for continued and expanded operations at the Chiquita Canyon Landfill. The court found that the petitioner had not argued in the Superior Court that the environmental impact report failed to quantify or analyze existing landfill emissions, and so had forfeited that argument. The appellate court also found that substantial evidence supported the methodologies used for data on criteria air pollutants and odors, as well

as the methodologies used to determine landfill gas capture efficiency rates and to quantify greenhouse gas emissions, which relied on modeled data. *Val Verde Civic Association v. County of Los Angeles*, No. B302885 (Cal. Ct. App. Feb. 10, 2021).

Delaware Chancery Court Ordered Company to Allow Inspection of Records Related to Clean Energy Claims

The Delaware Chancery Court ordered Bloom Energy Corporation to respond to a stockholder's demand to inspect the company's books and records, including documents relating to the company's clean energy claims and the company's carbon dioxide emissions. According to the court's decision, the company manufactures solid-oxide fuel cells that provide an alternative to obtaining energy from the electrical grid, and the company's primary product is the Bloom Energy Server, which the company promotes as supplying more efficient energy generation with lower greenhouse gas emissions than traditional fossil fuels. After a report published in 2019 concluded that the technology was neither profitable nor clean, the two plaintiffs submitted their demands for inspection. Although the court ruled for the company with respect to one of the plaintiff's demands, due to failure to comply with statutory requirements for such demands, the court found that the other plaintiff had carried his burden of demonstrating a "proper purpose" for inspection by presenting a credible basis to suspect wrongdoing, including with respect to the company's representations regarding its product's environmental benefits. *Jacob v. Bloom Energy Corp.*, No. 2020-0023-JRS (Del. Ch. Feb. 25, 2021).

NEW CASES, MOTIONS, AND OTHER NOTICES

Florida-Georgia Supreme Court Water Dispute Raised Issue of Climate Change's Contribution to Decreased Water Flow

On February 22, 2021, the U.S. Supreme Court heard oral arguments in an original jurisdiction case filed by Florida against Georgia in which Florida seeks a decree apportioning the waters of the Apalachicola, Chattahoochee, and Flint River Basins to address harms Florida allegedly suffered—including damage to oyster fisheries—due to decreased flows in the Apalachicola River that Florida contends is caused by Georgia's use of water. Georgia argues that Florida did not prove that Georgia's water use caused the harm to the fisheries and that changing climatic conditions and Florida's mismanagement of the fisheries played "a far greater role." *Florida v. Georgia*, No. 22o142 (U.S.).

Challenges to Trump Administration Actions on Hold as New Administration Undertakes Reviews

A number of the cases we are tracking have been stayed or are being held in abeyance to allow the Biden-Harris administration time to review the agency actions being challenged. EPA, the U.S. Department of Energy, and other agencies are reviewing actions taken during the Trump administration pursuant to President Biden's Executive Order 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." The following cases are among those affected by the new administration's review of Trump administration policies:

- **Energy Conservation:** In Ninth Circuit cases challenging U.S. Department of Energy (DOE) procedures for adopting energy conservation standards for appliances, the parties filed a consent motion seeking to hold the cases in abeyance for 150 days while the agency reviews the rules pursuant to Executive Order 13990. DOE included the rules in the list of 13 rules it is reviewing pursuant to the executive order. *California v. U.S. Department of Energy*, No. 20-71068 (9th Cir. abeyance motion Feb. 26, 2021).
- **Energy Conservation:** The Seventh Circuit transferred a case challenging new product classes for residential clothes washers and consumer clothes dryers in the Department of Energy's energy conservation program to the Second Circuit, where another challenge to the rule was pending. A challenge to another DOE rule—which adopted a revised definition for "showerhead" and added definitions for "body spray" and "safety shower showerhead"—remained pending in the Seventh Circuit. Petitioners moved for stays of both rules pending review. The response to the stay motion for the showerhead rule was due on March 8. Both rules are on DOE's list of rules that it is reviewing pursuant to Executive Order 13990. *Alliance for Water Efficiency v. U.S. Department of Energy*, No. 21-1166 (7th Cir. Feb. 17, 2021); *Alliance for Water Efficiency v. U.S. Department of Energy*, No. 21-1167 (7th Cir. Feb. 17, 2021).
- **Rail Transport of LNG:** The Pipeline and Hazardous Materials Safety Administration and other federal respondents asked the D.C. Circuit to place challenges to July 2020 regulations for transporting liquefied natural gas (LNG) by rail in abeyance for six months. *Sierra Club v. U.S. Department of Transportation*, No. 20-1317 (D.C. Cir. motion for abeyance Feb. 24, 2021).
- **Coastal Barrier Resources Act:** The federal district court for the Southern District of New York stayed a case challenging a 2019 rule interpreting the Coastal Barrier Resources Act (CBRA) that the National Audubon Society alleged "vastly expands potential sand mining projects in delicate coastal barriers" protected by CBRA. The case was stayed for an initial 60 days pursuant to a stipulation and consent order. *National Audubon Society v. de la Vega*, No. 1:20-cv-05065 (S.D.N.Y. Feb. 23, 2021).
- **Cost-Benefit Analysis in Clean Air Act Rulemaking:** The D. C. Circuit granted EPA's motion to hold in abeyance the cases challenging EPA's rule on "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process." The court directed the parties to file motions to govern future proceedings by June 23, 2021. *New York v. EPA*, No. 21-1026 (D.C. Cir. Feb. 23, 2021).
- **New Source Emission Standards in Oil and Gas Sector:** The D.C. Circuit granted EPA's motions to hold in abeyance cases that challenged EPA's amendments to emission standards for new, reconstructed, and modified sources in the oil and gas sector while EPA conducts its review pursuant to Executive Order 13990. There are two rules under review in two sets of cases. Both sets of cases are held in abeyance pending further order of the court. *Environmental Defense Fund v. Wheeler*, No. 20-1360 (D.C. Cir. Feb. 19, 2021); *California v. Wheeler*, No. 20-1357 (D.C. Cir. Feb. 12, 2021).
- **Existing Source Emission Standards in Oil and Gas Sector:** In a related lawsuit seeking to compel EPA to establish methane emissions guidelines for existing oil and natural gas sources, the federal district court for the District of Columbia denied pending motions to dismiss and for summary judgment without prejudice and directed the parties

to file a joint status report by April 9 advising on how they wish to proceed. The Trump administration sought to dismiss the lawsuit after EPA withdrew methane standards for new and modified sources in August 2020—a rule now under review by the Biden-Harris administration. *New York v. Nishida*, No. 1:18-cv-00773 (D.D.C. Feb. 12, 2021).

- **Vehicle Standards:** In the lawsuits challenging the Trump administration's greenhouse gas emission and fuel economy standards for passenger cars and light trucks (the Safer Affordable Fuel-Efficiency (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks), the federal respondents asked the D.C. Circuit to hold the cases in abeyance while the agencies evaluate the SAFE Rule pursuant to Executive Order 13990, which specifically targeted the SAFE Rule for review. Petitioners representing local and state governments and environmental and public health organizations opposed the federal respondents' request for an indefinite abeyance. The state and local government petitioners argued that the "sheer magnitude of … accumulating harms, which include greenhouse gas emission increases greater than the *total* emissions of many States," warranted judicial oversight to prevent delay or to ensure an opportunity for review should the challenged standards be left in place. The state and local government petitioners instead suggested a six-month extension of the deadline for the federal respondents' brief and corresponding extensions for other briefs. The public interest organization petitioners supported this suggestion. The D.C. Circuit is already holding in abeyances the cases challenging EPA's withdrawal of California's waiver for greenhouse gas emission standards and zero emission vehicle mandates and the National Highway Traffic Safety Administration's rule preempting state regulation of vehicle greenhouse gas emissions. *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, No. 20-1145 (D.C. Cir. Feb. 19, 2021).
- **Aircraft Standards:** The D.C. Circuit granted EPA's motion to hold cases challenging the greenhouse gas standards for aircraft in abeyance while EPA reviews the standards pursuant to Executive Order 13990. The D.C. Circuit directed that the cases be held in abeyance pending further order of the court. EPA must file status reports every 90 days. The Boeing Company and Aerospace Industries Association of America, Inc. moved to intervene to defend the standards. *California v. EPA*, No. 21-1018 (D.C. Cir. Feb. 17, 2021).
- **Keystone XL Pipeline:** In Executive Order 13990, President Biden also revoked the 2019 Presidential Permit for the Keystone XL pipeline. The federal district court for the District of Montana subsequently stayed two cases challenging the 2019 permit until April 5 and directed the parties to submit a status report before that date regarding whether the court should proceed with mootness briefing or continue the stay. *Indigenous Environmental Network v. Trump*, No. 4:19-cv-00028 (D. Mont. Feb. 17, 2021); *Rosebud Sioux Tribe v. Trump*, No. 4:18-cv-118 (D. Mont. Feb. 3, 2021).
- **Oil and Gas Leasing in Arctic National Wildlife Refuge:** The federal district court for the District of Alaska granted federal defendants' request for a stay of proceedings in the lawsuits challenging the approval of an oil and gas leasing program on the Coastal Plain of the Arctic National Wildlife Refuge. The parties must file status reports by April 12, 2021 advising the court about what further proceedings may be necessary. *Gwich'in Steering Committee v. de la Vega*, No. 3:20-cv-00204 (D. Alaska Feb. 12, 2021).

- **National Environmental Policy Act:** The federal district court for the Western District of Virginia denied the defendants' request for a 60-day stay to allow the Biden-Harris administration time to review challenged amendments to the National Environmental Policy Act (NEPA) regulations. The court noted that briefing on summary judgment motions was nearly complete and found that adding delay to the court's decision on the pending motions would not be appropriate. In the federal district court for the Northern District of California, however, the court stayed a case challenging the NEPA amendments for 60 days pursuant to a joint stipulation submitted by the parties. *Wild Virginia v. Council on Environmental Quality*, No. 3:20-cv-00045 (W.D. Va. Feb. 19, 2021); *Alaska Community Action on Toxics v. Council on Environmental Quality*, No. 3:20-cv-5199 (N.D. Cal. Feb. 12, 2021).
- **"Waters of the United States":** The federal district court for the Northern District of California granted federal defendants' motion for a 60-day stay and to continue deadlines in the case challenging the Trump administration's rule defining "waters of the United States" under the Clean Water Act. States that had intervened to defend the rule opposed the stay and continuance of the deadlines. *California v. Nishida*, No. 3:20-cv-03005 (N.D. Cal. Feb. 10, 2021).
- **Endangered Species Act Regulations:** The federal district court for the Northern District of California ordered a 60-day stay in three cases challenging amendments to the Endangered Species Act regulations and vacated deadlines. The District of Hawai'i granted a request for a 60-day stay in a separate challenge to the definition of "habitat" under the Endangered Species Act. *Center for Biological Diversity v. de la Vega*, No. 4:19-cv-05206 N.D. Cal. Feb. 16, 2021); *Conservation Council for Hawai'i v. de la Vega*, No. 1:21-cv-00040 (D. Haw. Feb. 10, 2021).

EPA Asked D.C. Circuit to Vacate Rule Extending Implementation Timeline for Landfill Emission Guidelines

EPA filed a motion in the D.C. Circuit for voluntary vacatur and remand of the final rule extending implementation timelines for emission guidelines under Clean Air Act Section 111(d) for municipal solid waste landfills. EPA argued that it was appropriate for the court to grant the request due to the D.C. Circuit opinion in *American Lung Association v. EPA* that found the justifications for extending Section 111(d) implementation timelines to be inadequate. EPA also noted that it had evaluated the final rule pursuant to President Biden's Executive Order 13990 and that it planned to issue a federal plan by May 2021 for any state without an approved state plan implementing the landfill emission guidelines. In addition to arguing that vacatur was an appropriate course of action because the D.C. Circuit had already rejected arguments similar to those EPA made in support of the landfill rule, EPA also contended that vacatur was more practical than remand without vacatur and that vacatur would not have disruptive consequences such as deleterious effects on public health and the environment. *Environmental Defense Fund v. EPA*, No. 19-1222 (D.C. Cir. Mar. 4, 2021).

Annapolis Sued Fossil Fuel Companies for Climate Change Damages

The City of Annapolis filed a lawsuit in Maryland Circuit Court seeking damages and other relief from fossil fuel companies that the City alleged "engaged in a coordinated, multi-front effort" to conceal and discredit information about climate change and their products' contribution to climate change. The City alleged that it had suffered and would continue to suffer severe injuries due to climate change, including inundation and loss of City property, loss of tax revenue, damage to infrastructure, and increased costs to prepare the City for the impacts of climate change. The City asserted claims of public nuisance, private nuisance, strict liability for failure to warn, negligent failure to warn, trespass, and violations of the Maryland Consumer Protection Act. The complaint alleged that the City sought "to ensure that the parties who have profited from externalizing the consequences and costs of dealing with global warming and its physical, environmental, social, and economic consequences bear the costs of those impacts on Annapolis, rather than the City, taxpayers, residents, or broader segments of the public." The relief sought includes compensatory damages; equitable relief, including abatement of the nuisances; punitive damages; disgorgement of profits; and attorneys' fees. *City of Annapolis v. BP p.l.c.*, No. C-02-CV-21-000250 (Md. Cir. Ct., filed Feb. 22, 2021).

Recent developments in other cases seeking to hold fossil fuel companies' liable for their alleged contributions to climate change include the following:

- Defendants filed their opposition to Delaware's motion to remand. *Delaware v. BP America Inc.*, No. 1:20-cv-01429 (D. Del. Mar. 5, 2021).
- In Oakland and San Francisco's cases, the defendants filed their oppositions to the cities' renewed motion to remand and their motion for leave to amend their complaints to remove federal claims. In their opposition to remand, the defendants contended that the action was removable under the Outer Continental Shelf Lands Act and the federal-officer removal statute and also because the plaintiffs' claims arose on federal enclaves and because the claims necessarily raised disputed and substantial freedom of speech issues. In response to the motion to amend, the defendants argued that it was unnecessary for the plaintiffs to amend their complaints at this time, and that "one is left to wonder" whether the plaintiffs were seeking to derail Supreme Court review of one of the questions presented in the defendants' January petition for writ of certiorari: whether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect (in this case, by adding a federal claim after the district court denied remand) and litigating the case to final judgment. In the Supreme Court, the cities' response to the certiorari petition is due on May 10, 2021. *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal. Feb. 25, 2021); No. 20-1089 (U.S.).
- In the City of Hoboken's case, briefing was completed on the City's motion to remand. *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J. Feb. 26, 2021).

Parties Briefed Scope of Corps of Engineers' NEPA Review After First Circuit Paused Work on Transmission Line

After the First Circuit Court of Appeals temporarily enjoined commencement of construction for a segment of a power transmission line project in Maine, the parties completed briefing on the plaintiffs' appeal of a district court's denial of their motion for a preliminary injunction. The

plaintiffs—who challenged the Clean Water Act Section 404 permit granted by the U.S. Army Corps of Engineers—argued that the scope of the Corps' NEPA analysis was "overly narrow," leading the Corps to give inadequate attention to many of the transmission line's impacts, including greenhouse gas emissions. The federal defendants argued that the Corps' jurisdiction was narrow and touched only construction activities related to wetlands and vernal pools. The defendants contended that the Corps did not have sufficient control over the pipeline to "federalize" the project and that it therefore properly limited the scope of its NEPA review. *Sierra Club v. U.S. Army Corps of Engineers*, No. 20-2195 (1st Cir. Jan. 21, 2021).

Nonprofit Group Charged that Ozone NAAQS Challenge Was "Backdoor" Effort to Restrict Greenhouse Gas Emissions

The nonprofit Energy Policy Advocates filed an amicus brief in the D.C. Circuit Court of Appeals in support of EPA's determination to retain the existing national ambient air quality standards (NAAQS) for ozone. Energy Policy Advocates stated in its brief that it had obtained public records that showed that the petitioners and EPA sought to set in motion a coordinated "backdoor" effort to vacate the Trump EPA's determination and adopt a secondary ozone NAAQS "which transmogrifies the NAAQS program to regulate non-criteria pollutant CO2/GHGs, after activists were frustrated in their pursuits through proper channels." Energy Policy Advocates also contended that the records it obtained showed an alternative motive for challenging the ozone NAAQS: "to assist private plaintiffs against private parties in climate 'public nuisance' litigation by obtaining a declaration, effectively, that the predominant 'nuisance' claims are not in fact displaced by EPA regulatory authority under *American Electric Power v. Connecticut*." *New York v. EPA*, No. 21-2028 (D.C. Cir. Feb. 22, 2021).

Challenges to Small Refinery Exemptions from Renewable Fuel Standard Filed in D.C. Circuit and Tenth Circuit

The D.C. Circuit Court of Appeals granted motions to hold in abeyance a case challenging the granting of small refinery exemptions from Renewable Fuel Standard requirements. EPA granted the exemptions on January 19, 2021. The case will be held in abeyance pending the Supreme Court's disposition of *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association* or a relevant determination regarding jurisdiction or venue in a related case filed by the same petitioner in the Tenth Circuit seeking the same relief. The petitioner filed the Tenth Circuit petition for review after learning that the exemptions were issued for refineries in the Tenth Circuit and stated its intention to dismiss the D.C. Circuit petition once the Tenth Circuit addresses any jurisdictional challenges. On March 5, the Tenth Circuit denied the petitioner's motion to stay EPA's action and granted EPA's motion to hold the case in abeyance. *Renewable Fuels Association v. EPA*, No. 21-1032 (D.C. Cir. Feb. 22, 2021); *Renewable Fuels Association v. EPA*, No. 21-9518 (10th Cir., filed Feb. 8, 2021).

States Challenged Rollback of Penalty Increase for Fuel Economy Violations

New York and 14 other states filed a petition seeking review of the National Highway Traffic Safety Administration's final rule that reversed an inflation adjustment to penalties for violations of fuel economy standards. The final rule was published in the January 14, 2021 issue of the

Federal Register. Environmental groups filed a challenge to the rule in January. *New York v. National Highway Traffic Safety Administration*, No. 21-339 (2d Cir., filed Feb. 16, 2021).

Oil and Gas Company Asked Court to Order BLM to Approve Drilling Permits for North Dakota Leases

An oil and gas exploration and production company operating oil and gas leases in North Dakota filed a lawsuit in the federal district court for the District of North Dakota to compel the U.S. Bureau of Land Management (BLM) to act on applications for permit to drill (APDs) submitted in 2020. The company alleged that BLM would have approved the APDs but for Secretarial Order 3395 signed by the Acting Secretary of the Interior on January 20, 2021, which withdrew authority from BLM to approve the APDs and placed the authority in the hands of new presidential appointees. The company asserted that by failing to approve the APDs, the defendants had failed to meet non-discretionary obligations under the Mineral Leasing Act. *Continental Resources, Inc. v. de la Vega*, No. 1:21-cv-00034 (D.N.D., filed Feb. 23, 2021).

Lawsuit Alleged Failure to Update Stock Assessments for Marine Mammals to Reflect Climate Change Impacts and Other New Information

Two organizations filed a lawsuit in the federal district court for the Northern District of California asserting that the U.S. Fish and Wildlife Service had failed to comply with its non-discretionary obligation to issue updated stock assessment reports under the Marine Mammal Protection Act. The plaintiffs alleged that despite the MMPA's requirement that the stock assessments be updated every year or every three years, depending on a species' vulnerability, the stock assessments for some species had not been updated for more than a decade even though significant new information—including, for example, the depletion of sea ice on which polar bears and walruses depend and the impacts on sea otters from the die-off of kelp stemming from climate change—had become available. *Center for Biological Diversity v. de la Vega*, No. 3:21-cv-1182 (N.D. Cal., filed Feb. 18, 2021).

Conservation Groups Challenged Environmental Review for Midwest Transmission Line

Four conservation organizations filed a lawsuit in the federal district court for the Western District of Wisconsin challenging a 101-mile high-voltage transmission line running from Iowa to a substation in Wisconsin. The plaintiffs contended that the environmental impact statement approved by the Rural Utilities Service did not comply with the National Environmental Policy Act, including because it "did not adequately consider greenhouse gas emissions and potential climate impacts from the project and the fossil fuel-generated electricity that it would carry." The plaintiffs also asserted that the transmission line's approval violated the National Wildlife Refuge System Improvement Act of 1997. *National Wildlife Refuge Association v. Rural Utilities Service*, No. 3:21-cv-00096 (W.D. Wis., filed Feb. 10, 2021).

Lawsuit Alleged Failure to Review Impacts of Oil and Gas Activities in California

Center for Biological Diversity (CBD) filed a lawsuit in California Superior Court alleging that the Geologic Energy Management Division of the California Department of Conservation

(CalGEM) issued permits for oil and gas drilling and other oil and gas activities without complying with the California Environmental Quality Act. CBD contended that CalGEM engaged in an "unlawful pattern practice" of approving such activities by issuing permits and approvals without any environmental review, in reliance on inapplicable exemptions, or based on inadequate environmental reviews conducted by local governments. CBD alleged that the "continual addition of new oil and gas activity" resulted in significant and well-documented environmental impacts, including significant amounts of greenhouse gas emissions associated with extraction, refining, combustion, and transportation. *Center for Biological Diversity v. California Geological Energy Management Division*, No. __ (Cal. Super. Ct., filed Feb. 24, 2021).

WildEarth Guardians Filed Lawsuit to Compel Agency Decision on Refinery Permits

WildEarth Guardians filed a lawsuit in Colorado District Court seeking to compel Colorado agencies to act on two Title V permit renewal applications for a refinery that is allegedly the largest non-coal source of greenhouse gas emissions in Colorado. The applications were submitted in September 2016 and October 2010. In its announcement of the suit, WildEarth Guardians called the refinery an "environmental injustice" and indicated that WildEarth Guardians and others had previously called for the permits to be denied and the refinery shut down due to chronic air quality violations. *WildEarth Guardians v. Colorado Department of Public Health & Environment*, No. 2021cv030213 (Colo. Dist. Ct., filed Feb. 16, 2021).

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FEATURED CASE

D.C. Circuit Vacated Trump EPA's Affordable Clean Energy Rule

On January 19, 2021, the D.C. Circuit Court of Appeals ruled that the U.S. Environmental Protection Agency's (EPA's) Affordable Clean Energy Rule (ACE Rule) for greenhouse gas emissions from power plants rested on an erroneous interpretation of the Clean Air Act that barred EPA from considering measures beyond those that apply at and to an individual source. The court therefore vacated and remanded the ACE Rule—which repealed the 2015 Clean Power Plan rule and in its place adopted a replacement rule that relied only on heat-rate improvements at individual plants. In concluding that Section 111 of the Clean Air Act does not limit EPA to identifying a "best system of emission reduction" consisting only of controls "that can be applied at and to a stationary source," the D.C. Circuit's majority opinion first concluded that neither the text nor the statutory history, structure, and purpose compelled such a reading. Second, the D.C. Circuit ruled that EPA incorrectly invoked the "major questions doctrine"—which requires a clear statement from Congress when an agency's regulatory action is of "extraordinary" significance—to support its interpretation of Section 111. The court found that Congress and the courts had long recognized EPA's authority to regulate greenhouse gases from power plants under Section 111, and that the major questions doctrine did not apply to EPA's identification of the "best system of emission reduction." The court said Congress knew "both the scope and important of what it was doing" when it gave EPA authority to set standards and that it "cabined the EPA's authority with concrete and judicially enforceable statutory limitations." With respect

to the significant regulatory consequences of the standards, the D.C. Circuit indicated that the consequences were "a product of the greenhouse gas *problem*, not of the best-system's role in the solution," writing that "any nationwide regulation of [power plants'] greenhouse gas pollution will necessarily affect a broad swath of the Nation's electricity customers." The court also rejected EPA's contention that the major questions doctrine applied because the Clean Power Plan regulated the electric grid and not air pollution. Third, the D.C. Circuit held that the federalism canon—requiring that Congress use "exceedingly clear language" to alter the balance of power between the federal government and the states—did not support an interpretation limiting the best system of emission reduction to measures applied at and to the source. The D.C. Circuit also rejected two arguments by coal companies against the ACE Rule. First, the court found that EPA made and retained the requisite endangerment finding for regulation of carbon dioxide emissions from power plants. Second, the court found that EPA "correctly and consistently" interpreted the Clean Air Act to permit both regulation of a source's hazardous air pollutant emissions under Section 112 and emissions of other pollutants under Section 111(d). The D.C. Circuit also concluded that two petitioners—Texas Public Policy Foundation and Competitive Enterprise Institute—lacked organizational standing to challenge EPA's authority to promulgate the ACE Rule. Finally, the D.C. Circuit found that amendments to the regulations implementing Section 111(d)—which extended the timeline for compliance—lacked reasoned support. Because EPA's sole defense for repeal of the Clean Power Plan and replacement with the Affordable Clean Energy Rule was that the interpretation underlying the rule was the only permissible one, the D.C. Circuit vacated the ACE Rule and remanded to EPA. Judge Walker issued a separate opinion dissenting from the majority's conclusion that EPA had authority to regulate coal-fired power plants under both Section 111 and Section 112. Although he concluded that regulation of coal-fired power plants was foreclosed for this "more mundane reason" and thus concurred in the vacating of the ACE Rule, Judge Walker also wrote that he doubted the validity of the Clean Power Plan—which he characterized as "arguably one of the most consequential rules ever proposed by an administrative agency"—under the major questions doctrine. The court directed that issuance of the mandate be withheld until seven days after disposition of any petition for rehearing or petition for rehearing en banc. *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir. Jan. 19, 2021).

DECISIONS AND SETTLEMENTS

D.C. Circuit Declined to Stay EPA's Amendments to Leak Detection and Repair Standards for Oil and Gas Sector

On January 15, 2021, the D.C. Circuit Court of Appeals denied a motion for partial stay pending review of EPA's amendment of leak detection and repair standards for the oil and gas sector. Judge Pillard would have granted the motion. On January 19, Western Energy Alliance moved for leave to intervene as a respondent outside the time provided for in the Federal Rules of Appellate Procedure. The challenged rule—"Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration"—is one of the rules included on the non-exclusive list of rules identified by the Biden administration for review under the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. EPA asked the court to hold these cases in abeyance pending its

review of the rule. *Environmental Defense Fund v. Wheeler*, No. 20-1360 (D.C. Cir. Jan. 15, 2021).

Montana Federal Court Found Failure to Take a Hard Look at Costs of Greenhouse Gas Emissions in Review of Coal Mine Expansion

The federal district court for the District of Montana found flaws in an updated environmental assessment for a mining plan modification that extended the life of the Spring Creek Mine, a surface coal mine in Montana. In earlier litigation challenging the same mining plan modification, the court found procedural and substantive violations of the National Environmental Policy Act (NEPA). In the instant case, the court agreed with a magistrate judge's findings that the Office of Surface Mining Reclamation and Enforcement (OSM) failed to take a hard look at the impacts of coal transportation, failed to adequately consider the effects of downstream non-greenhouse gas emissions, and failed to quantify costs associated with greenhouse gas emissions even though OSM quantified the mine expansion's socioeconomic benefits. Like the magistrate judge, the district court rejected claims that OSM improperly segmented its analysis and ignored cumulative impacts of the entire Spring Creek Mine. The court ordered OSM to prepare corrective NEPA analysis and deferred vacatur of mining plan approval for 240 days for preparation of the analysis. *WildEarth Guardians v. Bernhardt*, No. 17-cv-80 (D. Mont. Feb. 3, 2021).

After Denying Motions to Stop Construction Activities in National Petroleum Reserve, Alaska Federal Court Enjoined Certain Work for Two Weeks

On February 1, 2021, the federal district court for the District of Alaska denied motions for preliminary relief barring certain construction activities related to a major oil and gas development project in the National Petroleum Reserve in Alaska (NPR-A). First the court found that the plaintiffs' NEPA claims were likely time-barred under the Naval Petroleum Reserves Production Act (NPRPA), which requires that actions seeking judicial review under NEPA "concerning oil and gas leasing" in NPR-A be brought within 60 days after notice of the availability of an environmental impact statement is published in the *Federal Register*. With respect to claims under the Endangered Species Act, the court found that that the plaintiffs failed to demonstrate that Southern Beaufort Sea polar bears would be irreparably injured before the court issued a ruling on the merits. On February 6, the court issued an injunction on certain construction activities through February 20 or until the Ninth Circuit rules on any motions for injunction pending appeal. The district court noted that the application of the NPRPA's judicial review provision was one of first impression in the Ninth Circuit. The court further indicated that if the claim is not time-barred, the plaintiffs "could well be likely to succeed on the merits" of their claim that the defendants' analysis of greenhouse gas emissions violated NEPA. The court also concluded that the plaintiffs had established a likelihood of irreparable harm. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management*, Nos. 3:20-cv-00290 & 3:20-cv-00308 (D. Alaska Feb. 1, 2021).

Magistrate Judge Recommended Dismissal of Citizen Suit Challenging Permitting for Underground Coal Mine

A magistrate judge in the federal district court for the District of Colorado recommended that the court grant an underground coal mine operator's motion to dismiss a Clean Air Act citizen suit that alleged the mine required a Prevention of Significant Deterioration construction permit and a Title V operating permit. The magistrate judge concluded that the suit was barred by the statute of limitations. *WildEarth Guardians v. Mountain Coal Co.*, No. 1:20-cv-01342 (D. Colo. Jan. 26, 2021).

Montana Federal Court Rejected Request to Halt Coal Mining in Expansion Area

The federal district court for the District of Montana denied a motion for a preliminary injunction enjoining mining operations in an expansion area for the Rosebud Mine, a coal mine in Montana. The court noted that the Office of Surface Mining Reclamation and Enforcement had approved the mine's expansion in June 2019 but that the plaintiffs had not sought the preliminary injunction until August 2020. The court stated that "[u]nfortunately, the Court does not see what harm a preliminary injunction could prevent now that excavation in [the expansion area] has been ongoing since at least May 2020 and coal extraction since August 2020." The court also found that the plaintiffs had not met their burden of demonstrating that a preliminary injunction would prevent irreparable harm from the release of greenhouse gases. The court indicated that the plaintiffs had conceded that halting mining in the expansion area would not affect the level of greenhouse gas emissions from a nearby power plant that used coal from the mine. *Montana Environmental Information Center v. Bernhardt*, No. 1:19-cv-00130 (D. Mont. Jan. 25, 2021).

Alaska Federal Court Declined to Bar Issuance of Leases on Arctic National Wildlife Refuge

The federal district court for the District of Alaska denied without prejudice motions for a preliminary injunction barring issuance of oil and gas leases and authorization of seismic exploration on the Arctic National Wildlife Refuge. The court found that the U.S. Bureau of Land Management (BLM) had not taken final action on a seismic survey proposal, but that if BLM approved the proposal, the plaintiffs could seek injunctive relief at that time. The court further found that the plaintiffs did not establish a likelihood of imminent irreparable harm since the challenged Record of Decision did not authorize any immediate "on-the-ground activities" and plaintiffs did not establish a likelihood such ground-disturbing activities would occur before the court's final ruling on the merits. *Gwich'in Steering Committee v. Bernhardt*, Nos. 3:20-cv-00204, 3:20-cv-00205, 3:20-cv-00223 (D. Alaska Jan. 5, 2021).

Vermont Supreme Court Affirmed Public Utility Commission Approval for Solar Project

The Vermont Supreme Court upheld the Vermont Public Utility Commission's decision granting a certificate of public good for construction and operation of a solar net-metering system. The arguments of the neighbors challenging the project included that the Commission erred in finding that the project would not have an undue adverse effect on greenhouse gases. The court concluded the neighbors had standing to make this argument, but found that the Commission's finding that the project would not have an undue effect on greenhouse gas emissions was not clearly erroneous even though only "minimal evidence"—the project manager's testimony that construction emissions would be similar to emission of projects of comparable size—supported

the finding. Because the neighbors produced no other testimony and relied "merely on speculation that the excavation, regrading, and moving of materials would produce undue impacts," the court upheld the Commission's findings. *In re Acorn Energy Solar 2, LLC*, No. 2019-398 (Vt. Jan. 15, 2021).

Minnesota Court and D.C. Federal Court Declined to Stop Construction of Enbridge Line 3 Pipeline

The Minnesota Court of Appeals denied motions to stay the Minnesota Public Utilities Commission's decisions authorizing Enbridge Energy, LP's Line 3 pipeline replacement project. The court agreed that one of the movants—Friends of the Headwaters—was precluded from seeking a stay because it had not sought a stay from the Commission. On the merits of the stay motion by the Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe, the court found that the Commission's denial of a stay was not an abuse of discretion. The court was not persuaded that completion of construction of the pipeline would moot the appeals and concluded both that the Commission was not required to consider whether the appeal raised substantial issues and also that it was not clear that the appeals raised substantial questions that would override other factors to require a stay. *In re Enbridge Energy, LP*, Nos. A20-1071 (Minn. Ct. App. Feb. 2, 2021).

On February 7, 2021, the federal district court for the District of Columbia denied the motion by Red Lake Band, White Earth Band, and other plaintiffs' for a preliminary injunction in their case challenging U.S. Army Corps of Engineers permits for the pipeline project. The court, which did not address the plaintiffs' arguments regarding alleged inadequacies in the climate change-related analyses, found that the plaintiffs failed to demonstrate a likelihood of success on the merits or that they would suffer irreparable harm. *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers*, No. 1:20-cv-03817 (D.D.C. Feb. 7, 2021).

Colorado Court Ruled on Venue for Colorado Local Governments' Climate Change Claims

A Colorado District Court in Boulder County denied fossil fuel company defendants' motion to transfer the City of Boulder and Board of County Commissioners of Boulder County's action seeking damages for climate change harms to Denver County District Court, but ruled that venue for the claims of the third plaintiff—the Board of County Commissioners of San Miguel County—would only be proper in San Miguel County. The court found that a forum selection clause in a 2009 Master Contract between one of the defendants and San Miguel County for sale and purchase of asphalt that specified Denver as the venue did not apply; nor did the forum selection clauses in "Confirmation Contracts" that the defendant and San Miguel County executed in 2018 and 2019 after this lawsuit commenced. The court found that the public nuisance venue statute did not apply because the plaintiffs sought damages, not an injunction to abate the nuisance; the court also found that venue was not proper in Boulder County under the venue statute for tort actions because the plaintiffs did not satisfy their burden of demonstrating that the alleged tortious conduct and deceptive trade practices did not occur in the county. In addition, the court declined to find venue was proper in Boulder County based on the defendant's subsidiary's production of fossil fuels in the county. The court agreed, however, with the City

and County of Boulder that venue was proper under the statute governing venue in actions affecting real property because the City and County alleged direct injury to real property in the county and sought remedies related to that property. The court further found that the plaintiffs conceded that venue in Boulder County was not proper for San Miguel under this statute. Counsel for San Miguel County indicated that claims against a defendant that did not join the venue transfer motion would continue to be heard in Boulder County. *County Commissioners of Boulder County v. Suncor Energy USA*, No. 2018CV30349 (Colo. Dist. Ct. Jan. 25, 2021).

Town of Windsor Repealed "Reach Code" to Settle Developer Lawsuits but Court Expressed Skepticism About Challenge to City of Santa Rosa Natural Gas Ban

On January 6, 2021, the Town Council for Windsor, California voted to rescind an all-electric "reach code" adopted by the Town in 2019. The Town reportedly could not sufficiently fund its defense of the law, which was challenged by two developers. The agenda for the Town Council's meeting indicated that the Town had reached a negotiated settlement with the developers that required the repeal of the ordinance and portions of a related ordinance. In a separate case in which one of the developer's challenged the City of Santa Rosa's natural gas ban, the court issued a tentative ruling that would deny the developer's request that the court order the City to set aside its adoption of the reach code. The court reportedly was not persuaded by the developer's argument that the City did not account for "unusual circumstances" such as wildfires and electric power blackouts that could cause significant impacts under an all-electric code. *Gallaher v. Town of Windsor*, No. SCV-265553 (Cal. Super. Ct. Jan. 6, 2021); *Gallaher v. City of Santa Rosa*, No. SCV265711 (Cal. Super. Ct. Jan. 27, 2021).

California Court Rejected Claims of Failure to Consider Future Sea Level Rise in Review of Shoreline Residential Project

A California Superior Court rejected a challenge under the California Environmental Quality Act to a residential development planned for the shoreline of San Francisco Bay. The petitioners had asserted that new information about the rate of sea level rise combined with more detailed information about the project's design showed that impacts would be more severe than was disclosed in an environmental impact report prepared in 2015. The court reportedly ruled that the sea level rise issue was not relevant because potential flooding events would be "issues of impact of the environment on a project and not issues of the project's impact on the environment." *Citizens Committee to Complete the Refuge v. City of Newark*, No. RG19046938 (Cal. Super. Ct. Dec. 24, 2020).

NEW CASES, MOTIONS, AND OTHER NOTICES

Supreme Court Held Oral Argument on Scope of Appellate Review of Remand Order in Baltimore Climate Case; Certiorari Petition Filed in San Francisco and Oakland Case

On January 19, 2021, the U.S. Supreme Court heard oral argument in fossil fuel companies' appeal of a Fourth Circuit Court of Appeals decision affirming an order remanding to state court the City of Baltimore's climate change case against the companies. The justices are considering the question of whether the scope of appellate review of the remand order extends to all of the

bases for removal rejected by the district court, or only to the district court's rejection of removal under the federal-officer removal statute. Coverage of the oral argument is available here. *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Jan. 19, 2021).

Other developments in state and local governmental cases seeking to hold fossil fuel companies liable for contributing to climate change include the following:

- On January 29, fossil fuel companies filed their opposition to the City of Hoboken's motion to remand its case to New Jersey state court. *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J. Jan. 29, 2021).

- On January 8, 2021, fossil fuel companies filed a petition for writ of certiorari seeking review of the Ninth Circuit's May 2020 reversal of the district court's 2018 denial of Oakland's and San Francisco's motions to remand their climate change nuisance cases to California state court. The petition requested that the Court consider the questions of "[w]hether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law" and "[w]hether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment." (The cities added federal nuisance claims to their complaints after the district court denied the remand motions.) On January 28, Oakland and San Francisco filed a motion in the federal district court for the Northern District of California to amend their complaints to withdraw claims under the federal common law of public nuisance so that the sole remaining claims would be alleged violation of California's representative public nuisance law. The cities also filed a renewed motion to remand in which they contended that the fossil fuel companies' remaining grounds for removal after the Ninth Circuit's May 2020 decision—federal-officer removal, Outer Continental Shelf Lands Act, enclave jurisdiction, and bankruptcy removal—were not viable. *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal. motion to amend and motion to remand Jan. 28, 2021); *Chevron Corp. v. City of Oakland*, No. 20- (U.S. Jan. 8, 2021).

- Three defendants in Minnesota's case seeking to hold the fossil fuel industry liable for causing a "climate-change crisis" moved to stay the case and hold in abeyance a decision on Minnesota's motion to remand until the Supreme Court issues a decision in the Baltimore case and on the petition for writ of certiorari in Oakland and San Francisco's case. Minnesota opposed the stay. *Minnesota v. American Petroleum Institute*, No. 20-cv-1636 (D. Minn. Jan. 15, 2021).

Trump Administration Did Not Weigh in on Montana and Washington's Case Against Washington for Blocking Coal Exports

The Trump administration's Acting Solicitor General did not file a brief in response to the Supreme Court's invitation to express the views of the United States on Montana and Washington's motion for leave to file a bill of complaint asserting that the State of Washington unconstitutionally denied access to its ports for shipments of coal from Montana and Wyoming. The two states contended that Washington's denial of a water quality certification for a terminal

violated the Dormant Commerce Clause and the Foreign Commerce Clause. The case was distributed for the conference on September 29, 2020, and on October 5, the Court invited the Acting Solicitor General to file a brief. *Montana v. Washington*, No. 22O152 (U.S.).

D.C. Circuit Granted Biden Administration Motion for Abeyance in Cases Challenging Actions Preempting State Regulation of Greenhouse Gas Emissions from Vehicles; Automotive Trade Group Withdrew from Cases

On February 8, 2021, the D.C. Circuit granted the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration's (NHTSA's) motion to hold in abeyance the cases challenging the Trump administration's regulations preempting state vehicle greenhouse gas emission standards and zero emission vehicle mandates and the withdrawal of California's waiver for such regulations. The cases will be held in abeyance while the agencies conduct their review under President Biden's Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. States that had intervened to defend EPA and NHTSA's actions opposed the abeyance motion. On February 2, 2021, the Coalition for Sustainable Automotive Regulation, Inc. and Automotive Regulatory Council, Inc. moved to withdraw as respondent-intervenors in the cases, as well as in a related district court case challenging the preemption regulations. *Union of Concerned Scientists v National Highway Traffic Safety Administration*, No. 19-1230 (D.C. Cir. motion to withdraw Feb. 2, 2021 and motion for stay Feb. 1, 2021); *California v. Chao*, No. 1:19-cv-02826 (D.D.C. motion to withdraw Feb. 2, 2021).

Challengers to Trump Administration's Revised Fuel Economy and Emission Standards Filed Briefs

On January 14, 2021, petitioners filed their opening briefs in the D.C. Circuit proceedings challenging the Trump administration's amendment of the greenhouse gas emission and fuel economy standards for light-duty vehicles. The public interest organization petitioners argued that EPA and NHTSA relied on a "fundamentally flawed analysis of pollution impacts" that "gave scant, if any consideration to the huge increases in climate-disrupting pollution" the amendments would cause. The public interest organization petitioners also contended that the agencies' analysis of consumer effects was unlawful and arbitrary, that the cost-benefit analysis included "large and patent mistakes," that NHTSA used inconsistent fuel-economy projections, and that the agencies failed to comply with the Endangered Species Act and the National Environmental Policy Act (NEPA). The state and local government petitioners argued that EPA had arbitrarily rescinded the 2017 final determination that the standards for model years 2022-2025 remained appropriate, and that EPA disregarded emission increases, failed to exercise independent judgment by uncritically accepting analysis prepared by NHTSA, and relied on underlying analysis containing numerous errors. The state and local governments also asserted that NHTSA acted unlawfully by improperly elevating non-statutory policy objectives of the "core objective of conserving energy," preparing and relying on underlying analysis that including "fundamental flaws," and failing to comply with the requirements of the Clean Air Act, the Endangered Species Act, and NEPA. Industry petitioners argued that EPA and NHTSA "distort[ed] the record on consumer acceptance of electric vehicles," mischaracterized electric automakers' reliance on credits, and disregarded safety benefits of electric vehicles. Competitive

Enterprise Institute (CEI) argued that NHTSA should have considered more lenient standards that would result in safer vehicles and also contended that the agencies overstated the health risks of fine particulate matter. Eleven briefs were filed on behalf of the non-CEI petitioners by amici parties, including by Clean Fuels Development Coalition and other petitioners that had originally filed their own petition of review to argue that EPA failed to consider the role ethanol could play in improving fuel efficiency and reducing emissions and that EPA failed to consider impacts from harmful aromatic compounds. *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, No. 20-1145 (D.C. Cir.).

EPA Requested Postponement of Oral Argument in Landfill Emission Guidelines Case

On February 2, 2021, EPA filed an unopposed motion to postpone oral argument in the proceedings challenging the final rule delaying implementation of emission guidelines for existing municipal solid waste landfills. Oral argument is scheduled for February 22. EPA requested that the argument not take place before April 8 to allow EPA time to evaluate the impact of the D.C. Circuit's opinion in the Affordable Clean Energy Rule case (which vacated regulations extending timelines for implementation of emission guidelines) as well as to review the landfill delay rule pursuant to the Executive Order on Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis. The non-exclusive list of agency actions accompanying the executive order included the landfill delay rule as one of the rules that must be reviewed. *Environmental Defense Fund v. EPA*, No. 19-1222 (D.C. Cir. Jan. 26, 2021).

States and Environmental Organizations Challenged Air and Energy Rules from Trump Administration's Final Days

- On January 19, 2021, states filed a number of lawsuits challenging rules adopted in the final days of the Trump administration, including rules with ramifications for control of greenhouse gas emissions. The lawsuits included a proceeding challenging EPA's rule on "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process," as well as EPA's final rule that set a threshold for determining whether greenhouse gas emissions from new source performance standard (NSPS) source categories contribute significantly to dangerous air pollution. The rule would require that a source category's emissions constitute 3% of U.S. greenhouse gas emissions in order to be regulated in the NSPS program. Environmental groups also filed lawsuits challenging these two rules. The states also filed lawsuits in the Second Circuit challenging the U.S. Department of Energy (DOE) rule creating new product classes for short cycle washers and dryers (discussed above) and the DOE rule establishing an interim waiver process for test procedures for the energy efficiency program. *New York v. EPA*, No. 21-1026 (D.C. Cir., filed Jan. 19, 2021); *California v. EPA*, No. 21-1035 (D.C. Cir., filed Jan. 19, 2021); *New York v. U.S. Department of Energy*, No. 21-107 (2d Cir., filed Jan. 19, 2021); *California v. U.S. Department of Energy*, No. 21-108 (2d Cir., filed Jan. 19, 2021); *California Communities Against Toxics v. EPA*, No. 21-1041 (D.C. Cir., filed Jan. 25, 2021); *American Public Health Association v. EPA*, No. 21-1036 (D.C. Cir., filed Jan. 19, 2021).

- A few days earlier, states and environmental groups filed petitions for review challenging the aircraft greenhouse gas standards adopted by EPA. *California v. EPA*, No. 21-1018 (D.C. Cir., filed Jan. 15, 2021); *Center for Biological Diversity v. EPA*, No. 21-1021 (D.C. Cir., filed Jan. 15, 2021).

- Alliance for Water Efficiency, U.S. Public Interest Research Group, and Environment America filed two petitions for review in the Seventh Circuit Court of Appeals challenging final energy conservation rules adopted by the U.S. Department of Energy in December 2020 for showerheads and for residential clothes washers and consumer clothes dryers. The showerhead rule adopted a revised definition for "showerhead" pursuant to which each showerhead in a product with multiple showerheads is considered separately for purposes of determining compliance with energy conservation standards. The rule also added definitions for "body spray" and "safety shower showerhead" to clarify which products are not subject to the energy conservation standard for showerheads. The washers and dryers rule created new "short cycle" product classes for washers and dryers that take less time for a normal cycle. The current energy conservation standards do not apply to the new product classes. In a press release announcing the lawsuits, a representative for one of the petitioners stated that "it makes absolutely no sense to reverse policies that have successfully lowered our carbon emissions and reduced utility bill costs for Americans." The washers and dryers rule is on the non-exclusive list of rules identified by the Biden administration for review under the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. *Alliance for Water Efficiency v. U.S. Department of Energy*, No. 21-1167 (7th Cir., filed Jan. 27, 2021); *Alliance for Water Efficiency v. U.S. Department of Energy*, No. 21-1166 (7th Cir., filed Jan. 27, 2021).

- Natural Resources Defense Council and Sierra Club filed a petition for review challenging an interim final rule published on January 14, 2021 that provided that a 2016 inflation adjustment to the civil penalty for violations of Corporate Average Fuel Economy standards would not go into effect until model year 2022. The National Highway Traffic Safety Administration adopted the interim final rule in response to an October 2020 rulemaking petition from the Alliance for Automotive Innovation. The Alliance submitted the rulemaking petition after a Second Circuit ruling in August 2020 reinstated the 2016 penalty increase. *Natural Resources Defense Council, Inc. v. National Highway Traffic Safety Administration*, No. 21-0139 (2d Cir., filed Jan. 25, 2021).

EPA Sought to Suspend Lawsuit Challenging Amendments to Air Standards for New Sources in Oil and Gas Sector

On January 15, 2021, EPA filed a brief in defense of its amendments of the new source performance standards for the oil and gas sector. EPA argued that it acted reasonably when it removed transmission and storage sources from the source category and that it also was reasonable to rescind methane standards for oil and gas production and processing sources. On the issue of the rescission of the methane controls, EPA argued that the 2016 methane standards were invalid because they were not supported by a valid "significant contribution finding." On

February 1, EPA moved to hold the cases in abeyance pending review of the rule pursuant to President Biden's Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. *California v. Wheeler*, No. 20-1357 (D.C. Cir. abeyance motion Feb. 1, 2021; respondents' brief Jan. 15, 2021).

Trade Group Challenged Suspension of Federal Oil and Gas Leasing Program

Western Energy Alliance—a trade association that represents companies in the oil and natural exploration and production industry—filed a petition for review in the federal district court for the District of Wyoming challenging the Biden administration's suspension of the federal oil and gas leasing program. The trade association asserted that the suspension was "an unsupported and unnecessary action that is inconsistent with the Secretary[] [of the Interior's] statutory obligations." *Western Energy Alliance v. Biden*, No. 0:21-cv-00013 (D. Wyo., filed Jan. 27, 2021).

Lawsuit Challenged Corps of Engineers Permits for Line 3 Pipeline

On January 21, 2021, a new lawsuit was filed in the federal district court for the District of Columbia challenging permits issued by the U.S. Army Corps of Engineers for Enbridge Energy, LP's Line 3 crude oil pipeline in Minnesota. The plaintiff asserted that the Corps failed to comply with the Clean Water Act, NEPA, Corps regulations, and the Administrative Procedure Act. The complaint's allegations of NEPA noncompliance included that the Corps failed to consider the potential lifecycle greenhouse gas emissions from putting the Line 3 oil pipeline into service and the associated social cost of climate change. In a related case, the court on February 7 denied a motion for a preliminary injunction. *Friends of the Headwaters v. U.S. Army Corps of Engineers*, No. 1:21-cv-00189 (D.D.C., filed Jan. 21, 2021).

Group Sought to Challenge Additional Oil and Gas Lease Sales in New Mexico

Diné Citizens Against Ruining the Environment (Diné CARE) filed an unopposed motion to file a supplemental complaint that would challenge additional oil and gas lease sales in the Greater Chaco region in New Mexico. The proposed supplemental complaint would challenge 42 total parcels covering approximately 45,000 acres. Diné CARE asserted that the U.S. Bureau of Land Management failed to take a hard look at cumulative greenhouse gas emissions and cumulative climate change impacts, failed to take a hard look at health and environmental justice impacts, and should have prepared an environmental impact statement. Diné CARE also asserted a failure to comply with public participation requirements under NEPA and the Federal Land Policy and Management Act. *Diné Citizens Against Ruining the Environment v. U.S. Bureau of Land Management*, No. 1:20-cv-00673 (D.N.M. motion to supplement complaint Jan. 19, 2021).

Plaintiffs Said New Analyses of Columbia River System Dams Still Failed to Adequately Consider Climate Change

National Wildlife Federation and other plaintiffs filed an eighth supplemental complaint in their long-standing suit challenging management of hydroelectric dams on the Columbia and Snake Rivers. The plaintiffs alleged that actions taken by the National Marine Fisheries Service, the

U.S. Army Corps of Engineers, and the U.S. Bureau of Reclamation in 2020 did not cure defects—including climate change-related defects—identified in a 2016 order of remand by the federal district court for the District of Oregon. Among other things, the plaintiffs alleged that a 2020 biological opinion failed to fully assess the impacts of climate change on salmon, and also failed to consider climate change threats to the Southern Resident killer whale. Under NEPA, the plaintiffs alleged that the analysis of alternatives "does not account for the advancing impacts of climate change, and instead is based on temperatures observed in the region between 1929 and 2008" and that the environmental impact statement then addresses climate change separately from this "counterfactual" scenario in an assessment that "is cursory, truncated, and fails to incorporate credible and available information." The alleged shortcomings included consideration of climate impacts over a 25-year timeframe despite the analysis of other impacts over 50 years and failure to assess how climate change will compound harms. *American Rivers v. National Marine Fisheries Service*, No. 3:01-cv-00640 (D. Or. supplemental complaint Jan. 19, 2021).

Lawsuits Challenged NEPA Reviews for Oil and Gas Lease Sales in Colorado, New Mexico, Utah, and Wyoming

On January 19, 2021, WildEarth Guardians and Physicians for Social Responsibility filed a lawsuit in the federal district court for the District of Columbia challenging 890 oil and gas leases covering more than one million acres across Colorado, New Mexico, Utah, and Wyoming. They asserted that the U.S. Bureau of Land Management (BLM) failed to fully analyze the direct, indirect, and cumulative climate change impacts of the leases. The plaintiffs alleged that although BLM had recognized and sought to remedy deficient NEPA reviews for other oil and gas lease sales after the court's 2019 decision concerning Wyoming leases in another case, BLM had not done so with respect to the 19 lease sales challenged in this case. *WildEarth Guardians v. Bernhardt*, No. 1:21-cv-00175 (D.D.C., filed Jan. 19, 2021).

The case in which the federal court in the District of Columbia issued the 2019 decision finding the analysis of climate change impacts of Wyoming oil and gas leases to be inadequate is ongoing and also concerns leases in Colorado and Utah. After the 2019 decision, the court granted BLM's request for voluntary remand to allow BLM to review the Colorado and Utah leases in light of the decision. In November 2020, the court found that BLM had failed to adequately address the Wyoming leases' climate change impacts on remand. On January 26, 2021, the plaintiffs filed an unopposed motion to supplement their complaint to challenge the environmental assessments BLM prepared for the Colorado and Utah leases during the voluntary remand. The plaintiffs alleged that the new EAs "continue to fail to properly analyze the direct, indirect, and cumulative impacts on our climate as required by this Court and NEPA." *WildEarth Guardians v. Bernhardt*, No. 1:16-cv-01724 (D.D.C., filed Jan. 26, 2021).

States and Environmental Groups Alleged Definition of "Habitat" Would Constrain Endangered Species Act Responses to Climate Change

States and New York City filed a lawsuit in the federal district court for the Northern District of California challenging two regulations adopted under the Endangered Species Act in December 2020. The plaintiffs asserted that the first rule, which defines the statutory term "habitat," "fails

to account for species' need to expand their current ranges or to migrate to currently unoccupied habitat in response to existential threats such as climate change and habitat destruction to ensure species recovery and survival as mandated by the [Endangered Species Act]." The plaintiffs asserted that the process established by the second rule, the "Habitat Exclusion Rule," would exclude more areas from critical habitat designation and protection under the Endangered Species Act. The states alleged that the rules violated the Endangered Species Act, NEPA, and the Administrative Procedure Act. *California v. Bernhardt*, No. 4:21-cv-00440 (N.D. Cal., filed Jan. 19, 2021).

Environmental groups filed a separate lawsuit challenging the rule defining "habitat." Their lawsuit, filed in the federal district court for the District of Hawai'i, alleged that the definition "fails to account for the impacts of climate change by giving species only enough habitat to eke out an existence in today's climate, as opposed to protecting the areas they will need to recover and thrive in the long term." The groups contended that the plain language of the Endangered Species Act did not support the exclusion from the "habitat" definition of "currently unoccupied areas that the best available science identifies as essential to species conservation in the future, when imperiled species will need to move to or otherwise utilize new areas in response to climate change." They asserted claims under the Endangered Species Act, NEPA, and the Administrative Procedure Act. *Conservation Council for Hawai'i v. Bernhardt*, No. 1:21-cv-00040 (D. Haw., filed Jan. 14, 2021).

Lawsuit Said Forest Service Failed to Consider Cumulative Climate Change Impacts of Livestock Grazing

Two environmental organizations challenged the U.S. Forest Service's authorization of livestock grazing on 270,000 acres in the Apache-Sitgreaves and Gila National Forests in Arizona and New Mexico. They asserted that the Forest Service violated NEPA by failing to prepare an environmental impact statement for the project, which they alleged would "result in cumulatively significant impacts when considered against the impacts of climate change – those impacts from higher temperature regimes, increased wildfire risk, and prolonged drought that are impending as the climate continues to change, and that are already visibly occurring." They alleged that the environmental assessment failed to take a hard look at how livestock grazing would directly, indirectly, and cumulative impact forest resources and habitats already experiencing the impacts of drought and climate change. *Western Watersheds Project v. Perdue*, No. 4:21-cv-00020 (D. Ariz., filed Jan. 14, 2021).

New York Challenged Summer Flounder Allocation Allegedly Based on "Obsolete" Data

The State of New York and the New York State Department of Environmental Conservation (New York) filed a lawsuit in the federal district court for the Southern District of New York alleging that the federal defendants' rules allocating the annual quota for summer flounder and applying the allocation to the 2021 season were arbitrary, capricious, and not in accordance with law. New York contended that the allocation rules were "based on obsolete 1980s data reflecting a summer flounder fishery that no longer exists" because the "center of biomass of the summer flounder stock as shifted northeast," which researchers believe is due in part to ocean warming. New York asserts that the allocation rules discriminate against New York residents and allocates

fishing privileges in an unfair and inequitable manner and is, for that reason and other reasons, inconsistent with the Magnuson-Stevens Act. *New York v. Ross*, No. 1:21-cv-00304 (S.D.N.Y., filed Jan. 13, 2021).

Lawsuit in Montana Federal Court Challenged NEPA Reviews for 2019 and 2020 Oil and Gas Lease Sales

WildEarth Guardians and four other organizations filed a complaint in the federal district court for the District of Montana asserting that the U.S. Bureau of Land Management's (BLM's) sales of oil and gas leases on public lands in Montana and North Dakota between July 2019 and September 2020 suffered from the same defects that the court identified in a May 2020 decision that vacated 2017 and 2018 leases. In particular, the plaintiffs alleged that BLM failed to adequately consider the lease sales' effects on greenhouse gas emissions and climate and on groundwater and drinking water. *WildEarth Guardians v. U.S. Bureau of Land Management*, No. 4:21-cv-00004 (D. Mont., filed Jan. 12, 2021).

Forest Service Categorical Exclusions Challenged in Virginia Federal Court

A lawsuit filed in the federal district court for the Western District of Virginia challenged three categorical exclusions adopted by the U.S. Forest Service to exempt certain projects from NEPA review. The three categorical exclusions are for commercial logging projects up to 2,800 acres and construction of up to three miles of logging roads; construction of up to two miles of permanent road for any purpose; and "special use" authorizations for private uses affecting up to 20 acres of national forest lands. The complaint asserted that the final rule violated NEPA and the Administrative Procedure Act, including because the Forest Service did not consider the exclusions' impacts in light of conditions that are rapidly changing due to climate change. The complaint also alleged that the final rule would allow significant climate impact to occur without analysis "[b]ecause there is no programmatic analysis of the cumulative impact of successive projects on carbon storage." The plaintiffs contended that the Forest Service should have prepared an environmental impact statement or an environmental assessment to address, among other subjects, the rule's impact on efforts to limit greenhouse gas emissions. *Clinch Coalition v. U.S. Forest Service*, No. 2:21-cv-00003 (W.D. Va., filed Jan. 8, 2021).

Lawsuit Filed to Prevent Minnesota's Adoption of Greenhouse Gas Standards for Vehicles

Minnesota Auto Dealers Association (MADA) filed a lawsuit in federal court in Minnesota to enjoin the Minnesota Pollution Control Agency (MPCA) from establishing greenhouse gas emissions standards for new vehicles and imposing quotas for zero-emission vehicle sales. Citing EPA's withdrawal of California's waiver for greenhouse gas vehicle emission standards and zero emission vehicle mandates and NHTSA's 2019 preemption rule, MADA asserted that federal law expressly preempts MPCA's December 2020 proposal to adopt California vehicle standards beginning with model year 2025. *Minnesota Automobile Dealers Association v. Minnesota*, No. 0:21-cv-00053 (D. Minn., filed Jan. 6, 2021).

Environmental Groups Sought Response on Clean Air Act Petitions for Texas Facilities

Four environmental groups and a Texas resident filed a Clean Air Act citizen suit seeking to compel EPA to respond to petitions requesting that EPA object to Title V permits issued by the Texas Commission on Environmental Quality for eight facilities, including facilities that the plaintiffs allege are major sources of greenhouse gases. The plaintiffs filed the petitions between 2017 and 2020. They asserted that the EPA Administrator had a nondiscretionary duty to grant or deny the petitions. *Environmental Integrity Project v. Wheeler*, No. 1:21-cv-00009 (D.D.C., filed Jan. 4, 2021).

January 13, 2021, Update #142

FEATURED CASE

Ninth Circuit Said NEPA Review for Offshore Drilling Project Should Have Considered Greenhouse Gas Emissions Associated with Foreign Oil Consumption

The Ninth Circuit Court of Appeals vacated the Bureau of Ocean Energy Management's (BOEM) approval of an offshore drilling and production facility off the coast of Alaska in the Beaufort Sea, finding that BOEM failed to comply with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Although the Ninth Circuit disagreed with the petitioner's argument that BOEM's NEPA analyses used different methodologies to calculate the lifecycle greenhouse gas emissions from the project and the no-action alternative, the court agreed that BOEM's alternatives analysis was arbitrary and capricious because it failed to consider greenhouse gas emissions from foreign oil consumption in the analysis of the no-action alternative. The court said BOEM must either quantitatively evaluate such emissions or "thoroughly explain why such an estimate is impossible" and provide "a more thorough discussion of how foreign oil consumption might change" the analysis of greenhouse gas emissions. The Ninth Circuit held that BOEM violated the ESA by relying on nonbinding mitigation measures to conclude the project would not adversely modify polar bear critical habitat and by failing to estimate the project's nonlethal take of polar bears. *Center for Biological Diversity v. Bernhardt,* No. 18-73400 (9th Cir. Dec. 7, 2020).

DECISIONS AND SETTLEMENTS

Supreme Court Agreed to Hear Small Refiners' Appeal in Renewable Fuel Standard Exemption Case

On January 8, 2021, the U.S. Supreme Court granted a petition for writ of certiorari seeking review of a Tenth Circuit Court of Appeals decision that vacated U.S. Environmental Protection Agency (EPA) orders granting three petitions for extensions of small refinery exemptions from renewable fuel standards. The Tenth Circuit agreed with a coalition of renewable fuel producers that EPA exceeded its statutory authority granting extensions when none of the three small refineries had received an initial exemption in the years preceding their petitions for extension. The court also found that EPA improperly relied on hardship caused by factors other than compliance with renewable fuel obligations as a basis for granting the extensions. The petition for writ of certiorari raised the question of whether a small refinery must receive "uninterrupted,

continuous hardship exemptions for every year since 2011" to qualify for a hardship exemption. *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, No. 20-472 (U.S. Jan. 8, 2021).

After Temporarily Blocking Activity on Helium Extraction Project in Southeastern Utah, Federal Court Denied Emergency Injunctive Relief

On December 22, 2020, the federal district court for the District of Columbia issued an order pursuant to the All Writs Act temporarily enjoining any ground-disturbing work undertaken pursuant to the anticipated approval by the U.S. Bureau of Land Management (BLM) of a helium extraction project in an area of the San Rafael Desert in southeastern Utah covered by an oil and gas lease sold in December 2018. The lease area is part of lands subsequently designated as the Labyrinth Canyon Wilderness by the John D. Dingell, Jr. Conservation, Management, and Recreation Act in March 2019. On December 14, four environmental groups filed a lawsuit in the court to block the Secretary of the Interior and other defendants from approving applications for permit to drill under the lease. The environmental groups asserted that BLM, which prepared a "Determination of NEPA Adequacy" to support sale and issuance of the lease, failed to analyze the direct, indirect, and cumulative climate change impacts of greenhouse gas emissions associated with the leasing decision. They alleged that BLM was "poised to approve" the helium drilling project despite not having finalized the "curative" NEPA analysis it had undertaken in response to the district court's March 2019 decision in *WildEarth Guardians v. Zinke*, where the court held that BLM failed to adequately analyze greenhouse gas emissions and climate change impacts of oil and gas leases in Wyoming. The plaintiffs alleged that BLM recognized, based on *WildEarth Guardians v. Zinke*, that it had violated NEPA in connection with "hundreds of oil and gas leases" in Utah, including the lease at issue in this case. The plaintiffs also asserted that BLM violated NEPA and the Administrative Procedure Act when the Trump administration reversed course on the Obama administration's plan to complete a master leasing plan for the San Rafael Desert prior to authorizing new mineral development. After BLM issued approval documents on December 23 deferring approval on the federal lease and approving rights-of-way for work related to two nearby non-federal leases, the environmental groups filed an amended and supplemented complaint and a renewed motion for a temporary restraining order and preliminary injunction. On January 12, the court denied the renewed motion, finding that the plaintiffs failed to demonstrate a likelihood of success on the merits of their argument that BLM failed to analyze cumulative effects on water consumption when it approved the rights-of-way. *Southern Utah Wilderness Alliance v. Bernhardt*, No. 1:20-cv-03654 (D.D.C., filed Dec. 14, 2020 and TRO order Dec. 22, 2020).

Federal Court Rejected Claims that Climate Change-Related Developments Necessitated Supplemental NEPA Review for Forest Plan and Projects

The federal district court for the District of Montana dismissed a lawsuit that sought to compel the U.S. Forest Service to supplement the 1987 forest plan for the Custer Gallatin National Forest and for three projects authorized under the forest plan. The court rejected arguments that new climate change research and a decision to revise the 1987 forest plan to address climate change triggered supplementation requirements under NEPA. *Cottonwood Environmental Law Center v. Marten*, No. 2:20-cv-00031 (D. Mont. Dec. 17, 2020).

Maine Federal Court Declined to Enjoin Work on Electric Transmission Project

The federal district court for the District of Maine declined to issue a preliminary injunction barring construction of the New England Clean Energy Connect (NECEC), an electricity transmission project to connect the New England energy grid with non-fossil fuel sources of electric power. The court found that plaintiffs had not demonstrated they were likely to prevail on their arguments that the U.S. Army Corps of Engineers violated NEPA and failed to take concerns about impacts on waters of the United States into account. The court further found that the equitable interests of the NECEC developer undermined the plaintiff's request for preliminary relief and that the public interest was "not monolithic," given the asserted benefits of the NECEC project, including reducing rates, improving reliability, and reducing regional greenhouse gas emissions. *Sierra Club v. U.S. Army Corps of Engineers*, No. 2:20-cv-00396 (D. Me. Dec. 16, 2020).

Federal Court Ordered FOIA Production of CEQ Records Related to NEPA Rulemaking

In a Freedom of Information Act lawsuit filed by Southern Environmental Law Center in 2018, the federal district court for the Western District of Virginia ordered the Council on Environmental Quality (CEQ) to produce unredacted versions of a number of records related to CEQ's advance notice of proposed rulemaking (ANPRM) for amendments to the NEPA regulations. The court concluded that CEQ had not demonstrated it would suffer "a reasonably foreseeable harm" from unredacted production. The records included spreadsheets tracking and analyzing comments, draft ANPRM fact sheets, meeting agendas, and emails and meeting invitations regarding CEQ's process for managing comments. *Southern Environmental Law Center v. Center for Environmental Quality*, No. 3:18-cv-00113 (W.D. Va. Dec. 14, 2020).

Federal Court Upheld Climate Change Analysis for Utah Oil and Gas Leases, Remanded for Additional Consideration of Alternatives

The federal district court for the District of Utah rejected claims that BLM did not adequately consider greenhouse gas emissions and climate change impacts, including cumulative impacts, from oil and gas development associated with 59 leases in the Uinta Basin. Noting that "[a]n agency is not required to engage in analyses, including cumulative impact, if they are 'too speculative or hypothetical to meaningfully contribute to NEPA's goals of public disclosure and informed decisionmaking,'" the court found that EPA had taken "an appropriately hard look" at cumulative greenhouse gas and climate impacts by identifying impacts of its leasing decision, including a quantitative assessment of greenhouse gases from the decision, and "generally identif[ying] the broad global context within which this decision fits." The court also found that BLM did not violate NEPA by deferring analysis of site-specific greenhouse gas emissions from well development and operation. The court further concluded, however, that BLM failed to properly document and potentially failed to perform an analysis of reasonable alternatives. The court—which also found that BLM complied with the Federal Land Policy and Management Act—remanded to BLM for further consideration of alternatives but did not vacate the issued leases. *Rocky Mountain Wild v. Bernhardt*, No. 2:19-cv-00929 (D. Utah Dec. 10, 2020).

NEW CASES, MOTIONS, AND NOTICES

Supreme Court to Hear Arguments on Scope of Appellate Review of Remand Orders in Baltimore Case; New Certiorari Petitions Filed in Three Other Cases

The U.S. Supreme Court is scheduled to hear oral argument on January 19, 2021 in fossil fuel companies' appeal of a Fourth Circuit Court of Appeals decision affirming an order remanding to state court the City of Baltimore's climate change case against the companies. On January 8, the Court granted the Acting Solicitor General's motion for leave to participate in oral argument as amicus curiae in support of the companies. The companies identified the question for review as whether the statutory provision prescribing the scope of appellate review of remand orders "permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443." In its brief filed on December 16, Baltimore defined the question as whether the statutory provision "entitles a defendant, by including a meritless federal-officer or civil-rights ground for federal jurisdiction in a removal petition, to appellate review of every ground for removal rejected by the district court's remand order." The district court rejected eight grounds for removal, but the Fourth Circuit concluded its appellate jurisdiction was limited to determining whether the companies properly removed the case under the federal-officer removal statute. In December, six amicus briefs were filed in support of Baltimore—by state and local government groups, environmental groups, six senators, law professors who teach and write on civil procedure and the federal courts, 19 states and the District of Columbia, and Boulder County, San Miguel County, and the City of Boulder in Colorado. *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.).

In December 2020, three additional petitions for writ of certiorari were filed by fossil fuel companies seeking review of decisions affirming remand orders in cases brought by the County of San Mateo and other California local governments, by Rhode Island, and by the City of Boulder and Boulder and San Miguel Counties in Colorado. The companies requested that these petitions be held pending the outcome of the Baltimore case since the petitions raise the same jurisdictional issue. *Chevron Corp. v. County of San Mateo*, No. 20-884 (U.S. Dec. 30, 2020); *Shell Oil Products Co. v. Rhode Island*, No. 20-900 (U.S. Dec. 30, 2020); *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 20-783 (U.S. Dec. 4, 2020).

Developments in other climate change cases brought by state and local governments against fossil fuel companies include:

- Delaware filed a brief in support of its motion to remand its lawsuit to state court. *Delaware v. BP America Inc.*, No. 1:20-cv-01429 (D. Del. Jan. 5, 2021).
- The federal district court for the District of Minnesota scheduled a hearing on Minnesota's remand motion for January 13, 2021. *Minnesota v. American Petroleum Institute*, No. 20-cv-1636 (D. Minn.).

- The federal district court for the Northern District of California held a case management conference in *City of Oakland v. BP p.l.c.* on December 16, 2020 at which the parties agreed to the court's proposal that the parties brief Oakland and San Francisco's renewed motion to remand and motion to amend the complaint to remove federal common law claims, with the renewed motion to remand due by January 28, 2021. The court indicated that after briefing on the remand motion is complete, it will consider whether to defer its ruling on the motion pending the Supreme Court's decision in the Baltimore case. Personal jurisdiction issues would be briefed after the court's decision on the remand motion. *City of Oakland v. BP p.l.c.*, No. 3:17-cv-6012 (N.D. Cal.).
- The City of Hoboken filed a memorandum of law in support of its motion to remand. *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J. Dec. 11, 2020).
- The fossil fuel companies filed their opposition to the County of Maui's motion to remand. *County of Maui v. Sunoco LP*, No. 1:20-cv-00470 (D. Haw. Dec. 23, 2020).

Groups Challenged "Circumventing" of Efficiency Standards for Dishwashers

Natural Resources Defense Council (NRDC), Sierra Club, Consumer Federation of America, and Massachusetts Union of Public Housing Tenants filed a petition for review in the Second Circuit Court of Appeals to challenge the U.S. Department of Energy rule establishing a new product class for residential dishwashers. In a press release, NRDC said the rule was "circumventing longtime energy and water efficiency standards for dishwashers by needlessly creating a new category exempt from any energy-saving requirements, potentially leading to higher household utility bills and more pollution." *Natural Resources Defense Council, Inc. v. U.S. Department of Energy*, No. 20-4256 (2d Cir., filed Dec. 29, 2020).

Lawsuits Challenged Federal and State Authorizations for, and Sought to Halt Work on, Line 3 Pipeline Project in Minnesota

The Red Lake Band of Chippewa Indians, the White Earth Band of Ojibwe, Honor the Earth, and Sierra Club filed a lawsuit in the federal district court for the District of Columbia challenging a U.S. Army Corps of Engineers permit for the Enbridge Energy Line 3 pipeline replacement project in Minnesota. The plaintiffs—which asserted that approval of the permit violated NEPA, the Clean Water Act, and the Rivers and Harbors Act, Corps regulations and the Administrative Procedure Act—also filed a motion for a preliminary injunction. The plaintiffs alleged that the pipeline project would almost double the pipeline's capacity and that the project would facilitate increased extraction and use of Canadian tar sands oil, resulting in "significant damage, estimated in the hundreds of billions of dollars, due to its contribution climate change." In their claims under NEPA, the plaintiffs alleged that the Corps failed to quantify and evaluate "cumulative and incremental effects of climate change, including the potential for increased lifecycle greenhouse gas emissions and their associated costs, resulting from the approval of the Project and connected actions." *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers*, No. 1:20-cv-03817 (D.D.C., filed Dec. 24, 2020).

The same parties have also filed a petition in the Minnesota Court of Appeals challenging the decisions by the Minnesota Public Utilities Commission authorizing the Line 3 project. Issues to

be raised in this proceeding include the petitioners' contention that the PUC "decided to entirely disregard most of the climate change impacts of the Project," contrary to its obligations to consider effects on Minnesota's natural and socioeconomic environment and to consider climate change's economic and environmental costs on people within Minnesota, "including the Anishinaabe peoples who claim a right to continue to live on their lands in accordance with their beliefs and culture, which is their human and legal right to do." On December 29, 2020, the tribes filed a motion for a stay pending appeal. An environmental group, Friends of the Headwaters, filed a separate stay motion. *Friends of the Headwaters v. Minnesota Public Utilities Commission (In re Enbridge Energy, LP)*, No. A20-1071 (Minn. Ct. App. Dec. 30, 2020); *Red Lake Band of Chippewa Indians v. Minnesota Public Utilities Commission (In re Enbridge Energy, LP)*, No. A20-1072 (Minn. Ct. App. Dec. 29, 2020).

Lawsuit Challenged Roadless Rule Exemption for Tongass National Forest

A lawsuit filed in the federal district court for the District of Alaska challenged a final rule exempting the Tongass National Forest (Tongass) from the Roadless Area Conservation Rule. The complaint alleged that the Tongass is "[a] major carbon sink" and "a critical defense against climate change," and that the exemption "puts all of this at risk." The complaint asserted that the U.S. Forest Service and other defendants violated NEPA, the Administrative Procedure Act, the National Forest Management Act, the Organic Administration Act (which established most national forests), and the Alaska National Interest Lands Conservation Act. *Organized Village of Kake v. Perdue*, No. 1:20-cv-00011 (D. Alaska, filed Dec. 23, 2020).

Second Lawsuit Filed Challenging "Massive" Oil and Gas Development Project in Alaska

Three environmental groups filed a lawsuit in the federal district court for the District of Alaska challenging BLM's approval of the Willow Master Development Plan, which the plaintiffs alleged is a "massive oil and gas development project in the National Petroleum Reserve-Alaska" that poses "a threat to the global climate and an already dramatically warming Arctic region." (Six other organizations previously filed a lawsuit challenging the development plan.) The three groups also filed a motion for a preliminary injunction. The complaint asserted claims under NEPA, the Endangered Species Act, and the Administrative Procedure Act. Under NEPA, the plaintiffs alleged, among other shortcomings, that BLM failed "to fully consider and accurately describe the magnitude and significance of greenhouse gas emissions" from the project, including by excluding foreign oil consumption from the market simulation model it used to estimate net greenhouse gas emissions from the project. The plaintiffs contended that BLM failed to disclose and analyze the effects of the project's emissions and the significance of those emissions, ignoring "available science and well-established methods for assessing the effects of the Project's greenhouse gas emissions," and "misleadingly" compared the project's emissions with total U.S. emissions. Under the Endangered Species Act, the plaintiffs alleged that the Fish and Wildlife Service's conclusion that death or serious injury to polar bears was not likely to occur was not based on best available science and failed to consider relevant factors, including the increasing proportion of polar bears that den on land due to diminishing sea ice. *Center for Biological Diversity v. Bureau of Land Management*, No. 3:20-cv-00308 (D. Alaska, filed Dec. 21, 2020).

Department of Energy Sought to Dismiss Lawsuit Challenging Its Management of National Coal Council

The U.S. Department of Energy (DOE) moved to dismiss a lawsuit filed by Western Organization of Resource Councils in October challenging DOE's administration of the National Coal Council (NCC), which the complaint described as "a body designed to debate and recommend federal policies related to the production and consumption of American coal." The complaint alleged that DOE had not complied with obligations under the Federal Advisory Committee Act because it had failed to open NCC meetings to the public and to release NCC materials. The complaint further alleged that NCC's "current focus on coal production at the expense of all other considerations for American energy policy is evident in the NCC's recent work product," including an exclusive focus on "expanding the use of and financial support for coal, without any commensurate attempt to lower emissions." The plaintiff contended that "[a]s the NCC's balance and vision has changed, its capacity to contextualize the coal industry's interests within other public policy considerations for the federal government—such as global climate change and public and private land conservation—has all but evaporated." In its motion to dismiss, DOE argued that the plaintiff did not have standing for claims with respect to the full NCC and that the plaintiff failed to state viable claims with respect to NCC subcommittees. *Western Organization of Resource Councils v. Brouillette*, No. 4:20-cv-00098 (D. Mont. Dec. 21, 2020).

Environmental Groups Challenged Oil Well and Pipeline in Carrizo Plain National Monument

Center for Biological Diversity and Los Padres ForestWatch filed a lawsuit challenging BLM's approval of an application for a permit to drill in connection with a new well and pipeline within the Carrizo Plain National Monument. The plaintiffs alleged that the project was the first oil well and pipeline approved within the monument since its establishment in 2001. The plaintiffs asserted claims under the Federal Land Policy and Management Act (FLPMA), NEPA, and the Administrative Procedure Act. Claims under NEPA included that BLM failed to adequately consider the project's climate change impacts by "downplaying" its greenhouse gas emissions and "failing to consider the significance of the emissions as direct, indirect, and cumulative impacts." The plaintiffs also contended that the failure to adequately evaluate the project's climate change impacts violated BLM's resource management plan for the monument and therefore the FLPMA. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 2:20-cv-11334 (C.D. Cal., filed Dec. 15, 2020).

Organizations Cited Potential Flooding and Greenhouse Gas Emission Impacts in Challenge to Road Project in City of Erie

Two organizations—the National Association for the Advancement of Colored People Erie Unit 2262 and Citizens for Pennsylvania's Future—filed a lawsuit challenging the Federal Highway Administration's approval of a categorical exclusion for the Bayfront Parkway Project in Erie, Pennsylvania, a project that the plaintiffs alleged "prioritizes vehicles over pedestrians and cyclists" and "also ignored potential impacts to water quality, flooding, aesthetics, climate change, and the communities living closest to the Bayfront Parkway." The complaint asserted

that approval of the categorical exclusion under NEPA was arbitrary and capricious, including because the Pennsylvania Department of Transportation failed to examine potentially significant impacts, including increased flooding from Lake Erie due to climate change and the project's plan "to increase impervious surfaces and permanently destroy wetlands" and lower part of the Bayfront Parkway; impacts on vehicle miles traveled and greenhouse gas emissions; and disproportionate climate change impacts on communities of color and low-income communities. In addition to their NEPA claims, the plaintiffs also asserted claims under the Federal Aid Highway Act and Administrative Procedure Act. *National Association for the Advancement of Colored People Erie Unit 2262 v. Federal Highway Administration*, No. 20-cv-362 (W.D. Pa., filed Dec. 15, 2020).

NEPA Lawsuit Alleged Failure to Consider Climate Change in Environmental Review for Projects at Air National Guard Facility

A nonprofit organization challenged the environmental review for construction and demolition projects at the Wisconsin Air National Guard's 115th Fighter Wing Installation at a regional airport in Madison. The plaintiff asserted that the National Guard Bureau violated NEPA by preparing an environmental assessment instead of an environmental impact statement and by issuing a finding of no significant impact. Among the NEPA violations alleged in the complaint was a failure to adequately consider climate change, including by minimizing the project's greenhouse gas emissions and by failing to consider climate change effects on soil and groundwater emissions of per- and polyfluoroalkyl substances. *Safe Skies Clean Water Wisconsin, Inc. v. National Guard Bureau*, No. 3:20-cv-01086 (W.D. Wis., filed Dec. 7, 2020).

Lawsuit Challenged Land Exchange for Expansion of Gypsum Stacks

The Shoshone-Bannock Tribes filed a lawsuit in federal court in Idaho challenging the U.S. Department of Interior's approval of a land exchange to facilitate expansion of phosphogypsum stacks located on a Superfund site adjacent to the Fort Hall Reservation. The Tribes alleged that the environmental impact statement failed to satisfy NEPA requirements, including by failing to adequately evaluate air quality and climate change impacts. The Tribes also asserted violations of the FLPMA, the Administrative Procedure Act, the Act of June 6, 1900 (which the Tribes alleged reaffirmed off-reservation treaty rights), the Fort Bridger Treaty of 1868, and the U.S.'s trust responsibility. *Shoshone-Bannock Tribes of Fort Hall Reservation v. Hammond*, No. 4:20-cv-00553 (D. Idaho, filed Dec. 5, 2020).

New Lawsuit Challenging Keystone XL Project Cited Continuing Failure to Fully Assess Climate Impacts

A new lawsuit filed in the federal district court for the District of Montana challenged federal authorizations for the Keystone XL Pipeline Project, alleging that the federal defendants "are still attempting to resurrect and construct" Keystone despite the project's "continuing illegality and profound environmental impacts, particularly its exacerbation of the global warming crisis." The complaint asserted claims under NEPA, the Endangered Species Act, the Administrative Procedure Act, the Mineral Leasing Act, and the Federal Land Policy Management Act. The acts challenged included the U.S. Army Corps of Engineers' adoption of a finding of no significant

impact in conjunction with approval of reissuance of Nationwide Permit 12 under the Clean Water Act; President Trump's claim that Executive Order 13,867 retroactively validated the "unilaterally and unconstitutionally approved" 2019 presidential permit; the 2019 final supplemental environmental impact statement (FSEIS) issued by the U.S. Department of State; the U.S. Fish and Wildlife Service's reliance on an inadequate Biological Assessment; and BLM's issuance of a record of decision approving a right-of-way and temporary use permit based on the inadequate 2019 FSEIS. With respect to climate change, the complaint alleged that the 2019 FSEIS did not take a hard look at the project's greenhouse gas and climate change emissions, including the "cumulative worsening" of the project's annual greenhouse gas emissions. It asserted that the complaint "also impermissibly downplays the likely impacts that climate change will have on the Project, should it be built," including impacts of severe weather on its operation and risk that the project could become a "stranded asset as climate change undermines and ultimately eliminates the market for Canadian tar sands altogether." *Indigenous Environmental Network v. U.S. Bureau of Land Management*, No. 4:20-cv-00115 (D. Mont., filed Dec. 4, 2020).

December 7, 2020, Update #141

FEATURED CASE

Federal Court Found Flaws in New Climate Change Analysis for Wyoming Oil and Gas Leases

The federal district court for the District of Columbia ruled that the U.S. Bureau of Land Management (BLM) failed to adequately consider the climate change impacts of oil and gas leasing in Wyoming in accordance with the court's March 2019 opinion that identified shortcomings in BLM's original analysis under the National Environmental Policy Act. First, the court found that BLM's cumulative impacts analysis was still inadequate because BLM's supplemental environmental assessment (EA) did not adequately explain and failed to consistently apply a standard for determining what lease sales were reasonably foreseeable at the regional and national level. Second, the court concluded that BLM should have calculated and considered total greenhouse emissions, instead of merely relying on comparisons of yearly emission rates. Third, the court found that BLM used internally inconsistent emission rates. Fourth, the court found that BLM failed to engage in reasoned decision-making regarding whether to conduct a carbon budget analysis. Finally, the court rejected BLM's argument that errors that the plaintiffs identified in the supplemental EA were "flyspecks"; the court indicated that "[w]hile each error in isolation may be merely a flyspeck, when considered together, the errors do raise concerns." The court did not, however, accept the plaintiffs' argument that uncertainty about forecasting greenhouse gas emission levels was a factor that would on its own require an environmental impact statement. The court also declined to vacate BLM's leasing decisions and instead enjoined BLM from issuing drilling permits for the leases while it responds to the court's decision. *WildEarth Guardians v. Bernhardt*, No. 1:16-cv-01724 (D.D.C. Nov. 13, 2020).

DECISIONS AND SETTLEMENTS

Trade Groups Proceeding with Narrower Challenge to 2016 Refrigerant Management Rule; NRDC and States Challenge 2020 Rescission of Portion of Rule

The D.C. Circuit granted a joint motion by two trade associations for voluntary dismissal of their lawsuits challenging 2016 updates to refrigerant management requirements under Section 608 of the Clean Air Act. At the U.S. Environmental Protection Agency's (EPA's) request, the D.C. Circuit held the proceedings challenging the 2016 rule in abeyance beginning in August 2018 while EPA considered changes to portions of the rule. In March 2020, EPA published a final rule rescinding part of the 2016 updates that extended appliance maintenance and leak detection requirements to appliances containing 50 pounds or more of certain "non-exempt" substitute refrigerants, including hydrofluorocarbons. The D.C. Circuit previously consolidated challenges to the 2020 rule with the trade associations' challenges to the 2016 updates and also established a new docket for consideration of four issues that the two trade associations have raised in administrative petitions for reconsideration of the 2020 rule. The D.C. Circuit held this new proceeding in abeyance. Briefing in the challenges to the 2020 rule began in October, with state and municipal petitioners and Natural Resources Defense Council filing a joint brief arguing that the rescission of the appliance repair and leak detection requirements rested on an erroneous legal interpretation and that EPA acted arbitrarily and unreasonably by applying Section 608 inconsistently and disregarding prior findings. EPA's brief is due December 15. *National Environmental Development Association's Clean Air Project v. EPA*, No. 17-1016 (D.C. Cir. Nov. 30, 2020).

Fourth Circuit Vacated Denial of Small Refinery Exemption

The Fourth Circuit Court of Appeals again vacated a denial by EPA of a company's request for a small refinery exemption from requirements of the renewable fuel standard program. In 2018, the court vacated EPA's earlier denial of the request. In its November 17 opinion, the Fourth Circuit found that on remand from the 2018 decision EPA had addressed most of the deficiencies but that supplemental materials from another case called into question EPA assertions about the criteria the Department of Energy and EPA used to support denial. *Ergon-West Virginia, Inc. v. EPA*, No. 19-2128 (4th Cir. Nov. 17, 2020).

Ninth Circuit Rejected Claim That CEQA Applied to Taxi Rules for Airport Pickups

The Ninth Circuit Court of Appeals affirmed a district court judgment rejecting challenges to San Francisco regulations that dictated which taxi medallion holders could pick up passengers at San Francisco International Airport. Like the district court, the Ninth Circuit rejected an argument that the regulations were a "project" subject to the California Environmental Quality Act (CEQA) because the rules could impact the environment by increasing "deadhead" trips to and from the airport. The Ninth Circuit found that the complaint "has not plausibly alleged that the 2018 Regulations increase the number of taxis in circulation or authorize more fares." *San Francisco Taxi Coalition v. City & County of San Francisco*, No. 19-16439 (9th Cir. Nov. 9, 2020).

Baltimore and Incinerator Operator Settled Lawsuit over Local Air Law

The City of Baltimore and the operator of a commercial waste-to-energy facility reached a settlement that resolved a case challenging the Baltimore Clean Air Act, a 2019 ordinance that set emission limits for incinerators, including stricter emission limits than required by the facility's Title V permit for a number of pollutants as well as emission limits for pollutants not covered by the permit, including carbon dioxide. The case was currently pending before the Fourth Circuit after a federal district court in Maryland held that Maryland law preempted the local law. The settlement agreement requires the operator to invest in emissions control upgrades that meet or exceed the limits set by the local ordinance for some pollutants; the settlement does not establish limits on carbon dioxide emissions. *Wheelabrator Baltimore, L.P. v. Mayor & City Council of Baltimore*, No. 20-1473 (4th Cir. Nov. 4, 2020).

Second Circuit Agreed Brooklyn Man Had No Standing for Constitutional Claims Based on Community College's Refusal to Distribute Paper on Climate Change "Hoax"

In an unpublished summary order, the Second Circuit Court of Appeals affirmed dismissal of a lawsuit brought by a Brooklyn man, proceeding pro se, who alleged that the president of a community college violated the plaintiff's First Amendment rights by failing to require the distribution of the plaintiff's position paper explaining "why the political movement to reduce the use of fossil fuels is a malicious hoax" to students taking a climatology course. The Second Circuit agreed with the district court that the plaintiff lacked standing because he failed to allege an injury in fact since he "never explained why he had any legal right to have the document distributed." *Roemer v. Williams*, No. 20-127 (2d Cir. Nov. 2, 2020).

Federal Court in Washington Upheld Forest Restoration Plan

The federal district court for the Eastern District of Washington upheld the U.S. Forest Service's approval of the Mission Restoration Project, a plan whose aims were described as restoration of approximately 50,200 in the Methow Valley in Washington "to be more resilient to wildfire and climate change." The court found that the project was consistent with the Standards and Guidelines of the Okanogan National Forest Land and Resource Management Plan and Final Environmental Impact Statement and that the Forest Service complied with the National Environmental Policy Act and the Endangered Species Act. *Alliance for the Wild Rockies v. U.S. Forest Service*, No. 2:19-cv-00350 (E.D. Wash. Dec. 1, 2020).

Federal Court Said NOAA Justified Redaction of Communications Between Climate Scientist and White House During Obama Administration

The federal district court for the District of Columbia upheld the National Oceanic and Atmospheric Administration's (NOAA's) redaction of certain communications between a NOAA climate scientist and the director of the White House Office of Science and Technology Policy (OSTP) from January 20, 2009, through January 20, 2017. The court concluded that the Freedom of Information Act's deliberative process privilege shielded the redactions from disclosure. The redacted material fell into four categories: draft analysis of lab work, discussions with OSTP about scientific interpretation and impacts of environmental data sets, discussions with OSTP about a draft memorandum analyzing a Cato Institute memorandum or a *Wall Street Journal* article, and communications about the content and presentation of press releases and

talking points. The court found that a *Vaughn* index and declaration were sufficient to demonstrate that the redacted material was predecisional and deliberative. The court further found that NOAA satisfied the "foreseeable harm" standard of the FOIA Improvement Act with explanations of why disclosure of the information would endanger "frank discussions between subordinates and superiors" and potentially create "public confusion." The court was not persuaded by the plaintiff's argument that NOAA's real reason for withholding the information was fear of "agency embarrassment" and "painting the agency in a negative light." *Judicial Watch, Inc. v. U.S. Department of Commerce*, No. 17-cv-1283 (D.D.C. Nov. 25, 2020).

Federal Court Vacated Permits for Methanol Refinery and Export Terminal, Citing Failure to Consider Indirect Cumulative Greenhouse Gas Impacts

The federal district court for the Western District of Washington vacated U.S. Army Corps of Engineer permits for construction of a portion of a proposed methanol refinery and export terminal in Washington (the Kalama Project). The court found that the Corps' failure to consider "reasonable foreseeable" greenhouse gas emissions outside Washington and part of Oregon was arbitrary and capricious because the Corps should have considered indirect cumulative effects such as increased fracking and related emissions as well as emissions from shipping methanol and producing olefins (using methanol) in other parts of the world. The court also held that the Corps violated NEPA by not considering the need to expand the regional gas pipeline system as a cumulative indirect effect of the project. The further found that the failure to prepare an environmental impact statement violated NEPA. In addition, the court found that the Corps did not correctly conduct a public interest assessment under the Clean Water Act and Rivers and Harbors Act because it failed to properly consider the project's full cumulative impacts and "arbitrarily and capriciously relied on benefits of the Project in worldwide reduction of greenhouse gases [due to reduced use of coal to produce methanol] without conducting an assessment of the detriments worldwide." The court denied a claim under the Endangered Species Act. *Columbia Riverkeeper v. U.S. Army Corps of Engineers*, No. 3:19-cv-06071 (W.D. Wash. Nov. 23, 2020).

Steel Mill Owner Dropped Suit Challenging Pipeline over Property

A steel mill owner agreed to dismiss with prejudice its claims that the U.S. Army Corps of Engineers violated the National Environmental Policy Act, the Clean Water Act, the Endangered Species Act, and the Administrative Procedure Act when it reauthorized and reissued Nationwide Permit 12 (NWP-12) and approved a gas pipeline over the plaintiff's property under NWP-12. The complaint's allegations included that the Corps failed to analyze NWP-12's climate change impacts. In October, the federal district court for the Eastern District of Texas denied the plaintiff's request for a preliminary injunction. *Optimus Steel, LLC v. U.S. Army Corps of Engineers*, No. 1:20-cv-00374 (E.D. Tex. Nov. 20, 2020).

Oklahoma Federal Court Allowed Landowner to Proceed with NEPA Challenge of Osage Nation Oil and Gas Leases

The federal district court for the Northern District of Oklahoma denied non-federal defendants' motion to dismiss a landowner's lawsuit claiming that the U.S. Bureau of Indian Affairs failed to

comply with the National Environmental Policy Act (NEPA) when it approved oil and gas leases and drilling permits that affected his property. The Osage Nation controlled the land's mineral rights. The court concluded that in "equity and good conscience" the lawsuit should proceed even though the Osage Minerals Council was a necessary party that could not be joined due to its sovereign status. The court also found that the landowner had standing since he alleged several ways in which his property, which was the site of the agency action, could be harmed by the challenged leases and drilling permits, including by further contribution to climate change. *Hayes v. Bernhardt*, No. 4:16-cv-00615 (N.D. Okla. Nov. 2, 2020).

Federal Court Approved Voluntary Remand of Decisions on Oil and Gas Leases for Additional NEPA Review

The federal district court for the District of Columbia granted BLM's and federal officials' motion for voluntary remand without vacatur of claims that they failed to comply with NEPA in connection with 27 oil and gas leasing decisions across Colorado, Utah, Wyoming, New Mexico, and Montana between September 2016 and March 2019. BLM approved these leases prior to the court's decision in March 2019 (also noted in the Feature Case, above) finding that BLM's analysis of the climate change impacts of certain other oil and gas leases in Wyoming was insufficient. The federal defendants in the instant case said they had concluded that further analysis under NEPA was appropriate for all but three of the leasing decisions. The plaintiffs did not object to remand, but they urged the court to remand with vacatur. The court rejected this option, saying that it had not basis for vacatur since it had not reviewed the underlying environmental assessments and related decision documents underlying the leasing decisions. The court also noted that the plaintiffs had not filed a motion for preliminary injunction. *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056 (D.D.C. Oct. 23, 2020).

California Appellate Court Dismissed Appeal Concerning Greenhouse Gas Analysis for Logistics Campus After City Completed New Review

After the City of Moreno (City) completed a revised environmental impact report (EIR) for a proposed "logistics campus," the California Court of Appeal dismissed as moot an appeal that concerned whether the City properly relied on California's cap-and-trade program when it considered the project's impacts on greenhouse gas emissions under the California Environmental Quality Act (CEQA). The trial court concluded that the City's reasoning that greenhouse gas emissions subject to cap-and-trade requirements did not count against the significance threshold did not violate CEQA. Prior to the City's issuance of the revised EIR, the Court of Appeal issued a tentative decision finding that the original EIR's analysis of greenhouse gas emissions did violate CEQA. The revised EIR did not consider the cap-and-trade program and instead required that the project's greenhouse gas emissions be mitigated to "net zero." The Court of Appeal found that the petitioners failed to point to evidence that the revised EIR continued to rely on the cap-and-trade program. The Court of Appeal also found that neither the "continuing public interest" nor the "recurrence of the controversy" exceptions to mootness applied. *Paulek v. City of Moreno Valley*, No. E071184 (Cal. Ct. App. Nov. 24, 2020).

Washington Appellate Court Upheld Convictions of Activist Who Presented Necessity Defense

The Washington Court of Appeals affirmed a guilty verdict against a climate activist who cut a chain to enter a pipeline facility and attempted to cut a bolt that secured a shutoff valve on the pipeline, which carried tar sands oil from Canada. The activist relied on a necessity defense based on the "dire consequences of climate change"; he testified on his own behalf and also introduced testimony of climate, public policy, and civil disobedience experts. The jury found him guilty on counts of second-degree burglary, attempted criminal sabotage, and malicious mischief. On his appeal of the attempted criminal sabotage and malicious mischief convictions, the Court of Appeals rejected his argument that he had been deprived of his right to unanimous jury. The court said the State did not have to elect whether to rely for a conviction on the cutting of the chain or on the attempt to cut the bolt because the two acts constituted a "continuing course of conduct." The appellate court also found that even if the trial court erred, the error was harmless because the State proved both acts beyond a reasonable doubt. *State v. Zepeda*, No. 80593-2-I (Wash. Ct. App. Nov. 16, 2020).

Hawaii Court Ruled that Commercial Aquarium Fishing Required Environmental Review

A Hawaii court held that the Hawai'i Environmental Policy Act requires environmental review for commercial taking of aquarium fish and that Department of Land and Natural Resources issuance and renewal of licenses for commercial aquarium collection without environmental review was invalid and illegal. The court rejected DLNR's argument that a 2017 Hawaii Supreme Court decision requiring environmental review for aquarium fishing only applied to fishing with fine-meshed nets. The court's decision indicated that "[a]s far as the court is aware, no environmental review for the commercial taking of aquarium fish has been accepted," noting that a proposed environmental impact statement had been rejected in May 2020 for a number of reasons, including inadequate discussion of the "extreme threat" climate change poses to reefs. *Kaupiko v. Department of Land & Natural Resources*, No. 1CCV-20-0000125 (Haw. Cir. Ct. Nov. 27, 2020).

NEW CASES, MOTIONS, AND NOTICES

GM, Nissan Withdrew from Defense of Rule Preempting State Low-Carbon Vehicle Standards

On November 25, 2020, the Coalition for Sustainable Automotive Regulation—which intervened as a respondent in proceedings challenging the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program—filed an amended disclosure in the D.C. Circuit to reflect that General Motors LLC (GM) was no longer a member. The Coalition intervened to defend the rulemaking in which the National Highway Traffic Safety Administration preempted state vehicle greenhouse gas emission standards and zero emission vehicle mandates and EPA withdrew California's waiver for such regulations. Briefing in the case was completed in October. On November 23, GM announced that it was withdrawing from the litigation. On December 4, the Coalition filed another amended disclosure that indicated Nissan was no longer a member of the Automotive Regulatory Council, which is a member of the Coalition. Nissan announced that day that it would work with California and the federal government to establish

"common-sense" national standards. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, No. 19-1230 (D.C. Cir. Nov. 25, 2020).

Petitioners Sought Stay of EPA's Relaxation of Leak Detection and Repair Requirements for Oil and Gas Sector

Petitioners challenging EPA's amendment of leak detection and repair standards in the oil and gas sector asked the D.C. Circuit to stay portions of the amendments, which were scheduled to take effect on November 16. The petitioners asked the court to stay (1) a reduction in leak monitoring frequency for compressor stations and (2) an exemption from leak mitigation requirements for low production wells. Responses to the motion are due December 11. *Environmental Defense Fund v. Wheeler*, No. 20-1360 (D.C. Cir. Nov. 13, 2020).

Renewable Fuel Companies Asked D.C. Circuit to Compel Compliance with 2017 Decision on Volume Requirements

Renewable fuel companies and trade groups filed a motion requesting that the D.C. Circuit enforce the mandate more than three years after the court vacated EPA's decision to reduce the total renewable fuel volume requirements for 2016 based on its "inadequate domestic supply" waiver authority. The movants contended that EPA's delay in complying nullified the mandate and that the court could apply its mandamus power to compel compliance. The movants also urged the court to clarify that EPA could not retain the 2016 standards. *Americans for Clean Energy v. EPA*, No. 16-1005 (D.C. Cir. Nov. 23, 2020).

Briefs Filed in Supreme Court Arguing for Broader Appellate Review of Remand Order in Baltimore Climate Case; Oral Argument Scheduled for January 19

The U.S. Supreme Court scheduled oral argument for January 19, 2021 in fossil fuel companies' appeal of a Fourth Circuit Court of Appeals decision affirming an order remanding to state court the City of Baltimore's climate change case against the companies. The companies filed their brief on November 16, arguing that the Fourth Circuit erred by concluding that it was limited to reviewing removal based on the federal-officer removal statute. The companies also argued that the Court should preserve judicial resources when rectifying this error by addressing the other grounds for removal and reversing the Fourth Circuit's judgment. The brief argued in particular that the Court should hold that Baltimore's claims "necessarily and exclusively arise under federal common law." Alternatively, the companies asked that the Court vacate the judgment and remand to the Fourth Circuit to address the other grounds for removal raised by the companies. Ten amicus briefs were filed in support of the petitioners, including by the United States, which argued for the broader scope of appellate review of remand orders and noted its "significant interest" as "a frequent litigant" in "the application of statutory provisions governing federal appellate jurisdiction." *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.).

Developments over the past month in other pending cases seeking to hold fossil fuel companies liable for contributing to climate change included the following:

- In *Connecticut v. Exxon Mobil Corporation*, No. 3:20-cv-01555 (D. Conn.), Exxon Mobil Corporation moved to dismiss Connecticut's action on personal jurisdiction grounds (November 13). Connecticut filed a motion for remand to state court (December 2).

- In *County of Maui v. Sunoco LP*, No. 1:20-cv-00470 (D. Haw.), the County filed a motion to remand to state court (November 25). The court stayed resolution of the motion to remand in *City & County of Honolulu v. Sunoco LP*, No. 20-CV-00163 (D. Haw.) pending completion of briefing on the County of Maui's remand motion (November 4).

- In *Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp.*, No. 3:18-cv-07477 (N.D. Cal.), the court continued the case management conference scheduled for December 16 to June 9, 2021. The parties jointly requested that the conference be postponed until proceedings in the Supreme Court in *City of Oakland v. BP p.l.c.* and *County of San Mateo v. Chevron Corp.* have concluded. (The defendants have not yet filed their petitions for writ of certiorari in those cases.)

- In *Delaware v. BP America Inc.*, No. 1:20-cv-01429 (D. Del.), Delaware filed a motion to remand to state court (November 20).

- In *City of Oakland v. BP p.l.c.*, No. 3:17-cv-6011 (N.D. Cal.), the parties submitted a joint case management statement articulating their positions on how the case should proceed after the Ninth Circuit's remand of the case (November 10). The plaintiffs contended that no further stay of the cases was warranted and that there should be briefing on their motion to remand, as well as on the issues of staying the action, the plaintiffs' amending their complaint to withdraw federal common law claims, and the plaintiffs' planned motion to vacate the court's ruling on personal jurisdiction. The defendants argued that the court should stay the case until the Supreme Court determines whether to grant forthcoming petitions for writ of certiorari in this case and *County of San Mateo v. Chevron Corp.* On November 13, the court continued a case management conference scheduled for November 19 to December 16.

- In *Minnesota v. American Petroleum Institute*, No. 20-cv-1636 (D. Minn.), the defendants filed their opposition to Minnesota's remand motion (November 9).

- In *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J.), the City filed a motion to remand (November 5).

Corps of Engineers Sought Voluntary Remand for Reevaluation of Permit for Petrochemical Plant

On December 2, 2020, the U.S. Army Corps of Engineers moved for voluntary remand without vacatur and dismissal in a case challenging a Section 404 dredge-and-fill permit for a new petrochemical plant in Louisiana. Several weeks earlier the Corps gave notice to the company developing the plant that it had suspended the permit and was reevaluating it due to potential defects in the Clean Water Act alternatives analysis. The Corps said their review would result in

a new final agency action that would be subject to judicial review. Center for Biological Diversity and other plaintiffs asserted claims under NEPA—alleging inadequate climate change analysis—as well as the Clean Water Act, the Rivers and Harbors Act, the National Historic Preservation Act, and the Administrative Procedure Act. *Center for Biological Diversity v. U.S. Army Corps of Engineers*, No. 1:20-cv-00103 (D.D.C. Nov. 4, 2020).

Conservation Groups Asked Federal Court to Compel Decision on New Critical Habitat for Mount Graham Red Squirrel

Center for Biological Diversity and Maricopa Audubon Society filed a lawsuit in the federal district court for the District of Arizona seeking to compel the U.S. Fish and Wildlife Service (FWS) to make a 12-month finding on the plaintiffs' 2017 petition to revise the critical habitat for the endangered Mount Graham red squirrel, which the complaint alleged are found only in the Pinaleño Mountains in southeast Arizona. The complaint further alleged that "essentially all" of the critical habitat designated in 1990, which consisted of high elevation spruce-fir forest in the Pinaleño Mountains, "has been degraded or destroyed by telescope construction, wildfire … , drought, insect outbreaks, and other ecological changes influenced by climate change." The plaintiffs contended that lower elevation mixed-conifer forests were now essential to the survival of the Mount Graham red squirrel. The plaintiffs previously sued to compel a 90-day finding on their petition, after which the FWS published a finding in September 2019 that revision of critical habitat might be warranted. In this new suit, the plaintiffs asked the court to enforce the Endangered Species Act mandatory deadline for making a finding on a petition after a positive 90-day finding. *Center for Biological Diversity v. Bernhardt*, No. 4:20-cv-00525 (D. Ariz., filed Nov. 30, 2020).

EPA Asked District Court to Dismiss Lawsuit Seeking Regulation of Methane from Existing Oil and Gas Sources

EPA asked the federal district court for the District of Columbia to dismiss as moot a lawsuit brought in 2018 by New York, other states, Chicago, and Washington, D.C. to compel EPA to issue guidelines for regulation of methane emissions from existing sources in the oil and natural gas sector. EPA contended that it no longer had authority or a duty to issue such guidelines because it had rescinded new source performance standards for methane emissions from the sector. EPA's rescission of the methane standards for new sources has been challenged in the D.C. Circuit. *New York v. EPA*, No. 1:18-cv-00773 (D.D.C. Nov. 24, 2020).

Tribes Filed New Lawsuit Challenging Federal Authorization for Keystone XL Pipeline

The Rosebud Sioux Tribe and Fort Belknap Indian Community filed a new lawsuit challenging a right-of-way granted in 2020 by BLM for the Keystone XL Pipeline to cross more than 45 miles of federally administered land in Montana. The plaintiff tribes asserted that BLM failed to analyze and uphold the United States' treaty obligations and failed to analyze the pipeline's impact on their territories and particularly their water resources and lands held in trust. They alleged that they had identified a number of other issues during the NEPA process—including failure to conduct an adequate climate change analysis—but that the final supplemental environmental impact statement did not remedy these issues. They asserted five causes of action:

a claim under NEPA and the Administrative Procedure Act; breaches of the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, the 1868 Fort Laramie Treaty; and a failure to adhere to the Department of the Interior's tribal consultation policies. *Rosebud Sioux Tribe v. U.S. Department of the Interior*, No. 4:20-cv-00109 (D. Mont., filed Nov. 17, 2020).

Lawsuit Challenged Development Plan for Portion of National Petroleum Reserve-Alaska

Six organizations filed a federal lawsuit in Alaska challenging BLM's approval of the Willow Master Development Plan, which the complaint described as "a massive oil and gas development project … located within the northeastern portion of the National Petroleum Reserve-Alaska …, in an area already under stress from rapid industrialization and climate change." The plaintiffs asserted that BLM and other federal defendants failed to comply with the National Environmental Policy Act, the Federal Land Policy and Management Act, the Endangered Species Act, and the Administrative Procedure Act. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management*, No. 3:20-cv-00290 (D. Alaska, filed Nov. 17, 2020).

Religious Order Sought Damages Under Religious Freedom Restoration Act from Pipeline Developer

A vowed religious order of Roman Catholic women and individual members of the order filed a lawsuit in the federal district court for the Eastern District of Pennsylvania against the developer of the Atlantic Sunrise Pipeline, which was constructed across the order's property and put into service in 2018 "[o]ver the Sisters' strenuous, sincere, and repeated protests." The plaintiffs asserted that the developer's condemnation of a right-of-way on their land and construction and operation of the pipeline "substantially burdened [their] exercise of their deeply-held religious beliefs to use and protect their land as part of God's creation." The complaint cited a "Land Ethic" adopted by the order in 2005 "proclaiming the sacredness of all creation according to their religious beliefs" as well as Pope Francis's 2015 encyclical letter *Laudato Si*, which the order's complaint alleged "provides a comprehensive and exhaustive theological basis establishing that, as an act of religious belief and practice, members of the Roman Catholic Church, and others, must protect and preserve the Earth as God's creation." The complaint alleged that Pope Francis specifically identified climate change as a grave threat to humanity. The plaintiffs asserted a violation of the Religious Freedom Restoration Act and requested that the court award them compensatory and punitive damages. *Adorers of the Blood of Christ v. Transcontinental Gas Pipe Line Co.*, No. 2:20-cv-05627 (E.D. Pa., filed Nov. 11, 2020).

Lawsuits Asked Court to Compel Review and Updating of Energy Efficiency Standards

Two lawsuits were filed in the federal district court for the Southern District of New York asking the court to set an enforceable schedule for the U.S. Department of Energy to review and amend energy efficiency standards for 25 consumer and commercial products, including room air conditioners, pool heaters, furnaces, dishwashers, and walk-in coolers. Six organizations led by Natural Resources Defense Council filed one of the suits. The other was filed by 14 states, New York City, and the District of Columbia. The plaintiffs asserted violations of mandatory deadlines in the Energy Policy and Conservation Act. *New York v. Brouillette*, No. 20-cv-9362

(S.D.N.Y., filed Nov. 9, 2020); *Natural Resources Defense Council v. Brouillette*, No. 20-cv-9127 (S.D.N.Y., filed Oct. 30, 2020).

Petition Filed Challenging Water Quality Certification for Minnesota Crude Oil Pipeline

Environmental groups and tribes challenged the Clean Water Act Section 401 water quality certification by the Minnesota Pollution Control Agency (MPCA) for Enbridge Energy's Line 3, a crude oil pipeline that would cross Minnesota to reach a terminal and tank farm in Wisconsin. The petitioners identified four sets of issues they would raise on appeal, one of which was "[w]hether MPCA's refusal to consider climate or tribal impacts complied with the requirements of Minnesota and federal law." *Friends of the Headwaters v. Minnesota Pollution Control Agency (In re 401 Certification for Line 3 Replacement Project)*, No. A20-1513 (Minn. Ct. App., filed Nov. 30, 2020).

CARB and California Attorney General Sought to Join Lawsuit Challenging Port of Los Angeles Project

On November 4, 2020, the California Attorney General, on behalf of the People of the State of California, and the California Air Resources Board (CARB) sought to intervene in the South Coast Air Quality Management District's (SCAQMD's) proceeding challenging the environmental review for a terminal project at the Port of Los Angeles. SCAQMD charged that the City of Los Angeles and other defendants failed to implement and enforce mitigation measures in a 2008 environmental impact report (EIR) and then approved "unenforceable and inferior substitute measures" in a final supplemental EIR in 2020. SCAQMD alleged a number of failings in the supplemental EIR, including failure to take account of impacts of project changes on greenhouse gas emissions and to incorporate feasible measures to mitigate such emissions. *South Coast Air Quality Management District v. City of Los Angeles*, No. 20STCP02985 (Cal. Super. Ct. Nov. 4, 2020).

Environmental Groups Challenged Authorization for New Natural Gas Plant in Oregon

Columbia Riverkeeper and Friends of the Columbia Gorge filed a lawsuit in Oregon Circuit Court alleging that Oregon Department of Energy unlawfully allowed construction to proceed on the Perennial Wind Chaser Station, a proposed gas-fired power plant that would be a non-base load generating facility. The petitioners alleged that it would be one of the largest stationary sources of greenhouse gas emissions in Oregon. They contended that ODOE's actions should be reversed or remand based on violations of the Oregon Administrative Procedures Act and the Oregon Energy Facility Siting Act. *Columbia Riverkeeper v. Oregon Department of Energy*, No. 20CV38607 (Or. Cir. Ct., filed Nov. 2, 2020).

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FEATURED CASE

Oregon Supreme Court Said Public Trust Doctrine Did Not Impose Obligation to Protect Resources from Climate Change

The Supreme Court of Oregon rejected youth plaintiffs' arguments that the public trust doctrine should be expanded to encompass additional natural resources and that the doctrine imposes affirmative fiduciary obligations on the State to protect trust resources from substantial impairment caused by climate change. With respect to the scope of the doctrine, the Supreme Court said the public trust doctrine extends both to the State navigable waters and to the State's submerged and submersible lands. (A trial court had interpreted the scope more narrowly.) Although the court agreed with the plaintiffs that the doctrine "can be modified to reflect changes in society's needs," the court rejected the plaintiffs' "expansive test" for determining which resources should be protected, finding that the plaintiffs' two-factor test—(1) Is the resource not easily held or improved and (2) Is the resource of great value to the public for uses such as commerce, navigation, hunting, and fishing—would fail to provide "practical limitations." The court therefore declined to expand the doctrine to cover additional resources, including the atmosphere. Regarding the State's obligations under the public trust doctrine, the court rejected the plaintiffs' contention that the doctrine imposes obligations like the obligations trustees of private trusts owe to beneficiaries. The court indicated that importing private trust principles "could result in a fundamental restructuring of the public trust doctrine and impose new obligations on the State." The chief justice dissented, writing that in her view the judicial branch has "a role to play" in addressing the harms of climate change. She said the court "can and should issue a declaration that the state has an affirmative fiduciary duty to act reasonably to prevent substantial impairment of public trust resources." *Chernaik v. Brown*, No. S066564 (Or. Oct. 22, 2020).

DECISIONS AND SETTLEMENTS

First Circuit Affirmed Order Sending Rhode Island's Climate Case Back to State Court

The First Circuit Court of Appeals affirmed a district court order remanding to state court the State of Rhode Island's lawsuit that seeks relief from oil and gas companies for climate change injuries allegedly caused by the companies' actions. The First Circuit—like the Fourth, Ninth, and Tenth Circuits in other climate change cases—concluded that the scope of its appellate review was limited to whether the defendants properly removed the case under the federal-officer removal statute. The First Circuit stated that it was "persuaded that to allow review of every alleged ground for removal rejected in the district court's order would be to allow [the statutory exception allowing review of federal-officer removal] to swallow the general rule prohibiting review" of remand orders. The First Circuit further concluded that federal-officer removal did not apply in this case, finding that the companies' actions in connection with three contracts with the federal government concerning oil and gas production did not have a nexus with Rhode Island's allegations that the companies engaged in misleading marketing about the impacts of products they sold in the state. The First Circuit issued its decision several weeks after the Supreme Court agreed to review the issue of the scope of appellate review of remand orders in Baltimore's case against energy companies. State court proceedings in Rhode Island's case were put on hold in August pending the U.S. Supreme Court's and Rhode Island Supreme

Court's consideration of personal jurisdiction issues in unrelated cases. *Rhode Island v. Shell Oil Products Co.*, No 19-1818 (1st Cir. Oct. 29, 2020).

Tenth Circuit Ordered Coal Company to Stop Preparation for Mining in Colorado Roadless Area

The Tenth Circuit Court of Appeals granted environmental groups' emergency motion for an injunction barring a coal company "from imminently bulldozing additional drilling pads" and "drilling methane ventilation boreholes in preparation for coal mining in the Sunset Roadless Area" in Colorado. The Tenth Circuit ordered the injunction to remain in place pending consideration of the environmental groups' appeal of a district court order that declined to vacate mining lease modifications that authorized road construction in the Sunset Roadless Area. Although the Tenth Circuit vacated an exception to the Colorado Roadless Rule in March 2020, the district court concluded that it could not enjoin the coal companies' activities because all challenges to the mining lease modifications had been resolved in the federal defendants' favor. *High Country Conservation Advocates v. U.S. Forest Service*, No. 20-1358 (10th Cir. Oct. 29, 2020).

D.C. Circuit Allowed EPA Amendments to Emission Standards for Oil and Gas Sector to Take Effect

On October 27, 2020, the D.C. Circuit denied emergency motions for a stay preventing the U.S. Environmental Protection Agency's amendments to the 2012 and 2016 new source performance standards for the oil and gas sector from taking effect. The court said the petitioners—20 states, three cities, and 10 environmental groups—had not satisfied the "stringent requirements for a stay pending court review." Judge Judith W. Rogers would have granted the motions for stay. The court's order also dissolved the administrative stay that had been in place since September 17, denied the environmental groups' motion for summary vacatur (because the "merits of the parties' positions are not so clear as to warrant summary action"), granted motions to intervene, and established a briefing schedule, with the petitioners' briefs due on December 7, 2020 and briefing completed on February 10, 2021. *California v. Wheeler*, No. 20-1357 (D.C. Cir. Oct. 27, 2020).

Ninth Circuit Directed District Court to Grant EPA More Time for Federal Implementation Plan for Landfill Emissions

The Ninth Circuit Court of Appeals ruled that a district court should have granted the U.S. Environmental Protection Agency's (EPA's) request for modification of an injunction requiring EPA to issue a federal plan for implementation of emission guidelines for municipal landfills by November 2019. The emission guidelines—adopted in August 2016—were intended to reduce emissions of landfill gas and its components, including methane, from existing landfills. The Ninth Circuit held that because EPA, after the district court injunction, issued final rules that extended EPA's deadline for issuing the federal plan, the law that formed the basis of the district court's injunction had changed, and the district court abused its discretion by refusing to modify the injunction "even after its legal basis has evaporated." The Ninth Circuit was not persuaded by the plaintiff states' argument that "precedent requires a broad, fact-intensive inquiry into whether

altering an injunction is equitable, even if the legal duty underlying the injunction has disappeared." The Ninth Circuit also found that modification of the injunction due to EPA's rulemaking action did not threaten separation of powers. The court wrote that ultimately it saw "a greater threat to the separation of powers by allowing courts to pick and choose what law governs the executive branch's ongoing duties." *California v. EPA*, No. 19-17480 (9th Cir. Oct. 22, 2020).

D.C. Circuit Merits Panel to Decide Most Issues Related to Administrative Record Content in Challenges to Light-Vehicle Standards; Briefing to Begin in January

In the cases challenging the revised greenhouse gas emission and fuel economy standards for light-duty vehicles, the D.C. Circuit Court of Appeals granted petitioner Competitive Enterprise Institute's (CEI's) motion to complete the record to the extent it requested the inclusion of EPA's December 2019 Integrated Science Assessment for Particulate Matter in the administrative record. CEI argued that it should be included because EPA explicitly relied on it. The D.C. Circuit referred the remainder of CEI's motion to the merits panel, along with the entirety of a motion by State and Municipal and Public Interest Petitioners to complete and supplement the record. The other documents CEI seeks to add to the record are two Clean Air Scientific Advisory Committee peer review reports; CEI argued that EPA Administrator Andrew Wheeler had said he considered these reports. The State and Municipal and Public Interest Petitioners asked that the record include certain documents related to interagency review; the petitioners said these documents were probative of their claim that EPA failed to exercise independent judgment or apply technical expertise. The D.C. Circuit's order also established the briefing schedule for the cases, with three initial briefs from petitioners due on January 14, 2021, respondents' brief due April 14, 2021, and reply briefs due June 1, 2021. The petitioners had asked for a more accelerated briefing schedule that would have allowed for oral argument in the current term; they had also requested that they be permitted to file five briefs. *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, No. 20-1145 (D.C. Cir. Oct. 19, 2020).

California Federal Court Entered Final Judgment Vacating Repeal of 2016 Waste Prevention Rule After Wyoming Federal Court Vacated 2016 Rule

On October 29, 2020, the federal district court for the Northern District of California entered judgment vacating the 2018 final rule rescinding the U.S. Bureau of Land Management's 2016 Waste Prevention Rule. The federal defendants and trade group intervenor-defendants have appealed the court's July 2020 decision vacating much of the 2018 rule. On October 8, the District of Wyoming vacated the 2016 rule, with judgment entered on October 23. No appeals have been filed yet. *California v. Bernhardt*, No. 4:18-cv-05712 (N.D. Cal. Oct. 29, 2020).

Montana Federal Court Denied Requests to Stop Work on Keystone Pipeline, Asked for More Briefing on Separation of Powers Issues

In two lawsuits challenging the 2019 Presidential Permit for the Keystone XL pipeline, the federal district court for the District of Montana denied requests to enjoin work on the pipeline. The court found that the plaintiffs failed to show "at this juncture" that they were likely to

succeed on the merits of their claims and that they also failed to show they were likely to suffer irreparable injury. The court—which concluded that the Presidential Permit authorized only a 1.2-mile border-crossing segment of the pipeline and not, as the plaintiffs argued, the additional 875 miles of pipeline in the U.S.—found that alleged irreparable injuries outside the scope of what the permit authorized were "beyond the scope of the relief available." Although the court found that each side had "valid arguments for their side in the balance of equities and public interest," including the plaintiffs' allegations of climate change harms caused by Keystone's eventual operation, the court found that the "weight of these factors remains unclear and fails to compel the granting of preliminary relief."

In the lawsuit brought by Indigenous Environmental Network and North Coast Rivers Alliance, the court also denied motions to amend the complaint to add President Trump's executive order concerning permitting of facilities at international boundaries and to add a claim challenging a right-of-way permit from the U.S. Bureau of Land Management (BLM). The court rejected the former set of amendments on the grounds of futility, undue delay, and the plaintiffs' previous opportunity to amend, and the latter on the grounds of undue delay, unfair prejudice to the defendants and defendant-intervenors, and judicial economy.

In the lawsuit led by the Rosebud Sioux Tribe, the court also rejected any addition of claims related to BLM's right-of-way permit. In addition, the court granted summary judgment to the defendants on the plaintiffs' treaty-based claims due to the court's determination that the Presidential Permit's scope was limited to the 1.2-mile segment and did not affect tribal land.

In both cases, the court asked for supplemental briefing on the remaining constitutional issues, focused on separation of powers issues related to border-crossing pipeline permits. *Indigenous Environmental Network v. Trump*, No. 4:19-cv-00028 (D. Mont. Oct. 16, 2020); *Rosebud Sioux Tribe v. Trump*, 4:18-cv-00118 (D. Mont. Oct. 16, 2020).

Federal Court Found No-Jeopardy Determination for Sea Turtles Failed to Sufficiently Address Climate Change

The federal district court for the District of Columbia cited failures to address climate change as one of the bases for finding that a biological opinion for continued authorization of the Southeast U.S. shrimp fisheries in federal waters was arbitrary and capricious. The biological opinion found that the fisheries would not jeopardize continued existence of the Atlantic populations of sea turtles. The court agreed with the plaintiff that the National Marine Fisheries Service (NMFS) had not provided a reasoned basis for its no-jeopardy conclusion because it did not explain how it reached the conclusion in light of significant effects from climate change that were discussed in other parts of the biological opinion. The court also found that the NMFS did not have a reasoned basis for the conclusion that changes in oceanic conditions would not substantially impact sea turtles since there was "substantial evidence" in the record that climate change would have "significant impacts" on sea turtles. *Oceana, Inc. v. Ross*, No. 15-cv-0555 (D.D.C. Oct. 9, 2020).

Federal Court Vacated Negative Jurisdictional Determination for Salt Ponds Connected to San Francisco Bay

The federal district court for the Northern District of California vacated EPA's determination that the Redwood City Salt Ponds were not within the jurisdiction of the Clean Water Act, holding that EPA misapplied precedent regarding what constitutes "fast land," which is not subject to federal jurisdiction. The court concluded that although levees built before the Clean Water Act's enactment would not be subject to Clean Water Act jurisdiction, the salt ponds themselves could remain subject to Clean Water Act jurisdiction because they are wet, not uplands, and have "important interconnections" to San Francisco Bay. Since EPA's negative jurisdictional determination was "solely" anchored in its finding that the salt ponds were "transformed into fast last prior to passage" of the Clean Water Act, the court set aside the determination and remanded for evaluation of "the extent of nexus between the salt ponds and the Bay and the extent to which they significantly affect the chemical, physical, and biological integrity of the Bay and take into account all other factors required by law." The court's decision did not address the plaintiffs' allegations that the negative jurisdictional determination would exacerbate the consequences of sea level rise and impair California's ability to mitigate sea level rise impacts. *San Francisco Baykeeper v. EPA*, No. 3:19-cv-05941 (N.D. Cal. Oct. 5, 2020).

Federal Court Satisfied with Agency's New Explanations About Short-Term Climate Impacts on Loggerhead Turtles

The federal district court for the District of Columbia found that a revised biological opinion prepared by the National Marine Fisheries Service sufficiently responded to two issues that the court ordered the NMFS to address in a 2015 decision. One of the issues concerned the discussion of short-term impacts of climate change in the biological opinion, which addressed the impact of seven fisheries on the Northwest Atlantic Distinct Population Segment of loggerhead sea turtles. The 2015 decision directed the NMFS to "more clearly explain the connection between the record evidence of present and short-term effects caused by climate change, and the agency's conclusion that climate change will not result in any significant effects on the species in the short-term future." The court concluded that on remand the NMFS provided a reasoned basis for its conclusion about the short-term effects of climate change, noting that the NMFS had clarified "that while there is record evidence of past and expected future climate change, in the short-term these effects from climate change will not result in a 'significant effect' on sea turtles in the action area, specifically." The court also found that the NMFS had adequately responded to the court's identification of a need for further explanation of the conclusion that short-term effects on loggerheads would be negligible, given evidence in the record of rapid sea level rise in a 620-mile "hot spot" on the East Coast. In addition, the court said its remand to the NMFS did not require the agency to update the administrative record with more recent climate change studies, and that there was no need for the court to assess the new studies' impacts on the NMFS's conclusion. The court noted that the NMFS had reinitiated consultation and was reviewing new information that had become available since 2013. *Oceana, Inc. v. Ross*, No. 1:12-cv-00041 (D.D.C. Oct. 1, 2020).

Alabama Federal Court Dismissed Challenge to TVA Environmental Review of Rate Changes for Distributed Energy

The federal district court for the Northern District of Alabama dismissed on standing grounds a lawsuit asserting that the Tennessee Valley Authority's (TVA's) environmental review for rate changes that affected rates for distributed energy resources such as rooftop solar did not satisfy the requirements of the National Environmental Policy Act. The court agreed with TVA that individual members of the plaintiff organizations had failed to prove an injury "fairly traceable" to the rate change because the plaintiffs did not provide evidence that a decrease in investment in distributed energy resources would result in an increase in fossil fuel use. The court concluded, moreover, that even if the link could be proved, the plaintiffs failed to demonstrate the "requisite geographic nexus between the alleged pollution and their particular interests." *Center for Biological Diversity v. Tennessee Valley Authority*, No. 3:18-cv-01446 (N.D. Ala. Sept. 30, 2020).

Maine High Court Said State Law Would Not Preempt Local Ordinance Prohibiting Crude Oil Loading

The Maine Supreme Judicial Court answered certified questions from the First Circuit concerning state law preemption of a City of South Portland ordinance that prohibited bulk loading of crude oil onto vessels in the City's harbor. A federal district court rejected a challenge to the ordinance in 2018. The Maine high court said a license issued by the Maine Department of Environmental Protection for a marine oil terminal facility was not an "order" within the meaning of the Maine Coastal Conveyance Act that could have preemptive effect and, moreover, that the license was not in conflict with the ordinance, even if it could be considered an order. The court also concluded that the Coastal Conveyance Act as a whole did not preempt the City's ordinance by implication. *Portland Pipe Line Corp. v. City of South Portland*, No. Fed-20-40 (Me. Oct. 29, 2020).

NEW CASES, MOTIONS, AND NOTICES

Maui County Filed Climate Change Suit Against Fossil Fuel Companies

On October 12, 20201, the County of Maui filed a lawsuit in Hawai'i Circuit Court against fossil fuel companies seeking to hold them liable for climate change impacts. Defendants Chevron Corporation and Chevron U.S.A. Inc. removed the case to federal court on October 30 and indicated that all other joined and served defendants consented to removal. In its complaint, Maui alleged that the defendant companies were "directly responsible for the substantial increase in all CO_2 emissions between 1965 and the present" and that but for the defendants' participation in "denialist campaigns" to mislead the public about the role of their products in causing climate change, the impacts of climate change "would have been substantially mitigated or eliminated altogether." The adverse climate change impacts alleged to affect Maui include sea level rise and related flooding, inundation, erosion, and beach lose; extreme weather; ocean warming and acidification; increasingly scarce freshwater supplies; loss of habitat for endemic species; and social and economic consequences of these environmental changes. Maui asserted causes of action for public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass. The complaint asked the court for compensatory damages, equitable relief, attorneys' fees, punitive damages, disgorgement of profits, and costs of suit. *County of Maui v. Sunoco LP*, No. 2CCV-20-0000283 (Haw. Cir. Ct., filed Oct. 12, 2020).

Developments in other cases brought by local governments or states against fossil fuel companies included:

- *City of Hoboken v. Exxon Mobil Corp.*, No. 2:20-cv-14243 (D.N.J.): Defendants removed the case to federal court on October 9, 2020.
- *City & County of Honolulu v. Sunoco LP*, No. 20-cv-00163 (D. Haw.): Defendants submitted their opposition to Honolulu's motion to remand the case to state court on October 9, 2020. On November 4, the court sua sponte stayed proceedings pending completion of briefing on the anticipated motion to remand in the County of Maui case.
- *District of Columbia v. Exxon Mobil Corp.*, No. 1:20-cv-01932 (D.D.C.): Defendants submitted their opposition to the remand motion on October 15, 2020.
- *Delaware v. BP America Inc.*, No. 1:20-cv-01429 (D. Del.): Defendants removed the case to federal court on October 23, 2020.

ExxonMobil Asked Texas Supreme Court to Review Denial of Presuit Discovery Against California Cities and Counties

Exxon Mobil Corporation (ExxonMobil) filed a petition in the Texas Supreme Court seeking review of an intermediate appellate court's reversal of a trial court order that permitted ExxonMobil to seek presuit discovery against California cities and counties that had filed lawsuits in California to hold ExxonMobil and other energy companies liable for the impacts of climate change. ExxonMobil sought to conduct the discovery—which also would extend to California local officials and an outside attorney—"to evaluate potential claims for constitutional violations, abuse of process, and civil conspiracy" arising from "an alleged conspiracy … to use tort lawsuits against ExxonMobil and seventeen other Texas-based energy companies as a pretext to suppress Texas-based speech about climate and energy policies." ExxonMobil asked the Texas Supreme Court to "confirm that longstanding precedent of this Court and the U.S. Supreme Court supports exercising jurisdiction over the potential defendants for their improper effort to suppress speech in Texas." *Exxon Mobil Corp. v. City of San Francisco*, No. 20-0558 (Tex. Oct. 2, 2020).

Supreme Court Invited Solicitor General to Weigh in on Wyoming and Montana's Case Against Washington for Denying Port Access for Coal

On October 5, 2020, the U.S. Supreme Court invited the Acting Solicitor General to file a brief expressing the United States' view on Montana and Wyoming's motion for leave to file a bill of complaint asserting that the State of Washington had denied access to its ports for shipments of Montana and Wyoming's coal in violation of the dormant Commerce Clause and the Foreign Commerce Clause. *Montana v. Washington*, No. 22O152 (U.S. Oct. 5, 2020).

Organizations Challenged Department of Energy Rule for Setting Energy Conservation Standards

Natural Resources Defense Council and three other organizations filed a petition for review in the Ninth Circuit Court of Appeals challenging the U.S. Department of Energy's final rule that amended the procedures for establishing energy conservation standards for appliances. The amended rule changed the process for determining whether a standard is "economically justified." *Natural Resources Defense Council, Inc. v. Brouillette*, No. 20-73091 (9th Cir., filed Oct. 16, 2020).

Organizations Challenged Environmental Review for Electric Transmission Project in Maine

Sierra Club and two other groups filed a lawsuit asserting that the U.S. Army Corps of Engineers violated the National Environmental Policy Act and the Administrative Procedure Act when the agency reviewed a proposed 171.4 miles of electrical transmission lines and related facilities in Maine. The plaintiffs alleged that evidence showed that the project—for which the "stated purpose is to fulfill long-term contracts for 'clean energy' projects with the State of Massachusetts"—would instead increase greenhouse gas emissions. The complaint alleged that the supplier of hydroelectric power that the project would transmit had "insufficient hydroelectric energy to provide incremental hydroelectricity to New England" and would instead "engage in arbitrage, moving sales from different markets without any real reductions in GHG emissions." The complaint also alleged that construction and operation of hydropower "megadams" and their reservoirs increase greenhouse gas emissions and would present human rights and environmental justice issues. *Sierra Club v. U.S. Army Corps of Engineers*, No. 2:20-cv-00396 (D. Me., filed Oct. 27, 2020).

Conservation Groups Added Additional Claims to Challenge to Plan to Open More Land in Colorado to Oil and Gas Leasing

Six conservation groups filed an amended petition for review in their lawsuit challenging a resource management plan (RMP) for the Uncompahgre Field Office that expanded lands available to oil and gas leasing in southwestern Colorado. The petitioners—who filed suit in August—added causes of action under the Endangered Species Act related to the RMP's impacts on the Gunnison sage-grouse as well as a cause of action asserting that the RMP was invalid because William Perry Pendley was unlawfully serving as acting director of the U.S. Bureau of Land Management when the RMP was finalized. *Citizens for a Healthy Community v. U.S. Bureau of Land Management*, No. 1:20-cv-2484 (D. Colo. Oct. 27, 2020).

Endangered Species Act Challenge to Gulf of Mexico Oil and Gas Leasing Program Cited Insufficient Analysis of Climate Change

Sierra Club and three other organizations challenged the National Marine Fisheries Service's issuance of a programmatic biological opinion that governed oil and gas activities in the Gulf of Mexico. The plaintiffs' arguments included that the NMFS failed to account for how alterations to the population structure and distribution of endangered and threatened species such as whales, sea turtles, and Gulf sturgeon due to climate change would interact with the proposed action's effects. The plaintiffs also asserted that the NMFS failed to use best available science regarding

climate change's impacts on endangered and threatened species and their habitat. *Sierra Club v. National Marine Fisheries Service*, No. 20-cv-3060 (D. Md., filed Oct. 21, 2020).

WildEarth Guardians Appealed Decision that Rejected Claims of Climate Change Flaws in Review of Oil and Gas Leases

WildEarth Guardians filed an appeal in the Tenth Circuit Court of Appeals of the District of New Mexico's August 2020 decision rejecting the bulk of WildEarth Guardian's challenge to three leases for oil and gas development in southeastern New Mexico. The district court upheld, among other things, the U.S. Bureau of Land Management's analysis of cumulative climate change impacts and found that use of the Social Cost of Carbon was not required. The Tenth Circuit abated the appeal pending the district court's disposition of a motion for clarification filed by the federal defendants. *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505 (D.N.M. Oct. 19, 2020), No. 20-2146 (10th Cir. Oct. 30, 2020).

Environmental Group Filed FOIA Lawsuit Seeking Documents Related to Federal Grid Reliability Project

Center for Biological Diversity (CBD) filed a Freedom of Information Act (FOIA) lawsuit in federal district court in the District of Columbia alleging that the U.S. Department of Energy (DOE) failed to produce records in response to CBD's August 2019 request for records related to the North American Energy Resilience Model (NAERM) project, which the complaint described as "an effort to model grid vulnerabilities across North America." CBD alleged that it was concerned about "the extent to which NAERM may be biased to support reliance on gas, including fracked gas, as a resilience tool, at the expense of renewable energy sources, including wind and solar." CBD sought records of communications between DOE and non-federal agency individuals, such as energy company employees, as well as records discussing NAERM's costs, records regarding whether NAERM implementation would result in increased reliance on fossil fuels, and records mentioning or discussing the relationship between NAERM and wind and solar energy resources. *Center for Biological Diversity v. U.S. Department of Energy*, No. 1:20-cv-02950 (D.D.C., filed Oct. 15, 2020).

Second Lawsuit Filed to Challenge 211-Mile Mining Access Road in Alaska

The governing bodies of six federally-recognized Indian Tribes in Alaska and a consortium of tribal leaders filed a lawsuit challenging federal approvals of the Ambler Road Project, which their complaint described as a "a 211-mile, year-round, industrial access road that would traverse some of the most remote and undeveloped lands in Alaska" and "facilitate the construction of four large-scale mines for the extraction of copper, lead, zinc, silver, gold, cobalt, and molybdenum." The plaintiffs asserted claims under the Alaska National Interest Lands Conservation Act, the National Historic Preservation Act, the National Environmental Policy Act (NEPA), the Clean Water Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act. The plaintiffs' NEPA arguments include that the final environmental impact statement failed to adequately address climate change. Another lawsuit challenging the Ambler Road Project was filed in August. *Alatna Village Council v. Padgett*, No. 3:20-cv-00253 (D. Alaska, filed Oct. 7, 2020).

Environmental Groups Alleged Improper Deferral of CEQA Process for Water Tunnel

Sierra Club and four other organizations filed a lawsuit challenging California Department of Water Resources resolutions that authorized revenue bonds that the petitioners alleged would fund a tunnel under the Sacramento-San Joaquin Delta that "would divert large quantities of fresh water from the Sacramento-San Joaquin Delta for export south." The petitioners alleged that adoption of the resolutions violated CEQA because the Department failed to prepare an environmental impact report prior to adoption. The petition indicated that the Department initiated the environmental review in January 2020 with issuance of a Notice of Preparation that listed 24 "probably significant environmental effects of the Project," including changes in greenhouse gas emissions and increasing resiliency to respond to climate change. *Sierra Club v. California Department of Water Resources*, No. __ (Cal. Super. Ct., filed Oct. 27, 2020).

CEQA Challenge Said Analysis of Proposed Development's Greenhouse Gas Emissions Was Inadequate

Environmental groups challenged the California Environmental Quality Act (CEQA) review of a development in the City of Santee that allegedly would be located on a 2,638-acre site and include 2,900 to 3,000 residential units, commercial structures, a road network, and other infrastructure. Among the alleged shortcomings of the environmental review was failure to adequately disclose, analyze, and mitigate significant direct, indirect, and cumulative greenhouse gas impacts. *Preserve Wild Santee v. City of Santee*, No. 37-2020-00038168-CU-WM-CTL (Cal. Super. Ct., filed Oct. 21, 2020).

Petroleum Trade Association Challenged Amended California Standards for At-Berth Marine Vessels

Western States Petroleum Association (WSPA) challenged the California Air Resources Board's (CARB's) adoption of amended emission control measures for ocean-going vessels at berth in California ports. WSPA contended that CARB violated the Global Warming Solutions Act of 2006 by adopting capture and control requirements that were not technologically feasible, were not cost-effective, and would not achieve the projected emissions benefits, and also by failing "to properly balance the relative emission contribution from tankers against other mobile source categories throughout the state, and unfairly penaliz[ing] terminals where tankers berth because of the extremely high implementation costs associated with attempting to install capture and control technology at these facilities." WSPA also alleged that CARB failed to fully consider the amended regulations' environmental impacts beyond greenhouse gases. *Western States Petroleum Association v. California Air Resources Board*, No. 20STCP03138 (Cal. Super. Ct., filed Sept. 28, 2020).

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FEATURED CASE

Federal Court in Rhode Island Allowed Failure-to-Adapt Claims to Proceed

The federal district court for the District of Rhode Island for the most part denied a motion to dismiss a citizen suit asserting that Shell Oil Products US and other defendants (Shell) failed to prepare a terminal in Providence for the impacts of climate change. Although the court found that the plaintiff, Conservation Law Foundation (CLF), lacked standing to the extent its claims relied on "future harms," the court concluded that CLF had asserted "certainly impending harm" as to "near-term harms from foreseeable weather events." In particular, the court found that the complaint "makes clear that a major weather event, magnified by the effects of climate change, could happen at virtually any time, resulting in the catastrophic release of pollutants" due to Shell's alleged failure to adapt. The court further found that CLF's members' alleged injuries to their use and enjoyment of waters and roads in the terminal's vicinity flowed from the alleged failure to prepare the terminal for the impacts of climate change. For the same reasons, the court found that the case was ripe for adjudication. The court also concluded that the complaint stated claims under the Resource Conservation and Recovery Act (RCRA), except to the extent the claims were based on federal, instead of state, RCRA regulations. The court found that CLF pleaded facts satisfying the "imminent and substantial endangerment" standard on the theory that the alleged failure to prepare the terminal for foreseeable weather events was an imminent endangerment. The court also found that the complaint stated claims under the Clean Water Act related to the terminal's National Pollutant Discharge Elimination System permit. The court said the plaintiff's claims required interpretation of the permit, including whether its requirement of "good engineering practices" required preparing the terminal for catastrophic weather. In addition, the court declined to exercise its discretion to abstain or to apply the doctrine of primary jurisdiction. *Conservation Law Foundation v. Shell Oil Products US*, No. 1:17-cv-00396 (D.R.I. Sept. 28, 2020).

DECISIONS AND SETTLEMENTS

Wyoming Federal Court Vacated 2016 Waste Prevention Rule

The federal district court for the District of Wyoming vacated the bulk of the Waste Prevention Rule promulgated during the Obama administration, holding that the U.S. Bureau of Land Management (BLM) exceeded its authority and acted arbitrarily and capriciously. The Waste Prevention Rule was intended "to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities" on federal and tribal lands and to clarify "when produced gas lost through venting, flaring, or leaks is subject to royalties." In 2019, the Wyoming federal court stayed these proceedings challenging the Waste Prevention Rule while a challenge to the Trump administration's repeal of the rule was pending in the federal district court for the Northern District of California. After that court vacated the repeal in July 2020, the Wyoming federal court lifted the stay. In its order vacating all but two provisions of the Waste Prevention Rule, the court concluded that "a principal purpose and intent" of the rule was to "curb air emissions" and that the Mineral Leasing Act did not delegate authority to the Secretary of Interior to promulgate rules "justified primarily upon the ancillary benefit of a reduction in air pollution, particularly when considered in light of historical context and the comprehensive regulatory structure under the Clean Air Act." The court also found that BLM acted arbitrarily and capriciously by failing to consider the rule's impacts on marginal wells, failing to explain and identify support for the rule's capture requirements, and failing to separately consider the

rule's domestic costs and benefits. *Wyoming v. U.S. Department of the Interior*, No. 2:16-cv-00285 (D. Wyo. Oct. 8, 2020).

In Baltimore's Climate Case Against Fossil Fuel Companies, Supreme Court Agreed to Consider Scope of Appellate Review of Remand Order

On October 2, 2020, the U.S. Supreme Court granted fossil fuel companies' petition for writ of certiorari seeking review of the Fourth Circuit's order remanding to state court Baltimore's climate change case against the companies. Justice Alito did not participate in the consideration or decision of the petition. The question the Supreme Court agreed to consider is whether the statutory provision prescribing the scope of appellate review of remand orders "permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443." The district court rejected eight grounds for removal, but the Fourth Circuit concluded its appellate jurisdiction was limited to determining whether the companies properly removed the case under the federal-officer removal statute. *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Oct. 2, 2020).

D.C. Circuit Stayed Compliance Dates for Obama-Era Truck Trailer Fuel Economy Standards

On September 29, 2020, the D.C. Circuit Court of Appeals stayed the compliance dates for fuel economy regulations adopted by the Obama administration to the extent the regulations apply to truck trailers. The court heard oral argument on September 15 in a case challenging not only the fuel economy regulations, which the National Highway Traffic Safety Administration (NHTSA) promulgated, but also greenhouse gas emissions standards promulgated by the U.S. Environmental Protection Agency (EPA) in the same rulemaking. In October 2017, the D.C. Circuit stayed the EPA standards, which would have taken effect in January 2018. The NHTSA regulations would have taken effect in January 2021. In its stay motion, the Truck Trailer Manufacturers Association (TTMA) argued that the court had already determined that its challenge to the EPA standards was likely to be successful and that the NHTSA standards could not function without the EPA standards. TTMA also argued that NHTSA lacked authority to regulate fuel economy of trailers. In addition, TTMA asserted that its members would suffer immediate and irreparable harm in the absence of a stay. Both EPA and NHTSA are still in the process of reconsidering their trailer rules. *Truck Trailer Manufacturers Association, Inc. v. EPA*, No. 16-1430 (D.C. Cir. Sept. 29, 2020).

Effective Date Administratively Stayed for EPA Amendments to Oil and Gas Standards

On September 17, 2020, the D.C. Circuit Court of Appeals administratively stayed EPA amendments to the 2012 and 2016 new source performance standards (NSPS) for the oil and gas sector. The amendments—which were effective upon their publication in the *Federal Register*—removed transmission and storage sources from the oil and natural gas source category, rescinded the NSPS for such sources for both volatile organic compounds and methane, and separately rescinded methane requirements for production and processing sources. The

amendments were challenged in a petition filed by 20 states, along with Chicago, Denver, and the District of Columbia, and in a second petition filed by 10 environmental groups. The D.C. Circuit issued the administrative stay to allow the court "sufficient opportunity" to consider an emergency motion for stay filed by the environmental groups. After the amendments were stayed, the state and city petitioners filed their own emergency motion. The environmental groups also filed a separate petition challenging amendments to the NSPS resulting from EPA's reconsideration of fugitive emissions requirements, well site pneumatic pump standards, requirements for certification of closed vent systems, and provisions to apply for use of an alternative means of emission limitation. *California v. Wheeler*, No. 20-1357 (D.C. Cir., filed Sept. 14, 2020); *Environmental Defense Fund v. Wheeler*, No. 20-1359 (D.C. Cir., filed Sept. 14, 2020); *Environmental Defense Fund v. Wheeler*, No. 20-1363 (D.C. Cir., filed Sept. 15, 2020).

Federal Court Denied Preliminary Injunction in Steel Mill Owner's Pipeline Challenge

The federal district court for the Eastern District of Texas denied a steel mill owner's motion for a preliminary injunction barring construction of a gas pipeline that will cross the plaintiff's property. The owner asserted that the U.S. Corps of Engineers violated NEPA, the Clean Water Act, the Endangered Species Act, and the Administrative Procedure Act by reauthorizing and reissuing Nationwide Permit 12 (NWP-12) and by approving the pipeline under NWP-12. The court found that the steel mill owner was unlikely to succeed on the merits because it did not have standing under NEPA or the Endangered Species Act and its Clean Water Act claim failed. (The steel mill owner's allegations in support of its NEPA claim included that the Corps failed to adequately analyze NWP-12's climate change impacts including potential increased lifecycle greenhouse gas emissions.) The court also found that the plaintiff did not show irreparable harm or that the balance of equities or public interest weighed in its favor. *Optimus Steel, LLC v. U.S. Army Corps of Engineers*, No. 1:20-cv-00374 (E.D. Tex., filed Sept. 10, 2020 and order Oct. 4, 2020).

After District Court Declined to Enjoin Coal Company's Road-Building Activities in Colorado, Tenth Circuit Entered Temporary Injunction

The federal district court for the District of Colorado declined to vacate mining lease modifications that authorized a coal company to undertake road construction in the Sunset Roadless Area in Colorado. The U.S. Forest Service adopted the North Fork Exception to the Colorado Roadless Rule in 2016, allowing for road construction related to coal mining in the Sunset Roadless Area. In March 2020, the Tenth Circuit vacated the North Fork Exception due to the arbitrary and capricious exclusion of an alternative in the supplemental final environmental impact statement (SFEIS) for the Exception. The Tenth Circuit rejected, however, an argument that the U.S. Bureau of Land Management's SFEIS for the lease modifications failed to consider a "Methane Flaring Alternative." The district court concluded that although the Tenth Circuit vacated the North Fork Exception, the appellate court had not expressly or impliedly directed the district court to vacate the lease modifications. The district court further concluded that it could not enjoin the coal company from conducting surface-disturbing activities in the North Fork Exception area because all of the plaintiffs' challenges to the lease modifications had been resolved in favor of the federal agency defendants and the plaintiffs' assertions that the coal company's activities violated the Roadless Rule appeared to raise "an

entirely new claim" targeted not at the agencies but at the coal company. The plaintiffs appealed the court's ruling and filed motions for injunction pending appeal in the district court and the Tenth Circuit. To facilitate its consideration of the motion, the Tenth Circuit on October 7 entered a temporary injunction enjoining bulldozing additional drilling pads, drilling methane ventilation boreholes, and engaging in further surface disturbance in preparation for coal mining in the Sunset Roadless Area. *High Country Conservation Advocates v. U.S. Forest Service*, No. 1:17-cv-03025 (D. Colo. Oct. 2, 2020), No. 20-1358 (10th Cir.).

Federal Defendants Agreed to Make Determination on Climate Change-Threatened Beetle by August 2023

WildEarth Guardians and federal defendants reached an agreement for dismissal of one portion of an Endangered Species Act lawsuit challenging the defendants' failure to make final listing determinations on five aquatic species. Pursuant to the agreement, the defendants agreed to submit a determination as to whether the listing of the narrow-foot hygrotus diving beetle as threatened or endangered is warranted for publication in the *Federal Register* by August 15, 2023. WildEarth Guardians agreed to dismiss with prejudice its claim based on the narrow-foot hygrotus diving beetle. The complaint alleged that WildEarth Guardians petitioned for listing of the beetle due to the organization's concern that the beetle "will be unable to adapt and keep pace with changing climatic conditions, especially in light of the species' restricted range." *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-01035 (D.D.C. Sept. 30, 2020).

CARB, EPA, and NHTSA Resolved Dispute over Disclosure of Technical Studies Underlying Preemption Determination

The California Air Resources Board (CARB), EPA, and NHTSA stipulated to dismissal of CARB's Freedom of Information Act (FOIA) lawsuit seeking disclosure of records concerning the analysis supporting the federal agencies' preemption of state authority to establish vehicle emission standards. The parties agreed in July 2020 that EPA and NHTSA would respond by September 24 to clarified, limited, and revised requests for emissions analyses and other technical or scientific records regarding whether revocation of CARB's Clean Air Act waiver for zero-emission vehicle (ZEV) regulations would have impacts on emissions of criteria pollutants, California's attainment of the national ambient air quality standards, and California's conformity responsibilities under the Clean Air Act. In addition to the joint stipulation of dismissal, the parties also filed a joint motion to extend time for CARB to move for fees and costs to allow the parties "a suitable period" to determine whether they could reach agreement on this issue. *California Air Resources Board v. EPA*, No. 1:20-cv-1293 (D.D.C. Sept. 30, 2020).

Federal Court Found Problems with Assessment of How Sea Level Rise Would Affect Skink Habitat

The federal district court for the Southern District of Florida granted summary judgment to the Center for Biological Diversity (CBD) in a case challenging the Secretary of the Interior's decision not to list the Florida Keys mole skink as endangered or threatened under the Endangered Species Act. The skink is a lizard that lives only on islands of the Florida Keys; its habitat is threatened by sea level rise. The court found that the U.S. Fish and Wildlife Service

(FWS) did not explain why it relied on one set of habitat loss projections while also crediting 2017 projections by the National Oceanic and Atmospheric Administration that indicated sea levels were rising 15% faster. The court also found that the FWS needed to explain its conclusion that habitat threats were uniform across the skink's range notwithstanding non-uniform rates of inundation by sea level rise. The court was not persuaded, however, that the FWS acted arbitrarily and capriciously by limiting the foreseeable future to 2060, though the court said the FWS should consider on remand whether its approach to Geoplan would affect its conclusions regarding the foreseeable future. The court also rejected CBD's other arguments, including an argument that the FWS disregarded climate change effects other than sea level rise such as storm surge and saltwater intrusion. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 2:19-cv-14243 (S.D. Fla. Sept. 16, 2020).

New Jersey Federal Court Transferred Shareholder Derivative Action Against Exxon to Texas

In a consolidated stockholder derivative action against Exxon Mobil Corporation board members and executive officers (Exxon), the federal district court for the District of New Jersey granted Exxon's motion to transfer venue to the Northern District of Texas. The case involves allegations that the defendants misrepresented the costs of climate change regulations and did not appropriately project future costs of carbon and greenhouse gas emissions. A related federal securities action and additional shareholder derivative actions are pending in the Northern District of Texas. The New Jersey federal court concluded that private and public interests weighed in favor of transfer. *In re Exxon Mobil Corp. Derivative Litigation*, No. 2:19-CV-16380 (D.N.J. Sept. 15, 2020).

Federal Court Upheld State Department's Invocation of FOIA Exception for Legal Memorandum Supporting Paris Agreement Request

In a FOIA lawsuit brought by Competitive Enterprise Institute, a federal district court in the District of Columbia ruled that the U.S. Department of State properly withheld a legal memorandum that accompanied an "action memorandum" seeking authorization from the Secretary of State to join the Paris Agreement. The court found that the legal memorandum met the criteria for the deliberative process privilege because it was predecisional and deliberative and did not constitute the "working law" of the State Department. The court rejected CEI's argument that because a document appearing to be the legal memorandum had been posted on the internet, the memorandum fell outside the FOIA exemption under the "public domain doctrine." *Competitive Enterprise Institute v. U.S. Department of State*, No. 17-cv-02032 (D.D.C. Sept. 15, 2020).

Federal Court in Virginia Declined to Issue Preliminary Injunction in Challenge to CEQ Amendments to NEPA Regulations, Denied Motions to Dismiss

The federal district court for the Western District of Virginia denied a motion for preliminary injunction or stay barring the Council on Environmental Quality's (CEQ's) amendments to the National Environmental Policy Act (NEPA) regulations from taking effect. The court concluded that while the plaintiffs "may ultimately succeed," at this point they had not made the necessary

"clear showing" that they were likely to succeed. The court indicated it was "not unlikely that interpretative testimony and expert opinion would be required for the proper determination of the validity" of the amendments. The court also said the jurisdictional standing and ripeness issues raised by the defendants "may very well require evidence." The court also cited the Fourth Circuit's statement that issuance of a nationwide preliminary injunction should be limited "to the most exceptional circumstances." The court subsequently denied motions to dismiss the lawsuit and clarified that discovery was not contemplated but that summary judgment motions might be supported by expert declarations or other interpretive opinion. *Wild Virginia v. Council on Environmental Quality*, No. 3:20-cv-00045 (W.D. Va. Sept. 11, 2020).

Federal Court Upheld Environmental Review for Logging Project

The federal district court for the District of Colorado upheld the U.S. Forest Service's approval of a timber project authorizing logging on 1,631 acres in the White River National Forest in Colorado. The court rejected three claims under NEPA, including an argument that the Forest Service failed to consider foreseeable greenhouse gas emissions and the project's indirect and cumulative effect on global warming. The court found that the petitioners did not show that emissions from the project—which the court characterized as a "relatively small timber and biomass project"—would likely result in a cumulatively significant impact. The court distinguished this case from other cases in which consideration of emissions was required, indicating that in those cases "the significance of emissions was often beyond doubt." *Swomley v. Schroyer*, No. 1:19-cv-01055 (D. Colo. Sept. 3, 2020).

Court Denied Injunction in Challenge to Highway Project in Arkansas

The federal district court for the Eastern District of Arkansas declined to enjoin a highway reconstruction and widening project. The court found that the plaintiffs—who asserted, among other things, that the defendants failed to consider the project's cumulative impacts on greenhouse gas emissions—had not shown a likelihood that they would prevail on the merits. The court also found that the plaintiffs did not demonstrate they would suffer irreparable harm if work on the project commenced and that the balance of equities and public interest favored the defendants. *Little Rock Downtown Neighborhood Association, Inc. v. Federal Highway Administration*, No. 4:19-cv-00362 (E.D. Ark. Sept. 3, 2020).

Montana Supreme Court Affirmed that Public Service Commission Improperly Rewrote Terms of Solar Project PPA, Including by Eliminating Carbon Adder

The Montana Supreme Court affirmed a district court order that reversed a Montana Public Service Commission (PSC) order setting terms and conditions of a power purchase agreement (PPA) for a proposed 80 megawatt solar project. The project developer filed a petition with the PSC to establish terms and conditions after negotiations with a utility stalled. The PSC altered all terms and conditions in the PPA, including terms on which the parties agreed such as use of a "carbon adder" in the calculation of avoided energy costs. The PSC concluded that carbon costs would no longer be included in the avoided-costs calculation because the current federal administration opposed carbon emissions regulation. The district court held, among other things, that elimination of the carbon adder was arbitrary and capricious and directed the PSC to assign a

price for carbon. The Montana Supreme Court agreed with the district court that the solar project developer was entitled to an agreed-upon rate for energy, a carbon adder, and a 25-year contract term. The Supreme Court said the PSC lacked authority to rewrite these terms. *MTSUN, LLC v Montana Department of Public Service Regulation*, No. DA-19-0363 (Mont. Sept. 22, 2020).

Massachusetts High Court Upheld Approval of Hydropower Purchase Agreements

The Massachusetts Supreme Judicial Court affirmed the Massachusetts Department of Public Utilities' approval of power purchase agreements allowing electricity distribution companies to purchase clean electricity generated hydroelectrically by Hydro-Québec Energy Services (U.S.), Inc. The court held that the Department applied a reasonable interpretation of the statutory requirement that the PPAs provide for "firm service" hydroelectric generation (i.e., power provided without interruption). The court also found that substantial evidence supported the Department's conclusions that the PPAs "provide for the procurement of energy from hydroelectric generation alone" and that an industry-standard tracking system was an appropriate mechanism to meet statutory requirements intended to allow the Department of Environmental Protection to monitor progress in reducing greenhouse gas emissions. *NextEra Energy Resources, LLC v. Department of Public Utilities*, No. SJC-12886 (Mass. Sept. 3, 2020).

NEW CASES, MOTIONS, AND NOTICES

Connecticut Filed Lawsuit Alleging Exxon Engaged in "Campaign of Deception" Regarding Climate Change

Connecticut filed a lawsuit against Exxon Mobil Corporation in Connecticut Superior Court alleging that Exxon "misled and deceived Connecticut consumers about the negative effects of its business practices on the climate." Connecticut alleged that Exxon executives and other agents knew as early as the 1950s that fossil fuel combustion contributed to global warming and that when Exxon had the opportunity in the 1980s "to responsibly contribute to public understanding of climate change and its potentially catastrophic consequences," Exxon instead "began a systematic campaign of deception" to undermine climate science and maximize its profits. The complaint listed "myriad negative consequences in Connecticut" to which the State alleged the "campaign of deception" contributed, including sea level rise, flooding, drought, increases in extreme temperatures and severe storms, decreases in air quality, contamination of drinking water, increases in spread of diseases, and severe economic consequences. The State asserted eight counts under the Connecticut Unfair Trade Practices Act and sought injunctive and equitable relief; civil penalties; restitution for State expenditures attributable to Exxon to respond to the effects of climate change; disgorgement of revenues, profits, and gains; disclosure of research and studies on climate change; and funding of a corrective education campaign. *State v. Exxon Mobil Corp.*, No. HHDCV206132568S (Conn. Super. Ct., filed Sept. 14, 2020).

Delaware Lawsuit Sought Damages from Fossil Fuel Companies for Climate Change Injuries

Delaware filed a lawsuit in Delaware Superior Court asserting common law claims and a claim under its Consumer Fraud Act against fossil fuel companies for allegedly causing "the climate

crisis" through "concealment and misrepresentation of their products' known dangers—and simultaneous promotion of their unrestrained use." Delaware alleged "severe injuries," including inundation and loss of State property, loss of tax revenue due to inundation of private property and businesses and other impacts to Delaware's economy, injury to or destruction of critical State facilities, increased costs of providing government services, increased health care and public health costs, increased planning and preparation costs, and disruption and loss of coastal communities. The common law claims asserted by Delaware are negligent failure to warn, trespass, and nuisance. The State seeks compensatory damages, penalties for violation of the Consumer Fraud Act, attorneys' fees, punitive damages, and costs of suit. *State v. BP America Inc.*, No. N20C-09-097 (Del. Super. Ct., filed Sept. 10, 2020).

Charleston Filed Suit Against Fossil Fuel Companies Alleging Their Responsibility for "Devastating" Climate Change Impacts

The City of Charleston filed an action in the South Carolina Court of Common Pleas against fossil fuel companies asserting that they are responsible for "devastating adverse" climate change impacts on Charleston and its residents. The alleged impacts included flooding, inundation, erosion, and beach loss due to sea level rise; "more frequent, longer-lasting and more severe" extreme weather events; and resulting social, economic, and other consequences. The conduct alleged to be a substantial factor in causing the impacts includes failure to warn of threats posed by fossil fuel products, wrongful promotion of fossil fuels and concealment of known hazards, "public deception campaigns designed to obscure the connection" between the defendants' products and climate change, and failure to pursue less hazardous alternatives. The City asserted claims of public and private nuisance, strict liability for failure to warn, negligent failure to warn, and trespass, as well as violations of the South Carolina Unfair Trade Practices Act. The City sought compensatory damages, treble damages under the Unfair Trade Practices Act, equitable relief, attorneys' fees, punitive damages, disgorgement of profits, and costs of suit. *City of Charleston v. Brabham Oil Co.*, No. 2020CP1003975 (S.C. Ct. Com., filed Sept. 9, 2020).

First Circuit Heard Oral Arguments in Fossil Fuel Companies' Appeal of Remand Order in Rhode Island Case; Ninth Circuit Extended Stay of Mandate in *County of San Mateo*; Other Cases Still Pending in District Courts

Developments in September and early October in other state and local government climate change cases against fossil fuel companies included oral arguments heard by the First Circuit on September 11 in the companies' appeal of a federal district court's remand of Rhode Island's case to state court. On October 5, defendant Chevron notified the First Circuit of the Supreme Court's granting of review in *BP p.l.c. v. Mayor & City Council of Baltimore*. The letter indicated that the same issue the Supreme Court agreed to review was pending before the First Circuit in the Rhode Island case and that the Supreme Court was likely to decide the Baltimore case in this term. *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.).

The Ninth Circuit extended its stay of the mandate in *County of San Mateo v. Chevron Corp.* for 90 days. In May, the Ninth Circuit affirmed a remand order in cases brought by localities in California. The Ninth Circuit granted the extension of the stay of mandate after the Supreme Court allowed the fossil fuel company defendants an additional 60 days to file a petition for writ

of certiorari. The petition must be filed by January 4, 2021. *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir.).

In cases still pending in district courts, the District of Hawaii on September 9 declined to reconsider its order lifting the stay in the City and County of Honolulu's case against fossil fuel companies. The district court rejected the companies' contention that it should reconsider lifting the stay in light of the Ninth Circuit's stay of the issuance of the mandate in *County of San Mateo v. Chevron Corp.* The District of Hawaii said it remained "unpersuaded that the contingent utility of a stay in this case outweighs proceeding in the normal course with, at the very least, Plaintiff's anticipated motion to remand." Honolulu filed its motion to remand on September 11. *City & County of Honolulu v. Sunoco LP*, No. 1:20-cv-00163 (D. Haw.).

In the Western District of Washington, the district court continued a stay that has been in place since October 2018. The parties jointly requested that the stay be maintained pending resolution of the earlier of (1) defendants' petition for writ of certiorari to the Supreme Court in *City of Oakland v. BP p.l.c.* or (2) the Supreme Court's decisions in two cases involving personal jurisdiction issues. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash. Sept. 9, 2020).

In *City of Oakland v. BP p.l.c.*, which has returned to the Northern District of California, the court scheduled a case management conference for November 12, 2020. *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal.).

Environmental Groups Challenged FERC Approval of Alaska LNG Project of "Unprecedented" Scale

Center for Biological Diversity and Sierra Club filed a petition in the D.C. Circuit Court of Appeals for review of Federal Energy Regulatory Commission (FERC) actions authorizing the Alaska LNG Project, which includes a liquefied natural gas terminal in southcentral Alaska, an 807-mile gas pipeline, a gas treatment plant on the North Slope, and other related transmission lines. Issues raised by Center for Biological Diversity and Sierra Club before FERC included failure to meaningfully consider an alternative that would avoid the project's greenhouse gas emissions and other pollution, failure to take a hard look at the project's greenhouse gas emissions, and failure to take a hard look at impacts of the project's greenhouse gas emissions on polar bear recovery. The organizations also contended that FERC failed to consider how the project—the size of which they described as "unprecedented"—would exacerbate climate change in its public interest analysis under the Natural Gas Act. *Center for Biological Diversity v. Federal Energy Regulatory Commission*, No. 20-1379 (D.C. Cir., filed Sept. 21, 2020).

D.C. Circuit Heard Oral Argument on Clean Power Plan Repeal and Replacement

On October 8, 2020, the D.C. Circuit Court of Appeals heard oral argument on the repeal of the Clean Power Plan, EPA's authority to promulgate a replacement rule for carbon dioxide emissions from existing power plants, and the legality of EPA's replacement rule, the Affordable Clean Energy Rule. The court also heard arguments on issues related to EPA's treatment of biomass-based fuels and biogenic emissions. *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.).

Petitioners Requested Briefing Schedule to Allow Oral Argument in Current Term on Amendments to Vehicle Greenhouse Gas Standards; EPA and NHTSA Opposed

Petitioners and respondents in the proceedings challenging EPA and NHTSA's amendment of greenhouse gas and fuel economy standards for passenger cars and light trucks disagreed over the timeframe for briefing in the case. The petitioners asked the D.C. Circuit to establish a schedule that would allow for oral argument during the current term, with briefing to begin on November 10, 2020 and be completed on March 5, 2021. They also requested that the court permit petitioners to file five separate principal briefs. The respondents contended that the motion to establish a briefing schedule was premature because motions to supplement the record and motions to intervene were still pending. If the court decided to establish a briefing format and schedule, the respondents requested that the petitioners' opening briefs be due on January 14, 2021, with final briefs due on June 14, 2021. The respondents also argued that the petitioners' proposed word counts were unreasonable and requested reduced word counts. *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, No. 20-1145 (D.C. Cir.).

Briefs Filed in Support of EPA and NHTSA's Actions Restricting State Authority to Regulate Vehicle Emissions

EPA and NHTSA defended their rulemaking that withdrew California's waiver for its Advanced Clean Car program and explicitly preempted state and local regulations of tailpipe greenhouse gas emissions and zero-emission vehicle mandates. They argued in a brief filed in the D.C. Circuit that NHTSA had authority to issue the preemption regulations under the Energy Policy and Conservation Act (EPCA), that EPCA expressly and impliedly preempted state mandates and standards, and that NEPA did not apply to NHTSA's preemption regulations. They also argued that jurisdiction for review of the regulation was properly in the D.C. Circuit. The respondents also argued that EPA has authority to reconsider and withdraw waivers and that it properly withdrew California's waiver. Twelve states and several trade groups filed briefs as intervenors supporting EPA and NHTSA's actions. In addition, the U.S. Chamber of Commerce and the organization Urban Air Initiative filed amicus briefs in support of EPA and NHTSA. On September 22, Alaska moved to withdraw as a respondent-intervenor, and the D.C. Circuit granted its motion on September 24. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, No. 19-1230 (D.C. Cir.).

Plaintiff in Securities Action Against Exxon Said Decision Against New York Attorney General Should Not Affect this Case

The lead plaintiff in a federal securities action against Exxon Mobil Corporation told the federal district court for the Northern District of Texas that a New York State court's rejection of the New York attorney general's fraud claims against Exxon should have no impact on the district court's previous denials of Exxon's motion to dismiss the securities action. The plaintiff argued that the claims in this action were not dependent on evidence or allegations at issue in the New York decision, that the New York decision's factual findings did not provide a basis for finding the plaintiff's claims in this case implausible, and that the limited evidence produced to date

strongly supported the plaintiff's claims. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111 (N.D. Tex. Oct. 2, 2020).

New Lawsuit Challenging Amended NEPA Regulations Focused on CAFO Exemptions

Six organizations led by Iowa Citizens for Community Improvement filed a lawsuit in federal court in the District of Columbia challenging the Council on Environmental Quality's amendments to the NEPA regulations. It is the fifth lawsuit filed challenging the amended regulations; the cases are pending in four district courts. The plaintiffs in this case alleged that the amendments give "yet another free pass" to the concentrated animal feeding operation (CAFO) industry by restricting NEPA review of federal funding for the CAFO industry. The complaint alleged that CAFOs and the slaughterhouses they supply "cause and exacerbate climate change and harm rural community and economic health, drinking water quality and quantity, air quality, endangered species, the confined animals themselves, and other aspects of the human environment." *Iowa Citizens for Community Improvement v. Council on Environmental Quality*, No. 1:20-cv-02715 (D.D.C., filed Sept. 23, 2020).

Center for Biological Diversity Sought to Compel Listing Determination on Rare Lizards Threatened by Sea Level Rise

Center for Biological Diversity (CBD) filed a lawsuit in the federal district court for the District of Columbia challenging the U.S. Fish and Wildlife Service's failure to determine whether eight species of Caribbean skink warrant protection under the Endangered Species Act. The complaint alleged that skinks are rare lizards "endemic to a few islands in the Caribbean Sea and found nowhere else on earth" that are in "steep decline from threats including habitat destruction and degradation, human-introduced predators, climate change, and accelerating sea level rise." CBD alleged that it had petitioned the FWS to list the skins in February 2014, that the FWS determined there was substantial scientific or commercial information indicating that listing may be warranted in 2016, and that the FWS had subsequently failed to make a listing determination. *Center for Biological Diversity v. Bernhardt*, No. 1:20-cv-2714 (D.D.C., filed Sept. 23, 2020).

Lawsuit Challenged Opening of Federal Land in Western Colorado to Oil and Gas Leasing

A second lawsuit was filed by conservation groups challenging the U.S. Bureau of Land Management's (BLM's) approval of a resource management plan (RMP) covering almost a million acres in western Colorado. (Six other organizations filed a lawsuit in August.) The approval made 95% of the area covered by the RMP available for oil and gas leasing. The petitioners asserted that BLM violated NEPA, the Federal Land Policy and Management Act, and the Administrative Procedure Act, including by failing to take a hard look at climate change impacts. *Western Slope Conservation Center v. U.S. Bureau of Land Management*, No. 1:20-cv-02787 (D. Colo., filed Sept. 15, 2020).

U.S. Appealed District Court's Rejection of Challenges to Linkage Between California and Quebec Cap-and-Trade Programs

The United States filed an appeal from the judgment in favor of California and other defendants in the U.S. case challenging agreements linking California's greenhouse gas emissions cap-and-trade agreement with the trading program of provincial government of Quebec, Canada. The district court rejected the U.S.'s claims that the linkage violated the Treaty and Compact Clauses and was preempted under the Foreign Affairs Doctrine. *United States v. California*, No. 2:19-cv-02142 (E.D. Cal. Sept. 14, 2020), No. 20-16789 (9th Cir.).

Two Lawsuits Challenged Oil and Gas Leasing Program in Arctic National Wildlife Refuge

Two more lawsuits were filed in the federal district court for the District of Alaska challenging federal defendants' approval of an oil and gas leasing program on the Coastal Plain of the Arctic National Wildlife Refuge. Plaintiffs in one case are three federally recognized Indian Tribes; plaintiffs in the other suit are 15 states. In both cases, the plaintiffs asserted claims under NEPA, the National Wildlife Refuge System Administration Act, the Alaska National Interest Lands Conservation Act, the Administrative Procedure Act, and the Tax Cuts and Jobs Act of 2017. The tribes also asserted a claim under the National Historic Preservation Act. With respect to climate change, the tribes contended that the defendants failed to meaningfully analyze climate change in relation to subsistence, sociocultural systems, and environmental justice; cultural resources; caribou; migratory waterfowl; vegetation, tundra, and wetlands; and soils, permafrost, sand, and gravel. The states alleged that the analysis of greenhouse gas emissions and climate change impacts was inadequate because it "drastically" underestimated the leasing program's indirect greenhouse gas emissions, failed to quantify costs from greenhouse gas emissions and climate change, and failed to meaningfully analyze climate impacts of methane emissions or cumulative impacts of greenhouse gas emissions. *Washington v. Bernhardt*, No. 3:20-cv-00224 (D. Alaska, filed Sept. 9, 2020); *Native Village of Venetie Tribal Government v. Bernhardt*, No. 3:20-cv-00223 (D. Alaska, filed Sept. 9, 2020).

Lawsuit Challenged Chicken Slaughterhouse's Water Use as Unconstitutional

Animal Legal Defense Fund (ALDF) filed a lawsuit in California Superior Court alleging that a chicken slaughterhouse's use of millions of gallons of groundwater was unreasonable in violation of Article X, Section 2, of the California Constitution. ALDF alleged that the water use violated the Constitution for multiple reasons, including that "California is plagued with drought that is exacerbated by the effects of climate change, and there exists an ever-increasing need for water conservation," and that the state of existing water resources was "dire" and would continue to be worsened by climate change. *Animal Legal Defense Fund v. Foster Poultry Farms*, No. __ (Cal. Super. Ct., filed Sept. 2, 2020).

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FEATURED CASE

Second Circuit Reinstated Penalty Increase for Fuel Economy Violations

The Second Circuit Court of Appeals vacated the National Highway Traffic Safety Administration's (NHTSA's) reversal of a 2016 increase to the penalty for violations of fuel

economy standards. In 2016, NHTSA increased the penalty pursuant to Federal Civil Penalties Inflation Adjustment Act Improvements Act (the Improvements Act) from $5.50 to $14 for every tenth of a mile per gallon below the applicable standard, multiplied by the number of cars in a manufacturer's fleet. In 2019, NHTSA reversed the increase based on its conclusion that the Improvements Act did not apply to the fuel economy penalty and that, even if the Act did apply, the penalty's "negative economic impact" was sufficient to support reversal. The Second Circuit rejected both rationales. First, the Second Circuit held that the penalty was a "civil monetary penalty" under the Improvements Act. NHTSA therefore was required to adjust the penalty rate in accordance with the Improvements Act's requirements. Second, the court held that reconsideration and reversal of the increase based on economic consequences was untimely and therefore beyond NHTSA's authority. *New York v. National Highway Traffic Safety Administration*, Nos. 19-2395 & 19-2508 (2d Cir. Aug. 31, 2020).

DECISIONS AND SETTLEMENTS

Ninth Circuit Order Stayed Mandate After Affirming Remand of California Local Governments' Climate Cases to State Court

In cases brought by San Mateo County and other California localities seeking climate change-related damages from fossil fuel companies, the Ninth Circuit granted the companies' motion to stay the mandate after the Ninth Circuit affirmed a district court order remanding the cases to state court. The companies argued that a stay was warranted because their petition for writ of certiorari would raise the substantial question of whether a court of appeals may review any issue in a district court order granting remand where removal was based in part on the federal-officer removal statute or whether, as the Ninth Circuit ruled, the appellate court's jurisdiction is limited to reviewing the district court's decision on the federal-officer removal issue. The companies also argued there was good cause for a stay because remand would result in six cases being returned to four different state courts for proceedings, potentially forcing the defendants "to incur substantial burden and expense." The Ninth Circuit stayed the mandate pending the Supreme Court's action on the certiorari petition and, if the Supreme Court grants the petition, pending disposition of the case. The companies also filed a motion in the district court to confirm that the court's orders staying issuance of the remand orders pending appeal would extend to the conclusion of any Supreme Court proceedings. On August 20, the court issued an order clarifying the stay was intended to remain in place until the mandate issued and that the companies could have requested an additional stay. *County of San Mateo v. Chevron Corp.*, Nos. 18-15499 et al. (9th Cir. Aug. 25, 2020), Nos. 3:17-cv-04929 et al. (N.D. Cal. Aug. 20, 2020).

Ninth Circuit Denied Rehearing of Decision that Federal-Question Jurisdiction Did Not Provide Basis for Removing Oakland and San Francisco Climate Cases to Federal Court

In the cases brought by Oakland and San Francisco, the Ninth Circuit denied the energy company defendants' petition for panel rehearing and/or rehearing en banc of its opinion reversing the district court's determination that federal-question jurisdiction provided a basis for removal. The Ninth Circuit also amended a footnote in the opinion in response to a letter from the district court judge requesting that the Ninth Circuit withdraw the footnote. The district court judge asserted that Ninth Circuit's opinion misconstrued his decision as relying on admiralty

jurisdiction (which the energy companies had not identified as a basis for removal) rather than on federal-question jurisdiction arising out of the navigable waters of the United States. The amended footnote indicated that an argument that there was federal-question jurisdiction because "the instrumentality of the alleged harm is the navigable waters of the United States" failed for the reasons set forth in the section of the Ninth Circuit's opinion that held there was no exception to the well-pleaded complaint rule. The mandate issued on August 20, 2020. *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir. rehearing petition denied Aug. 12, 2020 and mandate issued Aug. 20, 2020).

State Courts Put Rhode Island and Baltimore Climate Damages Cases on Hold Pending U.S. Supreme Court Decision on Personal Jurisdiction Issues in Unrelated Auto Manufacturer Cases

In Rhode Island's case against fossil fuel companies, the First Circuit will hear oral argument on September 11, 2020 in the companies' appeal of the remand order returning the case to state court. On August 13, 2020, the state trial court in Rhode Island delayed further consideration of the defendants' motion to dismiss for lack of personal jurisdiction until the U.S. Supreme Court and the Rhode Island Supreme Court decide pending cases that concern similar personal jurisdiction issues. In this case, the defendants argue that Rhode Island has not demonstrated that its alleged injuries arise out of the defendants' limited contacts with Rhode Island; they contend that expansion of specific jurisdiction for climate change claims would violate due process and interfere with the defendants' home jurisdictions' power. The cases that the U.S. Supreme Court is scheduled to consider in its next term concern specific jurisdiction in wrongful death and products liability cases against auto manufacturers in Minnesota and Montana; the high courts of those states found personal jurisdiction in both cases. The case in the Rhode Island Supreme Court is an appeal of a trial court finding of no specific personal jurisdiction over defendants who designed and manufactured the truck and tire involved in a wrongful death action. The Rhode Island trial court also delayed consideration of Rhode Island's motion to compel jurisdictional discovery and stated that it would not consider the defendants' motion to dismiss for failure to state a claim until it determined that the parties were properly before the court. *State v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct. Aug. 13, 2020).

The Maryland trial court hearing Baltimore's climate case against fossil fuel companies deferred further proceedings pending both the U.S. Supreme Court's decision on the companies' petition for writ of certiorari seeking review of the Fourth Circuit's affirmance of the order remanding the case to state court and also the Supreme Court's decision in its review of decisions by the Montana and Minnesota high courts in cases concerning specific personal jurisdiction over auto manufacturers in wrongful death and products liability cases. The certiorari petition was distributed for consideration by the Court at a September 29, 2020 conference. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 24-C-18-004219 (Md. Cir. Ct. Aug. 6, 2020).

Federal Circuit Affirmed Dismissal of Second Case Charging CARB with Patent Infringement

The Federal Circuit Court of Appeals affirmed the dismissal on res judicata grounds of a second lawsuit brought by an individual who claimed that the California Air Resources Board's

(CARB's) cap-and-trade program infringed on a patent he held. In 2016, a district court dismissed the plaintiff's first case with prejudice because the plaintiff failed to oppose motions to dismiss. The Federal Circuit affirmed dismissal in 2017. In this second case, the Federal Circuit concluded that the district court properly applied preclusion since the plaintiff asserted the same acts of infringement. *Sowinski v. California Air Resources Board*, No. 19-1558 (Fed. Cir. Aug. 21, 2020).

D.C. Circuit Rejected Challenge to Cellulosic Biofuel Guidance

The D.C. Circuit Court of Appeals dismissed in part and denied in part a petition for review of a U.S. Environmental Protection Agency (EPA) guidance document that explained EPA's interpretation of regulatory requirements for determining the amount of cellulosic biofuel in ethanol produced from corn kernels. The D.C. Circuit noted that cellulosic biofuel "produces the least lifecycle greenhouse gas emissions of the four renewable fuels promoted by the Clean Air Act's Renewable Fuel Standard program." The D.C. Circuit dismissed the challenge to one portion of the guidance as unripe and concluded that another portion of the guidance announced "a final, interpretive rule that lawfully construes the underlying regulation." Judge Henderson dissented in part, stating that in her view the guidance was a legislative rule that effectively amended the applicable regulation, and that it therefore should have been subject to notice and comment. *POET Biorefining, LLC v. EPA*, No. 19-1139 (D.C. Cir. Aug. 14, 2020).

Florida Federal Court Said Federal Defendants Must Reinitiate Endangered Species Act Consultation to Consider Impact of Lake Okeechobee Releases on Manatees

The federal district court for the Southern District of Florida held that the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service acted arbitrarily and capriciously when they failed to reinitiate consultation under the Endangered Species Act regarding the effects of red and blue-green algae on endangered West Indian Manatees in connection with releases from Lake Okeechobee under the Lake Okeechobee Regulation Schedule (LORS). The decision does not mention climate change, but the plaintiffs' allegations included that past analyses of LORS under the ESA "entirely failed to consider how climate change might affect LORS and harmful algal blooms." The plaintiffs also asserted a claim under the National Environmental Policy Act that was not a subject of this decision. *Center for Biological Diversity v. U.S. Army Corps of Engineers*, No. 2:19-cv-14199 (S.D. Fla. Aug. 28, 2020).

California Federal Court Allowed Constitutional and Preemption Challenges to Proceed Against Richmond Ordinance Banning Coal and Petcoke Operations

The federal district court for the Northern District of California largely denied the City of Richmond and the Richmond City Council's motions to dismiss challenges to an ordinance prohibiting the storage and handling of coal and petcoke. The plaintiffs are the operator of a port and marine terminal that is the only coal and petcoke bulk handling facility and marine shipment transfer point in the Bay Area; the operator of a nearby refinery that produces petcoke and uses the terminal to ship the product abroad; and a Utah company that mines and sources thermal coal. The plaintiffs all alleged that the City viewed reducing climate change as the ordinance's objective. The court found that the plaintiffs stated plausible claims under the dormant

Commerce Clause (based on a *Pike* balancing test but not on a theory of extraterritoriality) and foreign Commerce Clause, as well as under the Due Process, Equal Protection, and Takings Clauses. In addition, the court allowed the plaintiffs to proceed with claims that the Interstate Commerce Commission Termination Act and the Shipping Act of 1984 preempted the ordinance, but not with a claim of preemption by the Hazardous Materials Transportation Act. The court also granted leave for permissive intervention to Sierra Club and San Francisco Baykeeper. *Levin Richmond Terminal Corp. v. City of Richmond*, No. 4:20-cv-01609 (N.D. Cal. Aug. 27, 2020).

Parties Agreed to Timeline for Action on Critical Habitat for Green Sea Turtles

Federal defendants and the Center for Biological Diversity and two other plaintiff organizations agreed to a settlement pursuant to which the defendants will issue a proposed determination for the designation of critical habitat for six distinct population segments of the green sea turtle, a species whose habitat is threatened by sea level rise among other factors. The defendants must submit the proposed determination for publication in the Federal Register by June 30, 2023. The settlement resolved a lawsuit filed in January 2020. *Center for Biological Diversity v. Bernhardt*, No. 1:20-cv-00036 (D.D.C. Aug. 20, 2020).

New Mexico Federal Court Found Cumulative Climate Change Analysis for Oil and Gas Leases Sufficient

The federal district court for the District of New Mexico found that the U.S. Bureau of Land Management's (BLM's) National Environmental Policy Act (NEPA) review of three leases for oil and gas development across 68,232 acres in southeastern New Mexico was adequate. First, the court concluded that BLM satisfied NEPA's requirements for analysis of the leases' cumulative climate change effects by placing the leases in a regional and national context, considering other development in the region, and assessing (in incorporated reports) "the global impact of its leases." The court found that the conclusion that the leases' impact was not significant was not arbitrary and capricious. Second, the court said BLM was not required to apply the Social Cost of Carbon protocol. In addition, the court found that BLM's consideration of air quality impacts and water quantity and quality impacts was sufficient. The court also found that BLM reasonably determined that environmental impact statements were not necessary. Regarding the NEPA regulations' inclusion of whether an action is "highly controversial" as a factor for significance, the court recognized "that climate change can elicit strong reactions." The court noted, however, "that nothing in NEPA or its accompanying regulations mandates certain studies to account for this global problem. What should not be controversial is the Court's role in holding agencies accountable to congressional mandates. If Congress requires BLM to perform specific climate change-based studies, then the Court will uphold them. That time has not yet arrived. At present, BLM states that extrapolating site-specific leasing emissions onto global climate models is too uncertain. Instead, it places emissions in the context of the locality and region. Such analysis meets NEPA's requirements and is not controversial despite the charged nature of the topic." The court denied the plaintiff's request to declare BLM's leasing process guidance unlawful but enjoined subsequent leases that did not allow for public participation, per the guidance. *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505 (D.N.M. Aug. 18, 2020).

Montana Supreme Court Said Public Service Commission Improperly Excluded Avoided Carbon Costs from Contract Rates for Small Solar Facilities

The Montana Supreme Court agreed with a lower court that the Montana Public Service Commission's (PSC's) reduction of standard-offer contract rates and maximum contract lengths for small solar qualifying facilities (QFs) violated the Public Utility Regulatory Policies Act (PURPA) and Montana law. The court concluded that the record did not support the PSC's decision not to include a "carbon adder" when setting the utility's avoided-cost rate; the PSC had decide not to include it because the change in presidential administrations decreased the likelihood of carbon emissions regulation. The court held that exclusion of carbon dioxide emissions cost violated PURPA, stating: "While carbon price forecasting may be innately difficult, to assign carbon pricing a value of 'zero' because of its speculative nature simply does not compensate QFs for the full avoided-cost rate." The court further found the PSC justification for the exclusion to be arbitrary because it was inconsistent with the PSC's inclusion of a carbon adder in another recent case involving purchase of wind energy from small QFs. In addition, the Supreme Court also affirmed the lower court's findings of other violations. *Vote Solar v. Montana Department of Public Service Regulation*, No. DA 19-0223 (Mont. Aug. 24, 2020).

Rhode Island Court Dismissed Challenge to Agency's Denial of Climate Change Rulemaking Petition

A Rhode Island Superior Court granted the Rhode Island Department of Environmental Management's (RIDEM's) motion to dismiss a lawsuit seeking review of RIDEM's denial of a rulemaking petition seeking adoption of regulations "to address urgent problems posed by climate change to the health of Petitioners." The court concluded it lacked subject matter jurisdiction over the plaintiff's administrative appeal under the Rhode Island Administrative Procedures Act (APA); the court found that it was "abundantly clear" that the plaintiffs had not been aggrieved within the meaning of the applicable APA provision. The court also held that the plaintiffs were not entitled to declaratory relief under the APA and that they did not have standing under the Uniform Declaratory Judgment Act. Regarding standing, the court concluded the plaintiffs—despite their presentation of data and studies indicating the detrimental effect of climate change—"failed to demonstrate a specific, tangible, and concrete injury suffered as a result of [the] rejection of the proposed rules" and that they had not alleged a "personal stake in the controversy," only "broader claims of the public at large." *Duryea v. Rhode Island Department of Environmental Management*, No. PC-2018-7920 (R.I. Super. Ct. Aug. 24, 2020).

New York Court Rejected Challenge to Plan to Elevate East River Park in Manhattan

A New York trial court rejected a public trust doctrine challenge to New York City's resiliency plan for the Lower East Side that involved elevating an existing park on the East River by eight feet to serve as a barrier to coastal storms and flooding. In a decision announced from the bench, the court found that although the plan involved a "substantial intrusion," the intrusion was for a park purpose and the public trust doctrine was not implicated. The court indicated that the record supported the conclusion "that without this plan we will likely not even have a park at all" due to climate change. The court also found that any "danger" of the City not restoring the entire park

and using a portion for non-park purposes was "speculation." *East River Park Action v. City of New York*, No. 151491/2020 (N.Y. Sup. Ct. Aug. 21, 2020).

NEW CASES, MOTIONS, AND NOTICES

District Courts Considered How to Proceed After Ninth Circuit Decisions in *County of San Mateo* and *City of Oakland*

After the Ninth Circuit's decisions on jurisdictional issues in the *County of San Mateo* and *City of Oakland* cases, there was activity in other similar climate change cases that are pending in district courts in the Ninth Circuit but that have been dormant while the California cases proceeded.

- In King County's case in the Western District of Washington, the court continued a stay until September 9, 2020 and directed the parties to submit a joint proposal for next steps by that date. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash. Aug. 27, 2020).

- In the Pacific Coast Federation of Fishermen's Associations' case in Northern District of California, the court initially scheduled a case management conference for August 26, 2020 but rescheduled the conference for December 16, 2020 after the parties submitted a joint request to vacate the case management conference given the defendants' intent to file petitions for writ of certiorari seeking review of the Ninth Circuit's decisions. *Pacific Coast Federation of Fishermen's Associations v. Chevron Corp.*, No. 3:18-cv-07477 (N.D. Cal. Aug. 22, 2020).

- In Honolulu's case in the District of Hawaii, the court concluded that the stay of the proceedings was no longer appropriate. The court stated that there was "not a strong likelihood of acceptance of certiorari or reversal" in the *County of San Mateo* and *City of Oakland* cases; that the defendants would not be irreparably injured absent a stay; that a further stay would "substantially injure" the plaintiff by prolonging the proceedings; and that there was "always a public interest" in "prompt" resolution of a dispute. The court gave Honolulu a deadline of September 11, 2020 for filing a motion to remand. On September 4, the defendants filed a request that the court reconsider in light of Ninth Circuit's stay of the mandate in *County of San Mateo*. *City & County of Honolulu v. Sunoco LP*, No. 1:20-cv-00163 (D. Haw. Aug. 21, 2020).

Hoboken Filed Suit Seeking Damages from Energy Companies for Climate Change Impacts

The City of Hoboken, New Jersey filed a lawsuit in state court asserting climate change-based claims for damages and injunctive relief against energy companies and the American Petroleum Institute. The City alleged that the defendants caused climate change-related harms through production of fossil fuels and concealment of fossil fuels' harms. The complaint alleged that Hoboken is "uniquely vulnerable to sea level rise" and that the city was experiencing more frequent and severe storms as a result of climate change. In response to these impacts, Hoboken

alleged that it had developed an adaptation and mitigation plan to address rainfall and seawater flooding that would cost more than $500 million. The complaint asserted claims of public and private nuisance, trespass, negligence, and violation of the New Jersey Consumer Fraud Act. The relief sought included compensatory, consequential, and punitive damages; treble damages under the Consumer Fraud Act; an order compelling the defendants to abate the alleged nuisance and to pay costs of abatement; an order enjoining future acts of trespass; and attorneys' fees and costs. *City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-003179-20 (N.J. Super. Ct., filed Sept. 2, 2020).

Petitioners Sought to Supplement Record in Challenges to Vehicle Emission and Fuel Economy Standards

Two motions to add documents to the record were filed in proceedings challenging EPA and NHTSA's revision of greenhouse gas emissions and fuel economy standards for passenger cars and light trucks. The State and Municipal Petitioners and Public Interest Petitioners requested that the D.C. Circuit order the respondents to add six interagency-review documents in the administrative record: two drafts of the final rulemaking notice submitted to the White House Office of Management and Budget; EPA comments to NHTSA on those drafts; and two EPA documents that provide context for its comments. The petitioners asserted that the deliberative privilege that would ordinarily shield EPA comments and the related documents from judicial review either did not apply or was "overcome by showings of need by [the petitioners] and bad faith or improper behavior by the Agencies." The petitioners argued that the documents were probative of their claim that EPA failed to exercise independent judgment or apply technical expertise, and also that the available evidence showed that EPA was "cut out of the process of developing its own rule" and that "the Executive Branch took unprecedented and improper steps to hide the facts." In the second motion, petitioner Competitive Enterprise Institute (CEI) sought the addition of three scientific documents regarding particulate matter. CEI argued that the final rule explicitly relied on one of the documents, and that EPA Administrator Andrew Wheeler considered the other two documents. *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, No. 20-1145 (D.C. Cir. Aug. 25, 2020).

Environmental Groups and States Challenged Authorization of LNG Transport by Rail

Seven environmental groups filed a petition for review in the D.C. Circuit Court of Appeals challenging the Pipeline and Hazardous Materials Safety Administration's promulgation of regulations authorizing transport of liquefied natural gas (LNG) by rail. Fourteen states and the District of Columbia also filed a petition for review. Both the environmental groups and the states raised concerns regarding both public safety and environmental impacts, including impacts on climate change and greenhouse gas emissions, in comments they submitted on the proposed rule. *Sierra Club v. U.S. Department of Transportation*, No. 20-1317 (D.C. Cir., filed Aug. 18, 2020); *Maryland v. U.S. Department of Transportation*, No. 20-1318 (D.C. Cir., filed Aug. 18, 2020).

California Led State, Territorial, and Local Governments in Fourth Lawsuit Challenging Amended NEPA Regulations

On August 28, 2020, California and 20 other states, along with Guam, the District of Columbia, Harris County in Texas, and New York City, filed a lawsuit in the Northern District of California challenging the Council on Environmental Quality's (CEQ's) amendments to the NEPA regulations. Like the three other previously filed challenges, the states' complaint asserted that amendments arbitrarily and unlawfully made changes that limit review of climate change impacts, including by narrowing the scope of effects required to be considered, imposing strict causation requirements, and directing agencies not to consider cumulative and indirect effects. The plaintiffs asserted that the final rule was contrary to NEPA's language and exceeded CEQ's statutory authority; that the final rule was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; and that CEQ violated NEPA by not preparing an environmental assessment or environmental impact statement to consider the final rule's impacts. In addition, the plaintiffs asserted that CEQ violated the Administrative Procedure Act by failing to provide an opportunity to comment on the Regulatory Impact Analysis and by failing to respond adequately to comments on the proposed rule. *California v. Council on Environmental Quality*, No. 3:20-cv-06057 (N.D. Cal., filed Aug. 28, 2020).

Owners of Private Golf Club Challenged Rezoning Described as Climate Change Adaptation Measure

The owners of a 118-acre property on Long Island in New York filed a lawsuit challenging a zoning ordinance that applied a "Coastal Conservation District" to the property. Until 2020, the property was used as a private golf club. The owners asserted that the establishment of the Coastal Conservation District—which reduced the number of permitted residential units from 284 to 59—violated their equal protection and due process rights, constituted an unconstitutional taking, constituted an unlawful and ultra vires exercise of zoning power, and unlawfully preempted the review process under the New York State Environmental Quality Review Act. The plaintiffs alleged that "no comprehensive environmental, or other, study" supported adoption of the Coastal Conservation District, for which "the stated purpose recites as its principal rationale the need to manage 'current and future physical climate risk changes due to sea level rise, storm surge and flooding.'" The plaintiffs alleged that the Expanded Environmental Assessment accompanying the District was "prepared entirely as a fig leaf to cover the naked land grab." *WG Woodmere LLC v. Town of Hempstead*, No. 1:20-cv-3903 (E.D.N.Y., filed Aug. 24, 2020).

Lawsuits Challenged EIS for Reopening of Millions of Acres in National Petroleum Reserve–Alaska to Oil and Gas Development

Two lawsuits were filed challenging the environmental impact statement (EIS) for a revision to the Integrated Activity Plan for the National Petroleum Reserve–Alaska that would open approximately 6.7 million acres of the Reserve to oil and gas development. Both sets of plaintiffs asserted violations of NEPA, and plaintiffs led by Northern Alaska Environmental Center also asserted violations of the Naval Petroleum Reserves Production Act and the Administrative Procedure Act. Both complaints identified climate change as one subject that the EIS failed to address adequately. *National Audubon Society v. Bernhardt*, No. 3:20-cv-00206 (D. Alaska, filed Aug. 24, 2020); *Northern Alaska Environmental Center v. Bernhardt*, No. 3:20-cv-00207 (D. Alaska, filed Aug. 24, 2020).

Plaintiffs in Two Lawsuits Challenged Oil and Gas Leasing Plan for Arctic National Wildlife Refuge

Two lawsuits were filed in the federal district court for the District of Alaska challenging the federal review and approval of an oil and gas leasing program for the Coastal Plain of the Arctic National Wildlife Refuge. The Tax Cuts and Jobs Act enacted in 2017 authorized an oil and gas leasing program; BLM released a record of decision authorizing a program on August 17, 2020. Together, the plaintiffs asserted violations of NEPA, the Endangered Species Act, the Alaska National Interest Lands Conservation Act, the Tax Cuts and Jobs Act, the National Wildlife Refuge System Administration Act, the Wilderness Act, and the Administrative Procedure Act. Their claims included that BLM and the Fish and Wildlife Service failed to consider the leasing program's impacts on climate change, as well as resulting impacts on polar bears. They also contended that the EIS failed to provide "a reasonably thorough discussion of the effectiveness of mitigation measures," including lease stipulations or operating procedures, that could limit impacts, including impacts on greenhouse gas emissions and climate change. *Gwich'in Steering Committee v. Bernhardt*, No. 3:20-cv-00204 (D. Alaska, filed Aug. 24, 2020); *National Audubon Society v. Bernhardt*, No. 3:20-cv-00205 (D. Alaska, filed Aug. 24, 2020).

Environmental Groups Challenged BLM Approval of Resource Management Plan for Colorado Public Lands

Six environmental and conservation groups filed a lawsuit in the federal district court for the District of Colorado challenging BLM's approval of a revised Resource Management Plan (RMP) for the Uncompahgre Field Office that expanded lands available to oil and gas leasing. The plaintiffs alleged that BLM failed to take "a hard look at the plan's greenhouse gas emissions and resulting impacts to the climate and natural resources." They asserted climate change-based claims under NEPA, the Federal Land Planning and Management Act (FLPMA), and the Administrative Procedure Act. Among other contentions, the plaintiffs asserted that "BLM's failure to define or take action to prevent the unnecessary or undue degradation of lands in the context of recognized climate impacts," as required by the FLPMA, violated the APA. They also contended that BLM violated NEPA by failing to consider a no leasing alternative; failing to take a hard look at "cumulative greenhouse gas emissions or the severity of resulting climate impacts" and declining to use any tool for quantitatively assessing the RMP's climate pollution impact; and failing to take a hard look at the 20-year global warming potential of methane emissions. *Citizens for a Healthy Community v. U.S. Bureau of Land Management*, No. 1:20-cv-2484 (D. Colo., filed Aug. 19, 2020).

Lawsuit Challenged Decision Not to Protect California Spotted Owl Under Endangered Species Act

Four environmental groups filed a lawsuit in the federal district court for the Northern District of California challenging the U.S. Fish and Wildlife Service's (Service's) determination that the California spotted owl did not warrant protection under the Endangered Species Act. The plaintiffs alleged that "the Service's own scientific experts … predicted there will be increasing threats from climate change and associated increases in drought, tree mortality, and high-severity

fire," among other serious threats." *Sierra Forest Legacy v. U.S. Fish & Wildlife Service*, No. 5:20-cv-05800 (N.D. Cal., filed Aug. 18, 2020).

EPA Sought Dismissal of Lawsuit Alleging Unreasonable Delay in Issuance of Methane Guidelines for Oil and Gas Sector

After EPA issued a final rule rescinding methane new source performance standards (NSPS) for the oil and natural gas sector, EPA sought the dismissal of a lawsuit seeking to compel it to issue guidelines for the regulation of methane emissions for existing sources in the sector. EPA argued that the case was prudentially moot because EPA no longer had the authority or duty to issue the guidelines. EPA further argued that it had not unreasonably delayed preparation of the methane guidelines because EPA had been conducting a review of the NSPS pursuant to President Trump's Executive Order 13783 and knew that development of the guidelines for existing sources would likely have been futile prior to completion of that review. *New York v. EPA*, No. 1:18-cv-00773 (D.D.C. Aug. 14, 2020).

CEQA Lawsuit Filed to Challenge Review of Lakeside Development

Three organizations filed a lawsuit asserting that San Bernardino County violated the California Environmental Quality Act (CEQA) when it approved a 50-lot residential development adjacent to Big Bear Lake. The petition alleged that the environmental impact report's (EIR's) conclusion that the project would not result in a significant impact on climate change was not supported by adequate analysis or substantial evidence. The petition asserted that the EIR's measures to mitigate greenhouse gas emission would not be effective. With respect to proposed voluntary measures to require information be provided to tenants regarding the climate change mitigation benefits of reducing trash and vehicle miles traveled, the petition alleged that these measures "do not appear to be seriously designed to mitigate" emissions. The plaintiffs also said a requirement that the developer require at least 20% of landscape maintenance equipment be electric-powered was not within the developer's authority and, moreover, did not appear to have been required by the County as a condition of approval. The petition also alleged that the County should have used an updated environmental baseline that included increased wildfire danger due to climate change and other factors. *Friends of Big Bear Valley v. County of San Bernardino*, No. __ (Cal. Super. Ct., filed Aug. 27, 2020).

Environmental Defense Fund Asked Court to Order Colorado Agencies to Propose Greenhouse Gas Regulations

Environmental Defense Fund filed a lawsuit in Colorado District Court to compel the Colorado Air Quality Control Commission and the Colorado Air Pollution Control Division to propose regulations to reduce statewide greenhouse gas emissions as required by laws enacted in 2019. The laws set a deadline of July 1, 2020 for publication of a notice of proposed rulemaking. WildEarth Guardians filed a similar lawsuit in July. *Environmental Defense Fund v. Colorado Air Quality Control Commission*, No. 2020CV32688 (Colo. Dist. Ct., filed Aug. 5, 2020).

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FEATURED CASES

Methane Waste Prevention Rule Cases: California Federal Court Vacated BLM Repeal of 2016 Rule, Wyoming Federal Court Restarted Challenge to 2016 Rule

A federal court in California vacated the U.S. Bureau of Land Management's (BLM's) 2018 rule repealing most of the 2016 Waste Prevention Rule, finding that the process that resulted in the 2018 rule was "wholly inadequate." First, the court found that BLM ignored the Mineral Leasing Act's statutory mandate by adding an "economic limitation" to the interpretation of "waste" and through a "blanket delegation" to state and tribal authority. Second, the court found that BLM did not comply with the Administrative Procedure Act, finding fault with all of BLM's grounds for the rescission. The court found that BLM did not provide adequate justification for reversing its position that the 2016 rule's requirements were "economical, cost-effective, and reasonable"; impermissibly relied on President Trump's Executive Order 13783 in a manner that was inconsistent with statutory mandates; arbitrarily and capriciously used a new "interim domestic" social cost of methane to analyze costs and benefits; arbitrarily ignored the Waste Prevention Rule's benefits; arbitrarily overstated the administrative burden and failed to explain the "dramatic recalculation" of administrative costs; and arbitrarily and capriciously calculated compliance costs. Third, the court found that BLM did not satisfy its "hard look" obligation under NEPA with respect to impacts on public health (including impacts on tribal communities), impacts on climate, and cumulative climate impacts of BLM's fossil fuel program. The court further found that BLM erred by not preparing an environmental impact statement. The court stayed its vacatur of the 2018 rule and re-implementation of the 2016 rule for 90 days to allow the parties to determine next steps. Five days later, four states (North Dakota, Texas, Wyoming, and Montana) moved to lift a stay on litigation challenging the 2016 rule in the federal district court for the District of Wyoming. The Wyoming court granted the motion the following day and ordered the parties to propose an expedited merits briefing schedule premised on completion of briefing by September 4, 2020. *California v. Bernhardt*, No. 4:18-cv-05712 (N.D. Cal. July 15, 2020); *Wyoming v. U.S. Department of the Interior*, No. 2:16-cv-00285 (D. Wyo. July 21, 2020).

DECISIONS AND SETTLEMENTS

Public Nuisance Cases: Tenth Circuit Affirmed Remand Order in Colorado Localities' Climate Suits Against Oil and Gas Companies; Ninth Circuit Denied Rehearing of Decision Affirming Remand Order; First Circuit Scheduled Oral Argument on Appeal of Remand Order in Rhode Island Case

The Tenth Circuit Court of Appeals affirmed a district court order remanding to Colorado state court a lawsuit brought by Boulder County and two other local governments seeking to hold oil and gas companies liable for climate change-related damages allegedly caused by the companies. The Tenth Circuit determined that its appellate jurisdiction was limited to the issue of federal officer removal. It therefore did not address the five other grounds for removal on which the companies relied in their appeal. The Tenth Circuit also found that ExxonMobil Corporation, one of the companies, failed to establish grounds for federal officer removal. The Tenth Circuit is the third federal appeals court to affirm the remand of a climate change lawsuit brought by local

governments (the others are the Fourth and Ninth Circuits). *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir. July 7, 2020).

In the California local government cases, the Ninth Circuit denied the defendants-appellants' petition for rehearing en banc in *County of San Mateo v. Chevron Corp.*, which affirmed the district court's remand order. A petition for panel rehearing and/or rehearing en banc is still pending in *City of Oakland v. BP p.l.c.* The United States, as well as the U.S. Chamber of Commerce and 20 states, filed amicus briefs in support of the petition for rehearing. The U.S. argued that whether "arising under federal common law" is a basis for removal and whether the case is governed by federal or state law are issues of "exceptional importance." The U.S. said the Ninth Circuit's failure to recognize "arising under federal common law" as a basis for removal conflicted with Ninth Circuit precedent. The U.S. also said rehearing should be granted because the Ninth Circuit "took a wrong turn" when it determined that improper removal could not be excused by the plaintiffs' subsequent amendment of their complaint to include a federal claim. *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir.); *County of San Mateo v. Chevron Corp.*, Nos. 18-15499 et al. (9th Cir. Aug. 4, 2020).

In Rhode Island's case against fossil fuel companies, which is currently proceeding in state court, the First Circuit scheduled oral argument for September 11, 2020 in the defendants' appeal of the remand order. *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.).

Ninth Circuit Denied Rehearing of Ruling that Oakland Prohibition on Coal Operations at Terminal Violated Development Agreement

The Ninth Circuit Court of Appeals denied petitions for panel rehearing and rehearing en banc of the court's decision affirming that the City of Oakland could not bar coal-related operations at a terminal being developed at a former Army base due to an agreement between the City and terminal's developer that existing regulations would apply to the facility. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 18-16105 (9th Cir. Aug. 3, 2020).

Ninth Circuit Said 2012 EIS Properly Served as NEPA Analysis for 2017 Lease Sales in National Petroleum Reserve-Alaska

The Ninth Circuit Court of Appeals affirmed summary judgment in favor of the defendants in a case challenging compliance with the National Environmental Policy Act (NEPA) prior to BLM's 2017 offer and sale of oil and gas leases in the National Petroleum Reserve-Alaska. The Ninth Circuit deferred to BLM's "reasonable position" that a 2012 environmental impact statement (EIS) that evaluated the management of all BLM-managed lands in the Reserve encompassed future lease sales; the court therefore rejected claims that BLM violated NEPA or its regulations by failing to prepare a NEPA analysis prior to the 2017 lease sale. The Ninth Circuit further concluded that the claim that BLM failed to take a hard look at the 2017 lease sale's impacts was time-barred under the Naval Petroleum Reserves Production Act's statute of limitations. The Ninth Circuit said the BLM's only remaining hard look obligation was to analyze new circumstances and new information, but the court said the plaintiffs had waived any supplementation claim.

In a separate unpublished memorandum in a related case, the Ninth Circuit affirmed the district court's dismissal of environmental organizations' claim that BLM failed to take a hard look at the potential greenhouse gas emissions from the lease sales and failed to adequately analyze alternatives. The Ninth Circuit rejected the organizations' argument that the 2012 EIS could not serve as NEPA analysis for the lease sales at issue because it did not assess climate change impacts. As in the other case, the Ninth Circuit further concluded that any hard look challenge to the 2012 EIS was time-barred; the court also found that the organizations failed to preserve any NEPA supplementation claim. *Northern Alaska Environmental Center v. U.S. Department of the Interior*, No. 19-35008 (9th Cir. July 9, 2020); *Natural Resources Defense Council v. Bernhardt*, No. 19-35006 (9th Cir. July 9, 2020).

Ninth Circuit Largely Agreed with District Court's Assessment of Problems with Yellowstone Grizzly Delisting Rule

The Ninth Circuit Court of Appeals largely affirmed a district court order that remanded to the U.S. Fish and Wildlife Service (FWS) a rule delisting the Greater Yellowstone Ecosystem distinct population segment of grizzly bears under the Endangered Species Act. The Ninth Circuit agreed with the district court that the FWS's commitment to ensuring the long-term genetic diversity of the Yellowstone grizzly was not adequate and that the FWS must commit to "recalibration" in the event of changes to the method of estimating the Yellowstone grizzly population. The lawsuits challenging the delisting rule had alleged threats to the Yellowstone grizzly bears due to climate change impacts on food sources and habitat. *Crow Indian Tribe v. United States*, No. 18-36030 (9th Cir. July 8, 2020).

Federal Court Transferred Challenge to Louisiana's Criminal Statute Barring Unauthorized Entry of Pipelines, Dismissed Claims Against State Attorney General

In a case challenging the facial and as-applied constitutionality of Louisiana's law prohibiting entry of critical infrastructure including pipelines, the federal district court for the Middle District of Louisiana denied motions to dismiss claims against a district attorney and sheriff in St. Martin Parish, where some of the plaintiffs were arrested while protesting construction of the Bayou Bridge Pipeline. The court dismissed claims against the Louisiana attorney general, finding that he was not a proper defendant under *Ex Parte Young*. Although the court concluded that venue over a constitutional challenge to a state statute was appropriate in the state's capitol, the court granted a motion to transfer the case to the Western District of Louisiana, finding that transfer was more convenient for the parties and witnesses and in the interest of justice. *White Hat v. Landry*, No. 3:19-cv-00322 (M.D. La. July 30, 2020).

Montana Federal Magistrate Denied Motion to Transfer Coal Mine Expansion Lawsuit to D.C., Found that Standing Allegations Were Inadequate for Some Plaintiffs

A magistrate judge in the federal district court for the District of Montana recommended that the court grant in part and deny in part a Montana coal mine owner's motion to dismiss a NEPA challenge to federal approval of the mine's expansion. The mine, known as the Rosebud Mine, is a 25,949-acre surface coal mine, and expansion would increase the mine's size by approximately 6,500 acres. The magistrate found that two of the organizations had adequately alleged standing

but that the standing allegations of three other organizations were insufficient. The magistrate recommended that the three organizations be allowed to amend the complaint with additional allegations. In a separate order, the magistrate denied the mine owner's motion to transfer the action to the federal district court in the District of Columbia, where the owner is challenging the exclusion of 74 acres from the mine expansion approval. Among other factors weighing against transfer, the magistrate found that there was not substantial overlap between the two cases because the issues in this case—which included impacts on surface waters and greenhouse gas emissions—were broader than the NEPA issues raised in the mine owner's lawsuit. The court also found that the case implicated both local concerns (harm to waters, endangered species, and the local economy) and national interests (climate change), making the "local interests" factor neutral. *Montana Environmental Information Center v. Bernhardt*, No. 1:19-cv-00130 (D. Mont. order and findings and recommendations on motion to dismiss and order denying motion to transfer July 29, 2020).

Federal Court Rejected U.S.'s Remaining Claim in Challenge to California's Cap-and-Trade Program

The federal district court for the Eastern District of California ruled that California's cap-and-trade program for greenhouse gas emissions was not preempted under the Foreign Affairs Doctrine. First, the court found that the United States failed to identify "a clear and express foreign policy that directly conflicts" with the cap-and-trade program. Second, although the court found that California's regulations and an agreement linking its cap-and-trade program with Quebec's program had a "broad purpose" that extends beyond the area of traditional state responsibility, the court concluded that the U.S. failed to show that the cap-and-trade program impermissibly intrudes on the federal government's foreign affairs power. The court therefore granted the defendants' motions for summary judgment on the Foreign Affairs Doctrine claim. Since the U.S.'s other claims under the Treaty and Compact Clauses had already been dismissed, the court entered judgment in favor of the defendants. *United States v. California*, No. 2:19-cv-02142 (E.D. Cal. July 17, 2020).

In Challenge to Berkeley Natural Gas Ordinance, Federal Court Said Restaurant Association Needed to Improve Complaint

The federal district court for the Northern District of California granted in part the City of Berkeley's motion to dismiss a challenge to its ban on natural gas infrastructure in new buildings. The court granted the motion on ripeness and standing grounds, but granted the California Restaurant Association leave to file an amended complaint by August 14, 2020 to add allegations to address the grounds for dismissal. The court also indicated during a hearing that the California Restaurant Association should do "a better job" of laying out its federal preemption argument. The court denied Berkeley's motion to dismiss on the remaining grounds but said Berkeley could raise them again in response to the amended complaint. *California Restaurant Association v. City of Berkeley*, No. 4:19-cv-07668 (N.D. Cal. July 14, 2020).

Federal Defendants Agreed to Issue Final Endangered Species Act Listing Determination on Wolverine in Lower 48 States

Conservation groups and federal defendants agreed to a dismissal of a lawsuit seeking to compel a final listing determination on the distinct population segment (DPS) of the North American wolverine in the lower 48 states. The federal defendants agreed to submit a final listing determination to the *Federal Register* by August 31, 2020. The federal district court for the District of Montana ruled in 2016 that the U.S. Fish and Wildlife Service erred by dismissing the threats of climate change and small population size when it withdrew a proposal to list the wolverine DPS as threatened. *Center for Biological Diversity v. Bernhardt*, No. 9:20-cv-00038 (D. Mont. July 2, 2020).

California Court Set Aside Some Conditions in Landfill Permit but Said Climate Change Impacts and Other Factors Justified Other Conditions

A California Superior Court upheld climate change-related conditions in a permit for a landfill in Los Angeles County in a lawsuit brought by the landfill's owner-operator. Conditions that were intended to reduce or address climate change impacts included limitations on solid waste tonnage, a time limit on landfill operations, and a requirement for periodic reviews to determine whether more stringent conditions should be imposed. The court found that some conditions, including waste reduction and diversion program fees, should be set aside, though the court indicated it was possible that the County could make required findings to support the waste reduction and diversion program fees and other mitigation fees under the Mitigation Fee Act. *Chiquita Canyon, LLC v. County of Los Angeles*, No. BS 171262 (Cal. Super. Ct. July 2, 2020).

NEW CASES, MOTIONS, AND NOTICES

Challenges to Amended NEPA Regulations Raised Climate Change Concerns

Environmental groups filed lawsuits in three federal district courts challenging the Council on Environmental Quality's (CEQ's) amendments to the NEPA regulations. All three complaints raised concerns regarding how the amendments would impede consideration of climate change impacts.

- In a suit filed in the District of Alaska, the plaintiffs asserted that CEQ should have prepared an environmental assessment or environmental impact statement under the existing regulations to evaluate the amendments' impacts, including environmental justice impacts and impacts on efforts to limit greenhouse gas emissions and to evaluate how a changing climate affects proposed projects. The Alaska plaintiffs also asserted that CEQ failed to comply with NEPA and/or the Administrative Procedure Act by failing to review environmental justice impacts, by violating standards that apply to agency decision-making, by promulgating rules that are contrary to the plain language and purpose of NEPA, and by invalidly attempting to amend statutory thresholds for judicial review. *Alaska Community Action on Toxics v. Council on Environmental Quality*, No. 3:20-cv-5199 (N.D. Cal., filed July 29, 2020).

- In a suit filed in the Western District of Virginia, the plaintiffs asserted 10 claims for relief under the Administrative Procedure Act. The claims included that CEQ arbitrarily

and capriciously reversed policy positions, including requirements for consideration of indirect and cumulative impacts. The plaintiffs also asserted that CEQ failed to respond to relevant and significant comments, including comments that eliminating consideration of climate change would lead to wasteful spending and poor decision-making. They also alleged that CEQ failed to consider alternative approaches that would adequately protect the climate, failed to demonstrate that the amended rules were consistent with NEPA, and made changes that were outside CEQ's authority. *Wild Virginia v. Council on Environmental Quality*, No. 3:20-cv-00045 (W.D. Va., filed July 29, 2020).

- In a suit filed in the Southern District of New York, plaintiffs alleged that the amendments would cause "real, foreseeable harms to people, communities, and the natural environment" and would cause agencies "to disregard, rather than disclose and consider, carbon pollution that threatens the integrity of our climate." The complaint described some of the "[c]ountless unnecessary environmental harms" that plaintiffs alleged had been "identified, disclosed, and often avoided, simply because NEPA requires federal agencies to think before they act." The plaintiffs characterized the amendments as an attempt "to revise a statute that Congress has been unwilling to repeal and rewrite" and asserted that defects in the rule rendered it illegal under the standards of the Administrative Procedure Act. Among the defects alleged in the complaint were the elimination of the requirement to consider cumulative impacts and indirect effects (which the plaintiffs alleged would make it "extremely difficult" to consider a project's effects, including climate change impacts, on environmental justice communities) and a failure to consider and adequately address public comments (including comments that eliminating the requirement to analyze indirect and cumulative effects would prevent assessment of the impacts of federal actions on climate change). *Environmental Justice Health Alliance v. Council on Environmental Quality*, No. (S.D.N.Y., filed Aug. 6, 2020).

Petitioners Argued that License Renewals for Nuclear Plant Failed to Account for Changing Climate Conditions

Petitioners challenging the U.S. Nuclear Regulatory Commission's (NRC's) license renewals for the Turkey Point nuclear generating station in Florida filed their initial brief. The renewals extend Turkey Point's operating time into the 2050s. The petitioners' arguments include that the "freshening plan" for protecting groundwater was not effective in drier and hotter conditions and that changing climate conditions would worsen the situation. The petitioners also contended that NRC failed to model anticipated climate conditions in its analysis of groundwater impacts even though it had modeled climate impacts in an earlier environmental impact statement for different reactor units. *Friends of the Earth v. U.S. Nuclear Regulatory Commission*, No. 20-1026 (D.C. Cir. July 27, 2020).

D.C. Circuit to Hear Argument on October 8 on Repeal and Replacement of Clean Power Plan

Briefing was completed in the litigation challenging EPA's repeal of the Clean Power Plan and the promulgation of the Affordable Clean Energy Rule in its place. The D.C. Circuit scheduled

oral argument for October 8, 2020. *American Lung Association v. EPA*, Nos. 19-1140 et al. (D.C. Cir.).

Conservation Law Foundation Argued that First Circuit Could Hear Appeal of Order Staying Climate Adaptation Case Against ExxonMobil

On July 10, 2020, Conservation Law Foundation (CLF) filed a brief arguing that the First Circuit had appellate jurisdiction over CLF's appeal of a district court order staying CLF's citizen suit alleging that an ExxonMobil Corporation terminal in Massachusetts was not prepared for climate change risks in violation of the its Clean Water Act permit and the Resource Conservation and Recovery Act. CLF said the stay order was an appealable "final decision" under the effectively-out-of-court rule and also under the collateral order doctrine. Alternatively, CLF argued the First Circuit should construe its appeal as a petition for writ of mandamus and exercise its discretion to review the stay order. On July 28, the First Circuit issued an order directing that the appeal proceed to merits briefing, with the issues of finality and any other jurisdictional issues to be considered by the merits panel. *Conservation Law Foundation v. Exxon Mobil Corp.*, No. 20-1456 (1st Cir. July 10, 2020).

Rhode Island Weighed in to Support Adjudication of Claims in Climate Change Adaptation Suit Against Shell

On August 13, 2020, a federal district court in Rhode Island will hear oral argument on the motion to dismiss the citizen suit brought against Shell Oil Products US and other defendants (Shell) regarding the defendants' alleged failure to prepare a terminal in Providence for the impacts of climate change. At the court's invitation, Rhode Island submitted an amicus brief asserting that doctrines of primary jurisdiction and abstention generally were not appropriate in citizen suits and that neither doctrine provided a basis for the court to stay this case or decline to adjudicate the claims. *Conservation Law Foundation v. Shell Oil Products US*, No. 1:17-cv-00396 (D.R.I. July 30, 2020).

Conservation Groups Filed Challenge to Mining Access Road Through National Park in Alaska

Conservation groups filed a lawsuit challenging federal approvals for a 211-mile road through the southern Brooks Range and Gates of the Arctic National Park and Preserve that would provide access to a mining district and be funded by the Alaska Industrial Development and Export Authority. The plaintiffs asserted claims under the Alaska National Interest Lands Conservation Act, NEPA (including failure to adequately analyze impacts on greenhouse gas emissions), the Clean Water Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act. *Northern Alaska Environmental Center v. Bernhardt*, No. 3:20-cv-00187 (D. Alaska, filed Aug. 4, 2020).

Exxon Said New York State Court's Rejection of Attorney General's Fraud Claims Required Dismissal of Securities Fraud Action in Texas Federal Court

Exxon Mobil Corporation (Exxon) and Exxon officials filed a motion for reconsideration of a 2018 decision by a federal court in Texas that partially denied their motion to dismiss a securities fraud class action based on allegations of materially false and misleading statements concerning climate change risks. The defendants argued that the plaintiff's theory was premised on the New York Attorney General's allegations in its unsuccessful fraud action against Exxon under New York law. The defendants argued that the New York State's December 2019 decision "unmasked" the Attorney General's allegations as "entirely meritless" and that the plaintiff's allegations in this case therefore could not meet the plausibility standard. The defendants also argued that the New York decision precluded the plaintiff's claims under res judicata principles and that the preclusive effect defeated class certification. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111 (N.D. Tex. July 31, 2020).

Exxon to Seek Dismissal of Massachusetts Lawsuit Under Anti-SLAPP Law

Exxon Mobil Corporation filed a notice in a Massachusetts state court indicating that it would seek to dismiss the Massachusetts Attorney General's lawsuit asserting that Exxon's failure to disclose climate change risks deceived investors and consumers. Exxon will seek to dismiss the suit under the Massachusetts anti-SLAPP (Strategic Litigation Against Public Participation) law. *Commonwealth v. Exxon Mobil Corp.*, No. 1984CV03333 (Mass. Super. Ct. July 30, 2020).

Fossil Fuel Defendants Removed Three More Climate Cases to Federal Court

Fossil fuel companies and other defendants removed climate change-based consumer protection cases brought by Minnesota, Washington, D.C., and an environmental group to federal court. In D.C.'s case and in Minnesota's case (which also involves a broader set of claims, including strict liability and negligent failure to warn claims), the defendants asserted multiple grounds for removal: that the cases raise disputed and substantial federal questions, that the claims necessarily arise under federal common law, that the claims arise out of federal enclaves, that federal-officer removal applies, that jurisdiction is proper under the Outer Continental Shelf Lands Act, that the case is removable under the Class Action Fairness Act, and that diversity citizenship creates removal jurisdiction. In the case brought by the nonprofit group Beyond Pesticides, Exxon Mobil Corporation identified diversity jurisdiction and the Class Action Fairness Act as the grounds for removal. *Minnesota v. American Petroleum Institute*, No. 0:20-cv-01636 (D. Minn. July 27, 2020); *District of Columbia v. Exxon Mobil Corp.*, No. 1:20-cv-01932 (D.D.C. July 17, 2020); *Beyond Pesticides v. Exxon Mobil Corp.*, No. 1:20-cv-01815 (D.D.C. July 6, 2020).

Group Sought Disclosure of Documents Regarding Relationships Between State Attorneys General and Outside Parties in Connection with Potential Climate Litigation

In June and July 2020, the nonprofit corporation Energy Policy Advocates filed suits in Massachusetts, Minnesota, and New Mexico under those states' public records disclosure laws seeking to compel disclosure of documents related to relationships between state attorneys general and outside parties in the context of potential climate change-related litigation. The Minnesota suit concerned requests for documents related to what the plaintiff called a "highly unusual arrangement" between the State Energy & Environmental Impact Center and the

Minnesota Attorney General where the Center funds special attorneys general to advance "progressive clean energy, climate change, and environmental legal positions." The New Mexico lawsuit concerned requests for correspondence and agreements with attorney general offices in other states. In Massachusetts, the plaintiff seek communications between the Office of Attorney General and outside lawyers. *Energy Policy Advocates v. Office of the Attorney General*, No. __ (Mass. Super. Ct., filed July 8, 2020); *Energy Policy Advocates v. Ellison*, No. 62-CV-20-3985 (Minn. Dist. Ct., filed July 8, 2020); *Energy Policy Advocates v. Balderas*, No. D-202-CV-2020-03587 (N.M. Dist. Ct., filed June 15, 2020).

Lawsuit Filed to Compel Action on Petition to Delist Arctic Ringed Seal

North Slope Borough (the local government for the northern portion of Alaska), the Iñupiat Community of the Arctic Slope, and the Arctic Slope Regional Corporation filed a lawsuit to compel action on their petition to delist the Arctic ringed seal under the Endangered Species Act. The plaintiffs alleged that available scientific information since the listing of the Arctic ringed seal as threatened in December 2012 confirmed that the seals' population remained high and that the population remained healthy while sea ice coverage for several decades. The plaintiffs asserted that new information and analyses demonstrated that the scientific basis for the threatened listing was erroneous. *North Slope Borough v. Ross*, No. 3:20-cv-00181 (D. Alaska, filed July 24, 2020).

Plaintiff Said Forest Service Should Have Conducted Supplemental Review Due to New Climate Change Information

A conservation group filed a lawsuit in the federal district court for the District of Montana asserting that the U.S. Forest Service violated NEPA by failing to prepare supplemental NEPA analysis in light of new scientific information regarding climate change. The plaintiffs alleged that the Forest Service approved a watershed project and a forest health project based on an environmental impact statement for a 1987 forest plan. *Cottonwood Environmental Law Center v. Marten*, No. 2:20-cv-00031 (D. Mont., filed July 21, 2020).

Plaintiffs Challenged Environmental Assessment for Revocation of Moratorium on Federal Coal Leasing

The federal district court for the District of Montana allowed plaintiffs to supplement their complaints in lawsuits challenging the U.S. Department of the Interior's failure to comply with NEPA when it lifted the moratorium on the federal coal leasing program. The plaintiffs sought to challenge the environmental assessment (EA) prepared by the defendants after the court ruled that lifting the moratorium was an action subject to NEPA. The plaintiffs alleged several flaws in the EA, including ignoring cumulative impacts and arbitrarily refusing to use the social cost of carbon or another metric to assess greenhouse gas impacts. The plaintiffs also contended that the absence of consideration in the EA and finding of no significant impact of the long-term public benefits of addressing climate change and other impacts violated the Mineral Leasing Act. *Citizens for Clean Energy v. U.S. Department of the Interior*, No. 4:17-cv-30 (D. Mont. July 23, 2020).

Groups Challenged Federal Lands Right-of-Way for Keystone XL

Environmental and conservation groups filed a lawsuit in federal court in Montana challenging BLM's granting of a right-of-way and temporary use permit for Keystone XL to cross federal land in Montana. The court previously dismissed a claim against BLM without prejudice because BLM had yet to act. In the new complaint, the plaintiffs alleged that the revised documents that BLM relied on still violated NEPA, the Endangered Species Act, and Administrative Procedure Act because the federal defendants made only a "cursory attempt to rectify the problems identified by the court" in its review of the cross-border permit issued by the Department of State. The plaintiffs alleged, among other things, that BLM based its decision, including a conclusion that climate impacts were minimal, on faulty environmental analyses, and that BLM therefore "failed to rationally assess whether granting a right-of-way for Keystone XL was consistent with the Bureau's multiple-use mandate." *Bold Alliance v. U.S. Department of the Interior*, No. 4:20-cv-00059 (D. Mont., filed July 14, 2020).

Plaintiffs Cite Cumulative Greenhouse Gas Impacts in Arguing for Preliminary Injunction to Stop Arkansas Highway Project

A motion for a preliminary injunction to halt construction of a "gargantuan" highway project in central Arkansas included an argument that the defendants failed to consider the project's cumulative effects on greenhouse gas emissions when combined with past, present, and reasonably foreseeable emissions of greenhouse gases in the region. The plaintiffs argued that the defendants unreasonably, arbitrarily, and capriciously limited the universe of actions against which it measured cumulative impacts. *Little Rock Downtown Neighborhood Association, Inc. v. Federal Highway Administration*, No. (E.D. Ark. July 10, 2020).

Plaintiffs Said BLM Failed to Consider Oil and Gas Leases' Cumulative Climate Impacts

Four organizations filed a lawsuit challenging BLM's authorization and issuance of oil and gas leases on 30 parcels covering nearly 41,000 acres of land in the San Juan Basin in New Mexico. The organizations asserted violations of NEPA, the Administrative Procedure Act, and the Federal Land Policy and Management Act. The plaintiffs alleged a failure to take a hard look at environmental impacts, including cumulative greenhouse gas emissions and cumulative climate change impacts. *Diné Citizens Against Ruining Our Environment v. U.S. Bureau of Land Management*, No. 1:20-cv-00673 (D.N.M., filed July 9, 2020).

Lawsuit Alleged Failure to Consider Wind Farm's Life Cycle Greenhouse Gas Impacts

A lawsuit filed in the federal district court for the Eastern District of California asserted that the U.S. Bureau of Indian Affairs failed to fully address harms to the Campo Band of Diegueño Mission Indians and the surrounding community when it authorized a lease for development, construction, operation, and maintenance of renewable energy generation facilities, including 60 wind turbines. The complaint—which alleged violations of NEPA, the Migratory Bird Treaty Act, and the Bald Eagle and Golden Eagle Protection Act—alleged that the environmental impact statement "paints a rosy picture" of global warming impacts but that its analysis failed to calculate the project's entire life cycle greenhouse gas emissions, including all life cycle

emissions from construction activities. *Backcountry Against Dumps v. U.S. Bureau of Indian Affairs*, No. 2:20-cv-01380 (E.D. Cal., filed July 8, 2020).

Lawsuit Charged that Interior Department Rule Would Imperil Protective Coastal Barriers

National Audubon Society filed a lawsuit in federal court in New York challenging a U.S. Department of the Interior final rule that allegedly "vastly expands potential sand mining projects in delicate coastal barriers protected by the 1982 Coastal Barrier Resources Act." The complaint alleged that coastal barriers, "when intact, safeguard the nation's geology, ecology, and economy," protecting communities from the impacts of coastal storms. The complaint further alleged that "[c]limate change will make coastal barriers even more important," with coastal barriers expected to mitigate $108 billion of sea level rise and flooding damages over the next 50 years. The plaintiffs asserted claims under NEPA and the Administrative Procedure Act. *National Audubon Society v. Bernhardt*, No. 1:20-cv-05065 (S.D.N.Y., filed July 2, 2020).

Lawsuit Filed to Compel Designation of Critical Habitat for Canada Lynx in the United States

A lawsuit filed in the federal district court for the District of Montana sought to compel the U.S. Fish and Wildlife Service (FWS) to comply with the court's September 2016 order remanding a critical habitat rule for the Canada lynx, a species whose population in the United States is threatened by climate change. The 2016 order found that the critical habitat rule violated the Endangered Species Act, although it rejected the argument that the FWS was required to designate unoccupied habitat that could serve as climate change refugia in the future. *WildEarth Guardians v. Skipwith*, No. 9:20-cv-00097 (D. Mont., filed July 1, 2020).

Gas Utility, Union, and Renewable Natural Gas Company Challenged California Plan to Phase Out Natural Gas

A gas distribution utility, the union representing its workers, and a company that provides renewable natural gas for the transportation market filed a lawsuit in California state court alleging that the California Energy Commission (CEC) had disregarded state law by deciding "to substantially eliminate" use of natural gas in the state. The plaintiffs alleged that the CEC violated the California Natural Gas Act when it issued a 2019 Integrated Energy Policy Report (IEPR) with an appendix intended to satisfy its Natural Gas Act obligations. The plaintiffs said the CEC was required to publish a separate Natural Gas Act Report "as a separate document that identifies strategies and options to maximize the benefits of natural gas" for each of 10 statutory criteria. They contended that the "Anti-Natural Gas Policy" embodied in the 2019 IEPR was an "underground regulation" that violate the California Administrative Procedure Act's rulemaking requirements. *Southern California Gas Co. v. California State Energy Resources Conservation and Development Commission*, No. __ (Cal. Super. Ct., filed July 31, 2020).

Natural Gas Vehicle Coalition Challenged California's Zero-Emission Vehicle Requirements for Heavy- and Medium-Duty Vehicles

The California Natural Gas Vehicle Coalition filed a lawsuit in California Superior Court challenging the California Air Resources Board's (CARB's) approval of the Advanced Clean Truck Regulation, which would require that manufacturers sell an increasing percentage of medium- and heavy-duty zero-emissions vehicles (ZEVs). The Coalition alleged that CARB violated the California Environmental Quality Act and the California Administrative Procedure Act, including by failing to consider reasonable alternatives such as a plan that would include both ZEVs and low NOx trucks. The petitioners said such a plan would achieve immediate and long-term reductions in greenhouse gas and NOx emissions in the heavy-duty transportation sector. *California Natural Gas Vehicle Coalition v. California Air Resources Board*, No. __ (Cal. Super. Ct., filed July 30, 2020).

California Cities Filed Suit Contending PG&E Owed Them Taxes Collected as Greenhouse Gas Credits from Electricity Users

Sixteen California cities and Sacramento County sued Pacific Gas & Electric Company (PG&E) in California Superior Court, asserting that that PG&E unlawfully diverted tens of millions of dollars that it collects each year from utility users and that are owed to the local governments under their electricity tax ordinances. The amounts allegedly withheld by PG&E are amounts that its users pay with greenhouse gas credits issued under California's Global Warming Solutions Act of 2006, pursuant to which the Public Utilities Commission developed three financial assistance programs for electric utility customers affected by increased rates due to the cap-and-trade program. The plaintiffs contended that their electricity tax ordinances apply to total charges for electricity consumed by PG&E users, regardless of whether customers pay by cash or by application of a greenhouse gas credit. The plaintiffs alleged that PG&E's conduct undermined "the goals of California's greenhouse gas law to reduce use of carbon-intensive power." *City of Arcata v. Pacific Gas & Electric Co.*, No. CGC-20-585483 (Cal. Super. Ct., July 21, 2020).

Lawsuit Filed to Compel Colorado Rulemaking on Actions to Achieve Greenhouse Gas Goals

WildEarth Guardians filed a lawsuit in Colorado state court to compel state defendants to publish a proposed rule setting forth measures to meet statutory greenhouse gas reduction goals. A law enacted in 2019 mandated publication of a notice of proposed rulemaking by July 1, 2020. *WildEarth Guardians v. Polis*, No. 2020CV32320 (Colo. Dist. Ct., filed July 9, 2020).

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FEATURED CASE

Hawai‘i Supreme Court Said Public Utilities Commission Improperly Limited Consideration of LNG Projects' Greenhouse Gas Impacts

The Hawai‘i Supreme Court vacated the Public Utilities Commission's (PUC's) approval of a rate increase that allowed a utility to pass the costs of two liquid natural gas (LNG) project on to

its customers. The court determined that two nonprofit groups had standing to appeal the PUC's determination because they had demonstrated they were "persons aggrieved" who had participated in the case. The court cited the groups' allegations that their members were "deeply concerned" about the environmental and financial impacts of climate change, as well as climate change's threats to native Hawaiian traditions and culture. The court further held that the PUC did not fulfill its statutory obligations under the State utilities law, which the court concluded did not limit the PUC's consideration of greenhouse gas (GHG) emissions to only those occurring within the state. The PUC therefore should have considered imported LNG's impacts on out-of-state greenhouse gas emissions. The court also said the PUC failed to comply with statutory requirements when it "merely restat[ed], without substantiating, [the utility's] representation that its LNG projects would decrease GHG emissions." In addition, the court held that the PUC's limitations on the participation of the nonprofit groups violated their due process rights because they possessed a "protected property interest in a clean and healthful environment" under the Hawai'i State Constitution, and the PUC had "limited its consideration of GHG emissions to those within the boundaries of the state, truncating Appellants' property interest." On the issues of whether the PUC had failed to fulfill constitutional obligations to protect one group's native Hawaiian customary and traditional rights or to abide by the PUC's affirmative obligations as a public trustee of the State's natural resources, the court found that the record was not sufficiently developed to address these issues because the PUC "improperly curtailed" the nonprofit groups' substantive participation. The court remanded to the PUC for further proceedings. *In re The Gas Co. dba Hawaii Gas*, No. SCOT-19-0000044 (Haw. June 9, 2020).

DECISIONS AND SETTLEMENTS

California Appellate Court Rejected San Diego County's Plan to Mitigate Greenhouse Gas Impacts with Off-Site Offsets

The California Court of Appeal rejected key aspects of San Diego County's appeal of a trial court decision that set aside the County's approvals of a 2018 Climate Action Plan, Guidelines for Determining Significance of Climate Change, and a supplemental environmental impact report (SEIR). The appellate court held that a mitigation measure in the SEIR that permitted the purchase of carbon offsets from projects outside the County, including international projects, violated the California Environmental Quality Act (CEQA) because the mitigation measure did not require that offsets meet AB 32 requirements, that greenhouse gas emission reductions be additional, and that the offsets originating outside California have greenhouse emissions programs equivalent to or stricter than California's program. In addition, the appellate court found that the mitigation measure violated CEQA because 100% of greenhouse gas emissions could be offset by projects originating outside California and there were no objective criteria for County officials to use to determine whether a particular offset program was appropriate. The court also found other shortcomings in the SEIR: inadequate cumulative impacts analysis due to the exclusion of greenhouse gas impacts from certain in-process projects; failure to support a finding that the offset mitigation measure was consistent with the Regional Transportation Plan required by SB 375; failure to analyze a smart-growth alternative; and inconsistency between the Climate Action Plan and the SEIR. *Golden Door Properties, LLC v. County of San Diego*, No. D075328 (Cal. Ct. App. June 12, 2020).

Texas Appellate Court Found Insufficient Contacts to Allow Exxon to Pursue Presuit Discovery Against California Cities and Counties

Reversing a trial court, the Texas Court of Appeals dismissed Exxon Mobil Corporation's (Exxon's) petition seeking presuit discovery against California cities and counties that had filed tort-based lawsuits in California courts seeking to hold Exxon and other fossil fuel companies liable for the impacts of climate change. Exxon—which also sought discovery from government officials and an outside attorney who represented two of the cities—contended that the counties' and cities' allegations in their lawsuits regarding climate change risks contradicted their bond-offering disclosures and that discovery would allow Exxon to determine whether the California suits were "baseless and brought in bad faith as a pretext to suppress the Texas energy sector's Texas-based speech and associational activities regarding climate change and to gain access to documents that Exxon keeps in Texas." The appellate court found that the potential defendants lacked "the requisite minimum contacts with Texas to be subject to personal jurisdiction here." The appellate court stated that "even though the California suits and some of the Potential Defendants' public comments target Exxon's climate-change speech, these out-of-state actions were directed at Exxon, not Texas. Without more, the mere fact that the Potential Defendants directed these statements at Texas-based Exxon and that Exxon might suffer injury here does not establish personal jurisdiction." In addition, the appellate court said the filing of lawsuits that could yield production of documents located in Texas was not sufficient to subject the potential defendants to personal jurisdiction in Texas. The appellate court further concluded that a Texas court could not order depositions from prospective witnesses when it did not have personal jurisdiction over the potential defendants. In the opinion's closing paragraphs, the appellate court said it would "confess to an impulse to safeguard an industry that is vital to Texas's economic well-being," but that "our reading of the law simply does not permit us to agree" that the potential defendants had the requisite contacts for jurisdiction. In a similar vein, the chief justice of the court wrote a short concurring opinion urging the Texas Supreme Court "to reconsider the minimum-contacts standard that binds us." *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV (Tex. Ct. App. June 18, 2020).

Supreme Court Stayed Nationwide Injunction on New Oil and Gas Pipelines, But Left Injunction in Place for Keystone

On July 6, 2020, the U.S. Supreme Court stayed a district court's order that enjoined the authorization of all new oil and gas pipelines under Nationwide Permit (NWP) 12 due to a failure to comply with the consultation requirements of the Endangered Species Act. The injunction remains in place for the Keystone XL pipeline. The U.S. Army Corps of Engineers had submitted an application to Justice Kagan for stay pending appeal of the district court order after the Ninth Circuit denied motions to stay in late May. The Corps argued to the Supreme Court that the district court "had no warrant" to set aside NWP 12 for the Keystone XL pipeline project, "let alone for the construction of all new oil and gas pipelines anywhere in the country." The Corps contended that nationwide equitable relief was improper, that the order was issued without fair notice, and that the order lacked any sound basis in the Endangered Species Act. *U.S. Army Corps of Engineers v. Northern Plains Resource Council*, No. 19A-1053 (U.S.).

Supreme Court Denied Certiorari in Challenge to Federal Approvals that Extended Life of Coal Plant on Navajo Land

The U.S. Supreme Court declined to review a Ninth Circuit decision affirming the dismissal of lawsuit brought by environmental groups in 2016 to challenge federal authorizations of the expansion of coal mining and the extension of a coal plant's operations on tribal lands in the Four Corners area of New Mexico and Arizona. The Ninth Circuit had agreed with the district court that the Navajo Transitional Energy Company (NTEC)—a corporation wholly owned by the Navajo Nation and the owner of the coal mine—was a required party that could not be joined due to tribal sovereign immunity. The Ninth Circuit further concluded that the district court had not abused its discretion in determining that the lawsuit could not proceed without NTEC. The environmental groups had asked the Supreme Court to review the question of whether the Federal Rules of Civil Procedure "require[] dismissal of an Administrative Procedure Act action challenging a federal agency's compliance with statutory requirements governing federal agency decisions, for failure to join a non-federal entity that would benefit from the challenged agency action and cannot be joined without consent." *Diné Citizens Against Ruining the Environment v. Bureau of Indian Affairs*, No. 19-1166 (U.S. June 29, 2020).

D.C. Circuit Rejected FERC Reliance on "Tolling Orders" to Delay Judicial Review

After granting a petition for rehearing en banc in proceedings challenging Federal Energy Regulatory Commission (FERC) authorization of the Atlantic Sunrise natural gas pipeline project, the D.C. Circuit Court of Appeals concluded that the Natural Gas Act did not allow FERC "to issue tolling orders for the sole purposes of preventing rehearing from being denied by its inaction and the statutory right to judicial review attaching." (The panel was interpreting a provision of the Natural Gas Act that provides that an application to FERC for rehearing will be deemed denied if FERC does not act on it within 30 days.) The D.C. Circuit therefore denied motions to dismiss the initial petitions for review that had been filed 30 days after applications for rehearing. On the merits, however, the en banc court agreed with the original panel that FERC reasonably found market need for the Atlantic Sunrise Project. The en banc court did not revisit the panel's conclusions that the National Environmental Policy Act review of the project was sufficient. In a concurring opinion, Judge Griffith wrote that tolling orders were "just one part of the legal web that can ensnare landowners in pipeline cases" and that courts should use other tools to protect landowners from inalterably losing their property before judicial review of a pipeline's authorization is complete. Judge Henderson concurred in the judgment and dissented in part, writing that there was no special justification for departing from the court's consistent holding that tolling orders were permissible. *Allegheny Defense Project v. Federal Energy Regulatory Commission*, No. 17-1098 (D.C. Cir. June 30, 2020).

Environmental Group Must Show Why It Can Appeal Stay Order in Citizen Suit Challenging Climate Readiness of Exxon Terminal

The First Circuit Court of Appeal questioned whether it had jurisdiction to consider an appeal of a Massachusetts district court order staying a citizen suit seeking to compel ExxonMobil Corporation to prepare a marine distribution terminal for severe weather and other climate change impacts. The First Circuit directed the plaintiff-appellant, Conservation Law Foundation,

either to move for voluntary dismissal of the appeal or to show cause why the appeal should not be dismissed for lack of jurisdiction. The order stated that "[b]ecause the order appealed from does not appear to be final or appealable on an interlocutory basis, this court does not appear [to] have jurisdiction to review." The First Circuit said failure to take action by July 10 would lead to dismissal for lack of diligent prosecution. *Conservation Law Foundation, Inc. v. ExxonMobil Corp.*, No. 20-1456 (1st Cir. June 26, 2020).

Second Circuit Rejected Constitutional Challenges to Connecticut's Transfer of Monies Out of Funds for Renewable and Clean Energy

The Second Circuit Court of Appeals affirmed the rejection of constitutional claims challenging Connecticut's transfers of funds from the Energy Conservation and Load Management Fund and Clean Energy Fund (the Energy Funds) to the State's General Fund. The Second Circuit agreed with the federal district court for the District of Connecticut that the appellants—who were electric distribution company customers who paid charges to the Energy Funds pursuant to tariffs—did not have a contractual right to prevent transfer of the funds. The Second Circuit therefore found that the appellants failed to plead a violation of the Contract Clause. The Second Circuit also found that the appellants did not have a property interest in monies in the Energy Funds. The appellate court therefore agreed that the law transferring the funds was not a tax, and that the taxpayer standing doctrine—which provides that taxpayers generally have standing to challenge imposition of taxes but not tax revenue expenditures—barred the appellants' Equal Protection claim, which was based on allegations that the transfers to the General Fund amounted to a tax that customers of municipalities were not required to pay. *Colon de Mejias v. Lamont*, No. 18-3533 (2d Cir. June 23, 2020).

Federal Court Rejected CARB Requests for Certain Documents Supporting Trump Administration's Vehicle Standards

The federal district court for the District of Columbia ruled against the California Air Resources Board (CARB) in CARB's Freedom of Information Act lawsuit seeking records related to the U.S. Environmental Protection Agency's (EPA's) and the National Highway Traffic Safety Administration's (NHTSA's) August 2018 proposed revisions to federal greenhouse gas emission and fuel economy standards for light-duty vehicles. Although the court rejected the defendants' argument that CARB improperly requested explanations rather than documents, the court also rejected CARB's contention that the defendants acted in bad faith. The court also found that NHTSA conducted an adequate search for responsive documents in response to CARB's requests concerning models and data supporting the proposed rule's conclusions regarding the costs of batteries for electric vehicles. In addition, the court found that EPA rightfully withheld email threads regarding battery cost models and data (because the threads were not responsive and also predecisional and deliberative) and that NHTSA properly withheld two draft reports concerning increased fatalities associated with vehicle mass reduction (because the draft reports were predecisional and deliberative). *California Air Resources Board v. EPA*, No. CIV-DS-1938432 (D.D.C. June 3, 2020).

Washington Appellate Court Rejected Necessity Defense for Climate Change Protestor, Creating Split Between Intermediate Appellate Courts

In a split opinion, the Washington Court of Appeals held that a protestor who stood on train tracks to protest the transport of oil and coal was not entitled to present a necessity defense because he had "reasonable legal alternatives" to trespass and unlawful obstruction, "even if those alternatives had not brought about timely legislative changes." The defendant had testified that he believed his actions were necessary to avoid the "imminent danger" of train derailment and "to minimize the danger to the Earth due to climate change." A climate scientist, conflict resolution professor, and international analyst in nuclear waste storage and transportation, accident prevention, and emergency planning and homeland security also testified or submitted an affidavit in support of his assertion of the necessity defense. The appellate court, which noted that the Washington Supreme Court had not addressed the question, stated: "The necessity defense does not apply to persons who engage in civil disobedience by intentionally violating constitutional laws. This is because such persons knowingly place themselves in conflict with the law and, if the law is constitutional, courts should not countenance this. There are always reasonable legal alternatives to disobeying constitutional laws." The appellate court discussed *State v. Ward*—in which another division of the Washington Court of Appeals concluded that a climate change protestor should have been allowed to present a necessity defense—and said it disagreed with the decision "[t]o the extent *Ward* authorizes people to intentionally violate constitutional laws when protests and petitions are unsuccessful." The dissenting judge would have found that the district court correctly ruled that the defendant in this case presented facts to support a necessity defense and that a jury should determine his guilt or innocence. *State ex rel. Haskell v. Spokane County District Court*, No. 36506-9-III (Wash. Ct. App. June 9, 2020).

D.C. Court Denied Reconsideration of Attorney's Fees Order in Climate Scientist's Defamation Suit

In a defamation lawsuit brought by a climate scientist in connection with the publication of an article that evaluated an article published by the plaintiff, the D.C. Superior Court denied the plaintiff's motion for reconsideration of its order granting the defendants' motions for attorney's fees and costs. The plaintiff voluntarily dismissed his action approximately five months after filing it and two days after a hearing on the defendants' special motion to dismiss pursuant to the D.C. Anti-SLAPP (Strategic Litigation Against Public Participation) Act. The court denied the motion for reconsideration on both procedural and substantive grounds. Procedurally, the court found that the plaintiff's violations of the court's page limits provided grounds for denial. Substantively, the court said it was not persuaded either by arguments that the motion "merely rehashes" or by arguments regarding new legal authority and evidence, including alleged admissions by a defendant that there were false facts in his article. *Jacobson v. Clack*, No. 2017 CA 006685 B (D.C. Super. Ct. June 25, 2020).

NEW CASES, MOTIONS, AND NOTICES

Minnesota Filed Lawsuit Charging that Fossil Fuel Defendants' "Campaign of Deception" Led to Climate Crisis

The State of Minnesota filed a lawsuit in state court against the American Petroleum Institute, Exxon Mobil Corporation (Exxon), Koch Industries, Inc. (Koch), and Exxon and Koch

subsidiaries, alleging that the defendants caused a "climate-change crisis" in the state through a "campaign of deception." The State alleged that it sought "to hold Defendants accountable for deliberately undermining the science of climate change, purposefully downplaying the role that the purchase and consumption of their products played in causing climate change and the potentially catastrophic consequences of climate change, and for failing to fully inform the consumers and the public of their understanding that without swift action, it would be too late to ward off the devastation." The complaint asserted a claim under the Minnesota Consumer Fraud Act as well as claims of strict and negligent liability for failure to warn; common law fraud and misrepresentation; deceptive trade practices under Minnesota Statutes § 325D.44; and violation of Minnesota's False Statement in Advertising Act. Minnesota asked the court to order the defendants to publish all research conducted by the defendants and their agents that relates to climate change and to "fund a corrective public education campaign in Minnesota relating to the issue of climate change." In addition, Minnesota sought civil penalties, restitution "to remedy the great harm and injury to the State resulting from Defendants' unlawful conduct," and disgorgement of profits resulting from unlawful conduct. In addition, Minnesota asked the court to award attorney's fees and other costs of investigation and litigation. *State v. American Petroleum Institute*, No. 62-CV-20-3837 (Minn. Dist. Ct., filed June 24, 2020).

D.C. Filed Suit Against Oil and Gas Companies Alleging Violations of Consumer Protection Law

The District of Columbia filed a lawsuit asserting claims under its Consumer Protection Procedures Act (CPPA) against oil and gas companies in D.C. Superior Court. The District alleged that the companies had engaged in "deceptive and unfair conduct" in violation of the CPPA by misleading consumers about "the central role their products play in causing climate change, one of the greatest threats facing humanity." The complaint alleged that D.C. had had to develop a heat emergency plan to address an increased number of extreme heat days, that D.C. was experiencing "more frequent and extreme precipitation events and associated flooding," and that impacts were particularly severe in low-income communities and communities of color. The District asked the court to enjoin the defendants from violating the CPPA and to order them to pay restitution or damages, civil penalties, and costs and attorney's fees. *District of Columbia v. Exxon Mobil Corp.*, No. 2020 CA 002892 B (D.C. Super. Ct., filed June 25, 2020).

Baltimore Argued that Supreme Court Should Decline to Review Decision Affirming Remand of Climate Case to State Court

Baltimore filed a brief in the U.S. Supreme Court arguing that the Court should deny oil and gas companies' petition for writ of certiorari seeking review of the Fourth Circuit's affirmance of a remand order in Baltimore's climate change case. Baltimore's brief said there were three principal reasons why the certiorari petition should be denied. First, Baltimore contended that a "purported circuit split" on the issues of the scope of appellate review of remand orders was "insignificant at best." Second, Baltimore contended that these issues were "not likely to recur with any frequency." Third, Baltimore argued that the Fourth Circuit's interpretation of the removal statute was "consistent with the statutory text and strict limitations Congress has historically placed on appellate review of remand orders." *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.).

Washington Asked Supreme Court to Reject Montana and Wyoming's Challenge to Denial of Certification for Coal Export Terminal

The State of Washington filed a brief in the U.S. Supreme Court opposing Montana and Wyoming's motion for leave to file a bill of complaint alleging that Washington violated the dormant Commerce Clause and Foreign Commerce Clause by denying a Clean Water Act Section 401 certification for a coal export terminal. Washington argued that the issues raised by Montana and Wyoming were related to a private dispute and were being addressed in other state and federal courts. Washington also argued that reversal of the denial of the Section 401 certification would not allow the project to proceed. In addition, Washington contended that the claims were meritless because the denial was "based on valid environmental concerns specifically authorized by federal law, not discriminatory motives," and the denial of a single permit did not amount to an "embargo" or "blockade" on the transport of coal from Montana and Wyoming through Montana. In reply, Montana and Wyoming told the Court that their sovereign interests were at stake and that their injuries were redressable. They also said Washington's denial of the certification was discriminatory in violation of the Commerce Clause and Foreign Commerce Clause. *Montana v. Washington*, No. 22O152 (U.S.).

District Court Asked Ninth Circuit to Delete Footnote in Opinion Reversing Determination on Removal Jurisdiction; Fossil Fuel Companies Must File Petitions for Rehearing by July 9

A month after the Ninth Circuit reversed a district court's determination that federal-question jurisdiction provided a basis for the removal of Oakland and San Francisco's climate change nuisance lawsuits against oil and gas companies, Judge William Alsup of the U.S. District Court for the Northern District of California submitted a letter to the Ninth Circuit "to correct a mistake" in the Ninth Circuit's opinion. Judge Alsup said a footnote in which the Ninth Circuit "declined to address the extent to which the complaints' dependence on the navigable waters of the United States afforded removal jurisdiction" incorrectly indicated that his decision relied on admiralty jurisdiction as a basis for removal, a grounds not identified by the companies in their removal notices. Judge Alsup said this footnote "confused federal-question jurisdiction arising out of the navigable waters of the United States with admiralty jurisdiction." Judge Alsup's letter asserted that navigable waters "serve as a bedrock of federal common law and federal-question jurisdiction" and requested that the Ninth Circuit withdraw the footnote and address "the merits of the ground on which removal jurisdiction was actually sustained."

On June 8, 2020, the Ninth Circuit granted the companies' motion for an extension of time to file a petition for panel rehearing or rehearing en banc in both the Oakland/San Francisco case as well as in *County of San Mateo v. Chevron Corp.*, in which the Ninth Circuit affirmed remand orders. Any petition for rehearing must be filed by July 9. *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir.); *County of San Mateo v. Chevron Corp.*, Nos. 18-15499 (9th Cir.).

Opening Briefs Challenged Lawfulness of EPA and NHTSA's Actions to Restrict California and Other States' Authority to Regulate Vehicle Greenhouse Gas Emissions

Petitioners filed their opening briefs in the D.C. Circuit cases challenging the Trump administration's "One National Program Rule," in which EPA and NHTSA finalized regulations that withdrew California's waiver for greenhouse gas and zero-emission vehicle standards, declared that the Energy Policy and Conservation Act (EPCA) preempted such standards, and provided that other states could not adopt or enforce California's greenhouse gas emissions standards. The primary brief filed by states, local governments, and public interest petitioners argued both that EPA lacked authority to withdraw the waiver and that EPA's grounds for the withdrawal—that California's standards were not needed "to meet compelling and extraordinary conditions" and that EPCA preempted the standards—were invalid. The petitioners also argued that the Clean Air Act "unambiguously authorizes" other states to adopt California's standards for any pollutant, including greenhouse gases. Regarding the preemption rule adopted by NHTSA, the petitioners asserted that the D.C. Circuit did not have original jurisdiction to review the rule but that, in any event, the preemption rule exceeded NHTSA's authority, that NHTSA's interpretation was contrary to statute, and that NHTSA violated NEPA by failing to prepare any environmental review documents. A group of "industry petitioners" that included utilities and a coalition of companies and organizations supporting electric vehicle and other advanced transportation technologies and related infrastructure filed a secondary brief that adopted the primary brief's arguments but also put forward additional arguments. The industry petitioners contended that withdrawal of California's waiver contravened the Clean Air Act's "technology-forcing" design and disregarded "significant industry reliance interests" and that the preemption regulation was contrary to statute because EPCA's text and purpose do not support preemption of standards that mandate that certain percentages of sales be zero-emission vehicles. As of July 3, 2020, two amicus briefs had been filed in support of the petitioners, one by the National Parks Conservation Association and Coalition to Protect America's National Parks, who argued that California's waiver was necessary to protect national parks in California and other states from climate change and air quality harms, and the other by not-for-profit public health and scientific organizations, who argued that California's standards were "crucial" to California's compliance with the Clean Air Act and addressed "compelling and extraordinary conditions presented by climate change." Ten additional amicus briefs were filed in support of the petitioners on July 6 by organizations representing municipal governments, the Edison Electric Institute, Lyft, Inc., members of Congress, the Institute for Policy Integrity at NYU Law School, a law professor at the University of Michigan, scientists who study the impacts of climate change on California, the National Association of Clean Air Agencies, former Secretaries of Transportation and EPA Administrators, and other former regulatory officials and legislative advisors who worked on the drafting and implementation of the Clean Air Act. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, Nos. 19-1230 et al. (D.C. Cir.).

NRDC Challenged FERC Orders That Allegedly Would Keep Electric Storage and Demand Response Resources Out of New York's Capacity Market

On June 19, 2020, Natural Resources Defense Council (NRDC) filed two petitions for review in the D.C. Circuit Court of Appeals seeking review of FERC orders that NRDC describes as "examples of federal policies blocking the clean energy transition" in New York State by requiring application of "buyer-side mitigation" rules to two types of technologies: (1) electric storage resources (e.g., batteries) and (2) demand response resources (which "pay customers to reduce their energy usage at the direction of the grid operator to help alleviate different types of

stress on the electric grid") The buyer-side mitigation rules for the New York Independent System Operator's capacity market require that the bids for these types of resources not take into account the subsidies they receive from State programs, thereby increasing their bid prices. According to NRDC, "[t]he effect of FERC's orders is to artificially raise the bid price of storage and demand response resources so that they are 'out of the money' and therefore are not selected in the capacity market auction. As a result, they will not displace, dirty incumbent fossil fuel power plants." *Natural Resources Defense Council v. Federal Energy Regulatory Commission*, No. 20-1224 (D.C. Cir., filed June 19, 2020); *Natural Resources Defense Council v. Federal Energy Regulatory Commission*, No. 20-1223 (D.C. Cir., filed June 19, 2020).

EPA Defended Clean Power Plan Repeal and Replacement

On June 16, 2020, EPA filed its brief defending the repeal of the Obama administration's Clean Power Plan and the promulgation of the Trump administration's replacement rule, the Affordable Clean Energy (ACE) Rule. EPA argued that the Clean Power Plan was unlawful because Section 111(d) required that emissions reductions occur at a particular source and did not authorize the Clean Power Plan's "generation shifting" measures. EPA also contended that it had properly defined a "Best System of Emissions Reduction" as an array of heat ray improvement methods and had properly identified the degree of emission limitations achievable. EPA also responded to arguments that it lacked authority to regulate carbon dioxide emissions at existing power plants; EPA argued that the ACE Rule was lawful based on EPA's 2015 New Source Rule and did not require a new endangerment finding. In addition, EPA said regulation of hazardous air pollutant emissions under Section 112 did not bar regulation of carbon dioxide emissions under Section 111(d). EPA also argued that states could not adopt trading programs in place of source-specific emission standards and that the Clean Air Act did not permit compliance with the ACE Rule through biomass co-firing. The National Association of Home Builders filed a brief in support of EPA's repeal of the Clean Power Plan, asserting that EPA "rightfully eliminates the Clean Power Plan's overly expansive regulatory framework." *American Lung Association v. EPA*, Nos. 19-1140 et al. (D.C. Cir.)

Two More Lawsuits Raise Climate Change Issue in New "Waters of the United States" Definition

Two additional lawsuits challenging the U.S. Army Corps of Engineers and EPA's revised definition of "waters of the United States" (WOTUS) contended that the adoption of the definition violated the Administrative Procedure Act by failing to consider climate change. The new lawsuits, one in the District of Arizona and the other in the Western District of Washington, alleged that the agencies' "decision to narrow the scope of waters protected under the Clean Water Act and to base the final rule on the permanence of surface flow in a typical year without considering the effects of climate change is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." At least two other lawsuits challenging the WOTUS rule—*California v. Wheeler* and *Conservation Law Foundation v. EPA*—have also challenged this aspect of the definition. *Puget Soundkeeper Alliance v. EPA*, No. 2:20-cv-950 (W.D. Wash., filed June 22, 2020); *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266 (D. Ariz., filed June 22, 2020).

Environmental Groups, Coal Company, and Federal Defendants Disagreed on Whether Company's Roadbuilding Activities Were in Violation of Tenth Circuit Ruling

The federal district court for the District of Colorado formally vacated a Colorado Roadless Rule exception for the North Fork Coal Mining Area after the Tenth Circuit ruled that the U.S. Forest Service should have considered an alternative proposed by the plaintiff environmental groups. The court also directed the defendants and defendant-intervenor to respond to the plaintiffs' emergency motion to enforce the remedy. The plaintiffs contended that the defendant-intervenor was illegally bulldozing in the Sunset Roadless Area despite the Tenth Circuit's ruling, "apparently relying on the fact that this Court had yet to take the non-discretionary step of formally entering the vacatur order." On June 23, 2020, the defendant-intervenor responded that after reviewing the Tenth Circuit decision, it had concluded that it had the right to continue roadbuilding pursuant to a separate exception in the Colorado Roadless Rule that allows roadbuilding when necessary to exercise statutory rights (in this case, rights under the Mineral Leasing Act). The federal defendants said the environmental groups' motion should be denied because the activities at issue took place before the Roadless Rule exception was actually vacated and because the requested relief went beyond the Tenth Circuit mandate. *High Country Conservation Advocates v. U.S. Forest Service*, No. 1:17-cv-03025 (D. Colo.).

Challenge Filed to Environmental Review for Approval of Drug to Reduce Ammonia Emissions from Cows

Three organizations filed a lawsuit in the federal district court for the Northern District of California alleging that the U.S. Food and Drug Administration (FDA) violated the Federal Food, Drug, and Cosmetic Act and NEPA when it approved a drug "that allegedly results in less ammonia gas released from the waste produced by cows raised for beef." In addition to allegations regarding the drug's safety and effectiveness, the complaint also alleged that the environmental assessment prepared in support of the drug's approval failed to adequately analyze whether the approval would have a significant adverse impact. The complaint alleged, among other things, that the reduction of ammonia emissions "while confining the same or greater number of cows in [concentrated animal feeding operations (CAFOs)] will do nothing to alleviate the overall air impacts of CAFOS," including emissions of the greenhouse gases methane and nitrous oxide. *Animal Legal Defense Fund v. Azar*, No. 3:20-cv-03703 (N.D. Cal., filed June 4, 2020).

Nonprofit Group Asked California Court to Enjoin VMT Regulation

The nonprofit organization The Two Hundred and residents of San Bernardino County in California filed a motion for a preliminary injunction in their lawsuit challenging new California Environmental Quality Act regulations, which the petitioners assert violate the federal and state constitutions, federal and state fair housing laws, the Global Warming Solutions Act, CEQA itself, and other laws. In their motion, the petitioners asked the court to enjoin the part of one of the new regulations that the petitioners describe as making "the act of driving a car or pickup truck (even an electric vehicle), for even a single mile in even a carpool on an existing road, a newly-invented 'vehicle mile travelled' ('VMT') 'impact' to the environment." They contended that enforcement of the new VMT regulation outside transit priority areas would "worsen

housing availability and affordability, thereby causing disparate harms to minority Californian[s]," and that the pandemic had exacerbated the harms. They argued that the legislature had considered and "uniformly rejected" laws requiring VMT reduction to achieve reductions in greenhouse gas emissions and that the adoption of the VMT regulation was procedurally deficient. *The Two Hundred v. Governor's Office of Planning & Research*, No. CIV-DS-1938432 (Cal. Super. Ct. June 2, 2020).

Energy Policy Advocates Sought State Attorneys General Communications Related to Climate Change

In early June 2020, Energy Policy Advocates filed a lawsuit in state court in Vermont seeking to compel the Attorney General's Office to produce records under the Vermont Public Records Law in response to four records requests made in April 2020. The requests sought certain correspondence, including certain emails with "GHG Emissions Affirmative Legislation" or "Affirmative Climate" in the subject line or that included the word "complaint" and "criteria pollutant," "greenhouse gas," or "GHG." The complaint alleged that the Attorney General's Office was improperly using common interest agreements to "shield records from the public eye, while nevertheless sharing such records with actors not employed by the State of Vermont." *Energy Policy Advocates v. Attorney General's Office*, No. __ (Vt. Super. Ct., filed June 1, 2020).

In late May 2020, Energy Policy Advocates filed a lawsuit in state court in Michigan under the Michigan Freedom of Information Act (FOIA) seeking correspondence of Department of Attorney General staff members and a contractor, as well as other records, including "purported common interest agreements." The complaint alleged that the Department was using FOIA exemptions "to shield from the public the agency's involvement with outside pressure groups and plaintiff's tort attorneys," including correspondence that the complaint alleged would show that climate activists were recruiting attorneys general to file litigation against private parties. *Energy Policy Advocates v. Nessel*, No. 20-__-MZ (Mich. Ct. Claims, filed May 27, 2020).

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FEATURED CASES

Ninth Circuit Ruled for California Cities and Counties on Questions of Whether Climate Lawsuits Against Energy Companies Belonged in State or Federal Court

In two opinions, the Ninth Circuit Court of Appeals ruled against energy companies that had removed to federal court cases brought by California local governments seeking compensation for climate change impacts. In an appeal by Oakland and San Francisco of a district court's denial of remand in, and dismissal of, their suits, the Ninth Circuit reversed the federal district court's determination that federal-question jurisdiction provided a basis for removal. The Ninth Circuit remanded for the district court to determine whether there was an alternative basis for jurisdiction. In the energy companies' appeal of a district court's remand order in cases brought by the County of San Mateo and other counties and cities, the Ninth Circuit concluded first that its jurisdiction to review was limited to whether the cases were properly removed under the

federal-officer removal statute and then that the companies had not proved that federal-officer removal could be invoked.

In the Oakland and San Francisco decision, the Ninth Circuit held that the cities' state-law claim for public nuisance did not arise under federal law because no exception to the "well-pleaded complaint rule" applied. First, the Ninth Circuit found that the cities' nuisance claim did not raise "a substantial federal question." The court noted that the companies had contended that the nuisance claim implicated "federal interests" such as energy policy, national security, and foreign policy, but the court said this was not sufficient to establish federal-question jurisdiction even though the question of whether the companies should be held liable and be compelled to abate harms was "no doubt an important policy question." Second, the Ninth Circuit rejected the companies' argument that the Clean Air Act completely preempted the cities' public nuisance claim. The Ninth Circuit also rejected the companies' argument that the cities waived their arguments in favor of remand by amending their complaint to add a federal common law claim; the Ninth Circuit said the cities' reservation of rights was sufficient. The Ninth Circuit also rejected the companies' contention that improper removal could be excused based on "considerations of finality, efficiency, and economy." The Ninth Circuit concluded that dismissal for failure to state a claim at the pleading stage did not warrant departure from the general rule that a case must be fit for federal adjudication at the time of removal. *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir. May 26, 2020).

In the decision in the cases brought by the County of San Mateo and other counties and cities, the Ninth Circuit rejected the energy companies' arguments in favor of plenary review of the remand order. First, the Ninth Circuit was not persuaded by the companies' contention that the district court had remanded based on a merits determination, not based on subject matter jurisdiction. Second, the Ninth Circuit found that under its existing precedent, it had jurisdiction to review the issue of federal-officer removal but not the portions of the remand order that considered seven other bases for removal. The Ninth Circuit concluded that Congress's enactment of the Removal Clarification Act of 2011 did not abrogate this precedent. The Ninth Circuit also rejected the companies' argument that it was not bound by its own precedent because the decision was not well reasoned; the court said it remained bound by the precedent "until abrogated by an intervening higher authority." The Ninth Circuit then conducted a de novo review of the issue of subject matter jurisdiction under the federal-officer removal statute. The appellate court found that the energy companies had not proven by a preponderance of the evidence that they were "acting under" a federal officer in any of the three agreements with the government on which the companies relied for federal-officer removal jurisdiction. The Ninth Circuit therefore affirmed the district court's determination that there was no federal-officer removal jurisdiction and dismissed the remainder of the appeal for lack of jurisdiction. *County of San Mateo v. Chevron Corp.*, Nos. 18-15499 et al. (9th Cir. May 26, 2020).

DECISIONS AND SETTLEMENTS

Ninth Circuit Declined to Stay Orders Enjoining Authorization of New Oil and Gas Pipelines Under Nationwide Permit

The Ninth Circuit Court of Appeals denied emergency motions for partial stay pending appeal of the District of Montana's orders vacating Nationwide Permit (NWP) 12 as it applies to Keystone XL Pipeline and other oil and natural gas pipelines. The Ninth Circuit found that the appellants—the Corps, the pipeline developers, and trade groups—had not demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm. In April, the district court ruled that the U.S. Army Corps of Engineers violated the Endangered Species Act when it issued NWP 12; the court enjoined authorization of any dredge and fill activities under NWP 12, which applies to utility projects. On May 11, 2020, the district court modified its injunction to apply only to new oil and gas pipeline construction, which the court said was the type of project likely to pose the greatest threat to listed species. The May 11 order also denied motions for partial stay pending appeal. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, Nos. 20-35412 et al. (9th Cir. May 28, 2020).

Eighth Circuit Affirmed Bankruptcy Discharge of Climate Claims Against Coal Company

The Eighth Circuit Court of Appeals upheld a district court judgment that affirmed a bankruptcy court's determination that California municipalities' climate change-based common law and statutory nuisance claims against the coal company Peabody Energy Corporation (Peabody) were discharged during Peabody's bankruptcy proceeding. The Eighth Circuit found that the district court did not abuse its discretion in finding that the bankruptcy plan's exemptions for governmental claims brought "under any applicable Environmental Law" or "under any … applicable police or regulatory law." The Eighth Circuit also rejected the municipalities' argument that their public-nuisance claim asserted on behalf of the people of California was not a claim under bankruptcy law because it only entitled them to equitable relief. In addition, the Eighth Circuit agreed with the bankruptcy court all of the municipalities' claims were directed at Peabody's pre-bankruptcy conduct and therefore did not survive the bankruptcy. *County of San Mateo v. Peabody Energy Corp. (In re: Peabody Energy Corp.)*, No. 18-3242 (8th Cir. May 6, 2020).

Ninth Circuit Upheld District Court's Determination that Oakland Could Not Bar Coal Operations at Terminal

In a split opinion, the Ninth Circuit Court of Appeals affirmed a district court ruling that invalidated a City of Oakland resolution adopted in 2016 that applied a new ordinance barring coal-related operations at bulk material facilities to a rail-to-ship terminal being developed at a former army base. The Ninth Circuit found that the district court had not clearly erred when it found that adoption of the resolution violated a 2013 agreement between the City and the developer of the terminal. The development agreement provided that existing regulations would apply to the facility unless the City determined "based on substantial evidence" that failure to apply new regulations "would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety." The district court—which allowed the developer to present evidence that had not been before the City Council—determined that Oakland breached the agreement because the City lacked substantial evidence that the coal operations posed a substantial health or safety danger. On the "pivotal" issue of standard of review, the Ninth Circuit concluded that the case should be reviewed as a breach of contract case, with deference given to the district court's

findings, instead of as an administrative law proceeding in which the court would grant deference to the City's health and safety findings. The Ninth Circuit then found that the district court's factual findings regarding the inadequacies in Oakland's determinations regarding particulate emissions and other harms associated with coal operations were not clearly erroneous. The Ninth Circuit did not address greenhouse gas emissions or global warming, which the district court had briefly discussed and rejected as a legitimate basis for the coal ban. The Ninth Circuit also held that the district court did not abuse its discretion in denying environmental groups' motion to intervene as of right. The appellate court upheld the district court's determination that the groups' contention that the development agreement was invalid was outside the scope of their permissive intervention and also rejected their argument that the agreement's restriction on new regulations was limited to land-use regulations. The dissenting judge would have reversed because in his view the trial court erred by admitting evidence about the health and safety effects of coal handling that was not submitted to the City. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, Nos. 18-16105 & 16-16141 (9th Cir. May 26, 2020).

Supreme Court Declined to Consider Cases Raising "Point of Obligation" Issue in Renewal Fuels Program

The U.S. Supreme Court denied a petition for writ of certiorari seeking review of the D.C. Circuit's decisions in three cases that concerned the U.S. Environmental Protection Agency's (EPA's) annual determination of obligations in the Renewable Fuel Standard program. American Fuel & Petrochemical Manufacturers and Valero Energy Corporation had sought the Court's review of the issue of whether EPA was required to consider the appropriate "point of obligation"—the parties to whom the obligations should apply (refineries, blenders, or importers)—on an annual basis. *Valero Energy Corp. v. EPA*/, No. 19-835 (U.S. May 18, 2020).

Massachusetts Federal Court Provided Rationale for Sending Climate Change-Based Fraud Case Against Exxon Back to State Court

The federal district court for the District of Massachusetts issued a decision explaining the rationale for its March 18, 2020 order remanding Massachusetts's fraud case against Exxon Mobil Corporation (Exxon) to state court. In its lawsuit, Massachusetts asserts causes of action under the Massachusetts Consumer Protection Act based on allegations that Exxon knew for decades that greenhouse gas emissions from fossil fuels were contributing to climate change, that Exxon downplayed the risks of climate change, and that Exxon deceived investors and consumers with misrepresentations concerning the company's products and its management of climate change risks. The district court found that Massachusetts's well-pleaded complaint pleaded only state law claims, "which are not completely preempted by federal law and do not harbor an embedded federal question." In doing so, the court rejected Exxon's contention that federal common law governed and completely preempted state law claims; the court found that the complaint's allegations were "far afield of any 'uniquely federal interests.'" The court also rejected Exxon's arguments that the federal-officer removal statute or the Class Action Fairness Act provided a basis for jurisdiction. *Massachusetts v. Exxon Mobil Corp.*, No. 1:19-cv-12430 (D. Mass. May 28, 2020).

Federal Court Allowed Addition of Climate Change Documents to Administrative Record in NEPA Challenge to Fuel-Reduction Project

The federal district court for the Eastern District of California allowed plaintiffs challenging a fuel-reduction project in Shasta-Trinity National Forest to supplement the administrative record in support of a claim that the U.S. Forest Service should have considered greenhouse gas emissions in assessing whether to prepare a supplemental environmental impact statement pursuant to the National Environmental Policy Act (NEPA). The two documents that the court allowed to be added to the record were a "Forest Carbon" chapter in a 2016 update to the Forest Service's Resource Planning Act Assessment and a 2016 Forest Service document that described how to account for climate change when conducting a NEPA analysis. Because the documents did not exist at the time the Forest Service issued its record of decision in 2013, the court denied the plaintiffs' request to add the documents to the record for their claim that the Forest Service failed to take a hard look. *Conservation Congress v. U.S. Forest Service*, No. 2:13-cv-00934 (E.D. Cal. May 28, 2020).

EPA Ordered to Produce Computer Model Used for Greenhouse Gas Vehicle Standards by June 7

After the Second Circuit issued the mandate to implement its April 1 ruling that EPA was required to disclose a component of a computer model used by EPA to evaluate greenhouse gas vehicle standards, the federal district court for the Southern District of New York ordered EPA to produce the model to Natural Resources Defense Council and Environmental Defense Fund by June 7, 2020. The environmental organizations sought unsuccessfully to expedite issuance of the mandate to give them more time to review the model in order to make a decision regarding whether to file a petition for administrative reconsideration of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule promulgated by EPA and the National Highway Traffic Safety Administration in late April. (Litigation challenging the SAFE Vehicles Rules is discussed below.) Although the Second Circuit did not expedite the mandate, the district court granted their request that EPA be given 10 days after issuance of mandate to produce the model. *Natural Resources Defense Council v. EPA*, No. 1:18-cv-11227 (S.D.N.Y. May 28, 2020).

Montana Federal Court Said Issuance of EA and FONSI for Lifting of Moratorium on Coal Program Remedied NEPA Violations

The federal district court for the District of Montana found that the U.S. Department of the Interior, the Secretary of the Interior, and the U.S. Bureau of Land Management (BLM) had complied with the court's previous order requiring them to initiate the NEPA process in connection with the Trump administration's lifting of the moratorium on the federal coal leasing program. Secretary of the Interior Sally Jewell instituted the moratorium in January 2016 and directed BLM to prepare a programmatic environmental impact statement for the federal coal program that addressed climate change, among other issues. After the court's previous order, BLM in February 2020 issued a final environmental assessment (EA) and finding of no significant impact (FONSI); the court noted that the EA's analysis was based on analysis of the impacts of resuming coal lease processing 24 months earlier and that the FONSI "relies heavily on the fact that the [moratorium] disrupted a 40-year framework for coal leasing, and the finite

nature of the [moratorium], together with the NEPA review of individual leases limited the effects" of lifting the moratorium. The court rejected the plaintiffs' contention that the final EA and FONSI did not remedy the NEPA violations identified by the court. Although the court declined to engage in a substantive review of the EA and FONSI "without a new complaint and administrative record to review," it said the plaintiffs "remain free to challenge the sufficiency of the NEPA analysis." *Citizens for Clean Energy v. U.S. Department of the Interior*, No. CV-17-30 (D. Mont. May 22, 2020).

Federal Court Said States Had Standing to Challenge Endangered Species Act Regulations; Organizational Plaintiffs Did Not

The federal district court for the Northern District of California ruled that state plaintiffs had adequately alleged facts to invoke federal jurisdiction in their lawsuit challenging amendments of the Endangered Species Act regulations. The court found that the states had alleged injury-in-fact, causation, and redressability and that their claims were both constitutionally and prudentially ripe. The states' challenges to the regulations include that the amendments violate the Endangered Species Act's plain language and purpose, including by limiting designation of unoccupied critical habitat where climate change poses threats to habitat. In two other cases challenging the amendments, the court found that the organizational plaintiffs had not demonstrated injury-in-fact to their members or that they suffered direct injury. *California v. Bernhardt*, No. 4:19-cv-06013 (N.D. Cal. May 18, 2020); *Animal Legal Defense Fund v. Bernhardt*, No. 4:19-cv-06812 (N.D. Cal. May 18, 2020); *Center for Biological Diversity v. Bernhardt*, No. 4:19-cv-05206 (N.D. Cal. May 18, 2020).

Florida Court Dismissed Suit Seeking to Compel Climate Action Under Florida Constitution and Common Law

At the end of a videoconference hearing on June 1, 2020, a judge in Florida Circuit Court announced that he would dismiss a lawsuit filed in 2018 by youth plaintiffs alleging that the State of Florida and state officials and agencies violated their fundamental rights to a stable climate system under Florida common law and the Florida constitution. The judge reportedly concluded that the plaintiffs sought relief that it would not be appropriate for a court to provide, but he stated that "I don't want anyone to think I am diminishing what your clients' concerns are. I think they're legitimate." The judge also said he would write his ruling so that it would be ripe for appeal. *Reynolds v. Florida*, No. 37 2018 CA 000819 (Fla. Cir. Ct. June 1, 2020).

Climate Scientist Must Pay Attorney's Fees After Bringing Defamation Suit Regarding Publication of Article

The D.C. Superior Court granted defendants' motions for attorney's fees and costs in a defamation lawsuit brought by a climate scientist in connection with the publication of an article written by one of the defendants that evaluated an article published by the plaintiff. The other defendant was the publisher of the journal in which the article appeared. The plaintiff voluntarily dismissed his action approximately five months after filing it and two days after a hearing on the defendants' special motion to dismiss pursuant to the D.C. Anti-SLAPP (Strategic Litigation Against Public Participation) Act. The court found that the defendants were entitled to attorney's

fees because the D.C. Anti-SLAPP Act covered the plaintiff's claims, a jury could not reasonably find that the claims were supported, and the plaintiff's attempts to obtain corrections in the article before filing suit did not constitute special circumstance that made a fees award unjust. *Jacobson v. Clack*, No. 2017 CA 006685 B (D.C. Super. Ct. Apr. 20, 2020).

NEW CASES, MOTIONS, AND NOTICES

Proceedings Filed in D.C. Circuit to Challenge Relaxation of Vehicle Standards; Briefing Schedule Set for Challenges to EPA and NHTSA's Earlier Preemptive Actions

Petitioners that included 23 states, five cities, and 12 environmental and consumer organizations filed petitions for review in the D.C. Circuit Court of Appeals challenging the EPA and National Highway Traffic Safety Administration's promulgation of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, which relaxed greenhouse gas (GHG) emission and fuel economy (CAFE) standards for light-duty vehicles. The states and cities and most of the organizations also sought review of EPA's 2018 Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, which the D.C. Circuit previously held was not final agency action. Other petitioners challenging the relaxation of the standards included air quality management districts in California, the National Coalition for Advanced Transportation (a coalition of companies that supports policies to promote electric vehicles and technologies), Advanced Energy Economy (a trade association supporting technologies including energy efficiency, demand response, renewable energy, and other technologies), and a number of utilities.

Several days earlier, a trade association which said it represented manufacturers of 99% of cars and light trucks sold in the U.S. filed a motion to intervene in support of EPA and NHTSA in a challenge to the vehicle standards previously filed by the Competitive Enterprise Institute (CEI) and other petitioners. The trade association said the challenge by the CEI petitioners, who wished to freeze the standards at Model Year 2018 levels, conflicted with the association's "substantial interest … in ensuring that increases in the stringency of the GHG and CAFE standards are implemented in a reasonable and steadily increasing manner." On May 29, 20 states, two cities, and several air quality management districts in California sought leave to intervene in support of the respondents in CEI's proceeding to oppose any arguments that the agencies should have adopted weaker standards. The public interest organization petitioners filed a similar motion on June 1. All of the documents in these consolidated proceedings are posted on the page for *Competitive Enterprise Institute v. EPA*, No. 20-1145 (D.C. Cir.). *California v. Wheeler*, No. 20-1167 (D.C. Cir., filed May 27, 2020); *Natural Resources Defense Council, Inc. v. Wheeler*, No. 20-1168 (D.C. Cir., filed May 27, 2020); *Environmental Defense Fund v. Owens*, No. 20-1169 (D.C. Cir., filed May 27, 2020); *South Coast Air Quality Management District v. National Highway Traffic Safety Administration*, No. 20-1173 (D.C. Cir., filed May 28, 2020); *National Coalition for Advanced Transportation v. EPA*, No. 20-1174 (D.C. Cir., filed May 28, 2020); *Advanced Energy Economy v. Wheeler*, No. 20-1176 (D.C. Cir., filed May 28, 2020); *Calpine Corp. v. EPA*, No. 20-1177 (D.C. Cir., filed May 28, 2020).

In related proceedings that challenged EPA and NHTSA's earlier regulatory actions preempting state regulation of greenhouse gas emissions from vehicles, the D.C. Circuit issued an order

setting a briefing schedule. The petitioners' opening briefs are due June 26, several weeks earlier than the petitioners' requested but two weeks later than the briefs would have been due under the schedule endorsed by the respondents. Briefing will be complete on October 27, 2020. The D.C. Circuit also referred the petitioners' motion to complete the administrative record to the merits panel and directed the parties to address the issues presented in the motion in their briefs. The motion seeks to have EPA's record include public comments and supporting documents that were submitted after the comment deadline. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, Nos. 19-1230 et al. (D.C. Cir. May 20, 2020).

Lawsuits Challenged FERC Approvals for Jordan Cove LNG Export Terminal

Environmental groups, tribes, and landowners filed petitions for review in the D.C. Circuit Court of Appeals challenging Federal Energy Regulatory Commission (FERC) orders authorizing the Jordan Cove liquefied natural gas (LNG) export terminal, associated facilities, and a natural gas pipeline system in Oregon. Issues raised before FERC included the projects' impacts on greenhouse gas emissions and climate change, including whether FERC used outdated global warming potentials; whether FERC adequately considered indirect, cumulative, and connected greenhouse gas emissions; whether FERC appropriately assessed the significance of the projects' emissions; whether FERC should have required measures to mitigate greenhouse gas emissions; and how FERC should consider the projects' contribution to climate change in the Natural Gas Act public interest analysis. The projects' developers filed their own petition challenging the FERC approvals. The documents for these consolidated proceedings are posted on the case page for *Evans v. Federal Energy Regulatory Commission*, No. 20-1161 (D.C. Cir., filed May 22, 2020). *Jordan Cove Energy Project L.P. v. Federal Energy Regulatory Commission*, No. 20-1170 (D.C. Cir., filed May 27, 2020); *Rogue Riverkeeper v. Federal Energy Regulatory Commission*, No. 20-1171 (D.C. Cir., filed May 27, 2020); *Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians v. Federal Energy Regulatory Commission*, No. 20-1172 (D.C. Cir., filed May 27, 2020); *Natural Resources Defense Council, Inc. v. Federal Energy Regulatory Commission*, No. 20-1180 (D.C. Cir., filed May 28, 2020).

Lawsuits Filed to Challenge EPA's Lifting of Leak Repair and Maintenance Requirements for HFC Refrigerants

Eleven states, two cities, and Natural Resources Defense Council filed petitions seeking review of EPA's final rule titled "Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes." The final rule revised 2016 regulations that extended refrigerant management regulations for refrigerants containing ozone-depleting substances to substitute refrigerants such as hydrofluorocarbons, which are greenhouse gases. The revised regulations limit leak repair and appliance maintenance requirements to ozone-depleting substances. Two consolidated cases challenging the 2016 regulations have been held in abeyance since April 2017. *Natural Resources Defense Council, Inc. v. Wheeler*, No. 20-1150 (D.C. Cir., filed May 11, 2020); *New York v. Wheeler*, No. 20-1151 (D.C. Cir., filed May 11, 2020).

California, Other Parties Said Foreign Affairs Doctrine Did Not Preempt Cap-and-Trade Linkages

California and other defendants filed cross-motions seeking summary judgment against the United States on the U.S.'s claim that California's linkage of its greenhouse gas cap-and-trade program with Quebec's is preempted under the Foreign Affairs Doctrine. The defendants asserted that the U.S. had not established any conflict with U.S. foreign policy. In addition, the defendants argued that the scope of field preemption under the Foreign Affairs Doctrine was very narrow and did not apply here and that the U.S.'s "obstacle preemption" argument, even if properly raised, would fail because the U.S. could not establish that the linkage with Quebec's program interfered with congressional delegation of authority to the President. Western Climate Initiative, Inc. (a nonprofit organization that provides administrative and technical services to any jurisdiction with a cap-and-trade program) and related defendants also contended that the Foreign Affairs Doctrine could not be applied to them. Other parties filed briefs opposing the application of the Foreign Affairs Doctrine to preempt the linkage between the cap-and-trade programs, including intervenor-defendant International Emissions Trading Association, as well as professors of foreign relations law, 14 states (led by Oregon), and the Nature Conservancy. *United States v. California*, No. 2:19-cv-02142 (E.D. Cal. May 18, 2020).

Environmental Groups Asked Court to Compel NEPA Review for Permanent Water Diversion Contracts

Center for Biological Diversity and two other organizations filed a lawsuit in the federal district court for the Eastern District of California asserting that the conversion of Central Valley Project "renewal contracts" into "permanent repayment contracts" was a major federal action that required compliance with NEPA. The plaintiffs alleged that completed and pending conversions would obligate the U.S. Bureau of Reclamation to deliver more than two million acre-feet of water each year by diverting water from rivers and the Sacramento-San Joaquin Delta, resulting in many significant adverse impacts on the watershed. The plaintiffs said a NEPA alternatives analysis "would allow meaningful consideration of the trade-offs between water deliveries and environmental harm as well as opportunities to reduce deliveries over time," including, for example, "to limit the term of the contract so as reduce quantities over time to reflect worsening conditions caused by climate change." *Center for Biological Diversity v. U.S. Bureau of Reclamation*, No. 1:20-cv-00706 (E.D. Cal., filed May 20, 2020).

Exxon Sought to Move New Jersey Shareholder Derivative Litigation to Texas

Exxon Mobil Corporation (Exxon) moved to transfer a consolidated shareholder derivative action in the federal district court for the District of New Jersey to the Northern District of Texas, where a putative federal securities class action filed in 2016 and a consolidated federal derivative action filed in 2019 are pending. Exxon told the District of New Jersey that the cases in Texas raised "substantially the same allegations and same causes of action against the same defendants," including allegations that Exxon officers made misleading statements about Exxon's use of "proxy costs of carbon." Exxon requested, in the alternative, that the District of New Jersey stay proceedings until the first-filed Texas suits were resolved. The plaintiffs opposed transfer, arguing that their derivative complaint was the only one to plead that demand for litigation was wrongfully refused and that they should not be penalized for allowing Exxon time to consider and respond to their litigation demands. They also argued that private (e.g., their

forum preference) and public factors (New Jersey's interest in litigation regarding a well-known company incorporated within its jurisdiction) weighed heavily against transfer. In addition, the plaintiffs argued that a stay was not warranted. *In re Exxon Mobil Corp. Derivative Litigation*, No. 2:19-cv-16380 (D.N.J.).

CARB Filed FOIA Lawsuit Seeking Records Underlying Federal Preemption Determinations for Zero-Emission Vehicle Standards

The California Air Resources Board (CARB) filed a Freedom of Information Act (FOIA) lawsuit seeking to compel production by EPA and NHTSA of records concerning the analysis supporting the federal agencies' preemption of state authority to establish vehicle emission standards. In particular, CARB alleged that it sought records "supporting the conclusion that preempting CARB's zero-emission vehicle (ZEV) regulations would not impact emissions of criteria pollutants or otherwise hinder California from meeting its responsibilities under the Clean Air Act." CARB asserted that EPA and NHTSA failed to make determinations on CARB's December 10, 2019 FOIA requests. *California Air Resources Board v. EPA*, No. 1:20-cv-01293 (D.D.C., filed May 15, 2020).

Lawsuit Asserted That NEPA Analysis for National Forest Project Failed to Adequately Consider Climate Change Impacts

Local government entities, along with a local resident and environmental groups, filed a lawsuit in federal court in Indiana challenging the U.S. Forest Service's approval of a vegetation management and restoration project in the Hoosier National Forest. The complaint asserted claims under the National Environmental Protection Act, the National Forest Management Act, and the Administrative Procedure Act. The plaintiffs alleged that the Forest Service violated NEPA by, among other things, failing to engage in a complete analysis of the project's impacts, including the release of carbon into the atmosphere when trees are cut and the forest floor is burned. The complaint described Hoosier National Forest as "a regionally significant carbon 'sink,'" where stored carbon had increased by roughly 34% since the early 1990s. The plaintiffs contended that "significant scientific controversy and uncertainty" were associated with the Forest Service's "reliance on long-term offsetting of carbon emissions in light of the scientific consensus established in the [Intergovernmental Panel on Climate Change's] 2018 report, which highlighted the urgency of reducing carbon emissions in the short term." The plaintiffs faulted the Forest Service for failing to cite the 2018 report in its analysis of climate change. *Monroe County Board of Commissioners v. U.S. Forest Service*, No. 4:20-cv-00106 (S.D. Ind., filed May 13, 2020).

Environmental Groups Said Corps of Engineers Failed to Consider Climate Change Impacts of Work in Middle Mississippi River

In a lawsuit filed in federal district court in the Southern District of Illinois, environmental groups asserted that the U.S. Army Corps of Engineers was violating NEPA by conducting activities intended to maintain a nine-foot deep navigation channel in the 195-mile Middle Mississippi River Reach of the Mississippi River without completing an adequate environmental review. Among other shortcomings, the complaint alleged that the final supplemental

environmental impact statement (SEIS) issued in 2017 failed to evaluate the impacts of climate change in conjunction with the Corps' activities on the Middle Mississippi River's side channels despite "overwhelming science confirming that climate change is having an extremely significant impact on the Middle Mississippi River and its vital side channels." The complaint also alleged that the SEIS failed to evaluate impacts to birds and waterfowl, including by failing to account for the cumulative effects of climate change. The plaintiffs contended that the SEIS should have assessed whether the activities conducted by the Corps would make the Middle Mississippi River and species that rely on it less resilient to climate change. They also said the review should have addressed the implications of the Middle Mississippi's susceptibility to increased extreme weather due to climate change. In addition, the complaint asserted claims under the Water Resources Development Act, the Fish and Wildlife Coordination Act, and the 1927 Rivers and Harbors Act. *National Wildlife Federation v. U.S. Army Corps of Engineers*, No. 3:20-cv-00443 (S.D. Ill., filed May 13, 2020).

Citizen Suit Asserted that West Elk Coal Mine Required Air Permits

Four environmental groups filed a Clean Air Act citizen suit against the operators of the West Elk coal mine in Colorado for failing to obtain air permits. The plaintiffs identified the citizen suit as related to a case filed in 2019 in which the plaintiffs successfully challenged an Office of Surface Mining Reclamation and Enforcement (OSM) approval for expansion of the mine. The plaintiffs noted that the court had remanded the earlier case to OSM for consideration of a flaring option for controlling the mine's emissions of methane and other volatile organic compounds (VOCs) and to assess how the mine's methane emissions contribute to climate change. The plaintiffs said the new case involved the permitting of VOC and methane emissions. *WildEarth Guardians v. Mountain Coal Co.*, No. 1:20-cv-01342 (D. Colo., filed May 12, 2020).

Plaintiffs Said Environmental Review for California Water Transfer Program Was Insufficient

California water resource management and conservation organizations filed a lawsuit challenging the environmental review and approval of a 2019-2024 water transfer program for the sale of water by sellers upstream of the Sacramento-San Joaquin Delta to buyers south of the Delta. The plaintiffs alleged the project would likely have "devastating impacts to the Delta," reducing freshwater flows and worsening existing problems of inadequate water supplies, instream flow deficits, water quality impairments, and degraded aquatic habitats. The plaintiffs alleged that an EIS prepared after the court previously vacated a similar water transfer program was still deficient. Among the alleged deficiencies in the new EIS was a failure to include sufficient information about climate change. The complaint alleged that the project would exacerbate climate change's impacts on groundwater resources. The plaintiffs asserted claims under NEPA, the California Environmental Quality Act, and the public trust doctrine. *AquAlliance v. U.S. Bureau of Reclamation*, No. 2:20-cv-00959 (E.D. Cal., filed May 11, 2020).

Conservation Law Foundation Appealed Court's Stay of Climate Adaptation Case

On April 17, 2020, Conservation Law Foundation (CLF) filed notice that it was appealing the decision of the federal district court for the District of Massachusetts that stayed CLF's climate

adaptation lawsuit against ExxonMobil Corporation. The district court concluded that it should defer to the primary jurisdiction of EPA regarding the steps Exxon should take to protect its petroleum storage and distribution terminal from flooding and severe storms caused by climate change. *Conservation Law Foundation v. ExxonMobil Corp.*, No. 1:16-cv-11950 (D. Mass.), No. 20-1456 (1st Cir.).

Groups Challenged Decision Not to List River Herring as Threatened

Four environmental and conservation groups filed a lawsuit in federal court in the District of Columbia challenging the National Marine Fisheries Service's (NMFS's) decision not to list alewife or blueback herring as threatened species under the Endangered Species Act. The complaint alleged that the populations of these fish, collectively known as "river herring," had "declined precipitously from their historic levels, and both species face significant threats to their survival from climate change. The plaintiffs further alleged that NMFS's decision contained "multiple errors of law, including a discounting of the threats to river herring posed by climate change and a reliance on an unsupported theory that river herring will rapidly 'recolonize' rivers if the extant populations in those rivers have been wiped out." *Natural Resources Defense Council, Inc. v. Oliver*, No. 1:20-cv-01150 (D.D.C., filed May 4, 2020).

Groups Asked Court to Compel Final Decision on Threatened Listing for Humboldt Marten

Center for Biological Diversity and Environmental Protection Information Center filed a lawsuit in the federal district court for the Northern District of California to compel the U.S. Fish and Wildlife Service (FWS) to issue a final determination on the proposed listing of the coastal distinct population segment of Pacific marten (the "Humboldt marten") as a threatened species. The complaint alleged that the Humboldt marten, a member of the weasel family, was "at high risk of extinction due to loss and fragmentation of its forest habitat by logging and fire," and that climate change was expected to increase the severity and frequency of fire events. FWS previously determined in 2015 that listing was not warranted, a finding that the court remanded to FWS in 2017. In October 2018, FWS proposed to list the species as threatened, which the plaintiffs asserted triggered a requirement for issuance of a final determination within one year. *Center for Biological Diversity v. Bernhardt*, No. 4:20-cv-03037 (N.D. Cal., filed May 4, 2020).

Nonprofit Group Alleged That Exxon Marketing Violated D.C. Consumer Protection Law

A non-profit organization filed a lawsuit in D.C. Superior Court alleging that Exxon Mobil Corporation violated the D.C. Consumer Protection Procedures Act by representing "that it engages in cleaner forms of energy at a significant level, when in fact, its core business remains entrenched in the production and delivery of fossil fuels." The plaintiff asked the court to issue an injunction halting Exxon's allegedly false marketing and advertising. *Beyond Pesticides v. Exxon Mobil Corp.*, No. 2020 CA 002532 B (D.C. Super. Ct., filed May 15, 2020).

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FEATURED CASE

D.C. Circuit Said EPA Decision to Expand Partial Vacatur of HFC Prohibition Required Notice and Comment

In a split decision, the D.C. Circuit Court of Appeals vacated the U.S. Environmental Protection Agency's (EPA's) 2018 rule in which EPA decided to expand the D.C. Circuit's partial vacatur in *Mexichem Fluor, Inc. v. EPA* of a 2015 rule barring replacement of ozone-depleting substances with hydrofluorocarbons (HFCs), which are powerful greenhouse gases. In *Mexichem*, the D.C. Circuit vacated the 2015 rule to the extent that it prohibited continued use of HFCs by companies that previously switched to HFCs from an ozone-depleting substance. EPA's 2018 rule also suspended the prohibition for companies currently using ozone-depleting substances. In ruling on the challenge to the 2018 rule, the D.C. Circuit concluded that the rule was not merely a rule that interpreted *Mexichem*'s partial vacatur but a legislative rule that "altered the decision's legal effect" and required notice-and-comment rulemaking. As a threshold matter, the court found that Natural Resources Defense Council (NRDC) and one of the state petitioners (New York) each had standing based on potential injuries from climate change which were caused in part by HFC emissions and which would be redressed by restrictions on such emissions. In addition, the court found that NRDC satisfied requirements for representational standing. The court also rejected the contention that the 2018 rule was not final action. The court noted that the parties agreed that the 2018 rule was the consummation of EPA's decision-making process, but that EPA and the intervenors argued that it was *Mexichem*—not the 2018 rule—that determined any legal rights or obligations or effected legal consequences. The D.C. Circuit disagreed, finding that the 2018 rule changed the rights and obligations of companies that continued to use ozone-depleting substances compared to the status quo created by *Mexichem*. Similarly, in determining that the 2018 rule was legislative and not interpretive, the majority found that the 2018 rule had "independent effect beyond that compelled by *Mexichem*" and therefore reflected EPA's "intent to exercise its delegated legislative power." The dissenting judge would have found that the 2018 rule was an interpretive rule because it "did no more than articulate the EPA's view of what was required by *Mexichem* in the 'near term' and pending further rulemaking." *Natural Resources Defense Council v. Wheeler*, No. 18-1172 (D.C. Cir. Apr. 7, 2020).

DECISIONS AND SETTLEMENTS

Citing Shortcomings in NEPA Analysis of Cumulative Climate and Groundwater Impacts, Montana Federal Court Vacated Oil and Gas Leases

The federal district court for the District of Montana vacated 287 oil and gas leases issued by the U.S. Bureau of Land Management (BLM) in December 2017 and March 2018 because the environmental assessments for the lease sales failed to meet National Environmental Policy Act (NEPA) requirements, including by failing to take a hard look at cumulative climate change impacts. The court said BLM should have catalogued past, present, and reasonably foreseeable actions and analyzed their combined environmental impact but that in this case the four environmental assessments for each of the planning areas did not discuss the other areas even though the EAs covered land sold in the same lease sale. Noting this failure to catalogue even other federal agency projects, the court rejected BLM's arguments that compliance with NEPA's

cumulative impacts requirements was "impossible." In addition, the court said neither the "tiering" of the EAs to the resource management plans for the planning areas nor the placing of an individual lease sale's greenhouse gas emissions in context with statewide and national emissions satisfied cumulative impact requirements. Although the court acknowledged that climate change "certainly poses unique challenges in the cumulative impact analysis," the court said the "large-scale nature of environmental issues like climate change show why cumulative impacts analysis proves vital to the overall NEPA analysis." The court stated: "[I]f BLM ever hopes to determine the true impact of its projects on climate change, it can do so only by looking at projects in combination with each other, not simply in the context of state and nation-wide emissions." In addition to the shortcomings in the cumulative climate impacts analysis, the court found that BLM did not take a hard look at groundwater impacts and failed to provide an adequate explanation for its decision not to consider alternatives suggested by one of the plaintiffs that included groundwater protection measures. *WildEarth Guardians v. U.S. Bureau of Land Management*, No. 4:18-cv-00073 (D. Mont. May 1, 2020).

Forest Product Companies to Pay $800,000 in Attorney's Fees and Costs after Dismissal of RICO and Other Claims Against Greenpeace

The federal district court for the Northern District of California ordered a forest product company and affiliated companies to pay Greenpeace defendants more than $800,000 in attorney's fees and costs after the defendants brought a successful anti-SLAPP (Strategic Litigation Against Public Participation) motion against the companies' claims that the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO) and were liable under state law, including for defamation and tortious interference with prospective and contractual business relations. The forest product company had alleged that Greenpeace's campaign labeling the company a "Forest Destroyer" and a major contributor to climate change was "malicious, false, misleading, and without any reasonable factual basis." In 2019, the court dismissed almost all of the companies' claims, except for a single defamation claim and a related claim under California's Unfair Competition Law arising from allegations related to a single set of statements. *Resolute Forest Products, Inc. v. Greenpeace International*, No. 17-cv-02824 (N.D. Cal. Apr. 22, 2020).

Montana Federal Court Vacated Nationwide Permit Due to Corps of Engineers Failure to Initiate Consultation Under Endangered Species Act

In a lawsuit challenging both the reissuance of Nationwide Permit (NWP) 12—which authorizes discharges of dredged or fill material associated with utility lines—and also the NWP 12's application to the Keystone XL Pipeline, the federal district court for the District of Montana vacated NWP 12 pending completion of the consultation process under the Endangered Species Act. The court found that there was "resounding evidence" in the record that authorized discharges may affect endangered and threatened species and critical habitat and that the U.S. Army Corps of Engineers could not circumvent consultation requirements by relying either on project-level review or on a General Condition in NWP 12 that required non-federal permittees to submit a preconstruction notification to the Corps if a permittee believed an activity might affect listed species or critical habitat. The court said that having remanded to the Corps for consultation under the Endangered Species Act, it was not necessary to determine whether the

Corps "made a fully informed and well-considered decision" under NEPA and the Clean Water Act. The court therefore did not address the plaintiffs' arguments under those statutes, including the argument that the Corps should have considered indirect and cumulative effects of authorized projects' lifecycle greenhouse gas emissions. The court said it anticipated that the Corps would conduct additional environmental analyses based on the consultation findings. On April 27, the defendants moved for a stay pending appeal of the portion of the court's order that vacated NWP 12 or at least a stay of vacatur to the extent the order related to projects other than the Keystone XL Pipeline. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044 (D. Mont. Apr. 15, 2020).

Washington Court Upheld Denial of Permits for Coal Export Terminal

The Washington Court of Appeals affirmed a Shorelines Hearings Board's ruling that upheld the denial of permit application for a coal export terminal. The court rejected the terminal developer's argument that the Board had erred in concluding that consideration of the project as a whole, instead of just its first phase, was clearly erroneous. The court said the developer's argument was based on "an impermissible attempt to piecemeal its project" under the Shoreline Management Act of 1971. The court also found that denial of the permit application based on State Environmental Policy Act substantive authority was not clearly erroneous. The court agreed with the Board that there was a basis for exercising such authority. In particular, the court found that conclusion that greenhouse gas emissions constituted a significant impact was not clearly erroneous. *Millennium Bulk Terminals-Longview, LLC v. State*, No. 52215-2-II (Wash. Ct. App. Mar. 17, 2020).

Ninth Circuit Said EIS Was Required for Forest Thinning Project in Oregon

The Ninth Circuit Court of Appeals reversed a federal district court in Oregon and held that the U.S. Forest Service's (USFS's) decision not to prepare an environmental impact statement (EIS) for a forest thinning project in Mount Hood National Forest was arbitrary and capricious. The appellate court found that the USFS had failed to "engage with the considerable contrary scientific and expert opinion" identified in public comments on the environmental assessment (EA) concerning forest thinning's effectiveness in suppressing wildfires. The Ninth Circuit also said the EA did not sufficiently identify and analyze cumulative impacts. The Ninth Circuit concluded that both of these factors raised "substantial questions" about whether the project would have significant effects and that an EIS was therefore required. The Ninth Circuit did not directly address the issue of the project's effects on climate change, an issue about which the district court concluded the USFS had undertaken a "thorough examination." *Bark v. U.S. Forest Service*, No. 19-35665 (9th Cir. Apr. 3, 2020; request for publication granted May 4, 2020).

Texas Federal Court Dismissed Pro Se Plaintiff's Action That Asserted Link Between EPA Restrictions on Aerosols and Global Warming

The federal district court for the Northern District of Texas dismissed for lack of standing a lawsuit against the EPA in which an individual pro se plaintiff asserted that EPA restrictions since 1990 on aerosols in the atmosphere had caused global warming. The plaintiff said the restrictions should not be enforced until EPA demonstrated that the restrictions were not causing

temperature increases. The district court adopted a magistrate judge's findings, conclusions, and recommendations, finding that the plaintiff's allegations of generalized harm failed to establish standing. *Field v. EPA*, No. 2:19-cv-120 (N.D. Tex. Apr. 29, 2020).

States, Electricity Providers Allowed to Intervene in Case Concerning Management of Glen Canyon Dam

In a case seeking greater consideration of climate change impacts in the management of the Glen Canyon Dam, the federal district court for the District of Arizona determined that six states as well as an association of not-for profit entities, including municipalities, that provide electricity must be permitted to intervene as defendants. With respect to the states (Arizona, California, Colorado, Nevada, Utah and Wyoming), the court noted that the disposition of the case could impede their hydropower and water allocation interests and that the states' interests overlapped with but were "more parochial" than the federal defendants. With respect to the association, the court noted that many of its members had contracts for hydropower from the Glen Canyon Dam or from downstream dams and that the case could affect dams other than those that concerned a similar association that had already intervened. *Save the Colorado v. U.S. Department of the Interior*, No. 3:19-cv-08285 (D. Ariz. Apr. 23, 2020).

California Federal Court Denied Preliminary Injunction to Stop Logging Project and Biomass Facility in Rim Fire Area

The federal district court for the Eastern District of California denied a motion for a preliminary injunction in a case challenging federal and state reviews and authorizations of a logging project and biomass energy facility on public forestland that burned during the 2013 Rim Fire. The plaintiffs alleged among other things that the defendants the two projects' cumulative impacts on carbon emissions. Although the court found that the plaintiffs raised "serious questions" as to whether a decision not to review the biomass facility together with the logging project was arbitrary and capricious, the court found that a preliminary injunction was not warranted because the balance of harms did not tilt sharply in the plaintiffs' favor. *Earth Island Institute v. Nash*, No. 1:19-cv-01420 (E.D. Cal. Apr. 21, 2020).

Federal Court Rejected NEPA Claims in Challenge to Gulf of Mexico Leases

A federal district court in the District of Columbia ruled that the Bureau of Ocean Energy Management (BOEM) fulfilled its obligations under NEPA in connection with two offshore oil and gas lease sales in the Gulf of Mexico. First, the court found that BOEM considered a "true" no action alternative, rejecting the plaintiffs' argument that it was improper to assume that future leasing would result in the same effects under the no action alternative. Second, the court was not persuaded that BOEM's hard look at impacts was undermined by reliance on safety rules that were being partially repealed and that were allegedly enforced inadequately. Third, the court rejected the argument that a supplemental EIS was necessary due to a reduction in royalty rate that the plaintiffs argued would result in higher levels of development and production than were assessed. *Gulf Restoration Network v. Bernhardt*, No. 1:18-cv-01674 (D.D.C. Apr. 21, 2020).

Montana Federal Court Said WildEarth Guardians Did Not Have "Failure to Act" Claim to Compel Pipeline Inspections

The federal district court for the District of Montana "reluctantly" concluded that it could not compel the Pipeline and Hazardous Materials Safety Administration (PHMSA) to comply with a Mineral Leasing Act directive to cause inspection of all federal pipelines on federal lands at least once annually. The court found that because PHMSA had "taken some steps, limited as they may be," to address this statutory obligation, the plaintiff could not bring a challenge under the Administrative Procedure Act's "failure to act" provision in Section 706(1). *WildEarth Guardians v. Chao*, No. 4:18-cv-00110 (D. Mont. Apr. 15, 2020).

Federal Court Said Biological Opinion for Lobster Fishery Should Have Included an Incidental Take Statement Due to Impacts on Right Whales

The federal district court for the District of Columbia ruled that a 2014 biological opinion for the American lobster fishery was invalid because the National Marine Fisheries Service did not include an incidental take statement despite finding that the fishery had the potential to harm the endangered North American right whale at more than three times the sustainable rate. The court described the "largest modern threats" to the right whale as ship strikes and fishing-gear entanglement, but the complaint alleged that the biological opinion recognized other threats, including ingestion of plastic debris and global climate change. The court did not address the plaintiffs' other arguments regarding the inadequacies of the biological opinion and said it would accept briefing from the parties on the scope of an injunctive remedy. *Center for Biological Diversity v. Ross*, No. 1:18-cv-00112 (D.D.C. Apr. 9, 2020).

Federal Court Dismissed States' Challenge to Trump Deregulatory Executive Order

The federal district court for the District of Columbia concluded that three states—California, Minnesota, and Oregon—did not have Article III standing to challenge President Trump's Executive Order 13,771, which, among other things, required federal agencies to identify two existing regulations for repeal for every new regulation proposed, to offset the incremental costs of new regulations by eliminating costs associated with two prior regulations, and to adhere to an "annual cap" that prohibited new regulations that in the aggregate exceed an agency's "total incremental cost allowance." The court considered four deregulatory actions or delayed regulatory actions that were the focus of the states' standing arguments—including the repeal of the Federal Highway Administration's (FHWA's) Greenhouse Gas (GHG) Performance Measure and the Department of Energy's delay in issuing new energy efficiency standards for residential cooking products—and found that the states had not demonstrated that the executive order was the cause of any material delay or any deregulatory action. Regarding the repeal of the FHWA's GHG Performance Measure, the court found that the existing evidence indicated that "substantive policy considerations" were the basis for repeal even though the executive order precipitated the FHWA's review of its regulations. (The court also said it was "far from clear" that the states had demonstrated that the repeal would cause particularized harm.) Regarding the delay in energy efficiency standards, the court assumed without deciding that the failure to finalize the standards had contributed to climate change and that the states had suffered injuries related to climate change. The court found, however, that "undisputed" evidence demonstrated

that the executive order did not cause the delay. *California v. Trump*, No. 19-cv-960 (D.D.C. Apr. 2, 2020).

California Appellate Court Rejected Challenges to Long-Term Management Plan for Sacramento-San Joaquin Delta

The California Court of Appeal reversed a trial court's determination that the Sacramento-San Joaquin Delta Reform Act of 2009 required the Delta Stewardship Council to adopt performance measure targets as legally enforceable regulations in the long-term management plan for the Delta to achieve certain objectives of the Act. The court also agreed with the Council that other violations found by the trial court were moot due to the adoption in 2018 of amendments to the Delta Plan. In addition, the court affirmed the trial court's rejection of certain other challenges to the Plan, including a claim that aspects of the Plan were not based on best available science. A climate change-related argument rejected by the trial court—that sea level rise projections in the Plan were too high and not based on best available science—did not appear to have been before the appellate court. *Delta Stewardship Council Cases*, Nos. C082944 & C086199 (Cal. Ct. App. Apr. 10, 2020).

Oregon Supreme Court Directed Changes to Ballot Title for Greenhouse Gas Emissions Reductions

The Oregon Supreme Court agreed with a petitioner that the Attorney General should modify the text of a ballot title that, if adopted by voters, would amend an Oregon statute to require that greenhouse gas emissions from industry and fossil fuel sources be reduced by 100% below 1990 levels by 2050. The current statute provides for an aspirational goal of reducing emissions by 75% below 1990 levels by 2050 and does not create additional regulatory authority for state agencies. The ballot title, on the other hand, would require both adoption of rules to achieve the emissions reduction target as well as enforcement of those rules. The Supreme Court said that due to the placement of a comma, the caption and the "yes" result statement could potentially be misread as requiring elimination of fossil fuels by 2050; the court also said the summary and potentially the caption should be modified to clarify that the mandated greenhouse gas phase-out would occur in two steps. *Hurst v. Rosenblum*, Nos. SC S067329 & S067333 (Or. Apr. 9, 2020).

Kansas Supreme Court Said Utilities Could Not Charge Distributed Energy Residential Customers Higher Rates

The Kansas Supreme Court held that a rate structure that charged residential utility customers more if they had distributed renewable energy sources was unlawfully discriminatory because it violated a Kansas statute enacted in 1980 that barred utilities from considering the use of renewable energy sources by a customer as a basis for establishing higher rates or charges. The court rejected the argument that a more recently enacted statute governing rate structure conflicted with and preempted the 1980 statute. The court described the concerns that led to policies favoring use of renewable energy sources, including oil and gas shortages and global climate change, and said these policies were "chosen by the policy makers in our Legislature and … cemented in Kansas law." *In re Westar Energy, Inc.*, No. 120,436 (Kan. Apr. 3, 2020).

California Appellate Court Said Approval of Permits to Drill Was Ministerial, Did Not Require CEQA Review

The California Court of Appeal affirmed a trial court's determination that California Environmental Quality Act (CEQA) review was not required for the issuance of certain permits to drill by the Division of Oil, Gas, & Geothermal Resources (DOGGR) of the California Department of Conservation because DOGGR's approvals in this case were ministerial in nature. The petitioners had alleged that the agency failed to consider the cumulative impacts of the permits, including the release of greenhouse gases. The appellate court concluded that "[a]lthough some statutory provisions and regulations reflect that, under other circumstances, DOGGR would ordinarily exercise discretion in making well drilling permit decisions, that was not the case here." In the "limited and narrow circumstances" of this case, the appellate court found that DOGGR had not exercise discretionary judgment or deliberation "but merely determined in a mechanical fashion whether there was conformity with applicable standards set forth in the regulations and … field rules." *Association of Irritated Residents v. California Department of Conservation, Division of Oil, Gas, & Geothermal Resources*, No. F078460 (Cal. Ct. App. Apr. 8, 2020).

California Appellate Court Upheld EIR for Refinery Project

The California Court of Appeal rejected challenges to an environmental impact report (EIR) prepared for an oil refinery project in the Los Angeles area. The petitioners had alleged that the EIR failed to disclose the increase in the amount of crude oil that would be refined at the facility and the full scope of impacts, including direct, indirect, and cumulative greenhouse gas emissions. The appellate court ruled for the respondents on all four issues raised by the petitioners on appeal, including whether a proper baseline was used in the EIR, whether the EIR should have disclosed input crude oil composition, and whether the EIR was required to disclose the existing volume of crude oil the refinery processes as a whole or the refinery's unused capacity. *Communities for a Better Environment v. South Coast Air Quality Management District*, No. B294732 (Cal. Ct. App. Apr. 7, 2020; modified opinion Apr. 30, 2020).

California Court of Appeal Said Recent Climate Change Information Did Not Necessitate Additional Consideration of Water Supply

The California Court of Appeal rejected the argument that Los Angeles County needed to prepare supplemental analysis under CEQA of the impacts on water resources of the first two phases of the proposed Newhall Ranch development to take into account recent historic drought, record high temperatures, and "accumulating data" on climate change's regional and global effects. The appellate court found that the County was "well aware of the threat posed by climate change" when it certified EIRs in 2011 and that post-2011 data were "consistent with the range of projections considered in 2011." *Friends of the Santa Clara River v. County of Los Angeles*, No. B296547 (Cal. Ct. App. Apr. 3, 2020).

NEW CASES, MOTIONS, AND NOTICES

Supreme Court Granted Baltimore's Request for More Time to Response to Petition Seeking Review of Remand Order Due to Burdens Imposed by COVID-19

The U.S. Supreme Court granted Baltimore's request for a 60-day extension of time to file a response to fossil fuel companies' petition for a writ of certiorari seeking review of the Fourth Circuit's affirmance of the remand order in Baltimore's case. Baltimore said it sought the extension due to the "extraordinary circumstances" of the COVID-19 pandemic, which placed an "enormous unanticipated burden" on Baltimore and its counsel. The fossil fuel companies asked the court to grant only a 30-day extension. Their letter to the Court noted that Baltimore was actively litigating the case in state court and that "nearly identical" cases were pending in other state courts. The companies noted that they had filed their petition "expeditiously" and that allowing a 60-day extension instead of a shorter extension would delay consideration of the petition until the next term. The Court granted Baltimore's request without comment, setting a deadline of June 29, 2020 for the filing of a response. Four amicus briefs were filed in support of the companies' certiorari petition by the U.S. Chamber of Commerce, the National Association of Manufacturers, the nonprofit organization Energy Policy Advocates, and 13 states. In state court, motions to dismiss for failure to state a claim and for lack of personal jurisdiction were filed in February, and the United States filed a motion for leave to file an amicus brief in support of the motion to dismiss. On April 15, Baltimore filed its opposition to the motion to dismiss, reportedly responding to a First Amendment defense by arguing that "[n]o law authorizes misleading and deceptive marketing of products that the manufacturer or marketer knows to be dangerous; and no law authorizes a multi-decade campaign of deceit to undermine public confidence in climate-related science to prolong or increase the use of the companies' products at the expense of other, safer alternatives." *BP p.l.c. v. Mayor & City of Baltimore*, No. 19-1189 (U.S. Apr. 24, 2020).

Oral Argument Held in Companies' Appeal of Remand Order in Colorado Localities' Suit; Localities Argued for Summary Affirmance Based on Fourth Circuit Decision

The Tenth Circuit heard oral argument telephonically on May 6, 2020 in the fossil fuel companies' appeal of the remand order in the climate change lawsuit brought by the City and County of Boulder and San Miguel County. On April 24, the plaintiffs-appellees moved for summary affirmance of the remand order, arguing that the doctrine of collateral estoppel barred Exxon Mobil Corporation (Exxon) from relitigating the issues of the scope of appellate jurisdiction and the merits of federal-officer removal because the Fourth Circuit decided these issues against Exxon in Baltimore's lawsuit. The plaintiffs-appellees also argued that although collateral estoppel did not apply against the other defendants—who are not defendants in Baltimore's lawsuit—the other defendants lack an independent basis for appeal since they did not raise their own federal-officer argument. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, No. 19-1330 (10th Cir.).

Challenge to Amended Vehicle Emission and Fuel Economy Standards Filed in D.C. Circuit; Petitioners Sought More Time for Briefing in Challenge to Earlier Preemption Actions

Competitive Enterprise Institute (CEI) filed a petition for review in the D.C. Circuit challenging EPA and the National Highway Traffic Safety Administration's final rule amending the greenhouse gas and fuel economy standards for passenger cars and light trucks. In its petition, CEI asserted that the final rule—which the agencies titled the "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule"—was based on inadequate consideration of the amended standards' adverse traffic safety impacts. The final rule was published in the Federal Register on April 30, and additional challenges are expected in the near future. *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, No. 20-1145 (D.C. Cir., filed May 1, 2020).

In related proceedings challenging EPA and NHTSA actions that preempted state regulations of greenhouse gas emission standards, on May 4 petitioners requested that the D.C. Circuit set a briefing schedule with the opening briefs due on July 21 and briefing completed on November 23. The proposed schedule would move the opening brief deadline approximately two months later than the deadline originally proposed jointly by the parties in early March. In April, the petitioners had requested a schedule that would require opening briefs to be filed in June, but the petitioners' May request asked for additional time "[i]n light of the lengthy and extraordinary effects of the COVID-19 pandemic" on the petitioners and their counsel, as well as due to new briefing obligations in another case for one lawyer. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, No. 19-1230 (D.C. Cir.).

Briefs Filed in Challenges to ACE Rule and Clean Power Plan Repeal

Petitioners and amicus parties in the lawsuits challenging the repeal of the Clean Power Plan and its replacement with the Affordable Clean Energy (ACE) Rule filed briefs in the D.C. Circuit. Arguments in the briefs filed by Public Health and Environmental Petitioners and State and Municipal Petitioners included that EPA had unreasonably determined that the "best system of emission reduction" for power plants could not include shifting generation to less-polluting plants; that the ACE Rule improperly repealed regulations for gas- and oil-fired plants without instituting new regulations; and that EPA unlawfully failed to establish a minimum degree of emission limitation to be incorporated in standards of performance. The initial briefs of Clean Energy Associations and Power Company Petitioners largely focused on arguments against EPA's limitations on generation-shifting, while petitioner Biogenic CO2 Coalition argued that the ACE Rule improperly prevented power plants from counting the co-firing of biomass as a compliance measure. In addition, Coal Industry Petitioners and another set of petitioners with members that included companies in the petroleum, trucking, forest products, and other industries, as well as individuals and nonprofit organizations, filed briefs arguing that EPA could not regulate carbon dioxide emissions from existing power plants under Section 111. Individuals, companies, and organizations filed 18 amicus briefs in support of the Public Health and Environmental Petitioners, State and Municipal Petitioners, Clean Energy Associations, and Power Company Petitioners. The amicus parties included climate scientists, administrative law professors, members of Congress, the co-leader of the Interagency Working Group that developed the Social Cost of Carbon methodology, the principal staff drafter of the 1970 Clean Air Act Amendments, outdoor gear companies, a coalition of local governments and officials and municipal organizations, Service Employees International Union, medical groups, and faith

organizations. All of the briefs are available on the case page. *American Lung Association v. EPA*, Nos. 19-1140 et al. (D.C. Cir.).

Organizations Challenged FERC Approval of Natural Gas Projects in Massachusetts

Two organizations filed a petition in the D.C. Circuit Court of Appeals for review of the Federal Energy Regulatory Commission's granting of a certificate authorizing construction and operation of the 261 Upgrade Project, a set of projects in southern Massachusetts to increase transportation capacity on the existing Tennessee Gas Pipeline system. The petition said FERC arbitrarily and capriciously departed from D.C. Circuit precedent regarding how FERC should evaluate greenhouse gas emissions from fossil fuel production and transportation projects. *Food & Water Watch v. Federal Energy Regulatory Commission*, No. 20-1132 (D.C. Cir., filed Apr. 21, 2020).

EPA Told D.C. Circuit that Final Amendments to Greenhouse Gas New Source Performance Standards Were Anticipated in Summer 2020

On April 24, 2020, the U.S. Department of Justice (DOJ) filed a status report in the proceedings challenging the Obama administration's new source performance standards for greenhouse gas emissions from new, modified, and reconstructed power plants. The proceedings have been held in abeyance since August 2017 while EPA considers whether and how to amend the regulations. In the status report, DOJ said EPA's work had been slowed by the COVID-19 pandemic, but that EPA intended and expected to be in a position to take final action on its proposed amendments to in the summer of 2020. *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. Apr. 24, 2020).

States, Nonprofit Groups Challenged Department of Energy Procedures for Appliance Energy Conservation Standards

Thirteen states, New York City, and the District of Columbia filed a petition for review in the Ninth Circuit seeking review of the U.S. Department of Energy's final rule establishing procedures for new or revised energy conservation standards and test procedures for consumer products and commercial/industrial equipment. Six organizations led by Natural Resources Defense Council filed a separate petition for review in the Ninth Circuit. *Natural Resources Defense Council, Inc. v. Brouillette*, No. 20-71071 (9th Cir., filed Apr. 14, 2020); *California v. U.S. Department of Energy*, No. 20-71068 (9th Cir., filed Apr. 14, 2020).

WOTUS Rule Challenges Raised Climate Change Concerns

At least two of the lawsuits filed to challenge EPA's new definition of "waters of the United States" (WOTUS) raised issues related to climate change. The complaint filed by 17 states, the District of Columbia, and New York City in the Northern District of California asserted that the final rule's "typical year" requirement—which the rule uses to define when tributaries, lakes, ponds, and impoundments are jurisdictional waters—did not take into account future changes due to climate change to the extent that the definition of typical year was based on "a rolling average of past data." Similarly, the complaint filed by environmental groups in the District of Massachusetts alleged that the "typical year" would "skew towards historical conditions that may no longer accurately represent today's climate." *California v. Wheeler*, No. 3:20-cv-03005 (N.D.

Cal., filed May 1, 2020); *Conservation Law Foundation v. EPA*, No. 1:20-cv-10820 (D. Mass., filed Apr. 29, 2020).

Lawsuit Filed Challenging Corps Permits for Docking Facility for LNG Transport

Delaware Riverkeeper Network and the Delaware Riverkeeper filed a lawsuit challenging a permit issued by the U.S. Army Corps of Engineers for a docking facility in New Jersey to transport liquefied natural gas (LNG) to docked vessels. The plaintiffs asserted claims under the National Environmental Policy Act, the Clean Air Act, the Administrative Procedure Act, and Corps regulations. Among other things, the plaintiffs alleged that the Corps' public interest review "was arbitrary and capricious because it did not give sufficient weight and analysis to climate change impacts and safety concerns." *Delaware Riverkeeper Network v. U.S. Army Corps of Engineers*, No. 1:20-cv-04824 (D.N.J., filed Apr. 22, 2020).

WildEarth Guardians Asked Court to Compel Final Listing Determinations on Five Species

WildEarth Guardians filed a lawsuit in federal district court in the District of Columbia asserting that the U.S. Fish and Wildlife Service had violated the Endangered Species Act and the Administrative Procedure Act by failing to make final determinations on the organization's petitions to list five aquatic species that inhabit western rivers and riparian ecosystems. The complaint alleged that climate change was one of the factors threatening the existence of three of the species. *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-01035 (D.D.C., filed Apr. 21, 2020).

U.S. Sought Summary Judgment on Foreign Affairs Doctrine Claim in Challenge to California-Quebec Greenhouse Gas Agreement

In its lawsuit challenging California's agreements with Quebec regarding linkages between their greenhouse gas cap-and-trade programs, the United States filed a motion seeking summary judgment motion on its claim that the agreements violated the Foreign Affairs Doctrine. The U.S. argued that the agreements and related arrangements conflicted with and were an obstacle to U.S. foreign policy, including the U.S.'s decision not to participate in the Paris Agreement. The U.S. further contended that even if California's activities did not conflict with U.S. foreign policy, they concerned an area of foreign affairs over which the federal government had exclusive domain. The United States also sought dismissal of its Foreign Commerce Clause claim, which the U.S. said was largely duplicative of the Foreign Affairs Doctrine claim. *United States v. California*, No. 2:19-cv-02142 (E.D. Cal. Apr. 20, 2020).

Environmental Groups Said Endangered Species Act Consultation Was Required for Operation of Spillway

Defenders of Wildlife and Healthy Gulf filed a federal lawsuit in the Southern District of Mississippi claiming that the U.S. Army Corps of Engineers and the Mississippi River Commission were failing to comply with the Endangered Species Act (ESA) in connection with its operation of the Bonnet Carré Spillway, a flood-control mechanism on the lower Mississippi

River. The plaintiffs alleged that the agencies had never completed formal or informal consultation under the ESA to consider the impact of diversions on nine threatened and endangered species that inhabit the bodies of water into which the spillway diverts water to reduce flooding in New Orleans. The complaint states: "As more extreme storms and varied weather increase the number and intensity of floods in the lower Mississippi River valley region, it is likely that the Spillway will be opened more frequently and for increasingly longer duration in the future. This in turn will increase the frequency and duration that imperiled species and habitats are subjected to Spillway water pollutants and other impacts." *Defenders of Wildlife v. U.S. Army Corps of Engineers*, No. 1:20-cv-00142 (S.D. Miss., filed Apr. 15, 2020).

BLM Asked Court for Voluntary Remand to Conduct Additional Analysis for Grand Junction Resource Management Plan

The U.S. Bureau of Land Management (BLM) moved for voluntary remand without vacatur of its decision approving the Grand Junction Resource Management Plan (RMP) so that it could prepare additional analysis under the National Environmental Policy Act. BLM said it intended to prepare supplemental analysis based on review of a 2018 decision in another case—*Wilderness Workshop v. BLM*—that involved a planning area with resource similarities. The court in the other case found that BLM failed to take a hard look at the RMP's indirect impacts, and the parties subsequently agreed to partial remand without vacatur. The plaintiffs in the Grand Junction RMP case objected to the "vague and open-ended terms" of the proposed voluntary remand and asked the court to require, among other things, that the additional analysis be prepare in an supplemental environmental impact statement and that its scope include indirect and cumulative emissions. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 1:19-cv-02869 (D. Colo. Apr. 8, 2020).

Lawsuit Challenged Water Diversion Project in California, Including for Failure to Evaluate Climate Change Impacts

Four organizations filed a lawsuit against the California Department of Water Resources seeking to vacate the agency's approval of the Long-Term Operation of the State Water Project, which the petitioners alleged "diverts large quantities of fresh water from the Sacramento River and San Joaquin River watersheds and the San Francisco Bay-Delta estuary for export" and "significantly degrades environmental conditions" in the watersheds and estuary. The petition asserted violations of the Delta Reform Act, the California Environmental Quality Act, and the public trust doctrine. The petition alleged, among other issues, that the environmental impact report failed to adequately analyze the implications of climate change on the project's water deliveries and the project's cumulative impacts in light of climate change. *Sierra Club v. California Department of Water Resources*, No. ___ (Cal. Super. Ct., filed Apr. 29, 2020).

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FEATURED CASE

Fourth Circuit Affirmed Remand of Baltimore's Climate Change Case Against Fossil Fuel Companies; Companies Sought Supreme Court Review and Argued for Limited Relevance in Other Pending Appeals

On March 6, 2020, the Fourth Circuit Court of Appeals declined to reverse a remand order that returned the City of Baltimore's climate change case against fossil fuel companies to state court. The district court had rejected all eight of the defendants' grounds for removal, but the Fourth Circuit held that its appellate jurisdiction was limited to the issue of whether the defendants properly removed the case under the federal officer removal statute. The Fourth Circuit cited decades-old Fourth Circuit precedent limiting the scope of review of remand orders to grounds specifically exempted from the statutory bar on appellate review, including federal-officer removal. The court rejected the defendants' argument that a Supreme Court decision on the scope of interlocutory review had abrogated this precedent. The Fourth Circuit also concluded that the Removal Clarification Act of 2011 did not authorize "plenary review" of remand orders. Regarding the application of federal-officer removal in this case, the Fourth Circuit found that none of the three contractual relationships on which the defendants based removal were sufficient to justify such removal, either because the relationships failed to satisfy the requirement that the defendants were "acting under" a federal officer or because the contractual relationships were "insufficiently related" to Baltimore's claims. The first contractual relationship consisted of fuel supply agreements between one defendant and the Navy Exchange Service Command; the court said these agreements contained provisions "typical of any commercial agreement" and did not satisfy the "acting under" requirement. The second contractual relationship was oil and gas leases administered under the Outer Continental Shelf Lands Act; the court found that these agreements did not satisfy the "acting under" requirement and, moreover, that the defendants "did not plausibly assert that the charged conduct was carried out 'for or relating to' the alleged official authority, given the 'wide array of conduct' for which they were sued," including alleged "concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use." The third contractual relationship was a 1944 agreement between one defendant's predecessor and the Navy for joint operation of a strategic petroleum reserve; the Fourth Circuit concluded this agreement did not satisfy the "acting under" requirement and that its relationship to Baltimore's claims was too attenuated. *Mayor & City of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir. Mar. 6, 2020).

On March 31, 2020, the defendants filed a certiorari petition in the Supreme Court, seeking review of the question of whether the statutory provision prescribing the scope of appellate review of remand orders "permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443." Baltimore's response to the petition is due on April 30. *BP p.l.c. v. Mayor & City of Baltimore*, No. 19-1189 (U.S. Mar. 31, 2020).

The state and local governmental plaintiffs in other climate change lawsuits against fossil fuel companies notified other circuit courts of appeal of the Fourth Circuit's decision. Rhode Island contended in a letter to the First Circuit that the decision "rejects the exact arguments raised … as to the proper scope of … appeal" of the remand order in its case as well as the defendants' "tenuous justification for federal officer removal." Oakland and San Francisco told the Ninth

Circuit that the Fourth Circuit had rejected the only basis for federal-officer removal that the defendants-appellees offered in their case, while other California local governments told the Ninth Circuit that the Fourth Circuit had rejected the defendants-appellants' arguments regarding both the scope of appellate jurisdiction and the application of federal-officer removal. In the Tenth Circuit, Colorado local government plaintiffs similarly told the court that the Fourth Circuit's decision supported affirmation of the remand order in their case. In response to these filings, defendant Chevron Corporation distinguished the Fourth Circuit's opinion, arguing that the Fourth Circuit viewed itself as bound by precedent regarding the scope of its appellate jurisdiction (which Chevron contended was not the situation in the other appeals). Chevron also asserted that the Fourth Circuit based its determination that federal-officer removal was inapplicable on an incorrect conclusion regarding the focus of Baltimore's claims. With respect to Oakland and San Francisco's appeal, Chevron also said the Ninth Circuit could review all grounds for removal since the appeal was from a final judgment, not just the remand order; Chevron also reasserted the defendants' contention that Oakland and San Francisco's amendment of their complaint after the denial of their motion to remand mooted their appeal of the denial.

Other developments in these appeals included the First Circuit's allowance of a motion to file a late amicus brief. The party seeking to file the brief—Energy Policy Advocates—said it had obtained information through public records requests regarding state court bias and Rhode Island's political and financial motivations for filing the lawsuit. Rhode Island urged the court to disregard the amicus brief, arguing that it was "filled with inflammatory, baseless speculation" that was not relevant to the substance of the appeal.

In the Tenth Circuit appeal of the remand order in the case brought by Colorado local government plaintiffs, oral argument was scheduled for May 6, 2020, but the Tenth Circuit has indicated that oral arguments scheduled for May will be argued telephonically, submitted on the briefs, or reset for in-person argument at a later date due to the COVID-19 pandemic. *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.); *County of San Mateo v. Chevron Corp.*, Nos. 18-15499 et al. (9th Cir.); *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir.); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.).

DECISIONS AND SETTLEMENTS

Second Circuit Ruled That EPA Must Disclose Component of Model Used to Evaluate Greenhouse Gas Vehicle Standards

Reversing a district court decision, the Second Circuit Court of Appeals held that the deliberative process privilege and Exemption 5 of the Freedom of Information Act did not apply to a "core model" component of OMEGA, a computer model used by the U.S. Environmental Protection Agency (EPA) to evaluate greenhouse gas vehicle standards. Exemption 5 shields 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." The Second Circuit found that the model was not deliberative because the record showed "that to the extent the full OMEGA model reflects *any* subjective agency views, it does so in the input files, not the core model." The

appellate court found that release of the core model would not "contain or expose the types of internal agency communications that courts typically recognize as posing a risk to the candor of agency discussion such as advice, opinions, or recommendations." *Natural Resources Defense Council v. EPA*, No. 19-2896 (2d Cir. Apr. 1, 2020).

Massachusetts Federal Court Stayed Climate Adaptation Citizen Suit Against Exxon

Citing the doctrine of primary jurisdiction, the federal district court for the District of Massachusetts stayed a citizen suit asserting that ExxonMobil Corporation (Exxon) and related defendants violated the National Pollutant Discharge Elimination System (NPDES) permit for their 110-acre petroleum storage and distribution terminal in Everett, Massachusetts, including by failing to consider flooding and severe storms caused by climate change in their maintenance of the terminal. The plaintiff also asserted that the permit violations posed an imminent and substantial endangerment to human health and the environment in violation of the Resource Conservation and Recovery Act. The terminal has a NPDES permit issued by EPA that expired in 2014 but which EPA has administratively continued so that its terms remain in effect; EPA regional counsel informed the court that the agency is working in good faith to renew the permit by 2022. The court found that the precedent against applying primary jurisdiction in citizen suits was "not overwhelming," and that, in any event, this case was not a "typical" citizen suit, both because it involved "ambiguous, narrative permit conditions" and would require the court to determine to what extent weather patterns were changing in the Boston area, an inquiry implicating scientific and policy issues. Although the court acknowledged that the doctrine of primary jurisdiction should be applied "sparingly" in citizen suits, it concluded that this case "involves a rare set of circumstances in which deferring to the primary jurisdiction of the EPA is justified and appropriate." Considering the factors for applying primary jurisdiction, the court first said that "determining permit conditions" was "at the heart of the EPA's authority" under the Clean Water Act. Second, the court noted again that the question of how Exxon should consider "predictable weather patterns" raised "scientific and policy issues that the EPA is better equipped to decide than the court." Third, the court noted that EPA's issuance of the renewed permit would "generate a fuller administrative record" to which the court could refer to interpret the permit and could moot the plaintiff's request for injunctive relief. Fourth, the court said allowing EPA the opportunity to issue the permit would further regulatory uniformity. The court also concluded that the potential for delay did not outweigh other factors; the court noted that resolving the case on the merits could require as much time as EPA had estimated for the permit's renewal. The court therefore stayed the case, directing the parties to confer within 30 days of issuance of a new permit regarding whether the stay should be lifted and, if so, how the case should proceed. The court further directed that if a new permit was not issued by November 1, 2021, the parties should confer and report to the court on the status of the permitting process and on whether the stay should be lifted. *Conservation Law Foundation v. ExxonMobil Corp.*, No. 16-11950 (D. Mass. Mar. 21, 2020).

Massachusetts Federal Court Granted Remand Motion in Massachusetts Attorney General's Climate Consumer Protection Action

During a telephonic hearing on March 17, 2020, the federal district court for the District of Massachusetts granted the Massachusetts attorney general's motion to remand her office's

consumer protection action against Exxon Mobil Corporation alleging a failure to disclose climate risks and misleading marketing of products. The court reportedly said that this was "not a case where the issue is in any substantial doubt." The judge indicated he would issue a written opinion at a later date. The court denied Exxon's request that it stay the order pending appeal. *Massachusetts v. Exxon Mobil Corp.*, No. 1:19-cv-12430 (D. Mass. Mar. 17, 2020).

Federal Court Rejected U.S.'s Treaty and Compact Clause Claims in Challenge to Linkage Between California and Quebec Cap-and-Trade Programs

The federal district court for the Eastern District of California ruled that an agreement between California and Quebec concerning the linking of their greenhouse gas cap-and-trade programs did not violate either the Treaty Clause or the Compact Clause of the U.S. Constitution. The U.S.'s claims under the foreign affairs doctrine and the foreign Commerce Clause are still pending. Regarding the Treaty Clause, the court concluded that "[b]y any metric, the Agreement between California and Quebec falls short of … consequential agreements" that the Supreme Court has identified as agreements that qualify as treaties such as "treaties of alliance for purposes of peace and war," "mutual government," the "cession of sovereignty," and "general commercial privileges." Regarding the Compact Clause, the court noted that the Supreme Court had limited the clause's bar on compacts between a state and another state or foreign power to "agreements that encroach upon federal sovereignty." In this case, the court found that the California-Quebec agreement did not contain indicia of a compact because (1) it "does not require reciprocal action to take effect"; (2) "does not impose a regional limitation"; (3) does not adopt a joint organization or body that exercises regulatory authority; and (4) does not include an "enforceable prohibition on unilateral modification or termination." The court also concluded that the agreement did not increase California's power so that it encroached on U.S. supremacy. In addition, it rejected the argument that the Clean Air Act's explicit authorization of agreements and compacts between states implicitly precludes agreements between states and foreign powers. *United States v. California*, No. 2:19-cv-02142 (E.D. Cal. Mar. 12, 2020).

Federal Court Upheld Repeal of Obama-Era Rule for Hydraulic Fracturing on Federal and Tribal Lands

The federal district court for the Northern District of California ruled that the Trump administration's repeal of a rule promulgated by the Obama administration in 2015 regulating hydraulic fracturing on federal and tribal lands did not violate the Administrative Procedure Act, the National Environmental Policy Act (NEPA), or the Endangered Species Act (ESA). As a threshold matter, the court found that California had standing for all its claims and that Citizen Group Plaintiffs had standing for claims under the ESA and NEPA but not under the APA. On the merits, the court concluded that the change in policy was not arbitrary and capricious under the APA, finding that the U.S. Bureau of Land Management's (BLM) "reasoned explanation" of the change "did enough to clear the low bar of arbitrary and capricious review." The court was not persuaded by California's critiques of the reversal, which included two main arguments: that BLM's determination that the 2015 rule was duplicative of state and tribal regulation was negated by BLM's earlier conclusions and that BLM ignored forgone benefits of the Obama-era rule in its cost-benefit analysis. The court declined to address the issue of whether BLM had authority to issue the 2015 rule. The court also agreed with the defendants that NEPA did not

apply since the 2015 rule was never in effect and the "environmental status quo" therefore was not altered. (California's NEPA claim was based in part on the defendants' failure to consider potential significant adverse environmental impacts, including climate change harms.) Regarding the ESA, the court found that there was a "rational connection" between BLM's "final position" that the repeal would have no effect on threatened species on BLM lands and the facts in the record. *California v. Bureau of Land Management*, No. 4:18-cv-00521, and *Sierra Club v. Zinke*, No. 18-cv-00524 (N.D. Cal. Mar. 27, 2020).

Challenges to Federal Determinations on California Water Diversion Projects Transferred from Northern to Eastern District

The federal district court for the Northern District of California transferred to the Eastern District of California two cases challenging federal adoption in 2019 of biological opinions for long-term operations of two major water diversion projects in California—the Central Valley Project and the State Water Project. One case was brought by six environmental organizations and the other by California agencies and the attorney general. The plaintiffs alleged, among other things, that the federal agencies—the U.S. Fish and Wildlife Service and the National Marine Fisheries Service—failed to consider the projects' impacts in the context of climate change when the agencies determined that the projects would not jeopardize the continued existence of threatened and endangered fish species or destroy or adversely modify the species' critical habitat. The court concluded that the Eastern District's local interests in the case (e.g., the presence of the reservoirs and critical habitat in the Eastern District) and considerations of judicial economy (another case concerning the projects was pending in the Eastern District) made transfer appropriate. *Pacific Coast Federation of Fishermen's Associations v. Ross*, No. 3:19-cv-07897 (N.D. Cal. Mar. 20, 2020); *California Natural Resources Agency v. Ross*, No. 3:20-cv-01299 (N.D. Cal., filed Feb. 20, 2020; transferred Mar. 20, 2020).

Federal Court Declined to Bar CEQ from Closing Comment Period on Proposed NEPA Regulations

In an environmental organization's Freedom of Information Act (FOIA) lawsuit against the Council on Environmental Quality (CEQ), a Virginia federal court denied the organization's motion for a preliminary injunction enjoining CEQ from closing the comment period on proposed amendments to the NEPA regulations. The FOIA request at issue in the case was for records related to the advance notice of proposed rulemaking for the NEPA regulations. The court concluded both that FOIA did not grant it the injunctive power to take such action since doing so would disrupt the statutory scheme of the Administrative Procedure Act. *Southern Environmental Law Center v. Council on Environmental Quality*, No. 3:18-cv-00113 (W.D. Va. order Mar. 9, 2020; opinion Mar. 18, 2020).

Federal Court Upheld Climate Change-Related Portions of New EA and FONSI for Coal Mine Expansion but Vacated EA on Other Grounds

The federal district court for the District of Montana largely rejected arguments that federal approval in 2018 of the expansion of an underground coal mine in south-central Montana violated NEPA and the Endangered Species Act. The court previously enjoined approval of the

expansion for failure to quantify the costs of greenhouse gas emissions associated with the action. The court concluded, however, that the Office of Surface Mining Reclamation and Enforcement (OSMRE) subsequently provided sufficient support for its conclusion in its 2018 environmental assessment (EA) that the Social Cost of Carbon was "too uncertain and indeterminate to aid … decision-making." The court also rejected the plaintiffs' argument that OSMRE failed to consider certain significance factors in the statement of reasons for its Finding of No Significant Impact, including factors related to climate change. In particular, the court found that the statement of reasons adequately considered the impact of greenhouse gas emissions on public health; that experts who commented on the Social Cost of Carbon and climate change did not raise a "substantial dispute" that would render the expansion "highly controversial"; that the presence of "some" uncertainty regarding long-term cumulative effects of greenhouse gases did not compel preparation of an environmental impact statement; and that a statement in the EA about greenhouse gases causing climate change did not raise "substantial questions" about the project's cumulative effects. The court did conclude, however, that a failure to analyze the risk of train derailments violated NEPA. The court therefore vacated the 2018 EA and remanded to OSMRE. *350 Montana v. Bernhardt*, No. 9:19-cv-00012 (D. Mont. Mar. 9, 2020).

Maine High Court Upheld Approval for Transmission Line from Québec

The Maine Supreme Judicial Court affirmed the Maine Public Utilities Commission's (PUC's) issuance of a certificate of public convenience and necessity for the New England Clean Energy Connect project, a transmission line proposed to run from the Maine-Québec border to Lewiston, Maine. The court rejected arguments that the PUC misconstrued and misapplied statutory requirements that it make specific findings regarding the "public need" for the project. As part of the public need analysis, the court found the PUC had appropriately considered state renewable energy generation goals, which included reduction in greenhouse gas emissions. The PUC found that the project would result in reduced greenhouse gas emissions, a finding supported by the record. *NextEra Energy Resources, LLC v. Maine Public Utilities Commission*, No. PUC-19-182 (Me. Mar. 17, 2020).

Minnesota High Court Will Review Determination That MEPA Applied to Agreements Regarding Out-of-State Power Plant

The Minnesota Supreme Court granted a petition to review a Minnesota Court of Appeals decision that found that the Minnesota Public Utilities Commission should have complied with the Minnesota Environmental Protection Act (MEPA) when it approved agreements associated with construction of a new natural gas power plant in Wisconsin. *In re Minnesota Power's Petition for Approval of the EnergyForward Resource Package*, Nos. A19-0688, A19-0704 (Minn. Mar. 17, 2020).

NEW CASES, MOTIONS, AND NOTICES

Lawsuits Filed to Challenge Approvals for Three LNG Facilities in Texas

Three lawsuits were filed—one in the Fifth Circuit and two in the D.C. Circuit—challenging federal authorizations for three liquefied natural gas (LNG) terminals in the Rio Grande Valley in Texas. The Fifth Circuit proceeding challenges the U.S. Army Corps of Engineers' issuance of a Section 404 permit, which the petitioners said they will argue failed to avoid or mitigate negative impacts to wetlands. The other two proceedings challenge Federal Energy Regulatory Commission (FERC) approvals of two other LNG facilities. Those proceedings challenge the NEPA reviews for the projects as well as FERC's conclusions under the Natural Gas Act that the projects are in the public interest. *Shrimpers and Fishermen of the RGV v. U.S. Army Corps of Engineers*, No. 20-60249 (5th Cir., filed Mar. 27, 2020); *Vecinos para el Bienestar de la Comunidad Costera v. Federal Energy Regulatory Commission*, No. 20-1094 (D.C. Cir., filed Mar. 27, 2020); *Vecinos para el Bienestar de la Comunidad Costera v. Federal Energy Regulatory Commission*, No. 20-1093 (D.C. Cir., filed Mar. 27, 2020).

Amici and Federal Government Filed Briefs on Rehearing Request in *Juliana*

Ten briefs were filed by amici curiae in support of the plaintiffs in *Juliana v. United States* who are seeking rehearing en banc of the Ninth Circuit's ruling that they lacked standing to pursue their climate change-based constitutional claims against the federal government. The amici included:

- 17 of the experts who had prepared expert opinions, which they said went "to the salient issues in this case, including the ability of the federal government to redress the youth plaintiffs' injuries";
- academic centers focused on issues of race, racial justice, and environmental justice, who said they supported rehearing because they were "deeply concerned that the majority's decision will make it more difficult for individuals and groups to safeguard their civil rights in the courts";
- two League of Women Voters organizations and the National Children's Campaign, which contended that the majority opinion "contravenes longstanding precedent and abdicates the judiciary's duty to safeguard fundamental rights, particularly those of children without voting power";
- two former Surgeons General, who argued that where the health and lives of children are at stake courts should intervene since children have no remedy at the "ballot box";
- members of Congress, who asserted that the courts had the power and the duty to remedy the plaintiffs' constitutional injuries;
- international organizations and lawyers, who described foreign jurisprudence that supported the redressability of the plaintiffs' claims and judicial ability to review climate policies;
- law professors who argued both that "the panel's majority incorrectly invoked the political question doctrine in determining whether youth plaintiffs possess standing" and that there were "well-established judicially discoverable and manageable constitutional standards" to evaluate and remedy the plaintiffs' claims;
- children's rights advocates, who contended that the majority overlooked precedent recognizing "a special judicial role in protecting children where children are explicitly excluded from influencing policies detrimental to them";

- environmental groups that argued that the majority improperly "infused political question principles into redressability analysis" and "failed to recognize that partial redressability is sufficient to establish standing," which could create obstacles for the groups to obtain relief in the future; and
- public health experts, who described the risks climate change poses to children's health.

On March 24, the federal defendants filed their opposition to the rehearing petition. They argued that the panel had properly concluded that the plaintiffs sought no relief that the courts had the power to grant and that the plaintiffs failed to establish that the relief sought would "substantially redress" their injuries. The defendants also contended that there was no legal question of exceptional importance that warranted rehearing. *Juliana v. United States*, No. 18-36082 (9th Cir.).

Lawsuit Challenged New Denial of Request for Status Review of Yellowstone Bison

Three organizations filed a lawsuit challenging the U.S. Fish and Wildlife Service's (FWS's) decision not to initiate a status review of the distinct population segment (DPS) of Yellowstone bison pursuant to the Endangered Species Act. The organizations alleged that the FWS failed to address deficiencies previously identified by the court in a 2016 decision not to initiate review. The plaintiffs asserted that the decision was arbitrary and capricious because the FWS, among other shortcomings, failed "to adequately analyze the foreseeable risk to the DPS of Yellowstone bison due to climate change." *Buffalo Field Campaign v. Skipwith*, No. 1:20-cv-00798 (D.D.C., filed Mar. 23, 2020).

Lawsuit Sought Final Listing Determination on Marsh Bird Threatened by Sea Level Rise

Two organizations filed a lawsuit to compel the U.S. Fish and Wildlife Service to make a final determination on the proposed listing of the eastern black rail, a "a small, elusive marsh bird with speckled black plumage, a rufous nape, and scarlet eyes" found in the eastern United States, Mexico, Central America, and the Caribbean. The plaintiffs alleged that the bird "stands on the brink of extinction" due to the loss, degradation, and fragmentation of its habitat but also due to increasing threats from sea level rise, which affects water depth, a "key habitat component" for the rail, which selects for its habitat "high ground areas of coastal marshes with shallow water (less than 6 centimeters) and infrequent tidal inundation or flooding." *Center for Biological Diversity v. Bernhardt*, No. 2:20-cv-00943 (E.D. La., filed Mar. 19, 2020).

Plaintiffs Challenged Fish and Wildlife Service's Failure to Take Final Action on Wolverine After 2016 Court Decision

A lawsuit filed in the federal district court for the District of Montana asked the court to issue a final listing determination on the distinct population segment of the North American wolverine. In 2016, the court found that the U.S. Fish and Wildlife Service had erred by dismissing the threats of climate change and small population size when it withdrew a proposal to list the wolverine DPS in the lower 48 states as threatened. The plaintiffs asserted that by failing to take final action since the court's 2016 decision, the FWS had violated the Endangered Species Act

statutory deadlines. *Center for Biological Diversity v. Bernhardt*, No. 9:20-cv-00038 (D. Mont., filed Mar. 18, 2020).

Lawsuit in Arizona Federal Court Asserted That Biological Opinions Failed to Consider Climate Change in Analysis of Military Base's Impacts

Two plaintiffs filed a lawsuit in federal court in Arizona seeking to set aside that concluded that groundwater pumping by a U.S. Army base in southeastern Arizona was not likely to jeopardize any endangered species that rely on the San Pedro River or destroy or adversely modify critical habitat. The complaint included nine causes of action under the Endangered Species Act, including one for failing to address the impacts species would face from climate change and failing entirely to analyze climate change in connection with the base's operations. Another cause of action asserted that consultation under the Endangered Species Act should have been reinitiated, due in part to new information showing that climate change "has had a more rapid and severe impact in the Southwest than anticipated." *Center for Biological Diversity v. Bernhardt*, No. 4:20-cv-00106 (D. Ariz., filed Mar. 13, 2020).

Honolulu Sued Fossil Fuel Companies in State Court

The City and County of Honolulu filed a lawsuit in Hawai'i state court alleging that the actions of fossil fuel company defendants directly and proximately caused "a substantial portion of the climate crisis-related impacts in the City," including sea level rise, extreme weather, ocean warming and acidification, impacts on freshwater supplies, loss of habitat for endemic species, and "the cascading social, economic, and other consequences of those environmental changes." The City alleged that these consequences would include injury to and destruction of critical City-owned or -operated facilities and would require the City to incur costs for adaptation and resiliency, while also reducing tax revenue due to impacts on the tourism- and ocean-based economy. The alleged wrongful conduct by the defendants included "concealing the dangers of, promoting false and misleading information about, and engaging in massive campaigns to promote increasing use of their fossil fuel products," which the complaint alleged had "contributed substantially to the buildup of CO_2 in the atmosphere that drives global warming." Honolulu asserted claims of public nuisance, private nuisance, strict liability for failure to warn, negligent failure to warn, and trespass. The City seeks compensatory damages; equitable relief, including abatement of the nuisance; punitive damages; disgorgement of profits; attorneys' fees; and costs of suit. *City & County of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct., filed Mar. 9, 2020).

Coal Company, Refinery Operator, and Marine Terminal Challenged Richmond Ordinance Banning Coal and Petcoke Operations

The owner and operator of a marine terminal in the City of Richmond filed a lawsuit challenging a City ordinance that prohibited transloading and export of coal and petroleum coke (petcoke). A coal company with contracts to ship coal from the terminal filed a separate lawsuit challenging the ordinance, as did the owner of a refinery that produces petcoke. The plaintiffs alleged that the City and its mayor viewed the objective of the ordinance as to reduce global climate change. The complaints asserted causes of action under the Commerce Clause, the Takings Clause, the Due

Process Clause, the Equal Protection Clause, the Impairments Clause, the Interstate Commerce Commission Termination Act, the Hazardous Materials Transportation Act, the Shipping Act of 1984, and the California Constitution. *Levin Richmond Terminal Corp. v. City of Richmond*, No. 3:20-cv-01609 (N.D. Cal., filed Mar. 4, 2020); *Wolverine Fuels Sales, LLC v. City of Richmond*, No. 3:20-cv-01614 (N.D. Cal., filed Mar. 4, 2020); *Phillips 66 Co. v. City of Richmond*, No. 4:20-cv-1643 (N.D. Cal., filed Mar. 6, 2020).

Youth Plaintiffs Filed Climate Lawsuit Against Montana Asserting Violations of State Constitutional Rights

Sixteen young people filed a lawsuit in Montana state court asserting climate change-based claims under the Montana constitution against the State of Montana, its governor, and state agencies. In particular, the case challenges the constitutionality of Montana's fossil fuel-based State Energy Policy and the "Climate Change Exception" in the Montana Environmental Policy Act. The plaintiffs allege that anthropogenic greenhouse gas emissions were "already triggering a host of adverse consequences in Montana, including dangerously increasing temperatures, changing precipitation patterns, increasing droughts and extreme weather events, increasing the frequency and severity of wildfires, increasing glacial melt, and causing numerous adverse health risks, especially to children," and that defendants had continued "to act affirmatively to exacerbate the climate crisis" despite their awareness that the plaintiffs were living under "dangerous climatic conditions that create an unreasonable risk of harm." The plaintiffs seek a declaration that their right to a clean and healthful environment includes a right a stable climate system, as well as declarations that the State Energy Policy and the Climate Change Exception violate the Public Trust Doctrine and constitutional provisions that protect the right to a clean and healthful environment; the right to seek safety, health, and happiness; and the right to individual dignity and equal protection. They also seek injunctive relief in the form of orders directing the defendants to prepare an accounting of Montana's greenhouse gas emissions and to develop and implement a remedial plan to reduce emissions "consistent with the best available science and reductions necessary to protect Youth Plaintiffs' constitutional rights from further infringement … , and to reduce the cumulative risk of harm to those rights." *Held v. State*, No. __ (Mont. Dist. Ct., filed Mar. 13, 2020).

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FEATURED CASE

Montana High Court Said Necessity Defense Was Not Available to Climate Change Protestor

The Montana Supreme Court upheld a trial court decision precluding a climate change activist from presenting a common law necessity defense. The activist—who cut a chain to gain access to a pipeline facility and then turned off the flow of oil—was convicted of misdemeanor criminal trespass and felony criminal mischief. The Montana Supreme Court found that the necessity defense was not available to the defendant for his "indirect civil disobedience" (i.e., conduct involving violation of a law that was not itself the object of protest). The Supreme Court also noted that the trial court had found a lack of immediacy in the harm. The Supreme Court also

rejected the application of out-of-state authority allowing the necessity defense in a similar context and was not persuaded by the defendant's contention that the trial court had unfairly raised the necessity issue at trial by questioning the defendant about his "perception of the immediacy of the climate problem." *State v. Higgins*, No. DA 18-0233 (Mont. Mar. 3, 2020).

DECISIONS AND SETTLEMENTS

In Colorado Coal Lease Case, Tenth Circuit Vacated Roadless Rule Exception but Upheld Forest Service and BLM Decision to Eliminate Methane Flaring Alternative

The Tenth Circuit Court of Appeals agreed with a district court that the U.S. Forest Service and U.S. Bureau of Land Management (BLM) did not have to conduct a detailed study of a "Methane Flaring Alternative" in an environmental impact statement (EIS) for coal lease modifications. The Tenth Circuit concluded that the agencies had taken a sufficiently hard look at the alternative, given the lack of information available at the time concerning flaring's feasibility and impacts and given uncertainty regarding whether the Mine Safety and Health Administration would approve methane flaring at an active coal mine. But the appellate court held that in its EIS for a Colorado Roadless Rule exception, the Forest Service arbitrarily and capriciously excluded an alternative that would foreclose coal mining in one area where there were no active mines. The court therefore vacated the entire exception. *High Country Conservation Advocates v. U.S. Forest Service*, No. 18-1374 (10th Cir. Mar. 2, 2020).

In a related case involving a challenge to the Office of Surface Mining Reclamation and Enforcement's (OSM's) environmental review of a mining plan modification for an active coal mine in the roadless area, the federal government moved to dismiss with prejudice its appeal of a District of Colorado order that enjoined a mining plan modification for the mine until further analysis was conducted regarding a methane flaring alternative and other issues. The Tenth Circuit dismissed the appeal on February 27. On December 13, 2019, OSM published a draft environmental assessment and finding of no significant impact (FONSI) in response to the district court's order. The FONSI concluded that the mining plan modification—which would allow continuation of mining operations for approximately 10 million tons of recoverable coal and include a voluntary methane flaring measure—would not have a significant impact. The comment period closed on December 23. *WildEarth Guardians v. Bernhardt*, No. 20-1011 (10th Cir. Feb. 27, 2020). Editor's note: this coal mine is part of the joint venture between Arch Coal and Peabody that the Federal Trade Commission challenged on February 27.

Challenge to EPA and NHTSA's "One National Program" for Vehicle Emission Standards to Proceed Initially in D.C. Circuit

The federal district court for the District of Columbia stayed the cases challenging the National Highway Traffic Safety Administration (NHTSA) regulation preempting state regulation of greenhouse gas emissions from vehicles. The NHTSA regulation was one component of the final rule promulgated by NHTSA and the U.S. Environmental Protection Agency (EPA) entitled "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program." The other two components were EPA's withdrawal of the waiver for California's greenhouse gas and zero-emission vehicle programs and EPA's determination that other states could not adopt

California's greenhouse gas standards pursuant to Section 177 of the Clean Air Act. The plaintiffs—states, California air quality management districts, and non-governmental organizations—challenged NHTSA's preemption rule in district court while also filing protective petitions for review in the D.C. Circuit. The district court issued its order staying their cases after the D.C. Circuit denied the petitioners' motions to stay the D.C. Circuit proceedings pending the outcome of the district court litigation (and administrative requests for reconsideration). The cases are staying pending resolution of the D.C. Circuit litigation. *California v. Chao*, Nos. 1:19-cv-02826 et al. (D.D.C. Feb. 11, 2020).

Subsequently, in the D.C. Circuit, petitioners filed a motion seeking to require EPA to complete its administrative record by including public comments and supporting documents submitted after the comment period closed, including a scientific study published after the comment period closed that the petitioners said showed that greenhouse gases emitted from California sources have direct and localized impacts in the state. The petitioners argued that EPA had agreed to consider comments submitted after the comment closing date unless they were received too late "to practicably consider." The petitioners noted that NHTSA made the identical commitment and included all comments and supporting documents received prior to final action. The petitioners also said EPA had "selectively considered after-arising evidence it deemed favorable." *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, Nos. 19-1230 et al. (D.C. Cir. motion to complete record Feb. 27, 2020).

Utah Federal Court Dismissed Challenges to Oil and Gas Leases for Which BLM Was Conducting Additional Environmental Analyses

After BLM suspended oil and gas leases in southeastern Utah that were sold in March and December 2018 so that it could conduct additional environmental analysis, the federal district court for the District of Utah dismissed two consolidated lawsuits challenging the leases. The court found that the plaintiffs' claims were moot because no leasing operations or ground-disturbing activity would occur during the suspensions and BLM would issue new leasing decisions arising from a different regulatory context. The court further found that the mootness exception for voluntary cessation of activity did not apply because the alleged violations could not reasonably be expected to start up again and events had "completely and irrevocably eradicated the effects of the alleged violations." *Friends of Cedar Mesa v. U.S. Department of the Interior*, No. 4:19-cv-00013 (D. Utah. Mar. 2, 2020).

Idaho Federal Court Set Aside Procedures that Limited Public Participation for Oil and Gas Sales in Sage-Grouse Habitat

A federal court in Idaho set aside procedures issued in 2018 by BLM as they applied to oil and gas leasing in Greater Sage-Grouse Habitat Management Areas. The court also set aside certain oil and gas lease sales that BLM approved in 2018. The court held that BLM's Instruction Memorandum (IM) 2018-034, which included the procedures, was not properly adopted because notice-and-comment rulemaking procedures should have been followed and that IM 2018-034 itself improperly constrained public participation in oil and gas leasing decisions in violation of the Federal Land Policy and Management Act and the National Environmental Policy Act (NEPA). The court therefore found that issuance of IM 2018-034 was arbitrary and capricious.

The court's decision did not address the plaintiffs' claim that BLM violated NEPA by failing to address likely climate change impacts to the sage-grouse and its habitat. *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187 (D. Idaho Feb. 27, 2020).

Fisheries Service Agreed to Make Critical Habitat Determinations for Coral Species

Pursuant to a settlement agreement filed in federal district court in the District of Columbia, the National Marine Fisheries Service (NMFS) and other federal defendants agreed to make proposed determinations concerning designation of critical habitat for 12 species of coral listed as threatened and found in U.S. waters. The Center for Biological Diversity, which filed suit in 2019, alleged in its complaint that the coral species face an "extinction crisis due to the threats of climate change, ocean acidification, disease, overfishing, and pollution, among others." In the settlement agreement, NMFS agreed to make the proposed critical habitat determinations by July 31, 2020. *Center for Biological Diversity v. Ross*, No. 1:19-cv-02526 (D.D.C. Feb. 27, 2020).

Federal Court Largely Denied Motion to Dismiss Some Defendants from U.S.'s Challenge to California's Greenhouse Gas Agreement with Canadian Provinces; Summary Judgment Hearing on March 9

The federal district court for the Eastern District of California declined to dismiss the Western Climate Initiative, Inc. (WCI) or its statutorily appointed voting board members from the federal government's lawsuit challenging the constitutionality of California's agreement with the governments of Quebec and Ontario related to cap-and-trade programs for reducing greenhouse gas emissions. The court found that the United States adequately alleged that WCI's actions in implementing the agreement would cause or contribute to the U.S.'s injury. The court further found that the U.S. claims for injunctive relief were properly asserted against the voting board members—the heads of the California Air Resources Board (CARB) and the California Environmental Protection Agency (CalEPA). The court also declined to dismiss the head of CalEPA in his official capacity as secretary of the agency since CalEPA is the parent agency of CARB, which is delegated authority to implement the cap-and-trade program. The court did dismiss two non-voting board members of WCI from the action. In a separate order, the court—citing its interest in not resolving the case in a piecemeal fashion—directed the parties to supplement their summary judgment briefing with explanations of their reasons for not moving for summary judgment on the Foreign Affairs Doctrine and Foreign Commerce Clause claims. The parties' summary judgment motions address only the U.S.'s Treaty Clause and Compact Clause claims.

Other developments in the case included the court's denial of the defendants' application to extend the schedule for briefing cross-motions for summary judgment. Briefing was to be completed on March 2, 2020, and a hearing was scheduled for March 9. Along with Environmental Defense Fund, Natural Resources Defense Council, and International Emissions Trading Association, which intervened in support of the defendants, the following parties moved to file briefs as amici curiae in support of the defendants: 13 professors of foreign relations law; 13 former U.S. diplomats and government officials; the Nature Conservancy; and 14 states. *United States v. California*, No. 2:19-cv-02142 (E.D. Cal.).

Montana Federal Court Rejected Shareholder's Bid to Have Utility Include Proposal for Cessation of Coal-Fired Generation in Proxy Materials

The federal district court for the District of Montana ruled that a public utility company could omit from its proxy materials a shareholder proposal requesting that the company cease coal-fired generation of electricity at a power plant and replace it with renewable energy sources and energy storage technologies by the end of 2025. The court agreed with the company that the proposal could be excluded pursuant to the Securities and Exchange Commission's rules for shareholder proposals because the proposal impermissibly interfered with a matter relating to the company's "ordinary business operations." The court concluded that although the proposal raised "sufficiently significant social policy issues," it would have to focus on "something larger than shutting down a specific plant by a specified target date" in order "to transcend the ordinary business operations" of the utility company. *Tosdal v. Northwestern Corp.*, No. 9:19-cv-00205 (D. Mont. Feb. 25, 2020).

Fish and Wildlife Service Agreed to Schedule for Critical Habitat Determinations for Climate Change-Threatened Hawaiian Species

The Center for Biological Diversity (CBD) and the U.S. Fish and Wildlife Service (FWS) filed a settlement agreement in federal court in Hawaii pursuant to which the FWS will publish a determination concerning the designation of critical habitat for 14 endangered species by February 28, 2023. CBD filed a lawsuit in October 2019, alleging that the 14 species, which were listed as endangered in 2013, faced serious and ongoing threats, including climate change. CBD asserted that the failure to designate critical habitat constituted agency action "unlawfully withheld or unreasonably delayed." *Center for Biological Diversity v. Bernhardt*, No. 1:19-cv-00588 (D. Haw. Feb. 25, 2020).

Parties Settled Lawsuit Regarding Delayed Listing Determinations on Eight Climate-Threatened Species

The federal district court for the Northern District of California dismissed an Endangered Species Act lawsuit brought by Center for Biological Diversity and San Francisco Baykeeper to compel listing decisions on eight species after the parties reached an agreement pursuant to which the U.S. Fish and Wildlife Service (FWS) would review the status of two species—the marron bacora (a plant threatened by climate change among other factors) and the Puerto Rico harlequin butterfly (also threatened by climate change). The settlement agreement indicated that the FWS had already taken action on four other species at issue in the case. The settlement agreement required the FWS to review the status of the species and submit 12-month findings for publication by the end of July 2020 for the marron bacora and by the end of August 2020 for the Puerto Rico harlequin butterfly. *Center for Biological Diversity v. Bernhardt*, No. 4:19-cv-02843 (N.D. Cal. Feb. 18, 2020).

Federal Court Remanded Three Endangered Species Act Issues for Arizona Mine, but Rejected Claim that Climate Change Cumulative Impacts on Groundwater Weren't Considered

The federal district court for the District of Arizona remanded certain issues back to the U.S. Fish and Wildlife Service for reconsideration in connection with the FWS's biological opinion pursuant to the Endangered Species Act for the Rosemont Mine in the Coronado National Forest. The court said the FWS unlawfully applied a heightened standard of review in determining that the mine was not likely to result in destruction or adverse modification of jaguar critical habitat, failed to assess the "tipping" point in its jeopardy analysis for the northern Mexican gartersnake, and included an unlawful Incidental Take Statement in the biological opinion. The court rejected other arguments raised by the plaintiff, including the argument that in evaluating jeopardy and adverse modification of critical habitat as to various listed aquatic species, the FWS failed to consider cumulative impacts of groundwater drawdown from private wells alongside effects of the mine and climate change. The court found that the FWS and U.S. Forest Service were aware of and considered these issues. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 4:17-cv-00475 (D. Ariz. Feb. 10, 2020).

New York Court Denied Nonprofit's Motion to Intervene in Exxon Suit for Purposes of Unsealing Documents

A New York trial court denied a motion by the nonprofit Energy Policy Advocates and an individual board member to intervene in the New York attorney general's unsuccessful case against Exxon Mobil Corporation for the purpose of moving to unseal certain judicial documents related to communications between a private attorney and the attorney general's office prior to the filing of the case. After noting that none of the five documents at issue were entirely sealed and that all were publicly discussed and available with minor redactions, the court found that the limited redactions at issue "do not in any way undermine the important public policy assuring that judicial proceedings be open and transparent." *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Feb. 27, 2020).

Mistrial Declared for Climate Change Activists on Trial in Oregon

The Oregonian/OregonLive reported that an Oregon state court declared a mistrial in a criminal case against five climate change activists who blocked train tracks used by an energy company by building a garden on the tracks. The six-person jury reported that it was split, with five people voting to acquit the defendants and one voting to convict. The defendants, who were accused of criminal trespass, presented a "choice of evils" or necessity defense. Three of the defendants submitted a notice, offer of proof, and memorandum in support of the defense in January. They contended that "[f]acing the indisputable crisis of global warming and the failure of government at all levels, as well as private industry, to take any appropriate action in response to the crisis, defendants had no reasonable alternative to their acts of non-violent resistance" and that it was reasonable for the defendants to believe that the "imminent harms" of global warming were greater than the potential injury of the "mere transient 'harm' to objects and property" caused by trespass. *State v. Butler*, No. 19-CR-28017, 19-CR-28005, 19-CR-27982, 19-CR-28019, and 19-CR-27988 (Or. Cir. Ct. Feb. 27, 2020).

Washington Appellate Court Said Agency Conducted Adequate Search for Records Related to Greenhouse Gas Analysis for Coal Terminal

The Washington Court of Appeals affirmed dismissal of a Public Records Act lawsuit brought by the developer of a proposed coal export terminal. The appellate court rejected the developer's argument that the Washington State Department of Ecology failed to conduct an adequate search in response to the developer's request for "data and assumptions" used to prepare an analysis of the proposed terminal's greenhouse gas emissions. *Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology*, No. 52270-5-II (Wash. Ct. App. Feb. 25, 2020).

NEW CASES, MOTIONS, AND NOTICES

Juliana Plaintiffs Sought *En Banc* Rehearing of Ninth Circuit Determination that They Lacked Standing

The plaintiffs in *Juliana v. United States* sought *en banc* reconsideration of the Ninth Circuit's ruling that they did not have standing to pursue their claims against the federal government for alleged violations of their constitutional rights, including a substantive due process right to a "climate system capable of sustaining human life." The plaintiffs argued that the Ninth Circuit majority made "significant errors of law," including by finding that declaratory relief was not sufficient to establish the redressability prong of standing. The plaintiffs also argued that the Ninth Circuit majority erroneously rejected partial redress of injury as a basis for standing, incorrectly concluded that Article III courts lacked power to institute a remedial plan to redress the plaintiffs' injuries, and improperly "created a new redressability test infused with the political question analysis" from Supreme Court precedent. The plaintiffs contended that the Ninth Circuit's decision therefore met every test for *en banc* reconsideration since it implicated "profoundly important issues" of catastrophic climate change harms to children; conflicted with Supreme Court, Ninth Circuit, and sister circuit law; and affected the national uniformity of the application of the law of redressability. The plaintiffs asserted that an *en banc* rehearing was particularly appropriate in this case because it involved children's constitutional rights. They said that over the past decade, the Ninth Circuit had "consistently granted rehearing in cases where children's constitutional rights were denied by the 3-judge panel, only denying rehearing in such cases where the 3-judge panel originally upheld the children's rights or allowed them to pursue their claims in another tribunal." *Juliana v. United States*, No. 18-36082 (9th Cir. Mar. 2, 2020).

Biofuel Trade Groups Sought Review of 2020 Volume Requirements for Renewable Fuel Standard Program

A coalition of three national trade associations representing companies and biofuel facilities that produce renewable electricity used as transportation fuel filed a petition for review in the D.C. Circuit Court of Appeals challenging EPA's final rule setting 2020 volume requirements for renewable fuel production in the Renewable Fuel Standard Program. On March 2, 2020, the coalition filed a motion to consolidate or otherwise coordinate their challenge to the 2020 rule with their pending challenge to the 2019 volume requirements. Alternatively, the coalition requested that the D.C. Circuit hold the challenge to the 2020 rule in abeyance pending a decision on the 2019 rule. *RFS Power Coalition v. EPA*, No. 20-1046 (D.C. Cir., filed Feb. 21, 2020; motion to consolidate Mar. 2, 2020).

Lawsuits Filed Challenging Department of Energy Decision to Leave Current Efficiency Standards for Incandescent Lamps in Place

Seven organizations led by Natural Resources Defense Council filed a petition in the Second Circuit Court of Appeals seeking review of the U.S. Department of Energy's (DOE's) December 2019 final rule concerning energy conservation standards for general service incandescent lamps. DOE finalized a determination that more stringent amended standards would not be economically justified. New York, 13 other states, and New York City and the District of Columbia filed a separate petition challenging the final rule. *Natural Resources Defense Council v. U.S. Department of Energy*, No. 20-699 (2d Cir., filed Feb. 25, 2020); *New York v. U.S. Department of Energy*, No. 20-743 (2d Cir., filed Feb. 28, 2020).

Challenge to Gulf Coast LNG Terminal Filed in D.C. Circuit

Environmental and community groups, the City of Port Isabel, and two individuals filed a petition seeking review of Federal Energy Regulatory Commission (FERC) authorizations for a liquefied natural gas (LNG) terminal on the Gulf Coast in Texas and a related new interstate natural gas pipeline system that would transport natural gas to the terminal for processing, liquefaction, and export. Before FERC, the petitioners raised issues regarding the projects' effect on global greenhouse gases as well as the projects' impacts on health, safety, and quality of life in nearby communities. *Vecinos para el Bienestar de la Comunidad Costera v. Federal Energy Regulatory Commission*, No. 20-1045 (D.C. Cir., filed Feb. 20, 2020).

Lawsuits Challenged NEPA Review for Air Cargo Facility in Southern California

Two lawsuits were filed in the Ninth Circuit Court of Appeals challenging the Federal Aviation Administration's (FAA's) issuance of a Finding of No Significant Impact and Record of Decision for an air cargo facility in San Bernardino, California. One petition for review was filed by a local environmental justice group, Sierra Club, a union, and two individuals. The other lawsuit was brought by the State of California, which asserted in comments on the draft environmental assessment that the FAA had failed to mention either the presence of a nearby environmental justice community or the significant and unavoidable air quality, climate change, and noise impacts identified in an earlier California Environmental Quality Act (CEQA) review of the project by the San Bernardino International Airport Authority. *Center for Community Action & Environmental Justice v. Federal Aviation Administration*, No. 20-70272 (9th Cir., filed Jan. 29, 2020); *California v. Federal Aviation Administration*, No. 20-70464 (9th Cir., filed Feb. 20, 2020).

Department of Interior Notified Court of Completion of Environmental Assessment for Resumption of Coal Leasing; No Significant Impacts Found

Federal defendants notified the federal district court for the District of Montana that they had posted a FONSI and final environmental assessment (EA) on the U.S. Bureau of Land Management website to comply with the court's April 2019 ruling that the lifting of the Obama administration's moratorium on coal leasing was a "major federal action" triggering obligations under NEPA. The FONSI stated that "[i]n the Department [of the Interior]'s view," the order

lifting the moratorium "does not have environmental effect because it does not, in itself, authorize sale or issuance of any new coal leases." The FONSI indicated that the Department of the Interior believed that the order did not alter substantive law but merely altered a choice the Obama administration made that the Department believed was inconsistent with existing law. The FONSI said the Final EA "documented the effects and consequences of lifting the [moratorium] and resuming application processing sooner than anticipated." Because of the "temporary nature" of the Obama administration moratorium, the FONSI concluded that the effects of lifting the moratorium were "limited to the timing of lease issuances" and that resumption of leasing practices, including compliance with NEPA, therefore "created no significant, unstudied impacts." *Citizens for Clean Energy v. U.S. Department of the Interior*, No. 4:17-cv-00030 (D. Mont. Feb. 27, 2020).

California Challenged Federal Endangered Species Act Determinations for Big Water Projects

California Natural Resources Agency, California Environmental Protection Agency, and California Attorney General Xavier Becerra, as representative for the people of California, filed a lawsuit contending that federal agencies violated the Endangered Species Act and NEPA when they adopted biological opinions finding that the Central Valley Project and State Water Project—the two largest water projects in California—were not likely to jeopardize the continued existence of threatened and endangered fish species or to destroy or adversely modify their critical habitat. The complaint alleged, among other things, that the final EIS included new modeling of climate change scenarios that required further analysis. The plaintiffs asserted that the public and other agencies had not been given an opportunity to comment on the updated modeling. The complaint also alleged that the EIS failed to take the required hard look at the consequences of extreme climate events even though it acknowledged that the frequency and magnitude of such events would increase. *California Natural Resources Agency v. Ross*, No. 3:20-cv-01299 (N.D. Cal., filed Feb. 20, 2020).

Conservation Groups Sought Protections for Endangered New Mexico Meadow Jumping Mouse

Center for Biological Diversity and Maricopa Audubon Society filed a lawsuit challenging federal defendants' failures to take actions to protect the endangered New Mexico meadow jumping mouse. The complaint alleged that a 2014 Species Special Assessment Report identified sources of habitat loss for the jumping mouse that included drought and wildfires, both exacerbated by climate change. In correspondence to the plaintiffs, the U.S. Forest Service declined to reinitiate consultation under the Endangered Species Act concerning the impacts of the ongoing implementation of the Land Management Plan (LMP) for the Apache-Sitgreaves National Forest on the jumping mouse. The Forest Service indicated that effects of climate change and other effects were part of the baseline for the LMP, not the result of the LMP. The complaint asserted violations of the Endangered Species Act and the National Forest Management Act. *Center for Biological Diversity v. Bernhardt*, No. 4:20-cv-00075 (D. Ariz., filed Feb. 20, 2020).

FOIA Plaintiff Asked Court to Bar CEQ from Closing Comment Period on Proposed NEPA Regulations

The Southern Environmental Law Center (SELC) filed a motion in a pending Freedom of Information Act (FOIA) case against the Council on Environmental Quality (CEQ) asking the court to bar CEQ from closing the comment period on its proposed NEPA regulations until CEQ provides documents requested by SELC in 2018. The FOIA request sought records related to the advance notice of proposed rulemaking that CEQ issued in June 2018. In its motion, SELC argued that a preliminary injunction was necessary "to stop CEQ from making unprecedented sweeping changes to the regulations that implement NEPA before it has provided SELC and the public a full and complete opportunity to understand and participate in the rulemaking process." SELC said the proposed rule was "unprecedented in scope" and would, among other things, "remov[e] the requirement that federal agencies consider long term, widespread impacts like climate change." *Southern Environmental Law Center v. Council on Environmental Quality*, No. 3:18-cv-00113 (W.D. Va. Feb. 13, 2020).

Missouri Challenged Environmental Review for Water Diversion Project

The State of Missouri filed a federal court lawsuit charging that the Bureau of Reclamation, the U.S. Army Corps of Engineers, and a North Dakota agency violated NEPA when they authorized the Central ND Project, which would divert water from the Missouri River. Missouri alleged that the Finding of No Significant Impact for the project "stated, without proper analysis," that the project would not substantively contribute to climate change or affect park lands, farming lands, wetlands, wild and scenic rivers, or ecologically critical areas. *Missouri v. U.S. Department of the Interior–Bureau of Reclamation*, No. 2:20-cv-04018 (W.D. Mo., filed Feb. 4, 2020).

Environmental Groups Challenged Wisconsin Approval for New Natural Gas Power Plant

Clean Wisconsin and Sierra Club filed a lawsuit challenging the Wisconsin Public Service Commission's decision approving a Certificate of Public Convenience and Necessity (CPCN) for the Nemadji Trail Energy Center, a proposed 625-megawatt natural gas-powered generating facility. The petitioners alleged that they had standing because they and their members "have an interest in reducing greenhouse gas emissions, are affected by global climate change, and will be further adversely affected if additional sources, such as the gas plant in this case, are allowed to add even more CO2-equivalent to the atmosphere" and also because petitioners' members included individuals who would be affected by other environmental impacts and who would be responsible for paying the costs of the proposed facility. The petitioners asserted that the Commission made errors of law, fact, procedure, and discretion when it determined that the statutory standards for approving a CPCN were met. The petitioners also asserted that the Commission failed to comply with obligations under Wisconsin's Energy Priorities Law and the Wisconsin Environmental Protection Act. *Clean Wisconsin, Inc. v. Public Service Commission*, No. 2020CV000585 (Wis. Cir. Ct., filed Feb. 28, 2020).

Lawsuit Filed Challenging City's Approval of Lower Manhattan Resiliency Project

Residents of the East Village and the Lower East Side of Manhattan, along with local organizations, filed a lawsuit challenging New York City's approval of a resiliency plan for the Lower East Side that involved elevating an existing park on the East River by eight feet to serve as a barrier to coastal storms and flooding. The petitioners contended that closing a portion of the park for several years to build the barrier constituted use of parkland for a non-park purpose and that "recreating a park on top of a seawall is sugar-coating a non-park purpose." The petitioners asserted that the City therefore violated the public trust doctrine by failing to obtain the New York State legislature's approval for the non-park use of the land. *East River Park Action v. City of New York*, No. 151491/2020 (N.Y. Sup. Ct., filed Feb. 6, 2020).

Organizations Challenged Vegetation Treatment Plan to Reduce California Wildfire Risk

Two conservation organizations challenged state approvals of the California Vegetation Treatment Program, which is intended to serve as a component of California's plan to reduce wildlife risk. The causes of action in the petition were for violations of the California Environmental Quality Act (CEQA) and Section 4483 of the Public Resources Code, which requires special consideration for protection of chaparral and coastal sage scrub plant communities that are threatened by wildfires. The petition alleged that the CEQA review failed to adequately analyze greenhouse gas emission impacts, including failure to analyze "net loss of carbon sequestration with the removal of vegetation and damage to the ability of soils to sequester carbon as a result of vegetation treatment activities." The petitioners also alleged a "failure to account for plant community extirpation due to projected climate change impacts and how the cumulative impact of their treatments will accelerate those impacts." *California Chaparral Institute v. Board of Forestry & Fire Protection*, No. 37-2020-00005203-CU-TT-CTL (Cal. Super. Ct., filed Jan. 28, 2020).

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FEATURED CASE

Divided Ninth Circuit Said *Juliana* Plaintiffs Lacked Standing to Press Constitutional Climate Claims Against Federal Government

In a split decision, the Ninth Circuit Court of Appeals ruled that young people and other plaintiffs asserting a claim against the federal government for infringement of a Fifth Amendment due process right to a "climate system capable of sustaining human life" did not have Article III standing. The Ninth Circuit therefore reversed the orders of the federal district court for the District of Oregon denying the government's motions to dismiss and for summary judgment and judgment on the pleadings. The Ninth Circuit rejected the government's argument that the plaintiffs' constitutional claims had to be brought pursuant to the Administrative Procedure Act and agreed with the district court that the plaintiffs met the injury and causation requirements for Article III standing because at least some plaintiffs had alleged concrete and particularized injuries caused by fossil fuel carbon emissions that were increased by federal subsidies and leases. The Ninth Circuit found, however, that the plaintiffs had not established the redressability requirement for standing. The court said it was "skeptical" that even the first prong of redressability—that the relief sought be substantially likely to redress the plaintiffs' injuries—

was satisfied, noting that the plaintiffs conceded "that their requested relief will not alone solve global climate change." The Ninth Circuit further concluded that even if the first prong was satisfied, the plaintiffs did not "surmount the remaining hurdle" of establishing that the relief they sought was within the power of Article III courts. The majority wrote that "[t]here is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular," but said it was beyond judicial power "to order, design, supervise, or implement the plaintiffs' requested remedial plan." The majority said it "reluctantly" concluded that "the plaintiffs' case must be made to the political branches or to the electorate at large" and "[t]hat the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes." The dissenting judge would have held that the plaintiffs had standing and that they had asserted claims under the Constitution and presented sufficient evidence to proceed to a trial. The dissent contended that "a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution." *Juliana v. United States*, No. 18-36082 (9th Cir. Jan. 21, 2020).

DECISIONS AND SETTLEMENTS

D.C. Circuit Declined to Speed Up or Slow Down Challenges to Withdrawal of California Waiver and Preemption of State Authority to Regulate Vehicle Greenhouse Gas Emissions

In cases challenging EPA and the National Highway Traffic Safety Administration's final rule withdrawing the waiver for California's greenhouse gas and zero emissions vehicle programs and preempting other such state programs, the D.C. Circuit denied motions to expedite (by respondents and respondent-intervenors) and motions to hold the cases in abeyance (by petitioners). The court said the respondents and respondent-intervenors had not articulated "strongly compelling" reasons for expedition of the proceedings. The court directed the parties to submit a proposed format for briefing within 30 days. One reason the petitioners asked the D.C. Circuit to hold the cases in abeyance was to allow the federal district for the District of Columbia to resolve cases challenging NHTSA's action that raise similar legal issues. The district court scheduled a hearing for April 16, 2020 to consider the defendants' motion to dismiss or transfer those cases. In a separate order, the court granted the motions of states and American Fuel & Petrochemical Manufacturers to intervene in support of the respondents. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, Nos. 19-1230 et al. (D.C. Cir. Feb. 4, 2020); *California v. Chao*, No. 1:19-cv-02826 (D.D.C.).

Tenth Circuit Vacated Extensions of Small Refinery Exemptions from Renewable Fuel Mandates

The Tenth Circuit Court of Appeals vacated U.S. Environmental Protection Agency (EPA) orders granting three petitions for extensions of small refinery exemptions from renewable fuel standards. The Tenth Circuit found that a coalition of renewable fuels producers had standing to challenge the exemptions and that the court otherwise had jurisdiction over the case. The Tenth Circuit agreed with the coalition that EPA exceeded its statutory authority granting extensions

when none of the three small refineries had received an initial exemption in the years preceding their petitions for extension. The court also found that EPA improperly relied on hardship caused by factors other than compliance with renewable fuel obligations as a basis for granting the extensions. *Renewable Fuels Association v. EPA*, No. 18-9533 (10th Cir. Jan. 24, 2020).

Fifth Circuit Vacated Denial of Petition to Delist Bird Facing Climate Change Threats

The Fifth Circuit Court of Appeals ruled that a U.S. Fish and Wildlife Service (FWS) decision denying a petition to delist the golden-cheeked warbler was arbitrary and capricious because the FWS applied "an inappropriately heightened" standard to its review of the delisting petition. The court said the FWS should not have required that the petition contain information that the FWS had not considered in its five-year review of the species that was sufficient to refute the five-year review's conclusions that the warbler should remain listed. The Fifth Circuit's opinion did not mention climate change, but climate change was one of the additional threats to the warbler that the FWS said the delisting petition failed to present information to address. *General Land Office of the State of Texas v. U.S. Department of the Interior*, No. 19-50178 (5th Cir. Jan. 15, 2020).

First Circuit Certified State Law Preemption Questions in Case Challenging Local Ordinance Prohibiting Crude Oil Loading at Harbor

In a pipeline operator's appeal of a district court's rejection of its challenge to a City of South Portland ordinance prohibiting bulk loading of crude oil onto vessels in the City's harbor, the First Circuit Court of Appeals certified three questions to Maine's high court concerning potential preemption of the ordinance by state law. The First Circuit said it would "sidestep the federal quagmire for the moment" in accordance with "well-settled constitutional avoidance doctrine." Therefore, instead of addressing the domestic and foreign Commerce Clause and federal preemption claims raised by the operator, the First Circuit asked the Maine Law Court to weigh in on whether the Maine Department of Environmental Protection's 2010 renewal license for the pipeline operator's oil terminal facility was an "order" with preemptive effect under the Maine Coastal Conveyance Act (CCA), a statute that imposes a licensure requirement for oil transfers in and around state waters. If the renewal license was an order, the First Circuit asked the state court to address whether the CCA expressly preempted the ordinance challenged in this case. In addition, the First Circuit asked the Maine Law Court also to address whether the CCA impliedly preempted the local ordinance. *Portland Pipe Line Corp. v. City of South Portland*, No. 18-2118 (1st Cir. Jan. 10, 2020).

Federal Court Said "Threatened" Listing for Northern Long-Eared Bats Was Arbitrary and Capricious, Cited Failure to Explain Cumulative Effects

The federal district court for the District of Columbia ruled that the U.S. Fish and Wildlife Service (FWS) acted arbitrarily and capriciously when it designated the northern long-eared bat as "threatened" rather than "endangered" under the Endangered Species Act. The primary threat to northern long-eared bat survival is white-nose syndrome (WNS), which the court noted has been "responsible for unprecedented mortality of insectivorous bats in eastern North America." The court agreed with the plaintiffs that FWS had acted arbitrarily and capriciously by disregarding "the cumulative effects that factors other than WNS may have on the species when

explaining the rationale for the threatened determination." Although the court did not mention climate change in its opinion, FWS mentioned climate change in the listing rule—as the plaintiffs noted in their briefing—as one of the factors that could have cumulative effects on the bats in concert with WNS. Although the court rejected the plaintiffs' argument that FWS's interpretation of "in danger of extinction" as "on the brink of extinction in the wild" was "unlawfully stringent," the court concluded that FWS had not provided the plaintiffs and the public with an opportunity to comment on the application of this interpretation to the northern long-eared bat. (FWS developed the interpretation in a 2011 "Polar Bear Memo" that addressed the determination of threatened status for polar bears.) The court also said FWS unlawfully applied its "significant portion of its range" policy to the bat. *Center for Biological Diversity v. Everson*, No. 1:15-cv-00477 (D.D.C. Jan. 28, 2020).

Federal Court Dismissed "Frivolous" First Amendment Claims by Man Who Sought Distribution of Position Paper Referring to Climate Change as "Malicious Hoax"

The federal district court for the Eastern District of New York dismissed a lawsuit brought by a Brooklyn man, proceeding *pro se*, who alleged that the president of a community college violated the plaintiff's First Amendment rights by failing to require the distribution of the plaintiff's position paper explaining "why the political movement to reduce the use of fossil fuels is a malicious hoax" to students taking a climatology course. The court found that the plaintiff, who did not allege any legally cognizable relationship with the community college, had failed to allege Article III standing. The court also found that the plaintiff's claim was "frivolous because there is no legal theory on which he can rely." *Roemer v. Williams*, No. 19-cv-6855 (E.D.N.Y. Jan. 7, 2020).

Montana Federal Court Agreed to Consider Keystone XL-Specific Documents and 2012 Biological Opinion in Challenge to Authorization Under Nationwide Permit

The federal district court for the District of Montana granted plaintiffs' motion to supplement the administrative record in a lawsuit challenging U.S Army Corps of Engineers (Corps) approval of the Keystone XL pipeline project under the reissued Nationwide Permit 12 (NWP 12) for pipeline and utility projects. The plaintiffs assert, among other arguments, that the environmental review for NWP 12 failed consider climate impacts. The court noted that the administrative record currently documented the Corps' decision to reissue NWP 12 in 2017. The court said it would consider eight additional documents concerning applications and authorizations specifically for the Keystone XL pipeline under the reissued NWP 12 "for the limited purpose of understanding whether the Corps considered all relevant factors and complied with the [Administrative Procedure Act]'s requirement that an agency's decision be neither arbitrary or capricious." The court also agreed to consider a 2012 biological opinion for a prior version of NWP 12 for the limited purpose of considering whether the Corps failed to conduct programmatic consultation in connection with reissuance of NWP 12 in violation of the Endangered Species Act. The court said it would not use any of the documents "to judge the wisdom of the Corps' actions or to question the Corps' scientific analyses or conclusions." *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044 (D. Mont. Jan. 8, 2020).

EPA Produced Documents Responding to FOIA Request Regarding Basis for Administrator's Assertions About Climate Change Impacts

On January 23, 2020, Sierra Club issued a press release saying that documents produced by EPA in response to a Freedom of Information Act (FOIA) lawsuit seeking documents supporting EPA Administrator Andrew Wheeler's assertions about climate change in a television interview revealed "that there was no factual basis" for Wheeler's statement that "most of the threats from climate change are 50 to 75 years out." In a joint status report filed with the district court for the District of Columbia, EPA indicated that it had completed its search for records responsive to Sierra Club's request for records on which Wheeler relied. The parties said they were conferring as to how EPA would respond to the second part of Sierra Club's request, which was for "records produced, commissioned, or otherwise obtained by EPA that support the conclusion that 'most of the threats from climate change are 50 to 75 years out[.]'" The parties proposed to update the court in a joint status report on February 21. *Sierra Club v. EPA*, No. 1:19-cv-03018 (D.D.C.).

Federal Court Denied Motions to Dismiss Challenges to 2019 Presidential Permit for Keystone XL

The federal district court for the District of Montana denied motions to dismiss and for a preliminary injunction in litigation challenging a presidential permit issued in 2019 for a cross-border segment of the Keystone XL pipeline. The court found that the plaintiffs pled plausible claims under the Commerce Clause and Property Clause that President Trump exceeded his legal authority when he issued the permit, as well as claims that the 2019 permit violated a 2004 executive order that established a permitting process for cross-border pipelines. The court found that the plaintiffs had not demonstrated that a preliminary injunction was required to maintain the status quo but said the plaintiffs could renew their request at a later time if the pipeline developer's activities interfered with the status quo. In a separate order, the court directed the parties to file supplemental briefs on eight issues related to the scope of authorized activities under the permit, separation of powers, and the developer's authority to construct the pipeline without a permit if the president lacks authority to issue the cross-border permit. After the developer filed a status report on January 14, 2020 indicating that it planned to commence construction of the cross-border segment in April 2020 and would need to engage in pre-construction activities beginning in February 2020, the plaintiffs filed a renewed motion for a preliminary injunction. Briefing on that motion is scheduled to be completed on February 18, and the developer indicated it would not begin pre-construction activities before February 24. Briefing on summary judgment motions is to be completed by March 23, with a hearing scheduled for March 25 on any pending motions. *Indigenous Environmental Network v. Trump*, No. 4:19-cv-00028 (D. Mont. Dec. 20, 2019).

Washington Supreme Court Invalidated Regulation of Indirect Greenhouse Gas Emissions

The Washington Supreme Court concluded that the Washington Clean Air Act did not grant the Department of Ecology authority to regulate indirect greenhouse gas emissions of businesses and utilities whose products ultimately generate such emissions. The court therefore invalidated regulations promulgated by Ecology to the extent the rules regulated "nonemitters" (i.e.,

petroleum product producers and importers and natural gas distributors) but allowed the regulations' continued application to "actual emitters." Ecology projected that the emissions from combustion of products sold by these "nonemitters" or "indirect emitters" accounted for approximately 74% of the emissions covered by the regulations. *Association of Washington Business v. Washington State Department of Ecology*, No. 95885-8 (Wash. Jan. 16, 2020).

California Appellate Court Rejected Challenges to CEQA Review for Master-Planned Community

The California Court of Appeal upheld approvals for a large master-planned community in Sacramento County that included residential and commercial uses and a university campus. The petitioners contended that the university was not likely to be built, and that the environmental impact report (EIR) prepared under the California Environmental Quality Act (CEQA) was therefore insufficient because it failed to analyze the project without the university and thereby understated impacts, including climate change impacts. The appellate court found that the EIR adequately discussed greenhouse gas impacts, noting that a mitigation measure required that any revised use of the land meet a specified per-capita greenhouse gas emissions threshold. The court also rejected a claim that Sacramento County was required to consider the project's consistency with the sustainable communities strategy prepared by the Sacramento Area Council of Government pursuant to SB 375 to reduce vehicle miles traveled and related greenhouse gases. *Environmental Council of Sacramento v. County of Sacramento*, No. C076888 (Cal. Ct. App. Jan. 30, 2020).

California Court of Appeal Affirmed Dismissal of CEQA Greenhouse Gas Challenge to 34-Story Building in Los Angeles

The California Court of Appeal ruled that a petitioner failed to exhaust administrative remedies because it had not asserted during administrative proceedings its specific claim that the CEQA review for a 34-story building in Los Angeles did not properly assess the project's compliance with greenhouse gas emission targets for 2030 and 2050 established by executive orders. The court said the petitioner's comments on the draft and final EIRs concerning the analysis of greenhouse gas emissions were not sufficient to exhaust administrative remedies. The appellate court therefore affirmed the denial of the mandate petition with regard to greenhouse gas emissions. *Golden State Environmental Justice Alliance v. City of Los Angeles*, No. B294231 (Cal. Ct. App. Jan. 28, 2020).

Oregon Court Reinstated Clean Energy Ballot Initiatives

An Oregon Circuit Court set aside the Oregon Secretary of State's decision to reject two clean energy ballot initiatives and allowed the measures to be processed and circulated for the November 2020 election. The court found that the measures—which would require Oregon to produce 100% of its electricity using renewable energy and carbon free sources by 2045 and in doing so to meet minimum labor standards and ensure that all customers and communities benefit equally—did not violate the Oregon Constitution's "single-subject" requirement for initiative petitions. The court reportedly said the labor and equity provisions could be

encompassed within a single subject with the clean energy mandates. *Richardson v. Clarno*, No. 20CV01920 (Or. Cir. Ct. Jan. 16, 2020).

NEW CASES, MOTIONS, AND NOTICES

Ninth Circuit Heard Oral Argument in California Local Government Cases; Fossil Fuel Companies Said *Juliana* Decision Supported Their Position

The Ninth Circuit Court of Appeals heard oral arguments on February 5, 2020 in the appeals in California local governments' climate change cases against fossil fuel companies. In one set of appeals, the companies seek reversal of an order remanding the cases to state court. In the other appeal, San Francisco and Oakland appeal the dismissal of their lawsuits, as well as the denial of their motion to remand. Judges Ikuta, Christen, and Lee comprise the panel considering the appeals. On January 15, the court granted a motion by the United States to participate in the oral argument as amicus curiae in support of affirmance of the dismissal of San Francisco and Oakland's case.

On January 29, Chevron Corporation submitted letters to the First, Fourth, and Ninth Circuit Courts of Appeal asserting that the Ninth Circuit's decision in *Juliana v. United States* supported the companies' argument that the climate change claims asserted by local and state governments against the companies "have their source in federal law and therefore belong in federal court."

Other developments in the local government cases against fossil fuel companies included the completion of briefing in fossil fuel companies' Tenth Circuit appeal of the remand of Boulder and San Miguel Counties and the City of Boulder's lawsuit. The defendants filed their reply brief on January 22, 2020, reiterating their arguments that the Tenth Circuit should review the entire remand order, not just the district court's determination that removal was not proper under the federal-officer removal statute, and that there were multiple valid grounds for removal. Fossil fuel companies also filed their reply brief in their appeal of the remand order in Rhode Island's case. *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir.); *County of San Mateo v. Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503, (9th Cir.); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.); *Mayor & City of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir.); *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.).

Montana and Wyoming Asked Supreme Court to Consider Claims That Washington Impermissibly Blocked Access for Coal Shipments

Montana and Wyoming filed a motion for leave to file a bill of complaint in the U.S. Supreme Court asserting that the State of Washington had denied access to its ports for shipments of Montana and Wyoming's coal in violation of the dormant Commerce Clause and the Foreign Commerce Clause. Montana and Wyoming alleged that the Washington's denial of a Section 401 certification for the Millennium Bulk Terminal was based on Washington officials' "discriminatory favoritism of Washington products over Montana and Wyoming coal"; the Washington governor's political opposition to coal; and "perceived extra-territorial

environmental impacts of coal combustion in foreign markets." The two states argued that the "seriousness and dignity" of their claims warranted exercise of the Court's original jurisdiction and that they had no other forum in which to pursue their claims. *Montana v. Washington*, No. 22O152 (U.S., filed Jan. 24, 2020).

Briefing in Challenges to Regulations for Existing Power Plants to Be Complete by End of July

On February 3, 2020, the D.C. Circuit Court of Appeals set the briefing schedule for cases challenging EPA's repeal of the Obama administration's Clean Power Plan and the promulgation of the Affordable Clean Energy rule to regulate greenhouse gas emissions from existing coal-fired power plants. Petitioners' opening briefs are due March 27, respondents' brief is due May 26, briefs for respondent-intervenors are due June 25, and reply briefs are due July 9, with final briefs to be filed on July 30. *American Lung Association v. EPA*, Nos. 19-1140 et al. (D.C. Cir.).

Plaintiffs Alleged Inadequate Consideration of Climate Change in Challenge to Permit for Petrochemical Plant

Four environmental organizations filed a lawsuit in the federal district court for the District of Columbia challenging the U.S. Army Corps of Engineers' issue of a Section 404 permit under the Clean Water Act for a new petrochemical plant on the Mississippi River in Louisiana. The plaintiffs asserted that the Corps violated the National Environmental Policy Act by relying on "deeply flawed and inadequate" environmental assessment to conclude that the project would not have a significant environmental effect. They alleged that the project—which would produce plastic chemicals and resins—would, among other impacts, emit 13.6 million tons per year of greenhouse gas emissions, "the equivalent annual emissions of three coal-fired power plants." The complaint further alleged that this figure "does not account for emissions from the power transmitted to the facility or for emissions from the entire lifecycle of plastics production." The plaintiffs contended that the project's greenhouse gas emissions would "contribute to the climate crisis and exacerbate Louisiana's susceptibility to flooding, land loss, and storm surges" and that the destruction of wetlands for the project "would remove some of the natural buffers against these impacts." The plaintiffs also asserted that the Corps violated the Clean Water Act and the Rivers and Harbors Act by overlooking "major consequences" of the facility in finding the project to be in the public interest and by failing to adopt the least environmentally damaging alternative. The complaint also asserted claims under the National Historic Preservation Act and the Administrative Procedure Act. *Center for Biological Diversity v. U.S. Army Corps of Engineers*, No. 1:20-cv-00103 (D.D.C., filed Jan. 15, 2020).

Lawsuits Challenged Supplemental EIS for Hydraulic Fracturing on Federal Lands in California

California and environmental groups filed lawsuits in the federal district court for the Central District of California challenging the supplemental environmental impact statement (SEIS) prepared by the U.S. Bureau of Land Management (BLM) for a resource management plan allowing hydraulic fracturing on 400,000 acres of public lands and 1.2 million acres of federal mineral estate in California. BLM prepared the SEIS to address issues identified by the court in

earlier cases. In both complaints, the plaintiffs alleged that the SEIS's consideration of climate change impacts was inadequate. California alleged that the SEIS failed to consider conflicts with state plans and policies, including California's efforts to reduce greenhouse gas emissions and fossil fuel consumption. The environmental groups alleged that the SEIS relied on "arbitrary and unsupported" predictions of the number of wells that would be fracked and underestimated climate and other impacts. *California v. Stout*, No. 2:20-cv-00504 (C.D. Cal., filed Jan. 17, 2020); *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 2:20-cv-00371 (C.D. Cal., filed Jan. 14, 2020).

Berkeley Moved to Dismiss Restaurant Association's Challenge to Its Natural Gas Ordinance; Lawsuit Filed in State Court to Challenge City of Santa Rosa Natural Gas Ban for New Homes

The City of Berkeley moved to dismiss a lawsuit challenging the City's ordinance that instituted a progressive ban on natural gas connections in new buildings. The City argued that there was no subject matter jurisdiction, that the California Restaurant Association lacked standing to bring the suit, that the suit was unripe, and that state law claims were barred by the doctrine of primary jurisdiction. In addition, Berkeley argued that the complaint failed to state a claim that the Energy Policy and Conservation Act preempted the ordinance. Berkeley also contended that the case should be dismissed because state law did not preempt the ordinance and the ordinance did not conflict with state energy efficiency standards. *California Restaurant Association v. City of Berkeley*, No. 4:19-cv-07668 (N.D. Cal. Jan. 13, 2020).

It was reported in January that a developer had filed a lawsuit in California Superior Court challenging the City of Santa Rosa's law requiring appliances in new homes of three stories or less to use electricity rather than natural gas. The law reportedly alleged that the City failed to comply with CEQA in enacting the ban, which must also be approved by state regulators. The developer previously filed a lawsuit challenging a natural gas ban in the Town of Windsor. *Gallaher v. City of Santa Rosa*, No. SCV265711 (Cal. Super. Ct., filed Dec. 17, 2020).

New Lawsuit Challenging Oil and Gas Leases in Western States Alleged "Fundamental Disconnect" Between Climate Crisis and Federal Leasing Program; Plaintiffs in Earlier Case Said BLM's New Greenhouse Gas Analysis Was Arbitrary and Capricious

WildEarth Guardians and Physicians for Social Responsibility filed a complaint in the federal district court for the District of Columbia challenging BLM's approval of 2,067 oil and gas leases covering almost two million acres of public lands across five states—Colorado, Montana, New Mexico, Utah, and Wyoming. The plaintiffs alleged that BLM violated the National Environmental Policy Act by failing to consider "the direct, indirect, and cumulative impacts of oil and gas leasing on our climate." They contended that BLM's process for reviewing the leases was at odds with the court's decision in another case involving BLM's authorization of 282 leases and that the case showed the "fundamental disconnect between the ongoing climate crisis and the federal oil and gas leasing program." *WildEarth Guardians v. Bernhardt*, No. 1:20-cv-00056 (D.D.C., filed Jan. 9, 2020).

In the earlier case challenging BLM's authorization of 282 leases, the plaintiffs filed a motion for summary judgment after remand, arguing that BLM "threw together an error-riddled Supplemental Environmental Assessment" (Supplemental EA) in response to the court's finding of deficiencies in its original analysis of greenhouse gas emissions. The plaintiffs asked the court to find BLM's re-approval of the leases arbitrary and capricious. They said BLM should have considered total, cumulative emissions, as opposed to annual emission rates; that BLM underestimated direct and indirect emission rates "through mathematical sleight of hand"; that BLM failed to assess reasonably foreseeable future emissions from regional and national BLM actions; and that "BLM's carbon budget analysis was inconsistent, irrational, and arbitrary." In addition, the plaintiffs argued that BLM's rationale for finding the leases' greenhouse gas emissions to be insignificant was inconsistent with statements in the Supplemental EA and that the finding of no significant impact failed to assess whether the leases were related to other actions with cumulatively significant impacts. *WildEarth Guardians v. Bernhardt*, No. 1:16-cv-01724 (D.D.C. Jan. 6, 2020).

Lawsuit Sought Critical Habitat Designation for Green Sea Turtles Whose Habitat Is Threatened by Sea Level Rise and Other Factors

Three conservation groups filed a lawsuit in the federal district court for the District of Columbia seeking to compel the U.S. Fish and Wildlife Service and National Marine Fisheries Service to designate critical habitat for distinct population segments of the green sea turtle. The complaint alleged that turtles are protected under the Endangered Species Act "because they are threatened by habitat loss from coastal development, beach armoring, and sea level rise; disorientation of hatchlings by beachfront lighting; marine pollution; watercraft strikes; and as bycatch in fishing operations." The plaintiffs contended that the turtle would remain at risk until the Services fulfilled their statutory obligation to designate critical habitat. *Center for Biological Diversity v. Bernhardt*, No. 1:20-cv-00036 (D.D.C., filed Jan. 8, 2020).

Nonprofit Group and Its Board Member Sought to Unseal Records in Attorney General's Suit Against Exxon

In January 2020, the nonprofit Energy Policy Advocates and an individual board member of the group asked the New York Supreme Court to permit them to intervene in the New York attorney general's unsuccessful case against Exxon Mobil Corporation for the purpose of moving to unseal judicial documents that the proposed intervenors said were "important to a vital public policy debate over policy and the increasing employment of state attorneys general at the request of private interests and to assist private ends." The proposed intervenors' papers described Energy Policy Advocates as a tax-exempt nonprofit "which conducts and publishes its public policy research using the federal Freedom of Information Act and similar state laws" and the individual as a radio and internet journalist who is a board member of the organization. An attorney whose communications with the attorney general's office the proposed intervenors seek to unseal moved to appear as amicus curiae to oppose intervention. The proposed intervenors had argued that "[t]he public deserves to see documentation of the effort by a tort lawyer to help his tort campaign against by enlisting the New York Office of Attorney General, successfully, if in pursuit of terribly unsuccessful prosecution at a cost, clearly, of millions of taxpayer dollars."

The attorney general opposed intervention. *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct.).

Lawsuit Said County Should Have Required More Greenhouse Gas Mitigation Measures for Approved Development

The Center for Biological Diversity filed a lawsuit in California Superior Court challenging Kern County's approvals of a project that would include 12,000 dwelling units, up to 5.1 million square feet of commercial land uses, and a development footprint of 4,643 acres. The petition asserted that the County failed to adequately analyze or mitigate the project's greenhouse gas impacts. The petitioner contended that the County should have required the project to be "zero net energy" and should have required distributed or rooftop solar installations. *Center for Biological Diversity v. County of Kern*, No. BCV-20-100080 (Cal. Super. Ct., filed Jan. 10, 2020).

Lawsuit Filed Challenging Solar Power Facility in California

A California community services district and a neighborhood group filed a lawsuit challenging San Bernardino County authorizations for a solar power generating facility across 3,500 acres. The petitioner-plaintiffs alleged that the EIR for the project failed to adequately analyze and mitigate the project's environmental impacts, including long-term greenhouse gas emissions and the project's "greenhouse gas impacts including on the desert ecosystem carbon sequestration processes." They asserted the project was inconsistent with California's long-term efforts to mitigate greenhouse gas emissions. *Newberry Community Services District v. County of San Bernardino*, No. CIV DS 2000745 (Cal. Super. Ct., filed Jan. 9, 2020).

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FEATURED CASE

Trial Court Ruled for Exxon in New York's Climate Change Securities Fraud Case

After a 12-day trial, a New York court found that the New York Office of the Attorney General failed to establish by a preponderance of the evidence that Exxon Mobil Corporation (Exxon) made any material misstatements or omissions that misled any reasonable investor about its practices or procedures for accounting for climate risk. The court therefore denied claims asserted under the Martin Act—New York's securities fraud statute—and Executive Law § 63(12), which prohibits repeated or persistent fraudulent acts. Although the court granted the attorney general's request to discontinue its common law and equitable fraud claims with prejudice, the court also said its decision established that Exxon would not have been held liable on any fraud-related claims since the attorney general failed to establish Exxon's liability even for causes of action that did not require proof of the scienter and reliance elements of fraud. The court found that Exxon's public disclosures in the 2013 to 2016 time period at issue in the case—including Form 10-K disclosures and March 2014 reports specifically addressing climate change risk and regulations that were prepared in consideration for withdrawal of shareholder proposals—were not misleading. The court said one of the March 2014 reports identified proxy

costs of carbon and GHG costs as "distinct and separate metrics," one of the factors leading the court to reject the premise of the attorney general's case that Exxon's disclosures "led the public to believe that its GHG cost assumptions for future projects had the same values assigned to its proxy cost of carbon." The court also found that an analyst's testimony undercut the attorney general's assertion that information in the March 2014 reports was material to investors and found the attorney general's expert testimony on materiality to be unpersuasive, "flatly contradicted by the weight of the evidence," and "fundamentally flawed." *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Dec. 10, 2019).

DECISIONS AND SETTLEMENTS

D.C. Circuit Lifted Abeyance on Truck Trailer Manufacturers' Challenge to Greenhouse Gas and Fuel Efficiency Standards

The D.C. Circuit Court of Appeals granted a motion by the Truck Trailer Manufacturers Association (TTMA) to lift the abeyance in TTMA's case challenging the U.S. Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration's (NHTSA's) 2016 rule establishing greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles. The schedule set by the D.C. Circuit requires final briefs to be filed by June 2, 2020. The court severed TTMA's case from another case brought by the Racing Enthusiasts and Suppliers Coalition (RESC) challenging different aspects of the same rule. RESC's case will continue to be held in abeyance. Both proceedings had been held in abeyance since 2017 while the agencies consider administrative requests for reconsideration. In October 2017, the D.C. Circuit granted TTMA's motion to stay the EPA portion of the rule, which was scheduled to take effect in 2018. In its motion to lift the abeyance, TTMA said it could "no longer afford to wait" for judicial review because the NHTSA portion of the rule would take effect in January 2021 and any delay in resolution of the proceedings beyond mid-2020 "will begin to cause significant prejudice to TTMA's members." *Truck Trailer Manufacturers Association, Inc. v. EPA*, No. 16-1430 (D.C. Cir. Dec. 26, 2019).

D.C. Circuit Granted Rehearing on Due Process Issue in Atlantic Sunrise Pipeline Case

The D.C. Circuit granted a petition for rehearing en banc of its decision upholding authorizations for the Atlantic Sunrise Project, a natural gas pipeline expansion extending from Pennsylvania to Alabama. The court directed the parties to address due process issues addressed in the opinion, including whether the Natural Gas Act authorizes the Federal Energy Regulatory Commission (FERC) to issue tolling orders that extend the statutory 30-day period for FERC action on an application for rehearing. The court's rehearing order did not mention the National Environmental Policy Act claims on which the court ruled in FERC's favor, including claims regarding inadequate consideration of downstream greenhouse gas emissions. *Allegheny Defense Project v. Federal Energy Regulatory Commission*, No. 17-1098 (D.C. Cir. Dec. 5, 2019).

Federal Court Dismissed Challenge to "Two for One" Executive Order

The federal district court for the District of Columbia ruled that the plaintiffs challenging President Trump's "two for one" executive order had not established standing. The executive

order was issued in January 2017 and directed, among other things, that federal agencies identify at least two existing regulations to be repealed for every new regulation promulgated and offset any new incremental cost of a new regulation by eliminating costs associated with at least two prior regulations. The district court—which previously allowed limited discovery to address deficiencies in the plaintiffs' standing allegations—found that the plaintiffs had not demonstrated that either the executive order itself or related guidance issued by the Office of Management and Budget caused the delay in the finalizing of two regulations identified by the plaintiffs: a federal motor vehicle safety standard for vehicle-to-vehicle accident avoidance communications and an energy efficiency standard for commercial water heating equipment. The court cited interrogatory responses of federal officials that supplied reasons for the delays and said the plaintiffs failed to point to evidence to contradict these responses. The court also rejected the plaintiffs' contention that they should be found to have standing because the executive order was certain to increase delay in the future. *Public Citizen, Inc. v. Trump*, No. 17-cv-253 (D.D.C. Dec. 20, 2019).

Federal Court Denied Stay Pending EPA's Appeal of Order Declining to Give EPA More Time to Implement Landfill Emission Guidelines

On December 17, 2019, the federal district court for the Northern District of California declined to stay its November 2019 order that denied EPA's motion for relief from the court's May 2019 order setting a schedule for EPA to implement landfill emission guidelines promulgated in 2016. EPA immediately applied to the Ninth Circuit for a stay pending appeal. EPA sought relief from the May 2019 order after it amended the regulations in August 2019 to change the deadlines for states to submit their implementation plans and to alter the timeframe for issuance of a federal plan. The court found that EPA had amended the regulations only to reset its non-discretionary deadline, not to rectify any violation identified by the court, and that enforcement of its original order was still equitable. In its December order denying a stay pending appeal, the court found that EPA's appeal raised "serious legal questions" but that the balance of hardships did not tip sharply in EPA's favor. *California v. EPA*, No. 4:18-cv-03237 (N.D. Cal. Dec. 17, 2019), No. 19-17480 (9th Cir. motion for stay Dec. 17, 2019).

Colorado Federal Court Let Authorizations for Oil and Gas Development Remain in Place While Agencies Conducted Analysis of Indirect Impacts

The federal district court for the District of Colorado declined to vacate federal actions authorizing oil and gas development in the Bull Mountain Unit in the Colorado River basin. The court—which in March 2019 found that the federal agencies erred in failing to consider the foreseeable indirect effects resulting from combustion of oil and gas—said vacatur was not warranted because the defendants prevailed on all but one of the eight issues raised by the plaintiffs and vacatur "would undoubtedly be somewhat disruptive" to intervenor-defendants who had spent 10 years in the approval process for proposed oil and gas operations. The court instead remanded to the federal defendants for further analysis and suspended approved Applications for Permits to Drill (APDs) and barred approval of additional APDs pending completion of the analysis. *Citizens for a Healthy Community v. U.S. Bureau of Land Management*, No. 1:17-cv-02519 (D. Colo. Dec. 10, 2019).

Minnesota Court Said Minnesota Environmental Protection Act Applied to Agreements for Construction of Power Plant in Wisconsin

The Minnesota Court of Appeals found that the Minnesota Public Utilities Commission had erred by approving "affiliated-interest agreements" associated with construction and operation of the Nemadji Trail Energy Center (NTEC)—a proposed 525 megawatt natural gas power plant in Wisconsin—without complying with the Minnesota Environmental Policy Act (MEPA). The court concluded that MEPA applied to affiliated-interest agreements and that the Commission had jurisdiction to order the preparation of an environmental assessment worksheet (EAW) under MEPA for a project in another state to determine whether an environmental impact statement should be prepared. The court noted that the affiliated-interest agreements contemplated a utility's undertaking of the physical activities of constructing and operating NTEC, which the court described as "definite, site-specific actions that will affect not only the plant's immediate location but also its surrounding environment, most notably through the large quantities of carbon dioxide that the plant will emit." The court said "[t]he impact of such emissions on air quality is precisely the type of environmental effect that MEPA addresses." The court directed the Commission to determine whether NTEC might have significant environmental effects, and if so, to prepare an EAW before reassessing whether to approve the agreements. *Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission*, No. A19-0688, A19-0704 (Minn. Ct. App. Dec. 23, 2019).

Hawaii Court Put Flood Management Project on Hold

On October 29, 2019, a Hawaii state court reportedly issued a decision barring the State from funding a flood management project along the Ala Wai Canal until an environmental impact statement is accepted. *CityLab* reported that the project had been initiated to protect Waikīkī and other communities from flood events, the threat of which is exacerbated by sea level rise. Opponents of the project have raised concerns about the project's ecological and visual impacts. *Protect Our Ala Wai Watersheds v. Miyahira*, No. 1CC191001480 (Haw. Cir. Ct., filed Sept. 18, 2019).

Appellate Court Upheld All but One of California Coastal Commission's Conditions for New Home on Oceanside Bluff

Reversing a trial court, the California Court of Appeal held in September that the California Coastal Commission had not abused its discretion by requiring that a new residence on an oceanside bluff be set back 60 to 62 feet from the edge of the bluff rather than the 40 feet approved by the City of Encinitas. The Commission's required setback was based in part on the use of a higher erosion rate—due to expected sea level rise—than what was predicted in the owner's geotechnical report. The appellate court also upheld the Commission's authority to impose a condition barring the homeowners from constructing a bluff or shoreline protective device to protect the new home and found that this condition was not an unconstitutional taking. In addition, the court upheld a requirement that the homeowners obtain and follow recommendations of a geotechnical report, including removal of the threatened portion of a structure, if the bluff eroded to within 10 feet of the principal residence. The appellate court concluded, however, that a condition requiring the owners to remove the residence if a

government agency ordered that the structure not be occupied was overbroad and unreasonable as drafted. The owners had expressed concerns that any government entity "could order the house 'not to be occupied' without any justification, or with unsupported claims about the impact of projected sea-level rise and future erosion of the bluff." *Lindstrom v. California Coastal Commission*, No. D074132 (Cal. Ct. App. Sept. 19, 2019).

NEW CASES, MOTIONS, AND NOTICES

Briefing Continued in Fossil Fuel Companies' Appeals of Remand Orders in First and Tenth Circuits; Fourth Circuit Heard Oral Argument in Baltimore's Case

On December 26, 2019, the State of Rhode Island filed its brief in support of the affirmance of the federal district court order remanding to state court its action seeking relief from fossil fuel companies for climate change-related injuries. Rhode Island argued that it had the right to pursue its causes of action for public nuisance, strict liability and negligent failure to warn, strict liability and negligent design defect, trespass, impairment of public trust resources, and violations of Rhode Island's Environmental Rights Act in state court. The State contended that the First Circuit only had jurisdiction to review whether federal-officer removal jurisdiction existed and further argued that, in any event, other grounds for removal had no merit.

On December 20, Boulder County, the City of Boulder, and San Miguel County filed their brief in the Tenth Circuit, also arguing that the appellate court could only review removal under the federal-officer removal statute, which they argued did not provide a basis for removal of their case. The plaintiffs-appellees also argued that the well-pleaded complaint rule governed removal under the general removal statute and that jurisdiction could not rest on unpled federal common law. In addition, the plaintiffs-appellees said their claims for relief did not necessarily depend on resolution of a substantial and disputed federal issue and that there was no complete preemption, federal enclave jurisdiction, or jurisdiction under the Outer Continental Shelf Lands Act.

Amicus briefs were filed in the First Circuit in support of affirmance of the remand orders. The amicus parties included "three of the nation's leading local government associations," which said state law tort claims "provide an important means for cities and local governments to seek abatement of and damages for localized harms arising from activities that cross jurisdictional boundaries." The organizations argued that the district court's decision remanding the case "stands in line with a consistent body of jurisprudence that has sustained the availability of state claims for complex cases." Other amici in the First Circuit included 13 states that asserted "a unique interest in maintaining their state courts' authority to develop and enforce requirements of state statutory and common law—including monetary remedies—in cases brought against commercial entities causing harm to and within their jurisdictions"; three senators, including both senators from Rhode Island, whose brief contended that courts as well as other branches of government needed to address climate change and urged scrutiny of arguments advanced by amicus party U.S. Chamber of Commerce regarding the merits and justiciability of the case due to the Chamber's alleged efforts to "stifle" congressional and executive action on climate change; former U.S. diplomats and government officials who contended that corporate liability would not disrupt the U.S.'s international climate negotiations; the Center for Climate Integrity, the Union of Concerned Scientists, and "scholars and scientists with strong interests, education,

and experience in the environment and the science of climate change," who argued that the defendants had engaged in a "coordinated, multi-front effort" to discredit climate science that justified the local government claims; climate scientists whose brief was intended to provide the court with "an understanding of the relevant science and the unavoidable adaptation expenses" communities face; Natural Resources Defense Council, Inc., which argued that neither federal common law nor the Clean Air Act completely preempted Rhode Island's claims; and Public Citizen, Inc., which cited its concern about removal jurisdiction due to its implications for state court authority "to provide remedies under state law for actions that threaten public health and safety." *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir.)

Public Citizen, the local government associations, and NRDC also filed amicus motions in the Tenth Circuit in the defendants' appeal of a District of Colorado order remanding the case brought by Boulder County, the City of Boulder, and San Miguel County. A 31-member coalition of local governments in Colorado also filed an amicus motion. The Tenth Circuit directed the defendants to file a response to the amicus motions by January 14. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, No. 19-1330 (10th Cir.).

On December 11, 2019, the Fourth Circuit heard oral argument in the appeal of the District of Maryland's decision remanding Baltimore's climate change case against fossil fuel companies. After the argument, the defendants submitted a letter and other documents in response to a question from the court regarding whether the federal government had exercised its right to extract petroleum form the Elk Hills Reserve. The defendants said that a 1976 law gave the Secretary of the Navy authority to sell or otherwise dispose of the U.S. share of the petroleum produced from such reserves and that the government had final authority over all production, which was carried out by defendant Chevron Corporation's predecessor Standard Oil. The defendants also submitted a General Accounting Office report that indicated that Chevron and the government shared production, revenues, and expenses in proportion to their ownership shares. The plaintiffs responded that the court should disregard the defendants' submission because it was an inappropriate attempt to supplement the evidentiary record and have the court make new factual findings. The plaintiffs further argued that the supplemental materials did not support federal-officer removal jurisdiction. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir.).

EPA, DOT, and Automakers Sought to Speed Up Challenge to Vehicle Emission Standard Preemption Actions; Challengers Asked D.C. Circuit to Put Proceedings on Hold

On December 18, 2019, the federal respondents in lawsuits in the D.C. Circuit challenging federal actions preempting state authority to set greenhouse gas vehicle emission standards and withdrawing California's waiver for its greenhouse gas vehicle standards asked the D.C. Circuit to expedite briefing in the cases. The government said an expedited schedule was warranted due to the case's potential impact on "the near-term decision-making of a significant sector of the economy" and on the vehicles that will be available to the public. On December 24, 2019, automaker groups that intervened on behalf of the defendants also moved to expedite briefing. The automaker groups asserted that "protracted litigation" would cause them to suffer irreparable injury and would drive up costs for both manufacturers and consumers. On December 26, 2019, both the State and Municipal Petitioners and the Public-Interest Petitioners moved to hold all of

the consolidated cases in abeyance. The State and Municipal Petitioners asked the court to hold the cases in abeyance pending final action on pending administrative reconsideration petitions and resolution by the federal district court for the District of Columbia of cases addressing some of the same legal issues. The Public-Interest Petitioners sought abeyance for the duration of the district court proceedings and argued that judicial economy favored abeyance. They argued that the district court must hear the challenge to the National Highway Traffic Safety Administration (NHTSA) preemption rule first and that petitions for review of EPA's revocation of the waiver was predicated on the preemption rule. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, Nos. 19-1230 et al. (D.C. Cir.).

In the district court cases challenging NHTSA's preemption rule, the court granted the Coalition for Sustainable Automotive Regulation and Association of Global Automakers motion to intervene in support of the defendants and the motions of the National Coalition for Advanced Transportation and a group of utilities to intervene in support of the plaintiffs. The court also consolidated the three cases challenging the rule. *California v. Chao*, No. 19-cv-2826 (D.D.C.).

Massachusetts Asked Federal Court to Send Consumer Protection Action Against Exxon Back to State Court

On December 26, 2019, Massachusetts moved to remand its action against Exxon Mobil Corporation under the State's consumer protection law back to state court. Massachusetts asserted that its complaint focused solely on alleged violations of the Massachusetts Consumer Protection Act and did not raise any federal claims. The attorney general argued that all of Exxon's bases for removal were "implausible" and had no support in law or fact not only because the complaint alleged only violations of a single state law but also because the claims did not require the disposition of any federal issue, did not arise under federal common law, did not involve action by Exxon taken under the direction of a federal officer or agency, and did not constitute a "class action" under the Class Action Fairness Act. The attorney general also said the federal court should ignore Exxon's allegations of conspiracy—which the attorney general characterized as "unsupported innuendo"—as a basis for removal and instead focus on the "four corners" of the complaint. *Massachusetts v. Exxon Mobil Corp.*, No. 1:19-cv-12430 (D. Mass. Dec. 26, 2019).

Lawsuit Filed to Compel Corps of Engineers and Mississippi River Commission to Take Action to Mitigate Adverse Impacts of Spillway Releases on Coastal Communities

Three Mississippi cities, two counties, and two organizations representing the Mississippi lodging and tourism and commercial fishing industries filed a lawsuit in the federal district court for the Southern District of Mississippi asserting that the Mississippi River Commission and the U.S. Army Corps of Engineers unlawfully failed to consider impacts to coastal communities and natural resources when they opened the Bonnet Carré Spillway in the spring and summer of 2019. The plaintiffs alleged that the opening of the spillway released "a flood of polluted Mississippi River water through the Lake Pontchartrain Basin and into the Mississippi Sound, wreaking havoc on the natural resources, communities and businesses on the Mississippi Gulf Coast." The plaintiffs also alleged that the "disastrous" opening of the spillway was "unlikely to be an isolated event," noting that it had been opened six times since 2008 after having been

opened only eight times in the first 70 years of its existence. The complaint said the increase in frequency and volume of the opening was driven by increased flooding and precipitation, and that "[t]his increased precipitation will continue as a consequence of warming temperatures." The plaintiffs asserted that "absent development of mitigating strategies by the Corps and the Mississippi River Commission, the Bonnet Carré Spillway will continue to open on a basis that will cause ongoing damage to the public resources of coastal Mississippi." The plaintiffs sought a declaration that the defendants were in violation of the National Environmental Policy Act and the Magnuson Stevens Fishery Conservation and Management Act and asked the court to order the defendants to fully comply with those statutes "with all due haste" and in the interim to require the Corps to consult with and obtain the consent of the plaintiffs and relevant Mississippi authorities regarding measures to avoid and minimize impacts prior to any opening of the spillway. A separate lawsuit asserting violations of the National Environmental Policy Act was filed by the Mississippi Secretary of State and Trustee of the Public Tidelands Trust. *Harrison County v. Mississippi River Commission*, No. 1:19-cv-00986 (S.D. Miss., filed Dec. 23, 2019); *Hosemann v. U.S. Army Corps of Engineers*, No. 1:19-cv-00989 (S.D. Miss., filed Dec. 30, 2019).

Montana Plaintiff Asked Federal Court to Require Energy Company to Include His Shareholder Proposal in Proxy Statement

A Montana man filed a lawsuit in the federal district court for the District of Montana to compel NorthWestern Corporation to include in its annual proxy statement his shareholder proposal requesting that the company cease coal-fired generation of electricity from the Colstrip power plant in Montana by 2025 and replace the electricity generated by the plant with non-carbon renewable energy. The plaintiff alleged that he is a shareholder in NorthWestern, the parent company of a company that operates an energy company that generates and transmits electricity to parts of Montana, South Dakota, and Nebraska. The plaintiff alleged that NorthWestern had told the Securities and Exchange Commission that it intended to omit the proposal on grounds that the plaintiff asserts are invalid. The plaintiff sought a declaration that his proposal qualified for inclusion in NorthWestern's 2020 proxy statement and that NorthWestern had a legal duty to include it. *Tosdal v. NorthWestern Corp.*, No. 9:19-cv-00205 (D. Mont., filed Dec. 23, 2019).

Plaintiffs Raised Climate Change Concerns in Challenge to Hog Slaughter Inspection Rule

A lawsuit challenging the U.S. Department of Agriculture's (USDA's) final rule establishing an optional new inspection system for hog slaughter establishments included a claim that the USDA violated the National Environmental Policy Act (NEPA) by determining that the rule was categorically excluded from NEPA review. The complaint—filed by seven nonprofit organizations in the federal district court for the Western District of New York—asserted that even if the general terms of the USDA's categorical exclusion for the actions of the Food Safety and Inspection Service could cover the rule, "extraordinary circumstances" existed that required preparation of an environmental assessment or environmental impact statement. Those circumstances related to the significant adverse environmental effects that the plaintiffs alleged would result from the increase in pig demand and slaughter numbers that the USDA projected in its economic benefits analysis. The plaintiffs alleged that the potential environmental effects included "supply-level" effects, including increasing the risk of climate change due to increases

in emissions of the greenhouse gases methane and nitrous oxide at concentrated animal feeding operations. *Farm Sanctuary v. U.S. Department of Agriculture*, No. 6:19-cv-06910 (W.D.N.Y., filed Dec. 18, 2019).

Plaintiffs Said Biological Opinions Failed to Fully Consider California Water Diversion Projects' Impacts in Context of Climate Change

A lawsuit filed in the federal district court for the Northern District of California challenged biological opinions issued regarding the Central Valley and State Water Projects. The plaintiffs alleged that the water diversion projects "have caused devastating environmental impacts and have contributed to severe declines in California's native fish species" and that "the biological opinions … were blatantly and improperly shaped by political motivations and authorize Water Project operations that will cause grave harm to species and their critical habitat, increasing the risk of extinction of endangered and threatened salmon, steelhead, and Delta Smelt." Among the issues identified in the complaint was that the federal agencies allegedly failed to consider the full extent of the projects' operations long-term impacts in the context of climate change. *Pacific Coast Federation of Fishermen's Associations v. Ross*, No. 3:19-cv-07897 (N.D. Cal., filed Dec. 2, 2019).

Shareholder Derivative Suit Filed Against Exxon in New Jersey Federal Court for Allegedly Misleading on Climate Risks

The City of Birmingham Retirement and Relief System filed a stockholder derivative complaint in the federal district court for the District of New Jersey against Exxon Mobil Corporation officers and board members seeking damages for breaches of fiduciary duties, waste, and unjust enrichment. The complaint alleged that Exxon had for decades "misled shareholders about the material risks climate change posed and poses to its business in order to increase its short-term profits and falsely inflate its assets, revenues, and stock price." *City of Birmingham Retirement and Relief System v. Tillerson*, No. 3:19-cv-20949 (D.N.J., filed Dec. 2, 2019).

Groups Challenged Corps' NEPA Review for Methanol Marine Export Terminal in Washington

Five organizations filed a lawsuit in federal court in Washington challenging the U.S. Army Corps of Engineers' issuance of a Section 404 permit for a marine export terminal on the Columbia River in Kalama, Washington. The terminal will serve a methanol manufacturing facility. The plaintiffs asserted, among other claims, that the Corps' "truncated" NEPA review failed to fully consider the project's greenhouse gas impacts. *Columbia Riverkeeper v. U.S. Army Corps of Engineers*, No. 3:19-cv-06071 (W.D. Wash., filed Nov. 12, 2019).

Lawsuit Charged California City with Failure to Adequately Consider Sea Level Rise in Environmental Review for Shoreline Residential Project

Two environmental groups filed a lawsuit in California Superior Court alleging that the City of Newark violated the California Environmental Quality Act when it approved a residential project along the shoreline of San Francisco Bay. The petitioners asserted that new information about

the rate of sea level rise combined with more detailed information about the project's design showed that impacts would be more severe than was disclosed in an environmental impact report prepared in 2015. The petition also claimed that the City did not consider the impact of sea level rise in combination with the project on available habitat for the endangered salt marsh harvest mouse and that the City had improperly deferred mitigation by relying on future adaptive management measures to mitigate impacts from sea level rise. *Committee to Complete the Refuge v. City of Newark*, No. RG19046938 (Cal. Super. Ct., filed Dec. 16, 2019).

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FEATURED CASE

Supreme Court Denied Publishers' Petitions in Climate Scientist's Defamation Case; Alito Issued Written Dissent

The U.S. Supreme Court denied two petitions for writ of certiorari seeking review of a D.C. Court of Appeals decision that allowed climate scientist Michael Mann to proceed with a defamation lawsuit against the authors and publishers of articles attributing scientific misconduct to Mann. Justice Alito issued a written dissent asserting that the questions raised by the petitioners "go to the very heart of the constitutional guarantee of freedom of speech and freedom of the press: the protection afforded to journalists and others who use harsh language in criticizing opposing advocacy on one of the most important public issues of the day." Alito wrote that one of the questions raised—whether a court or a jury should determine the truth of allegedly defamatory statements—was a "delicate and sensitive" question that "has serious implications for the right to freedom of expression," especially given the "highly technical" matter at issue in this case and the "intense feelings" that the issue of climate change arouses in the jury pool. Alito also said the petitioners raised the "very important question" of where to draw the line between "a pungently phrased expression of opinion regarding one of the most hotly debated issues of the day" (which Alito said would be protected by the First Amendment and "a statement that is worded as an expression of opinion but actually asserts a fact that can be proven in court to be false" (which the First Amendment would not protect). Alito noted that he recognized that the D.C. court's decision was "interlocutory" and that an ultimate outcome adverse to the petitioners could be reviewed later, but he said requiring a "free speech claimant to undergo a trial after a ruling that may be constitutionally flawed is no small burden." *National Review, Inc. v. Mann*, No. 18-1451 (U.S. Nov. 25, 2019); *Competitive Enterprise Institute v. Mann*, No. 18-1477 (U.S. Nov. 25, 2019).

DECISIONS AND SETTLEMENTS

D.C. Circuit Declined to Expedite or Stay Challenges to ACE Rule

On November 22, 2019, the D.C. Circuit Court of Appeals denied a motion by the U.S. Environmental Protection Agency (EPA) to expedite pending challenges to the Affordable Clean Energy (ACE) rule, which repealed and replaced the Obama administration's Clean Power Plan. The D.C. Circuit said the respondents had not "articulated 'strongly compelling' reasons that

would justify expedition." The court also denied motions by the Environmental and Public Health Petitioners and the State and Municipal Petitioners to hold the cases in abeyance pending the resolution of the petitioners' requests for administrative reconsideration. (The Environmental and Public Health Petitioners also argued that the cases should be held in abeyance until EPA finalized its proposal to relax the application of New Source Review (NSR) requirements; the petitioners argued that EPA's anticipated finalization of the NSR regulations would be "highly disruptive" to the litigation because it would alter essential aspects of the ACE rule, including costs, emissions consequences, and sources' expected responses.) The D.C. Circuit also denied a motion by the Biogenic CO2 Coalition to sever its case—which solely raised the issue of EPA's regulation of emissions from agricultural biomass feedstocks—and hold the case in abeyance pending EPA's "forthcoming" administrative resolution of biogenic emissions issues. The court directed the parties to submit a proposed format for briefing within 30 days. Earlier in November, the D.C. Circuit granted Nevada's motion for voluntary dismissal and granted pending motions to intervene. *American Lung Association v. EPA*, Nos. 19-1140 et al. (D.C. Cir. Nov. 22, 2019).

D.C. Circuit Dismissed Challenge to Renewable Fuel Small Refinery Exemption Criteria

In an unpublished judgment, the D.C. Circuit Court of Appeals dismissed a proceeding challenging EPA's apparent modification of the criteria for a "small refinery" exemption from Renewable Fuel Program requirements. The court found that the petitioner—a biofuels trade group—failed to identify a final agency action at the time the petition was filed in May 2018. The court indicated that "EPA's briefing and oral argument paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency's actions without a viable avenue for judicial review" but concluded that it was not necessary to determine "whether or how an ongoing pattern of genuinely secret law might be challenged" because EPA had publicly issued a memorandum in August 2019 that announced a new decisional framework for exemptions. *Advanced Biofuels Association v. EPA*, No. 18-1115 (D.C. Cir. Nov. 12, 2019).

Colorado Federal Court Enjoined Implementation of Coal Mining Plan During Further Analysis of Methane Flaring Alternative

The federal district court for the District of Colorado enjoined a coal mining company from proceeding with a mining plan in Colorado until further analysis was conducted regarding a methane flaring alternative and potential impacts to perennial streams. The court found that the Office of Surface Mining Reclamation and Enforcement (OSM) acted arbitrarily and capriciously in recommending approval of the mining plan based on other agencies' environmental analysis documents. First, the court found that methane flaring was a reasonable alternative and that the federal agencies were required to consider it since no agency reasonably concluded it was infeasible. (The court also concluded as a threshold matter that the plaintiffs were not precluded based on litigation challenging other agency approvals related to the mine from making their argument regarding the methane flaring alternative. The court noted that the earlier litigation concerned actions involving different agencies that took place years before the actions at issue in this case. The court further noted that the court in the earlier case did not find that the plaintiffs failed to demonstrate that the methane flaring analysis was insufficient but only

that the analysis had been reasonably postponed.) Second, the court rejected the plaintiffs' argument that the defendants failed to consider the project's cumulative climate change impacts in conjunction with past, present, and reasonably foreseeable future actions. The court said the plaintiffs waived this argument at the leasing stage and found that OSM could have reasonably concluded that the new information since the leasing stage did not significantly alter the analysis. Third, the court found that OSM should have given additional attention to impacts on perennial streams based on new information that "serves to completely reverse" the agency's previous conclusions. The court noted that the mining company had recently filed information about a potential methane flaring system for which it was seeking Mine Safety and Health Administration approval and that OSM had thereafter sought voluntary remand without vacatur so that it could prepare an environmental assessment to consider the methane flaring proposal. The court concluded, however, that it was necessary to enjoin further work pursuant to the mining plan because "remand without vacatur or injunction would incentivize agencies to rubber stamp a new approval, rather than take a true and informed hard look." *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-01920 (D. Colo. Nov. 8, 2019).

Rejecting Climate Change Concerns, Federal Court Declined to Question EPA's Remedy Selection at Superfund Site

In an order approving a consent decree that resolved federal government claims related to the cleanup of a Superfund site on the Atlantic coast of Georgia, the federal district court for the Southern District of Georgia was not persuaded by arguments that EPA's selected remedy of capping contaminated soils would not withstand flooding caused by hurricanes, tidal changes, and global warming. (This concern had been raised by amici curiae.) The court found that the record showed that EPA considered such concerns, and the court cited EPA's conclusion that the remedial measures provided a "long-term effective remedy with a high degree of permanence and resiliency as required by the Climate Change Adaptation Implementation Plan of 2014." The court said it would not second-guess EPA technical judgments and found that the selection of the remedy was not unreasonable, arbitrary, or capricious. *United States v. Hercules, LLC*, No. 2:18-cv-62 (S.D. Ga. Nov. 27, 2019).

Montana and Trade Groups Allowed to Intervene in Challenge to Nationwide Permit that Authorized Keystone XL; Plaintiffs Moved for Summary Judgment

The federal district court for the District of Montana allowed the State of Montana and five trade groups to intervene in a lawsuit challenging the U.S. Army Corps of Engineers' reissuance of Nationwide Permit 12 and the Corps' application of Nationwide Permit 12 to authorize the Keystone XL pipeline. The court found that Montana and the trade groups were not entitled to intervention as of right but allowed them to intervene permissively on a limited basis since their defenses shared a common issue of law or fact—their "significant interest" in defending the legality of Nationwide Permit 12's streamlined process for pipelines and other utility projects. On November 22, the plaintiffs filed a motion for partial summary judgment on their claims that reissuance of Nationwide Permit 12 and its application to Keystone XL violated the National Environmental Policy Act (NEPA), the Clean Water Act, and the Endangered Species Act. Under NEPA, the plaintiffs argued that the Corps failed to evaluate the indirect and cumulative effects of lifecycle greenhouse gas emissions caused by projects authorized under Nationwide

Permit 12. Under the Endangered Species Act, the plaintiffs asserted that programmatic consultation was required because reissuance of Nationwide Permit 12 was clearly an agency "action" that "may affect" and "is likely to adversely affect" listed species and critical habitat due in part to the permit's authorization of activities that cause indirect impacts associated with climate change. *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044 (D. Mont. order granting intervention Nov. 7, 2019; motion for partial summary judgment Nov. 22, 2019).

California Federal Court Denied EPA Request to Vacate Deadlines for Landfill Emission Guidelines

The federal district court for the Northern District of California denied EPA's motion for relief from the court's order and judgment setting a schedule for EPA to implement landfill emission guidelines adopted in August 2016. EPA sought relief from the court's deadlines after the agency amended its regulations to extend the deadlines for states and EPA to take action. The court rejected EPA's request, finding that that EPA had amended its regulations only to reset its non-discretionary deadline, not to rectify any violation identified by the court, and that enforcement of the original judgment was still equitable. *California v. EPA*, No. 18-cv-03237 (N.D. Cal. Nov. 5, 2019).

Federal Court Denied Center for Biological Diversity Request to Intervene in Defense of California County's Denial of Oil Facility Permits

The federal district court for the Northern District of California denied Center for Biological Diversity's (CBD's) motion to intervene in a lawsuit challenging Alameda County's decision not to renew conditional use permits for continued operation of an oil extraction and production facility in the City of Livermore. CBD argued that its "substantial involvement" in the matter—including its administrative appeal, which led to the County's denial of the permits—gave it a significantly protectable interest in the litigation. In addition, CBD asserted a significantly protectable interest in "advancing its longstanding organizational mission to protect the environment and combat climate change." Although the court agreed that CBD had a significantly protectable interest, the court found that CBD had not demonstrated that the County would not adequately represent CBD's interests. The court also found that efficient resolution of the dispute outweighed the benefits of permissive intervention. *E&B Natural Resources Management Corp. v. County of Alameda*, No. 4:18-cv-05857 (N.D. Cal. Nov. 4, 2019).

Federal Court Declined to Put Case Concerning Lobster Fishery and Endangered Right Whales on Hold

The federal district court for the District of Columbia denied the National Marine Fisheries Service and other federal defendants' (NMFS's) motion to stay a lawsuit challenging the management of the American lobster fishery. Plaintiffs asserted that the federal defendants failed to adequately address the fishery's impacts on the endangered North American right whale, including by failing to consider cumulative effects of climate change. NMFS argued that the case should be stayed because its pending promulgation of two conservation measures would moot the claims, but the court found that NMFS had not shown a compelling need for a stay. The court

decided that the case should proceed "because harm to a critically endangered species hangs in the balance." *Center for Biological Diversity v. Ross*, No. 1:18-cv-00112 (D.D.C. Oct. 31, 2019).

South Dakota Agreed Not to Enforce Provisions of Riot Boosting Act

A month after a federal court in South Dakota blocked the State from enforcing provisions of a riot boosting statute, the State and plaintiffs reached a settlement pursuant to which the State agreed not to enforce the provisions that the court temporarily enjoined. The plaintiffs had alleged that the statute had been passed in anticipation of possible protests by environmental activists along the route of the Keystone XL pipeline. *Dakota Rural Action v. Noem*, No. 5:19-cv-05026 (D.S.D. Oct. 24, 2019).

Federal Government Agreed to Take Actions Under Endangered Species Act to Resolve Lawsuit that Sought Action on Six Climate-Threatened Species

Center for Biological Diversity and U.S. Department of the Interior defendants reached an agreement that resolved CBD's lawsuit that sought to compel action under the Endangered Species Act with respect to 24 species, including six species that CBD identified in its complaint as threatened by climate change. Pursuant to a stipulated settlement agreement, the U.S. Fish and Wildlife Service must abide by a schedule for making 12-month findings as to whether listing is warranted for nine species, final listing determinations for two species, proposed critical habitat designations for four species, and final critical habitat designations for two species. The agreement provides that any challenges to final determinations made in accordance with the agreement must be filed in separate actions. *Center for Biological Diversity v. Bernhardt*, No. 1:19-cv-01071 (D.D.C. Oct. 11, 2019).

California Appellate Court Upheld Greenhouse Gas Analysis for Sacramento's 2035 General Plan

The California Court of Appeal affirmed the denial of a petition challenging the City of Sacramento's 2035 General Plan and the related environmental impact report. Among other things, the appellate court rejected the petitioner's "unsupported and undeveloped arguments" that the analysis of greenhouse gas emissions was based on faulty traffic analyses and therefore deficient. The appellate court also was not persuaded by the argument that the City did not support its rejection of a no-action alternative—i.e., the 2030 General Plan. The appellate court noted that the City rejected the no-action alternative as infeasible because it did not advance some City objectives (such as inclusion of the City's 2012 climate action plan), had greater impacts than the 2035 General Plan (including greenhouse gas and climate change impacts), and would not avoid any significant impacts associated with the 2035 General Plan. *Citizens for Positive Growth & Preservation v. City of Sacramento*, No. C086345 (Cal. Ct. App. Nov. 26, 2019).

Coal Companies and Coal Executive Dropped Appeal of Dismissal of Lawsuit Against Comedian

On November 10, 2019, comedian John Oliver announced on his television show that coal executive Robert E. Murray and related coal companies had withdrawn their appeal of the dismissal of their lawsuit against Oliver. The plaintiffs asserted claims of defamation, false light invasion of privacy, and intentional infliction of emotional distress on the grounds that Oliver and the other defendants knowingly broadcast malicious statements that they knew to be false based on information provided by the plaintiffs. The allegedly defamatory statements included statements that Mr. Murray and his companies "appear to be on the same side as black lung" and that their position on a coal dust regulation was the equivalent of rooting for bees to kill a child, as well as a description of Mr. Murray as looking "like a geriatric Dr. Evil." A West Virginia trial court dismissed the case in 2018, and an appeal had reportedly been pending before the West Virginia Supreme Court for more than a year. *Marshall County Coal Co. v. Oliver*, No. __ (W. Va. Nov. 10, 2019).

Connecticut High Court Upheld Variances to Allow Rebuilding of Sea Cottage in Flood-Prone Area

The Connecticut Supreme Court upheld variances granted for the reconstruction of a "sea cottage" severely damaged by Hurricane Sandy. Because the cost of repairs exceeded 50% of the sea cottage's value, the reconstructed cottage was required to comply with certain current City of Stamford regulations for structures in flood-prone areas, including a minimum elevation requirement, even though the cottage was a legally nonconforming structure. To satisfy the elevation requirement, however, the owner had to obtain variances from building height and setback requirements. A neighbor challenged the variances. The Connecticut Supreme Court agreed with the cottage owner and the City of Stamford that the minimum flood elevation requirement applied even though the cottage was legally nonconforming, noting that the City had to impose a minimum standard of floodplain management regulation to be eligible for the National Flood Insurance Program. The court also cited the "crucial role" that zoning regulations for flood-prone areas play in responding to the threat of coastal flooding, which would be exacerbated by climate change. The court further found that the cottage owner established the existence of an "unusual hardship" warranting approval of the height and setback variances because enforcement of the height and setback restrictions would have deprived the owner of his constitutionally protected right to continue using the cottage. *Mayer-Wittmann v. Zoning Board of Appeals of the City of Stamford*, No. SC 19972 (Conn. Nov. 5, 2019).

NEW CASES, MOTIONS, AND NOTICES

Ninth Circuit to Hear Oral Argument in February 2020 in California Local Government Climate Change Cases

The Ninth Circuit Court of Appeals scheduled oral argument for the morning of Wednesday, February 5, 2020 for the appeals in California local governments' climate change cases against fossil fuel companies. By that time, two other federal courts of appeal will have heard arguments in cases involving municipal claims against fossil fuel companies. The Second Circuit heard oral argument on November 22 in New York City's appeal of a district court's dismissal of its lawsuit. The Fourth Circuit will hear oral argument on December 11 in fossil fuel companies' appeal of the remand order in Baltimore's case. (The federal district court in the Baltimore case

lifted the stay on the remand order on November 12.) The Ninth Circuit cases concern (1) companies' appeals of remand orders sending six cases brought by California counties and cities back to state court and (2) Oakland and San Francisco's appeal of orders denying their motion to remand and dismissing their cases for failure to state a claim and for lack of personal jurisdiction over four of the companies. *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir.); *County of San Mateo v. Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503 (9th Cir.); *City of New York v. BP p.l.c.*, No. 18-2188 (2d Cir.); *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir.).

Opening Briefs Filed in First and Tenth Circuits Seeking Reversal of Remand Orders in Climate Change Cases Against Fossil Fuel Companies

Fossil fuel companies argued in briefs to the First and Tenth Circuit Courts of Appeal that they had properly removed cases brought by the State of Rhode Island and Colorado municipal governments in which the plaintiffs seek to hold the companies liable for the impacts of climate change. The companies' opening briefs contended that the appellate courts had jurisdiction to review the entirety of the remand orders, not just the district courts' conclusions that the federal officer removal statute did not provide a basis for removal. The companies further argued that there were multiple grounds for removal, including that the plaintiffs' claims asserted injuries that were caused by nationwide (and worldwide) greenhouse gas emissions and therefore necessarily arose under federal, not state, common law. In addition, the companies argued that the presence of substantial, disputed federal questions invoked federal jurisdiction and that the cases were also subject to federal jurisdiction under the federal officer removal statute, the federal bankruptcy statute (Rhode Island case only), the Outer Continental Shelf Lands Act, federal enclave doctrine, and admiralty jurisdiction (Rhode Island case only), and due to complete preemption by the Clean Air Act. The U.S. Chamber of Commerce filed amicus briefs in the First and Tenth Circuit amplifying the companies' arguments that federal common law provided a basis for federal jurisdiction and that the appellate court could review the entirety of the remand orders. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir. Nov 18, 2019); *Rhode Island v. Shell Oil Products Co.*, No. 19-1818 (1st Cir. Nov. 20, 2019).

Opening Briefs in Ninth Circuit Said President Trump Had Authority to Reverse Obama's Withdrawal of Arctic and Atlantic Areas from Oil and Gas Leasing

The federal government, State of Alaska, and American Petroleum Institute (API) filed briefs urging the Ninth Circuit Court of Appeals to reverse the District of Alaska's decision vacating President Trump's revocation of President Obama's withdrawals of areas in the Arctic and Atlantic Oceans from oil and gas leasing. The federal brief argued that the plaintiffs had not satisfied threshold requirements for their suit, including standing, ripeness, a waiver of sovereign immunity, and the existence of a congressionally created cause of action. The federal brief also argued that the district court erred in concluding that President Trump's action exceeded his authority under the Outer Continental Shelf Lands Act, which provides that the president "may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf." Alaska also argued that the district court erred in determining that President Trump lacked authority, contending that the district court's interpretation "distorts the meaning of the

withdrawal provision of the Outer Continental Shelf Lands Act and effectively allows a single president to nullify the Act and vitiate the Act's promises for the State of Alaska." API's brief also argued for a reading of the Act that gives the president "broad discretion over withdrawals," including authority to modify previous exercises of that discretionary authority. *League of Conservation Voters v. Trump*, No. 19-35460 (9th Cir. Nov. 7 and 22, 2019).

Challenges to Withdrawal of California and Other States' Authority to Set Vehicle Greenhouse Gas Emission Standards Proceeded in D.C. Circuit and District Courts

On November 15, 2019, 23 states, the District of Columbia, and the Cities of New York and Los Angeles filed a petition for review in the D.C. Circuit Court of Appeal challenging EPA's withdrawal of the waiver allowing California to implement its greenhouse gas and zero emission vehicle program. The petition for review also included a protective petition challenging the National Highway Traffic Safety Administration's (NHTSA's) related preemption of state programs regulating tailpipe emissions of carbon dioxide and other greenhouse gases. The states and municipalities previously filed a separate challenge to the NHTSA action in federal district court, which they believe has exclusive original jurisdiction to review the NHTSA preemption regulation. San Francisco, three air quality management districts in California, a group of power company and utility petitioners, and the National Coalition for Advanced Transportation—a "coalition of companies and non-profit organizations that supports electric vehicle and other advanced transportation technologies and related infrastructure"—filed similar petitions for review. Advanced Energy Economy—a "not-for-profit business association dedicated to making energy secure, clean, and affordable"—also filed a petition challenging the EPA action. (The California air quality management districts also filed a complaint in federal district court in D.C. seeking a declaration that the NHTSA preemption rule is invalid.) In addition, 11 environmental and citizen groups—nine of which previously filed a protective petition challenging NHTSA's action—filed a second petition for review challenging EPA's withdrawal of the waiver. All of the D.C. Circuit proceedings were consolidated, with *Union of Concerned Scientists v. National Highway Traffic Safety Administration* as the lead case. The D.C. Circuit allowed groups representing auto manufacturers to intervene on behalf of the respondents. A group of 13 states, led by Ohio, has moved to intervene as respondents. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, No. 19-1230 (D.C. Cir.); *South Coast Air Quality Management District v. Chao*, No. 1:19-cv-03436 (D.D.C., filed Nov. 14, 2019).

On December 3, 2019, NHTSA and the other defendants filed their motion to dismiss the district court cases challenging the preemption regulation. NHTSA argued that the Court of Appeals had exclusive jurisdiction to review the regulations, including National Environmental Policy Act claims related to the preemption regulations. NHTSA also argued that the D.C. Circuit should resolve any question as to whether the National Highway Traffic Safety Administration acted outside its statutory authority in issuing the regulations. NHTSA said the district court should either dismiss the cases for lack of jurisdiction or transfer them to the D.C. Circuit. *California v. Chao*, No. 1:19-cv-02826 (D.D.C. Dec. 3, 2019).

Lawsuits Challenged Rule that Excluded Certain Lightbulbs from Scope of Energy Efficiency Standards

Two petitions for review were filed in the Second Circuit Court of Appeals to challenge the U.S. Department of Energy's (DOE's) withdrawal of a final rule adopted in January 2017 that expanded the types of lightbulbs subject to backstop energy conservation standards that would take effect on January 1, 2020. DOE said the 2017 rule included certain "general service incandescent lamps" as "general service lamps" (the category of lightbulbs subject to the backstop standard) in a manner that was not consistent with the Energy Policy and Conservation Act of 1975 as amended by the Energy Independence and Security Act of 2007. The first petition was filed by 15 states, New York City, and the District of Columbia. The second petition was filed by six organizations that included environmental, consumer, and public housing tenant groups. *New York v. U.S. Department of Energy*, No. 19-3652 (2d Cir., filed Nov. 4, 2019); *Natural Resources Defense Council v. U.S. Department of Energy*, No. 19-3658 (2d Cir., filed Nov. 4, 2019).

Exxon Said Massachusetts Climate Change Enforcement Action Belonged in Federal Court

On November 29, 2019, Exxon Mobil Corporation removed Massachusetts's enforcement action alleging that Exxon misled investors and consumers regarding climate change risks and its products' impacts on climate change to federal district court in Massachusetts. Exxon contended that the Massachusetts attorney general—in conjunction with "plaintiffs' attorneys, climate activists, and special interests"—was engaged in a plan "to force a political and regulatory agenda that has not otherwise materialized through the legislative process." Exxon said the enforcement action was not properly brought under state law and instead sought "to wade into complex federal statutory, regulatory, and constitutional issues and frameworks, and to substitute one state's judgment for that of longstanding decisions by the federal government about national and international energy policy and environmental protection." Exxon asserted that it was necessary for the case to be heard in federal court because the Commonwealth's claims necessarily raised disputed and substantial issues concerning international climate change policy and the balance between environmental policy and economic development. In addition, Exxon argued that the case arose under federal common law because it was "inherently premised on interstate pollution that causes environmental harm in the form of global warming" and therefore implicated "uniquely federal interests and should be governed by federal common law." In addition, Exxon said the case satisfied the requirements of the federal officer removal statute because federal officials directed Exxon to engage in the extraction and production of fossil fuels, the activities that "constitute the crux" of the State's complaint. In addition, Exxon asserted that the case qualified for removal under the Class Action Fairness Act. *Massachusetts v. Exxon Mobil Corp.*, No. 1:19-cv-12430 (D. Mass. Nov. 29, 2019).

Exxon Asked New York Trial Court to Reject Attorney General's Withdrawal of Fraud Claims

After the New York attorney general's office said during closing arguments in its enforcement action against Exxon Mobil Corporation (Exxon) that it was abandoning two fraud counts, Exxon filed a post-trial motion opposing the request to discontinue the claims. Exxon said the attorney general's "last-minute gambit to avoid judicial repudiation of its claims should not be countenanced" because New York's procedural rules bar unilateral discontinuance of claims after the close of evidence and because any exercise of discretion by the court to permit the

attorney general to discontinue the claims would be inappropriate. Exxon argued that without "express acknowledgment" that the evidence did not show the intent or reliance necessary for the fraud claims, Exxon "can never repair the reputational damage … inflicted on the Company and its employees" or deter "copycat litigants" from pursuing identical claims. If the court allowed the attorney general to withdraw the fraud claims, the two remaining claims would be a Martin Act securities fraud cause of action and a related claim under New York's Executive Law. Both sides filed post-trial memoranda and proposed findings of fact, with the attorney general arguing that the evidence proved that Exxon made "materially misleading representations to its investors concerning its use of an internal cost of carbon to account for the likelihood of increasingly stringent climate regulations," while Exxon argued that the evidence showed that its disclosures were not materially misleading, particularly when viewed in the context of its financial statements, stock price, and analyst valuation and in light of investors' expectations regarding the climate risk information provided in response to investor requests. Exxon said the evidence showed that "reasonable investors would not have considered the disclosures at issue here to have significantly altered the total mix of information available." *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Nov. 18, 2019).

Lawsuit Filed Challenging EPA's Failure to Comply with NEPA and Endangered Species Act Before Granting Aquifer Exemption

Center for Biological Diversity (CBD) filed a lawsuit in the federal district court for the Northern District of California challenging EPA's granting of a Safe Drinking Water Act exemption that CBD alleged would allow the injection of oil and gas wastewater and other fluids in the Arroyo Grande Oil Field in San Luis Obispo County in California. CBD asserted that EPA failed to comply with NEPA and with the consultation requirements of Section 7 of the Endangered Species Act. With respect to NEPA, CBD said the approval of the aquifer exemption was "major Federal action that may significantly affect the quality of the human environment by, among other things, expanding injections and oil production that could "exacerbat[e] the climate crisis." *Center for Biological Diversity v. EPA*, No. 3:19-cv-07664 (N.D. Cal., filed Nov. 21, 2019).

Restaurant Industry Group Challenged Berkeley Ban on Natural Gas Infrastructure in New Buildings

An association representing the restaurant industry in California challenged the City of Berkeley's ordinance banning natural gas infrastructure in new buildings beginning on January 1, 2020. The plaintiff asserted that both federal law (the Energy Policy and Conservation Act) and state law (the California Building Standards Code and the California Energy Code) preempted the ordinance. The plaintiff alleged that "[w]ith millions of Californians sitting in the dark to avoid wildfires, and California's energy grid under historic strain, banning the use of natural gas is irresponsible and does little to advance climate goals." *California Restaurant Association v. City of Berkeley*, No. 3:19-cv-07668 (N.D. Cal., filed Nov. 21, 2019).

Lawsuit Said Federal Approval of Coal Mine Expansion Missed Opportunity to Plan for "Just Transition"

Five organizations challenged federal approval of expansion of the Rosebud coal strip-mine in Colstrip, Montana. In a complaint filed in federal district court in Montana, the plaintiffs cited a "warning" by the Montana Department of Health and Environmental Sciences in 1973 regarding economic reliance on "exploitation" of coal and alleged that in approving an expansion of the mine, the federal defendants had "refused to heed this warning and failed to use their considerable resources to outline what a just transition would look like in Colstrip." The plaintiffs asserted violations of NEPA, including failure to evaluate the greenhouse gas pollution from combustion of the mined coal despite monetizing the economic benefits of the mine expansion. The complaint also asserted that the defendants failed to consider a reasonable range of alternatives, including a "middle-ground alternative that involved mining less coal." The complaint said failure to consider such an alternative "precluded the agency from examining in detail any just transition alternative and increase[d] the likelihood that an abrupt 'bust[]' … will come to pass." *Montana Environmental Information Center v. Bernhardt*, No. 1:19-cv-00130 (D. Mont., filed Nov. 18, 2019).

Conservation Groups Launched New Challenge to Bull Trout Recovery Plan

Three conservation groups filed a lawsuit in the federal district court for the District of Montana to challenge the Bull Trout Recovery Plan approved by the U.S. Fish and Wildlife Service in 2015. The plaintiffs previously challenged the plan in the District of Oregon, which dismissed the case without prejudice. The Ninth Circuit affirmed the dismissal, and in July 2019, the district court in Oregon denied a motion to amend the complaint but left open the possibility that the plaintiffs could file a new complaint. In the District of Montana complaint, the plaintiffs asserted that the recovery plan failed to incorporate objective and measurable recovery criteria and failed to incorporate recovery criteria that addressed Endangered Species Act delisting factors. The complaint alleged that "[c]limate change has, and will continue to affect bull trout habitat," with changes including "warmer air and water temperatures and reduced stream flows" that "will reduce available bull trout habitat, stress existing populations and allow more heat tolerant non-native species to out-compete bull trout." *Save the Bull Trout v. Everson*, No. 9:19-cv-00184 (D. Mont., filed Nov. 18, 2019).

Environmental Groups Cited Failure to Adequately Consider Wildlife Risk in Challenge to Land Management Project in Oregon

Four environmental groups challenged the U.S. Bureau of Land Management's (BLM's) approval of the first project prepared by the Lakeview District in the Klamath Falls Resource Area in Oregon under a 2016 resource management plan, which allowed additional timber harvest from BLM-managed lands in Oregon. The complaint, filed in federal court in Oregon, asserted that BLM failed to comply with NEPA. The plaintiffs also indicated that they planned to amend their complaint to add the U.S. Fish and Wildlife Service as a defendant and an Endangered Species Act claim. The complaint's allegations included that BLM's environmental assessment failed to consider the direct, indirect, and cumulative effects of the land management project on wildfire risk and also alleged that fire season in Oregon had grown "longer and more unpredictable" because "the effects of global climate change in the region is resulting in hotter, drier summers, and less snow accumulation during the winters." The complaint also alleged that BLM's consideration of impacts on northern spotted owls was inadequate. *Klamath-Siskiyou*

Wildlands Center v. U.S. Bureau of Land Management, No. 1:19-cv-01810 (D. Or., filed Nov. 11, 2019).

Lawsuit Filed Challenging Decision Not to List Joshua Tree as Threatened Species

WildEarth Guardians filed a lawsuit in the federal district court for the Central District of California challenging the U.S. Fish and Wildlife Service's (FWS's) decision not to list the Joshua tree as threatened under the Endangered Species Act. The complaint alleged that the Joshua tree—"an icon of the Southern California desert"—faced eradication by the end of the century due to climate change and "other often related and synergistic threats" such as prolonged droughts, increasing fire, and habitat loss. WildEarth Guardians said FWS failed to adequately analyze and impermissibly dismissed these significant threats to habitat and also erroneously discounted and failed to adequately consider how the lack of existing regulatory mechanisms to address climate change could impact the Joshua tree. In addition, the complaint asserted that FWS arbitrarily and capriciously found that Joshua trees were not threatened throughout a significant portion of their range and failed to use best available science by disregarding models that provided information on the future status of Joshua trees. *WildEarth Guardians v. Bernhardt*, No. 2:19-cv-09473 (C.D. Cal., filed Nov. 4, 2019).

Non-Profit Group Sought State Department Records on Treatment of Paris Agreement as Non-Treaty Agreement

A non-profit organization filed a Freedom of Information Act lawsuit against the U.S. Department of State seeking a response to requests for documents, memoranda, and emails related to the State Department's "Circular 175" analysis for determining whether an international agreement is a treaty. The plaintiff alleged that the records it sought would "inform the public of the Department's 'working law' leading it to declare that the 2015 'Paris climate agreement' … was, for U.S. purposes, not a treaty, but a mere 'agreement', despite Paris requiring ever-tightening constraints every five years in perpetuity or until the U.S. withdraws, and despite Paris otherwise being a treaty according to its duration, its lineage, international practice and U.S. custom and practice." The plaintiff said it had in its possession a document that purported to be the Circular 175 memorandum of law for the Paris Agreement. The plaintiff alleged that, if authentic, this document "represents a significant legal and political scandal" because it misstated the history of agreements that supported its conclusion that the Paris Agreement was not a treaty. The plaintiff asserted that documents it sought from the State Department were the "only means" that would allow the public to evaluate the propriety of entering and withdrawing from the Paris Agreement. *Energy Policy Advocates v. U.S. Department of State*, No. 1:19-cv-03307 (D.D.C., filed Nov. 3, 2019).

Environmental Defense Fund Sought Documents on White House Climate Science Review Panel

Environmental Defense Fund (EDF) filed a Freedom of Information Act (FOIA) lawsuit seeking "records relating to a White House effort to discredit established findings that climate change poses a national security threat to the United States." EDF alleged that it sent FOIA requests to the U.S. Department of the Interior, National Oceanic and Atmospheric Administration (NOAA),

and National Aeronautics and Space Administration (NASA) after the *Washington Post* and other media outlets reported in February 2019 that the White House was planning to convene a panel to "target" recent federal climate change studies, including the Fourth National Climate Assessment, and that representatives of the Interior Department, NOAA, and NASA had been invited to a February 22, 2019 meeting concerning the panel. *Environmental Defense Fund v. U.S. Department of the Interior*, No. 1:19-cv-03286 (D.D.C., filed Oct. 31, 2019).

Lawsuit Filed Challenging Colorado ZEV Program

An organization that described its membership as including individuals, businesses, local government representatives, and organizations throughout Colorado filed a lawsuit in Colorado state court challenging the Colorado Air Quality Control Commission's adoption of a modified version of California's zero emission vehicle (ZEV) program. The organization asserted that the Commission lacked authority to adopt ZEV regulations due to the federal withdrawal of California's waiver and that ZEV regulations were preempted due to NHTSA's adoption of regulations preempting state regulation of greenhouse gas tailpipe emissions. In addition, the organization said Colorado's ZEV regulations violated the Clean Air Act's requirement that standards be identical to California's. The organization also said the Commission violated the Colorado Air Pollution Prevention and Control Act and the Colorado Administrative Procedure Act. *Freedom to Drive Inc. v. Colorado Air Quality Control Commission*, No. 2019CV34156 (Colo. Dist. Ct., amended complaint filed Oct. 30, 2019).

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FEATURED CASE

State and Local Government Climate Cases to Proceed Against Fossil Fuel Companies in State Courts After Supreme Court Declined to Stay Remand Orders

On October 22, 2019, the U.S. Supreme Court denied fossil fuel companies' application for a stay pending appeal of a district court's remand order returning Baltimore's lawsuit seeking to hold the companies liable for impacts of climate change. The application was presented to Chief Justice Roberts, the circuit justice for the Fourth Circuit, who referred the application to the Court. The Court's order denying the application indicated that Justice Alito did not take part in the consideration or decision of the application. Also on October 22, the circuit justices for the First Circuit (Breyer) and Tenth Circuit (Sotomayor) denied applications from fossil fuel companies for stays pending appeal of remand orders in cases brought by Rhode Island and Colorado municipal governments. The companies' appeal of the remand order in Baltimore's case has been fully briefed in the Fourth Circuit and is scheduled for oral argument on December 11. As of November 5, the district court in Maryland had not yet issued an order to lift its temporary stay on the remand order. In the Rhode Island case, the federal district court issued a text order granting the motion to remand two days after the Supreme Court denied a stay. The companies' brief in their First Circuit appeal of the remand order is due on November 20. The federal district court in the Colorado case notified the state court of the remand order on October 8, immediately after denying oil and gas companies' emergency motion for a stay. Other

developments in governmental climate change cases against fossil fuel companies included the scheduling of oral argument in the Second Circuit for November 22 in New York City's case. *BP p.l.c. v. Mayor & City of Baltimore*, No. 19A368 (U.S. Oct. 22, 2019); *BP p.l.c. v. Rhode Island*, No. 19A391 (U.S. Oct. 22, 2019); *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 19A428 (U.S. Oct. 22, 2019); *City of New York v. BP p.l.c.*, No. 18-02188 (2d Cir. Sept. 30, 2018).

DECISIONS AND SETTLEMENTS

D.C. Circuit Dismissed Challenges to EPA Withdrawal of Obama Administration's Mid-Term Determination on Vehicle Emission Standards

The D.C. Circuit concluded that it did not have jurisdiction to consider the U.S. Environmental Protection Agency's (EPA's) withdrawal of the Obama administration's mid-term determination that model year 2022 to 2025 greenhouse gas emission standards promulgated in 2012 remained appropriate. The D.C. Circuit said the withdrawal was not a final agency action because it did not satisfy the second prong of the Supreme Court's *Bennett v. Spear* test for final agency action, which requires that a final action determine rights or obligations or establish legal consequences. The court noted that the withdrawal did not itself change the emission standards established in 2012 but only created the possibility that the standards could be modified in the future, similar to an agency's grant of a petition for reconsideration of a rule. The court was not persuaded by the petitioners' arguments that the withdrawal satisfied the second prong because it had the direct legal consequence of requiring EPA to conduct rulemaking, because it created legal consequences for states that had to act quickly to put California's standards in place in accordance with Section 117 of the Clean Air Act, and because it withdrew the Obama administration's determination, which was itself a final agency action. *California v. EPA*, Nos. 18-1114, 18-1118, 18-1139, 18-1162 (D.C. Cir. Oct. 25, 2019).

Ninth Circuit Affirmed Order Directing Department of Energy to Publish Obama-Era Energy Conservation Standards

The Ninth Circuit Court of Appeals agreed with a district court that a U.S. Department of Energy (DOE) regulation imposed a non-discretionary duty on DOE to publish four energy conservation standards approved by DOE at the end of the Obama administration. The Ninth Circuit therefore lifted its stay on the district court's order directing DOE to publish the standards in the *Federal Register*. The standards at issue covered portable air conditioners, commercial packaged boilers, uninterruptible power supplies, and air compressors. *Natural Resources Defense Council, Inc. v. Perry*, No. 18-15380 (9th Cir. Oct. 10, 2019).

Plaintiffs Withdrew Lawsuit After Climate Change-Threatened Caribou Listed as Endangered

In a lawsuit seeking to compel the U.S. Fish and Wildlife Service (FWS) to list the Southern Mountain Caribou distinct population segment (DPS) as endangered or threatened, conservation groups filed a notice of voluntary dismissal after the FWS issued a final rule listing the DPS as endangered and designating critical habitat. The final rule identified climate change as a threat to

the caribou and stated that "changes in climate could directly impact the southern mountain caribou DPS by: (1) Reducing the abundance, distribution, and quality of caribou habitat; (2) limiting the ability of caribou to move between seasonal habitats; and (3) limiting their ability to avoid predation. Impacts from climate change may also affect caribou and their habitat by affecting external factors such as increased disease and insect outbreaks, increased fire occurrence, and changes in snow depth." *Center for Biological Diversity v. Bernhardt*, No. 2:19-cv-00265 (D. Idaho Oct. 29, 2019).

Idaho Federal Court Enjoined 2019 Amendments to Sage-Grouse Plans

The federal district court for the District of Idaho granted a motion for a preliminary injunction barring the U.S. Bureau of Land Management (BLM) from implementing the 2019 BLM Sage-Grouse Plan Amendments for Idaho, Wyoming, Colorado, Utah, Nevada/Northeastern California, and Oregon. The court directed that a 2015 plan (which is also being challenged in the lawsuit) remain in effect while the court considers the merits of the plaintiffs' claims, which include claims that the 2019 Plan Amendments failed to evaluate climate change impacts. In granting the preliminary injunction, the court found that the plaintiffs were likely to succeed on their claims that the 2019 Plan Amendments contained substantial reductions in protections for the sage grouse (compared to the 2015 Plans) without justification and that the environmental impact statements (EISs) failed to comply with the National Environmental Policy Act's requirement that reasonable alternatives be considered; failed to contain a sufficient cumulative impacts analysis; and failed to take the required "hard look" at the environmental consequences. The court also found that the plaintiffs were likely to succeed on their claim that supplemental draft EISs should have been issued. In addition, the court found a likelihood of irreparable harm due to numerous site-specific applications for drilling and mining projects in sage-grouse habitats that would be subject to the 2019 Plan Amendments and found that the balance of hardships tipped towards the plaintiffs. *Western Watersheds Project v. Schneider*, No. 1:16-cv-00083 (D. Idaho Oct. 16, 2019).

Montana Federal Court Denied Defendants' Early Motion for Judgment on the Pleadings in Challenge to Mine Project

The federal district court for the District of Montana denied motions for judgment on the pleadings for two claims in a lawsuit challenging federal determinations authorizing a silver and copper mine project in Montana. First, the court noted that the federal defendants had acknowledged that the complaint stated a cognizable claim that the decision not to reinitiate Endangered Species Act consultation for the grizzly bear in connection with the project was arbitrary and capricious. Second, the court rejected the arguments that the plaintiffs lacked standing to challenge the use of an allegedly improper metric to measure incidental take of bull trout—which the complaint alleged were particularly vulnerable to climate change—and that this claim was not ripe because the taking of the bull trout would not occur until Phase II of the project, which was not yet approved. *Ksanka Kupaqa Xaʾłɬin v. U.S. Fish & Wildlife Service*, No. 9:19-cv-00020 (D. Mont. Oct. 10, 2019).

Alaska Federal Court Upheld Determination that Listing of Pacific Walrus as Endangered or Threatened Was Not Warranted

The federal district court for the District of Alaska granted summary judgment to the federal government in Center for Biological Diversity's lawsuit challenging the 2017 determination that listing of the Pacific walrus as endangered or threatened was not warranted. First, the court found that the U.S. Fish and Wildlife Service (FWS) had provided a reasoned explanation for changing its policy from a 2011 decision that listing was warranted but precluded, including change concerning the effect of projected future losses of sea-ice habitat. Second, the court rejected the claim that the FWS arbitrarily defined the foreseeable future to extend to 2060 rather than 2100. The court said the policy of using 2060 as the foreseeable future timeframe was permissible under the Endangered Species Act, that the use of 2100 in the 2011 listing decision was not determinative, and that the FWS provided reasons for using 2060. Third, the court found that the FWS did not act arbitrarily or capriciously in drawing the conclusion that the Pacific walrus could adapt to loss of habitat. Fourth, the court rejected the argument that the FWS "treated scientific uncertainty inconsistently" by "dismissing the negative impacts of sea ice loss beyond 2060 because of uncertainly, while relying on uncertainty to conclude that the walrus would be able to adapt to the loss of its sea ice habitat, that the population is approaching stability, and that subsistence harvest would remain sustainable." Fifth, the court said the FWS had adequately considered sea-ice and land habitat and that the failure to consider coastal erosion was not arbitrary and capricious. *Center for Biological Diversity v. Bernhardt*, No. 3:18-cv-00064 (D. Alaska Sept. 26, 2019).

Minnesota Appellate Court Said Pollution Control Agency Must Consider Dairy Farm Expansion's Greenhouse Gas Emissions

In an unpublished opinion, the Minnesota Court of Appeals reversed and remanded the Minnesota Pollution Control Agency's (MPCA's) determination that an environmental impact statement was not necessary for the proposed expansion of a dairy farm concentrated animal feeding operation. The court concluded that the MPCA should have considered greenhouse gas emissions—an issue raised by an environmental group during the comment period—even though the issue was not included on the alternative environmental assessment worksheet for animal feedlots used in the environmental review. The court noted that the MPCA did not dispute that large dairy farm operations emit methane and also that the MPCA indicated that it was considering changing its review for feedlots to include greenhouse gas emissions, implying that "the MPCA was aware of, but failed to consider the potential effects of the greenhouse-gas emissions." The court rejected other objections to the MPCA's determinations. *In re Proposed Expansion of Daley Farms of Lewiston LLP et al.*, Nos. A19-0207 & A19-0209 (Minn. Ct. App. Oct. 14, 2019).

California Appellate Court Found Shortcomings in Napa County's Reliance on Woodland Preservation as Mitigation Measure for Vineyard Project

The California Court of Appeal found that the Center for Biological Diversity (CBD) demonstrated that an environmental impact report's (EIR's) conclusion that a vineyard-conversion project would not have a significant impact on greenhouse gas emissions was not supported by substantial evidence. Although the court agreed with the respondent, Napa County, that woodland preservation could mitigate the project's greenhouse gas emissions, the court

concluded that such preservation would not have mitigation or offset value if the trees "would have reasonably remained otherwise." In this case, the court said substantial evidence did not support an inference that "trees to be permanently conserved would not reasonably have remained on the property" since the EIR did not identify the location of woodland acres that would be preserved and 40% of the property was currently undevelopable under local regulations. The court rejected other climate change arguments made by CBD, deferring to the County's choice of methodology regarding the accounting for loss of carbon sequestration due to tree removal and regarding the calculation of greenhouse gas emissions from downed trees. *Living Rivers Council v. County of Napa*, Nos. A154253, A154300, A154314 (Cal. Ct. App. Sept. 30, 2019).

Trial Began in New York Attorney General's Fraud Action Against Exxon

The trial in the New York attorney general's fraud action against Exxon Mobil Corporation (Exxon) began on October 22, 2019 and was scheduled to last three weeks. On October 16, the court held a hearing at which it denied three motions: (1) the attorney general's motion for an adverse inference against Exxon for spoliation of evidence in connection with Exxon's failure to preserve emails from its former chief executive Rex Tillerson's "Wayne Tracker" email account; (2) Exxon's motion to exclude the testimony of the attorney general's expert witness on whether Exxon's alleged misrepresentations had a quantitative impact on the company's stock price; and (3) Exxon's motion to exclude testimony of an expert witness on whether Exxon's use of two metrics (proxy costs and GHG costs) were misleading and material to investors. The court denied the attorney general's motion without prejudice to renewal at trial. Select documents are available on the case's page on the U.S. Climate Case Chart. All filings in the case can be viewed on New York's eCourts site. *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Oct. 16, 2019).

New York Court Dismissed Challenge to State's Nuclear Plant Subsidies

A New York court upheld the New York State Public Service Commission's (PSC's) Clean Energy Standard and Zero Emission Credit (ZEC) program for nuclear plants. The court found that the PSC had complied with requirements of the State Administrative Procedure Act, including by "adequately striv[ing] to ensure, to the maximum extent practical" that the application of the term "zero-emission" to power plants complied with the SAPA goal that agencies write "in a clear and coherent manner, using words with common and everyday meanings." In addition, the court found that the administrative record adequately supported the PSC's use of the social cost of carbon in the calculation of ZEC payments. The court also concluded there was adequate support in the record for the PSC's conclusions regarding reduced carbon emissions associated with continued operation of the nuclear plants and the PSC's findings of "public necessity." *Hudson River Sloop Clearwater, Inc. v. New York State Public Service Commission*, Index No. 7242-16 (N.Y. Sup. Ct. Oct. 8, 2019).

NEW CASES, MOTIONS, AND NOTICES

Automakers and Seven States Sought to Intervene to Defend NHTSA's Preemption of State Vehicle Standards

Seven states, a trade association representing automobile manufacturers, and an umbrella organization representing certain automobile manufacturers and trade groups filed motions to intervene in support of the National Highway Traffic Safety Administration (NHTSA) in a proceeding filed in the D.C. Circuit to challenge NHTSA's final rule withdrawing California's waiver for its greenhouse gas and zero-emission vehicle (ZEV) program and preempting state programs that regulate vehicle greenhouse gas emissions or create ZEV mandates. Environmental Defense Fund (EDF) filed a protective petition for review in the D.C. Circuit in September to protect its right to judicial review in the event that the federal district court in which EDF and others have filed lawsuits challenging the final rule determines that the district court lacks subject matter jurisdiction. On October 28, EDF and other groups filed a second protective petition for review after the federal government sought to dismiss the district court case or transfer it to the D.C. Circuit. The next day EDF sought voluntary dismissal without prejudice of its original petition. The seven states—Ohio, Alabama, Alaska, Louisiana, Texas, Utah, and West Virginia—sought to intervene "both because California's standards elevate California's sovereignty above other States and because those standards shape the market for the regulated vehicles nationwide." The automaker groups argued that they should be allowed to intervene as of right because they represent a substantial portion of the regulated industry and have an interest in a single national regulatory program. *Environmental Defense Fund v. National Highway Traffic Safety Administration*, No. 19-1200 (D.C. Cir., filed Sept. 27, 2019); *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, No. 19-1230 (D.C. Cir., filed Oct. 28, 2019).

Massachusetts Attorney General Launched Enforcement Action Against Exxon for Allegedly Misleading Investors and Consumers

On October 24, 2019, the Massachusetts attorney general filed a complaint in Massachusetts Superior Court asserting that Exxon Mobil Corporation (Exxon) committed deceptive practices against Massachusetts investors and consumers by failing to disclose climate change risks, misrepresenting its business practices related to use of proxy costs of carbon, misleadingly advertising its products, failing to disclose its products' impacts on climate change, and engaging in greenwashing campaigns. The complaint said Exxon's actions and practices violated the Massachusetts Consumer Protection Act. The attorney general seeks injunctive relief, penalties, the costs investigation, and attorneys' fees. Prior to the filing of the lawsuit, the Superior Court denied an emergency motion by Exxon for an extension of time in which to initiate a meet-and-confer with the attorney general's office. Exxon reportedly argued that it had a right to confer in person and that it could not do so until November due to its attorneys' involvement in the ongoing trial in the New York attorney general's fraud action against Exxon. *Commonwealth v. Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct., filed Oct. 24, 2019).

U.S. Sued to Block Implementation of California-Quebec Cooperation on Greenhouse Gas Emissions

The United States filed a lawsuit in the federal district court for the Eastern District of California seeking to bar California from continuing to implement a 2013 agreement with the provincial government of Quebec, Canada pursuant to which California and Quebec work to harmonize

their greenhouse gas reporting and cap-and-trade programs. The U.S. contended that the agreement—along with a separate agreement between California and the Western Climate Initiative and certain supporting provisions of California law—violated the Constitution by intruding on federal powers to negotiate international agreements. The complaint alleged that "[a]llowing individual states in the Union to conduct their own foreign policy to advance their own narrow interests is … anathema to our system of government and, if tolerated, would unlawfully enhance state power at the expense of the United States and undermine the United States' ability to negotiate competitive international agreements." The U.S. asserted claims under the Treaty Clause, the Compact Clause, the foreign affairs doctrine, and the foreign Commerce Clause. *United States v. California*, No. 2:19-cv-02142 (E.D. Cal., filed Oct. 23, 2019).

States Filed Protective Challenge to EPA Extension of Deadlines for Implementing Landfill Emission Guidelines

California and eight other states filed a protective petition for review in the D.C. Circuit Court of Appeals challenging EPA's final rule published in August 2019 that had the effect of extending certain implementation deadlines for the emission guidelines for municipal solid waste landfills promulgated in 2016. In their petition, the states indicated that they believed a district court order in the Northern District of California would mitigate the final rule's harm, but that it was necessary to file the petition because EPA had filed a motion to amend the district court's order. Environmental Defense Fund also filed a petition for review of EPA's final rule. *California v. EPA*, No. 19-1227 (D.C. Cir., filed Oct. 25, 2019); *Environmental Defense Fund v. EPA*, No. 19-1222 (D.C. Cir., filed Oct. 23, 2019).

Farmers, Ethanol Producers Challenged EPA Decision on Small Refinery Exemptions

Trade groups for producers of ethanol and other biofuels and trade associations for farmers filed a petition for review of EPA's August 2019 decision regarding small refinery exemptions to renewable fuel standard requirements for 2018. *Renewable Fuels Association v. EPA*, No. 19-1220 (D.C. Cir., filed Oct. 22, 2019).

Sierra Club Sought FOIA Response from SEC Concerning Climate Change Shareholder Proposals

Sierra Club filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Securities and Exchange Commission (SEC) asserting that the agency failed to comply with FOIA deadlines and perform an adequate search for records in response to Sierra Club's requests for external communications and internal records regarding shareholder proposals on climate change, greenhouse gas emissions, or the Paris Agreement. Sierra Club's requests also sought records involving the SEC's use of the term "micromanagement" in evaluating shareholder proposals. Sierra Club alleged that the SEC was increasingly using micromanagement as a basis for shareholder proposal no-action letters. The complaint cited, in particular, the SEC's "unprecedented" no-action letter allowing EOG Resources, Inc. to omit from shareholder consideration a proposed resolution requiring the company to set a target for its greenhouse gas emissions. *Sierra Club v. U.S. Securities & Exchange Commission*, No. 4:19-cv-06971 (N.D. Cal., filed Oct. 24, 2019).

Lawsuit Filed Challenging Resource Management Plan Amendment that Makes Bay Area and Central Coast Public Lands Available for Oil and Gas Development

Center for Biological Diversity and Sierra Club filed a lawsuit in the federal district court for the Northern District of California challenging BLM's approval of a resource management plan amendment for a planning area that included California's Bay Area and Central coast. The complaint alleged that the plan amendment would make 725,500 acres available for oil and gas leasing and that BLM's environmental review failed to adequately analyze the impacts of oil and gas development, including effects on greenhouse gas emission and the climate. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 4:19-cv-07155 (N.D. Cal. Oct. 30, 2019).

Lawsuit Asked Court to Require Designation of Critical Habitat for Endangered Hawaiian Plants and Animals

Center for Biological Diversity filed an Endangered Species Act lawsuit in federal court in the District of Hawaii seeking to compel the designation of critical habitat for 14 species of plants and animals from the island of Hawai'i that were listed as endangered in 2013. The complaint alleged that the species were in danger of extinction throughout their range due to serious and ongoing threats including climate change. *Center for Biological Diversity v. Bernhardt*, No. 1:19-cv-00588 (D. Haw., filed Oct. 28, 2019).

New York Asked Federal Court to Require New State-by-State Quotas for Shifting Summer Flounder Fishery

New York State filed a federal lawsuit challenging a final rule that established the 2020–2021 specifications for the summer flounder fishery, including a total annual commercial summer flounder quota and a state-by-state allocation of that quota based on a 1993 allocation rule. New York, along with the New York State Department of Environmental Conservation (DEC) and the DEC Commissioner, alleged that the summer flounder (also known as fluke) population had shifted northeast in the years since the state-by-state quotas were established—"likely due to … factors including ocean warming"—and that New York now has an unfairly low allocation of the quota based on out-of-date data about the summer flounder population. The plaintiffs alleged that this allocation led to, among other things, New York-based fishermen catching summer flounder in waters near Long Island (now the center of the fishery), then traveling to southern states such as Virginia and North Carolina to land their catch, and returning to their home ports in New York. The complaint asserted that the 2020–2021 specifications rule and the 1993 allocation rule were inconsistent with the Magnuson-Stevens Act and arbitrary and capricious. On the same day that New York filed its complaint, the State also filed a motion for summary judgment. New York previously filed a similar lawsuit challenging the 2019 allocation. The district court closed that case after receiving a letter from the federal defendants indicating that they anticipated issuing a proposed rule revising the 1993 state-by-state quotas in September 2019 and finalizing the regulation in March or April 2020; the court said the case could be reopened no later than April 2020. *New York v. Ross*, No. 1:19-cv-09380 (S.D.N.Y., filed Oct. 10, 2019).

Sierra Club Filed Lawsuit Seeking Documents Supporting EPA Administrator's Climate Change Assertions in TV Interview

Sierra Club filed a FOIA lawsuit in federal court in the District of Columbia seeking an order requiring EPA to respond to its request for records on which EPA Administrator Andrew Wheeler relied in a television interview in March 2019 when he asserted that "most of the threats from climate change are 50 to 75 years out." Sierra Club alleged that Wheeler's assertion "directly contradicts the clear consensus of the scientific community, including the United States' own Fourth National Climate Assessment—a monumental work authored by scientists from 13 federal agencies including EPA, and published months before the Administrator's interview." Sierra Club alleged that EPA initially signaled it would comply with the FOIA request but later categorically denied it, claiming that the request was not adequately specific. Sierra Club asserted that this was an improper basis for denial of the request. *Sierra Club v. EPA*, No. 1:19-cv-03018 (D.D.C., filed Oct. 9, 2019).

Environmental Groups Challenged BLM's Failure to Consider Colorado Resource Management Plan's Climate Impacts

Center for Biological Diversity and two other groups filed a lawsuit in federal court in Colorado challenging BLM's approval of a resource management plan in western Colorado that applied to 1,061,400 acres of BLM-administered surface land and 1,231,200 acres of BLM-managed federal mineral estate. The plaintiffs alleged that the plan made 935,600 acres available for oil and gas leasing and that BLM projected that 3,940 wells would be drilled. They asserted that BLM violated NEPA by failing to address foreseeable indirect impacts from downstream combustion of oil and gas resources and by failing to consider cumulative effects to the climate caused by foreseeable oil and gas production under the plan in combination with BLM's nationwide public lands oil and gas program. The plaintiffs also said BLM's failure to consider alternatives to oil and gas leasing and development violated NEPA. *Center for Biological Diversity v. Bernhardt*, No. 1:19-cv-02869 (D. Colo., filed Oct. 8, 2019).

Conservation Groups Alleged Interior Department Failed to Consider Climate Change in Review of Management Plan for Glen Canyon Dam

Three conservation groups filed a lawsuit in federal court in Arizona asserting that the U.S. Department of the Interior's December 2016 plan for managing the Glen Canyon Dam violated NEPA due to the Department's "illegal and willful omission of Colorado River climate change impact projections from the required environmental impacts analysis." The plaintiffs said the Department failed to analyze the environmental consequences of the proposed action on the affected environment, including the cumulative and indirect impacts caused by climate change; improperly drafted the project's purpose and need statement to exclude climate change adaption; failed to consider a reasonable range of alternatives, including numerous reasonable alternatives that would adapt the Dam's operations to climate change impacts; and failed to explain the relationship between relevant land use policies, controls, and guidance documents in regard to the examined alternatives and rejected alternatives and climate change impacts. The plaintiffs also contended that even if the 2016 environmental impact statement was adequate at that time, a supplemental EIS was required because of recently published scientific research on climate

change impacts on the Colorado River. *Save the Colorado v. U.S. Department of the Interior*, No. 3:19-cv-08285 (D. Ariz., filed Oct. 1, 2019).

Lawsuit Filed Challenging Modification to Greater Sage-Grouse Oregon Conservation Plan

Three conservation groups filed a lawsuit challenging BLM's March 2019 decision "to reverse and abandon" a provision of the 2015 conservation plan for the greater sage-grouse in Oregon by closing approximately 22,000 acres to livestock grazing. The plaintiffs alleged that the "ungrazed areas serve as indispensable control sites to study the effects of grazing—and of not grazing—on unique sagebrush plant communities that are essential to the survival and recovery of the sage-grouse." They asserted that the amendment to the conservation violated NEPA by, among other things, failing "to consider the relationship of the plan amendment to global climate change," including failing to consider effects specific to certain areas that lie within BLM-identified Climate Change Conservation Areas." The complaint also asserted a violation of the Federal Land Policy and Management Act. *Oregon Natural Desert Association v. Hanley*, No. 3:19-cv-01550 (D. Or., filed Sept. 27, 2019).

Rhode Island Court to Consider Its Jurisdiction to Review State's Denial of Climate Change Rulemaking Petition

At a hearing on October 28, 2019, a Rhode Island state court held a hearing in a lawsuit challenging the Rhode Island Department of Environmental Management's (RIDEM's) denial in 2018 of a petition requesting that RIDEM initiate rulemaking to address climate change. News accounts reported that the court set a schedule for the parties to address the threshold issue of whether the court had jurisdiction to hear the case. *Duryea v. Rhode Island Department of Environmental Management*, No. PC-2018-7920 (R.I. Super. Ct. Oct. 28, 2019).

CEQA Lawsuit Alleged Plan for Transit-Oriented Development in San Diego Neighborhood Did Not Adequately Analyze Greenhouse Gas Impacts

A community group filed a California Environmental Quality Act lawsuit against the City of San Diego challenging the approval of the Balboa Avenue Station Area Specific Plan, which affects approximately 210 acres and was intended to provide a framework for transit-oriented development. The group alleged that the City failed to adequately analyze the environmental effects of the Plan, including its greenhouse gas impacts. The group also alleged that the Plan violated the City's General Plan and Climate Action Plan. *Friends of Rose Creek v. City of San Diego*, No. 37-2019-00053679-CU-TT-CTL (Cal. Super. Ct., filed Oct. 9, 2019).

State Lawsuit in Colorado Sought Stay on Permitting for Oil and Natural Gas Development Pending Completion of Rulemaking Under New Law

A community organization representing residents of Broomfield, Colorado filed a lawsuit asking a Colorado state court to stay permitting for an application for a horizontal wellbore spacing unit until the Colorado Oil and Gas Conservation Commission completed rulemaking required by SB 19-181. The plaintiff also requested a stay of permitting in all cases involving permitting of any

drilling, pooling, and spacing units until rulemaking was completed. The plaintiff said the new state law required rulemaking that addressed the potential cumulative impacts of oil and gas development as well as rulemaking to minimize emissions of methane and other pollutants from oil and natural gas facilities. *Wildgrass Oil & Gas Committee v. Colorado Oil & Gas Conservation Commission*, No. 2019CV33888 (Colo. Dist. Ct., filed Oct. 8, 2019).

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FEATURED CASE

Fourth Circuit Declined to Stay Remand Order in Baltimore's Climate Case Against Fossil Fuel Companies; Companies Sought Stay from Supreme Court

On October 1, 2019, the Fourth Circuit Court of Appeals denied fossil fuel companies' motion for a stay pending their appeal of the district court order remanding Baltimore's climate change lawsuit against the companies to state court. On the same day, the companies filed an application for a stay in the U.S. Supreme Court. On October 2, the district court granted the companies' motion to temporarily extend its stay of the remand order until the Supreme Court resolves the application. (The district court previously extended the stay of the remand order pending the Fourth Circuit's resolution of the companies' stay motion.) The district court said Baltimore could seek to rescind the temporary extension "as improvidently granted" by filing a motion by October 7. On September 30, the Fourth Circuit tentatively calendared oral argument on the companies' appeal for the December 10–12 argument session. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir. Oct. 1, 2019).

DECISIONS AND SETTLEMENTS

Rhode Island Federal Court Denied Motion to Stay Remand Order in Rhode Island's Climate Change Case

On September 11, 2019, the federal district court for the District of Rhode Island denied oil and gas companies' motion for a stay of the court's July 22 decision remanding the State of Rhode Island's lawsuit seeking to hold the companies liable for climate change impacts. Pursuant to a consent order, the remand order will not be entered until October 10, 2019. On September 13, the companies filed an expedited motion for stay pending appeal in the First Circuit. Briefing on the stay motion was completed on September 26. *Rhode Island v. Chevron Corp.*, No. 1:18-cv-00395 (D.R.I. Sept. 11, 2019).

Colorado Federal Court Remanded Local Governments' Climate Case to State Court

On September 5, 2019, a federal district court in Colorado ruled that oil and gas companies had not met their burden of showing that federal jurisdiction existed for climate change-related claims asserted by Boulder County, San Miguel County, and the City of Boulder. Citing the well-pleaded complaint rule, the court concluded that removal was not appropriate based on federal question jurisdiction because the plaintiffs' claims did not on their face raise the federal issues of energy, the environment, and national security. The court said the defendants' argument

that the plaintiffs' state law claims were governed by federal common law appeared to be a matter of ordinary preemption, which would not provide a basis for federal jurisdiction. The district court also found that the defendants did not establish that the plaintiffs' claims necessarily depended on the resolution of a substantial question of federal law. In addition, the court rejected the contention that the Clean Air Act or foreign affairs doctrine completely preempted the plaintiffs' claims and also indicated that federal common law would not provide a basis for complete preemption. The court also was not persuaded that federal jurisdiction existed based on federal enclave jurisdiction, federal officer jurisdiction, jurisdiction under the Outer Continental Shelf Lands Act, or jurisdiction based on the claims' relationship to bankruptcy proceedings.

On September 6, the court granted the defendants' emergency motion for a temporary stay pending the court's ruling on the defendants' motion for a stay pending appeal. After the defendants filed an appeal of the remand order in the Tenth Circuit, the plaintiffs filed a motion to dismiss all aspects of the appeal except for the defendants' appeal of the district court's determination that there was no federal officer removal jurisdiction. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 1:18-cv-01672 (D. Colo. Sept. 5, 2019), No. 19-1330 (10th Cir., motion for partial dismissal filed Sept. 20, 2019).

D.C. Circuit Dismissed Clean Power Plan Challenges

The D.C. Circuit Court of Appeals granted motions seeking to dismiss as moot the proceedings challenging the Obama administration's Clean Power Plan, which established emission guidelines for greenhouse gases from existing power plants. The court dismissed the proceedings 11 days after the effective date of the U.S. Environmental Protection Agency (EPA) rule repealing the Clean Power Plan and finalizing the final Affordable Clean Energy rule in its place. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. Sept. 17, 2019).

D.C. Circuit Ruled that EPA Must Consider Endangered Species in Setting Renewable Fuel Standards

The D.C. Circuit Court of Appeals sent the 2018 Renewable Fuel Standards rule back to EPA after finding that EPA failed to comply with requirements of the Endangered Species Act. The court said EPA should have consulted with the U.S. Fish and Wildlife Service or National Marine Fisheries Service and made a finding as to whether the Renewable Fuel Standard would affect listed species. The court upheld other aspects of the 2018 standards, including the applicable volumes, restrictions on the use of Renewable Identification Numbers for fuel that is exported, and EPA's accounting for small refinery exemptions. EPA remanded the standards but did not vacate the rule. *American Fuel & Petrochemical Manufacturers v. EPA*, No. 17-1258 (D.C. Cir. Sept. 6, 2019).

District Court Rejected Climate Change Arguments in Challenge to Listing Determination for Rio Grande Cutthroat Trout

The federal district court for the District of Colorado rejected arguments that the U.S. Fish and Wildlife Service (FWS) erred in its analyses of climate change's impact on the Rio Grande

cutthroat trout when it determined in 2014 that the species no longer warranted listing under the Endangered Species Act. The FWS concluded in 2008 that the trout should be listed but reversed course in 2014 and concluded that listing was no longer warranted. The court was not persuaded by the plaintiffs' contention that the FWS had concluded that conservation projects would outpace climate change effects on the trout or by the argument that the FWS erred by abandoning a finding in its 2008 determination that climate change constituted a "severe" threat to the trout that exacerbates other threats. The court did, however, find that the FWS failed to explain different methodologies it used in 2008 and 2014 to calculate the number of healthy populations of the trout. Because the court found that the FWS had acted arbitrarily and capriciously in this respect, the court vacated the 2014 determination in part and remanded for the FWS to explain its rationale for determining the number of healthy populations. *Center for Biological Diversity v. Jewell*, No. 16-CV-1932 (D. Colo. Sept. 26, 2019).

South Dakota Federal Court Granted Preliminary Injunction Against Enforcement of Laws Targeting Pipeline Protesters

The federal district court for the District of South Dakota temporarily enjoined enforcement of provisions of a riot boosting statute enacted in South Dakota in 2019 in response to anticipated protests of the Keystone XL pipeline. The court also temporarily enjoined two felony riot statutes because they went "far beyond" the State's "appropriate interest" in criminalizing participation in a riot with acts of force or violence. The court said the laws' provision for criminal or tort liability for advising, encouraging, or soliciting persons participating in a riot to acts of force or violence was overbroad and vague. In a separate order, the court dismissed a county sheriff from the action because the court found the plaintiffs lacked standing to bring claims against him. *Dakota Rural Action v. Noem*, No. 5:19-cv-05026 (D.S.D. preliminary injunction order and standing order Sept. 18, 2019).

Federal Court Barred Timber Management in Arizona National Forests Pending New Jeopardy Analysis for Mexican Spotted Owl but Upheld Climate Change Analysis

The federal district court for the District of Arizona enjoined the U.S. Forest Service (USFS) from proceeding with timber management actions in 11 national forests in Arizona and directed the FWS and the USFS to reinitiate a formal Section 7(a)(2) consultation pursuant to the Endangered Species Act to reassess the jeopardy analysis and the effect of Forest Plans on recovery of the threatened Mexican spotted owl. The court found that a 2012 no-jeopardy determination was unsupported, arbitrary, and capricious because it did not account for the owl's recovery. The court found, however, that the plaintiff failed to show that the defendants had not considered climate change effects on the Mexican spotted owl and therefore held that the FWS's analysis of climate change was neither arbitrary nor capricious. *WildEarth Guardians v. U.S. Fish & Wildlife Service*, No. 4:13-cv-00151 (D. Ariz. Sept. 12, 2019).

Minnesota Supreme Court Declined to Review Claims Regarding Environmental Review for Oil Pipeline

The Minnesota Supreme Court denied petitions for further review of an appellate court decision finding all but one aspect of the environmental review for the Enbridge Line 3 oil pipeline

project to be adequate. (The appellate court said the Minnesota Public Utilities Commission gave inadequate attention to the potential impact of an oil spill in the Lake Superior watershed.) The StarTribune reported that the non-profit group Honor the Earth and the Mille Lacs Band of Ojibwe filed one petition, and Friends of the Headwaters filed another petition, each arguing that there were other shortcomings in the Public Utilities Commission's review. *In re Enbridge Energy, LP*, No. __ (Minn. Sept. 17, 2019).

Washington High Court Declined to Review Decision Giving Pipeline Protester Right to Present Necessity Defense

The Washington Supreme Court denied a petition to review an intermediate appellate court's determination that a pipeline protester should be allowed to present a climate change necessity defense. The Climate Defense Project, which represents the defendant, said the Supreme Court decision made Washington the first state to affirmatively recognize the right of a climate activist to offer the necessity defense at trial. *State v. Ward*, No. 97182-0 (Wash. Sept. 4, 2019).

California Appellate Court Again Directed Dismissal of Lawsuits Raising Concerns About Climate Change Impacts on Oroville Dam Operations

The California Court of Appeal again concluded that the Federal Power Act (FPA) preempted application of state environmental laws to a relicensing of the Oroville Dam. The appellate court therefore ruled that state courts were without jurisdiction to consider claims that a California Environmental Quality Act review should have considered the impacts of climate change on continued operation of the dam. The court previously reached the same conclusion in December 2018, but the California Supreme Court directed it to reconsider the case in light of the Supreme Court's 2017 decision in *Friends of the Eel River v. North Coast Railroad Authority*, which concerned the preemptive effect of the federal Interstate Commerce Commission Termination Act of 1995 (ICCTA). In its 2019 opinion, the Court of Appeal wrote that ICCTA was "materially distinguishable" from the FPA because unlike ICCTA, the FPA is not "deregulatory" in nature. The Court of Appeal also said the plaintiffs incorrectly construed the project subject to environmental review as the "dam and facilities as built" but that the "correct view" was that the project subject to review was a project "to further mitigate the loss of habitat caused by construction of the dam in 1967." The court said this "correct view of the project" involved only questions of federal law and concluded that the plaintiffs therefore failed to tender an issue over which the court had jurisdiction. *County of Butte v. Department of Water Resources*, No. C071785 (Cal. Ct. App. Sept. 5, 2019).

Maryland Appellate Court Said Residents Lacked Standing to Challenge Update to Master Plan

The Maryland Court of Special Appeals ruled that a group of residents did not have standing to bring claims challenging a District Council's approval of an update to a master plan for a portion of Montgomery County. The residents alleged, among other things, that approval of the plan was illegal and ultra vires because the plan's potential impact on greenhouse gas emissions had not been assessed, as required by County law. The court concluded that "property owner standing"

was not a basis to challenge the plan, which was a "comprehensive zoning" action, and that the residents failed to plead facts supporting taxpayer standing. *Bennett v. Montgomery County*, No. 302 (Md. Ct. Spec. App. Sept. 3, 2019).

New York Court Dismissed Challenge to Local Zoning Law that Restricted Development of Solar Facilities

A New York trial court dismissed a lawsuit challenging a town zoning ordinance that restricted utility-scale solar collection systems to commercial and industrial zones. As a threshold matter, the court found that property owners who were concerned about fossil fuel consumption and sought to imminently use their land for renewable energy generation had standing under the New York State Environmental Quality Review Act (SEQRA), even though the property owners also asserted an economic concern regarding the long-term economic viability of their properties that would not on its own constitute a cognizable injury under SEQRA. The court also ruled that the property owners had standing to challenge the zoning ordinance and that an unincorporated citizens association formed to promote a proposed solar project had organizational standing even if the association's purpose benefited its members economically. On the merits, the court found that the respondents had taken the hard look required by SEQRA, rejecting arguments that they failed to consider (1) the New York State Energy Plan and its renewable energy target; (2) the pending solar project; (3) the impact on fossil fuel emissions; and (4) global climate change. The court also deferred to the town's authority in land use matters and found that the zoning ordinance was a valid exercise of local police power. The court noted that New York State had recognized by statute that climate change was adversely affecting New York and that development of solar and other renewable energy was critical to the State's efforts to combat climate change. The court concluded, however, that local governments could consider the negative impacts of solar energy in their land use decision-making as well as other interests such as protecting agricultural land. *Friends of Flint Mine Solar v. Town Board of Coxsackie*, No. 19-0216 (N.Y. Sup. Ct. Sept. 13, 2019).

D.C. Court Dismissed Counterclaims in Climate Scientist's Defamation Lawsuit

The D.C. Superior Court dismissed counterclaims brought by an individual writer against the climate scientist Michael Mann in Mann's defamation lawsuit against National Review, the Competitive Enterprise Institute, and two individuals. The court said the writer had already availed himself of the remedy offered by D.C.'s anti-SLAPP (Strategic Lawsuit Against Public Participation) statute—i.e., a special motion to dismiss with lower burden of proof, a stay of discovery when the motion is pending, a special motion to quash discovery requests, and the recovery of attorneys fees. The court said the writer, having lost the special motion to dismiss, could not "seek the same remedy in the guise of a counterclaim"; the court concluded that the "Anti-SLAPP statute does not create an implied right to affirmatively assert a claim against the plaintiff." The court also found that Mann's lawsuit did not constitute state action and therefore dismissed the writer's constitutional tort claim. In addition, the court found that the writer failed to allege elements of an abuse of process or a malicious prosecution claim. The court also declined to "create a new tort named abusive litigation." *Mann v. National Review, Inc.*, No. 2012 CA 008263 B (D.C. Super. Ct. Aug. 29, 2019).

Massachusetts Court Upheld State Approval of Coastal Landfill's Expansion

On July 26, 2019, a Massachusetts state court upheld a Massachusetts Department of Environmental Protection (MassDEP) decision authorizing expansion of a landfill in the Town of Saugus. Conservation Law Foundation (CLF) and the Town of Saugus had appealed the MassDEP's decision. CLF's allegations included that the landfill's coastal location "makes it extremely vulnerable to climate change impacts, including sea level rise and damaging storm surge, creating a significant risk of erosion and of pollution from the Landfill washing into the surrounding rivers and coastal wetlands." News coverage of the court's decision affirming MassDEP's decision did not discuss the climate change-related allegations. The Board of Health filed a notice of appeal on August 26, 2019. *Conservation Law Foundation v. Massachusetts Department of Environmental Protection*, No. 1884CV01431 (Mass. Super. Ct. July 26, 2019); *Town of Saugus Board of Health v. Massachusetts Department of Environmental Protection*, No. 1884CV01419 (Mass. Super. Ct. July 26, 2019).

Board of Land Appeals Set Aside BLM Vegetation Management Plan in Southern Utah but Rejected Challengers' Climate Change Arguments

The Interior Board of Land Appeals (IBLA) rejected claims that the U.S. Bureau of Land Management (BLM) failed to take a hard look at greenhouse gas emissions and climate change impacts of a vegetation management project on 54,018 acres northeast of Kanab, Utah. But IBLA set aside approval of the project because it found both that BLM failed to consider the project's cumulative effects on migratory birds and that BLM approved the use of non-native seed in ways that were inconsistent with the applicable land use plan. Regarding greenhouse gas emissions and climate change, BLM concluded that greenhouse gas emission factors were not sufficiently refined for quantifying emissions at the project level without site-specific measurements and data, which meant BLM could neither quantify nor assess specific climate change impacts due to project emissions that were below EPA's greenhouse gas reporting threshold of 25,000 tons per year. IBLA said it was satisfied with BLM's explanation for why a detailed analysis or quantification of emissions and climate change impacts would not be feasible or useful. IBLA also said the quantification of emissions for a project in Oregon did not necessarily mean BLM could quantify similar emissions from this project. *In re Southern Utah Wilderness Alliance*, No. IBLA 2019 94 (IBLA Sept. 16, 2019).

NEW CASES, MOTIONS, AND NOTICES

Parties Challenging Clean Power Plan Repeal Opposed Motions to Expedite; Motion Filed for Abeyance

Petitioners challenging EPA's repeal and replacement of the Clean Power Plan opposed EPA's and aligned intervenors' motions to expedite the case. The petitioners argued that the motions did not satisfy the standard described in the D.C. Circuit's Handbook of Practice and Internal Procedures for expediting cases, which states that the court "grants expedited consideration very rarely" and that the reasons "must be strongly compelling." The petitioners also argued that granting the motion would prejudice the petitioners' interests. Later in September,

Environmental and Public Health Petitioners and State and Municipal Petitioners filed their own motion requesting that the court hold the proceedings in abeyance pending EPA final action on petitions for reconsideration. *American Lung Association v. EPA*, Nos. 19-1140 et al. (D.C. Cir.).

States Filed Lawsuit Challenging Trump Administration's Changes to the Endangered Species Act Regulations

Seventeen states, the District of Columbia, and New York City filed a lawsuit in the federal district court for the Northern District of California challenging amendments to the regulations implementing the Endangered Species Act (ESA). The plaintiffs asserted that the amendments violated the ESA's plain language and purpose, as well as "its legislative history, numerous binding judicial precedents interpreting the ESA, and its precautionary approach to protecting imperiled species and critical habitat," including by limiting designation of unoccupied critical habitat, "particularly where climate change poses a threat to species habitat." The plaintiffs also contended that the defendants failed to provide reasoned analysis for the changes and overlooked important issues, including the need to address threats from climate change. The plaintiffs asserted claims under the ESA, the Administrative Procedure Act, and the National Environmental Policy Act. The plaintiffs indicated that their case was related to the previously filed *Center for Biological Diversity v. Bernhardt*. *California v. Bernhardt*, No. 3:19-cv-06013 (N.D. Cal., filed Sept. 25, 2019).

Citing Resiliency and Sea Level Rise Concerns, Environmental Groups and California Challenged Negative Jurisdictional Determination for Redwood City Salt Ponds

Four regional environmental organizations and the State of California filed lawsuits in federal district court for the Northern District of California challenging the EPA's determination that the Redwood City Salt Ponds were not within the jurisdiction of the Clean Water Act. The organizations' complaint alleged that the Salt Ponds consisted of approximately 1,365 acres that are "one of the last remaining undeveloped areas along the San Francisco Bay's shorelines" and that the protection of such areas "will help the surrounding area be resilient to climate impacts." The complaint asserted that EPA's negative jurisdiction concluding that the Salt Ponds are not waters of the United States ignored numerous factors and was not consistent with the Clean Water Act and that it would lead to impacts on water quality and exacerbate the consequences of sea level rise. California alleged that the negative jurisdictional determination would make it more likely that the Salt Ponds would be developed, impairing the State's ability to control and mitigate sea level rise impacts in San Francisco Bay. The State asserted that the determination violated the Administrative Procedure Act. *San Francisco Baykeeper v. EPA*, No. 3:19-cv-05941 (N.D. Cal., filed Sept. 24, 2019); *California v. Wheeler*, No. 3:19-cv-05943 (N.D. Cal., filed Sept. 24, 2019).

Lawsuit Said Determination that Island-Dwelling Lizard Was Not Endangered or Threatened Was Unlawful

The Center for Biological Diversity (CBD) filed a lawsuit in federal district court in the Southern District of Florida claiming that the U.S. Fish and Wildlife Service's decision not to list the Florida Keys mole skink under the ESA was unlawful. The complaint alleged that the skink is "a

severely imperiled, island-dwelling lizard that is steadily losing what remains of its limited habitat to urban development and rising seas." CBD said the FWS failed to provide a rational explanation for finding that the skink was not endangered or threatened even though the agency's projections indicated that sea level rise would inundate half of the skink's habitat by 2060 and nearly all of it by 2100. The complaint also alleged that the FWS "ignored or dismissed myriad cumulative impacts of climate change," including increased storm surge and changes in precipitation and temperature. The complaint asserted that FWS failed to use best available scientific data in violation of the ESA and unlawfully limited the "foreseeable future" to 2060 when the FWS had projections through 2100. In addition, the complaint asserted that the FWS failed to consider the ESA's five listing factors, failed to lawfully analyze whether the skink was threatened or endangered "in a significant portion of its range," failed to apply the definitions of "endangered" and "threatened," and acted arbitrarily and capriciously. On September 27, the parties agreed to the dismissal of the lawsuit without prejudice in contemplation of the filing of an amended complaint in a related Freedom of Information Act case already pending before the court. *Center for Biological Diversity v. Bernhardt*, No. 2:19-cv-14353 (S.D. Fla., filed Sept. 23, 2019).

States and Cities Challenged Rule Preempting State Regulation of Vehicle Carbon Dioxide Emissions

On September 19, EPA Administrator Andrew Wheeler and National Highway Traffic Safety Administration (NHTSA) Acting Administrator James Owens signed a final rule in which EPA withdrew the waiver that allowed California to promulgate greenhouse gas standards for vehicles and establish a zero-emission vehicle (ZEV) mandate. The rule also finalized text in NHTSA regulations explicitly preempting state regulation of carbon dioxide emissions from vehicles. EPA and NHTSA described these actions as "legal matters that are independent of the technical details" of proposed federal greenhouse gas and Corporate Average Fuel Economy standards for light-duty vehicles that EPA and NHTSA have not yet finalized. EPA and NHTSA said the final waiver and preemption actions were necessary to ensure "the existence of one Federal program for light vehicles." On September 20, California, 23 other states, the District of Columbia, New York City, and Los Angeles filed a lawsuit in federal district court in the District of Columbia against the Secretary of Transportation, Owens, the U.S. Department of Transportation, and NHTSA. The states asserted that the preemption regulation exceeded NHTSA's authority, that the regulation contravened the Energy Policy and Conservation Act of 1975 and the Clean Air Act, and that NHTSA failed to consider the regulation's environmental impacts as required by the National Environmental Policy Act. On September 27, nine nonprofit organizations filed a similar lawsuit challenging the NHTSA regulation. *California v. Chao*, No. 1:19-cv-02826 (D.D.C., filed Sept. 20, 2019); *Environmental Defense Fund v. Chao*, No. 1:19-cv-02907 (D.D.C., filed Sept. 27, 2019).

Conservation Groups and Climate Scientist Challenged Logging and Biomass Plant in Northern California

Earth Island Institute, Sequoia Forestkeeper, Greenpeace, and climate scientist James Hansen filed a lawsuit in the federal district court for the Northern District of California challenging federal and state authorizations for a logging project and biomass power plant on public

forestland burned during the Rim Fire in 2013. The complaint alleged that the U.S. Department of Housing and Urban Development (HUD) and the California Department of Housing and Community Development (HCD) improperly used disaster relief funds for logging activities and that HUD, HCD, and U.S. Forest Service violated the National Environmental Policy Act. The plaintiffs contended that environmental impact statements (EISs) from 2014 and 2016 should have been supplemented with new information about the forest's natural regeneration and that the biomass plant should have been considered in the same EISs as the logging project. The complaint's allegations included that the EISs failed to analyze the environmental impacts of logging for biomass energy production, including increased greenhouse gas emissions, and that the climate and greenhouse gas effects of logging would be different than what was studied in the EISs due to differences in logging "post-fire large, dead trees" for lumber and removing and burning "trees of all sizes, both live and dead, and including the young, naturally-regenerating forest, for biomass energy production." The plaintiffs later filed a motion for a temporary restraining order or preliminary injunction. The federal defendants filed to dismiss the case for improper venue or to transfer the case to the Eastern District of California. *Earth Island Institute v. Nash*, No. 3:19-cv-05792 (N.D. Cal., filed Sept. 16, 2019).

FOIA Lawsuit Filed Seeking Documents Regarding Dismissal of NOAA Acting Administrator

A non-profit organization filed a Freedom of Information Act (FOIA) lawsuit in the federal district court for the District of Columbia seeking to compel the National Oceanic and Atmospheric Administration (NOAA) to respond to a request for documents related to the removal of retired U.S. Navy Rear Admiral Tim Gallaudet as acting administrator of NOAA. The complaint alleged that Gallaudet "had earned plaudits for advancing the agency's priorities in ocean and atmospheric sciences without succumbing to political interference with climate research." *Democracy Forward Foundation v. National Oceanic & Atmospheric Administration*, No. 1:19-cv-02751 (D.D.C., filed Sept. 16, 2019).

Conservation Groups Challenged Environmental Review for 130 Oil and Gas Lease Sales in Utah

Three conservation groups challenged 130 oil and gas lease sales covering 175,357 acres of public lands in Utah for failing to consider indirect and cumulative greenhouse gas emissions and climate change impacts. The complaint asserted that the National Environmental Policy Act (NEPA) reviews for the lease sales, which were conducted between 2014 and 2018, considered no indirect greenhouse gas emissions other than carbon dioxide emissions from combustion and failed to analyze downstream emissions for non-carbon dioxide emissions and emissions that occurred after drilling but prior to combustion. The complaint also alleged that the NEPA reviews did not quantify cumulative emissions of other past, present, or reasonably foreseeable oil and gas lease sales but instead provided "only broad and generic statements regarding the nature of the climate crisis." *Living Rivers v. Hoffman*, No. 4:19-cv-00074 (D. Utah, filed Sept. 12, 2019).

Lawsuit Filed Challenging 2015 Determination that Listing Sonoran Desert Tortoise as Endangered or Threatened Was Not Warranted

WildEarth Guardians and Western Watersheds Project challenged the U.S. Fish and Wildlife's October 2015 decision that listing of the Sonoran desert tortoise under the Endangered Species Act was "not warranted." The complaint included a number of climate change-related allegations. It alleged that the FWS failed to consider and adequately apply the five threat factors for determining whether a species is endangered and threatened, including by failing "to consider and analyze how climate change is already impacting and will continue to directly, indirectly, and cumulatively impact the Sonoran desert tortoise and its habitat now and into the foreseeable future." In addition, the complaint alleged that the FWS "arbitrarily dismissed the best available science on climate change impacts," which predicted increased severity of droughts in the tortoises' range. The plaintiffs also contended that in the analysis of whether the tortoise was in danger of extinction in a "significant portion of its range," the FWS did not consider significance variables and factors such as climate change that, unlike the threat of urban development, might not have geographic concentrations. *WildEarth Guardians v. Bernhardt*, No. 4:19-cv-00441 (D. Ariz. Sept. 5, 2019).

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FEATURED CASE

Environmental Groups, States, and Cities Launched Challenges to Clean Power Plan Repeal; EPA Sought to Expedite Proceeding

On August 13, 2019, 22 states, the District of Columbia, and six cities filed a petition for review of EPA's repeal of the Clean Power Plan and promulgation of the Affordable Clean Energy rule in its place. They were joined on August 14 by 10 environmental groups, who filed a separate petition, and on August 29 by the Chesapeake Bay Foundation. All petitions were consolidated with the proceeding filed in July by two public health organizations. On August 28, EPA filed a motion seeking to expedite the D.C. Circuit's consideration of the case. EPA requested a briefing schedule in which petitioners would file opening briefs by December 5, and briefing would be completed in February, potentially allowing oral argument as early as April 2020. The petitioners did not consent to the motion. A number of entities applied to intervene in support of EPA in the proceeding, including coal companies Murray Energy Corporation and Westmoreland Mining Holdings LLC, the national association of rural electric cooperatives, the U.S. Chamber of Commerce, owners of coal-fired generating facilities, and a trade association of companies involved in the production, transportation, and use of coal to produce electricity. *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.); *New York v. EPA*, No. 19-1165 (D.C. Cir., filed Aug. 13, 2019); *Appalachian Mountain Club v. EPA*, No. 19-1166 (D.C. Cir., filed Aug. 14, 2019); *Chesapeake Bay Foundation v. EPA*, No. 19-1173 (D.C. Cir., filed Aug. 29, 2019).

DECISIONS AND SETTLEMENTS

D.C. Circuit Dismissed Challenges to Renewable Fuel Standard Rules

The D.C. Circuit rejected a set of challenges to Renewable Fuel Standard (RFS) program rules. First, the court upheld the U.S. Environmental Protection Agency's (EPA's) denial of petitions to

reconsider its 2010 "point of obligation" rule that imposed RFS compliance obligations on refiners and importers but not on blenders. Second, the court upheld EPA's decision not to reassess categories of "obligated parties" when it issued the 2017 annual standards. Third, the court rejected challenges to EPA's cellulosic biofuel projection for 2017 and the decision not to use the entirety of the discretionary cellulosic waiver to lower the 2017 requirements for advanced biofuel and total renewable fuel. Fourth, the court rejected a claim that the 2018 volume for biomass-based diesel was too low. *Alon Refining Krotz Springs, Inc. v. EPA*, Nos. 16-1052 et al. (D.C. Cir. Aug. 30, 2019).

Colorado State Senator Agreed to Unblock Constituent Who Criticized Him on Climate Change

A Colorado resident and a Colorado state senator reached an agreement to resolve a lawsuit filed by the resident in May 2019 seeking an injunction requiring the state senator to unblock the plaintiff—whom the complaint characterized as "an outspoken critic" of the state senator, including on climate change issues—from his social media discussions. The complaint alleged that the state senator had banned the plaintiff from his Facebook page and blocked her interactions with his Twitter account in 2017 after she wrote a blog article and posted comments critical of the state senator's positions on climate change and climate science. In a joint motion to dismiss the case, the parties said the state senator had not been aware of case law addressing whether government officials could ban users on social media accounts based on the users' viewpoints. The motion then cited recent cases that found such bans to be unconstitutional viewpoint discrimination. While the state senator did not take a position on the case law, he agreed to unblock the plaintiff, to refrain from blocking individuals and organizations from his official social media accounts, and to pay the plaintiff $25,000 in attorneys' fees and costs. *Landman v. Scott*, No. 1:19-cv-01367 (D. Colo. Aug. 30, 2019).

Arizona Federal Court Stayed Pro Se Climate Suit Pending Resolution of *Juliana*

The federal district court for the District of Arizona granted federal defendants' motion to stay a pro se plaintiff's lawsuit asserting climate change-related claims. The defendants sought to stay the case pending the Ninth Circuit's resolution of the appeal in *Juliana v. United States*, arguing in their motion that a stay was appropriate given that the issues were "virtually identical" to those in *Juliana*. In its two-page order granting the motion, the court stayed the pro se action until *Juliana* is resolved in the federal district court in Oregon and established deadlines by which the plaintiff would have to act after resolution of *Juliana* in order to lift the stay. Three of the *Juliana* plaintiffs moved to intervene in the pro se action, contending that the plaintiff had "substantially plagiarized" their complaint and that his lawsuit could adversely affect their case. *Komor v. United States*, No. 4:19-cv-00293 (D. Ariz. Aug. 27, 2019).

Federal Court Agreed with EPA that FOIA Exemption Applied to Model for Greenhouse Gas Emission Standards

The federal district court for the Southern District of New York ruled that EPA properly withheld the "core model" component of a tool for evaluating greenhouse gas emissions vehicle standards under the Freedom of Information Act's (FOIA's) "deliberative process privilege."

The court described the core model of the "Optimization Model for Reducing Emissions of Greenhouse Gasses from Automobiles" (OMEGA) as "a computer program … , which applies a series of algorithms to the input data to yield the output data." In concluding that the FOIA exemption applied, the court first found that the deliberative process privilege did not apply solely to letters and memoranda. The court then found both that the OMEGA model was "predecisional" even though EPA did not rely on it in developing the greenhouse gas vehicle standards proposed in August 2018 and also that the OMEGA model was "deliberative" because "its disclosure 'would inaccurately reflect or prematurely disclose the views of the agency' regarding [] how to analyze input data and the role of certain analytical tools … in determining [greenhouse gas] emissions standards." The court further concluded that EPA had satisfied FOIA's "foreseeable harm" requirement by describing how disclosure of the OMEGA model would chill internal discussion. The court also found that EPA had provided a "detailed justification" for its determination that non-exempt material was not segregable. *Natural Resources Defense Council v. EPA*, No. 18-cv-11227 (S.D.N.Y. Aug. 22, 2019).

Federal Court Declined to Sever and Transfer Conservation Groups' Challenges to Sage Grouse Plans

The federal district court for the District of Idaho denied intervenors' motions to sever and transfer a case challenging the U.S. Bureau of Land Management's (BLM's) sage grouse plans for 15 sub-regions in 10 western states. The plaintiffs originally challenged plans issued by the Obama administration and later supplemented their challenges with additional claims, including a failure to evaluate climate change impacts, after BLM revised the plans, allegedly in response to a directive from Secretary of the Interior Ryan Zinke to relax restrictions on oil and gas development in sage grouse habitat. The court was not persuaded by the intervenors' arguments that local concerns justified severing the case and transferring the challenges to the sage grouse plans for a particular state to the federal court in that state. The court said this argument ignored the complaint's allegations of "common failings" that "were heavily influenced by directions from the Trump Administration and the Interior Secretary." The court concluded that severing the case would require duplicative arguments and perhaps lead to conflicting decisions, and that circumstances had not changed since the court rejected a previous motion to sever and transfer. *Western Watersheds Project v. Bernhardt*, No. 1:16-CV-83 (D. Idaho Aug. 16, 2019).

Nevada Federal Court Again Found that BLM's Analysis of Oil and Gas Lease Impacts Was Sufficient

The federal district court for the District of Nevada denied environmental groups' request for partial reconsideration of its decision that BLM had satisfied its National Environmental Policy Act obligations in connection with issuance of oil and gas leases for approximately 198,000 acres of land. Although the court found that its previous order was based on an incorrect interpretation of certain BLM regulations and Ninth Circuit case law, the court nonetheless agreed with BLM that an environmental impact statement was not required because BLM had sufficiently analyzed the impacts of oil and gas development in its environmental assessment. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 3:17-cv-00553 (D. Nev. Aug. 15, 2019).

Conservation Group Voluntarily Dismissed Lawsuit to Compel Determination on Joshua Tree After Fish and Wildlife Service Said Threatened Listing Was Not Warranted

On August 15, 2019, WildEarth Guardians voluntarily dismissed a lawsuit it had filed only two days earlier to compel the U.S. Fish and Wildlife Service (FWS) to make a 12-month finding on a petition to list the Joshua tree as threatened under the Endangered Species Act. WildEarth Guardians submitted the petition in September 2015, and FWS issued a positive 90-day finding in September 2016. On August 14, 2019, FWS issued a determination that listing was not warranted. The August 13 complaint alleged that climate change and drought threatened to "completely eradicate" the Joshua tree by 2100. *WildEarth Guardians v. Bernhardt*, No. 2:19-CV-7025 (E.D. Cal., filed Aug. 13, 2019; voluntary dismissal Aug. 15, 2019).

New York Court Imposed Limits on Exxon Document Requests to Third-Party Witnesses in Climate Fraud Action

In the New York attorney general's enforcement action against Exxon Mobil Corporation (Exxon) alleging climate change-related fraud, the trial court agreed with the attorney general that Exxon's document discovery requests from third-party witnesses were excessive. The court reportedly concluded that Exxon was entitled to third-party witnesses' communications with the Office of the Attorney General but that Exxon could not "go on a gigantic, burdensome fishing expedition" for documents unrelated to the case. The trial is scheduled to begin on October 23, 2019. *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Aug. 5, 2019).

FERC Found that New York Waived Section 401 Authority for Constitution Pipeline

The Federal Energy Regulatory Commission (FERC) issued an order reversing its previous determination that the New York State Department of Environmental Conservation (NYSDEC) had not waived its authority under Section 401 of the Clean Water Act to issue or deny a water quality certification for the Constitution Pipeline, a 125-mile-long natural gas pipeline extending from Pennsylvania to New York. FERC issued the order on voluntary remand from a D.C. Circuit proceeding challenging the previous no-waiver determination so that FERC could consider the D.C. Circuit's 2019 decision in *Hoopa Valley Tribe v. FERC*, which held that withdrawal and resubmission of water quality certification applications "does not trigger" a new one-year statutory period of review. FERC concluded that *Hoopa Valley* compelled a finding of waiver based on NYSDEC's failure to act on the pipeline developer's Section 401 application within one year and on NYSDEC's actions encouraging the developer's withdrawal and resubmission of its application for the purpose of avoiding the one-year waiver period. *In re Constitution Pipeline Co., LLC*, No. CP18-5 (FERC Aug. 28, 2019).

Rhode Island Federal Court Allowed Plaintiff to Amend Complaint in Lawsuit Challenging Shell Terminal's Climate Readiness

The federal district court granted Conservation Law Foundation's (CLF's) motion for leave to amend its complaint in its lawsuit asserting that Shell Oil Products US and other defendants failed to prepare the Shell Terminal in Providence, Rhode Island for the impacts of climate change. The court allowed CLF to add an additional cause of action under the Resource

Conservation and Recovery Act and also to add two additional defendants. Defendants must file their motion to dismiss by October 4, 2019. *Conservation Law Foundation v. Shell Oil Products US*, No. 1:17-cv-00396 (D.R.I. July 23, 2019).

NEW CASES, MOTIONS, AND NOTICES

Baltimore Said Fourth Circuit Should Reject Appeal of Remand Order in Climate Case; Amicus Briefs Filed in Support of Remand

On August 27, 2019, the Mayor and City Council of Baltimore (Baltimore) filed a brief arguing that the Fourth Circuit should reject oil and gas companies' appeal of a district court's order remanding Baltimore's climate change lawsuit to state court. Baltimore argued that the appellate court only had jurisdiction to consider the companies' argument that the federal-officer removal statute provided jurisdiction; Baltimore further argued that the district court correctly rejected this basis for removal. In addition, Baltimore contended that the district court properly rejected the companies' other asserted grounds for removal. Seven amicus briefs were filed in support of Baltimore. Amicus parties included (1) three organizations representing the interests of local governments; (2) a group of scholars and scientists "with strong interests, education, and experience in the environment and the science of climate change, with particular interest in public information and communication about climate change and how the public and public leaders learn about and understand climate change," along with organizations that advocate for climate change policies; (3) Natural Resources Defense Council; (4) a group of climate scientists and scholars that submitted a brief to assist the court with its "understanding of the relevant science and the unavoidable adaptation expenses … communities are facing"; (5) nine states; (6) Senators Sheldon Whitehouse and Edward Markey; and (7) Public Citizen, which expressed concern about improper invocation of removal jurisdiction. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir. Aug. 27, 2019).

States, D.C., Environmental Groups Challenged Penalty Reduction for Violations of Vehicle Standards

Twelve states, the District of Columbia, and two environmental groups filed petitions for review in the Second Circuit Court of Appeals challenging the National Highway Traffic Safety Administration's (NHTSA's) decision to reverse an inflation adjustment to the civil penalty for violations of Corporate Average Fuel Economy standards. NHTSA determined that the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act) did not apply and further concluded that even if the Inflation Adjustment Act did apply, the increased penalty rate would have a negative economic impact and therefore that in accordance with the Energy Policy and Conservation Act of 1975 and the Energy Independence and Security Act of 2007, the lower rate should be reinstated. *Natural Resources Defense Council, Inc. v. National Highway Traffic Safety Administration*, No. 19-2508 (2d Cir., filed Aug. 12, 2019); *New York v. National Highway Traffic Safety Administration*, No. 19-2395 (2d Cir., filed Aug. 2, 2019).

Citing Sea Level Rise and Other Risks, Nonprofit Group Filed Suit to Block Decommissioning Plan for Nuclear Plant

A nonprofit group filed a federal lawsuit in the Southern District of California to block implementation of the decommissioning plan for the San Onofre Nuclear Generating Station (SONGS) in California. The defendants are the utilities that own SONGS, the U.S. Nuclear Regulatory Commission (NRC), and the manufacturer of canisters used for storage of spent nuclear fuel. The complaint asserted that the NRC's approval of the plan violated the Administrative Procedure Act and that the plan constituted a public nuisance. The complaint also asserted a strict products liability claim against the canister manufacturer. The plaintiff alleged that the defendants were "risking the lives of millions of California residents and the prospect of irreparable harm to the environment by removing spent nuclear fuel from a storage location specifically designed and used for that purpose for decades," transporting it into defective canisters, and "dropping it into holes a mere 108 feet from one of California's most populated public beaches, within a tsunami zone, surrounded by active fault lines." Among the risks alleged in the complaint were that if sea levels rise at the rate projected by climate change experts, the results could be "catastrophic." *Public Watchdogs v. Southern California Edison Co.*, No. 3:19-cv-01635 (S.D. Cal., filed Aug. 29, 2019).

Citing Amended Regulations, EPA Sought to Extend Court-Ordered Deadline for Federal Plan for Landfill Emission Guidelines

EPA filed a motion to amend a November 6 deadline set by a California federal court for promulgation of a federal plan to implement 2016 emission guidelines for existing municipal solid waste landfills. EPA told the court that a final rule signed on August 16, 2019 had extended the deadline for states to submit their own plans from May 30, 2017 to August 29, 2019, and that related amendments to the emission guideline regulations adopted as part of the Affordable Clean Energy rule gave EPA two years to promulgate a federal plan from the time that the agency finds that a state has failed to submit a plan or has not submitted a satisfactory plan. EPA said that in light of the new rules, there was no nondiscretionary duty for EPA to issue a federal plan until at least August 30, 2021. EPA also published notice of a proposed federal plan on August 22. *California v. EPA*, No. 4:18-cv-03237 (N.D. Cal. Aug. 26, 2019).

Lawsuit Challenging Amended Endangered Species Act Regulations Raised Climate Change Concerns

Seven organizations filed a lawsuit in the federal district court for the Northern District of California challenging amendments to the Endangered Species Act (ESA) regulations. The plaintiffs asserted that the regulations undermined and violated the ESA and that the U.S. Fish and Wildlife Service and National Marine Fisheries Service had failed to comply with the National Environmental Policy Act. Among the amendments challenged in the lawsuit is the revised definition of "foreseeable future." The amendments provided that "foreseeable future" extends "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." The complaint alleged that the "likely" requirement "increased the level of certainty required to protect species, contravening Congress's intent to 'give the benefit of the doubt to the species'" and that "[t]he consequence of imposing this increased certainty requirement is that species facing extinction from the impacts of climate change or other future events involving prediction and uncertainty will improperly be

deprived of protection until after it is too late to prevent their extinction, violating the ESA's command to use the best available science." *Center for Biological Diversity v. Bernhardt*, No. 3:19-cv-05206 (N.D. Cal., filed Aug. 21, 2019).

Lawsuit Filed to Compel Designation of Critical Habitat for Coral Species

The Center for Biological Diversity filed a lawsuit in federal court in the District of Columbia asserting that the National Marine Fisheries Services (NMFS) had failed to comply with its nondiscretionary obligation under the Endangered Species Act to designate critical habitat for five species of Florida and Caribbean coral and seven species of Pacific coral. NMFS designated the species as threatened in 2014. The complaint alleged that the coral species face an "extinction crisis due to the threats of climate change, ocean acidification, disease, overfishing, and pollution, among others" but that "bold and immediate action" to protect habitats could improve resiliency for many species. *Center for Biological Diversity v. Ross*, No. 1:19-cv-02526 (D.D.C., filed Aug. 21, 2019).

Louisiana Pipeline Protesters Sued Pipeline Company and Law Enforcement Officers

Three individuals who were arrested at a protest against the Bayou Bridge Pipeline in August 2018 filed a lawsuit in federal court in Louisiana asserting that the pipeline's developer, a private security company, officers of the Louisiana Department of Public Safety & Corrections, a local sheriff, and other unnamed defendants violated their rights under federal and state law. The complaint alleged that environmental activists had vehemently opposed the pipeline, which they believed could exacerbate coastal erosion and "could contribute to rising sea levels, leaving coastal communities more vulnerable to hurricanes, in addition to threatening wildlife and contaminating drinking water in the surrounding areas." The plaintiffs asserted violations of the First, Fourth, and Fourteenth Amendments as well as rights established by the Louisiana Constitution. The plaintiffs also asserted intentional tort claims, including intentional infliction of emotional distress, assault, battery, and false imprisonment. *Spoon v. Bayou Bridge Pipeline LLC*, No. 3:19-cv-00516 (M.D. La., filed Aug. 9, 2019).

Shareholder Derivative Lawsuit Filed Against Exxon in New Jersey Federal Court over Misrepresentations About Proxy Cost of Carbon

An Exxon shareholder filed a shareholder derivative lawsuit against Exxon board members and executive officers in the federal district court for the District of New Jersey. The shareholder asserted that from 2014 through 2016 Exxon "was the lone 'supermajor' oil and gas company that refused to writedown its assets during the prolonged price collapse," until the company disclosed a $2 billion impairment charge in January 2017. The complaint alleged that the defendants knew or were grossly negligent or reckless in not knowing that Exxon's actual investment and asset valuation processes did not incorporate proxy costs of carbon in a manner that was consistent with Exxon's public representations and internal policies; that Exxon did not incorporate proxy costs into the impairment evaluation processes; and that certain operations and assets were operating at a loss or impaired. The shareholder further alleged that the defendants' misconduct caused Exxon to expend resources defending itself in a related securities class action suit in federal court in Texas and in an investigation and lawsuit by the New York attorney

general. The shareholder also said the defendants' actions "irreparably damaged Exxon's corporate image and goodwill." The complaint asserted claims of breach of fiduciary duty, waste of corporate assets, and unjust enrichment, as well as claims under the Securities Exchange Act of 1934 against certain defendants who are also defendants in the related securities class action. *Saratoga Advantage Trust Energy & Basic Materials Portfolio v. Woods*, No. 3:19-cv-16380 (D.N.J., filed Aug. 6, 2019).

Plaintiffs Challenged BLM Approvals for Oil and Gas Permits in New Mexico; Court Said It Would Not Rush to Hear Motion for Injunctive Relief

On August 1, 2019, four environmental groups filed a complaint and a motion for a temporary restraining order and preliminary injunction in the federal district court the District of New Mexico challenging BLM's approval of at least 255 applications for permits to drill in Mancos Shale/Gallup formations. The complaint—which cited significant increases in methane emissions as a consequence of continued expansion of Mancos Shale development—alleged that BLM continued to approve drilling permits despite having failed to complete its assessment of hydraulic fracturing and even though the Tenth Circuit ruled that BLM had failed to considered the cumulative impacts of oil and gas production in the Mancos Shale. On August 28, the court issued a sua sponte order to explain why it had not yet set a hearing on the plaintiff's motion for preliminary relief. The court noted the burdens it and other southwest border courts were facing and the need to prioritize criminal cases. The court also said it saw no basis for a temporary restraining order and that the plaintiffs' request for injunctive relief might be subject to a ripeness challenge. *Diné Citizens Against Ruining the Environment v. Bernhardt*, No. 1:19-cv-00703 (D.N.M., filed Aug. 1, 2019).

Environmental Groups Challenged Opening of Utah Public Lands to Off-Highway Vehicle Use

Environmental and conservation groups filed a lawsuit in Utah federal court challenging BLM's decision to lift a 12-year-old ban on cross-country off-highway vehicle (OHV) travel on 5,400 acres of public lands east of the entrance to Capitol Reef National Park. The complaint—which asserted violations of the National Environmental Policy Act and the Administrative Procedure Act—alleged that BLM was allowing OHV use without performing environmental review of its impacts, including climate change impacts. The complaint alleged that "[i]n a changing climate, aridification combined with land uses that increase dust emissions have synergistic and significant consequences." *Natural Resources Defense Council v. McCarthy*, No. 4:19-cv-00055 (D. Utah, filed Aug. 1, 2019).

U.S. Sugar Brought Suit Alleging "Unprecedented" Releases from Lake Okeechobee Violated NEPA

United States Sugar Corporation (U.S. Sugar) filed a lawsuit against the U.S. Army Corps of Engineers in federal court in the Southern District of Florida asserting that the Corps violated the National Environmental Policy Act (NEPA) by failing to prepare a new or supplemental environmental impact statement (EIS) before releasing "unprecedented amounts" of water from Lake Okeechobee, allegedly "driving the Lake to extreme low levels and man-made drought."

The complaint alleged that the existing EIS and Regulation Schedule, from 2007 and 2008, respectively, did not anticipate or provide for the releases undertaken by the Corps beginning in November 2018. U.S. Sugar said the Corps' declaration that the 2007 EIS provided "coverage" under NEPA for the releases "flouts the law by ignoring the changes in operations and the changes in circumstances" since 2007, including the Corps' development of additional science regarding risks from climate change. *United States Sugar Corp. v. Semonite*, No. 9:19-cv-81086 (S.D. Fla., filed Aug. 1, 2019).

Group Filed Lawsuit Seeking Documents from Minnesota Attorney General About Private Lawyers Allegedly Placed to Pursue Climate Cases

A nonprofit corporation filed a lawsuit against Minnesota Attorney General Keith Ellison to compel the production of documents related to "a major political donor's program to place privately hired attorneys" in the offices of state attorneys general "to initiate investigations of perceived opponents" of policies and actions to address climate change. The information sought included correspondence between the Office of the Attorney General and a plaintiffs' law firm and an individual in another state attorney general's office. The plaintiff alleged that through similar requests to other state attorneys general it had obtained information demonstrating "clear relationships" between state attorneys general and the program to place private lawyers in their offices. The plaintiff asserted claims under the Minnesota Government Data Practices Act. *Energy Policy Advocates v. Ellison*, No. __ (Minn. Dist. Ct., filed Aug. 14, 2019).

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FEATURED CASE

Oregon Federal Court Dismissed Climate Case That Claimed a "Right to Wilderness"

The federal district court for the District of Oregon dismissed a lawsuit in which two nonprofit organizations and six individuals claimed that climate change and the government's failure to protect them from climate change violated their constitutional rights. The court ruled that the plaintiffs failed to allege the particularized harm necessary for standing because climate change is "a diffuse, global phenomenon that affects every citizen of the world." The court further ruled that it lacked jurisdiction to make the "policy decisions" that would be required to grant the relief sought by the plaintiffs, which related to federal policies on fossil fuels, agriculture, logging, and family planning. In addition, the court found no basis for the plaintiffs' assertions of a fundamental right to wilderness and therefore found that they failed to state a claim upon which relief could be granted. The court distinguished the district court's decisions in *Juliana*, writing that the *Juliana* plaintiffs "did not object to the government's role in just *any* pollution or climate change, but rather *catastrophic* levels of pollution or climate change." The court also said the right to a "stable climate system" at issue in *Juliana* was narrower than the right to wilderness for which the plaintiffs advocated in this case. *Animal Legal Defense Fund v. United States*, No. 6:18-cv-01860 (D. Or. July 31, 2019).

DECISIONS AND SETTLEMENTS

Maryland Federal Court Declined to Stay Remand Order in Baltimore's Climate Case Against Oil and Gas Companies; Stay to Remain in Place While Companies Seek Stay in Fourth Circuit

On July 31, 2019, the federal district court for the District of Maryland denied oil and gas companies' motion for a stay of the June 10 remand order returning the Mayor and City Council of Baltimore's (Baltimore's) climate change lawsuit to state court. The companies had sought to stay the remand order until the Fourth Circuit resolves their appeal. Instead, a stay agreed to by Baltimore will remain in place pending the resolution of the companies' anticipated motion for a stay in the Fourth Circuit. Although the district court agreed with the companies that removal of the case based on application of federal law raised "complex and unsettled" legal questions, the court concluded that appellate jurisdiction in this case would likely extend only to the issue of whether the case was properly removed under the federal officer removal statute, an issue on which the court concluded the companies had not demonstrated a substantial likelihood of success. The court further found that the companies had not demonstrated irreparable harm since the appeal would only be rendered moot in the event a state court entered final judgment before the appeal was resolved. The court also was not persuaded that the cost of litigating in state court would cause irreparable injury and disagreed with the companies' contention that federal courts were "uniquely qualified" to address the issues presented in the case. Regarding the harm to the opposing party and weighing the public interest, the district court found that the impacts of further delay of litigation on the merits of Baltimore's claims weighed against a stay. The court also noted that even if the remand order were vacated, interim proceedings in state court "may well advance" the case's resolution in federal court. Briefing in the Fourth Circuit has already begun, with the opening brief filed by the oil and gas companies on July 29, 2019. The companies argue that the Fourth Circuit has jurisdiction to consider their appeal and that Baltimore's claims were properly removed on multiple grounds. Baltimore's response brief is due by August 27, 2019, and any reply brief is due within 21 days of service of the response brief. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 1:18-cv-02357 (D. Md. July 31, 2019), No. 19-1644 (4th Cir.).

Federal Court Granted State of Rhode Island's Motion to Remand Climate Change Case Against Oil and Gas Companies, but Stayed Remand Order for 60 Days

The federal district court for the District of Rhode Island remanded the State of Rhode Island's climate change lawsuit against oil and gas companies to state court. The court found that the companies had not carried their burden of showing that the case belonged in federal court. First, the court rejected the companies' arguments that the State artfully pleaded its claims to avoid federal jurisdiction. The court said federal common law—which the defendants said necessarily governed the State's claims—could not completely preempt the State's public nuisance claim "absent congressional say-so." The court also was not persuaded that the Clean Air Act or foreign affairs doctrine completely preempted the state-law claims. In addition, the court found that the issues of foreign affairs, federal regulations, and navigable waters raised by the companies were not disputed and substantial federal issues that the federal court could entertain "without disturbing any congressionally approved balance of federal and state judicial responsibilities." The court said the federal issues were issues that the defendants "may press in

the course of this litigation, but that are not perforce presented by the State's claims." The court also rejected the defendants' arguments for removal under "bespoke jurisdictional law," i.e., the Outer Continental Shelf Lands Act, federal enclave jurisdiction, the federal officer removal statute, the bankruptcy removal statute, and admiralty jurisdiction. The court stayed the remand order for 60 days to allow the parties to brief whether a stay pending appeal is warranted. *Rhode Island v. Chevron Corp.*, No. 1:18-cv-00395 (D.R.I. July 22, 2019).

D.C. Circuit Upheld Authorizations for Atlantic Sunrise Natural Gas Pipeline Project

The D.C. Circuit Court of Appeals dismissed challenges to the Federal Energy Regulatory Commission's (FERC's) authorization of the Atlantic Sunrise Project, a natural gas pipeline expansion extending from Pennsylvania to Alabama. With respect to climate change, the court rejected the argument that FERC had not factored downstream greenhouse gas emissions into its environmental review. Although the court agreed with the petitioners that FERC was obligated to consider both the direct and indirect effects of the project and that downstream greenhouse gas emissions are "just such an indirect effect," the court found that FERC had already taken the required steps by estimating the amount of carbon dioxide emissions resulting from the gas that the project would transport and predicting that those emissions would be partially offset by reductions in higher carbon-emitting fuel that the project's natural gas would replace. The court said the petitioners failed to identify "what more [FERC] should have said." The court also rejected a claim that FERC improperly segmented its review of the Atlantic Sunrise Project by failing to consider the project's "synergistic effect" on emissions associated with the Southeast Market Pipeline. *Allegheny Defense Project v. Federal Energy Regulatory Commission*, No. 17-1098 (D.C. Cir. Aug. 2, 2019).

Ninth Circuit Affirmed Dismissal of Challenge to Coal Mining on Navajo Land

The Ninth Circuit Court of Appeals affirmed the dismissal of a lawsuit challenging federal agency actions that reauthorized coal mining activities on land reserved to the Navajo Nation. The Ninth Circuit agreed with the district court that the Navajo Transitional Energy Company (NTEC)—a corporation wholly owned by the Navajo Nation and the owner of the coal mine—was a required party that could not be joined due to tribal sovereign immunity. The Ninth Circuit further concluded that the district court had not abused its discretion in determining that the lawsuit could not proceed without NTEC. *Diné Citizens Against Ruining Our Environment v. U.S. Bureau of Indian Affairs*, No. 17-17320 (9th Cir. July 29, 2019).

D.C. Circuit Denied Rehearing of Determination That Organization Lacked Standing to Challenge Review of Natural Gas Compression Facilities

The D.C. Circuit Court of Appeals denied petitions for rehearing and rehearing en banc of its judgment that it lacked jurisdiction to hear a challenge to the Federal Energy Regulatory Commission's review of natural gas compression facilities in New York because the organizational petitioner failed to demonstrate Article III standing. *Otsego 2000, Inc. v. Federal Energy Regulatory Commission*, No. 18-1188 (D.C. Cir. July 22, 2019).

Federal Court Postponed Remedies Ruling to Allow Federal Defendants to Complete Environmental Assessment of Ending Federal Coal Moratorium

The federal district court for the District of Montana postponed its remedies ruling in the case challenging Secretary of the Interior Ryan Zinke's lifting of the Obama administration's moratorium on federal coal leasing. In April 2019, the court ruled that the lifting of the moratorium was subject to the National Environmental Policy Act (NEPA), and in May, the federal defendants issued a 35-page draft environmental assessment (EA). Although the plaintiffs argued that the appropriate remedy for the defendants' failure to comply with NEPA was vacatur and contended that the draft EA did not overcome the deficiencies, the court concluded that it was appropriate to postpone a ruling on remedies to allow the federal defendants to complete their environmental review. The defendants told the court that they anticipated they would reach a determination on whether an environmental impact statement was required by August 5, 2019. *Citizens for Clean Energy v. U.S. Department of the Interior*, No. 4:17-cv-00030 (D. Mont. July 31, 2019).

Federal Court Declined to Enjoin Activity on Challenged Oil and Gas Leases

The federal district court for the District of Columbia denied a request by plaintiffs to enjoin the U.S. Bureau of Land Management (BLM) from authorizing new oil and gas drilling on Colorado and Utah leases challenged in this case. The court previously granted BLM's motion for voluntary remand of the National Environmental Policy Act environmental review documents associated with the Colorado and Utah leases so that BLM could supplement its review in accordance with the court's March 2019 decision finding the analysis of greenhouse gas emissions associated with Wyoming leases also at issue in the case to be deficient. The court said the motion to reconsider its remand order was not the proper vehicle for obtaining injunctive relief and concluded it could not amend its remand order to grant injunctive relief in the absence of any briefing on the merits of the plaintiffs' claims pertaining to the Colorado and Utah leases. The court also denied the plaintiffs' motion to enforce its March 2019 order to continue enjoining activity on the Wyoming leases. Because BLM had completed supplementary analysis by preparing revised environmental assessments and findings of no significant impact and because the court declined "to second-guess BLM's performance of its duties," the court found that the plaintiffs had received the relief provided by the March 2019 decision. The court said the plaintiffs would have to supplement their complaint to raise any new claims regarding BLM's revised analysis. The court warned BLM, however, that it would "not hesitate to unwind any improper grants of authority to drill on the Wyoming, Colorado, or Utah land." *WildEarth Guardians v. Bernhardt*, No. 1:16-cv-01724 (D.D.C. July 19, 2019).

Federal Court Cited Absence of Consideration of Climate Change Effects in Granting Preliminary Injunction That Restricted Grazing on Federal Allotments in Oregon

The federal district court for the District of Oregon partially granted three conservation groups' motion for a preliminary injunction barring grazing on certain allotments. The plaintiffs asserted that the federal defendants violated NEPA, the Federal Land Policy and Management Act, and BLM regulations when they renewed the grazing permits of a family-owned Oregon ranching corporation whose officers had been convicted of intentionally setting fires on public lands and

were later pardoned by President Trump. The court found that the plaintiffs had shown a likelihood of success on the merits of their NEPA claim and had demonstrated irreparable harm from the level of grazing authorized in the renewed permits (though not at the reduced level proposed by the defendants). In considering the defendants' basis for arguing that there would be no irreparable harm, the court noted that evaluations and assessments on which the defendants relied did not consider the proposed grazing's impacts in combination with other factors such as climate change or take into account current conditions such as the effects of climate change and fire. The court also said that the fact that grazing had taken place on the allotments in the past did not prevent the plaintiffs from demonstrating irreparable harm since circumstances had changed, including due to climate change causing increased temperatures. *Western Watersheds Project v. Bernhardt*, No. 2:19-cv-00750 (D. Or. July 16, 2019).

Federal Court Declined to Add Climate Change Documents to Record in Coal Lease Challenge

The federal district court for the District of Utah declined to add 14 documents related to climate change to the administrative record in a challenge to a federal coal lease. The plaintiffs had argued that the documents should be added to assist the court in determining whether significant new information about climate change arose after the environmental impact statement (EIS) was prepared in 2002 that would require a supplemental EIS. The court said the federal agencies had not ignored the issue of climate change in making their decision to issue the lease and therefore found no clear deficiency in the record. The court also found that the plaintiffs failed to show that the agency actions could not be properly reviewed without the additional documents. The court did allow the addition of other documents to the record and also found that discovery would be unnecessary. *WildEarth Guardians v. Zinke*, No. 2:16-cv-00168 (D. Utah July 8, 2019).

Connecticut Federal Court Said Resiliency Concerns Did Not Require Further Attention to Bridge Alternatives

The federal district court for the District of Connecticut granted summary judgment to federal and state transportation agencies and officials in a lawsuit challenging the environmental review for a bridge replacement project in Norwalk, Connecticut. The court was not persuaded by the plaintiffs' arguments that the defendants had failed to consider the resiliency benefits of a fixed bridge alternative. The court said the decision not to move forward with the fixed bridge options was reasonable and that resiliency considerations did not create a requirement that the defendants consider a low-level fixed bridge option. *Norwalk Harbor Keeper v. U.S. Department of Transportation*, No. 3:18-cv-0091 (D. Conn. July 8, 2019).

Maryland High Court Said State Law Preempted Local Land Use Authority over Solar Energy Systems

The Maryland Court of Appeals ruled that state law preempted local zoning authority with respect to solar energy generating systems (SEGS) that require a Certificate of Public Convenience and Necessity issued by the Maryland Public Service Commission. The question of state and local authority to determine whether and where SEGS can be constructed arose in a

case concerning a SEGS to be built on two contiguous farms totaling 86 acres. After landowners challenged local approvals for the SEGs, the SEGS developer sought a pre-appeal determination challenging the court's jurisdiction on the ground of state law preemption by implication. The Court of Appeals affirmed lower court determinations that the state public utilities law preempted by implication local authority approval for siting and location and SEGS. The Court of Appeals said the state law was comprehensive and specifically gave local authorities an advisory role. In describing the statutory framework for the public utilities law, the court noted the intent of the legislature to reduce greenhouse gas emissions and to move the energy market away from reliance on fossil fuels. *Board of County Commissioners of Washington County v. Perennial Solar, LLC*, No. 66 (Md. July 15, 2019).

Iowa Supreme Court Upheld State Utilities Board's Approval of Dakota Pipeline

The Iowa Supreme Court affirmed the Iowa Utilities Board's approval of the construction of the Dakota Access pipeline and use of eminent domain for easements for the pipeline. Among the arguments rejected by the court was the petitioners' contention that the pipeline did not meet the constitutional definition of "public use" under the Iowa Constitution and the Fifth Amendment of the U.S. Constitution. The court recognized that "a serious and warranted concern about climate change underlies some of the opposition to the Dakota Access pipeline" and that as a matter of policy a carbon tax might be appropriate to force all players in the marketplace "to bear the true cost of their carbon emissions." However, the court determined that "policy making is not our function, and as a legal matter we are satisfied that the Dakota Access pipeline meets the characteristics of a public use under the Iowa and United States Constitutions." *Puntenney v. Iowa Utilities Board*, No. 17-0423 (Iowa May 31, 2019).

New York Appellate Court Said Town Did Not Have to Consider Potential Benefits of Quarry on Climate Change-Affected Water Levels

A New York appellate court rejected claims that a town board in upstate New York erred when it conducted its environmental review of a law that created a wildlife refuge overlay district in which mining was prohibited. One of the petitioner mining company's arguments was that the town board should have considered a proposed stone quarry's potential beneficial impacts on water levels in light of the effects of climate change. The appellate court said the town board "had the discretion to select the environmental impacts most relevant to its determination and to overlook those 'of doubtful relevance.'" *Matter of Frontier Stone, LLC v. Town of Shelby*, No. 162 CA 18-01316 (N.Y. App. Div. July 31, 2019).

New Jersey Appellate Court Said Permit Review for Pipeline Did Not Require Consideration of Global Warming Impact

A New Jersey appellate court affirmed a joint permit issued by the New Jersey Department of Environmental Protection for a .68-mile-long portion of a 30-mile natural gas pipeline. Among other things, the court found that NJDEP had properly exercised its power under the Coastal Area Facility Review Act (CAFRA) and issued the permit after making the required findings about the project's impact on the environment. The court said it was not necessary for NJDEP to address factors not set forth in CAFRA, including the project's impact on global warming. *In re*

New Jersey Department of Environmental Protection CAFRA Permit No. 0000-15-007.1 CAF 150001 & Freshwater Wetlands Protection Act Permit No. 0000-15-0007.1 FWW 15001 Issued to New Jersey Natural Gas, No. A-3293-16T1 (N.J. Super. Ct. App. Div. July 22, 2019).

California Appellate Court Upheld Streamlined CEQA Review for Sacramento Condominium Project

The California Court of Appeal upheld City of Sacramento approvals for a high-rise condominium building for which the City conducted a streamlined California Environmental Quality Act (CEQA) review based on determining that the project qualified as a "transit priority project" and was consistent with the regional transportation plan and sustainable communities strategy. California's Sustainable Communities and Climate Protection Act authorizes use of the streamlined sustainable communities environmental assessment (SCEA) for projects that meet these criteria. The appellate court said there was no dispute that substantial evidence supported the City's determination that the project was consistent with the strategy and that "[p]laintiff's concern that some type of environmental review may not occur by using an SCEA in this instance is a complaint to take to the Legislature." *Sacramentans for Fair Planning v. City of Sacramento*, No. C086182 (Cal. Ct. App. July 8, 2019).

Minnesota Appellate Court Sent EIS for Oil Pipeline Back to Public Utilities Commission

The Minnesota Court of Appeals reversed the Public Utilities Commission's determination that the final environmental impact statement (FEIS) for the proposed Enbridge Line 3 oil pipeline project was adequate. Although the court upheld the Commission's conclusion that the consideration of many issues, including upstream greenhouse gas emissions, was adequate, the court found that the FEIS was inadequate because it did not address the potential impact of an oil spill into the Lake Superior watershed. *In re Enbridge Energy, LP*, Nos. A18-1283 et al. (Minn. Ct. App. June 3, 2019).

Colorado Court Said Auto Dealer Association Lacked Standing to Challenge Low Emission Vehicle Standards

A Colorado District Court ruled that a non-profit association representing Colorado automobile dealers did not have standing to challenge Colorado's low emission automobile regulations, which require that automobile manufacturers build and certify light- and medium-duty vehicles sold in Colorado that comply with California vehicle emissions standards beginning with 2022 model year vehicles. The court concluded that the alleged economic impact on dealers did not constitute an injury-in-fact sufficient to confer standing and, moreover, that the claimed harm was not to a legally protected interest. The court therefore granted the state defendants' motion to dismiss. *Colorado Automobile Dealers Association v. Colorado Department of Public Health & Environment*, No. 2019CV30343 (Colo. Dist. Ct. July 8, 2019).

NEW CASES, MOTIONS, AND NOTICES

States Filed Challenge to Penalty Reduction for CAFE Standard Violations

Twelve states and the District of Columbia filed a petition for review in the D.C. Circuit Court of Appeals asking it to set aside a National Highway Traffic Safety Administration (NHTSA) final rule that reversed a December 2016 increase in the civil penalty for violating corporate average fuel economy (CAFE) standards. NHTSA concluded that the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015 did not apply to automobile manufacturers that fail to meet CAFE standards and are unable to offset the deficit with compliance credits. NHTSA also determined that even if the Act did apply, increasing the civil penalty would have a negative economic impact and that the current penalty rate should therefore continue to apply. *New York v. National Highway Traffic Safety Administration*, No. __ (D.C. Cir., filed Aug. 2, 2019).

First Lawsuit Filed Challenging Repeal and Replacement of Clean Power Plan

On July 8, 2019, the American Lung Association and American Public Health Association filed the first petition for review challenging the U.S. Environmental Protection Agency's (EPA's) final rule repealing the Obama administration's Clean Power Plan and replacing it with the Affordable Clean Energy Rule, which establishes emission guidelines for existing coal-fired power plants based on heat rate improvement as the best system of emissions reduction. *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir., July 8, 2019).

Clean Power Plan Challengers Sought Dismissal of Proceedings as Moot

After EPA published a final rule repealing the Clean Power Plan and finalizing new greenhouse gas emission guidelines for coal-fired power plants, petitioners in the proceedings challenging the Clean Power Plan asked the D.C. Circuit Court of Appeals to dismiss those proceedings as moot. EPA filed responses supporting dismissal. States and public health and environmental organizations that intervened to defend the Clean Power Plan opposed dismissal as premature because the new rule does not take effect until September 6. The respondent-intervenors asked the court to deny the motions or hold them in abeyance. The respondent-intervenors also noted that a challenge to the repeal and replacement rule had already been filed and that more petitioners for review were anticipated. The respondent-intervenors reserved their rights to object to the revival of the petitioners' claims in this case should those proceedings result in the D.C. Circuit vacating the repeal of the Clean Power Plan. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir.).

***City of Oakland* and *County of San Mateo* Appeals to Be Heard by Same Panel**

The Ninth Circuit Court of Appeals granted a motion by oil and gas companies to assign Oakland and San Francisco's appeal of the district court decisions denying remand and dismissing their climate change nuisance actions to the same panel that will hear the companies' appeals of the order remanding the County of San Mateo's and three other climate lawsuits to California state court. The court subsequently notified the parties that it was considering the cases for an upcoming oral argument and asked for information on counsel's availability in November, December, and January. *County of San Mateo v. Chevron Corp.*, Nos. 18-15499 et al. (9th Cir.); *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir.).

Petitioners Sought Rehearing of D.C. Circuit Decision Upholding FERC Review for Natural Gas Compression Facility

Petitioners filed a petition for rehearing and rehearing en banc of the D.C. Circuit Court of Appeals decision that rejected their challenge to the environmental review for a natural gas compression facility despite expressing concerns regarding the Federal Energy Regulatory Commission's (FERC's) efforts to fully consider the project's indirect greenhouse gas impacts. The petitioners argued that the D.C. Circuit's decision directly contradicted its 2017 holding in the Sabal Trail Pipeline case, which involved "nearly identical facts." The petitioners also contended that the case involved "a question of exceptional importance with far reaching consequences." They further argued that the D.C. Circuit's conclusion that it lacked jurisdiction to consider the petitioners' argument because they had not preserved the argument before FERC was "unfounded" because FERC's denial that the project had any indirect impacts left the petitioners without an opportunity to develop the record on indirect impacts on rehearing. *Birckhead v. Federal Energy Regulatory Commission*, No. 18-1218 (D.C. Cir. July 19, 2019).

Lawsuit Filed to Compel Endangered Species Act Determination on Emperor Penguins

The Center for Biological Diversity (CBD) filed a lawsuit in federal court in the District of Columbia to compel the U.S. Fish and Wildlife Service (FWS) to issue a finding as to whether listing the emperor penguin under the Endangered Species Act (ESA) is warranted. CBD petitioned for the listing of the emperor penguin in 2011 and asserted the FWS violated the ESA and the Administrative Procedure Act by failing to make a 12-month finding in response to the petition. The complaint alleged that the emperor penguins "face a potentially insurmountable threat: anthropogenic climate change," and cited a 2019 study that documented a "catastrophic breeding failure" during the past three years in the world's second-largest colony following record low sea-ice extent and early sea-ice breakup as well as a 2017 study projecting a global population decline of 40–99% by the century's end. *Center for Biological Diversity v. Bernhardt*, No. 1:19-cv-02282 (D.D.C., filed July 31, 2019).

Colorado Plaintiffs Challenged Constitutionality of Local Sign Law That Prevented Posting of Their Call for Action on Global Warming

Two individuals sued a Colorado town claiming that its sign code was an unconstitutional content-based restriction that violated their free speech rights and was unconstitutionally vague. The complaint alleged that one of the plaintiffs, a resident of the town, wished to display three pieces of political art designed by the other plaintiff in his front yard to protest President Trump and call for action on global warming. The plaintiffs alleged that they had not posted the artworks due to the town's threat of enforcement. They asserted that the sign code violated the U.S. Constitution and Colorado Constitution both facially and as applied. *Jensen v. Town of Fraser*, No. 1:19-cv-02131 (D. Colo., filed July 25, 2019).

Environmental Groups Challenged Oil and Gas Leases in Arizona

Three environmental groups filed a lawsuit in the federal district court for the District of Arizona challenging BLM's issuance of oil and gas leases covering land parcels near rural towns, the

Navajo Nation, Petrified Forest National Park, the Coconino Aquifer, and the Little Colorado River. The plaintiffs asserted violations of NEPA, the National Historic Preservation Act, and the Federal Land Policy and Management Act. The plaintiffs alleged that the federal defendants improperly relied on 30-year-old environmental analysis that did not anticipate oil and gas development or consider significant new information about the local environment, wildlife, new oil and gas technologies, and climate change. *Center for Biological Diversity v. Suazo*, No. 3:19-cv-08204 (D. Ariz., filed July 15, 2019).

Lawsuit Filed to Compel Listing Decision on Plant Species in Desert Southwest

The Center for Biological Diversity and the Maricopa Audubon Society filed a lawsuit seeking to compel the U.S. Fish and Wildlife Service to determine whether to list the Arizona eryngo—a plant species with only two remaining populations in the U.S.—as endangered or threatened under the Endangered Species Act. The plaintiffs asserted that the FWS violated the ESA and the Administrative Procedure Act by failing to issue a 12-month final determination in response to the plaintiffs' submission of a listing petition in April 2018. The plaintiffs alleged that the Arizona eryngo can live "only in silty groundwater-fed wetlands unique to the desert Southwest, known as ciénegas" and that "ciénegas have been nearly wiped out over the past century by groundwater pumping, overgrazing, altered patterns of water infiltration and runoff, and reductions in stream baseflows." The complaint alleged that in addition to habitat modification, climate change also posed one of the greatest threats to the eryngo and its habitat. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 4:19-cv-00354 (D. Ariz., filed July 12, 2019).

Conservation Groups Sought Listing of Southern Mountain Caribou as Endangered or Threatened

Three conservation groups filed a lawsuit to compel the FWS to issue a final rule listing the Southern Mountain Caribou distinct population segment (DPS) as threatened or endangered under the Endangered Species Act and to make a final determination on the designation of critical habitat. The complaint alleged that the FWS had already found that the Southern Mountain Caribou faced significant threats, including destruction and curtailment of habitat due to logging, forest fires, insect outbreaks, human development, recreation, and climate change. The FWS proposed listing the DPS as threatened in 2014 and reopened the proposed rule for comments in 2015 and 2016. *Center for Biological Diversity v. Bernhardt*, No. 2:19-cv-00265 (D. Idaho, filed July 10, 2019).

Environmental Groups Challenged Environmental Review of Mining Plan for Expanded Colorado Coal Mine

Five environmental groups filed a lawsuit in the federal district court for the District of Colorado challenging federal approval of a mining plan for the 1,720-acre expansion of the West Elk Coal Mine in western Colorado. The plaintiffs asserted that the federal respondents violated the National Environmental Policy Act (1) by failing to consider an alternative that would reduce or offset methane pollution associated with coal mining, (2) by failing to support their conclusion that a previously prepared supplemental environmental impact statement covered activities

permitted by the mining plan, (3) by failing to take a hard look at the cumulative impacts of climate change in conjunction with other similar federal coal approvals and proposals and in light of new climate science and information, and (4) by failing to take hard look at impacts on fish and water resources. The plaintiffs also filed a motion for a preliminary injunction *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-01920 (D. Colo., filed July 2, 2019).

Lawsuit Filed to Compel Critical Habitat Designation for Threatened Ice Seals

The Center for Biological Diversity filed a lawsuit in Alaska federal court asserting the National Marine Fisheries Service (NMFS) violated the Endangered Species Act by failing to designate critical habitat for the Arctic subspecies of ringed seal and the Beringia DPS of the bearded seal. NMFS listed both species as threatened in 2012. The complaint alleged that NMFS has acknowledged that "best available science demonstrates that the earth will continue to warm throughout this century and that the warming will cause a dramatic loss of sea ice and snow cover in the Arctic." The complaint further alleged that best available science "shows that such losses will likely cause a precipitous decline in the ringed and bearded seal populations and that both species will disappear from most of the places they currently live within the foreseeable future." The plaintiff asked the court to order NMFS to designated critical habitat for both species "by a reasonable date certain." *Center for Biological Diversity v. Ross*, No. 3:19-cv-00165 (D. Alaska, filed June 13, 2019).

California Challenged Termination of Federal Funding for High-Speed Rail Project

In May, California and the California High-Speed Rail Authority filed an action in federal court challenging the Federal Railroad Administration's (FRA's) termination of almost $1 billion in federal grant funding for the California high-speed rail project. The complaint alleged that the project is "a critical part of California's long-term strategic planning, not only to address critical transportation needs, but also greenhouse gas emissions and climate change." The plaintiffs asserted that the termination violated the Administrative Procedure Act because it was contrary to the FRA's policies, procedures, and regulations, as well as its ordinary practices and was also contrary to statutory requirements, inconsistent with the parties' course of dealings, not based on examination of relevant data, and precipitated by "President Trump's overt hostility to California, its challenge to his border wall initiatives, and what he called the 'green disaster' high-speed rail project." *California v. U.S. Department of Transportation*, No. 3:19-cv-02754 (N.D. Cal., filed May 21, 2019).

Lawsuit Filed Challenging "New, Sprawl City" on Edge of Los Angeles County

In May, the Center for Biological Diversity and California Native Plant Society filed a lawsuit challenging the environmental review for a development project on 12,323 acres on Los Angeles County's border with Kern County. The project, which the petition called "a new, sprawl city," would include 19,333 houses and 8.4 million square feet of commercial, industrial, and business park uses. The petitioners alleged that the project is "exactly the type of leapfrog sprawl development that climate legislation such as SB 375 sought to prevent" and that it would generate 75,000 new vehicle trips per day, with an average trip length of 45 miles. The petitioners contended that the greenhouse gas emissions generated by these trips "will be many

orders of magnitude greater than those of a non-sprawl development and will hinder California's efforts to combat climate change." They asserted, among other things, that the project's greenhouse gas emissions were not adequately analyzed or mitigated in Los Angeles County's CEQA review and that the project is inconsistent with the greenhouse gas goals of the Los Angeles County General Plan. *Center for Biological Diversity v. County of Los Angeles*, No. 19STCP02100 (Cal. Super. Ct., filed May 28, 2019).

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FEATURED CASE

Federal Court Said Baltimore's Climate Case Against Oil and Gas Companies Belonged in State Court

The federal district court for the District of Maryland remanded the City of Baltimore's climate change lawsuit against oil and gas companies to state court. The court concluded that federal question jurisdiction did not exist and also rejected alternative bases for federal jurisdiction. First, the court rejected the defendants' argument that federal common law governed Baltimore's state law nuisance claim as a "cleverly veiled preemption argument." The court said ordinary preemption was merely a defense and did not permit it to treat the claim as if it had been pleaded under federal law for jurisdictional purposes. The court further concluded that federal common law would not support removal even under the complete preemption doctrine because the defendants had not shown that any federal common law claim for public nuisance was available and case law suggested that the Clean Air Act displaced any such claim. Second, the court found that the case did not fall within the "slim category" of cases in which federal question jurisdiction exists for state law claims that raise substantial and disputed federal issues. Although the court acknowledged that there were "federal *interests* in addressing climate change," the court said the defendants had not established that "a federal issue" such as foreign policy or a federal regulatory scheme was a necessary element of Baltimore's claims. Third, the court rejected the argument that the foreign affairs doctrine or the Clean Air Act completely preempted Baltimore's claims. Fourth, the court found no basis for federal jurisdiction based on defendants' activities on federal enclaves. Regarding the alternative bases for removal jurisdiction, the court found that the defendants did not demonstrate that jurisdiction existed under the Outer Continental Shelf Lands Act, or that the claims were removable under the federal officer removal statute, the bankruptcy removal statute, or admiralty jurisdiction. Pursuant to a stipulation by the parties, the remand order is temporarily stayed. The defendants are seeking to stay the order pending their appeal to the Fourth Circuit. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 1:18-cv-02357 (D. Md. June 10, 2019).

DECISIONS AND SETTLEMENTS

Ninth Circuit Vacated District Court Judgments on Keystone XL Pipeline as Moot Due to New Permit Issued by Trump; Environmental Groups Challenged Corps of Engineers Approval

Because President Trump issued a new permit for the Keystone XL pipeline project and revoked the previous permit, the Ninth Circuit Court of Appeals granted the federal government's motion to dismiss as moot the appeal of a district court's decisions finding lapses in the State Department's initial approval of the project. The Ninth Circuit also vacated the district court judgments, dissolved the permanent injunction orders, and remanded the case with instructions to dismiss the district court actions as moot. On July 1, environmental and conservation groups filed a lawsuit in the District of Montana challenging the U.S. Army Corps of Engineers approval of the project using Nationwide Permit 12, a general permit issued for pipelines and other utility projects. *Indigenous Environmental Network v. U.S. Department of State*, No. 18-36068 (9th Cir. June 6, 2019); *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044 (D. Mont., filed July 1, 2019).

Federal Court Found That Forest Service Took Hard Look at Carbon Impacts of Forest Thinning Project

The federal district court for the District of Oregon rejected claims that the U.S. Forest Service (USFS) failed to take a hard look at the climate change effects of a forest thinning project in the Mount Hood National Forest. The plaintiffs contended that the USFS's National Environmental Policy Act (NEPA) analysis was inadequate because it was taken from the environmental assessment for a much smaller previous project and because it did not incorporate information from public comments, including a formula for assessing the carbon impacts of timber sales. The USFS argued that the project would promote the health of the forest, thereby sequestering carbon in the long run. The court wrote that the debate over "[w]hether the Project will have a net positive or negative contribution to carbon emissions depends on whether the USFS is correct in determining that thinning of overstocked stands will contribute to forest health and reduce the risk of fire, insect infestation, and disease." The court said this question "is appropriately addressed in an analysis of whether the …Project will have highly controversial or uncertain effects" and found that the USFS had satisfied its NEPA hard look obligation by undertaking "a thorough examination of the question." *Bark v. U.S. Forest Service*, No. 3:18-cv-01645 (D. Or. June 18, 2019).

Federal Court Dismissed Claims to Compel U.S. Submission of UNFCCC Reports

The federal district court in the District of Columbia again dismissed claims seeking to compel the U.S. Department of State to comply with reporting obligations under the United Nations Framework Convention on Climate Change (UNFCCC). The U.S. failed to submit two reports—a "National Communication" and a "Biennial Report"—by a January 2018 deadline. The court found that the plaintiff, Center for Biological Diversity, did not havae standing based on informational injury because the UNFCCC did not impose a disclosure obligation either directly on the U.S. or indirectly through a UN disclosure obligation. The court previously dismissed the lawsuit without prejudice in November 2018 for lack of standing. *Center for Biological Diversity v. U.S. Department of State*, No. 1:18-cv-00563 (D.D.C. June 12, 2019).

New York Appellate Court Rejected Necessity Defense for Power Plant Protesters

A New York appellate court affirmed a defendant's convictions for disorderly conduct in connection with his obstructing vehicles from entering a power plant construction site. The appellate court agreed with the trial court that the defendant failed to meet the requirements to establish the justification by necessity defense. In particular, the appellate court agreed that the defendant's actions, "planned in advance with the stated intention of drawing attention to the issue of global warming, cannot be considered to have been reasonably calculated to actually prevent any harm presented merely by the construction of the power plant." The court also rejected the defendant's definition of "imminent" as extending beyond immediacy to refer to harms that are certain to occur. The court said caselaw did not support such a definition. The appellate court noted that it did not reach the issue of whether "the threat of global warming was of such gravity that the desirability and urgency of avoiding this threat outweighed the injury sought to be prevented by the disorderly conduct statute." The court also affirmed the disorderly conduct convictions of five other defendants. *People v. Cromwell*, No. 2017-1310 OR CR (N.Y. App. Term June 13, 2019).

State Court Dismissed Exxon's Defenses Accusing Attorney General's Office of Misconduct in Climate Change Fraud Action

At a hearing on June 12, 2019, a New York trial court dismissed affirmative defenses related to alleged conflicts of interest and official misconduct in the New York Attorney General's climate change fraud action against Exxon Mobil Corporation (Exxon). The court reserved its decision on Exxon's defense of selective enforcement pending submission of additional documents. The court directed the parties to submit three-page letters on potential depositions of Office of Attorney General (OAG) staff. In addition, the court granted OAG's motion to seal certain emails between OAG attorneys and a third-party attorney. The court also addressed a dispute over access to former Attorney General Eric Schneiderman's personal email account, which Exxon alleges was used to conduct official business relevant to Exxon's defenses. The court directed OAG to provide "a less carefully worded statement" to provide confidence "that anything that was official business or related to this investigation was made available" to Exxon "via communications sent by Mr. Schneiderman to his official account." *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. June 12, 2019).

NEW CASES, MOTIONS, AND NOTICES

Competitive Enterprise Institute and National Review Seek Supreme Court Intervention to Stop Climate Scientist's Defamation Action

The Competitive Enterprise Institute (CEI) and a CEI commentator and National Review, Inc. filed petitions for writ of certiorari seeking U.S. Supreme Court review of the D.C. Court of Appeals decision that allowed climate scientist Michael Mann's defamation lawsuit to proceed against them in connection with articles that accused Mann of scientific misconduct. National Review's petition presents the question: "Is the question whether a statement contains a 'provably false' factual connotation a question of law for the court (as most federal circuit courts hold), or is that a question of fact for the jury when the statement is ambiguous (as many state high courts hold)?" The National Review petition also presents the question of whether the First Amendment permits "defamation liability for expressing a subjective opinion about a matter of

scientific or political controversy, such as characterizing a statistical model about climate change as 'deceptive' and calling its creation a form of 'scientific misconduct.'" Similarly, the questions presented in the CEI petition are "[w]hether the First Amendment permits defamation liability for subjective commentary on true facts concerning a matter of public concern" and "[w]hether the determination of whether a challenged statement contains a provably false factual connotation is a question of law for the court or a question of fact for the jury." *Competitive Enterprise Institute v. Mann*, No. 18-1477 (U.S. May 23, 2019); *National Review, Inc. v. Mann*, No. 18-1451 (U.S. May 21, 2019).

D.C. Circuit to Hear Arguments on Vehicle Greenhouse Gas Standards on September 6

The D.C. Circuit scheduled oral argument for September 6, 2019 in the proceedings challenging the U.S. Environmental Protection Agency's decision to withdraw the Obama administration's Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles because the standards appeared to be too stringent. *California v. EPA*, No. 18-1114 (D.C. Cir. June 21, 2019).

EPA Notified D.C. Circuit of Clean Power Plan Repeal and Replacement

On June 20, 2019, the U.S. Environmental Protection Agency (EPA) notified the D.C. Circuit that EPA Administrator Andrew Wheeler had signed a final rule repealing the Clean Power Plan and instituting new emission guidelines for existing power plants. EPA recommended that the court continue to hold the pending challenges to the Clean Power Plan in abeyance. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. June 20, 2019).

Remedy Briefs to Be Submitted in July in Challenge to Lifting of Moratorium on Federal Coal Leasing; Federal Government Took Comments on Draft EA Through June 10

The federal district court for the District of Montana granted the federal government more time to submit briefing on the appropriate remedies for the government's failure to comply with NEPA when Secretary of the Interior Ryan Zinke lifted the Obama administration's moratorium on the federal coal leasing program. The federal government notified the court on May 22, 2019 that it had published a draft environmental assessment (EA) for the coal program in partial compliance with the court's April 2019 order that found violations of NEPA and the Administrative Procedure Act. The plaintiffs countered that remedies briefing was still necessary despite publication of the draft EA. The court directed that the parties submit remedy briefs by the earlier of (1) 14 days after the defendants determine whether to issue a finding of no significant impact or to prepare an environmental impact statement or (2) July 22, 2019. The public comment period on the draft EA ended on June 10. *Citizens for Clean Energy v. U.S. Department of Interior*, No. 4:17-cv-00030 (D. Mont. June 18, 2019).

Environmental Groups Charged Federal Agencies with Ongoing Failure to Consider Information on Climate Change Impacts on Lake Okeechobee and Downstream Waters

Three environmental organizations filed a lawsuit in the federal district court for the Southern District of Florida asserting that the federal defendants were violating NEPA, the Endangered

Species Act (ESA), and the Administrative Procedure Act (APA) by continuing to manage Lake Okeechobee under the Lake Okeechobee Regulation Schedule (LORS) and allowing "unmitigated releases of Lake Okeechobee water into the Caloosahatchee and St. Lucie rivers and estuaries." The plaintiffs alleged, among other things, that past analyses of LORS under NEPA and the ESA "entirely failed to consider how climate change might affect LORS and harmful algal blooms." They asserted that the U.S. Army Corps of Engineers was violating NEPA by failing to supplement its LORS NEPA analysis with "significant new information" regarding climate change impacts and toxic algae. They also asserted that the U.S. Fish and Wildlife Service and the National Marine Fisheries Service were violating the ESA and the APA by failing to consider climate change effects. *Center for Biological Diversity v. U.S. Army Corps of Engineers*, No. 2:19-cv-14199 (S.D. Fla., filed June 11, 2019).

Environmental Groups Challenged Analysis of Cumulative Climate Change Impacts of Utah Oil and Gas Leases

Four environmental groups filed a lawsuit in federal court in Colorado challenging the U.S. Bureau of Land Management's (BLM's) decisions to issue 59 oil and gas leases covering 61,910.92 acres in northeast Utah. The plaintiffs asserted violations of the Federal Land Policy and Management Act, NEPA, and the APA, including that BLM failed to consider cumulative climate change impacts. *Rocky Mountain Wild v. Bernhardt*, No. 1:19-cv-01608 (D. Colo., filed June 5, 2019).

WildEarth Guardians Lawsuit Challenged Oil and Gas Leases in New Mexico

WildEarth Guardians filed a lawsuit challenging 210 oil and gas leases covering 68,232.94 acres of land in New Mexico in BLM's Pecos District. The complaint asserted claims under the Federal Land Policy and Management Act, NEPA, and the APA, including a failure to take a hard look at the direct, indirect, and cumulative impacts of climate change. *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505 (D.N.M., filed June 3, 2019).

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FEATURED CASE

D.C. Circuit Upheld FERC Approval of Pipeline Project Despite Concerns About Analysis of Upstream and Downstream Greenhouse Gas Impacts

The D.C. Circuit Court of Appeals rejected a challenge to the Federal Energy Regulatory Commission's (FERC's) environmental review for a natural gas compression station in Tennessee despite the court's "misgivings" regarding FERC's "decidedly less-than-dogged efforts" to obtain the information it would need to determine that greenhouse gas emissions were a reasonably foreseeable indirect effect of the project. FERC had declined to consider the impacts of upstream gas production and downstream gas combustion in its National Environmental Policy Act (NEPA) review, concluding that such impacts did not qualify as indirect effects of the project. With respect to upstream emissions, the D.C. Circuit found that the

petitioners had failed to rebut FERC's conclusion that the record did not provide evidence to establish the necessary causal relationship between the project and upstream gas production. The court indicated that such evidence might include the number and location of any wells that would be drilled as a result of production demand created by the project. The court also said the petitioners failed to "meaningfully dispute" FERC's assertion that it would be futile to ask applicants to provide such information. Regarding downstream emissions, the court rejected FERC's position that downstream emissions were not reasonably foreseeable because gas associated with the project might displace higher-emission fuels or otherwise offset emissions. The court also rejected FERC's contention that FERC could not be considered the "legally relevant cause" of downstream emissions because it lacked jurisdiction over any party other than the project applicant. The court concluded that FERC is a "legally relevant cause" of such effects because the Natural Gas Act directs FERC to consider "the public convenience and necessity" and therefore provides FERC with statutory authority to act on information about the direct and indirect environmental effects of projects it approves. The court also said it was "troubled" by FERC's reliance on a lack of information about the destination and end use of gas to justify its decision not to consider the downstream impacts. The court wrote: "It should go without saying that NEPA also requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities." In this case, however, the petitioners had not raised the issue of FERC's failure to develop the record in the proceedings before FERC. The court therefore concluded that it lacked jurisdiction to decide whether FERC had violated NEPA by failing to further develop the record. The court also rejected an argument that FERC had failed to adequately assess alternative sites for the project. *Birckhead v. Federal Energy Regulatory Commission*, No. 18-1218 (D.C. Cir. June 4, 2019).

DECISIONS AND SETTLEMENTS

Supreme Court Declined to Review Constitutionality of Oregon Clean Fuel Program

The U.S. Supreme Court denied, without comment, a petition for writ of certiorari seeking review of the Ninth Circuit Court of Appeals decision upholding the Oregon Clean Fuel Program. The certiorari petition was filed by American Fuel & Petrochemical Manufacturers, American Trucking Associations, Inc., and Consumer Energy Alliance, who argued that the Program constituted impermissible extraterritorial regulation and discriminated against interstate commerce. *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, No. 18-881 (U.S. May 13, 2019).

D.C. Circuit Said Organization Lacked Standing to Challenge FERC Authorization of Natural Gas Compression Facilities

In an unpublished judgment, the D.C. Circuit Court of Appeals dismissed a challenge to FERC's authorization of compression facilities for an existing natural gas pipeline network. The court did not reach the merits of the challenge—which included assertions that FERC failed to consider upstream and downstream greenhouse gas emissions—because the organizational petitioner failed to demonstrate Article III standing and the individual plaintiffs had not timely submitted a rehearing request to FERC. The D.C. Circuit noted that the organizational petitioner had acknowledged that it was not a membership organization and had not argued that it had

associational standing. The D.C. Circuit found that the petitioner also did not have organizational standing since its affidavits had not identified any injury other that expenditure of time and money related to the litigation. The D.C. Circuit said the "information[al] injury" that the organization mentioned at oral argument was not properly before the court. *Otsego 2000 v. Federal Energy Regulatory Commission*, No. 18-1188 (D.C. Cir. May 9, 2019).

Tenth Circuit Ordered BLM to Conduct Analysis of Cumulative Water Impacts for New Mexico Horizontal Wells

The Tenth Circuit Court of Appeals ruled that the U.S. Bureau of Land Management (BLM) had violated the National Environmental Policy Act (NEPA) by failing to consider cumulative water impacts associated with 3,960 reasonably foreseeable horizontal wells in the Mancos Shale in the San Juan Basin in New Mexico. The Tenth Circuit directed that the environmental assessments for those wells be remanded for BLM to conduct proper NEPA analysis. The Tenth Circuit's decision did not address issues raised in the district court concerning greenhouse gas emissions. In addition, although the Tenth Circuit concluded that BLM was required to consider the cumulative impacts, including air pollution impacts, for all reasonably foreseeable wells, the court concluded that the appellants had not provided a record from which the court could assess BLM's air analysis. The Tenth Circuit also did not reverse the district court's conclusions that BLM had not violated the National Historic Preservation Act. *Diné Citizens Against Ruining Our Environment v. Bernhardt*, No. 18-2089 (10th Cir. May 7, 2019).

California Federal Court Ordered EPA to Implement Landfill Emission Guidelines

The federal district court for the Northern District of California set a schedule for the U.S. Environmental Protection Agency (EPA) to take mandatory steps to implement emission guidelines for existing municipal solid waste landfills. Although EPA did not dispute that it had failed to perform nondiscretionary obligations with respect to the guidelines, which were finalized in August 2016, EPA argued that the states that brought this lawsuit lacked standing. The court rejected this argument, finding that the state plaintiffs had standing to challenge EPA's failure to perform nondiscretionary duties based on the "special solicitude" afforded to them under *Massachusetts v. EPA*, 549 U.S. 497 (2007). The court also set stricter deadlines than what EPA proposed for approval or disapproval of the existing state plans submitted by states in EPA Region 9 (California and Arizona), finding that EPA had not met its burden of showing that the timeframe EPA proposed for plans outside Region 9 was infeasible for the Region 9 plans. The court also rejected EPA's timetable for promulgation of a federal plan. *California v. EPA*, No. 18-cv-03237 (N.D. Cal. May 6, 2019).

Washington Federal Court Rejected Coal Export Terminal Proponents' Bid to Ease Quick Appeal

In a lawsuit challenging the State of Washington's denials of approvals needed for development of a coal export terminal, the federal district court for the Western District of Washington denied a motion for entry of final judgment with respect to two orders issued in 2018. One of the 2018 orders dismissed the State's Commissioner of Public Lands as a defendant; the other order dismissed preemption claims under the Interstate Commerce Commission Termination Act and

the Ports and Waterways Safety Act. In April 2019, the court stayed the action on *Pullman* abstention grounds due to pending state court challenges to the State's denials. The plaintiffs (coal companies and the companies that propose to develop the coal export facility) and an intervenor railroad company have appealed both 2018 orders and the April 2019 stay order. The plaintiffs argued in their motion that the stay order was final and appealable and indicated that the motion for entry of final judgment on the 2018 orders was merely a "precautionary measure." The district court concluded that judicial administrative interests and equities did not favor certifying the 2018 orders as final. *Lighthouse Resources Inc. v. Inslee*, No. 3:18-cv-05005 (W.D. Wash. May 28, 2019), *appeal filed*, No. 19-35415 (9th Cir. May 10, 2019).

Federal Court Granted Voluntary Remand for Supplemental Environmental Review of Oil and Gas Leases in Colorado and Utah; BLM Affirmed Decisions on Wyoming Leases After Supplemental Review

The federal district court for the District of Columbia granted federal defendants' motion for voluntary remand of environmental assessments, findings of no significant impact, and determinations of NEPA adequacy prepared for oil and gas leasing on public lands in Colorado and Utah. The federal defendants' motion followed the court's March 2019 opinion finding that BLM failed to adequately quantify climate change impacts for oil and gas leasing decisions in Wyoming. The case had been separated into three phases, with each phase focused on a different state, starting with Wyoming. After the March 2019 decision, BLM determined that further analysis was also appropriate for the leasing decisions in Colorado and Utah. On remand, BLM must conduct supplemental environmental review in accordance with the March 2019 opinion. Other developments in this case include the State of Colorado's withdrawal as an intervenor defendant and BLM's notice of compliance indicating it had completed a supplemental environmental assessment for the Wyoming leases and had affirmed the challenged leasing decisions. *WildEarth Guardians v. Bernhardt*, No. 1:16-cv-01724 (D.D.C. May 29, 2019).

Lawsuit Challenging Federal Failure to Inspect Pipelines Survived Motion to Dismiss

The federal district court for the District of Montana denied a motion to dismiss a lawsuit seeking to compel the Pipeline and Hazardous Materials Safety Administration (PHMSA) and other federal defendants to perform inspections of oil and gas pipelines required by the Mineral Leasing Act (MLA). The plaintiff, WildEarth Guardians, alleges, among other things, that pipeline spills contribute to climate change. The court found that WildEarth Guardians had alleged a sufficiently particularized injury to survive a challenge to its standing. The court also concluded that a court order could redress the alleged injury and that the plaintiff had adequately stated a failure-to-act claim under the Administrative Procedure Act. In addition, the court concluded it was appropriate to exercise jurisdiction to consider the "narrow issue" of whether the defendants had failed to comply with their duty under the MLA given the lack of an administrative record or any activity before PHMSA that could provide a basis for review in the Ninth Circuit pursuant to the Pipeline Safety Act of 1979, which provides for exclusive review in the courts of appeals. *WildEarth Guardians v. Chao*, No. 18-cv-110 (D. Mont. May 23, 2019).

In Case Concerning Exxon Facility's Climate Readiness, Massachusetts Federal Court Held Hearing on Motion to Stay; EPA Lawyer Answered Questions on NPDES Permit Timing

In a citizen suit asserting that ExxonMobil Corporation (Exxon) violated environmental laws by failing to prepare its marine terminal on the Mystic River in Massachusetts for the effects of climate change, the federal district court for the District of Massachusetts heard arguments on EPA's motion to quash a subpoena for testimony by the Region 1 Water Permits Branch Chief and also on Exxon's motion to stay the action. Exxon sought the stay pursuant to the doctrine of primary jurisdiction to allow EPA to consider Exxon's application to renew the terminal's National Pollutant Discharge Elimination System (NPDES) permit. The court had said any testimony by the EPA official would be limited to matters relevant to Exxon's motion to stay, including questioning about the timing of EPA's review of the Exxon's application to renew its NPDES permit. Exxon argued that a stay was appropriate because it would allow EPA to resolve "technical and policy-laden questions" regarding the extent of climate change risks and the appropriate remedies for addressing those risks. Although the regional counsel for EPA Region 1 said he would instruct the Branch Chief not to testify, the regional counsel himself agreed to answer questions at the hearing, though not under oath. The regional counsel reportedly testified that EPA had a mandate to clear the permit backlog within three years but said that there was some internal "skepticism" as to whether that timeline will be met. The court dismissed the motion to quash as moot in light of the regional counsel's appearance and took Exxon's stay motion under advisement. *Conservation Law Foundation v. ExxonMobil Corp.*, No. 1:16-cv-11950 (D. Mass. May 6, 2019).

Hawai'i Supreme Court Remanded Biomass Facility Power Purchase Agreement for "Explicit" Consideration of Greenhouse Gas Emissions

The Hawai'i Supreme Court ruled that the Public Utilities Commission (PUC) had erred by failing to explicitly consider the reduction of greenhouse gas emissions before approving a utility's amended power purchase agreement (Amended PPA) with a company that was going to construct and operate a biomass-fueled energy production facility. The court said "explicit" findings regarding greenhouse gas emissions were required by the State's utilities law. The court also ruled that the PUC had denied Life of the Land, an environmental nonprofit organization, due process by restricting the organization's opportunity to be heard regarding the biomass facility's impacts. The court therefore vacated the decision and order approving the Amended PPA and remanded to the PUC for a hearing that complied with procedural due process. The hearing must include an opportunity for the organization to "meaningfully address" the Amended PPA's impacts on the organization's members' right to a clean and healthful environment and must also include "express consideration of [greenhouse gas] emissions that would result from approving the Amended PPA, whether the cost of energy under the Amended PPA is reasonable in light of the potential for [greenhouse gas] emissions, and whether the terms of the Amended PPA are prudent and in the public interest, in light of its potential hidden and long-term consequences." *In re Hawai'i Electric Light Co.*, No. SCOT-17-0000630 (Haw. May 10, 2019).

California Appellate Court Said County Must Support Conclusion That Requiring Solar Panels in New Residential Development Was Infeasible

The California Court of Appeal found that a revised final environmental impact report (FEIR) prepared to remedy previously identified deficiencies failed to comply with the California Environmental Quality Act because the FEIR did not include any evidence supporting its conclusion that it was infeasible to require use of solar panels to mitigate a residential development's greenhouse gas impacts. The trial court had discharged a previously issued writ that was based both on Orange County's improper deferral of consideration of greenhouse gas mitigation measures and also on arbitrary limits on the consideration of mitigation measures. The appellate court said that in considering whether to discharge its writ, the trial court should have addressed the argument that the County had failed to consider the impact reduction potential of solar roof panels, an additional mitigation measure that was brought to the County's attention in conjunction with preparation of the revised FEIR. The appellate court concluded, however, that the petitioners were barred from raising an argument concerning the County's reliance on greenhouse gas emission reductions from statewide measures because the trial court previously rejected a similar argument "spun in a slightly different way" when it first considered the case. The appellate court also rejected the petitioners' argument that the County was required to analyze greenhouse gas reductions that would result from a reduced density alternative. *Protect Our Homes & Hills v. County of Orange*, No. G055716 (Cal. Ct. App. May 8, 2019).

New Jersey Appellate Court Affirmed Denial of Application to Inspect Exxon Records

An intermediate appellate court in New Jersey affirmed a trial court's denial of the City of Birmingham Relief and Retirement System's application to inspect ExxonMobil Corporation's (Exxon's) books and records. The plaintiff—a beneficial owner of Exxon stock—alleged that Exxon had for decades funded groups that discredited the scientific community's opinions about climate change even though Exxon's scientists shared the view that "that human-influenced global climate change was real and required a dramatic reduction in the dependence of [sic] fossil fuels." Citing newspaper and research articles and state and federal investigations, the plaintiff sought to investigate evidence that Exxon violated New Jersey and federal law by funding these groups and by misleading investors. The appellate court found, however, that even if these motivations served as a proper purpose for inspection of company records, the plaintiffs' evidence was "all grounded in hearsay" and insufficient to demonstrate that its allegations were credible. *City of Birmingham Relief & Retirement System v. ExxonMobil Corp.*, No. A-4279-17T3 (N.J. Super. Ct. App. Div. May 6, 2019).

Illinois Court Rejected Utility's Challenge to Renewable Energy Programs

The Illinois Appellate Court upheld programs approved by the Illinois Commerce Commission that provide financial support to small renewable energy generation facilities. The programs involve the generation facilities' sale of renewable energy credits to three major electric utilities, which pass along some costs to their ratepayers. Although certain "local utilities" are not subject to the programs' requirements, the major utilities must buy credits from small renewable generating facilities within the local utilities' service areas. One of the major utilities challenged this aspect of the programs, arguing that the state law authorizing the programs did not intend for generation facilities within the local utilities' service areas to be included. The court deferred to the Commission and agreed that inclusion of such facilities in the programs promoted the

legislative intent for the programs to meet goals, including goals to limit carbon dioxide emissions. *Commonwealth Edison Co. v. Illinois Commerce Commission*, No. 17-0838 (Ill. App. Ct. May 2, 2019).

NEW CASES, MOTIONS, AND NOTICES

Oil and Gas Companies, Amici Filed Ninth Circuit Briefs in Oakland and San Francisco Climate Nuisance Cases

On May 10, 2019, oil and gas companies filed briefs in the Ninth Circuit Court of Appeals urging affirmance of the dismissal of San Francisco's and Oakland's climate change public nuisance lawsuits. Chevron Corporation—the only company not dismissed from the lawsuit on personal jurisdiction grounds—argued that the district court both properly denied the cities' motion to remand the lawsuit to state court and properly dismissed the cities' claims on the merits. With respect to remand, Chevron first argued that the plaintiffs had mooted their challenge to the denial of remand by voluntarily amending their complaint to assert federal claims and to add new parties. Chevron also argued that the cities' claims provided federal removal jurisdiction, primarily because the nuisance claims were necessarily governed by federal common law but also based on other grounds. On the merits of the cities' cases, Chevron argued that federal statutes displaced the cities' common law claims to the extent the claims were based on domestic activities, whether those domestic activities were emissions of greenhouse gases from fossil fuels (for which the Clean Air Act would displace federal common law claims), oil and gas production (for which "numerous federal statutes" addressing fossil fuel policy would displace claims), or allegedly misleading advertising (for which claims would be displaced by the Federal Trade Commission Act, Energy Policy Act of 2005, and Energy Independence and Security Act of 2007). Chevron further argued that claims based on foreign conduct would be barred by the presumption against extraterritoriality. In addition, Chevron asserted that the First Amendment barred the cities' claims and that the cities failed to plead a public nuisance claim. The other four companies—which were not residents of California—filed a separate brief arguing that the district court had properly determined that there was no specific personal jurisdiction.

Six amicus briefs were filed supporting affirmance of dismissal by the United States, 18 states, the National Association of Manufacturers (NAM), three law professors, the U.S. Chamber of Commerce, and the Washington Legal Foundation (WLF). The U.S. argued that the Clean Air Act and the Constitution's foreign commerce and foreign affairs authorities displaced or preempted the cities' claims. In addition, the U.S. said federal common law nuisance claims were not available to municipalities; that recognizing "such broad and novel claims" would be at odds with the Supreme Court's narrow view of federal common law; and that the cities' claims "would entangle the judiciary in matters assigned to the representative branches of government." Like Chevron, the U.S. contended that the remand issue was moot. However, the U.S. alternatively urged the Ninth Circuit to find removal jurisdiction based on a ground raised sua sponte by the district court—that sea-level rise attributed to federal jurisdictional waters creates federal question jurisdiction. Eighteen states, led by Indiana, filed a brief arguing that the cities' claims raised nonjusticiable political questions and would jeopardize cooperative federalism by undermining the national regulatory system established by the Clean Air Act. The states also

argued that the cities' claims would interfere with international agreements and obstruct state initiatives, including initiatives to promote energy production. In its amicus brief, NAM characterized the lawsuits as an attempt "to circumvent products liability law and create category liability for lawful, beneficial energy products that are essential to modern life." NAM argued that precedent required rejection of the claims and that advancements in technology and other innovations—not lawsuits—were the best means to mitigate climate change. In their amicus brief, the three law professors asserted that the cities' claims "would dramatically and unwisely expand" nuisance law "beyond the discrete private harms to which it has always been limited." In its amicus brief, the U.S. Chamber of Commerce argued that the district court had jurisdiction and that state law tort claims based on climate change violate the constitutional prohibition against extraterritorial state laws. WLF's brief argued that the cities could not establish proximate causation. The brief asserted that "[t]he path from John D. Rockefeller and his successors, on one side, to the present-day tides of the Bay Area, on the other, is too long, too winding, and too tangled to support liability." WLF said the court should not relax the proximate causation standard to accommodate the lawsuit because doing so would violate due process and impose massive retroactive liability.

The cities' reply brief is due July 1, 2019. *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir.).

California Localities Cited Additional Authorities for Limited Review by Ninth Circuit of Remand Order in Climate Cases

In fossil fuel companies' appeal of a remand order in the climate change cases brought by the County of San Mateo and other California local governments, the local governments filed two letters notifying the Ninth Circuit of recent decisions concerning the scope of appellate jurisdiction to review remand orders. The letters cited decisions by the Fifth Circuit and Eleventh Circuit that limited appellate review to the grounds for removal for which the applicable statute provides for appellate review. The fossil fuel companies responded that the neither of the unpublished per curiam decisions "bears meaningfully on the scope of this Court's jurisdiction to review the district court's remand order under 28 U.S.C. § 1447(d)." The companies said the pro se appellants in the two cases had not presented, and the courts had not analyzed, the jurisdictional issues briefed in this case. *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir.).

***Juliana* Plaintiffs Submitted Additional Authorities to Ninth Circuit in Advance of June 4 Oral Argument**

In the month leading up to oral argument on June 4, 2019, the plaintiffs in *Juliana v. United States* filed several letters notifying the Ninth Circuit of recent developments that the plaintiffs argued were relevant to the government's appeal and the plaintiffs' urgent motion for preliminary injunction. On May 8, the plaintiffs wrote that the Ninth Circuit's recent decision in an action challenging statewide policies and practices in Arizona's foster care system was pertinent to the *Juliana* plaintiffs' standing, as well as to the issues of judicial authority to hear systemic due process cases and the plaintiffs' state-created danger claim. The government responded, arguing that the case was not pertinent to any of these issues. On May 20, the plaintiffs wrote to bring President Trump's Executive Order 13868 on "Promoting Energy

Infrastructure and Economic Growth" to the Ninth Circuit's attention, arguing that the order was relevant to their standing to challenge federal energy policies and practices. On May 28, the plaintiffs identified another Ninth Circuit decision as relevant to the issue of whether the district court had appropriately determined that the plaintiffs' evidence was sufficient to defeat summary judgment on the standing issue.

On May 22, the plaintiffs filed a motion seeking judicial notice of certain federal government documents released since the plaintiffs completed briefing on their urgent motion, including documents concerning the effects of a fossil fuel-based energy system and press releases on new authorizations for coal, oil, and gas extraction on public lands and in federal offshore areas. The plaintiffs asserted that the documents both "provide additional evidence of Defendants' systemic practices that serve to intensify and lock in Plaintiffs' irreparable harms" and also "confirm the severity of Plaintiffs' irreparable injuries by presenting additional evidence that the U.S. fossil fuel-based energy system is further expanding."

Oral argument in the *Juliana* appeal was held on Tuesday, June 4. Judge Mary H. Murguia, Judge Andrew D. Hurwitz, and Judge Laura Staton (a district court judge for the Central District of California) are on the panel hearing the case. Video of the argument is available on the Ninth Circuit's website. *Juliana v. United States*, No. 18-36082 (9th Cir.).

Shareholder Derivate Actions Filed Against Exxon Directors and Officials in Texas Federal Court

Two shareholder derivative complaints were filed in the federal district court for the Northern District of Texas against directors and certain senior officers of Exxon Mobil Corporation (Exxon). Both complaints alleged that Exxon had "a well-documented history of intentionally misleading the public concerning global climate change and its connection to fossil fuel usage, as well as the impact the changing climate will have on Exxon's reserve values and long-term business prospects." The plaintiffs asserted claims of breach of fiduciary duty, waste, and unjust enrichment. They also sought contribution against the individual defendants in the related federal securities class action pending in the same court (should those defendants be found liable for securities violations) and sought rescission of contracts between Exxon and the individual defendants based on any violations by the individual defendants of securities laws. On May 31, the plaintiff in one of the shareholder derivative actions filed a motion to consolidate the two lawsuits and for his appointment as lead plaintiff. *von Colditz v. Exxon Mobil Corp.*, No. 3:19-cv-01067 (N.D. Tex., filed May 2, 2019); *Montini v. Woods*, No. 3:19-cv-01068 (N.D. Tex., filed May 2, 2019).

New York Trial Court to Hear Oral Arguments on Discovery Disputes, Affirmative Defenses in Attorney General's Fraud Action Against Exxon

The New York State Supreme Court scheduled a hearing for June 12, 2019 to hear oral argument on three pending motions in the New York attorney general's fraud action against Exxon Mobil Corporation (Exxon). The attorney general alleges that Exxon deceived investors about its management of climate change risks. The first of the three motions that the court will hear on June 12 is the attorney general's motion to dismiss five affirmative defenses that assert that the

Office of the Attorney General (OAG) committed prosecutorial misconduct in commencing and conducting the underlying investigation of ExxonMobil; the attorney general alternatively seeks a protective order limiting discovery on these defenses. In the second motion, the attorney general seeks to seal five emails between OAG attorneys and a third-party attorney in which the third-party attorney provides information to the OAG about Exxon. OAG designated the emails as confidential in its production to Exxon. In the third motion, the attorney general seeks a protective order barring Exxon from deposing OAG attorneys. The attorney general indicates that the motion to seal and motion for a protective order should only be considered if the court does not dismiss the prosecutorial misconduct affirmative defenses. Other disputes have arisen in the course of discovery but are not yet the subject of motions, including a dispute over access to former Attorney General Eric Schneiderman's personal email account, which Exxon alleges was used to conduct official business relevant to Exxon's defenses. *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. May 20, 2019).

Pro Se Plaintiff Filed Constitutional Climate Case in Arizona Federal Court Asking for National Plan to Remove Carbon from Atmosphere

A pro se plaintiff filed a lawsuit in federal court in Arizona against the United States, the President, and federal agencies and officials asserting that he and other class action plaintiffs were suffering from "immediate and threatened injuries" due to the defendants' actions and inaction supporting the production and consumption of fossil fuels. The complaint asserted violations of due process, equal protection, and the public trust doctrine. The complaint also alleged that the defendants infringed on unenumerated rights protected by the Ninth Amendment, which the complaint said included "the right to be sustained by our country's vital natural systems, including our climate system." The plaintiff asked the court to order the defendants to prepare a consumption-based inventory of carbon dioxide emissions; to implement a "national remedial plan" to phase out fossil fuel emissions ("like that described in the congressional resolution "Green New Deal"); and to fund, research, and operationalize a methodology for "active atmospheric carbon removal." The complaint alleged that direct atmospheric carbon removal was the "only effective relief" the plaintiff could request because "replacing or augmenting environmental protections, as requested by Juliana v. USA" would not be sufficient "to avoid the fast approaching mid-2030's climate deadline with its grave and irreparably catastrophic effects on human life." *Komor v. United States*, No. 4:19-cv-00293 (D. Ariz., filed May 29, 2019).

Appeals Filed After Alaska Federal Court Vacated Trump's Revocation of Obama Withdrawals of Offshore Areas from Oil and Gas Leasing

The federal government, the State of Alaska, and the American Petroleum Institute appealed an Alaska federal court's decision holding that President Trump did not have authority to revoke President Obama's withdrawals of certain areas of the Outer Continental Shelf in the Arctic and Atlantic Oceans from oil and gas leasing. The appeals are pending in the Ninth Circuit. *League of Conservation Voters v. Trump*, No. 3:17-cv-00101 (D. Alaska May 28, 2019), *on appeal*, Nos. 19-35460, 19-35461, & 19-35462 (9th Cir.).

Lawsuit Filed Seeking Protections for Eight "Highly Imperiled" Species

The Center for Biological Diversity filed an Endangered Species Act (ESA) citizen suit in the federal district court for the Northern District of California alleging that the U.S. Fish and Wildlife Service (FWS) was in "flagrant violation" of its obligations to protect eight "highly imperiled species": the longfin smelt (San Francisco Bay-Delta population), Hermes copper butterfly, Marron bacora (a plant), Sierra Nevada red fox, red tree vole (North Coast population), gopher tortoise (eastern population), Berry Cave Salamander, and Puerto Rico harlequin butterfly. The complaint alleged that these species were among the "approximately one million species worldwide" that "face extinction in the foreseeable future as a direct consequence of human-caused habitat loss and climate change, among many other threats." FWS deemed the listing of the eight species as "warranted but precluded" in December 2016, and the complaint asserted that FWS was now in violation of the ESA because it was not making "expeditious progress" to list other higher-priority species and had not published new findings regarding whether the listing of the eight species continued to be precluded. *Center for Biological Diversity v. Bernhardt*, No. 3:19-cv-02843 (N.D. Cal., filed May 23, 2019).

Federal Government Notified Montana Federal Court of Draft EA for Lifting of Federal Coal Program Moratorium; Plaintiffs Said EA Didn't Qualify as Compliance with Court Order

The federal defendants filed a notice of partial compliance with the federal district court for the District of Montana to inform the court that it had published a draft environmental assessment (EA) that considers the environmental impacts of former Secretary of the Interior Ryan Zinke's lifting of the moratorium on the federal coal program. The Northern Cheyenne Tribe and conservation groups subsequently filed a response indicating that they did not view publication of the draft EA as "partial compliance" with the court's April 2019 order finding that the lifting of the moratorium required compliance with NEPA. The Tribe and conservation groups said they would therefore submit a brief regarding appropriate remedies for the federal defendants' NEPA violations. *Citizens for Clean Energy v. U.S. Department of the Interior*, No. 4:17-cv-00030 (D. Mont. May 22, 2019).

Sierra Club Filed FOIA Lawsuit Seeking External Communications of Interior Officials

Sierra Club filed a new Freedom of Information Act (FOIA) lawsuit seeking to compel the U.S. Department of the Interior to update its response to previous requests for records concerning DOI officials' external communications. The earlier requests were the subject of another FOIA lawsuit. Sierra Club alleged that the documents sought were of "significant public interest and concern" because they could potentially reveal conflicts of interest relevant to DOI activities, including efforts to open offshore areas to drilling and to make way for private development, including energy development, on public lands. *Sierra Club v. U.S. Department of Interior*, No. 3:19-cv-02838 (N.D. Cal., filed May 22, 2019).

Lawsuit Filed Challenging Louisiana Law That Targeted Pipeline Protests

Pipeline opponents, a journalist, landowners, community leaders, and environmental justice organizations filed a federal lawsuit challenging 2018 amendments to a Louisiana law that

prohibits unauthorized entry of critical infrastructure. The complaint alleged that the amendments expanded the definition of critical infrastructure to include 125,000 miles of pipelines, which in many cases are not visible or clearly marked. The plaintiffs asserted that the law is unconstitutional on its face and as applied because it is unconstitutionally vague and allows for arbitrary and discriminatory enforcement, is overbroad, has a chilling effect on protected speech, and targets speech with a particular viewpoint for harsher punishment. They alleged that "the law's vagueness, overbreadth, and unconstitutional aim are glaringly apparent in the felony arrests of pipeline opponents engaged in non-violent protest immediately after the law went into effect." *White Hat v. Landry*, No. 3:19-cv-00322 (M.D. La., filed May 22, 2019).

Environmental Groups Filed Suit Alleging NEPA Climate Analysis for Oil-Shale Mine and Processing Plant Was Inadequate

Environmental and conservation groups filed a lawsuit in federal court in Utah challenging the U.S. Department of the Interior's approval of rights-of-way that would enable construction and operation of commercial-scale oil-shale mine and processing plant. The complaint asserted claims under NEPA and the Endangered Species Act. With respect to climate change, the plaintiffs alleged that BLM's analysis of climate change impacts was inadequate and failed entirely to consider the climate impacts of end-use combustion of synthetic oil carried by the pipeline associated with part of the project. *Living Rivers v. Bernhardt*, No. 4:19-cv-00041 (D. Utah, filed May 16, 2019).

Conservation Groups Sought Action on Yellowstone Bison

Three conservation groups filed a lawsuit to compel the U.S. Fish and Wildlife Service to take action in response to a petition to list the Yellowstone bison as an endangered or threatened distinct population segment of plains bison. The complaint alleged that the threats imperiling the Yellowstone bison include climate change. *Buffalo Field Campaign v. Bernhardt*, No. 1:19-cv-01403 (D.D.C., filed May 15, 2019).

Lawsuit Challenging Baltimore Clean Air Act Alleged That Law Would Lead to Increased Methane Emissions

The operators of a waste-to-energy facility and a hospital/medical/infectious waste incineration facility and three other plaintiffs filed a lawsuit in federal court in Maryland challenging a City of Baltimore ordinance, the Baltimore Clean Air Act, that the plaintiffs allege was a "targeted attempt" to shut down the plaintiffs' facilities. The complaint alleged that the closure of the facilities would have negative environmental effects, including increased methane emissions from decomposition of waste in landfills. The plaintiffs asserted that the ordinance was preempted by federal and State law, that the ordinance was an ultra vires act, and that it violated the U.S. and Maryland constitutions. *Wheelabrator Baltimore, L.P. v. Mayor & City Council of Baltimore*, No. 1:19-cv-01264 (D. Md. Apr. 30, 2019).

Environmental Groups Sought Review of Approval of Minnesota Utility's Stake in New Gas-Fired Power Plant in Wisconsin

Environmental groups petitioned the Minnesota Court of Appeals for review of the Minnesota Public Utilities Commission's (MPUC's) approval of agreements that gave a utility a 50% stake in a new gas-fired power plant (the Nemadji Trail Energy Center) to be constructed in Wisconsin. The environmental groups asserted that the MPUC had made its decision without satisfying the requirements of the Minnesota Environmental Policy Act and that the MPUC had ignored an administrative law judge's conclusion that the utility agreements would not be in the public interest. *Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission*, No. __ (Minn. Ct. App. May 1, 2019).

Environmental Groups Launched CEQA Challenge to Residential Development in Southern California

Two environmental organizations filed a lawsuit in California Superior Court challenging approvals for the Northlake Specific Plan Project, which the organizations alleged "would place 3,150 dwelling units on over 1,300 acres of very high fire hazard wildlands next to the Castaic Lake State Recreation Area and the Angeles National Forest." The organizations asserted violations of the California Environmental Quality Act, including for failures to consider the project's greenhouse gas impacts, and of the California Planning and Zoning Law. With respect to greenhouse gases, the organizations contended that the environmental impact report (EIR) relied on an improper significance threshold; that the greenhouse gas mitigation measures were vague, deferred, or unenforceable; and that the EIR failed to establish consistency with AB 32 and other applicable state and local plans and policies. *Center for Biological Diversity v. County of Los Angeles*, No. 19STCP01610 (Cal. Super. Ct., filed May 1, 2019).

Renewable Energy Company Challenged Maine Approval for Hydropower Transmission Line

A renewable energy company appealed the Maine Public Utilities Commission's approval of a transmission line for Canadian hydropower. The company contended that the approval was not supported by substantial evidence and was contrary to the law, arbitrary, capricious, and an abuse of discretion. The company asserted, among other arguments, that the Commission failed consider whether the transmission line was reasonable compared to other statutes and that the Commission's determination that the transmission line would provide benefits to Maine was not supported by substantial evidence. *In re Central Maine Power Co.*, No. 2017-00232 (Me. PUC, filed May 7, 2019).

May 7, 2019, Update # 122

FEATURED CASE

Montana Federal Court Said Lifting of Moratorium on Coal Leasing Triggered NEPA

The federal district court for the District of Montana ruled that the Trump administration's lifting of a moratorium on coal leasing triggered the need to comply with the National Environmental Policy Act (NEPA). Secretary of the Interior Sally Jewell issued an order in January 2016

directing the U.S. Bureau of Land Management (BLM) to prepare a programmatic environmental impact statement (PEIS) for the federal coal leasing program. The order also imposed a moratorium on coal leasing until the PEIS was completed. In March 2017, Secretary of the Interior Ryan Zinke issued an order determining that a PEIS was not necessary and lifting the moratorium. The district court found that the Zinke order met the requirements both for "major federal action" triggering obligations under NEPA and also for reviewable final agency action under the Administrative Procedure Act. The court also determined, as threshold matters, that the state and organizational plaintiffs had standing and that their claims were ripe. Although the court concluded that it could not at this point compel the defendants to prepare a PEIS, it ordered the defendants to take the initial step under NEPA of determining the extent of environmental analysis that was necessary. The court also directed the parties to attempt to reach an agreement on potential remedies within 30 days or, alternatively, if they could not reach agreement, to submit briefing on the *Monsanto* factors for permanent injunctive relief. *Citizens for Clean Energy v. U.S. Department of the Interior*, No. CV-17-30 (D. Mont. Apr. 19, 2019).

DECISIONS AND SETTLEMENTS

Supreme Court Declined to Review Decisions Upholding State Nuclear Subsidies

The U.S. Supreme Court denied petitions for writ of certiorari seeking review of Second and Seventh Circuit Court of Appeals decisions that upheld state subsidies in New York and Illinois for nuclear power plants. The petitioners had argued that the Court should review the question of whether the Federal Power Act preempted the states' zero-emission credit programs. *Electric Power Supply Association v. Star*, No. 18-868; *Electric Power Supply Association v. Rhodes*, No. 18-879 (U.S. Apr. 15, 2019).

Tenth Circuit Dismissed Moot Appeal of Order Enjoining Obama Administration's Waste Prevention Rule

After BLM finalized a rule to replace the Obama administration's Waste Prevention Rule for oil and gas development on public lands, the Tenth Circuit Court of Appeals dismissed as moot an appeal of a district court order enjoining enforcement of the Obama-era rule. The Tenth Circuit also vacated the district court's order. The Tenth Circuit did not, however, order the district court to dismiss the challenge to the Waste Prevention Rule. The court noted that although adoption of a new rule typically moots a challenge to the rule it replaces, in this case the replacement rule removed "almost all" of the Waste Prevention Rule's requirements, leaving some requirements in place. For this reason, the Tenth Circuit concluded that "[w]e do not see any harm in allowing the district court to decide in the first instance whether the entire case is moot." *Wyoming v. U.S. Department of the Interior*, Nos. 18-8027 & 18-8029 (10th Cir. Apr. 9, 2019).

Adhering to 2017 Opinion, D.C. Circuit Vacated HFC Substitution Requirement

In an unpublished judgment, the D.C. Circuit Court of Appeals granted petitions for review challenging the second of two U.S. Environmental Protection Agency (EPA) rules that made certain hydrofluorocarbons (HFCs) unacceptable substitutes for ozone-depleting substances due to the HFCs' global warming potential. The D.C. Circuit said it was bound by its 2017 opinion

that held that EPA could not require manufacturers to replace HFCs they had already lawfully installed as substitutes. The court rejected the arguments of respondent-intervenors that the challenges to the substitution requirement were not timely. Although the D.C. Circuit had not expressly decided the timeliness issue in its 2017 opinion, the court concluded that the argument was barred under the doctrine of offensive issue preclusion. *Mexichem Fluor, Inc. v. EPA*, No. 17-1024 (D.C. Cir. Apr. 5, 2019).

D.C. Circuit Granted EPA Request to Continue Abeyance for Clean Power Plan Challenges; EPA Sent Final Replacement Rule to OMB

On April 5, 2019, the D.C. Circuit Court of Appeals granted EPA's request to continue holding the cases challenging the Obama administration's Clean Power Plan in abeyance while EPA considers a potential replacement rule to address carbon dioxide emissions from existing power plants. The court ordered that the cases be held in abeyance for 60 more days, with status reports to be filed by EPA at 30-day intervals. On April 26, 2019, EPA submitted its final replacement rule—which the proposed rule called the "Affordable Clean Energy Rule"—to the Office of Management and Budget (OMB) for review. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. Apr. 5, 2019).

Washington Federal Court Stayed Challenge to Denial of Water Quality Certification for Coal Export Facility Until State Court Actions Concluded

On April 11, 2019, the federal district court for the Western District of Washington stayed a lawsuit challenging Washington State's denial of a water quality certification for a coal export facility on and in the Columbia River. The court concluded that the case satisfied the three elements for *Pullman* abstention, which allows federal courts to postpone exercise of jurisdiction "when a federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law." First, the district court said the complaint touched on "a sensitive area of social policy" upon which it should not enter since a viable state court alternative was available—i.e., the pending challenges in state court to the denial of the water quality certification. Second, the district court found that the Commerce Clause issues raised by the plaintiffs "plainly" could be avoided "depending on the degree to which Plaintiffs may prevail in the state court." Third, the court found that the determination of the state law issues—including whether Washington could deny a permit with prejudice and whether it could base the denial on considerations other than water quality—was in doubt. Earlier in April, the district court dismissed foreign affairs doctrine claims, rejecting arguments that the denial of the water quality certification intruded on federal power to deal with foreign nations and was therefore preempted. *Lighthouse Resources Inc. v. Inslee*, No. 3:18-cv-05005 (W.D. Wash.).

Arizona Federal Court Allowed Pared-Down Challenge to Mexican Grey Wolf Recovery Plan to Proceed

A federal court in Arizona allowed conservation groups to pursue only some of their claims that the U.S. Fish and Wildlife Service's (FWS's) 2017 recovery plan for the Mexican grey wolf was inadequate. Plaintiffs alleged, among other things, that the recovery plan failed to utilize best available science to assess threats to the endangered Mexican wolf, including threats from

ongoing and future impacts of climate change. The court concluded that it had jurisdiction under the Endangered Species Act (ESA) citizen suit provision to consider allegations that the recovery plan had failed to address certain problems identified by the agency. The court found, however, that other claims—including the claim that the recovery plan failed to incorporate best available science—were not cognizable either under the ESA or the Administrative Procedure Act. The court held that the ESA's recovery plan provision does not impose a "best available science" mandate. The court also characterized many of the plaintiffs' claims as disagreements with FWS determinations that were within the FWS's discretion and therefore unreviewable. *WildEarth Guardians v. Zinke*, No. 4:18-cv-00048 (D. Ariz. Mar. 30, 2019).

New York Federal Court Reversed Jury Verdict Against Town of East Hampton for Causing Shoreline Erosion

The federal district court for the Eastern District of New York granted judgment as a matter of the law to the Town of East Hampton, reversing a jury verdict that found the Town liable to the owners of beachfront homes next to two jetties that allegedly caused the plaintiffs' beaches to erode. The court held that the requirements for intentional private nuisance were not met; that the requirements for negligent private nuisance could not be satisfied because the Town did not have control over the jetties and therefore had no duty to prevent the jetties from damaging or interfering with the plaintiffs' properties; and that the Town could not be liable for trespass because it had not acted intentionally and willfully or negligently. The court said, alternatively, that it would grant the Town's motion for a new trial. *Cangemi v. Town of East Hampton*, No. 2:12-cv-03989 (E.D.N.Y. Mar. 15, 2019).

California Supreme Court Sent Case Concerning Climate Impacts on Dam Back to Lower Appellate Court

The California Supreme Court directed the California Court of Appeal to vacate and reconsider its decision finding that state courts lacked jurisdiction to hear California counties' claims that the impact of climate change on continued operation of the Oroville Dam should have been considered in a relicensing process for the dam. The Supreme Court ordered the Court of Appeal to reconsider the case in light of the Supreme Court's 2017 decision *Friends of the Eel River v. North Coast Railroad Authority*, which concluded that the federal Interstate Commerce Commission Termination Act of 1995 did not preempt application of the California Environmental Quality Act to a railroad project undertaken by a state public entity. *County of Butte v. Department of Water Resources*, No. S253810 (Cal. Apr. 10, 2019).

Washington Appellate Court Said Climate Change Protester Must Be Allowed to Present Necessity Defense

The Washington Court of Appeals held that a trial court order excluding testimony and evidence on the necessity defense deprived a climate change protester of his Sixth Amendment right to present a defense. The protester was convicted of burglary in the second degree after he broke into a pipeline facility and turned off a valve, stopping the flow of Canadian tar sands oil to refineries in Washington. The court found that the protester had presented "a sufficient quantum of evidence to show that he would likely be able to meet each element of the necessity defense."

First, the court said the defendant's proof of how past acts of civil disobedience had been successful, of previous climate activism campaigns, and of his own personal experience of effecting change through civil disobedience was sufficient evidence that he believed his actions were necessary to minimize the harms he perceived. Second, the court found that the defendant had offered sufficient evidence that the harms of climate change were greater than the harm of breaking into the pipeline facility. Third, the court said whether the harms of global climate change were caused by the defendant was not at issue in this case but noted that the defendant had proffered evidence about the "root causes" of global climate change. Fourth, the court found that the defendant offered sufficient evidence of the absence of reasonable legal alternatives. The evidence included the defendant's 40 years of involvement in environmental movements, his numerous attempts to address climate change, and the failures of most of those efforts. The court also concluded that the defendant's actions "were not intended to be merely symbolic in nature" (since he sought not just to alleviate climate change "generally" but to address the "specific dangers" of tar sands oil and sea level rise in Washington) and that the evidence offered therefore was not solely aimed at inducing jury nullification. The court also found that the denial of the defendant's constitutional rights was not harmless since even on the "closest question" of whether the defendant admitted he had reasonable legal alternatives a jury could "well have concluded that [the] available legal alternatives were futile." The court reversed and remanded for a new trial. *State v. Ward*, No. 77044-6-I (Wash. Ct. App. Apr. 8, 2019).

Virginia Court Dismissed Challenge to Denial of Application for Residential Development in Flood-Prone Area

A Virginia trial court reportedly ruled on April 24, 2019 that the Virginia Beach City Council properly denied a developer's application to build a residential development in an area prone to flooding. The developer had contended that the City acted outside of its authority and arbitrarily and capriciously by requiring the developer to provide a stormwater analysis that accounted for 1.5 foot sea level rise and heavier storms. As of May 5, 2019, a written order from the court was not available. *Argos Properties II, LLC v. City Council for Virginia Beach*, No. CL18002289-00 (Va. Cir. Ct. Apr. 24, 2019).

NEW CASES, MOTIONS, AND NOTICES

Challenge to Outer Banks Toll Bridge Alleged Failure by Transportation Agencies to Consider Recent Advances in Climate Science

A North Carolina conservation organization and a local citizen group filed a lawsuit in the federal district court for the Eastern District of North Carolina challenging approvals for a toll bridge in the Currituck Outer Banks. The plaintiffs alleged that transportation agencies had approved the project in March 2019 without any public review of the project since a final environmental impact statement (EIS) was completed in January 2012 after the project had failed to move forward for decades due to concerns about the need for the bridge, its potential environmental impacts, and the availability of alternatives. The plaintiffs alleged that a number of issues warranted further scrutiny, including that in the intervening years "the science behind sea level rise, storm surge, and climate change models has significantly advanced—with implications for the durability of the Toll Bridge, its utility as a hurricane evacuation route, and

its financial viability as a toll revenue generating facility." The plaintiffs said the reevaluation of the 2012 EIS had not considered recent advances in climate change science; up-to-date sea level projections; recent observed and projected increases in storm surge magnitude; intensifying hurricanes; or marsh migration. The plaintiffs asserted a number of claims under NEPA, including that a supplemental EIS should have been prepared to address, among other issues, the new data about sea level rise and storm surge impacts. *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014 (E.D.N.C., filed Apr. 23, 2019).

Antitrust Class Action in Arizona Federal Court Challenged Alleged Discriminatory Pricing Scheme for Consumers with Solar Energy Systems

An antitrust class action lawsuit filed in the federal district court for the District of Arizona alleged that a public utility took actions "to unlawfully maintain its existing monopoly power over the retail delivery of electricity to customers throughout its service territory … by engaging in anticompetitive conduct designed to eliminate solar energy competition by implementing a discriminatory pricing scheme" that imposed higher electricity rates on consumers with solar energy systems. The complaint's allegations included that the utility's price plan "prevents consumers from taking advantage of solar energy systems purchased in order to save money, promote environmental policies, conserve natural resources and promote other beneficial policies realized through the self-generation and use of solar energy" (including reduction of air pollution, water pollution, and greenhouse gases). The complaint asserted claims under the Sherman Antitrust Act, the Arizona Uniform State Antitrust Act, the Arizona Constitution, Arizona's public utilities statute, and the Equal Protection Claus of the Fourteenth Amendment of the U.S. Constitution. *Ellis v. Salt River Project Agricultural Improvement & Power District*, No. 2:19-cv-01228 (D. Ariz., first amended complaint Apr. 23, 2019).

Lawsuit Filed Challenging Environmental Reviews for Oil and Gas Leases in Southeastern Utah

Southern Utah Wilderness Alliance (SUWA) filed a lawsuit in federal court in Utah claiming that the U.S. Bureau of Land Management acted arbitrarily and capriciously when it decided in March and December 2018 to offer 35 oil and gas leases covering 54,508 acres of public lands in southeastern Utah. SUWA alleged that over the past year and a half BLM had "offered, sold and issued a mosaic of oil and gas leases on the doorstep of Bears Ears, Canyons of the Ancients, and Hovenweep National Monuments" without fully analyzing the impacts of the leasing decisions, including impacts on greenhouse gas emissions and climate change. In particular, the complaint alleged that BLM had not considered emissions of greenhouse gases other than carbon dioxide, such as methane and nitrous oxide. SUWA also said BLM's environmental review failed to consider greenhouse gas emissions from activities that occur after production but prior to combustion such as fugitive emissions from pipeline leaks. In addition, SUWA alleged that BLM had not considered reasonably foreseeable cumulative impacts. The complaint asserted claims under the National Environmental Policy Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act. *Southern Utah Wilderness Alliance v. Bernhardt*, No. 2:19-cv-00266 (D. Utah, filed Apr. 19, 2019).

Lawsuit Filed to Compel Action Under Endangered Species Act for 24 Species, Including Climate Change-Threatened Species

Center for Biological Diversity filed a lawsuit in federal court in the District of Columbia challenging the Secretary of the Interior and U.S. Fish and Wildlife Service's failures (1) to make required 12-month findings on petitions to list 16 species under the Endangered Species Act; (2) to publish final listing determinations on two species; and (3) to designate critical habitat for six species. The complaint alleged climate change-related threats to six of the species that are the subject of this lawsuit—the Franklin's bumblebee, the yellow-banded bumblebee, the meltwater lednian stonefly, the western glacier stonefly, the Miami tiger beetle, and the elfin-woods warbler. *Center for Biological Diversity v. Bernhardt*, No. 1:19-cv-01071 (D.D.C., filed Apr. 17, 2019).

Environmental Groups Challenged NEPA Review for Federal Coal Lease Near Bryce Canyon National Park

Six environmental and conservation organizations filed a lawsuit in the federal district court for the District of Utah challenging a federal coal lease sale on public land in Utah. The complaint alleged that the lease would allow an existing coal mine on private lands located approximately 10 miles from Bryce Canyon National Park to expand to include federal lands. The complaint—which asserted claims under the National Environmental Policy Act (NEPA)—included allegations that the federal defendants failed to assess direct, indirect, and cumulative impacts from greenhouse gas emissions. In particular, the complaint asserted that although the defendants quantified economic benefits associated with expansion of the mine, they failed to use available tools to quantify the direct or indirect impacts of greenhouse gas emissions associated with the mine. The complaint also alleged that the defendants failed to consider the project's cumulative greenhouse gas impacts together with other coal mining projects considered and approved by the defendants. *Utah Physicians for a Healthy Environment v. U.S. Bureau of Land Management*, No. 2:19-cv-00256 (D. Utah, filed Apr. 16, 2019).

Lawsuit Challenged Constitutionality of President Trump's New Authorizations for Keystone XL Pipeline; Government and TransCanada Asked Ninth Circuit to Order Dismissal of Challenge to 2017 Permit

A regional network of indigenous peoples and a regional association of conservation leaders filed a lawsuit on April 5, 2019 challenging actions taken by President Trump on March 29, 2019 to facilitate construction and operation of the Keystone XL Pipeline. The lawsuit challenged the President's authority to issue a new presidential permit for pipeline facilities at the U.S.-Canada border (President Trump also revoked the presidential permit issued in March 2017) and his authority to authorize the pipeline's other U.S. facilities, which extend for 875 miles. The plaintiffs asserted that the President lacked authority to issue the presidential permit because the Constitution's Property Clause granted Congress the authority to regulate federal lands and Congress had directed BLM to manage the property in question (a 1.2-mile segment in Montana on lands administered by BLM). The plaintiffs asserted that the President lacked authority with respect to the balance of the pipeline for three reasons: (1) the pipeline would cross 45 miles of other lands administered by BLM; (2) the authorization conflicted with Congress's correlative

power to regulate foreign and domestic commerce; and (3) the authorization conflicted with executive orders that delegated authority to approve transboundary pipelines such as Keystone XL to the Department of State. The plaintiffs contended that the executive orders required compliance with all applicable laws and that by evading compliance with those laws, the President's action conflicted with Congress's correlative power to regulate foreign and interstate commerce. (In Executive Order 13867 issued on April 10, President Trump revoked these executive orders.) *Indigenous Environmental Network v. Trump*, No. 4:19-cv-00028 (D. Mont., filed Apr. 5, 2019).

In the litigation challenging the March 2017 presidential permit, the federal government and TransCanada asked the Ninth Circuit to dismiss their appeals of the district court's orders finding violations of NEPA and the Administrative Procedure Act. In their motions, the government and TransCanada argued that President Trump's revocation of the presidential permit rendered the plaintiffs' claims moot. They asked the Ninth Circuit to vacate the district court's judgment and void the district court's injunction on construction and certain preconstruction activities. Briefing on the motions was scheduled to be completed on May 7. *Indigenous Environmental Network v. U.S. Department of State*, Nos. 18-36068 et al. (9th Cir.).

Tribes Challenged Section 404 Permit for Copper Mine in Arizona, Cited Cumulative Effects of Climate Change in Alleging Violations of State Water Quality Standards

Three Indian tribes filed a lawsuit challenging a Section 404 permit granted to a mining company for prefilling all washes on a copper mine site with native material. The complaint alleged that the South Pacific Division of the U.S. Army Corps of Engineers had "artificially constrained" the scope of its analysis under the Clean Water Act and "circumvented" previous adverse findings of EPA, the Los Angeles District of the Corps, local agencies, the tribes, and the public by reasoning that the filling of the washes would allow the mining company to construct a mine pit and dump waste rock without additional Clean Water Act analysis. The tribes asserted claims under the Clean Water Act, NEPA, and the Administrative Procedure Act, including claims that the mine would violate state water quality standards "due to increased pollution, loss of assimilative capacity, and the cumulative effects of climate change, among other things." The case has been consolidated with an earlier-filed case (*Save the Scenic Santa Ritas v. U.S. Army Corps of Engineers*, No. 4:19-cv-00177) in which environmental and conservation groups assert similar claims. *Tohono O'odham Nation v. Helmlinger*, No. 4:19-cv-00205 (D. Ariz., filed Apr. 10, 2019).

CARB Sought to Compel Release of Information Underlying Proposed Rollback of Vehicle Emission Standards

The California Air Resources Board (CARB) filed a Freedom of Information Act (FOIA) lawsuit against EPA and the National Highway Traffic Safety Administration (NHTSA) seeking to compel the agencies to conduct searches for, and make available, records responding to CARB's requests for information related to the agencies' proposed rollbacks of vehicle emission and fuel economy standards. CARB alleged that the agencies' proposed rollbacks "contradict previous, thorough technical analyses conducted by EPA, NHTSA, CARB and others" and that "in a stark departure from prior rulemakings, critical information underlying EPA's and NHTSA's analyses

was not disclosed." CARB said that "very serious flaws" in the agencies' analysis and conclusions compelled it to submit FOIA requests for underlying information. CARB asserted that EPA had failed to issue timely determinations on its requests, and that NHTSA had improperly withheld information. *California Air Resources Board v. EPA*, No. 1:19-cv-965 (D.D.C., filed Apr. 5, 2019).

Alleging Climate Change Injuries, Three States Launched Challenge to Trump's "Reducing Regulation" Executive Order

California, Oregon, and Minnesota filed a new lawsuit challenging President Trump's Executive Order 13771 on "Reducing Regulation and Controlling Regulatory Costs" as well as guidance issued by the Office of Management and Budget to assist agencies in implementing the executive order. The executive order includes, among other directives, a "two-for-one" requirement that agencies repeal at least two regulations to offset each new regulation. In their lawsuit, filed in federal court in the District of Columbia, the three states alleged that the executive order had been a cause of the Trump administration's failure to finalize regulations proposed during the Obama administration, including rules proposed to address energy conservation and greenhouse gas emissions. The states' complaint also included allegations detailing climate change-related impacts the states were suffering. The states said that although they had taken significant measures to address their own greenhouse gas emissions, action on a nationwide scale was necessary. They cited several rulemaking processes allegedly affected by the order, including the failure to implement municipal solid waste landfill emission guidelines, the delay and suspension of BLM's methane waste rule, the repeal of the Federal Highway Administration's Greenhouse Gas Performance Measure, and the failure to finalize proposed energy efficiency standards for residential conventional cooking products. The complaint alleged violations of the separation of powers doctrine and Take Care Clause, asserted that President Trump and other defendants had acted outside the scope of their authority, and contended that the agency defendants violated the Administrative Procedure Act. *California v. Trump*, No. 1:19-cv-00960 (D.D.C., filed Apr. 4, 2019).

Activists Challenged Constitutionality of South Dakota "Riot Boosting" Law

Environmental and indigenous groups and activists filed a lawsuit in federal court in South Dakota challenging the "Riot Boosting Act," a law signed by South Dakota Governor Kristi Noem in March 2019 that makes persons who participate in, direct, advise, or encourage "riots" or solicit another participant in a riot to acts of force or violence liable to the State or other political subdivision for damages. The plaintiffs alleged that the law was passed in response to pipeline protests near Standing Rock, North Dakota, and to legislators' concerns regarding possible protests of the Keystone XL pipeline. The complaint asserted that the Riot Boosting Act, along with certain criminal statutes, unlawfully chilled "peaceful protests" in violation of the First and Fourteenth Amendments. *Dakota Rural Action v. Noem*, No. 5:19-cv-05046 (D.S.D., filed Mar. 28, 2019).

April 1, 2019, Update # 121

FEATURED CASE

D.C. Federal Court Said Climate Change Analysis for Wyoming Oil and Gas Leases Was Insufficient

The federal district court for the District of Columbia ruled that the U.S. Bureau of Land Management (BLM) did not sufficiently consider the climate change effects of oil and gas leasing in its National Environmental Policy Act (NEPA) review for 282 lease sales covering more than 303,000 acres in Wyoming. The court found that BLM did not take a hard look at drilling-related and downstream greenhouse gas emissions associated with the leases and that BLM failed to "sufficiently compare those emissions to regional and national emissions." Regarding drilling-related emissions, the court rejected the argument that BLM could defer its consideration of certain environmental impacts, including greenhouse gas emissions, until the drilling stage; the court said NEPA required BLM at the leasing stage to "reasonably quantify the [greenhouse gas] emissions resulting from oil and gas development on the leased parcels in the aggregate." The court found that BLM had sufficient information to forecast greenhouse gas emissions at this stage and concluded that BLM's justification for limiting its analysis to qualitative discussions of greenhouse gas emissions and their impacts was not reasonable. The court also rejected BLM's argument that the environmental assessments for the lease sales had been "tiered" to environmental impact statements (EISs) for resource management plans that quantified emissions; the court noted that not all of the EISs included such quantitative analysis and that the analysis in the EISs that did quantify emissions was not adequate for the leasing stage analysis. With respect to downstream emissions from combustion of oil and gas, the court found that such emissions were indirect effects of the oil and gas leasing under the applicable "heightened" causation standard. The court declined, however, to require BLM to quantify downstream emissions. Instead, the court remanded for BLM to "strengthen" its discussion of downstream effects and directed the agency to consider whether quantifying greenhouse gas emissions from downstream use was "reasonably possible," including through use of an emissions calculator suggested by the plaintiffs. Regarding cumulative effects, the court ruled that BLM's refusal to quantify greenhouse gas emissions rendered its cumulative impacts analysis inadequate. BLM's duty under NEPA, said the court, was to "quantify the emissions from each leasing decision—past, present, or reasonably foreseeable—and compare those emissions to regional and national emissions, setting forth with reasonable specificity the cumulative effect of the leasing decision at issue." The court stated that "[g]iven the national, cumulative nature of climate change, considering each individual drilling project in a vacuum deprives the agency and the public of the context necessary to evaluate oil and gas drilling on federal land before irretrievably committing to that drilling." The court rejected, however, the plaintiffs' contention that BLM was required to use certain protocols—the "social cost of carbon" and the "global carbon budget"—to quantify climate change impacts. The court did not vacate the leasing decisions but enjoined BLM from authorizing new oil and gas drilling on the leases while the agency conducts its additional analysis. *WildEarth Guardians v. Zinke*, No. 16-1724 (D.D.C. Mar. 19, 2019).

DECISIONS AND SETTLEMENTS

Ninth Circuit Declined to Lift Injunction Barring Keystone XL Construction and Preconstruction Activities; Trump Issued New Presidential Permit Intended to Be Unreviewable

On March 15, 2019, the Ninth Circuit Court of Appeals denied a motion by the Keystone XL pipeline developers to stay a district court order barring them from proceeding with construction and certain preconstruction activities. A Montana federal district court enjoined such activities pending the U.S. Department of State's completion of additional environmental review in compliance with the court's November 2018 order. On March 29, 2019, however, President Trump issued a new presidential permit authorizing the construction of the pipeline across the U.S.-Canadian border. The new permit revoked the March 2017 permit that is the subject of the lawsuit. The new permit stated that it was granted "notwithstanding" a January 2017 presidential memorandum on which the district court relied to find that the March 2017 permit was not immune from review. The district court concluded that the January 2017 memorandum waived the president's right to review the State Department's decision on the permit and that the State Department's decision was subject to judicial review. Neither the government nor the pipeline developer had applied to the district court or the Ninth Circuit for relief from the injunction as of April 1.

In their stay motion in the Ninth Circuit, the Keystone developers focused on threshold jurisdictional issues, including the issue of whether the district court had erred in finding that the State Department's issuance of a presidential permit for the project was subject to judicial review. The developers also argued that the scope of the district court's injunction was impermissibly broad. In the order denying the stay, the Ninth Circuit characterized the jurisdictional questions as "complex" and found that the developers had not made "the requisite strong showing that they are likely to prevail on the merits." Noting that the district court itself had narrowed the scope of its injunction, the Ninth Circuit found no abuse of discretion in the district court's declining to stay the injunction. *Indigenous Environmental Network v. U.S. Department of State*, Nos. 18-36068 et al. (9th Cir. Mar. 15, 2019).

Alaska Federal Court Vacated Trump Revocation of Obama Withdrawals of Arctic and Atlantic Areas from Oil and Gas Leasing

On March 29, 2019, the federal district court for the District of Alaska vacated the portion of a 2017 executive order issued by President Trump that revoked President Obama's prior withdrawals of certain areas of the Outer Continental Shelf in the Arctic and Atlantic Oceans from oil and gas leasing. The court held that President Trump's revocation of the withdrawals exceeded presidential authority granted by the Outer Continental Shelf Lands Act (OCSLA). The court said that the text of Section 12(a) of the OCSLA—which provides that the president "may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf"—did not expressly grant the power to revoke prior withdrawals. Although the court said the inclusion of "from time to time" in Section 12(a) rendered the provision ambiguous, the court concluded that the structure, legislative history, and purposes of the OCSLA indicated that Congress intended to authorize the president only to withdraw lands from leasing. The court indicated that instances of Congress deciding not to challenge "the small number of prior revocations" fell "far short of the high bar required to constitute acquiescence" to the president's

authority to revoke withdrawals, and that there was "[t]oo little information" about Congress's inaction with respect to Section 12(a) to override the court's interpretation. *League of Conservation Voters v. Trump*, No. 3:17-cv-00101 (D. Alaska Mar. 29, 2019).

Massachusetts Federal Court Let Claims Proceed Against Exxon for Failing to Consider Foreseeable Severe Weather Events at Marine Terminal

A federal court in Massachusetts declined to dismiss claims asserted by Conservation Law Foundation (CLF) against ExxonMobil Corporation (Exxon) for allegedly violating a marine terminal's Clean Water Act permit by failing to take into account the impacts of climate change. The court—which issued its decision orally—concluded that CLF's amended complaint included new allegations of imminent harm sufficient to allege standing and that the complaint alleged sufficient facts to state claims that Exxon violated the Clean Water Act permit by failing to consider weather events induced by climate change in its Storm Water Pollution Prevention Plan (SWPPP). Regarding standing, the court pointed to the complaint's allegations of severe weather events induced by climate change that were already occurring or would occur in the near future in Massachusetts. In considering whether CLF had stated a claim, the court held that the Clean Water Act permit required consideration of foreseeable severe weather events, including climate change-induced weather events, because the permit required Exxon both to develop a SWPPP using "good engineering practices" and also to proactively address potential discharges of pollutants. The court found that U.S. Environmental Protection Agency (EPA) guidance and allegations of engineers' practices in the field were sufficient to establish a claim that "good engineering practices" should include consideration of foreseeable severe weather events. The court was not persuaded by Exxon's arguments that the permit shield doctrine barred CLF's claims because EPA was aware of climate change when it issued the permit for the terminal; the court also said CLF allegations were sufficient to allege that Exxon had not taken foreseeable severe weather events into account in the SWPPP and in designing the terminal. The court also allowed CLF's Resource Conservation and Recovery Act claim to proceed, except to the extent that it was based on discharges from point sources covered by the permit, because CLF plausibly alleged an imminent threat of harm. In addition, the court dismissed two claims and allowed two non-climate change claims to proceed, as it had previously indicated it would do, and also dismissed a third claim that it deemed to be subject to the permit shield doctrine. The court set a schedule for Exxon to file a motion for a stay under the doctrine of primary jurisdiction, with oral argument to be held on May 14. The court directed Exxon to issue any subpoena for EPA testimony by April 5 to allow EPA an opportunity to move to quash the subpoena. *Conservation Law Foundation, Inc. v. ExxonMobil Corp.*, No. 1:16-cv-11950 (D. Mass. Mar. 14, 2019).

Missouri Federal Court Upheld Bankruptcy Court Order Requiring California Municipalities to Dismiss Lawsuits Against Peabody

A federal district court in Missouri upheld a bankruptcy court's order requiring the San Mateo and Marin Counties and the City of Imperial Beach (the plaintiffs) to dismiss their climate change lawsuits against the reorganized Peabody Energy Corporation (Peabody). Peabody, a coal company, filed for bankruptcy in 2016 and emerged from bankruptcy in April 2017. The plaintiffs filed their lawsuit against Peabody and other defendants in July 2017. The district court found that Peabody's Chapter 11 bankruptcy plan discharged the plaintiffs' claim under

California's public nuisance statute because not only equitable but also legal relief was available to the plaintiffs for an alleged breach of the statute. The district court also found that the bankruptcy court did not abuse its discretion in determining that the plaintiffs' other claims were not exempt from discharge. *County of San Mateo v. Peabody Energy Corp. (In re Peabody Energy Corp.)*, No. 4:17 CV 2886 (E.D. Mo. Mar. 29, 2019).

Colorado Federal Court Said NEPA Required Consideration of Foreseeable Oil and Gas Combustion Impacts but Upheld Other Aspects of Review

The federal district court for the District of Colorado ruled that greenhouse gas emissions from combustion of oil and natural gas should have been considered in the environmental review for BLM and the U.S. Forest Service actions authorizing oil and gas development in the Bull Mountain Unit in the Colorado River basin, but rejected other challenges to the agencies' analysis of climate change-related impacts. The court found that the agencies erred in failing to consider the foreseeable indirect effects resulting from combustion of oil and gas, rejecting arguments that calculating greenhouse gas emissions from the combustion of oil and natural gas would be too speculative and that the defendants' approval of a master development plan for land owned by defendant-intervenors within the Unit would not affect the intervenors' ability to develop oil and gas resources. The court found, however, that the agencies had taken "an appropriately hard look" at cumulative climate change impacts and that the defendants were not required to perform a cost-benefit analysis using the social cost of carbon. The court also largely upheld other aspects of the agencies' NEPA review, except for its evaluation of cumulative impacts on mule deer and elk. *Citizens for a Healthy Community v. U.S. Bureau of Land Management*, No. 1:17-cv-02519 (D. Colo. Mar. 27, 2019).

D.C. Federal Court Dismissed Challenge to Critical Habitat for Climate Change-Threatened Sierra Nevada Amphibians

The federal district court for the District of Columbia ruled that the California Cattlemen's Association and two other agricultural trade groups lacked standing to challenge the designation of critical habitat for three amphibian species listed under the Endangered Species Act. All three species live in California's Sierra Nevada mountain range and are threatened by a number of factors, including changes associated with climate change. The district court found that the trade groups had not established that any of their members would suffer an injury traceable to the designation of critical habitat, as opposed to pre-existing requirements. In addition, the groups failed to show that a decision in their favor would redress the alleged injuries. *California Cattlemen's Association v. U.S. Fish & Wildlife Service*, No. 1:17-cv-01536 (D.D.C. Mar. 27, 2019).

Texas Federal Court Said Fish and Wildlife Service Should Not Have Required Unavailable Data—Including Climate Change Information—in Delisting Petition for "Elusive Spider"

The federal district court for the Western District of Texas found that the U.S. Fish and Wildlife Service (FWS) had acted arbitrarily and capriciously when it denied a petition to remove the bone cave harvestman—"an elusive spider known to inhabit only Travis and Williamson

Counties, Texas"—from the list of endangered species. The court found that the FWS violated its own regulations by requiring that the petition "essentially present conclusive evidence about the harvestman's population trends—more evidence than the Service admits is available or attainable." The FWS had cited the absence of population data, including the absence of "trend analysis to indicate that this species can withstand the threats associated with development or climate change over the long term," as grounds for its conclusion that the petition did not present sufficient information to demonstrate that delisting might be warranted. The court concluded that the FWS did not deny the petition based on the best available data, as required by the Endangered Species Act and the FWS regulations, because it denied the petition based on the absence of "admittedly *unavailable*" evidence. The court concluded that the petition met the threshold for a finding that delisting may be warranted and remanded to the FWS for further consideration. *American Stewards of Liberty v. Department of the Interior*, No. 1:15-cv-1174 (W.D. Tex. Mar. 28, 2019).

Sierra Club Found to Have Standing to Challenge Lack of Manufactured Housing Energy Efficiency Standards

The federal district court for the District of Columbia ruled that Sierra Club had associational standing to bring a lawsuit against the Secretary of Energy to compel the promulgation of energy efficiency standards for manufactured housing. The Energy Independence and Security Act of 2007 required that such standards be established by December 19, 2011. The court found that Sierra Club had demonstrated that its members had suffered economic, health, and procedural injuries, and that there was a causal relationship between the Secretary's inaction and the alleged injuries that would be redressed by promulgation of energy efficiency standards should Sierra Club prevail. The court said it was undisputed and clear that Sierra Club satisfied both of the remaining requirements for associational standing since its members' interests were germane to the organization's purpose and the members' individual participation in the lawsuit was not required. *Sierra Club v. Perry*, No. 17-cv-2700 (D.D.C. Mar. 12, 2019).

California Appellate Court Said Utilities' Distributed Resource Plans Could Consider Nonrenewable Energy Sources

The California Court of Appeal rejected Sierra Club's challenge to a determination by the California Public Utilities Commission (CPUC) allowing electric utilities to consider energy produced from nonrenewable sources in their proposed plans for the deployment of "distributed resources." The court agreed with Sierra Club that the Public Utilities Code definition of "distributed resources" excluded energy produced from nonrenewable sources but found that the statute did not prohibit utilities' plans from also discussing localized natural gas-fueled energy sources. *Sierra Club v. Public Utilities Commission*, No. A152005 (Cal. Ct. App. Mar. 7, 2019).

Oregon Court Upheld State's Low Carbon Fuel Standard Rules

The Oregon Court of Appeals upheld rules adopted to implement Oregon's low carbon fuel standard. The court found that the Environmental Quality Commission (EQC) evaluated required statutory factors relating to safety and potential adverse effects on public health, the environment, and air and water quality. The court also found that the challenge to EQC's failure

in 2015 to evaluate potential effects on the generation and disposal of waste was moot because EQC had readopted and amended the rules in 2017 in a manner that appropriately addressed the waste issue. The court also ruled that purchase of credits in the low-carbon-fuel market established by the rules did not constitute payment of a tax and therefore did not violate the Oregon constitution's requirement that revenue from taxes on motor vehicle fuels be used exclusively for construction and maintenance of public roads and roadside rest areas. *Western States Petroleum Association v. Environmental Quality Commission*, Nos. 158944, A161442 (Or. Ct. App. Feb. 27, 2019).

NEW CASES, MOTIONS, AND NOTICES

Oakland, San Francisco, and Amici Argued for Revival of Climate Change Nuisance Case

On March 13, 2019, Oakland and San Francisco filed their opening brief in their Ninth Circuit appeal of the dismissal of their climate change nuisance action against oil and gas companies. They argued first that the district court erred in denying their motion to remand to state court in the absence of complete preemption of their state law public nuisance claim. They argued that their claims were not governed by federal common law and that there was no other basis for removal jurisdiction. Second, the municipalities argued that the district court's dismissal of the action—based on the "supposedly 'extraterritorial' reach" of the claims and potential interference with "foreign policy"—"rested on a mischaracterization" of their public nuisance claims as seeking to regulate or enjoin greenhouse gas emissions. The plaintiffs described their actions as seeking only an equitable abatement remedy to mitigate local harms caused by climate change based on the defendants' wrongful promotion of their fossil fuel products "while intentionally failing to disclose material information and/or affirmatively making misleading statements about the inevitable, devastating impacts on coastal communities it knew would result from the expanded use of … otherwise lawful products." The municipalities asserted that their state law nuisance claims "easily survive" a federal preemption defense; that the presumption against extraterritoriality did not apply (or would be overcome if it did apply); and that the claims could be adjudicated without any foreign policy concerns. Finally, the municipalities contended that the court erred in declining to exercise specific personal jurisdiction over four out-of-state companies.

On March 20, 2019, 10 amicus briefs were filed in support of the municipalities:

Ten states and the District of Columbia argued that the cases belonged in state court and that the district court's personal jurisdiction ruling would have "far reaching adverse consequences."

The California State Association of Counties argued that the municipalities' claims belonged in state court and that personal jurisdiction was proper.

Three local government associations argued that the lawsuits should be remanded or, in the alternative, that the Ninth Circuit should reverse the dismissal of the municipalities' claims on displacement and separation of powers grounds. They also contended that the district court's test for specific personal jurisdiction "places an impossible burden on cities seeking to use nuisance to address harms from activities that cross jurisdictional boundaries."

Six U.S. senators, including both California senators, contended that the municipalities' claims were a "classic case or controversy," "not some abstract political question that is both

nonjusticiable and committed to the other branches of government." They asserted, moreover, that acceptance of the defendants' separation of powers argument "at face value" would reward the defendants' "decades-long efforts" to stifle climate change action by Congress, the executive branch, and international bodies and would not be consistent with the public interest or justice for the municipalities.

Natural Resources Defense Council argued that neither federal common law nor the Clean Air Act completely preempted the municipalities' claims.

Former U.S. government officials did not take a position on the merits of the lawsuit but argued that the district court had erred when it invoked "diplomatic concerns" as a basis for dismissing the municipalities' claims.

Law professors with expertise in conflict of laws and foreign relations law argued that the district court erred in applying the presumption against extraterritoriality to the municipalities' claims and that "judicial caution" in the area of foreign affairs did not apply to the municipalities' domestic tort claims. They also asserted that there was no foreign affairs preemption in this case.

Legal scholars with expertise in property and tort law and related areas contended that California courts were "well-equipped" to handle the municipalities' public nuisance claims and that nuisance law would provide an "efficient remedy" by requiring the defendants "to internalize the costs of any wrongful promotion of fossil fuels."

The Center for Climate Integrity, the Union of Concerned Scientists, and "scholars and scientists with strong interests, education, and experience in the environment and the science of climate change, with particular interest in public information and communication about climate change and how the public and public leaders learn about and understand climate change" indicated that their amicus brief was intended to document what they described as the defendants' "coordinated, multi-front effort" to conceal their knowledge that "the unabated extraction, production, promotion, and sale of their fossil fuel products would result in material dangers to the public."

Scientists and scholars with expertise in climate science submitted a brief to assist the court in understanding "the relevant science and the *inevitable* adaptation expenses these communities are facing." *City of Oakland v. BP p.l.c.*, No. 18-16663 (9th Cir.).

Briefing Completed, Oral Argument Scheduled for June 4 in *Juliana v. United States*

The Ninth Circuit Court of Appeals scheduled oral argument for the federal government's appeal in *Juliana v. United States* to take place in Portland, Oregon, on Tuesday, June 4, 2019, at 9:30 AM. Briefing was completed on March 8 when the federal government filed its reply brief. The government rearticulated its arguments that the plaintiffs lacked standing and that their lawsuit was not a cognizable case or controversy under Article III of the Constitution. The government contended that a "quick look at the climate change issues and actions pending before Congress and the Executive Branch"—including the Green New Deal, carbon tax legislation, and the replacement for the Clean Power Plan—"confirms that Plaintiffs have petitioned the wrong branch." The government also argued that the plaintiffs were required to proceed under the Administrative Procedure Act and that their constitutional claims failed on the merits. In addition, the government countered the plaintiffs' argument that the Ninth Circuit should reconsider its decision to permit the appeal. *Juliana v. United States*, No. 18-36082 (9th Cir.).

EPA Told D.C. Circuit It Expected to Take Final Action on Proposed Clean Power Plan Replacement by End of June

In a status report filed with the D.C. Circuit on March 11, 2019, EPA indicated that the government shutdown had delayed its work on reviewing the public comments on the Affordable Clean Energy Rule (ACE Rule) that EPA has proposed as a replacement for the Obama administration's Clean Power Plan to regulate carbon emissions from existing power plants. EPA said it intended and expected that it would be in a position to take final action on the ACE Rule proposal in the second quarter of 2019. EPA requested that the court continue to hold the cases challenging the Clean Power Plan in abeyance pending the conclusion of rulemaking. Respondent-intervenors opposed this request but asked, in the alternative, that the abeyance period be limited to no more than 60 days with a requirement for status reports every 30 days. *West Virginia v. EPA*, Nos. 15-1363 (D.C. Cir.).

Environmental Groups Sought to Challenge Rollbacks of Sage-Grouse Protections, Asserted Continuing Failure to Consider Climate Change Impacts on Habitat

Environmental groups sought to file a supplemental complaint in their lawsuit challenging federal land use plan amendments adopted in 2015 as part of the National Greater Sage-Grouse Planning Strategy. In the original complaint, the groups contended that the 2015 plans did not go far enough to ensure sage-grouse conservation, including because federal defendants had failed to consider climate change impacts on sage-grouse habitats and populations. In their proposed supplemental complaint and the brief supporting their motion for leave to file it, the groups asserted that the Trump administration had recently taken final actions to roll back protections included in the 2015 plans and that the administration's actions would "hasten the sage-grouse's decline toward extinction." The supplemental complaint alleged that in rolling back the 2015 plans, the defendants had against failed "to analyze the cumulative and synergistic impacts of climate change on sage-grouse habitats and populations," which would include "larger and more frequent wildfires and droughts, and invasions of cheatgrass and other non-native vegetation" that "will further reduce and fragment sage-grouse habitats." *Western Watersheds Project v. Bernhardt*, No. 1:16-cv-00083 (D. Idaho, Mar. 29, 2019).

Groups Challenged Environmental Review for Contract for Green River Water Extractions, Alleging Failure to Take Climate Impacts into Account

Four environmental groups filed a lawsuit asserting that the U.S. Bureau of Reclamation failed to conduct an adequate environmental review pursuant to the National Environmental Policy Act (NEPA) prior to issuing a contract allowing new water extractions from the Green River and the Colorado River Basin. The groups alleged, among other things, that the Bureau of Reclamation's environmental assessment used a modeling run "cherry picked to show minimal impact from the project" because the modeling run ignored the effects of climate change on water availability in the system. The groups asserted that an environmental impact statement should have been prepared, that the NEPA analysis had been unlawfully segmented, that the defendants failed to take a hard look at environmental effects (including by failing to take into account that climate change was "predicted with strong certainty to decrease stream flows"), and that they failed to

look at a reasonable range of alternatives. *Center for Biological Diversity v. U.S. Department of the Interior*, No. 1:19-cv-00789 (D.D.C., filed Mar. 21, 2019).

FOIA Lawsuit Sought Records on Decision That Emission Standards Did Not Require Endangered Species Act Consultation

The Center for Biological Diversity (CBD) filed a Freedom of Information Act (FOIA) lawsuit against the National Highway Traffic Safety Administration (NHTSA) in the federal district court for the District of Columbia to compel NHTSA to produce records in response to a request for records concerning the Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE Vehicles Rule). CBD alleged that the SAFE Vehicles Rule "would vastly increase fuel consumption and emissions of greenhouse gases and other pollutants." The records sought in the FOIA request were any records explaining NHTSA's determination that the SAFE Vehicles Rule did not require Section 7 consultation under the Endangered Species Act. NHTSA, along with EPA, concluded that setting emissions standards did not require such consultation. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, No. 1:19-cv-00785 (D.D.C. Mar. 21, 2019).

Lawsuit Filed Challenging Oil and Gas Lease Sale in Gulf of Mexico

Three environmental groups filed a lawsuit in federal court in the District of Columbia against the Secretary of the Interior and other federal defendants asserting that they violated the National Environmental Policy Act and the Administrative Procedure Act in their decision to hold an oil and gas lease sale in the Gulf of Mexico (Lease Sale 252). The plaintiffs alleged that the Bureau of Ocean Energy Management (BOEM) significantly underestimated the impacts of Lease Sale 52, including by using an incorrect royalty rate to forecast levels of oil and gas exploration, development, and production. They also contended that BOEM arbitrarily assumed that the same impacts would result from the proposed lease sale and the no action alternative. The complaint alleged that oil and gas activities in the Gulf of Mexico cause numerous impacts to the environment, including by contributing significantly to climate change due to greenhouse gases emitted by exploration, development, and production operations and due to the burning of the oil and gas produced in the Gulf. *Healthy Gulf v. Bernhardt*, No. 1:19-cv-00707 (D.D.C., filed Mar. 13, 2019).

Dakota Access Pipeline Developers Launched New Lawsuit Against Protesters

The developers of the Dakota Access Pipeline filed a lawsuit in North Dakota state court against Greenpeace, Red Warrior Society (which the developers said operated as a "front organization" for Greenpeace "to provide cover for Greenpeace USA's support of and engagement in illegal, violent 'direct action'" against DAPL and its developers), and three individuals. The lawsuit was filed a week after a federal court in North Dakota dismissed claims under the Racketeer Influenced and Corrupt Organizations Act against the same defendants (except for Red Warrior Society, which was not a party to the earlier action). The new lawsuit asserted some claims that were the same as or similar to claims the federal court dismissed without prejudice (trespass, defamation, tortious interference, and civil conspiracy), as well as new claims for aiding and abetting trespass, conversion, and aiding and abetting conversion. The plaintiffs alleged that the

defendants "advanced their extremist agenda" through illegal and violent means and that they "also engaged in large-scale, intentional dissemination of misinformation and outright falsehoods," including about DAPL's impacts on climate change. The plaintiffs seek actual, consequential, special, and restitution damages. On March 18, 2019, the Greenpeace defendants removed the lawsuit to federal court on the grounds that the requirements of diversity jurisdiction were met. *Energy Transfer LP v. Greenpeace International*, No. 30-2019-0V-00180 (N.D. Dist. Ct., filed Feb. 21, 2019), *removed*, No. 1:19-cv-00049 (D.N.D. Mar. 18, 2019).

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FEATURED CASE

Pennsylvania Federal Court Dismissed Lawsuit Challenging Trump Administration's Climate Change Deregulatory Actions as Unconstitutional

The federal district court for the Eastern District of Pennsylvania dismissed a lawsuit brought by Clean Air Council and two minors seeking to block the Trump administration's climate change deregulatory efforts on the grounds that they violated the plaintiffs' constitutional rights. The court concluded that it did not have jurisdiction to hear the plaintiffs' claims because neither Clean Air Council nor the individual plaintiffs had established standing. Regarding Clean Air Council, the court found that neither the complaint nor an affidavit submitted by the plaintiffs included specific harms suffered by the organization's members. With respect to the individuals, the court found that while their alleged physical harms constituted particularized and concrete injuries, the injuries were not imminent or certain. The court further found that the alleged injuries could not be traced to the regulatory rollbacks and that a favorable decision by the court would not redress the injuries. In addition, the court said that prudential considerations regarding the separation of powers precluded jurisdiction. In the alternative, the court found that the plaintiffs failed to state a viable claim. The court said there was no legally cognizable due process right to environmental quality, rejecting the plaintiffs' argument that the right to a life-sustaining climate system was a liberty interest guaranteed by the Fifth Amendment. The court said the District of Oregon's decision to the contrary in *Juliana* "certainly contravened or ignored longstanding authority." The court also found that the plaintiffs' claim did not meet the requirements for a state-created danger claim and that the plaintiffs had not stated a claim of invasion of their due process right to property. In addition, the court held that the Ninth Amendment did not provide substantive rights to sustain the plaintiffs' action, and that the public trust claim had no basis in law. *Clean Air Council v. United States*, No. 17-4977 (E.D. Pa. Feb. 19, 2019).

DECISIONS AND SETTLEMENTS

Supreme Court Declined to Consider Religious Order's Pipeline Challenge

The U.S. Supreme Court denied a petition for writ of certiorari in which a religious order of Roman Catholic women sought review of the Third Circuit Court of Appeals' decision affirming dismissal of their Religious Freedom Restoration Act (RFRA)-based challenge

to the Federal Energy Regulatory Commission's approval of a natural gas pipeline that would run through land in Pennsylvania owned by the order. *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*, No. 18-548 (U.S. Feb. 19, 2019).

D.C. Circuit Granted FERC Motion for Voluntary Remand of Case Concerning Timeliness of Determination on Water Quality Certification for Constitution Pipeline

On February 28, 2019, the D.C. Circuit granted the Federal Energy Regulatory Commission's (FERC's) motion for voluntary remand of a proceeding in which a natural gas pipeline developer sought review of FERC's determination that the New York State Department of Environmental Conservation (NYSDEC) had not waived its authority to issue a water quality certification for the pipeline project. The pipeline project at issue is the Constitution Pipeline, which would extend for approximately 124 miles from Pennsylvania through four counties in New York. The developer first submitted an application for a water quality certification to NYSDEC in 2013, and subsequently withdrew and resubmitted applications in 2014 and 2015. NYSDEC denied the application in April 2016, and the Second Circuit upheld the denial. FERC told the D.C. Circuit that it wished to reconsider the orders challenged by the pipeline developer in light of the court's recent decision in *Hoopa Valley Tribe v. FERC*, in which the D.C. Circuit held that withdrawal and resubmission of water quality certification applications "does not trigger" a new one-year statutory period of review. FERC said *Hoopa Valley* left open questions about whether "wholly new" requests can trigger a new statutory review period and about "how different" an application would have to be to trigger a new review period. FERC said it would permit the parties on remand to submit supplemental materials on the significance of the *Hoopa Valley* decision. *Constitution Pipeline Co. v. Federal Energy Regulatory Commission*, No. 18-1251 (D.C. Cir. Feb. 28, 2019).

D.C. Circuit Upheld FERC Approval for Mountain Valley Pipeline, Rejected Claims Regarding Review of Downstream Emissions

In an unpublished judgment, the D.C. Circuit Court of Appeals denied petitions for review of FERC's approval of the Mountain Valley natural gas pipeline, which would extend 300 miles from West Virginia to Virginia. The court found that FERC's conclusion that there was a market need for the project was reasonable and supported by substantial evidence. The court rejected the contention that the climate change impacts of downstream combustion were not adequately considered. The court found it unnecessary to consider the petitioners' argument that FERC had improperly concluded that the downstream emissions were not reasonably foreseeable impacts of the project because FERC had "provided an estimate of the upper bound of emissions resulting from end-use combustion" and given "several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under [the National Environmental Policy Act (NEPA)] or the Natural Gas Act." The D.C. Circuit noted that the petitioners neither proffered an alternative tool for assessing incremental climate impacts of downstream emissions nor countered all of FERC's reasons for not using the Social Cost of Carbon tool. The court also rejected the petitioners' other NEPA and Natural Gas Act arguments as well as Takings Clause, due process,

and National Historic Preservation Act challenges. *Appalachian Voices v. Federal Energy Regulatory Commission*, Nos. 17-1271 et al. (D.C. Cir. Feb. 19, 2019).

Agreement Reached to Resolve Citizen Suit Alleging EPA Failed to Prepare Timely Reports on Renewable Fuel Standard Program

On February 22, 2019, the U.S. Environmental Protection Agency (EPA) published notice of a proposed partial consent decree that would partially resolve a citizen suit brought by Sierra Club to compel EPA (1) to submit triennial reports to Congress on the Renewable Fuel Standard program's environmental and resource impacts and (2) to complete an "anti-backsliding" study to determine the program's impacts on air quality. Sierra Club said EPA's delay in preparing the reports undermined the reporting requirements' purpose of ensuring that the Renewable Fuel Standard program was addressing climate change without adversely affecting the environment. The consent decree would require EPA to complete the anti-backsliding study by March 30, 2020 and would also provide that if the parties could not reach agreement on deadlines for any follow-up action after completion of the anti-backsliding study, the parties would submit a joint motion to govern further proceedings. The parties also stipulated to the dismissal with prejudice of Sierra Club's claim regarding the triennial reports since EPA had issued a report in June 2018. *Sierra Club v. Wheeler*, No. 1:17-cv-02174 (D.D.C. Feb. 22, 2019).

Montana District Court Largely Denied Keystone XL Developer's Request to Conduct Off-Right-of-Way Activities During New Review; Developer Sought Stay from Ninth Circuit

The federal district court for the District of Montana granted in part but largely denied a motion by the developers of the Keystone XL oil pipeline for a stay pending appeal of the injunction barring construction and preconstruction activities for the pipeline. The court enjoined work on the pipeline after finding that the Department of State violated the National Environmental Policy Act (NEPA) and Administrative Procedure Act when it reversed the Obama administration's denial of a cross-border permit for the pipeline. In the stay motion, the developer sought permission to conduct three off-right-of-way activities. In its order on the motion, the court found that the developer was unlikely to prevail on appeal, including on its arguments that the Department of State sufficiently analyzed cumulative greenhouse gas impacts and adequately explained its decision to reverse course and approve the permit. With respect to the policy shift, the court said the Department's "discretion to give more weight to energy security" did not excuse it from ignoring the Obama administration's "factually-based determinations" regarding "Climate Change-Related Foreign Policy Considerations." The court further found that both the developer and the plaintiffs had shown irreparable injury; that off-right-of-way activities in areas that had not been surveyed or were not part of the earlier supplemental environmental impact statement would further threaten irreparable injury to the plaintiffs; and that the public interest weighed in favor of a complete NEPA review. The court therefore allowed certain preconstruction activities to take place in already-surveyed areas but otherwise left the injunction on preconstruction activities in effect. On February 21, 2019, the developer filed a motion in the Ninth Circuit for a stay pending appeal. *Indigenous Environmental Network v. U.S. Department of State*, No. 4:17-cv-00029 (D. Mont. supplemental order on motion to stay Feb. 15, 2019), No. 18-36068 (9th Cir. motion for stay Feb. 21, 2019).

North Dakota Federal Court Dismissed RICO Claims Against DAPL Protestors

The federal district court for the District of North Dakota ruled that the developers of the Dakota Access Pipeline (DAPL) failed to establish claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) against Greenpeace and three individual anti-pipeline protestors. Greenpeace allegedly raised money based on false information about DAPL's impact on the environment and Native American lands and provided funds to support DAPL protestors. One of the individual defendants was allegedly an organizer for the Red Warrior Camp, an encampment of protestors who allegedly delayed the construction of DAPL and damaged plaintiffs' property. A second individual allegedly received training from Earth First! (which had already been dismissed from the lawsuit) and used an oxy-acetylene cutting torch to cut holes in the pipeline in Iowa. The third individual, a pipeline campaigner for Greenpeace, allegedly trained anti-pipeline protestors in Louisiana. Other named individual defendants had not been served. The court found that the plaintiffs' allegations were insufficient to establish a RICO "enterprise" because although the defendants shared the common purpose of opposing DAPL, there was "no ongoing organization, no continuing unit, and no ascertainable structure distinct from the alleged RICO violations." The court also pointed out problems with the amended complaint's allegations of a pattern of racketeering activity, including shortcomings in the allegations of predicate acts of wire and mail fraud, drug trafficking, money laundering, and interstate transportation of stolen property, and the absence of allegations concerning how these alleged predicate acts caused the plaintiffs' injury. The court dismissed the RICO claims with prejudice, declined to exercise jurisdiction over the remaining state-law claims, and denied plaintiffs' motion for an extension of time to serve. *Energy Transfer Equity, LP v. Greenpeace International*, No. 1:17-cv-00173 (D.N.D. Feb. 14, 2019).

Federal Magistrate Found NEPA Violations in Updated Environmental Assessment for Montana Coal Mine Expansion

A federal magistrate judge in the District of Montana recommended that the Office of Surface Mining (OSM) be required to conduct new NEPA analysis for a mining plan modification that would permit expansion of a surface coal mine in southern Montana. In a previous proceeding, the district court found that the initial NEPA review for the modification was insufficient and remanded for additional review. In the new lawsuit, the magistrate judge found that the updated environmental assessment (EA) and finding of no significant impact still violated NEPA. As an initial matter, the magistrate judge concluded that an environmental group that was not a party to the previous litigation had standing and that res judicata therefore did not bar new arguments raised in the new lawsuit—including an argument that OSM failed to apply the social cost of carbon protocol in examining greenhouse gas impacts. On the merits, the magistrate judge agreed with the plaintiffs that the defendants failed to take a hard look at the impacts of coal transportation and the non-greenhouse gas effects of coal combustion. The magistrate also agreed with the plaintiffs that since OSM quantified the mine expansion's economic benefits, it was also required to quantify the costs associated with greenhouse gas emissions or provide a non-arbitrary reason for not doing so. The magistrate then found that the reasons given for not using the social cost of carbon tool as a means to quantify the costs of greenhouse gas emissions were arbitrary. The EA had stated that there was not a consensus on what fraction of the social cost of carbon should be assigned to a coal producer; that it was not certain that greenhouse gas

emissions would be reduced in the absence of the mine's expansion since power plants have alternative sources of coal; and that there were uncertainties regarding the "specific and accurate" social cost of carbon for the proposed action. The magistrate found that the decision not to prepare an environmental impact statement was arbitrary and capricious, but rejected claims that the defendants improperly piecemealed their NEPA analysis or that the Office of Surface Mining arbitrarily failed to consider the validity of the underlying lease. Regarding remedy, the magistrate found that concerns regarding the detrimental impacts of vacating the approval of the mining plan modification remained valid and therefore recommended that vacatur be deferred to allow the defendants time to correct the NEPA violations. *WildEarth Guardians v. Zinke*, No. 1:17-cv-00080 (D. Mont. Feb. 11, 2019).

Federal Court Declined to Dismiss Challenge to "Two-for-One" Order but Found That Plaintiffs Had Not Yet Established Standing

The federal district court for the District of Columbia denied the federal government's motion to dismiss a lawsuit challenging President Trump's "Two-for-One" executive order, but also denied the plaintiffs' motion for summary judgment on the issue of standing. In denying the motion to dismiss for lack of standing, the court found that the plaintiffs had plausibly alleged that the order—which requires agencies to identify two regulations for potential repeal for every new proposed regulation—had delayed issuance of a regulation and that the delay would likely cause harm to at least one of the plaintiff organizations' members that could be redressed by invalidation of the order. In denying the motion for partial summary judgment, the court found that the plaintiffs had failed to demonstrate associational standing as a matter of undisputed material fact with respect to any of the five regulatory measures that the plaintiffs contended had been delayed due to the order, including efficiency standards for cooking products and water heaters. The court also found that the plaintiffs failed to establish organizational standing based on the executive order's undermining of their ability to advocate for health and safety, consumer protection, the environment, and improved working conditions. The court said the case "currently sits in a liminal state" since it cannot not consider the merits without determining that it had jurisdiction. The court planned to hold a status conference to discuss next steps. *Public Citizen, Inc. v. Trump*, No. 17-cv-253 (D.D.C. Feb. 8, 2019).

Federal Court Upheld Denial of Petition to Remove Golden-Cheeked Warbler from Endangered Species List

The federal district court for the Western District of Texas upheld the U.S. Fish and Wildlife Service's (FWS's) 90-day finding that supported denial of a petition to remove the golden-cheeked warbler from the list of endangered species. A 2014 review of the warbler's status found that the warbler was still threatened by widespread destruction of its habitat; at that time, the warbler had been classified as "critically vulnerable" to climate change. In 2015, a petition to delist was submitted, and in 2016, the FWS found that the petition to delist failed to present information regarding the threats of habitat destruction and fragmentation and regarding how those threats affected analysis of other potential threats. The FWS also found that the petition to delist failed to present any information on other potential threats to the warbler's survival, including climate change. In upholding the FWS's findings, the court rejected the argument that the review of the petition to delist was overly stringent, as well as the argument that the FWS

acted arbitrarily and capriciously by listing the warbler as endangered while refusing to designate critical habitat. *General Land Office of the State of Texas v. U.S. Fish & Wildlife Service*, No. 1:17-cv-00538 (W.D. Tex. Feb. 6, 2019).

Washington Federal Court Allowed Environmental Groups to Proceed with Claim that Corps of Engineers Unlawfully Limited Its Jurisdiction by Using Improper High Tide Line

The federal district court for the Western District of Washington denied a U.S. Army Corps of Engineers motion to dismiss a claim that the Corps arbitrarily and capriciously limited its jurisdiction in the Seattle District under Section 404 of the Clean Water Act by deciding not to proceed with a recommended change to the high tide line boundary. The plaintiffs—three environmental advocacy groups—contended that shoreline armoring projects such as seawalls and bulkheads damage the Puget Sound ecosystem and that the Corps was unlawfully limiting its jurisdiction over such projects by using a mean higher high water (MHHW) boundary rather than the mean annual highest tide (MAHT). The plaintiffs alleged that harms associated with shoreline armoring projects would increase due to climate change, as sea levels rise and demand for armoring projects increases. They asserted that the Seattle District had adopted MHHW for the high tide line because it was the highest tidal elevation data available at the time the Clean Water Act was enacted, but that it was frequently exceeded and that data for higher tidal elevations, including MAHT, was now accessible. The court rejected the Corps' argument that that a memo from the commander of the Corps' Northwestern Division directing that the Seattle District "shift away from further consideration" of changing the jurisdictional boundary was a not a final agency action. The court found that the memo marked the consummation of the Corps' decision-making on whether to maintain its use of MHHW as the boundary. The court also said the memo determined rights and obligations and gave rise to direct and appreciable legal consequences since it "indefinitely stopped" any consideration of a change to the boundary. In addition, the court found that the plaintiffs had adequately pleaded standing. *Sound Action v. U.S. Army Corps of Engineers*, No. 2:18-cv-00733 (W.D. Wash. Feb. 5, 2019).

California Appellate Court Said Addendum to 1991 EIR Did Not Have to Consider Climate Change

In an unpublished decision, the California Court of Appeal affirmed a trial court's ruling that an addendum prepared pursuant to the California Environmental Quality Act to review changes to a condominium development on the shore of Big Bear Lake did not have to consider climate change. The appellate court found that substantial evidence reflected that the potential environmental impact of greenhouse gas emissions was known in 1991 when an environmental impact report (EIR) was prepared and that the initial study specifically discussed whether the project would negatively impact climate. The appellate court also upheld all but one of the other challenged aspects of the trial court's decision. *Friends of Big Bear Valley v. County of San Bernardino*, No. E067447 (Cal. Ct. App. Feb. 27, 2019).

New York Court Allowed Attorney General to Move to Dismiss Exxon's Prosecutorial Misconduct Defenses in Climate Fraud Case, Said Discovery on Defenses Could Continue in Meantime

On February 27, 2019, a New York trial court issued a notice allowing the New York attorney general to file a motion to dismiss certain defenses asserted by Exxon Mobil Corporation (Exxon) in the attorney general's climate change fraud suit against Exxon. The attorney general contended that five of Exxon's defenses that were based on allegations of prosecutorial misconduct were "inadequately pleaded and irrelevant." In addition, the attorney general told the state court that the theory behind Exxon's selective-enforcement claim had already been rejected by the federal district court for the Southern District of New York. In the alternative, the attorney general said it would file motion for a protective order limiting discovery in connection with the five defenses. Exxon opposed the attorney general's request to file the motions, arguing that the motions were meritless and premature. Exxon said the attorney general could not rely on the federal court decision, which Exxon said did not consider the viability of the state-law defenses is asserting in this case. Exxon also noted that the attorney general had told the Second Circuit that it should affirm dismissal of Exxon's constitutional claims because Exxon would have a full opportunity to raise objections to the state civil enforcement action. Citing federal and state court decisions in Texas that were generally supportive of Exxon's theories and claims, Exxon also urged the court to reject the attorney general's "cherry picking of judicial authority." In granting permission for the attorney general to file its motion, the court noted that the parties "are involved in disputes in multiple fora and appear to have taken different positions on various issues in different courts." Nonetheless, the court allowed the motion; the court also said Exxon could proceed with discovery on its defenses. The next conference scheduled in the case is on June 25, 2019. *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Feb. 27, 2019).

CARB Announced Approval of Settlement of SoCalGas That Will Fully Mitigate Methane Released During Aliso Canyon Gas Leak

On February 25, 2019, the California Air Resources Board (CARB) announced that a California Superior Court had approved a settlement with Southern California Gas Company (SoCalGas) in the lawsuit arising from the Aliso Canyon natural gas leak that began in 2015. CARB said the settlement, which was announced in August 2018, would fully mitigate the 109,000 metric tons of methane released during the leak. SoCalGas must pay $119.5 million, which includes $26.5 million for addressing methane emissions from dairies, as well as $45.4 million for a supplemental environmental project run by the City of Los Angeles, Los Angeles County, and the California Attorney General's Office; $21 million in civil penalties; $19 million to cover governmental response and litigation costs; and $7.6 million to be held in reserve for mitigation, if needed. CARB said that biomethane generated at dairies would be injected into the pipeline system for use as transportation fuel, which would help to prevent localized nitrogen oxides emissions generated by biomethane's use for electrical generation. *People v. Southern California Gas Co.*, No. BC602973 (Cal. Super. Ct. Feb. 25, 2019).

New Jersey Juries Awarded Compensation to Oceanfront Property Owners for Property Lost to Protective Dune System

A New Jersey state court jury reportedly awarded $330,000 to oceanfront homeowners in Ocean County as compensation for loss of land and oceanfront views due to the State's construction of a dune system intended to protect the shoreline. The Associated Press article indicated that in the fall of 2018 a jury in another case awarded a Point Pleasant Beach homeowner $260,260 for the

loss of his property due to the dune system. *LaPlante v. State*, No. __ (N.J. Super. Ct. Feb. 14, 2019).

Hawai‘i Court Ordered More Rigorous Implementation of Solar Water Heater Mandate

In a ruling from the bench on February 5, 2019, the senior environmental court judge for the First Circuit Court in Hawai‘i ordered the Department of Business, Economic Development and Tourism to adhere to a state law mandating that new single-family homes include solar water heaters and to allow variances for gas water heaters only on a case-by-case base. The plaintiffs said that "[b]y issuing thousands of variances, the agency has reinforced Hawai‘i's reliance on fossil fuels—to our collective peril—instead of empowering residents to move to clean, renewable energy sources that will reduce their energy costs." The plaintiffs also said the intent of the law was that the variance option be "rarely, if ever, exercised." The court is expected to issue a written order. *Hawai‘i Solar Energy Association v. Department of Business, Economic Development and Tourism*, No. 1CC181001398 (Haw. Cir. Ct. Feb. 5, 2019).

NEW CASES, MOTIONS, AND NOTICES

***Juliana* Plaintiffs Asked Ninth Circuit to Bar Federal Authorizations of Fossil Fuel Development and Infrastructure During Government's Appeal; Government Opposed Request; Plaintiffs Also Filed Answering Brief**

On February 7, 2019, the youth plaintiffs in the climate change-based constitutional case against the federal government filed an "urgent motion" in the Ninth Circuit Court of Appeals seeking a preliminary injunction pending the resolution of the government's appeal of the Oregon district court's denial of the governments' motions to end the case. The plaintiffs asked the court to bar the government from authorizing the following activities "in the absence of a national plan that ensures the … authorizations are consistent with preventing further danger" to the plaintiffs: (1) mining or extraction of coal on federal public lands; (2) offshore oil and gas exploration, development, or extraction on the Outer Continental Shelf; and (3) development of new fossil fuel infrastructure such as pipelines and fossil fuel export facilities. The plaintiffs argued that the immediate relief was necessary to preserve their ability to obtain a remedy that would address their injuries and protect the public interest. The plaintiffs filed 16 declarations in support of their motion, including the declarations of several individual plaintiffs attesting to "intense impacts to their mental and emotional wellbeing" and declarations of the plaintiffs' experts on climate science, climate change impacts, and the connection between climate change and the government's decisions and actions.

On February 19, 2019, the government filed its opposition to the plaintiffs' motion, asserting that it should be denied both because of the plaintiffs' "long delay" in seeking preliminary relief and also because the plaintiffs did not satisfy any of the four factors for preliminary injunctive relief. The government argued that the timing of the plaintiffs' motion exposed their strategy of delaying appellate review since interlocutory appellate review would have been automatic had the plaintiffs sought and received preliminary injunctive relief. On the merits of the motion, the government contended that the plaintiffs were required to meet a heightened standard since they sought relief that went "well beyond simply maintaining the status quo." Reiterating the

arguments made in its opening brief, the government said the plaintiffs were unlikely to prevail on their claims. The government also argued that the plaintiffs had not met their burden of showing that they would be irreparably harmed in the absence of the relief during the pendency of the appeal. Finally, the government asserted that the balance of harms and the public interest both weighed against granting injunctive relief. The government again cited the plaintiffs' delay in seeking preliminary relief and contested the plaintiffs' "blithe assertion" that the injunction would not result in harm to employment, the economy, energy security, or the treasury.

On February 22, 2019, the plaintiffs filed their answering brief on the merits of the appeal. The brief began by asking the Ninth Circuit to reconsider its certification of the interlocutory appeal. The plaintiffs argued that the district court orders did not address most of the plaintiffs' claims, meaning that—except for the issues relating to standing and whether the lawsuit was required to be brought under the Administrative Procedure Act (APA)—the case would go forward regardless of how the Ninth Circuit ruled. The plaintiffs further argued that the APA and standing issues did not meet the test for interlocutory review. The plaintiffs then proceeded to argue that the district court had jurisdiction of the case, that the district court had not erred in allowing the case to proceed directly under the Constitution, and that they had asserted valid substantive due process, state-created danger, and public trust claims.

On February 28 and March 1, a number of amicus briefs were filed in support of the plaintiffs. The government's optional reply brief is due March 8. The Ninth Circuit initially indicated that oral argument would take place in Portland, Oregon during the week of June 3, but later also sought information on the parties' availability during the weeks of July 8 and October 21. *Juliana v. United States*, No. 18-36082 (9th Cir.).

Briefs Filed in Support of Challenge to EPA Decision to Roll Back Greenhouse Gas Vehicle Standards

Parties challenging EPA's decision to withdraw and revise its January 2017 Mid-Term Evaluation of greenhouse gas emission standards for 2022-2025 model year vehicles filed opening briefs in the D.C. Circuit Court of Appeals. The briefs argued that EPA's action—which concluded the 2022-2025 standards were not "appropriate"—was a final agency action and that the issues were ripe for judicial review. They contended that EPA violated procedural and substantive requirements of the regulations that set the framework for the Mid-Term Evaluation. They also argued that EPA's revision of the 2017 determination was arbitrary and capricious under the Administrative Procedure Act because the new determination disregarded and was contradicted by the record; because it lacked reasoned analysis; and because it failed to offer a reasoned explanation for EPA's reversal. Three amicus briefs were also filed in support of the petitioners, by the Consumer Federation of America, by Lyft, Inc., and by local government associations and 16 individual cities and counties. You can read here about the local governments' brief, which was filed by attorneys at the Sabin Center, Columbia Environmental Law Clinic, and Morningside Heights Legal Services. *California v. EPA*, Nos. 18-1114 et al. (D.C. Cir.).

Challenges Filed to 2019 Standards for Renewable Fuel Standard Program

Trade associations, refiners, environmental organizations, and other parties filed petitions in the D.C. Circuit Court of Appeals seeking review of EPA's 2019 renewable fuel percentage standards for the Renewable Fuel Standard program. The challenged rule also set volume requirements for cellulosic biofuel, advanced biofuel, and total renewable fuel for 2019, and the applicable volume of biomass-based diesel for 2020. Petitioners included an ethanol trade association; a trade group representing the Biomass Power Association, the American Biogas Council, and the Energy Recovery Council; a petroleum products refiner; a trade group representing independent petroleum retailers and convenience stores; a biodiesel trade association; an "ad hoc working group of companies that own and operate biomass-based diesel and ethanol production plants and participate in the [RFS] program"; a transportation fuels refiner and owner of biofuel plants; and environmental and conservation groups. *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir., filed Feb. 4, 2019); *RFS Power Coalition v. EPA*, No. 19-1027 (D.C. Cir., filed Feb. 7, 2019); *Monroe Energy, LLC v. EPA*, No. 19-1032 (D.C. Cir., filed Feb. 8, 2019); *Small Retailers Coalition v. EPA*, No. 19-1033 (D.C. Cir., filed Feb. 8, 2019); *National Biodiesel Board v. EPA*, No. 19-1035 (D.C. Cir., filed Feb. 8, 2019); *Producers of Renewables United for Integrity Truth and Transparency v. EPA*, No. 19-1036 (D.C. Cir., filed Feb. 9, 2019); *American Fuel & Petrochemical Manufacturers v. EPA*, No. 19-1037 (D.C. Cir., filed Feb. 11, 2019); *Valero Energy Corp. v. EPA*, No. 19-1038 (D.C. Cir., filed Feb. 11, 2019); *National Wildlife Federation v. EPA*, No. 19-1039 (D.C. Cir., filed Feb. 11, 2019).

Environmental Groups Challenged PSD Permit for New Natural Gas-Fired Power Plant in California

On February 8, 2019, four environmental groups filed a petition for review in the Ninth Circuit Court of Appeals challenging EPA's issuance of a Clean Air Act Prevention of Significant Deterioration (PSD) permit for the Palmdale Energy Project, a natural gas-fired power plant. In October 2018, the EPA Environmental Appeals Board rejected the groups' administrative appeal of the permit, including the argument that EPA had erred by rejecting battery storage (in lieu of duct burners) as a best available control technology (BACT). *Center for Biological Diversity v. EPA*, No. 19-70340 (9th Cir., filed Feb. 8, 2019).

Oil and Gas Companies Filed Briefs Urging Second Circuit to Affirm Dismissal of New York City's Climate Change Case

U.S.-based energy companies filed their brief in the Second Circuit Court of Appeals in support of affirmance of the Southern District of New York's dismissal of New York City's lawsuit seeking to hold them liable under state tort law for climate change harms. The companies said the district court had properly determined that federal common law governed the City's claims because they involved transboundary pollution. The companies also urged the Second Circuit to affirm the district court's determination that no federal common law claim was pleaded. The companies argued that any claim based on domestic greenhouse gas emissions was displaced by the Clean Air Act and also that federal common law had never been applied "to hold manufacturers of lawful products liable merely because the *users* of those products create interstate pollution" or to supply "a remedy where the causal chain connecting the defendant's conduct to the alleged harms extends back several decades, includes billions of intervening actors, and depends on complex phenomena that scientists continue to study." The defendants

also contended that the City did not state viable state law claims because causation requirements were not satisfied and because the doctrine of *in pari delicto* barred the City's claims since the City and its resident "have long consumed Defendants' products and have thus willingly contributed to" the emission that allegedly caused the City's injuries. Finally, the companies argued that the claims were preempted by the foreign affairs doctrine and the Clean Air Act and were barred by Commerce Clause, Due Process, and Takings Clauses. *City of New York v. Chevron Corp.*, No. 18-2188 (2d Cir. Feb. 7, 2019).

Bond Investors Filed Securities Action Against PG&E for Misrepresenting Efforts to Address Wildfire Risks

Investors in bonds issued by the utility Pacific Gas and Electric Company and its parent company (PG&E) filed a federal securities class action in the Northern District of California alleging that investigations of catastrophic wildfires in California in 2017 and 2018 revealed that PG&E had failed to take proper fire mitigation measures and that the company's failures to do so directly contradicted representations made in offering documents for more than $4 billion worth of bonds. The complaint alleged that PG&E had been "implicated in directly causing the two most destructive wildfire events in California history in a span of only 13 months." The complaint included allegations that PG&E had stated in offering documents that it had taken precautions to address climate change risks, including wildfire risks, but had failed to disclose "the heightened risk caused by PG&E's own conduct and failure to comply with applicable regulations governing the maintenance of electrical lines, and the hundreds of fires that were *already* being ignited annually by the Company's equipment." *York County v. Rambo*, No. 3:19-cv-00994 (N.D. Cal., filed Feb. 22, 2019).

Environmental Groups Filed Lawsuit to Compel Final Listing Determination on Gulf of Mexico Whale

Natural Resources Defense Council (NRDC) and Healthy Gulf filed an Endangered Species Act citizen suit seeking an order to compel the National Marine Fisheries Service (NMFS) to make a final decision on whether to list the Gulf of Mexico whale as endangered. The plaintiffs alleged that NMFS's 12-month finding and proposal to list the species as endangered—which were published in December 2016 in response to NRDC's listing petition—identified 27 threats to the whale's survival. The plaintiffs asserted that NMFS was required to take further action within a year of the publication of the proposed listing decision. The plaintiffs alleged that the whale faced numerous anthropogenic threats and that its small population size and limited range "increase[d] its vulnerability to extinction from … environmental processes like climate change." *Natural Resources Defense Council v. Ross*, No. 1:19-cv-00431 (D.D.C., filed Feb. 21, 2019).

Center for Biological Diversity Filed FOIA Lawsuit Seeking Records About NOAA's Denial of Petition to List Pacific Bluefin Tuna as Endangered or Threatened

Center for Biological Diversity (CBD) filed a Freedom of Information Act (FOIA) lawsuit in the federal district court for the Central District of California seeking to compel the National Oceanic and Atmospheric Administration (NOAA) to perform an adequate search for records concerning NOAA's decision in 2017 to deny CBD's petition to list the Pacific bluefin tuna as

threatened or endangered. NOAA had issued a positive 90-day finding and announced the initiation of a status review of the tuna in October 2016. CBD also asked the court to compel the release of all records and portions of records that CBD alleged NOAA had improperly withheld. CBD alleged that the Pacific bluefin tuna was primarily threatened by commercial fishing but that it also was threatened by water and plastic pollution, oil and gas development, renewable energy projects, large-scale aquaculture, forage fish depletion, and climate change. *Center for Biological Diversity v. National Oceanic & Atmospheric Administration*, No. 2:19-cv-01082 (C.D. Cal., filed Feb. 13, 2019).

Environmental Groups Filed Lawsuit Seeking to Compel TMDL for Western Lake Erie

Two environmental groups filed a Clean Water Act citizen suit in the federal district court for the Northern District of Ohio asserting that EPA had "expressly endorsed" the Ohio Environmental Protection Agency's (Ohio EPA's) attempt to evade its legal obligation to address nutrient pollution causing harmful algal blooms in western Lake Erie. The groups alleged that EPA had approved a report and impaired water list submitted by Ohio EPA that identified western Lake Erie as a "low" priority for development of a Total Daily Maximum Load (TMDL) after having said the waterbody was "one of the highest, if not the highest, priority for Ohio to address." The groups said EPA's approval of the "low" designation would allow Ohio EPA "to continue dragging its feet and failing to protect western Lake Erie waters for many years more with limited legal and public accountability." The groups asked the court to direct EPA to require Ohio EPA to adopt a legally sufficient and adequate TMDL for western Lake Erie. Citing the most recent National Climate Assessment, the groups asserted that a TMDL was "especially urgent" because algal blooms and nutrient pollution problems "are likely to be exacerbated by climate change." *Environmental Law & Policy Center v. EPA*, No. 3:19-cv-00295 (N.D. Ohio Feb. 7, 2019).

Lawsuit Filed Challenging New NEPA Review for Underground Coal Mine's Expansion

Environmental groups filed a new lawsuit in federal district court in Montana challenging federal defendants' re-approval of an expansion of the Bull Mountains Mine, an underground coal mine in Montana. The court previously vacated an environmental assessment prepared for the expansion, finding that the Office of Surface Mining had failed to take a hard look at indirect and cumulative effects of coal transportation and combustion and at foreseeable greenhouse gas emissions and the economic costs associated with emissions. In the new complaint, the plaintiffs alleged that the defendants had expanded and increased their analysis of the mine expansion's economic benefits "while once more *refusing* to acknowledge and quantify the economic costs of the expansion," ignoring "expert evidence that the harm from the mine expansion, from greenhouse gas pollution and toxic and harmful air pollution, would cost the public billions of dollars and be 5 to 15 times *greater than* the economic benefits of the mine." The plaintiffs asserted that the defendants violated NEPA by failing to prepare an environmental impact statement and by once again failing to take a hard look at impacts and to consider reasonable alternatives, including replacing the mine with renewable resources. *350 Montana v. Bernhardt*, No. 9:19-cv-00012 (D. Mont., filed Jan. 16, 2019).

Malibu Residents Filed Suit to Recover Damages from Woolsey Fire

In a lawsuit seeking damages and other relief in connection with the Woolsey Fire, Malibu residents mentioned climate risk as one known factor of which the defendants—the utility Southern California Edison Company, its parent company, and the Boeing Company (Boeing)—were aware and to which the defendants failed to respond in their maintenance and operation of their equipment and property. The Woolsey Fire was ignited in November 2018 in the area of the Santa Susana Field Laboratory site owned by Boeing, which the plaintiffs alleged was a former rocket engine test and nuclear research facility and "currently the focus of a comprehensive environmental investigation and cleanup program." The plaintiffs asserted that the utility defendants had a non-delegable duty to safely maintain their electrical equipment, and that Boeing had a non-delegable duty to keep its property reasonably safe, and that all defendants were aware of the high risk of wildfire and knew that their equipment or property was not properly maintained or safe. The complaint asserted claims of negligence, inverse condemnation, public nuisance, private nuisance, trespass, premises liability, and violations of the California Public Utilities Code and Health and Safety Code. *Von Oeyen v. Southern California Edison Co.*, No. 19STCV04409 (Cal. Super. Ct., filed Feb. 8, 2019).

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FEATURED CASE

Ninth Circuit Rejected Challenge to California's Low Carbon Fuel Standard

The Ninth Circuit Court of Appeals upheld California's Low Carbon Fuel Standard (LCFS), rejecting claims under the Commerce Clause that largely echoed unsuccessful arguments made before the Ninth Circuit in a previous appeal concerning only the 2011 and 2012 versions of the LCFS. The Ninth Circuit noted that although the LCFS had been repealed and replaced in 2015, the "core structure" of the regulations (with their emphasis on fuels' lifecycle emissions) and claims was the same as it had been when the court decided the first appeal. The Ninth Circuit therefore ruled that its prior decision on the 2011 and 2012 versions of the LCFS precluded the plaintiffs' claims that the 2015 LCFS constituted impermissible extraterritorial regulation and that it facially discriminated against interstate commerce in ethanol and crude oil. Regarding extraterritoriality, the court rejected the argument that the LCFS was motivated by a concern for environmental harms in other states, stating: "California did not enact the LCFS because it thinks that it is the state that knows how best to protect Iowa's farms, Maine's fisheries, or Michigan's lakes." The court said California's interest in lifecycle emissions arose from its concern about climate change's impacts on California and that the LCFS was therefore "a classic exercise of police power." Regarding facial discrimination, the court said that California was attempting "to address a vitally important environmental issue with vast potential consequences" and that it could not offer "a potential solution to the perverse incentives that would otherwise undermine any attempt to assess and regulate the carbon impact of different fuels … without the ability to differentiate the different production processes and power generation that are used to produce those fuels." The Ninth Circuit also held that the plaintiffs' "structural federalism" claim was precluded by the court's recent decision on Oregon's Clean Fuel Program, in which the Ninth Circuit concluded that any such claim would be contingent on a finding that the program

regulated extraterritorially. The Ninth Circuit emphasized that "[t]here is simply no reason to search beyond the Commerce Clause for the Constitution's limits on the ability of states to affect interstate commerce." In addition, the Ninth Circuit found that the plaintiffs had failed to take advantage of the opportunity given by its earlier decision on the 2011 and 2012 LCFS to show that the LCFS was actually intended "to prop up local fuel interests" and discriminate against interstate commerce. The court also dismissed claims against the 2011 and 2012 versions of the LCFS as moot because the challenged laws were no longer in effect and plaintiffs' obligations under the earlier versions had been discharged. *Rocky Mountain Farmers Union v. Corey*, No. 17-16881 (9th Cir. Jan. 18, 2019).

DECISIONS AND SETTLEMENTS

Federal Court Again Dismissed ERISA Action Alleging Breach of Fiduciary Duties by Exxon Officers

The federal district court for the Southern District of Texas again dismissed a class action lawsuit brought under the Employee Retirement Income Security Act (ERISA) by Exxon Mobil Corporation (Exxon) employees who participated in an Exxon Mobil Savings Plan and who were invested in Exxon stock between November 1, 2015 and November 1, 2016. The plaintiffs alleged that defendants—senior corporate officers who were fiduciaries of the Savings Plan—knew or should have known that the value of Exxon's stock had become artificially inflated due to fraud and misrepresentation, making it an imprudent investment. The plaintiffs asserted that Exxon's public statements were materially false and misleading because they failed to disclose that Exxon reserves had become impaired due to, among other factors, the proxy cost of carbon. In their second amended complaint, the plaintiffs alleged that the defendants should have sought out those responsible for Exxon's securities disclosures to persuade them to refrain from making affirmative misrepresentations. The district court found that the second amended complaint still failed to meet the very high pleading standards for a claim under ERISA of failure to prudently manage the Savings Plan's assets. The court found that it could not say that "attempting to prevent Exxon's alleged misrepresentations would have been 'so clearly beneficial that a prudent fiduciary *could not conclude* that it would be more likely to harm the fund than to help it.'" The court distinguished a recent Second Circuit opinion that found that a plan's fiduciaries could not have concluded that a corrective disclosure would do more harm than good. In Exxon's case, the district court said Fifth Circuit precedent precluded the plaintiffs' argument that the alleged fraud would become more damaging over time. The court also said that eventual disclosure was not inevitable despite investigations into Exxon by state attorneys general and the Securities and Exchange Commission. *Fentress v. Exxon Mobil Corp.*, No. 4:16-cv-03484 (S.D. Tex. Feb. 4, 2019).

Federal Court Allowed Forest Products Companies to Proceed with Single Defamation Claim Against Greenpeace, Dismissed RICO Claim

The federal district court for the Northern District of California allowed a defamation claim by forest products companies to proceed against the environmental groups Greenpeace, Inc., Greenpeace International, and three Greenpeace employees. The court found that the companies alleged all the elements of a defamation claim, including actual malice, with respect to one

alleged statement in which a Greenpeace employee said the companies had logged in the Montagnes Blanches in Quebec when she was on notice that the statement was not true. The court also allowed the companies to proceed with an Unfair Competition Law claim against these five defendants based on the viable defamation claim. The court, however, found that almost 300 alleged statements by the defendants were not actionable, including statements that the companies were "bad news for the climate" and that the companies' practices had a large effect on climate change. The court also dismissed claims of trade libel, intentional interference with prospective and contractual economic relationships, and civil conspiracy as well as claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), finding that allegations of essential elements of these claims were missing from the complaint. The court also dismissed the other defendants from the action and granted the defendants' motion to strike under California's "anti-SLAPP" (Strategic Lawsuits Against Public Participation) law as to the claims dismissed for failure to state a claim. *Resolute Forest Products, Inc. v. Greenpeace International*, No. 17-cv-02824 (N.D. Cal. Jan. 22, 2019).

Colorado High Court Said Agency Properly Turned Down Youth Activists' Rulemaking Petition; Court Denied Activists' Motion to Vacate or Reconsider Decision Due to Reliance on Suspended Judge's Dissent

Reversing an intermediate appellate court, the Colorado Supreme Court ruled that the Colorado Oil and Gas Conservation Commission (COGCC) properly declined to consider a rule proposed by youth activists that would have precluded COGCC from issuing permits for drilling oil and gas wells "unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change." First, the Supreme Court noted that its review of agency decisions regarding whether to engage in rulemaking was "limited and highly deferential." Second, the court concluded that COGCC had correctly determined that the Colorado Oil and Gas Conservation Act did not allow COGCC to condition new oil and development on the absence of cumulative adverse public health and environmental impacts. Third, the Supreme Court found that COGCC reasonably relied on the facts that it was already working with the Colorado Department of Public Health and Environment to address the concerns to which the rulemaking petition was directed and that other COGCC priorities took precedent over the rulemaking requested by the youth activists.

On January 28, 2019, the Colorado Supreme Court denied the youth activists' motion to vacate the intermediate appellate court's dissenting opinion on which the Supreme Court relied in its decision and to vacate or reconsider and modify the Supreme Court decision. The basis for these requests was new information received by the activists about an email sent by the judge who authored the dissent and judicial discipline proceedings related to the email. The judge sent an email about this case, using a "racial epithet" to refer to another judge on the panel, the day after oral argument before the intermediate appellate court. The email formed part of the basis for a recommendation by the Colorado Commission on Judicial Discipline that the judge, who was already suspended, be removed from the bench. The report adopted by the Commission on Judicial Discipline wrote that the judge's email about the case, in which the lead plaintiff is of Native American and Latino lineage, "creates a double-barreled appearance of impropriety

undermining the public's trust that she acted without racial bias when dissenting in the case." The youth activists contended that they had been harmed by the Colorado Supreme Court's "disregard of [the dissenting judge's] lack of independence, integrity and impartiality in deciding this case of significant public importance." *Colorado Oil and Gas Conservation Commission v. Martinez*, No. 17SC297 (Colo. opinion Jan. 14, 2019; motion Jan. 24, 2019; order Jan. 28, 2019).

Oregon Appellate Court Found No State Obligation to Protect Public-Trust Resources from Climate Change

In a lawsuit brought in 2011 by minor children (now adults), the Oregon Court of Appeals ruled that the Oregon common-law public-trust doctrine did not impose a fiduciary obligation on the State to affirmatively protect public-trust resources from climate change impacts. The appellate court concluded that the doctrine was "rooted in the idea that the state is restrained from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources" and found no source under the doctrine for imposing duties on the State to "affirmatively act to protect public-trust resources from the effects of climate change." The appellate court therefore directed a trial court to enter a declaratory judgment in favor the State defendants. The appellate court declined to address other issues raised by the plaintiffs on appeal, including whether the public-trust doctrine applied to resources other than submerged or submersible lands. *Chernaik v. Brown*, No. A159826 (Or. Ct. App. Jan. 9, 2019).

District Court Reaffirmed Stay of Proceedings and Government Filed Opening Ninth Circuit Brief in *Juliana*

On January 8, 2019, the federal district court for the District of Oregon denied the *Juliana* plaintiffs' motion for reconsideration of its November 2018 order staying the proceedings pending a decision by the Ninth Circuit. Addressing questions raised by the plaintiffs concerning the status of the proceedings, the court reaffirmed that the proceedings were stayed until final disposition of the government's Ninth Circuit appeal. The government filed its opening brief in the appeal on February 1. The government argued that the plaintiffs lacked standing and that the lawsuit "is categorically not a case or controversy within the meaning of Article III" because it would require courts to "review and assess the entirety of Congress's and the Executive Branch's programs and regulatory decisions relating to climate change and then to pass on the comprehensive constitutionality of all of those policies, programs, and inaction in the aggregate." The government also contended that the plaintiffs were required to proceed under the Administrative Procedure Act and that their constitutional claims were without merit. In addition, the government asserted that there was no federal public trust doctrine and that, even if there were, the Clean Air Act had displaced it. The government further argued that even if the federal public trust doctrine existed and had not been displaced, it would not cover the "climate system" or atmosphere. The government also filed a three-volume set of excerpts from the record. *Juliana v. United States*, No. 18-36082 (9th Cir. opening brief, record excerpts: vol. 1, vol. 2, vol. 3 Feb. 1, 2019); No. 6:15-cv-01517 (D. Or. order Jan. 8, 2019).

Ninth Circuit Granted Voluntary Dismissal of Appeals of Decision on NEPA Analysis of Powder River Basin Resource Management Plans' Climate Impacts

The Ninth Circuit Court of Appeals granted motions for voluntary dismissal of appeals of a Montana federal district court's decision that found deficiencies in some aspects of the U.S. Bureau of Land Management's (BLM's) review under the National Environmental Policy Act (NEPA) of the climate change impacts of resource management plans (RMPs) for the Powder River Basin. The plaintiffs, federal defendants, coal company intervenors, and the State of Wyoming had all appealed the district court's decision. The voluntary dismissals followed BLM's publication in the *Federal Register* on November 28 of notices that it intended to prepare supplemental environmental impact statements and potential amendments for the RMPs. *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, No. 18-35836 (9th Cir. Jan. 2, 2019).

Aerospace Company Agreed to Include New York City Pension Funds' Shareholder Proposal for Greenhouse Gas Management Plan in Proxy Materials

In December 2018, New York City's five public pension funds filed a lawsuit alleging that an aerospace company intended to unlawfully exclude from its proxy materials their shareholder proposal requesting that the company adopt a management plan for greenhouse gas emissions. The company subsequently withdrew its request to the Securities and Exchange Commission (SEC) for a no-action determination. The company also advised the SEC that it would include the proposal in its 2019 proxy materials. In January 2019, the federal lawsuit was resolved by a stipulation of settlement and dismissal filed by the parties. *New York City Employees' Retirement System v. TransDigm Group, Inc.*, No. 1:18-cv-11344 (S.D.N.Y. Jan. 18, 2019).

Nevada Federal Court Rejected NEPA Challenge to Oil and Gas Leases

The federal district court for the District of Nevada granted summary judgment to the federal defendants in Center for Biological Diversity and Sierra Club's challenge to BLM's leasing of approximately 198,000 acres of land in the Battle Mountain District in northern Nevada. The court found that BLM had satisfied NEPA's "hard look" standard by analyzing in "general terms" what could happen—including climate change and greenhouse gas impacts—if lessees drilled for oil and gas. The court also found that BLM adequately considered the impacts of fracking, had not improperly relied on "stale data," and had properly analyzed mitigation measures to protect mule deer and pronghorn antelope, and that its mitigation measures to protect wetlands were not arbitrary and capricious. In addition, the court upheld BLM's decisions not to prepare an environmental impact statement (EIS) and to issue a Determination of NEPA Adequacy instead of an EIS or environmental assessment. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 3:17-cv-00553 (D. Nev. Jan. 15, 2019).

Conservation Groups Reached Agreement with Fish & Wildlife Service for Path Forward on Critical Habitat for Yellow-Billed Cuckoo

Friends of Animals, the Audubon Society of Greater Denver, and Center for Biological Diversity reached an agreement with the U.S. Fish and Wildlife Service (FWS) and other federal defendants to settle lawsuits challenging the defendants' failure to designate critical habitat for the western distinct population segment of the yellow-billed cuckoo, which faces threats from climate change among other factors. The FWS published a 90-day finding on a delisting petition

for the western DPS of the yellow-billed cuckoo, concluding that the petition presented substantial scientific or commercial information indicating that delisting may be warranted due to information on additional habitat being used by the species. The parties agreed to timeframes for a process of considering critical habitat that depends on whether and when the FWS publishes a 12-month finding that delisting is warranted. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 1:18-cv-02647 (D. Colo. Dec. 21, 2018); *Friends of Animals v. U.S. Fish & Wildlife Service*, No. 1:18-cv-01544 (D. Colo. Dec. 21, 2018).

Washington Federal Court Dismissed Some Preemption Claims in Lawsuit Challenging Denial of Water Quality Certification for Coal Export Facility

The federal district court for the Western District of Washington dismissed preemption claims challenging the State of Washington's denial of a water quality certification for a coal export facility. The court found that neither the facility's developer nor the rail company that would transport coal to the facility had standing for the preemption claims. Because a ruling in the plaintiffs' favor on the preemption issue could have invalidated only some of the grounds for the denial of the water quality certification, the plaintiffs could not show that a ruling in their favor would redress their injury. The court also found that even if the plaintiffs had standing, neither the Interstate Commerce Commission Termination Act nor the Ports and Waterways Safety Act preempted the denial of the water quality certification. On January 24, 2019, both the state defendants and environmental groups that had intervened on their behalf filed motions for summary judgment seeking dismissal of the rail company's claim that denial of the water quality certification was preempted by U.S. foreign policy favoring expansion of coal exports. *Lighthouse Resources Inc. v. Inslee*, No. 3:18-cv-05005 (W.D. Wash. order Dec. 11, 2018; state motion and environmental group motion Jan. 24, 2019).

Federal Court Ruled for Sierra Club in FOIA Lawsuit Against EPA

On December 26, 2018, the federal district court for the Northern District of California granted Sierra Club's motion for partial summary judgment in a Freedom of Information Act (FOIA) lawsuit seeking the external communications of seven U.S. Environmental Protection Agency (EPA) personnel. The court agreed with the plaintiffs that EPA had violated FOIA by not making a determination as to whether to comply with Sierra Club's four requests within 20 business days of receipt. The court ordered EPA to produce the priority documents identified by Sierra Club at "approximately" Sierra Club's proposed schedule. *Sierra Club v. EPA*, No. 3:18-cv-03472 (N.D. Cal. Dec. 26, 2018).

California Appellate Court Dismissed Appeal Challenging 2013 Version of Plan Bay Area

In an unpublished opinion, the California Court of Appeal ruled that adoption of the "Plan Bay Area 2040" sustainable community strategy in 2017 mooted an appeal concerning an earlier "Plan Bay Area." Petitioners argued that Plan Bay Area could not feasibly meet greenhouse gas emissions reductions targets, that it violated the Equal Protection Clause of the Fourteenth Amendment, and that it usurped local land use autonomy. The appellate court said it was "disinclined" to analyze the infeasibility claim without the petitioners explaining the impacts of "meaningful changes" included in Plan Bay Area 2040. The appellate court also found that the

petitioners had provided no reason to conclude that the other claims were likely to recur or raised declaratory relief issues that should be addressed by the court. The Court of Appeal said it was sympathetic to the argument that the issues raised were likely to evade judicial review, due to the required revision of the plan every four years and the time required for review. The court concluded, however, that the argument was not persuasive "in the absence of any meaningful indication by petitioners" that the factors warranting exercise of discretionary authority to consider the appeal were present in this case. *Post Sustainability Institute v. Association of Bay Area Governments*, No. A144815 (Cal. Ct. App. Jan. 16, 2019).

Pipeline Protesters Found Guilty of Trespass, Necessity Defense Rejected

A Town Justice in Cortlandt, New York, found three protesters of the Algonquin Incremental Market natural gas pipeline guilty of non-criminal trespass. The Town Justice rejected the defendants' necessity defense. The three protesters—who spent 16 hours inside a section of pipeline in 2016—presented evidence on necessity related to climate change, risks from exploding gas pipelines in proximity to Indian Point nuclear power plant, and risks of adverse public health effects of shale gas for populations in and around gas pipelines. The Town Justice read her decision into the record, and news reports indicated she found that the defendants did not satisfy the elements for the necessity defense because they had not exhausted other available means of protest such as writing letters or intervening in the regulatory process. The Town Justice also rejected the prosecutor's request that the defendants be required to perform 300 hours of community service not related to environmental causes. The defendants have filed a notice of appeal. *People v. Berlin*, No. __ (N.Y. Just. Ct. Jan. 8, 2019).

NEW CASES, MOTIONS, AND NOTICES

Supreme Court Review Sought of Decisions Upholding Subsidies for Nuclear Power in New York and Illinois

Parties challenging New York's and Illinois's zero-energy credit (ZEC) subsidies for nuclear energy filed petitions for writ of certiorari in the U.S. Supreme Court seeking review of the Second and Seventh Circuit rulings that upheld the ZEC programs. The two petitions argued that the Federal Power Act preempted the ZEC programs. They cited the Court's decision in *Hughes v. Talen Energy Marketing, LLC* invalidating Maryland subsidies that guaranteed generators compensation at state-approved rates rather than at the wholesale market-based rate set in auctions approved by the Federal Energy Regulatory Commission (FERC). The petitioners argued that the Federal Power Act preempted not only subsidies where generators were required to sell their power in FERC-approved markets (as in *Hughes*) but also preempted subsidies like New York's and Illinois's that the petitioners said were designed to subsidize only generators that sell into FERC-approved markets even though they did not require sales in such markets. The petitioners told the Supreme Court that the New York case was the superior vehicle for review of the question. *Electric Power Supply Association v. Rhodes*, No. 18-879 (U.S., filed Jan. 7, 2019); *Electric Power Supply Association v. Star*, No. 18-868 (U.S., filed Jan. 7, 2019).

Supreme Court Review Sought of Ninth Circuit Decision Upholding Oregon Clean Fuel Program

American Fuel & Petrochemical Manufacturers, American Trucking Associations, Inc., and Consumer Energy Alliance filed a petition for writ of certiorari seeking review of the Ninth Circuit's opinion upholding the Oregon Clean Fuel Program. In particular, they sought review on the questions of whether the Program's regulation of fuels based on a "life-cycle" analysis constituted impermissible extraterritorial regulation. In addition, they sought review on whether the Program—which they contended was "designed to require and has the effect of requiring out-of-state competitors to subsidize in-state producers"—violated the Commerce Clause. The petitioners argued that the Ninth Circuit's opinion implicated a circuit split on the extraterritorial regulation issue and that the Ninth Circuit's conclusion that the program did not discriminate against interstate commerce was at odds with Supreme Court precedent and the decisions of other circuit courts of appeals. *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, No. 18-881 (U.S., filed Jan. 7, 2019).

Michigan, Colorado Withdrew from Clean Power Plan Challenge; EPA Said It Intended to Finalize Affordable Clean Energy Rule in Spring 2019

The D.C. Circuit granted motions by Michigan and Colorado to withdraw as petitioners in the case challenging the Clean Power Plan. Both states sought to withdraw after newly elected attorneys general took office. Democrat Dana Nessel was elected attorney general for Michigan, replacing Republican Bill Schuette. In Colorado, Democrat Phil Weiser replaced Republican Cynthia Coffman as attorney general. In EPA's most recent 30-day status report to the court, filed on December 21, 2018, EPA said its "intention and expectation remains that the Agency will be in a position to take final rulemaking action in the Spring of 2019" on its proposed "Affordable Clean Energy Rule," for which the comment period closed on October 31, 2018. The D.C. Circuit granted EPA an extension for the filing of its January 2019 status report due to the partial government shutdown. The court directed EPA to file the report within 14 days of the restoration of appropriations and the Department of Justice's resumption of usual civil litigation functions. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir.).

FERC Defended Decision Not to Consider Upstream and Downstream Greenhouse Gas Emissions in Environmental Reviews for Compressor Stations

FERC filed its response briefs in two proceedings challenging its environmental reviews of two projects involving construction, replacement, and modification of natural gas compression facilities. One project was in West Virginia, Kentucky, and Tennessee, and the other in New York. FERC argued that it had properly concluded that greenhouse gas emissions from upstream natural gas production activities and from downstream end use of gas were not indirect effects of the projects that it was required to consider under the National Environmental Policy Act. FERC contended that the petitioners were incorrect that the D.C. Circuit's 2017 decision in *Sierra Club v. FERC* established that such emissions must be considered as indirect effects of natural gas projects in all circumstances. FERC distinguished the 2017 case from these two cases because the 2017 case involved a pipeline that would connect to specific power plants. In these two cases, FERC argued that the compressor station projects were not the legally relevant cause of upstream or downstream greenhouse gas emissions and that such emissions were not reasonably foreseeable. In the New York case (Otsego 2000), FERC also argued that it had acted reasonably

when it announced in its rehearing order in this proceeding that it would end "its temporary practice of providing generic emissions estimates when the upstream production and downstream use of natural gas are not cumulative or indirect impacts of the proposed natural gas transportation project." *Birckhead v. Federal Energy Regulatory Commission*, No. 18-1218 (D.C. Cir. Jan. 25, 2019); *Otsego 2000, Inc. v. Federal Energy Regulatory Commission*, No. 18-1188 (D.C. Cir. Jan. 25, 2019).

California Counties and Municipalities and Amici Argued for Affirmance of Order Remanding Climate Change Cases to State Court

On January 22, 2019, six California municipalities and counties (the plaintiffs) filed a brief urging the Ninth Circuit Court of Appeals to reject fossil fuel companies' appeal of a district court order remanding the plaintiffs' climate change cases to state court. The plaintiffs argued that the Ninth Circuit only had jurisdiction to consider the fossil fuel companies' appeal of the district court's determination that there was no basis for removal under the federal officer removal statute. The plaintiffs contended that the district court's determinations on the companies' other grounds for removal were not reviewable. The plaintiffs further argued that even if the Ninth Circuit concluded it had jurisdiction to consider the companies' other grounds for removal, it should reject those grounds. First, the plaintiffs asserted that their claims were pleaded under state law and did not "arise under" federal common law. They argued that the companies' argument that the claims actually were governed by federal common law was a preemption defense that was insufficient as a basis for removal. The plaintiffs also noted that the district court had recognized that any federal common law that might have governed their claims was displaced by the Clean Air Act, and that federal common law therefore could not supersede their state law claims. The plaintiffs also urged the Ninth Circuit to reject the companies' other grounds for removal as meritless. They argued that the Clean Air Act did not completely preempt their claims, and that their claims did not necessarily raise disputed and substantial federal issues. In addition, the plaintiffs said neither the Outer Continental Shelf Lands Act, the federal enclave doctrine, nor the bankruptcy removal statute provided a basis for removal. Finally, the plaintiffs argued that the defendants had waived the right to assert admiralty jurisdiction as a basis for removal but that, in any event, admiralty jurisdiction alone would not be grounds for removal and there was no admiralty jurisdiction.

On January 29, 2019, eight amicus briefs were filed in support of the plaintiffs. The Center for Climate Integrity and a group of scholars and scientists "with particular interest in public information and communication about climate change and how the public and public leaders learn about and understand climate change" submitted a brief asserting that the fossil fuel companies had actual knowledge of the risks of their products and had taken "proactive steps to conceal their knowledge and discredit climate science" while at the same time taking steps to protect their own assets from the impacts of climate change. Another group of scientists and scholars—who described themselves as having devoted much of their professional lives "to study, writing, and teaching one or more aspects of climate science, including sea level rise and its impacts on coastal communities"—submitted a brief that they intended to assist the court in understanding "the relevant science and the unavoidable adaptation expenses" faced by the plaintiffs. The California State Association of Counties, three local government associations, and eight states submitted amicus briefs focused on arguments favoring preservation of state law

claims to address climate change impacts and limitations on removal jurisdiction. Senator Sheldon Whitehouse of Rhode Island submitted a brief "to provide context for arguments made by amicus curiae United States Chamber of Commerce" in support of reversal of the remand order. Whitehouse said the Chamber's actions reflected "decades-long campaign of disinformation, obstruction, and political intimidation designed to prevent democratically accountable branches of government from adopting any policies that would reduce carbon pollution"—and that the Ninth Circuit "should assess the Chamber's arguments accordingly." The consumer advocacy organization Public Citizen submitted an amicus brief arguing that the federal officer removal statute did not provide a basis for removal. Natural Resources Defense Council filed a brief arguing that neither federal common law nor the Clean Air Act preempted all state law claims, and that there was no "unique federal interest in climate change" that would preempt all state law claims. *County of San Mateo v. Chevron Corp.*, Nos. 18-15499 (9th Cir. plaintiffs-appellees' brief Jan. 22, 2019; amicus briefs Jan. 29, 2019).

Endangered Species Act Lawsuit Filed Challenging Federal Approvals for Montana Silver and Copper Mine Project

A "coalition of traditional cultural leaders from the Ksanka Band of the Ktunaxa Nation and local, regional, and national conservation organizations" filed a lawsuit in the federal district court for the District of Montana asserting that federal agencies failed to comply with the Endangered Species Act when they authorized the Rock Creek Mine project in the Cabinet Mountains in northwest Montana. The complaint alleged that the copper and silver mine project would tunnel under one of the region's last undeveloped habitats for two threatened species, grizzly bear and bull trout. (The complaint alleged that bull trout were threatened by a number of factors and were particularly vulnerable to climate change because they require "especially cold water to spawn and rear.") The plaintiffs contended that the FWS had concluded that a 2006 no-jeopardy determination for the grizzly bear remained valid without considering new mortality data. The plaintiffs also challenged the FWS's biological opinion for the bull trout as well as U.S. Forest Service authorizations that relied on the FWS determinations. *Ksanka Kupaqa Xaʾłc̓in v. U.S. Fish & Wildlife Service*, No. 9:19-cv-00020 (D. Mont., filed Jan. 25, 2019).

Lawsuit Filed Challenging Failure to Designate Critical Habitat for Rusty Patched Bumble Bee

Natural Resources Defense Council (NRDC) filed a lawsuit in the federal district court for the District of Columbia challenging the federal government's failure to designate critical habitat for the rusty patched bumble bee, which was listed as endangered on January 11, 2017. The complaint alleged that the species had disappeared from 87% of the counties it once occupied and identified habitat loss, pesticide use, climate change, and disease as threats to the bee. NRDC asserted that the failure to designate critical habitat constituted a violation of the Endangered Species Act or, alternatively, a violation of the Administrative Procedure Act. *Natural Resources Defense Council, Inc. v. Bernhardt*, No. 1:19-cv-00078 (D.D.C., filed Jan. 15, 2019).

Dakota Action Pipeline Protesters Seek Dismissal from Pipeline Developers' RICO Suit

In December 2018 and January 2019, two individual defendants moved for their dismissal from the Dakota Action Pipeline (DAPL) developers' RICO action against Greenpeace and other environmental groups and activists who opposed and protested against DAPL. Krystal Two Bulls—who described herself as "an Oglala Lakota and Northern Cheyenne woman, United States Army veteran, and longtime activist for environmental justice, Indigenous Peoples' rights, and anti-militarism—argued both that the plaintiffs had failed to serve her within the allotted time and that the plaintiffs' claims were inconsistent with the First Amendment and inadequately pled. The plaintiffs responded that Two Bulls had participated with other defendants in a criminal enterprise "to finance, organize, and perpetrate violence, vandalism, and other illegal activity to obstruct construction and operation" of DAPL; they contended that the First Amendment did not protect the alleged conduct. They also asserted that Two Bulls was liable for violations of North Dakota racketeering law, criminal trespass, and conspiracy. Another individual defendant—who described herself as a lifelong Arizona resident "raised as a person of faith and conscience" who "has spent the majority of her young life engaged in community service and public interest activism"—argued that there was no allegation that she was connected in any way to the alleged enterprise other than "an apparent shared desire to stop the pipeline." She also argued that the court lacked personal jurisdiction and that there was insufficient process and service of process. *Energy Transfer Equity, L.P. v. Greenpeace International*, No. 1:17-cv-00173 (D.N.D.).

Summary Judgment Motion Filed in Lawsuit Challenging EPA's Failure to Implement Landfill Emission Guidelines

A month after the federal district court for the Northern District of California denied EPA's motion to dismiss, eight states and Environmental Defense Fund (EDF) filed a motion for summary judgment seeking an order compelling EPA to implement its emission guidelines for existing municipal solid waste landfills. The states and EDF said EPA had already stipulated that it had not reviewed and responded to the compliance plans submitted by some states, and that it had not promulgated a federal plan for states that did not submit approvable plans. The states and EDF contended that these actions were nondiscretionary duties and that they were therefore entitled to summary judgment since there were no disputed issues of fact. They urged the court to set the following deadlines because "*time is of the essence* in reducing greenhouse gas emissions to avoid the most severe consequences of climate change": (1) review of existing state plans within 30 days; (2) promulgation of a federal plan within five months; and (3) response to any future state plans within 60 days of submission. *California v. EPA*, No. 4:18-cv-03237 (N.D. Cal. Jan. 23, 2019).

Car Dealer Association Challenged Colorado's Adoption of California Low Emission Vehicle Standards

A not-for-profit association representing new car and truck dealers filed a lawsuit challenging Colorado's adoption of California's low emission vehicle emission standards (LEV III) for light-duty passenger vehicles and trucks and medium-duty passenger vehicles. The plaintiff asserted that the Colorado Air Quality Control Commission failed to complete emission control studies that were statutory prerequisites for motor vehicle emission control regulations and aftermarket catalytic converter standards. The plaintiff also alleged that the Colorado Air Pollution Control

Division had failed to adequately consider the costs of the regulation in violation of the Colorado Air Pollution Prevention and Control Act (APPCA) and the Colorado Administrative Procedure Act. In addition, the plaintiff asserted a failure to provide adequate time for review and comment of a revised economic impact analysis and also alleged that the Commission relied on "materially and statutorily flawed" documents as the justification for the regulations. The plaintiff also said the Colorado governor's executive order directing the California Department of Health and Environment to adopt California's LEV III standards violated the separation of powers and that the Commission's "rigid adherence" to the order violated the Colorado Constitution and the Administrative Procedure Act. *Colorado Automobile Dealers Association v. Colorado Department of Public Health & Environment*, No. 2019CV30343 (Colo. Dist. Ct., filed Jan. 28, 2019).

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FEATURED CASE

With One Judge Dissenting, Ninth Circuit Permitted Federal Government Appeal in Young People's Climate Case; Expedited Briefing Schedule Set

On December 26, 2018, the Ninth Circuit Court of Appeals granted the federal government's petition for permission to appeal an Oregon federal court's decisions allowing constitutional climate change claims brought by a group of young people to proceed. Judge Friedland dissented from the order, writing that she believed the district court's statements in its order certifying the decisions for interlocutory appeal prevented the Ninth Circuit from permitting the appeal because the district court "expressed that it does not actually think that the criteria for certification are satisfied." Certification for interlocutory appeal requires (1) that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion," and (2) that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Judge Friedland said it appeared that the court "felt compelled" to declare that certification requirements were satisfied due the Supreme Court's statements that "[t]he breadth of [the] claims is striking, … and the justiciability of those claims presents substantial grounds for difference of opinion" and by the Ninth Circuit's echoing of those statements. Judge Friedland noted that the decision whether to certify was left to the district court's discretion, and that while the Ninth Circuit and the Supreme Court might be "as well-positioned as the district court" to consider the first "purely legal" requirement for certification, the district court "is far better positioned" to assess the second requirement, which concerns "how to resolve the litigation most efficiently." In a footnote, Judge Friedland wrote that "[i]t is also concerning that allowing this appeal now effectively rewards the Government for its repeated efforts to bypass normal litigation procedures," and that "[i]f anything has wasted judicial resources in this case, it was those efforts."

In a separate order, the Ninth Circuit denied as moot the government's pending mandamus petition, which was filed after the Supreme Court denied its application for a stay. The Ninth Circuit also denied all other pending motions as moot, including the *Juliana* plaintiffs' emergency motion for a lifting of stay previously granted by the Ninth Circuit (which the plaintiffs filed in both the mandamus proceeding and the permission-to-appeal proceeding).

At the district court, the plaintiffs' December 5 motion for reconsideration of the court's November 21 order staying the proceedings is still pending. In a reply filed on December 27 in support of the motion for reconsideration, the plaintiffs said they believed the stays granted by the district court and the Ninth Circuit had both been lifted due to the Ninth Circuit's acceptance of the appeal and the denial of the mandamus petition. The plaintiffs contended that the district court should continue with certain proceedings, including supervision of "minimal outstanding discovery," resolution of pretrial motions, hearing a motion for preliminary injunctive relief that the plaintiffs were preparing, and presiding at trial over particular questions that the plaintiffs said were not at issue in the pending appeal in the Ninth Circuit.

On January 7, the Ninth Circuit set an expedited briefing schedule for the government's appeal, partially granting the plaintiffs' motion to expedite the schedule. The government must file its opening brief by February 1, a response brief is due February 22, and an optional reply brief would be due March 8. The court denied as moot the government's request that its obligation to respond to the motion to expedite be postponed due to the government shutdown. *Juliana v. United States*, No. 18-80176 (9th Cir. Dec. 26, 2018), No. 18-36082 (9th Cir. Jan. 7, 2019); No. 6:15-cv-01517 (D. Or.).

DECISIONS AND SETTLEMENTS

U.S. Supreme Court Declined to Review Massachusetts High Court's Decision Allowing Climate Change Investigation of Exxon

The U.S. Supreme Court denied without comment Exxon Mobil Corporation's (Exxon's) petition for a writ of certiorari seeking review of the Massachusetts Supreme Judicial Court's ruling that allowed the Massachusetts attorney general to proceed with a climate change-related investigation of Exxon's marketing and sales of its products. Exxon argued that the Massachusetts court's standard for personal jurisdiction violated due process. *Exxon Mobil Corp. v. Healey*, No. 18-311 (U.S. Jan. 7, 2019).

D.C. Circuit Upheld FERC Authorization of New England Pipeline Project

In an unpublished judgment, the D.C. Circuit Court of Appeals rejected a challenge to proposed upgrades to existing natural gas pipelines in New England. The court rejected the contention that the project did not serve the public convenience and necessity in violation of the Natural Gas Act. The court also rejected claims that the Federal Energy Regulatory Commission's (FERC's) consideration of environmental effects, including greenhouse gas emissions, was inadequate. The court said that FERC had "both quantified the project's expected greenhouse-gas emissions and discussed how the project would interact with Massachusetts's climate-change goals." The court also found that FERC had not violated the Coastal Zone Management Act. *Town of Weymouth v. Federal Energy Regulatory Commission*, No. 17-1135 (D.C. Cir. Dec. 27, 2018).

California Federal Court Allowed States to Proceed with Lawsuit to Compel Enforcement of Emission Guidelines for Existing Landfills

The federal district court for the Northern District of California denied the U.S. Environmental Protection Agency's (EPA's) motion to dismiss a lawsuit brought by eight states to compel EPA to implement and enforce emission guidelines for existing landfills. The guidelines were promulgated in August 2016 and took effect on October 29, 2016; pursuant to EPA regulations, states were required to submit implementation plans by May 30, 2017, and EPA was to approve or disapprove submitted plans by September 30, 2017, and to promulgate federal plans by November 30, 2017 for states that did not submit implementation plans or whose plans were disapproved. The court rejected EPA's contention that the court lacked jurisdiction because EPA's sovereign immunity had not been waived for duties imposed by regulations. The court also rejected EPA's argument that the plaintiffs failed to identify states that should have submitted implementation plans, triggering EPA's duty to act. In addition, the district court denied EPA's motion to stay the case until EPA concludes a rulemaking in which it has proposed to extend the deadline for states to submit implementation plans until August 29, 2019. *California v. EPA*, No. 4:18-cv-03237 (N.D. Cal. Dec. 21, 2018).

Montana Federal Court Barred Preconstruction Activities for Keystone Pipeline; Government Shutdown May Delay Decision on TransCanada's Stay Motion

On December 7, 2018, the federal district court for the District of Montana enjoined TransCanada Keystone Pipeline, LP (TransCanada) from conducting certain "preconstruction activities" in connection with the Keystone XL pipeline until the U.S. Department of State completed supplemental environmental review in response to the court's November 2018 order enjoining work on the pipeline. After TransCanada sought to narrow the scope of the injunction, the court initially allowed TransCanada to proceed with certain activities and, in the December 7 order, also allowed TransCanada to go ahead with certain surveying activities and to maintain a security presence. The court found, however, that the plaintiffs had established all four prongs justifying a permanent injunction barring the preconstruction activities, which included preparation of off-right-of-way pipe storage and contractor yards and transportation, receipt, and off-loading of pipe at storage yards. In considering whether such activities would cause irreparable harm, the court said allowing the preconstruction activities to go forward before the State Department finished its review "could skew the Department's future analysis and decision-making regarding the project."

TransCanada appealed the November and December orders and has asked the district court for a stay while it pursues the appeal. TransCanada requested that the court rule on the stay request by January 7 so that TransCanada could, if necessary, pursue relief in the Ninth Circuit "with the goal of preserving the 2019 construction season." The district court scheduled a hearing on the stay motion for January 14. On January 4, TransCanada submitted a statement conveying its view that the hearing could proceed even if the federal government shutdown prevented the U.S. Department of Justice (DOJ) from participating because, in TransCanada's view, the court's injunction "largely concerns TransCanada" and DOJ's presence "is not essential." On January 7, DOJ filed a statement supporting TransCanada's view. *Indigenous Environmental Network v. U.S. Department of State*, No. 4:17-cv-00029 (D. Mont. Dec. 7, 2018); No. 18-36068 (9th Cir.).

Alaska Federal Court Rejected Challenges to Lease Sales in National Petroleum Reserve-Alaska

The federal district court for the District of Alaska ruled that plaintiffs challenging 2016 and 2017 oil and gas lease sales for parcels in the National Petroleum Reserve-Alaska were time-barred from asserting claims that the U.S. Bureau of Land Management (BLM) failed to take a hard look at greenhouse gas emissions that would result from the lease sales or at alternative lease sale configurations, size, or timing. The court found that the plaintiffs were challenging the adequacy of an Integrated Activity Plan/Environmental Impact Statement (IAP/EIS) finalized in 2012, and that, pursuant to the Naval Petroleum Reserves Production Act of 1976, challenges to the IAP/EIS were required to be filed within 60 days. Moreover, to the extent the plaintiffs challenged the lease sales themselves, the court found they had waived any argument that BLM should have supplemented the IAP/EIS. The court incorporated by reference its order granting summary judgment to the defendants in a separate challenge to the 2017 lease sale. Plaintiffs in that case asserted that BLM was required to prepare an environmental impact statement or environmental assessment prior to issuing the leases. The court rejected this argument, concluding that Ninth Circuit precedent upholding issuance of leases prior to a site-specific analysis of each lease parcel was controlling. As in the other case, the court held that the plaintiffs waived any claims that BLM should have supplemented its earlier review in the IAP/EIS. *Natural Resources Defense Council v. Zinke*, No. 3:18-cv-00031 (D. Alaska Dec. 6, 2018); *Northern Alaska Environmental Center v. U.S. Department of the Interior*, No. 3:18-cv-00030 (D. Alaska Dec. 6, 2018).

California Appellate Court Found No State Court Jurisdiction for Claims About Climate Change Impacts on Oroville Dam

The California Court of Appeal ruled that state courts were without jurisdiction to hear claims that the impact of climate change on continued operation of the Oroville Dam was not considered in a relicensing process for the dam. The trial court had dismissed the complaint on the ground that predicting climate change impacts was speculative. The Court of Appeal concluded, however, that the operation of the existing dam was not the "project" subject to environmental review. Instead, the "project" at issue was certain specified measures to further mitigate the loss of habitat caused by the dam's construction decades ago, a project over which the Federal Energy Regulatory Commission had jurisdiction under the Federal Power Act. The appellate court noted that this case did not concern "the construction, repair, or replacement of the dam spillways, the need for which occurred during the pendency of this case," referring to failure of a spillway at the dam in 2017, which forced the evacuation of almost 200,000 people who lived downstream. *County of Butte v. Department of Water Resources*, No. C071785 (Cal. Ct App. Dec. 20, 2018).

D.C. Appellate Court Left in Place Decision Allowing Climate Scientist's Defamation Claims to Proceed

Two years after the District of Columbia Court of Appeals ruled that climate scientist Michael Mann could proceed with defamation claims against the authors and publishers of online articles, the appellate court responded to a petition for rehearing by issuing an amended opinion with only minor adjustments—the addition of one footnote and the revision of another. The appellate court thereby reaffirmed its conclusion that a reasonable jury could find that statements in two of the

articles were false, defamatory, published by appellants to third parties, and made with actual malice. The articles accused Mann of scientific misconduct and compared his alleged misconduct to the conduct of Jerry Sandusky, a football coach at Penn State who was convicted of child sexual abuse. On December 27, appellant National Review, Inc. filed a petition for rehearing en banc. *Competitive Enterprise Institute v. Mann*, No. 14-CV-101 (D.C. Ct. App. Dec. 13, 2018).

NEW CASES, MOTIONS, AND NOTICES

Environmental Groups Filed Challenge to Plan for Offshore Oil and Gas Development in Beaufort Sea

Five environmental groups led by Center for Biological Diversity filed a petition in the Ninth Circuit Court of Appeals seeking review of Bureau of Ocean Energy Management's (BOEM's) decision to approve an offshore oil and gas development and production plan submitted by Hilcorp Alaska, LLC, for the Liberty Project located in the Beaufort Sea offshore of Alaska and also of the U.S. Fish and Wildlife Service's (FWS's) biological opinion for the construction and operation of the project. The groups said that BOEM's approval of the plan violated the National Environmental Policy Act, the Outer Continental Shelf Lands Act, and the Administrative Procedure Act, and that FWS violated the Endangered Species Act. *Center for Biological Diversity v. Zinke*, No. 18-73400 (9th Cir., filed Dec. 17, 2018).

Environmental Defense Fund Launched FOIA Lawsuit Seeking External Communications of Department of Transportation Officials About Emissions Standards

Environmental Defense Fund (EDF) filed a Freedom of Information Act (FOIA) lawsuit in federal district court in the District of Columbia against the U.S. Department of Transportation (DOT) seeking to compel a response to requests for calendars and correspondence of DOT officials related to DOT's proposed and anticipated actions to roll back greenhouse gas and fuel efficiency standards for light- and medium-duty vehicles and for heavy-duty trailers. The complaint alleged that DOT was "now taking a prominent role in attacking these win-win safeguards" and that "[k]nowledge of the extent and nature of communications with external stakeholders is critical for EDF, its members, and the public to make an informed judgment" about DOT's actions. *Environmental Defense Fund v. U.S. Department of Transportation*, No. 1:18-cv-03004 (D.D.C., filed Dec. 19, 2018).

Environmental Groups Filed FOIA Lawsuit to Compel Release of Technical Information Supporting Vehicle Standards

Natural Resources Defense Council and Environmental Defense Fund filed a FOIA lawsuit against EPA seeking a response to the organizations' request for "certain limited agency records relating to the technological feasibility of greenhouse gas emission standards." The organizations alleged that they made the request after EPA published notice of its intent to revise greenhouse gas emission standards for light-duty vehicles. The particular records sought are related to the computer model developed by EPA to assess the cost and effectiveness of greenhouse gas emission standards, "the Optimization Model for reducing Emissions of Greenhouse gases from

Automobiles (OMEGA)." The organizations said that EPA historically made such records public "as a matter of course" and that access to records was necessary "to enable meaningful public comment on highly-technical standards." *Natural Resources Defense Council v. EPA*, No. 1:18-cv-11227 (S.D.N.Y., filed Dec. 3, 2018).

Youth Plaintiffs Filed Appeal in Alaska Supreme Court of Dismissal of Climate Case Based on State Constitution

A group of youth plaintiffs appealed an Alaska trial court's dismissal of their lawsuit that charged that the State of Alaska's climate and energy policies violated their rights under the Alaska constitution to a stable climate system. In their statement of points on appeal, the plaintiffs asserted that the Alaska Superior Court misconstrued four counts alleging violations of previously recognized constitutional rights as a "single constitutional claim to an unenumerated substantive due process right to a stable climate system" and failed to address other claims. The plaintiffs also said the Superior Court failed "to liberally construe and assume the truth of the facts alleged in their complaint, erred by finding the claims to be nonjusticiable, and erred by finding that reductions in the State's greenhouse gas emissions would not redress the plaintiffs' injuries. In addition, the plaintiffs contended that the trial court erred by finding that the Alaska Department of Environmental Conservation's denial of their rulemaking petition was not arbitrary and by not addressing whether the denial violated the plaintiffs' due process rights. *Sinnok v. State*, No. S17297 (Alaska Nov. 29, 2018).

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FEATURED CASE

Oregon Federal District Court Stayed Young People's Climate Case for Government to Pursue Interlocutory Appeal

On November 21, 2018, the federal district court for the District of Oregon certified for interlocutory appeal its decisions denying the governments' dispositive motions in the case brought by youth plaintiffs claiming that the government's actions and inaction contributing to a dangerous climate system violated their constitutional rights. The district court issued its order reversing its previous denials of the government's requests for interlocutory appeal almost two weeks after the Ninth Circuit granted the government's emergency motion for a stay pending the Ninth Circuit's consideration of a petition for writ of mandamus filed by the government. The government had also filed motions in the district court for reconsideration of the denial of interlocutory appeal and for a stay. In its order certifying the case for interlocutory appeal, the district court noted that the Ninth Circuit had "invited" the district court to revisit its decision to deny interlocutory review. (The Ninth Circuit stated: "The district court is … requested to promptly resolve petitioners' motion to reconsider the denial of the request to certify orders for interlocutory review.") The district court also noted that although it had been "aware of federal defendants' concerns and their interest in pursuing an interlocutory appeal" over the course of the proceedings, the court's belief had been "that a bifurcated trial might present the most efficient course for both the parties and the judiciary." The court said it had believed that reserving interlocutory appeal until after the liability phase would allow appellate courts the

benefit of a fully developed record. The court wrote that it "stands by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial," but said that it had reviewed the record and taken particular note of the Supreme Court and Ninth Circuit orders and now found "sufficient cause to revisit the question of interlocutory appeal." The court said it therefore "exercise[d] its discretion" to certify the case for interlocutory appeal and stayed the case pending a decision by the Ninth Circuit. The district court denied the government's motions for reconsideration and a stay as moot and stayed consideration of other pending motions.

After the district court stayed proceedings, the government told the Supreme Court and the Ninth Circuit (in submissions made in connection with its pending mandamus petitions) that it would file a petition for permission to appeal in the Ninth Circuit by December 3 and that it expected to seek dismissal of the mandamus petitions if the Ninth Circuit permitted appeal. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. order certifying for interlocutory appeal Nov. 21, 2018); *United States v. U.S. District Court for the District of Oregon*, No. 18-73014 (9th Cir. stay order Nov. 8, 2018); *In re United States*, No. 18-505 (U.S. government's letter Nov. 23, 2018).

DECISIONS AND SETTLEMENTS

Federal Court Found That Approval for Keystone XL Pipeline Did Not Comply with NEPA and Administrative Procedure Act

The federal district court for the District of Montana vacated the record of decision issued for the presidential permit for the Keystone XL pipeline and enjoined further construction or operation of the pipeline until the U.S. Department of State completes supplemental environmental review. The court found that the Department of State failed to comply with the National Environmental Policy Act (NEPA) and the Administrative Procedure Act when it reversed the Obama administration's denial of the permit without providing a reasoned explanation for disregarding the Obama administration's factual findings concerning climate change and the U.S.'s role in contributing to and addressing climate change. The court also found that the Department had not taken the hard look required by NEPA with respect to several issues, including the effects of current low oil prices on the project's viability and the cumulative effects of greenhouse gas emissions from the Alberta Clipper pipeline expansion project and Keystone. In response to a motion by the pipeline developer, the court said during a status conference on November 28 that the developer could begin certain preconstruction activities and deferring a final decision on other activities until parties filed their responses to the motion. *Indigenous Environmental Network v. U.S. Department of State*, No. 4:17-cv-00031 (D. Mont. Nov. 8, 2018).

Federal Court Dismissed (Without Prejudice) Center for Biological Diversity Claims to Compel Submission of UNFCCC Reports

The federal district court for the District of Columbia ruled that the Center for Biological Diversity (CBD) lacked standing to compel the federal government to submit reports required by the United Nations Framework Convention on Climate Change (UNFCCC). The reports—the "national communication" and the "biennial report"—were required to be produced by January 1, 2018. The court found that CBD had not asserted an "informational injury" because it had not

alleged that the UNFCCC reports were required to be made publicly available. The court also found that CBD had not succeeded in alleging an "organizational injury" based on the impact of the missed deadline on CBD's educational and advocacy efforts. The court said CBD had made no allegation that it used its resources to counteract any harm to its interests. The court allowed CBD until December 10, 2018 to amend the complaint. *Center for Biological Diversity v. U.S. Department of State*, No. 18-cv-563 (D.D.C. Nov. 8, 2018).

Proposed Consent Decree for Clean Air Act Violations at Natural Gas Processing Plant Would Require Mitigation Projects That Reduce CO_2e Emissions

The federal government and the owner of a natural gas processing plant in Illinois lodged a proposed consent decree in the federal district court for the Northern District of Illinois to resolve alleged violations of the Clean Air Act, Illinois law, and the plant's permits. The alleged violations concerned fugitive emissions of volatile organic compounds (VOCs). The owner agreed to pay a $2.7 million civil penalty and to spend at least $4.5 million on pollution controls and projects to reduce VOC and nitrogen oxide (NO_x) emissions. In addition, the consent decree requires the owner to implement environmental mitigation projects at locomotive switchyards at a cost of no less than $3 million. The mitigation projects will have environmental benefits including reductions in annual emissions of VOCs, NO_x, particulate matter, and carbon dioxide equivalent (CO_2e). A comment period on the proposed consent decree was scheduled to close on December 3, 2018. *United States v. Aux Sable Liquid Products LP*, No. 1:18-cv-07198 (N.D. Ill. Oct. 29, 2018).

Texas Federal Court Rejected Exxon Request for Reconsideration or Interlocutory Appeal of Decision Allowing Securities Fraud Lawsuit

The federal district court for the Northern District of Texas denied Exxon Mobil Corporation's motion for reconsideration of the court's August 2018 decision partially denying's Exxon's motion to dismiss a federal securities fraud lawsuit. The court also denied Exxon's motion to certify its order denying the motion to dismiss for interlocutory appeal. The court ruled on August 14, 2018 that investors had adequately pleaded claims that Exxon and Exxon officials made material misstatements concerning the company's use of proxy costs for carbon in business and investment decisions. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-3111 (N.D. Tex. Nov. 5, 2018).

New York Judge Denied Motion for Disqualification in State's Exxon Fraud Case but Said He Would Sell All Exxon Stock; Trial Set for October 2019

On November 7, 2018, a New York State Supreme Court judge denied the New York Office of the Attorney General's motion for judicial disqualification in the State's fraud case against Exxon Mobil Corporation (Exxon). The attorney general argued that the case should be reassigned from the judge who had presided over the attorney general's subpoena enforcement proceeding due to the judge's ownership of Exxon stock. The attorney general contended that its waiver of disqualification in the earlier proceeding did not constitute a waiver in the present action. Although he denied the disqualification motion, the judge told the parties that he would divest all Exxon holdings by November 8, 2018. The attorney general's office indicated it would

not appeal the denial of the motion. On November 15, 2018, the court signed a preliminary conference order scheduling the trial to begin on October 23, 2019. *People v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Nov. 7, 2018).

California Superior Court Must Respond to Porter Ranch Resident's Petition Seeking to Undo Aliso Canyon Gas Leak Guilty Plea

On November 15, 2018, the California Court of Appeal ordered the Los Angeles County Superior Court to show cause why a resident of Porter Ranch was not entitled to restitution in conjunction with Southern California Gas Company's (SoCalGas's) pleading guilty to failing to timely report the release of hazardous materials in connection with the gas leak at SoCalGas's Aliso Canyon/Porter Ranch gas storage facility in October 2015. The resident had asked the Superior Court to set aside SoCalGas's plea agreement and to award restitution to victims of the leak, but the Superior Court denied the motion. In August 2018, the Appellate Division of the Superior Court concluded that the Superior Court had not abused its discretion in concluding that the violation to which SoCalGas pleaded guilty was not causally connected to the victims' damages. The resident subsequently filed this petition for writ of mandamus in the Court of Appeal. The Superior Court must serve its written return by December 17. *Crump v. Superior Court of the State of California for the County of Los Angeles*, No. B292786 (Cal. Ct. App. Nov. 15, 2018).

California Court Allowed Plaintiffs Challenging Greenhouse Gas Scoping Plan to Pursue Some Claims, Amend Others

On October 26, 2018, a California Superior Court found that a group of civil rights leaders had sufficiently alleged claims that the California Air Resources Board's (CARB's) Scoping Plan for reducing greenhouse gas emissions violated substantive due process and the California Clean Air Act and was ultra vires. For claims under the federal Fair Housing Act (FHA) and the California Fair Employment and Housing Act (FEHA), the court said it would not sustain CARB's demurrer based on CARB's argument that the Scoping Plan contained only optional recommendations; the court also found that the plaintiffs had alleged "sufficient facts to raise an inference of causation between the Scoping Plan and the alleged disparate impact on minority communities." The court further found, however, that the FHA and FEHA claims were not ripe but allowed the plaintiffs leave to amend these claims. The court also found that the plaintiffs had failed to allege an equal protection claim or claims under the Administrative Procedure Act, but allowed leave to amend these claims as well. On November 21, 2018, the plaintiffs filed an amended complaint. *The Two Hundred v. California Air Resources Board*, No. 18CECG01494 (Cal. Super. Ct. Oct. 26, 2018).

Environmental Appeals Board Concluded That Conservation Groups Had Not Demonstrated Battery Storage Should Be Considered as BACT

The U.S. Environmental Protection Agency's (EPA's) Environmental Appeals Board (EAB) denied conservation groups' petition seeking review of a prevention of significant deterioration (PSD) permit issued for construction and operation of a 645-megawatt combined-cycle natural gas-fired power plant in Palmdale, California. The conservation groups argued unsuccessfully

that EPA had erred by rejecting battery storage (in lieu of duct burners) as a best available control technology (BACT). The groups contended that batteries would reduce carbon monoxide, nitrogen oxide, and greenhouse gas emissions. The EAB concluded that the groups failed to demonstrate that EPA clearly erred in its rejection of battery storage on the basis that the groups had not demonstrated it was technically feasible. *In re Palmdale Energy, LLC*, PSD Appeal No. 18-01 (EAB Oct. 23, 2018).

Minnesota Public Utilities Commission Denied Rehearing on Certificate of Need for Replacement Crude Oil Pipeline

On November 21, 2018, the Minnesota Public Utilities Commission denied petitions for rehearing of the Commission's order granting a certificate of need for the replacement of the Enbridge Energy Line 3 crude oil pipeline. The Commission granted the certificate of need in a September 5, 2018 order, rejecting concerns raised by an administrative law judge about the replacement pipeline's route, which would abandon the old pipeline in place. The Commission found that the consequences of granting the certificate of need would be more favorable than those of denying the certificate if the project were modified to require a removal program allowing landowners to choose to have the existing pipeline removed where feasible. In a discussion of potential climate change impacts in its September order, the Commission concluded that the project's lifecycle greenhouse gas emissions would be "a significant consequence" but that the environmental costs did not result directly from the project but from "the continued demand for crude oil to produce refined products used by consumers." The Commission found that record evidence did not support a conclusion that denial of the certificate of need would significantly reduce demand for crude oil. As a condition of the granting of the certificate of need, Enbridge must purchase renewable energy credits to offset the incremental increase in nonrenewable energy consumed by the project. In October 2018, the Commission also approved a pipeline routing permit. *In re Enbridge Energy, L.P.*, No. PL-9/CN-14-916 (Minn. PUC Nov. 21, 2018).

NEW CASES, MOTIONS, AND NOTICES

Fishing Trade Group Sued Fossil Fuel Companies for Climate Change Damage

A commercial fishing industry trade group filed a lawsuit in California Superior Court seeking to hold fossil fuel companies liable for adverse climate change impacts to the ocean off the coasts of California and Oregon that resulted in "prolonged closures" of Dungeness crab fisheries. The plaintiff alleged that the companies had known for decades that use of their products could be "catastrophic" and that "only a narrow window existed" for action before consequences would be irreversible. The plaintiff asserted the companies took actions to obscure the harms and avoid regulation, while still acknowledging and planning for climate change's consequences internally. The plaintiff contended that the companies' actions prevented the development of alternatives that could have eased the transition to a less fossil fuel-dependent economy. The complaint contains five causes of action: nuisance, strict liability for failure to warn, strict liability for design defect, negligence, and negligent failure to warn. The plaintiff seeks compensatory damages, equitable relief including abatement of the nuisance, punitive damages, disgorgement

of profits, and attorneys' fees and costs. *Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp.*, No. CGC-18-571285 (Cal. Super. Ct., filed Nov. 14, 2018).

Western States Petroleum Association Expected to File Certiorari Petition Seeking Review of Oregon Court's Decision Upholding Portland's Fossil Fuel Terminal Ban

Chief Justice John Roberts granted an application by the Western States Petroleum Association (WSPA) to extend the deadline for filing a petition for writ of certiorari seeking review of an Oregon appellate court's determination that the City of Portland's ban on new and expanded fossil fuel terminals did not violate the dormant Commerce Clause. The Oregon Court of Appeals entered its judgment on January 4, 2018, and the Oregon Supreme Court declined to review the ruling on July 26, 2018. WSPA must file its petition by December 21, 2018. WSPA argued that an extension of the deadline was warranted because counsel retained to prepare the petition needed time to familiarize themselves with the case and because of the importance of the issues raised. The application asserted that the Oregon appellate court's decision was at odds with Supreme Court precedent holding that states and localities may not burden interstate commerce in a way that favors in-state interests. WSPA also contended that the case had "significant practical import" because of Portland's "key location near important in-land transportation routes." *Western States Petroleum Association v. City of Portland*, No. 18A395 (U.S. Oct. 15, 2018).

Fossil Fuel Companies Urged Ninth Circuit to Rule That Local Governments' Climate Cases Belong in Federal Court

Fossil fuel companies filed their opening brief in their appeal of the denial of their motions to remand lawsuits brought by California local governments seeking damages and other relief for climate change impacts. As a threshold matter, the companies argued that the remand order was reviewable because one of their grounds of removal had been the federal officer removal statute, which they contended provided the Ninth Circuit with jurisdiction to review the entire remand order. Alternatively, the companies argued that the district court had made a reviewable merits determination because the court's remand decision rested in part on the district court's conclusion that displacement of federal common law by the Clean Air Act would leave the plaintiffs without a federal remedy. On the merits, the companies argued that the case belonged in federal court because federal common law necessarily governed climate change nuisance claims. The companies also asserted numerous alternative grounds for removal, including that the case depended on resolving "substantial, disputed federal questions relating to the extraction, processing, promotion, and consumption of global energy resources" and that the local governments' claims were completely preempted by Clean Air Act. Other grounds for removal cited by the companies were the Outer Continental Shelf Lands Act, the federal enclave doctrine, the federal officer removal statute, the federal bankruptcy statutes, and admiralty jurisdiction. The U.S. Chamber of Commerce filed an amicus brief in support of the companies, arguing that climate change was "a national and international problem requiring a uniform, coordinated federal response" and that a "patchwork of state law tort rules would be ineffective and unadministrable." The local governments' answering brief is due on January 22, 2019. *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir. Nov. 21, 2018).

In Briefs to Second Circuit, New York City and Amicus Parties Argued for Revival of City's Climate Change Case Against Oil and Gas Companies

In November 2018, New York City and amicus parties filed briefs urging the Second Circuit Court of Appeals to reverse the dismissal of the City's lawsuit seeking to hold oil and gas companies liable for the adverse impacts of climate change. New York City argued that "long-established" common law causes of action under New York law provided a means of reallocating the costs imposed by the companies' lawful economic activity. New York City also argued that its allegations did not present "one of the extraordinary cases where state law must be displaced by federal common law"; that the Clean Air Act did not bar the City's common law claims; and that the district court's concerns regarding separation of powers and the president's ability to conduct foreign policy in the area of climate were "misplaced." Five amicus briefs were filed in support of New York City. Local government associations filed a brief arguing that state law claims were available to address local climate change harms. Environmental justice groups based in New York City submitted a brief to demonstrate to the court "that climate change, while experienced globally, is a problem with very local effects, especially on the City's low-income communities and communities of color." A group of conflict of laws and foreign relations law scholars contended that the district court had erred in applying the "presumption against territoriality" to common law claims; they asserted that the applicable conflict-of-laws rules would call for application of New York law. The legal scholars also argued that "judicial caution" did not provide a basis for limiting the geographic scope of New York law and that foreign affairs preemption did not apply. New York State, seven other states, and the District of Columbia submitted a brief asserting that the district court's reasoning was inconsistent with states' authority to address environmental harms; the brief described state and local climate mitigation and adaptation efforts. The states' brief also echoed the City's arguments that the City's claims were not displaced by federal common law or barred by the Clean Air Act. A professor with expertise in the areas of torts, products liability, and administrative law filed a brief arguing that the application of nuisance law in this case was "nothing extraordinary" but instead represented "a natural extension of longstanding theoretical and doctrinal principles of tort law." The defendants-appellees' brief is due on February 7, 2019. *City of New York v. BP p.l.c.*, No. 18-2188 (2d Cir.).

D.C. Circuit Merits Panel Will Hear EPA and Trade Groups' Arguments for Dismissal of Lawsuits Challenging Withdrawal of Obama-Era Determination That Vehicle Greenhouse Gas Standards Remained Appropriate

In cases challenging EPA's decision to withdraw its Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, the D.C. Circuit Court of Appeals referred EPA and trade group motions to dismiss to the merits panel and directed the parties to address the issues presented in the motions to dismiss in their briefs rather than incorporating their arguments by reference. EPA issued the Mid-Term Evaluation in January 2017, just before President Trump took office. The Mid-Term Evaluation concluded that the 2022-2025 standards remained appropriate. EPA withdrew the Mid-Term Evaluation in April 2018, concluding that more recent information showed that the standards might be "too stringent." EPA and trade groups sought to dismiss the challenges to the April 2018 action as

premature and also argued that the petitioners did not have standing. *California v. EPA*, No. 18-1114 (D.C. Cir. Nov. 21, 2018).

Opening Brief in Challenge to Natural Gas Facilities in New York Argued That Evaluation of Greenhouse Gas Impacts Was Inadequate

Petitioners challenging Federal Energy Regulatory Commission (FERC) authorizations for construction, modification, and expansion of natural gas facilities associated with a transmission pipeline in New York filed an opening brief in the D.C. Circuit Court of Appeals arguing that FERC had improperly limited the scope of its evaluation of the project's greenhouse gas emissions. The petitioners argued that FERC, in a split decision, failed to properly evaluate indirect and cumulative impacts of upstream and downstream activities. The petitioners also argued that FERC had failed to disclose the climate change impacts of the project's greenhouse gas emissions. In addition, the petitioners contended that FERC had improperly announced, in its denial of a petition for rehearing, a new policy of not providing upper-bound estimates of downstream and upstream impacts in environmental reviews. *Otsego 2000, Inc. v. Federal Energy Regulatory Commission*, No. 18-1188 (D.C. Cir. Nov. 26, 2018).

FERC and Trade Groups Defended Greenhouse Gas Emissions Analysis for Mountain Valley Pipeline

FERC and five trade groups filed briefs in the D.C. Circuit defending FERC's review of the Mountain Valley Pipeline, a natural gas pipeline extending from West Virginia to Virginia. FERC argued that its consideration of downstream greenhouse gas emissions was reasonable. In particular, FERC contended that end-use greenhouse gas impacts were not an indirect impact of the project; that it was reasonable to determine that FERC could not assess the significance of downstream emissions; that it was reasonable to decline to use the social cost of carbon tool; that FERC reasonably declined not to consider downstream emissions in its public interest analysis under the Natural Gas Act; and that FERC relied on record evidence to support its determination that a no-action alternative would not decrease natural gas consumption or greenhouse gas emissions. FERC also defended other aspects of its decision-making from claims under the National Historic Preservation Act, the Natural Gas Act, Section 4(f) of the Department of Transportation Act, and the takings and due process clauses of the Constitution. Four trade groups filed an amicus brief that defended FERC's determinations regarding the scope of the review of greenhouse gas emissions. Interstate Natural Gas Association of America filed its own amicus brief that also defended the analysis of greenhouse gas emissions and climate change. *Appalachian Voices v. Federal Energy Regulatory Commission*, No. 17-1271 (D.C. Cir.).

EPA Said Challenges to Clean Power Plan Should Remain in Abeyance Pending Completion of Replacement Rulemaking

On November 21, 2018, EPA filed a status report in the still-pending challenges to the Clean Power Plan in the D.C. Circuit Court of Appeals. The court has held the cases in abeyance since April 28, 2017. In September 2018, intervenors defending the Clean Power Plan asked the D.C. Circuit to discontinue the abeyance and decide the merits of the case. In the November status report, EPA told the court it intended and expected to take final rulemaking action on a

replacement rule for the Clean Power Plan "by the first part of 2019." EPA said the court should continue to hold the cases in abeyance pending the conclusion of the rulemaking. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Nov. 21, 2018).

Exxon Told Second Circuit That District Court Decision in NRA Case Supported Exxon's Viewpoint Discrimination Claims Against Attorneys General

On November 20, 2018, Exxon Mobil Corporation's counsel in its appeal of the dismissal of its lawsuit challenging the climate change-related investigations of the New York and Massachusetts attorneys general submitted a letter to advise the Second Circuit Court of Appeals of a district court decision in the Northern District of New York that denied New York State officials' motion to dismiss viewpoint discrimination claims by the National Rifle Association (NRA). Exxon argued that its allegations against the attorneys general should have been reviewed under the same standards as were applied to the NRA's claims, and contended that the court in the NRA case had rejected many of the arguments made by the attorneys general and their amici, including that actual chilled speech was necessary for a First Amendment claim and that viewpoint discrimination cannot arise from statements that might qualify as "government speech." *Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir. Nov. 20, 2018).

States, D.C., and NRDC Argued That EPA's Decision Not to Apply HFC Use Restrictions Was Unlawful

Natural Resources Defense Council (NRDC) and 11 states and the District of Columbia filed their opening briefs in D.C. Circuit proceedings challenging EPA guidance that stated EPA would not apply any restrictions adopted in 2015 on the use of hydrofluorocarbons (HFCs) as substitutes for ozone-depleting substances. The petitioners argued that the guidance turned the D.C. Circuit's 2017 decision partially vacating the 2015 restrictions (to the extent they required manufacturers currently using HFCs to stop using them) into a "complete vacatur." NRDC and the states contended that the guidance therefore violated the Clean Air Act by suspending a final regulation without notice-and-comment rulemaking and that the guidance was arbitrary and capricious because EPA failed to provide a reasoned explanation for the suspension of the HFC use restrictions. *Natural Resources Defense Council v. Wheeler*, No. 18-1172 (D.C. Cir. Nov. 7, 2018).

EPA Appealed and Sought Stay of Federal Court Order Requiring Temperature TMDL for Columbia and Snake Rivers

On November 21, 2018, EPA appealed an Oregon district court's judgment requiring EPA to issue a total maximum daily load (TMDL) for temperature for the Columbia and lower Snake Rivers. EPA also sought a stay pending appeal from the district court, which on November 8 denied EPA's motion to extend the court's 60-day deadline for issuing the TMDL. In its October order setting the deadline, the district court concluded that Washington and Oregon had constructively submitted a "no TMDL" because the states had "clearly and unambiguously indicated" they would not produce a TMDL for the rivers. The district court therefore determined that EPA had failed to undertake its mandatory duty to issue a TMDL. EPA argued in its motion for a stay pending appeal that it was likely to succeed on its appeal because the

constructive submission doctrine was an unlawful expansion of the Clean Water Act and, even if lawful, was not properly applied in this case. EPA also noted that it had disapproved the states' "constructive submission" on November 16, 2018, and that it was not yet in violation of its duty to issue a TMDL. EPA also argued it would be irreparably harmed because being compelled to issue a TMDL could moot its appeal, would impose significant hardship because TMDL preparation typically takes three to five years, and would interfere with EPA's "ability to engage in a robust TMDL process." EPA also asserted that the balance of equities and public interest favored a stay pending appeal to allow synchronization and coordination of TMDL preparation and implementation. *Columbia Riverkeeper v. Pruitt*, No. 2:17-cv-00289 (W.D. Wash. order denying motion for extension Nov. 8, 2018; notice of appeal and motion for stay pending appeal Nov. 21, 2018); No. 18-35982 (9th Cir.).

Center for Biological Diversity Asked Court to Compel EPA to List Oregon Coastal Waters as Impaired by Ocean Acidification

Center for Biological Diversity filed a lawsuit in federal court in Oregon asserting that EPA had violated the Clean Water Act by failing to identify ocean waters off the coast of Oregon as impaired by ocean acidification. CBD alleged that Oregon's coastal waters were "experiencing a dramatic water quality problem" caused by the ocean's absorption of carbon dioxide from the atmosphere and by land-based pollution, including nutrient runoff. CBD said Oregon had failed to include marine waters impaired by ocean acidification on its 2012 list of impaired waters submitted to EPA pursuant to Section 303(d) of the Clean Water Act. In December 2016, EPA partially disapproved the list and sought data and information on ocean acidification but never finalized a rulemaking identifying waters impaired by ocean acidification. CBD asked the court to declare that EPA's failure to take action violated the Clean Water Act and Administrative Procedure Act and to compel EPA to finalize its rulemaking to add additional impaired waters to Oregon's Section 303(d) list, including waters impaired by acidification. *Center for Biological Diversity v. EPA*, No. 6:18-cv-02049 (D. Or., filed Nov. 27, 2018).

Securities Class Action Alleged That Southern California Utility Misled Investors on Wildfire Risk

A federal securities class action was filed in the federal district court for the Central District of California on behalf of parties that acquired stock in Southern California Edison Company (SCE) and its parent holding company in the approximately two and a half years leading up to the outbreak of two wildfires in Southern California in November 2018 and the California Public Utilities Commission's subsequent launch of an investigation into SCE's compliance with applicable rules and regulations in fire-impacted areas. The complaint alleged that the companies made false and misleading statements about their maintenance of the electric grid and wildfire risks. The complaint included an excerpt from a public statement by the companies alluding to increased risk of wildfires due to factors including climate change and the associated financial risks to SCE. *Barnes v. Edison International*, No. 2:18-cv-09690 (C.D. Cal., filed Nov. 16, 2018).

Conservation Groups Filed Challenge to Mining Project in Idaho Federal Court

Two conservation groups filed a lawsuit against the U.S. Forest Service in federal court in Idaho challenging the approval of a mining exploration project. The plaintiffs asserted that the Forest Service had violated the National Environmental Policy Act, the National Forest Management Act, the Forest Service Organic Act, and the Administrative Procedure Act. The alleged violations included a failure to provide "quantitative or detailed information" to support the conclusion that the project and threats posed by nonnative white pine blister rust, native mountain pine beetle, climate change, and fire suppression would not have measurable cumulative effects on whitebark pine. *Idaho Conservation League v. U.S. Forest Service*, No. 1:18-cv-00504 (D. Idaho, filed Nov. 13, 2018).

Union of Concerned Scientists Filed Lawsuit Seeking Correspondence and Other Records Regarding Proposed Coal and Nuclear Subsidies

Union of Concerned Scientists (UCS) filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Department of Energy and the Federal Energy Regulatory Commission seeking to compel the agencies to produce additional records responsive to UCS's requests for correspondence and other documents related to the agencies' consideration of subsidies for coal and nuclear power. UCS submitted seven FOIA requests, including requests for communications between DOE officials and representatives of certain coal companies, a utility company, and the National Coal Council. *Union of Concerned Scientists v. U.S. Department of Energy*, No. 1:18-cv-02615 (D.D.C., filed Nov. 13, 2018).

Defenders of Wildlife Filed FOIA Lawsuit Seeking Documents About Fossil Fuel Development Plans for Arctic National Wildlife Refuge

Defenders of Wildlife filed a Freedom of Information Act lawsuit seeking to compel a response to requests for documents from the U.S. Department of the Interior, the U.S. Fish and Wildlife Service, and the U.S. Bureau of Land Management about plans for fossil fuel development on the Coastal Plain of the Arctic National Wildlife Refuge. The complaint alleged that oil and gas development would threaten the environment and that "threats would be compounded in an area that is already ground zero for climate change – the Arctic is warming at more than twice the rate as the rest of the planet." *Defenders of Wildlife v. U.S. Department of the Interior*, No. 18-cv-2572 (D.D.C., filed Nov. 8, 2018).

After Proposing Delay of Compliance Requirements for Landfill Emission Guidelines, EPA Asked Federal Court to Stay States' Lawsuit

On November 5, 2018, EPA moved to stay a lawsuit brought by states in the federal district court for the Northern District of California to compel EPA to promulgate federal implementation plans for Obama-era emission guidelines for existing municipal solid waste landfills. EPA told the court that the deadlines upon which the states' claims were based were the subject of proposed rulemakings to amend the deadlines. First, in August 2018, EPA proposed in its "Affordable Clean Energy" replacement for the Clean Power Plan to amend timing requirements for all "ongoing" emission guidelines to allow more time for submission of state plans as well as for EPA review of such plans and EPA promulgation of federal plans. Second, in October 2018, EPA proposed to extend the deadline for submitting state plans for the landfill emission

guidelines to August 19, 2019 (from May 30, 2017), and to provide additional time after that date for EPA review and, if necessary, EPA promulgation of federal plans. The states opposed the stay request, as did Environmental Defense Fund, which the court granted permission to intervene in support of the plaintiffs. On November 14, the states asked the court to hold a hearing on the stay motion as soon as possible, arguing that significant prejudice and harm would result and that EPA's relief would be effectively granted if the hearing were held on February 14, 2019, as currently scheduled. *California v. EPA*, No. 4:18-cv-03237 (N.D. Cal.).

Competitive Enterprise Institute Filed Lawsuit Seeking Law Professors' Correspondence About Energy Industry and Climate Change

Competitive Enterprise Institute filed a lawsuit seeking to compel the University of California at Los Angeles (UCLA) Law School to respond to requests under the California Public Records Act for records "concerning the University's work with private outside parties including law enforcement to develop theories of litigation against, and pursue as targets of investigation, perceived opponents of a political and policy agenda shared by these outside parties and certain faculty." In particular, CEI sought the correspondence of two UCLA Law School professors, who CEI said had used their positions at the school to coordinate with institutions and individuals to urge legal action against "energy industry participants or political opponents of the 'climate' policy agenda." *Competitive Enterprise Institute v. Regents of the University of California*, No. 18 ST CP 02832 (Cal. Super. Ct., filed Nov. 8, 2018).

Challengers of San Diego Development Project Alleged Failures to Disclose Greenhouse Gas Emissions, Wildfire Risk

Environmental and other nonprofit organizations and community groups, along with a number of individuals and a spa company that "emphasizes harmony with the environment in focusing on the health and fitness of its guests," filed a lawsuit in California Superior Court challenging San Diego County's approvals for a residential and commercial project. The petition described the project as involving construction of 2,135 residential units and 81,000 square feet of commercial uses "in a mostly undeveloped, Very High Severity fire hazard area in a rural, unincorporated area of the County located far from transit infrastructure and job centers." The petitioners asserted claims under the California Environmental Quality Act, the State Planning and Zoning Law, the Subdivision Map Act, and County regulatory and zoning ordinances, California and U.S. constitutional violations, and the Religious Land Use and Institutionalized Persons Act. The petitioners contended, among other claims, that the County approved the project despite having been enjoined from relying on a greenhouse gas mitigation measure in the County's Climate Action Plan that was "essentially the same" as a mitigation measure for the project. The petitioners asserted that the County "failed to disclose, discuss, or analyze the cumulative effects on energy consumption and environmental justice of permitting in-County [greenhouse gas] emissions and [vehicle miles traveled] in exchange for carbon offsets that would reduce [greenhouse gas] emissions in other places of the world." The petitioners also asserted that the County "failed to account for the increasing prevalence and severity of wildfires" due to "climate change and other climatic changes." *California Native Plant Society v. County of San Diego*, No. 37-2018-00054559-CU-TT-CTL (Cal. Super. Ct., filed Oct. 26, 2018).

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FEATURED CASE

Supreme Court Denied Stay of Young People's Constitutional Climate Case, Saying Federal Government Could Ask Ninth Circuit to Stop Case

On November 2, 2018, the U.S. Supreme Court issued an order denying the federal government's application for a stay of district court proceedings in the constitutional climate case brought by young plaintiffs in the District of Oregon. The Court also vacated an administrative stay granted by Chief Justice Roberts on October 19. The federal government had sought a stay pending the Court's disposition of a petition for a writ of mandamus ordering the district court to dismiss the suit. The trial had been scheduled to start on October 29. The Court said the petition for a writ of mandamus did not have a "fair prospect" of success because the government could still seek mandamus relief in the Ninth Circuit. The Court noted that while the Ninth Circuit had denied two earlier requests for mandamus relief in this case, "the court's basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs' claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions." The Supreme Court indicated that those reasons were, "to a large extent, no longer pertinent" since a 50-day trial was scheduled to begin on October 29, 2018 and had been held in abeyance only because of Chief Justice Roberts's administrative stay. Justices Gorsuch and Thomas would have granted the stay.

Earlier in October, the district court largely denied the federal government's dispositive motions in the case. The district court granted in part and denied in part motions for summary judgment and judgment on the pleadings. The court declined to rule for the defendants at this stage on the primary claims advanced by the plaintiffs: a "state-created danger" due process claim and a public trust claim. The court dismissed President Trump from the action (but without prejudice) and also granted summary judgment to the defendants on the plaintiffs' Ninth Amendment claim and on an equal protection claim based on "posterity" being a suspect classification. The district court said, however, that an equal protection claim based on alleged interference with a right to a climate system capable of sustaining human life would be aided by further development of a factual record. The district court rejected arguments that the case was required to be heard under the Administrative Procedure Act; that separation of powers principles foreclosed the plaintiffs' claims; that plaintiffs lacked standing; and that there is no right to a climate system capable of sustaining human life. The district court declined to certify its decisions for interlocutory appeal. On the same day, the district court denied the government's motion for a stay pending Supreme Court review.

On October 12, a few days prior to the district court's ruling on the dispositive motions and denial of the government's motion for a stay, the government filed a third petition for writ of mandamus in the Ninth Circuit Court of Appeals, also seeking a stay of district court proceedings pending Supreme Court review. On November 2, 2018, just hours before the Supreme Court denied the government's stay application, the Ninth Circuit Court of Appeals issued an order denying the federal government's request. The Ninth Circuit said that Chief Justice Roberts's

granting of a stay of the litigation on October 19 rendered the government's "non-substantive" motion moot.

Correction: The October monthly update indicated incorrectly that the trial in *Juliana v. United States* was expected to last two weeks. Lawyers for the parties estimated that the trial would last 50 days or 8 to 12 weeks.

In re United States, No. 18-505/18A-410 (U.S. Nov. 2, 2018); *United States v. U.S. District Court for District of Oregon*, No. 18-72776 (9th Cir. Nov. 2, 2018); *Juliana v. United States*, No. 6:15-cv-1517 (D. Or. Oct. 15, 2018). Link to case page is available here.

DECISIONS AND SETTLEMENTS

Supreme Court Declined to Consider Appeals of D.C. Circuit Ruling That EPA Lacked Authority to Issue Rule Restricting HFCs with High Global Warming Potential

On October 9, 2018, the U.S. Supreme Court denied, without comment, petitions for writ of certiorari seeking review of the D.C. Circuit Court of Appeals' vacating of a U.S. Environmental Protection Agency (EPA) rule that restricted the use of hydrofluorocarbon (HFC) refrigerants with high global warming potential as replacements for ozone-depleting substances. The D.C. Circuit held in August 2017 that the Clean Air Act did not provide EPA with the authority to issue the rule. Certiorari was sought by two manufacturers that had invested in alternative refrigerants and also by Natural Resources Defense Council. EPA opposed certiorari. *Honeywell International Inc. v. Mexichem Fluor, Inc.*, Nos. 17-1703 & 18-2 (U.S. Oct. 9, 2018).

BLM Dropped Appeal of Decision Requiring More Climate Change Analysis for Oil and Gas Leases

The Tenth Circuit Court of Appeals granted the motion by the U.S. Bureau of Land Management (BLM) and other federal appellants for voluntary dismissal of their appeal of a New Mexico federal court's decision setting aside oil and gas leases and the finding of no significant impact for the leases. The district court found that BLM's National Environmental Policy Act (NEPA) review had not taken a hard look at impacts on climate change and greenhouse gases, or at impacts on water use. *San Juan Citizens Alliance v. U.S. Bureau of Land Management*, No. 18-2119 (10th Cir. Oct. 26, 2018).

Seventh Circuit Denied Rehearing of Challenge to Illinois "Zero Emission Credits" Program

On October 9, 2018, the Seventh Circuit Court of Appeals denied a petition for rehearing of its decision upholding Illinois's "zero emission credit" (ZEC) program for nuclear power plants. The court held in September that the Federal Power Act did not preempt the ZEC program and that the program did not violate the dormant Commerce Clause. *Electric Power Supply Association v. Star*, No. 17-2445 (7th Cir. Oct. 9, 2018).

Connecticut Federal Court Dismissed Challenge to State's Transfers from Clean Energy and Energy Conservation Funds

The federal district court for the District of Connecticut rejected constitutional claims against Connecticut's governor, treasurer, and comptroller in connection with transfers of funds from Connecticut's Energy Conservation and Load Management Fund (ECLMF) and Clean Energy Fund (CEF) to the State's General Fund. The transfers from the funds—which receive funds from surcharges on electricity bills—were authorized by laws enacted in 2017 and 2018. The court found no basis for concluding that the contracts plaintiffs had with electric distribution companies for provision of electricity gave them any contractual rights over how the funds in the ECLMF and CEF were spent. The court also dismissed for lack of standing the plaintiffs' claim that the transfers violated the Equal Protection Act by assessing a tax on electric distribution company customers that did not have a rational relation to a legitimate governmental purpose. The court declined to exercise jurisdiction over the plaintiffs' state law claims. *de Mejias v. Malloy*, No. 3:18-CV-00817 (D. Conn. Oct. 25, 2018).

Washington Federal Court Dismissed State Official from Lawsuit Challenging Denials of Approvals for Coal Export Terminal

The federal district court for the Western District of Washington dismissed the Washington Commissioner of Public Lands from a lawsuit challenging Washington State agencies' denials of approvals for a coal export terminal on and in the Columbia River, including denial of a request for approval of a sublease of State-owned aquatic lands. The federal court concluded that the Eleventh Amendment barred the plaintiffs from pursuing their claims against the commissioner because the relief sought "would functionally prevent Washington State's officers from exercising their authority over Washington's sovereign lands." The court noted that a state forum was available to hear the plaintiffs' challenge. *Lighthouse Resources Inc. v. Inslee*, No. 3:18-cv-05005 (W.D. Wash. Oct. 23, 2018).

Colorado Mayor Agreed to Unblock Anti-Fracking Protesters from Official Facebook After First Amendment Suit Was Filed

Four days after two Colorado residents filed a lawsuit alleging that the City of Thornton, Colorado, and its mayor *pro tem* violated their First Amendment rights by barring them from posting about the dangers of hydraulic fracturing on the mayor's official Facebook page, the parties filed a stipulation in which the mayor agreed to unblock the defendants and to refrain from blocking individuals and from deleting comments from the Facebook page during the pendency of the lawsuit. The parties agreed that comments and postings controlled by the plaintiffs "must not contain true threats and/or obscenity." The plaintiffs had posted comments on the Facebook page that included assertions about carbon emissions and public health effects associated with oil combustion; the comments were allegedly deleted and the plaintiffs banned from future commenting. The plaintiffs asserted First Amendment claims for violations of free speech rights and the right to petition the government and for retaliation. *Willmeng v. City of Thornton*, No. 1:18-cv-02636 (D. Colo., filed Oct. 16, 2018 and stipulation Oct. 20, 2018).

Colorado Federal Court Found Some Shortcomings in Assessment of Greenhouse Gas Impacts in NEPA Review for Resource Management Plans

The federal district court for the District of Colorado found that BLM's environmental review for a Resource Management Plan for the Glenwood Springs Resource Area in Colorado failed to take a hard look at indirect effects of greenhouse gas emissions from combustion of oil and gas development in the planning area. The court also found, however, that BLM "took an appropriately hard look at the cumulative climate change impacts" and that NEPA did not require BLM to perform a cost-benefit analysis to take into account the "economic downsides" of greenhouse gas emissions. In addition, the court concluded that BLM had taken a sufficiently hard look at the issues of methane emissions and impacts of oil and gas development on human health but found that it had not considered reasonable alternatives to oil and gas development. *Wilderness Workshop v. U.S. Bureau of Land Management*, No. 1:16-cv-01822 (D. Colo. Oct. 17, 2018).

Washington Federal Court Ordered EPA to Issue Temperature TMDL for Columbia and Lower Snake Rivers

The federal district court for the Western District of Washington found that EPA violated the Clean Water Act by failing to issue a total maximum daily load (TMDL) for temperature for the Columbia and lower Snake Rivers. The court noted that native salmon and steelhead populations in the rivers were generally suited to and dependent on cold water temperatures and that migrating fish were particularly vulnerable to warm water temperatures, with upstream migration becoming more difficult as water temperatures approached 68°F and halting altogether at 72-73°F. The court also noted that water temperature in the rivers had consistently exceeded 68°F in recent years and that "[t]emperature issues are projected to worsen as the effects of human activities and climate change continue to increase water temperatures." The court found that a constructive submission by Washington and Oregon of "no TMDL" had occurred and that EPA had failed to undertake its mandatory duty to issue a temperature TMDL. The court gave EPA 30 days to approve or disapprove the constructive submission (but noted that the court "does not see how the EPA can approve the constructively submitted TMDL consistent with its obligations under the [Clean Water Act]") and 30 additional days to issue a new TMDL. *Columbia Riverkeeper v. Pruitt*, No. 2:17-cv-00289 (W.D. Wash. Oct. 17, 2018).

Federal Court Granted King County's Request to Stay Climate Case Against Fossil Fuel Companies; 12 States Urged Dismissal

On October 17, 2018, the federal district court for the Western District of Washington granted King County's motion to stay proceedings in the County's lawsuit seeking to hold fossil fuel companies liable for climate change impacts. The court ordered proceedings to be stayed until the Ninth Circuit issues a decision in San Francisco's and Oakland's appeals of the dismissal of their similar lawsuits. The district court found that it was "unlikely that a stay would result in any significant damage or cause any hardship to any party" and that there was "substantial overlap" between King County's lawsuit and the San Francisco and Oakland lawsuits, "particularly with regard to how and whether state-law public nuisance claims are preempted by federal common law." Earlier in October, 12 states—led by Indiana—filed a motion for leave to file an amicus

curiae brief in support of the defendants' motion to dismiss King County's lawsuit. The states asserted that the "justiciability of climate change lawsuits under federal common law is an issue of extraordinary importance" to them, and that permitting adjudication of such claims "would disrupt carefully calibrated state regulatory schemes devised by politically accountable officials." They contended that their interest was "especially strong" because the list of potential defendants is limitless" and they could themselves be future defendants. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash. stay order Oct. 17, 2018 and amicus motion Oct. 3, 2018).

Federal Court Dismissed Challenge to Forest Service Project, Said Plaintiff Waived Climate Change Claims

The federal district court for the Eastern District of Washington granted summary judgment to the U.S. Forest Service (USFS) and USFS officials in a challenge to the agency's approval of a restoration, logging, and timber sale venture in the Colville National Forest. The court found that the defendants were not arbitrary and capricious in their environmental analysis and ruled that the plaintiff abandoned and waived a number of claims in its amended complaint, including claims related to climate change. The plaintiff had alleged that the environmental assessment did not "analyze or disclose the body of science that implicates logging activities as a contributor to reduced carbon stocks in forests and increases in greenhouse gas emissions" and also that the assessment failed to provide "any credible analysis as to how realistic and achievable its forest plan" was "in the context of a rapidly changing climate." The complaint also alleged that the environmental assessment did not address cumulative impacts of ungulates such as cattle and climate change. *Alliance for the Wild Rockies v. Pena*, No. 2:16-cv-00294 (E.D. Wash. Oct. 2, 2018).

Federal Court Said Endangered Species Act Claim Based on Alleged Temperature-Related Mortality of Salmonids Would Go to Trial

The federal district court for the Eastern District of California concluded that a claim that the U.S. Bureau of Reclamation (the Bureau) and holders of Sacramento River Settlement Contracts (SRS Contractors) violated the Endangered Species Act's prohibition against taking listed species could not be resolved on motions to dismiss and for summary judgment. A coalition of environmental groups asserts that the SRS Contractors caused substantial temperature-related mortality of listed salmonids by diverting and transferring water in 2014 and 2015 without an appropriate permit. The environmental groups contend that the Bureau took listed salmonids by approving water transfers from SRS Contractors to others in 2014 and 2015. Due to failure to provide proper notice, the court dismissed the aspect of the unlawful taking claim against the Bureau that was based on a theory that the Bureau should have required one SRS Contractor to divert water from a source other than the Sacramento River. The court rejected the Bureau's other rationales for dismissing the claim against it, including the Bureau's argument that the claim involved wholly past agency actions. The court found that the environmental groups had presented evidence to support the assertions that conditions similar to the dry conditions in 2014 and 2015 could recur due to climate change. The court concluded that the plaintiffs had established a likelihood of future recurrence sufficient to withstand dismissal. The court also denied both the Bureau's and the environmental groups' motions for summary judgment. Regarding the environmental groups' motion, the court found that the SRS Contractors' evidence

was sufficient to cast doubt on the conclusion that the Sacramento River's temperature during 2014 and 2015 caused mortality. *Natural Resources Defense Council v. Zinke*, No. 1:05-cv-01207 (E.D. Cal. Sept. 28, 2018).

Federal Court Found That Water Diversions at California Dam Caused Unauthorized Take of Climate-Threatened Fish

In an Endangered Species Act citizen suit, the federal district court for the Central District of California ruled that the United Water Conservation District's operation of the Vern Freeman Diversion Dam on the Santa Clara River resulted in authorized take of Southern California Steelhead. The court connected water diversions and operations at the dam to three types of effects that independently and cumulatively constituted take: an inadequate "fish ladder" at the dam that hinders and sometimes blocks upstream migration; the injuring and killing of steelhead as they pass through the dam's infrastructure; and diminishment of the functioning of the downstream migration corridor. The court noted that the National Marine Fisheries Service had found that climate change was expected to increase air and water temperatures and decrease rain, potentially decreasing suitable habitat for the steelhead and that climate change was likely to exacerbate factors affecting the Southern California Steelhead's continued existence. The court concluded that the operation and maintenance of the dam and diversion of river flows prevented the recovery of the species. The court found, however, that the plaintiffs did not establish that the defendant caused unauthorized take of flycatcher, a migratory songbird. *Wishtoyo Foundation v. United Water Conservation District*, No. 2:16-cv-03869 (C.D. Cal. Sept. 23, 2018).

California Appellate Court Affirmed Trial Court Judgment Barring Use of San Diego County Climate Change Guidance

The California Court of Appeal affirmed a trial court judgment barring San Diego County from using a 2016 guidance document on climate change analysis in California Environmental Quality Act (CEQA) reviews. The appellate court found that challenges to the guidance were ripe and further found that the guidance violated CEQA because the guidance's "Efficiency Metric" established a threshold of significance that should have been adopted by ordinance, resolution, rule, or regulation and developed through a public review process. The appellate court also found that the County did not provide substantial evidence to support the guidance's reliance on statewide data. In addition, the Court of Appeal found that the issuance of the guidance constituted piecemeal environmental review at odds with an earlier decision by the appellate court concluding that the County's Climate Action Plan (CAP) and thresholds of significance based on the CAP were a single project subject to environmental review. Therefore, despite the County's contention that development of a CAP and thresholds of significance were underway and on schedule, the appellate court found that the 2016 guidance violated its earlier directive. *Golden Door Properties, LLC v. County of San Diego*, Nos. D072406, D072433 (Cal. Ct. App. Sept. 28, 2018).

Minnesota Court Dismissed Criminal Charges Against Valve-Turner Protesters

A Minnesota trial court dismissed felony and misdemeanor charges against three climate change activists in connection with their participation in a "valve turner" pipeline protest in 2016. The

Climate Defense Project, an organization assisting in the defense of the protesters, announced on October 9, 2018 that the judge dismissed the charges after the prosecution closed its case on the second day of trial. The court found that there was insufficient evidence that the defendants damaged the pipeline. The trial court had ruled in 2017 that the defendants could present a necessity defense. In 2018, the Minnesota Court of Appeals dismissed the State's appeal of the trial court's ruling on the necessity defense, and the Minnesota Supreme Court declined to review. The dismissal of the charges rendered the presentation of the necessity defense unnecessary. Prior to the start of the trial, the court restricted the number of expert witness the defense could call to five and required that experts testify in person. *State v. Klapstein*, Nos. 15-CR-16-413 et al. (Minn. Dist. Ct. Oct. 9, 2018).

Alaska Court Rejected Youth Plaintiffs' Lawsuit Alleging State Climate and Energy Policies Violated State Constitution

The Alaska Superior Court dismissed claims brought by 16 youth plaintiffs against the State of Alaska, its governor, and State agencies alleging that the State's climate and energy policies violated their rights under the Alaska constitution to a stable climate system. The court found that the plaintiffs' claims for injunctive relief were indistinguishable from claims presented in an earlier case that involved two of the same plaintiffs (*Kanuk v. Alaska*) in which the Alaska Supreme Court determined that the claims required science- and policy-based inquiry and therefore presented non-justiciable political questions. The Superior Court also cited *Kanuk* in concluding that the plaintiffs' claims for declaratory relief must be dismissed on prudential grounds because declaratory relief would not advance the plaintiffs' interest in reducing greenhouse gas emissions. The Superior Court also upheld the Department of Environmental Conservation commissioner's denial of a rulemaking petition to address climate change. *Sinnok v. State*, No. 3AN-17-09910 CI (Alaska Super. Ct. Oct. 30, 2018).

California Superior Court Upheld CEQA Review for Refinery Project

On September 21, 2018, the California Superior Court ruled against Communities for a Better Environment (CBE), an environmental justice organization, in its CEQA lawsuit challenging the South Coast Air Quality Management District's approval of a refinery project in Los Angeles County. CBE alleged that the environmental impact report (EIR) for the refinery project masked the underlying purposes of significantly increasing the amount of crude oil at the refinery and allowing the processing of dirtier crude oil. CBE asserted that there were numerous deficiencies in the EIR, including low estimates of local air pollution and failure to disclose direct, indirect, and cumulative greenhouse gas emissions. The court found that substantial evidence supported the District's determination that the project's increase in crude storage capacity was not intended to and did not permit an increase in crude processing. The court also found that substantial evidence supported the EIR's conclusions. *Communities for a Better Environment v. South Coast Air Quality Management District*, No. BS169841 (Cal. Super. Ct. Sept. 21, 2018).

NEW CASES, MOTIONS, AND NOTICES

New York Attorney General Filed Fraud Action Against Exxon for Alleged Misrepresentations in Climate Disclosures

On October 24, 2018, the New York attorney general filed an action alleging that Exxon Mobil Corporation (Exxon) perpetrated a "longstanding fraudulent scheme … to deceive investors and the investment community … concerning the company's management of the risks posed to its business by climate change." The lawsuit followed a multi-year investigation that became public after the attorney general issued an investigatory subpoena to Exxon in November 2015. In its complaint, the attorney general alleged that Exxon had made materially false and misleading representations concerning the proxy cost of carbon dioxide that it claimed to use to simulate the impact of future climate change regulations. In particular, the complaint asserted that Exxon made material misrepresentations and failed to disclose material facts concerning "(i) its use of proxy costs in its cost projections, including in investment decision-making, business planning, oil and gas reserves and resource base assessments, and impairment evaluations; (ii) its consistent application of proxy costs; (iii) its use of proxy costs in its demand and price projections; and (iv) the risks to its business posed by a two degree scenario." The complaint asserted a securities fraud cause of action under New York's Martin Act, as well as causes of action for persistent fraud and illegality in violation of Executive Law § 63(12), actual fraud, and equitable fraud. The relief sought includes injunctive relief, a comprehensive review of Exxon's alleged failure to apply a consistent proxy cost and the economic and financial consequences of such failure, damages, disgorgement of amounts obtained in connection with the alleged violations of law, and restitution for investors. *People of the State of New York v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct., filed Oct. 24, 2018).

Supreme Court Requested Response from Massachusetts Attorney General to Exxon Certiorari Petition for Review of Personal Jurisdiction Issue in Climate Investigation

On October 29, 2018, the U.S. Supreme Court requested a response from the Massachusetts attorney general to Exxon Mobil Corporation's petition for writ of certiorari seeking review of the Massachusetts Supreme Judicial Court ruling that permitted the attorney general to proceed with her climate change investigation of Exxon's marketing and sales of its products. Exxon has asked the Supreme Court to consider whether Massachusetts courts' exercise of jurisdiction over Exxon violated due process. The attorney general must file her response by November 28. Two amicus briefs have been filed in support of Exxon's petition—one by DRI–The Voice of the Defense Bar, which described itself in its brief as "an international organization of more than 22,000 attorneys involved in the defense of civil litigation," and the other by the U.S. Chamber of Commerce and the National Association of Manufacturers. *Exxon Mobil Corp. v. Healey*, No. 18-311 (U.S. Oct. 29, 2018).

Briefing Completed in Exxon's Second Circuit Appeal of Dismissal of Lawsuit Against State Attorneys General

Briefing was completed in Exxon Mobil Corporation's appeal to the Second Circuit Court of Appeals of the dismissal of Exxon's lawsuit seeking to bar—largely on constitutional grounds—investigations by the New York and Massachusetts attorneys general of Exxon's climate change-related disclosures. On October 5, 2018, both attorneys general filed their briefs urging the Second Circuit to affirm the dismissal of the case. The New York attorney general argued that Exxon's lawsuit was not ripe because failure to comply with its investigative subpoena would

not have automatic consequences. The New York attorney general further argued that, in any event, the district court had correctly concluded that Exxon failed to adequately plead a First Amendment claim or any other claim, including Fourth Amendment, due process, conspiracy, and dormant Commerce Clause claims. The attorney general also contended that the district court had properly found that amendment of Exxon's complaint would be futile. The Massachusetts attorney general also argued that Exxon failed to state plausible claims and also argued that Massachusetts state court decisions independently precluded Exxon's claims. Three amicus briefs were filed in support of the attorneys general. A group of law professors with expertise in First Amendment law asserted in their amicus brief that profit-seeking companies do not have First Amendment rights to issue false or misleading statements that deceive investors or consumers. Nineteen states and the District of Columbia argued in their brief that the First Amendment did not preclude states from conducting anti-fraud investigations and securities regulation. The amici states said they had an compelling interest in maintaining their investigative and consumer protection functions and contended that immunizing misleading and deceptive statements under an overbroad reading of the First Amendment would detrimentally affect consumers, investors, and financial markets. In the third amicus brief, former Massachusetts attorneys general addressed how the Massachusetts consumer protection law operates and asserted that Exxon should not be permitted to collaterally attack an investigation in federal court that it had unsuccessfully challenged in state court. Exxon filed its reply brief on October 19, contending that its allegations established viewpoint discrimination in violation of the First Amendment and that it had also plausibly alleged other claims. Exxon contended its constitutional claims were ripe and that res judicata did not bar its claims against the Massachusetts attorney general because the company did not have a full and fair opportunity to litigate its First Amendment and other constitutional claims in state court. *Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir.).

Citing Publication of New Regulation, BLM Filed Motion to Dismiss Appeal of District Court Order Staying Obama-Era Waste Prevention Rule

On October 11, 2018, the federal government moved to dismiss appeals of a Wyoming federal court's stay of the effectiveness the Obama administration's Waste Prevention Rule, which regulated oil and gas development on federal and tribal lands to reduce venting, flaring, and leaks of methane. The government argued that the U.S. Bureau of Land Management's publication on September 28, 2018 of a final rule rescinding and revising requirements of the Waste Prevention Rule rendered the appeal moot. The environmental groups and states appealing the stay order agreed that the case was moot but argued that the Tenth Circuit should vacate the stay order to prevent the district court's "unprecedented" expansion of judicial authority to enjoin federal regulations "from spawning any legal consequences." The appellants also contended that the Tenth Circuit should direct the district court to dismiss the underlying petitions for review challenging the Obama administration rule. On October 26, the Tenth Circuit referred the motion to dismiss to the panel assigned to consider the merits of the appeal. Briefing on the merits was completed on October 1. *Wyoming v. U.S. Department of the Interior*, Nos. 18-8027 & 18-8029 (10th Cir.).

Citing Threat to Religious Liberty, Religious Order Sought Supreme Court Review of Pipeline Approval

A vowed order of Roman Catholic women and individual members of the order filed a petition for writ of certiorari in the U.S. Supreme Court, seeking review of the Third Circuit Court of Appeals' decision affirming dismissal of their Religious Freedom Restoration Act (RFRA)-based challenge to the Federal Energy Regulatory Commission's (FERC's) approval of a natural gas pipeline that would run through land in Pennsylvania owned by the order. The petition said the order and its members "agree with Pope Francis's teachings that the threat of climate change, caused in large part by the intensive use of fossil fuels, represents a principal challenge facing humanity." The petitioners asserted that the pipeline's operation on their property "violates their deeply-held religious beliefs and conscience by forcing them to use their own land to facilitate a fossil fuel pipeline that will harm the earth." They contended that the Third Circuit's decision—which concluded that RFRA did not abrogate or create an exception to the Natural Gas Act's administrative requirements and jurisdictional provisions—was not consistent with Supreme Court precedent applying RFRA. Their petition presented the questions of whether a person must "intervene in an application and follow the required administrative procedures for objecting to proposed agency action in order to prevent the government agency from later burdening her religious exercise in violation of RFRA" and whether circuit court review of an administrative agency's order satisfies "RFRA's guarantee to assert a claim in a judicial proceeding and obtain appropriate relief against the government." The petitioners argued that requiring adherence to administrative review requirements foreclosed statutory rights guaranteed by RFRA and would have a significant adverse impact on protection of religious liberties. *Adorers of the Blood of Christ, United States Province v. Federal Energy Regulatory Commission*, No. 18-548 (U.S., filed Oct. 26, 2018).

Lawsuit Filed in Oregon Federal Court Alleging Constitutional Right to Protection of Wilderness from Climate Change

Animal Legal Defense Fund, Seeding Sovereignty (an organization that seeks to "amplify the role of indigenous knowledge for environmental justice"), "Future Generations," and individual plaintiffs filed a lawsuit in the federal district court for the District of Oregon alleging that the federal government violated their constitutional "to be let alone free from human influence in wilderness." The plaintiffs asked the court for a declaration that the defendants violated their constitutional rights under First, Fourth, Fifth, Fourteenth, and Ninth Amendments by causing and contributing to dangerous concentrations of greenhouse gases in the atmosphere. They asked that a special master be appointed to "facilitate the immediate review of potential Wilderness Areas for designation as a means to reduce the impacts of climate change on wilderness, in keeping with statutory mandates" and that the federal government be ordered "to prepare and implement an enforceable national remedial plan to expeditiously phase out commercial logging of old-growth forests, animal agriculture, and fossil fuel development and extraction in order to draw down greenhouse gases until the climate system has stabilized for the protection of wilderness on which Plaintiffs now and in the future will depend for the exercise of their fundamental autonomy and privacy rights." *Animal Legal Defense Fund v. United States*, No. 6:18-cv-01860 (D. Or., filed Oct. 22, 2018).

Lawsuit Filed Seeking Critical Habitat Designation for Climate-Threatened Cuckoo Species

Center for Biological Diversity filed a lawsuit in the federal district court for the District of Colorado asking the court to order the U.S. Fish and Wildlife Service to designate critical habitat for the threatened western yellow-billed cuckoo. Primary factors threatening the species include loss and degradation of habitat from altered watercourse hydrology, overgrazing, and agricultural encroachment, while climate change, pesticides, wildfires, and patch habitat pose additional threats. The western yellow-billed cuckoo was listed as threatened in 2014, but a proposed rule designating critical habitat in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Texas, Utah, and Wyoming was never finalized. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 1:18-cv-02647 (D. Colo., filed Oct. 17, 2018).

Lawsuit Filed Challenging Forest Service Plan to Reduce Wildfire Risk in Area in California

Three environmental groups filed a lawsuit in the federal district court for the Eastern District of California challenging a U.S. Forest Service plan to reduce risks of wildfire in the Johnny O'Neil Late-Successional Old Growth Forest Reserve. The plaintiffs alleged that the project included clear-cut logging of old forests affected by wildfire, which the plaintiffs said would "increase the future risk of wildfire and compromise ecological integrity of the recovering forest." The complaint stated that the causes of the increase in wildfires in California and other western states "are complex and include global climate change and past forest management" and that "how forests are managed after wildfire can dictate how forests function in the future: the best available science indicates that future wildfires are made worse by extensive logging that removes all of the largest fire-affected trees from an area." The plaintiffs asserted violations of the National Forest Management Act, NEPA, and the Administrative Procedure Act. *Klamath-Siskiyou Wildlands Center v. Grantham*, No. 2:18-cv-01604 (E.D. Cal., filed Oct. 16, 2018).

Fossil Fuel Companies Opposed Remand of Baltimore's and Colorado Localities' Climate Change Lawsuits

On October 11, 2018, fossil fuel companies filed papers in Maryland federal court opposing remand of the Mayor and City Council of Baltimore's (Baltimore's) lawsuit seeking to hold the companies liable for the impacts of climate change. On October 12, 2018, fossil fuel company defendants in the climate change lawsuit brought by the City of Boulder, Boulder County, and San Miguel County also filed their opposition to remand. The companies argued that the claims necessarily arose under federal common law, and that even if only state-law claims were asserted, the claims necessarily raised disputed and substantial federal issues. In addition, the companies argued that the Clean Air Act and other federal statutes completely preempted the claims and that federal jurisdiction was also available pursuant to the Outer Continental Shelf Lands Act, the federal officer removal statue, federal enclave doctrine, and the bankruptcy removal statute. In the Baltimore case, the companies also argued that admiralty jurisdiction was a basis for federal jurisdiction. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 1:18-cv-02357 (D. Md. Oct. 11, 2018); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 1:18-cv-01672 (D. Colo. Oct. 12, 2018).

Appeals Filed in Case Finding Inadequate Climate Change Analyses in NEPA Review for Powder River Basin Resource Management Plans

BLM, Wyoming, three coal mining companies, and environmental groups have appealed a Montana federal court's decision finding that some climate change analyses for Resource Management Plans for the Powder River Basin were inadequate. The parties are appealing the court's March 2018 opinion and order as well as its July 2018 remedy order, in which the court declined to enjoin issuance of new mineral leases and gave BLM 16 months to complete new NEPA reviews. *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, Nos. 18-35836 et al. (9th Cir.).

Class Action Filed in California Court Alleging Misrepresentation of Recyclability of Single-Serve Coffee Pods

A California resident filed a class action complaint in California Superior Court against a company that makes single-serve "coffee pods." The complaint alleges that the company misrepresents the recyclability of their product. The alleged negative effects of plastic waste include one climate-related allegation: "The staggering amount of plastic waste accumulating in the environment is accompanied by an array of negative side effects. … More recently, scientists have discovered that, as it degrades, plastic waste releases large amounts of methane, a powerful greenhouse gas. Thus, plastic waste is also thought to be a significant potential cause of global climate change." The complaint asserts a breach of an express warranty, violations of the California Consumers Legal Remedies Act, and violations of California's unfair competition law. *Smith v. Keurig Green Mountain, Inc.*, No. RG18922722 (Cal. Super. Ct., filed Sept. 28, 2018).

Developer Challenged Denial of Rezoning Application Where City Said Stormwater Plans Needed to Account for Sea Level Rise

A developer filed a lawsuit in Virginia state court asserting that the Virginia Beach City Council unlawfully denied its application for a proposed rezoning of a 50-acre property for residential development on the grounds that the developer failed to provide a stormwater analysis that accounted for 1.5 foot sea level rise and based on other flooding concerns. The developer asserted that the defendants' actions were arbitrary and capricious and ultra vires and that the defendants had imposed conditions on its rezoning application that violated its Equal Protection rights. *Argos Properties II, LLC v. City Council for Virginia Beach*, No. CL18002289-00 (Va. Cir. Ct., filed May 17, 2018).

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FEATURED CASES

Seventh and Second Circuits Upheld Illinois and New York Subsidies for Nuclear Generation

On September 13, 2018, the Seventh Circuit Court of Appeals upheld an Illinois law that established subsidies for some in-state nuclear generation facilities by providing them with "zero emission credits" (ZECs) that fossil fuel-fired power plants were required to purchase. The price of the credits was based on a social cost of carbon. The Seventh Circuit held that the Federal Power Act did not preempt the Illinois law because the ZEC program stayed within the scope of the state's authority to regulate power-generating facilities and did not impinge on the Federal Energy Regulatory Commission's (FERC's) authority to regulate sales of electricity in interstate commerce (including in auctions conducted by regional organizations). The plaintiffs asserted that the ZEC system indirectly regulated such auctions because average auction prices were a component of the formula for determining the cost of a credit. The Seventh Circuit concluded, however, that because the ZEC system did not require that power be sold in an interstate auction, it was not preempted, even though the ZEC system would indirectly influence auction prices by increasing the quantity of power available for sale. In addition to the preemption question, the Seventh Circuit also briefly addressed the plaintiffs' dormant Commerce Clause claims, writing that Congress's provision that states may regulate local generation, combined with the "absence of overt discrimination" in the ZEC program, "defeats any constitutional challenge." *Electric Power Supply Association v. Star*, No. 17-2445 (7th Cir. Sept. 13, 2018).

Two weeks later, the Second Circuit Court of Appeals affirmed the dismissal of a lawsuit challenging New York State's ZEC program, which subsidizes qualifying nuclear power facilities. As in the Illinois program, the price of ZECs is based on the social cost of carbon. The Second Circuit concluded that the Federal Power Act did not preempt the ZEC program because the plaintiffs failed to allege "an impermissible 'tether'" between the ZEC program and wholesale market participation. The Second Circuit found that the ZEC program did not set wholesale prices, but instead "regulates the environmental attributes of energy generation and in the process considers forecasts of wholesale pricing." The Second Circuit also concluded that ZECs did not compel generators to make wholesale sales. In addition, the court rejected the argument that the "practical effect" of the ZEC program was to regulate wholesale prices, stating: "even though the ZEC program exerts downward pressure on wholesale electricity rates, that incidental effect is insufficient to state a claim for field preemption under the [Federal Power Act]." The court also rejected the plaintiffs' attempts to distinguish ZECs from renewable energy credits, which FERC previously confirmed were within states' jurisdiction. The Second Circuit also found that the plaintiffs failed to identify "clear damage to federal goals," foreclosing their claim of conflict preemption. While the plaintiffs argued that the ZEC program was at odds with the FERC's goal of promoting competition in the wholesale market from more efficient generators, the court said FERC acted "with the background assumption that the [Federal Power Act] establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets." Finally, the Second Circuit held that the plaintiffs lacked Article III standing for a dormant Commerce Clause claim. The court said the plaintiffs' alleged injuries arose not from alleged discrimination against out-of-state entities, but from the plaintiffs' use of fuels disfavored by New York. *Coalition for Competitive Electricity v. Zibelman*, No. 17-2654 (2d Cir. Sept. 27, 2018).

DECISIONS AND SETTLEMENTS

Ninth Circuit Upheld Oregon Clean Fuels Program

Over the dissent of one judge, the Ninth Circuit Court of Appeals affirmed the dismissal of a lawsuit challenging the Oregon Clean Fuels Program, which regulates production and sale of transportation fuels based on greenhouse gas emissions. The Ninth Circuit held that the Oregon program did not violate the dormant Commerce Clause and that it was not preempted by the Clean Air Act. With respect to the dormant Commerce Clause, the Ninth Circuit said its 2013 decision in *Rocky Mountain Farmers Union v. Corey* upholding California's Low Carbon Fuel Standard (LCFS) "squarely controlled" on the issue of whether the Oregon program facially discriminated based on the state of origin. The Ninth Circuit concluded that, like the LCFS, the Oregon program distinguished among fuels based on lifecycle greenhouse gas emissions, not based on origin. The Ninth Circuit also upheld the district court's finding that allegedly discriminatory statements by Oregon public officials did not undermine the Oregon program's stated purposes of reducing Oregon's greenhouse gas emissions. The Ninth Circuit also rejected the contentions that the Oregon program placed impermissible burdens on out-of-state fuels or provided impermissible benefits to in-state entities such as Oregon biofuel producers. Applying the *Pike* balancing test, the Ninth Circuit found that the complaint failed to plausibly allege that any burden on importers of out-of-state fuels was "clearly excessive" in light of the "substantial state interest" in mitigating greenhouse gas emissions. The Ninth Circuit also rejected a claim that the Oregon program regulated extraterritorially since, as with California's LCFS in *Rocky Mountain*, the program applies only to fuels sold in, imported to, or exported from Oregon. With respect to preemption, the Ninth Circuit held that the U.S. Environmental Protection Agency's exclusion of methane from the definition of volatile organic compounds did not constitute a finding pursuant to Section 211(c) of the Clean Air Act that regulation of methane was unnecessary. The exclusion therefore did not have a preemptive effect. In his dissent, Judge N. Randy Smith wrote that in his view the pleadings plausibly alleged that the Oregon program discriminated in practical effect and that it was plausible that there were nondiscriminatory means to advance Oregon's interest in mitigating greenhouse gas emissions. *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, No. 15-35834 (9th Cir. Sept. 7, 2018).

D.C. Circuit Denied Stay of Mountain Valley Pipeline; Challengers Filed Opening Brief

On August 30, 2018, the D.C. Circuit Court of Appeals denied motions to stay work on the Mountain Valley Pipeline, a gas pipeline extending 303.5 miles from West Virginia to Virginia. The D.C. Circuit said the petitioners had not satisfied the stringent requirements for a stay pending court review. On September 4, the petitioners filed a joint opening brief. Their arguments include that FERC failed to adequately analyze downstream greenhouse gas effects in its review of the project pursuant to the National Environmental Policy Act (NEPA) and that FERC's refusal to weigh such impacts in its public interest determination violated the Natural Gas Act. The brief said FERC had estimated the downstream greenhouse gas emissions associated with burning 2.0 billion cubic feet of gas per day but had incorrectly concluded that downstream effects were outside the scope of its NEPA analysis and had refused to use the social cost of carbon to evaluate the downstream impacts. *Appalachian Voices v. Federal Energy Regulatory Commission*, No. 17-1271 (D.C. Cir. Sept. 4, 2018).

Federal Court Upheld Threatened Listing for Gunnison Sage-Grouse, Rejected Claim That Consideration of Climate Change Was Arbitrary and Capricious

A federal district in Colorado upheld the U.S. Fish and Wildlife Service's (FWS) 2014 final rule listing the Gunnison sage-grouse as a threatened species and designating 1.4 million acres as critical habitat. The court rejected a procedural challenge to the listing as well as challenges to the merits of the listing. One issue on the merits was the FWS's consideration of the threat of climate change to the Gunnison sage-grouse. The court found that the FWS's "assessment of an increased threat from climate change and drought conditions was not arbitrary and capricious." In addition, the court was not persuaded that the FWS unreasonably dismissed the effectiveness of existing regulatory mechanisms to protect the sage-grouse in the Gunnison Basin. The court noted that one of those mechanisms, a "Candidate Conservation Agreement with Assurances," "does not take into account climate change, drought, disease, and small population issues—all of which reasonably support the threatened listing." In addition, the court noted that a 2013 conservation agreement executed by the Colorado and Utah governors and counties in the sage-grouse's range did not address the threat of climate change. *Colorado v. U.S. Fish & Wildlife Service*, No. 1:15-cv-00286 (D. Colo. Sept. 27, 2018).

Montana Federal Court Vacated Delisting of Greater Yellowstone Grizzly Bears

The federal district court for the District of Montana vacated the U.S. Fish and Wildlife Service final rule delisting the Greater Yellowstone Ecosystem population of grizzly bears and restored Endangered Species Act status to the Greater Yellowstone grizzlies. The court agreed with the plaintiffs that the FWS "entirely failed to consider an important aspect of the problem" because it did not analyze how delisting the Greater Yellowstone grizzlies would affect the remaining population in the lower 48 states. The court also found that the FWS threat analysis was arbitrary and capricious both because it "illegally negotiated away its obligation to apply the best available science" by dropping a "key commitment" to calibrate any population estimator used in the future to the estimator used to justify the delisting and also because the FWS illogically relied on studies to support its determination that the Greater Yellowstone grizzlies could remain independent and genetically self-sufficient when the studies concluded that introduction of new genetic materials was necessary to ensure the grizzlies' long-term health. The court's decision cited one of the studies as recommending measures to ensure cross-breeding between ecosystems "particularly given the unpredictability of future climate and habitat changes." *Crow Indian Tribe v. United States*, No. 9:17-cv-00089 (D. Mont. Sept. 24, 2018).

California Federal Court Vacated Withdrawal of Proposed Listing of Pacific Fisher as Threatened

The federal district court for the Northern District of California vacated the FWS's withdrawal in 2016 of a proposal to list the Pacific fisher as a threatened species under the Endangered Species Act. Although the plaintiffs cited climate change as a threat to the species in their complaint and motion papers, the court's decision did not address climate change and remanded the matter to the FWS based on inadequate treatment of the threat of toxicants and on "flawed logic regarding population stability." The court noted that it did not reach the plaintiffs' "other criticisms regarding the Service's treatment of other stressors" but said that "[t]his order, however, acknowledges that plaintiffs have raised plausible criticisms." The court suggested that on remand the FWS "consider and address those further points made by plaintiffs as well." *Center*

for Biological Diversity v. U.S. Fish & Wildlife Service, No. 3:16-cv-06040 (N.D. Cal. Sept. 21, 2018).

After Rejecting Defendants' Effort to Break Apart and Transfer Case Challenging Oil and Gas Lease Sale Procedures in Sage-Grouse Habitat, Idaho Federal Court Ordered BLM to Apply 2010 Procedures

On September 21, 2018, the federal district court for the District of Idaho issued a preliminary injunction in a lawsuit challenging federal actions that allegedly promote and expedite oil and gas leasing on public lands in violation of federal laws and in contravention of previously agreed-upon protections for the greater sage-grouse. The plaintiffs claimed, among other things, that the defendants violated NEPA by failing to address likely climate change impacts to the sage-grouse and its habitat. The plaintiffs' motion for a preliminary injunction concerned only Instruction Memorandum (IM) 2018-034, which replaced an IM issued in 2010. The court agreed with the plaintiffs that IM 2018-034 was procedurally invalid and that it limited public notice of and involvement in decisions regarding oil and gas development and leasing in violation of NEPA and the Federal Land Policy and Management Act. The court also found that the plaintiffs suffered irreparable harm and that the balance of hardships and public interest favored an injunction requiring the U.S. Bureau of Land Management to follow certain provisions of the 2010 IM (in lieu of IM 2018-034 provisions) starting in the fourth quarter of 2018. The injunction applied only to oil and gas lease sales in the Greater Sage-Grouse Habitat Management Areas.

Earlier in September, the court denied defendants' motion to sever and transfer the lawsuit. The court rejected the defendants' arguments that the challenges to lease sales should be transferred to the district courts in which the lands subject to the lease sales are located. The court also was not persuaded that claims challenging IMs that apply nationwide should be transferred to the District of Montana where other challenges to the IMs were pending. *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187 (D. Idaho Sept. 21 and Sept. 4, 2018).

Missouri Federal Court Denied California Local Governments' Request for Stay Pending Appeal of Decision Enjoining Them from Pursuing Climate Claims Against Peabody Energy

The federal district court for the Eastern District of Missouri denied a motion by the County of San Mateo, the City of Imperial Beach, and the County of Marin (the appellants) for a stay pending appeal of a bankruptcy court's decision enjoining them from pursuing their climate change tort law action against Peabody Energy Corporation (Peabody). The bankruptcy concluded that the appellants' claims, which were filed in June 2017, were discharged in Peabody's bankruptcy, from which it emerged in April 2017. In the appeal to the district court, the district court found that the appellants had not established either that they were likely to succeed on the merits or that they would suffer irreparable injury absent a stay pending appeal. *County of San Mateo v. Peabody Energy Corp. (In re Peabody Energy Corp.)*, No. 4:17-cv-02886 (E.D. Mo. Sept. 20, 2018).

Federal Court Said Department of Energy's Search for Records About Presidential Transition Team's Climate Change Questions Was Not Adequate

The federal district court for the District of Columbia found that the U.S. Department of Energy (DOE) had not conducted an adequate search in response to Protect Democracy Project's Freedom of Information Act request for records created between November 9, 2016 and February 15, 2017 regarding Presidential Transition Team questionnaires about climate change, including communications between DOE employees and specified individuals, including Donald Trump, Rick Perry (now the Secretary of Energy), and various Trump aides and officials. The court concluded, however, that DOE had conducted an adequate search for records created during that period regarding personnel changes, assignments, and policies. The court also found that DOE properly invoked Exemption 6 (concerning personal privacy) to withhold information and, except for three sets of documents, had properly invoked Exemption 5 (the deliberative process privilege). The court withheld judgment on the issue of whether Exemption 5 had been properly invoked for the remaining three sets of documents, which included DOE's response to the transition team's questionnaire, documents relating to Secretary Perry's security clearance, and documents released after Protect Democracy Project filed its cross-motion for summary judgment. *Protect Democracy Project v. U.S. Department of Energy*, No. 17-cv-779 (D.D.C. Sept. 17, 2018).

Colorado Federal Court Rejected Challenge to 2013 BLM Plan for Oil Shale and Tar Sands Development

The federal district court for the District of Colorado rejected a challenge to 2013 amendments to the U.S. Bureau of Land Management's (BLM) Resource Management Plan related to commercial leasing for oil shale and tar sands (OSTS). Environmental groups had asserted that the amendments' approach to consultation under Section 7 of the Endangered Species Act (ESA) did not comply with the ESA and alleged, among other things, that OSTS development would increase greenhouse gas emissions, exacerbating the effects of climate change and adversely affecting the lands and waters of Colorado, Utah, and Wyoming. The court found that BLM's phased approach to ESA consultation was within its authority and not unlawful. The court said its findings were limited to the "unique situation here, where it is unknown whether future OSTS leasing and development will ever be viable, let alone approved and permitted." The court's decision did not address the plaintiffs' climate change-related allegations. *Rocky Mountain Wild v. U.S. Bureau of Land Management*, No. 1:13-cv-01988 (D. Colo. Sept. 10, 2018).

Earth First! Dismissed from Dakota Access Pipeline Developers' RICO Lawsuit; Greenpeace Defendants Moved to Dismiss Amended Complaint

On August 22, 2018, the federal district court for the District of North Dakota dismissed the defendant "Earth First!" (EF) from a Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit brought by the developers of the Dakota Access Pipeline. The court dismissed for failure to effect service. The court had issued an order to show cause on July 23, 2018, requiring that the plaintiffs show cause as to why EF should not be dismissed. The court noted in the order to show cause that the plaintiffs had served Earth First! Journal (Journal), which claimed that EF was a movement not affiliated with Journal. On August 3, the court ruled that

Journal was not a proper party to the suit and denied leave to conduct discovery on Journal. The court further ruled that the plaintiffs' service of another nonparty on July 27 was "wholly insufficient to provide notice to an entity subject to suit that allegedly provided hundreds of thousands of dollars to fund an international terrorist, drug-smuggling RICO enterprise." In its August 22 order, the court said the plaintiffs' amended complaint (filed on August 6, 2018) did not establish that Earth First! was an entity subject to suit but granted the plaintiffs 30 days to identify John and Jane Doe Defendants who allegedly operated as associates of, or held themselves out as representatives, of EF. In a motion on September 4, the plaintiffs asked for limited discovery on John and Jane Does.

The plaintiffs filed their amended complaint after the court dismissed one defendant from the case on July 24 and then denied, on July 25, other defendants' motions to dismiss without prejudice to renewal if the plaintiffs filed an amended complaint "containing concise and direct allegations" against each named defendant. In its July 25 order, the court warned the plaintiffs that they had failed to state plausible RICO claims against defendants Greenpeace International, Greenpeace Fund, Inc., and Greenpeace, Inc. and had failed to comply with basic rules of pleading, but that they had supplied sufficient information to permit amendment rather than dismissal. On September 4, the Greenpeace defendants filed new motions to dismiss, arguing failure to state plausible claims under RICO or for defamation, tortious interference, or criminal trespass. *Energy Transfer Equity, LP v. Greenpeace International*, No. 1:17-cv-00173 (D.N.D.).

Southern California Gas Co. to Mitigate Methane Emissions, Fund Environmental Projects to Resolve Governmental Claims Arising from Aliso Canyon Gas Leak

On August 8, 2018, the California attorney general, Los Angeles city and county officials, and Southern California Gas Company (SoCalGas) lodged a proposed consent decree in the California Superior Court that would resolve the governmental parties' civil claims arising from the natural gas leak from SoCalGas's Aliso Canyon storage facility in 2015. The consent decree requires SoCalGas to mitigate 109,000 tons of methane emissions in accordance with the terms of a Mitigation Agreement, which provides that the mitigation projects will at least initially be dairy-digester biomethane projects. The Mitigation Agreement was subject to 35 days of public comment. The proposed consent decree also requires payment of $119.5 million to fund the methane mitigation obligation, a mitigation reserve, civil penalties, supplemental environmental projects (SEPs), and the governmental plaintiffs' costs. The approved SEPs include projects to improve air quality in public schools in environmental justice communities, enhanced air monitoring and reporting requirements in the area near the Aliso Canyon facility and in other areas in the county, mobile asthma clinics, electric school buses and infrastructure, a study of the long-term health effects of natural gas and its constituents, and lead-based paint abatement projects. In addition, SoCalGas must continue to conduct fenceline methane monitoring for at least eight years and comply with associated public disclosure, notice, and reporting requirements. *In re Southern California Gas Leak Cases*, Nos. BC602973, BC628120 (JCCP No. 4861) (Cal. Super. Ct. Aug. 8, 2018).

NEW CASES, MOTIONS, AND NOTICES

Exxon Sought Supreme Court Review of Massachusetts High Court's Finding of Personal Jurisdiction in Massachusetts Attorney General's Climate Change Investigation

Exxon Mobil Corporation (Exxon) filed a petition for writ of certiorari seeking review of the Massachusetts Supreme Judicial Court ruling that permitted Massachusetts Attorney General Maura Healey to proceed with her investigation of Exxon's marketing and sales of fossil fuel products. Exxon asserted that the case—in which the attorney general made, according to Exxon, "sweeping investigatory requests … for decades' worth of documents concerning petitioner's knowledge of, and the relationship of petitioner's products to, climate change"—involved "a breathtaking assertion of personal jurisdiction over a nonresident defendant." Exxon argued that the Supreme Judicial Court had applied a "lax" but-for causation standard for determining whether Exxon's contacts with the state were sufficient to establish specific jurisdiction and that this standard did not comport with due process. Exxon said the case presented "an ideal opportunity" to resolve an open question of the type of relationship that is required between a plaintiff's claims and a defendant's forum contacts to satisfy constitutional requirements. Exxon also said the case offered the opportunity "to address a subsidiary question that is vexing the lower courts: specifically whether an unexercised contractual power to be involved in another party's potential contact with a forum State has any relevance to the specific-jurisdiction inquiry (and, if so, in what way)." Exxon further argued that the Massachusetts high court's decision was difficult to reconcile with Supreme Court precedent and that the "disarray in the lower courts" provided a basis for Supreme Court review. *Exxon Mobil Corp. v. Healey*, No. 18-311 (U.S., filed Sept. 10, 2018).

Two-Week Trial Set to Begin in Late October in Young People's Climate Change Case Against Federal Government

On September 20, 2018, the federal district court for the District of Oregon issued a scheduling order setting trial dates for the climate change constitutional lawsuit brought by young people against the federal government. The order set the trial to begin on Monday, October 29 and to last for two weeks. The federal government's motions for summary judgment and judgment on the pleadings are still pending, as are motions by the plaintiffs concerning whether the court may take judicial notice of certain documents. On September 5, the federal government filed its response to the plaintiffs' submission on August 24 of a notice of supplemental disputed facts in support of their opposition to the summary judgment motion. The plaintiffs' notice was based on information in the federal government's expert reports. The government urged the court not to consider the supplemental disputed facts, calling their submission "untimely and procedurally improper" and asserting that the plaintiffs' claims "are legally deficient in ways that cannot be saved by any amount of factual development." Also on September 5, the federal government filed a notice with the court to inform it of the dismissal of New York City's lawsuit against oil and gas companies and of the dismissal of a lawsuit brought by 12 young people against the State of Washington. The defendants characterized both decisions as finding "that a judicial solution for claims arising out of climate change—like that requested in this case—is barred by the separation of powers." The court also noted that Washington decision had found no constitutional right to a stable and healthy climate. On September 26, the defendants moved to amend the deadline for exchanging exhibit lists from October 1 to October 12. The defendants contended that the parties "will be in no position to provide a meaningful or complete exhibit list

by October 1, 2018, particularly given the number of depositions, scheduled for the first two weeks in October and the need for counsel to prepare for those depositions." The defendants indicated that the plaintiffs opposed the request. The court granted the defendants' motion on September 28. *Juliana v. United States*, No. 6:15-cv-1517 (D. Or.).

Briefing Completed on Motions to Dismiss Lawsuits Challenging EPA Actions Rolling Back Vehicle Greenhouse Gas Emissions Standards

States, environmental groups, utilities, and a coalition of companies supporting the development of electric vehicle and other advanced transportation technologies told the D.C. Circuit Court of Appeals that their lawsuits challenging the U.S. Environmental Protection Agency's (EPA's) withdrawal of the Obama administration's Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles was a final agency action and ripe for review. They therefore urged the D.C. Circuit to deny motions to dismiss their cases. Each set of petitioners also argued that they had standing to maintain their cases. Two amicus motions were also filed to oppose EPA's action. The South Coast Air Quality Management District, which has jurisdiction over pollution from non-motor vehicle sources in the Los Angeles metropolitan area and surrounding counties, told the D.C. Circuit that its "time-locked plans" for meeting air quality standards depended "overtly and materially" on reductions associated with the greenhouse gas vehicular emissions standards at issue in the cases. In the second amicus motion, a coalition of local governments led by the National League of Cities contended that its members had "strong interest in maintaining and improving" the emissions standards at issue in the case, on which the local governments "rely heavily" to meet their own emissions reductions targets. Briefing on the motions to dismiss was completed on September 21 when EPA and auto industry trade groups filed replies, in which they asserted again that the challenged action was not a reviewable final action because EPA had not completed its decision-making process and the challenged action did not have legal consequences. *California v. EPA*, No. 18-1114 (D.C. Cir.).

Manufacturers Said D.C. Circuit's 2017 Decision Vacating HFC Ban Required Same Result for Expansion of Ban

Mexichem Fluor, Inc. and Arkema Inc.—manufacturers of industrial chemicals, including hydrofluorocarbons (HFCs)—filed an opening brief in their challenge to a 2016 EPA rule that expanded a ban on using HFCs and HFC blends as replacements for ozone-depleting substances. In a 2015 rule, EPA previously had classified HFCs and HFC blends as unacceptable for 25 uses pursuant to the Significant New Alternatives Program (SNAP) under Clean Air Act Section 612; the 2016 rule extended the ban to other sectors. In 2017, the D.C. Circuit ruled that EPA acted outside its authority in promulgating the 2015 rule. In their brief concerning the 2016 rule, the manufacturers said the 2017 decision was controlling and that the 2016 rule was "invalid insofar as the ban applies to those who have already replaced ozone-depleting substances." The manufacturers also argued that jurisdictional arguments raised by respondent-intervenors were foreclosed by *stare decisis* and collateral estoppel, and that, in any event, the arguments lacked merit. *Mexichem Fluor, Inc. v. EPA*, No. 17-1024 (D.C. Cir. Sept. 17, 2018).

Proceedings Filed in D.C. Circuit to Challenge FERC Approvals of PennEast Project

A number of petitions for review were filed in the D.C. Circuit Court of Appeals to challenge FERC's issuance of a certificate of public convenience and necessity for the PennEast project and FERC's denial of requests for rehearing. The PennEast project includes a 116-mile natural gas pipeline from Pennsylvania to New Jersey, three lateral pipelines, a compression station, and appurtenant aboveground facilities. Issues raised by the petitioners in the requests for rehearing included FERC's consideration of greenhouse gas emissions and impacts on climate change. *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission*, Nos. 18-1128 et al. (D.C. Cir.).

Oil and Gas Companies Argued for Rhode Island Climate Case to Stay in Federal Court

Oil and gas companies filed papers opposing Rhode Island's motion to remand its lawsuit seeking to hold them liable for climate change impacts to Rhode Island state court. The companies argued that the case "raises federal claims that belong in federal court" and that Rhode Island "cannot avoid the comprehensive role federal law plays" through "selective pleading and strategic omission." The companies asserted that the case "threatens to interfere with longstanding federal policies over matters of uniquely national importance, including energy policy, environmental protection, and foreign affairs." They contested Rhode Island's assertion that the requested remedies would redress only injuries within Rhode Island, arguing that Rhode Island sought to hold them liable for their "global conduct" and for harms that occurred all over the world and that had not relation to their conduct. The companies asserted a number of possible bases for federal jurisdiction. First, they argued that federal common law controls Rhode Island's claims. Second, they argued that the claims arise under federal law because they necessarily raise a substantial and disputed federal issue because the nuisance claim "unavoidably second-guess the reasonableness of the balance struck by federal energy policy." Third, they contended that the Clean Air Act and other federal statutes completely preempt Rhode Island's claims. Fourth, they asserted that there is jurisdiction under "various jurisdiction-granting statutes and doctrines": the Outer Continental Shelf Lands Act, the federal officer removal statute, the federal enclaves doctrine, the bankruptcy removal statute, and federal admiralty jurisdiction. *Rhode Island v. Chevron Corp.*, No. 1:18-cv-00395 (D.R.I. Sept. 14, 2018).

King County Asked Washington Federal Court to Stay Climate Case Until Ninth Circuit Decides Oakland and San Francisco's Appeal of Dismissal of Their Case

On September 13, 2018, King County filed a motion to stay proceedings in its climate change case against oil and gas companies until the Ninth Circuit decides the pending appeal by Oakland and San Francisco of the dismissal of their similar lawsuits. Three of the five defendants supported the stay request, while the other two objected. The objecting defendants argued that the stay could harm them by prolonging litigation that could be resolved on legal motions, that King County had not made a "clear case" that allowing the case to go forward would result in hardship or inequity, and that "orderly course of justice" did not support a stay since briefing in the Ninth Circuit was scheduled to continue through January 2019 and the stay could delay King County's proceeding for a year or more. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash.).

Baltimore Moved to Remand Its Climate Lawsuit Against Fossil Fuel Companies to State Court

On September 11, 2018, Baltimore moved to remand its climate change lawsuit against fossil fuel companies to Maryland state court. First, Baltimore contended that the defendants' assertions that federal common law governed the City's tort claims raised an ordinary preemption defense, which did not confer subject matter jurisdiction. Moreover, Baltimore argued, its claims were not required to be pleaded under federal common law and, in any event, fell outside the scope of federal common law. Baltimore further argued that the defendants' other grounds for removal did not supply a basis for federal subject matter jurisdiction. In particular, Baltimore asserted that the complaint did not necessarily raise substantial, disputed federal questions; that the Clean Air Act did not preempt the City's claims; that the Outer Continental Shelf Lands Act did not supply jurisdiction for the claims; that there was no federal enclave jurisdiction; that the federal officer removal statute did not apply because the defendants did not act under federal officers; that the bankruptcy removal provisions did not apply; and that admiralty jurisdiction did not provide a basis for removal. *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 1:18-cv-02357 (D. Md. Sept. 11, 2018).

Conservation Groups Challenged Oil and Gas Lease Sales in Colorado and Utah

Four conservation groups filed a lawsuit in federal court in Colorado challenging 121 oil and gas leases covering 117,720.59 acres in and around the Uinta Basin in northwestern Colorado and northeastern Utah. The plaintiffs asserted that BLM violated the Federal Land Policy and Management Act, NEPA, and the Administrative Procedure Act. The complaint alleged that additional oil and gas development would further impair air quality and adversely affect Dinosaur National Monument and also asserted that greenhouse gas emissions from oil and gas development threatened public health and the environment. With respect to climate change, the complaint alleged a failure by BLM to take a hard look at cumulative climate impacts "in conjunction with other past, present, and future lease sales in the Uinta Basin." *Rocky Mountain Wild v. Zinke*, No. 1:18-cv-02468 (D. Colo., filed Sept. 27, 2018).

States Challenged BLM's Repeal of Key Provisions of Waste Prevention Rule; Trade Groups Sought to Intervene to Defend Repeal

On the same day that BLM issued a final rule repealing key requirements of the Waste Prevention Rule, California and New Mexico filed a lawsuit in the federal district court for the Northern District of California challenging the repeal. The states alleged causes of action under the Administrative Procedure Act, the Mineral Leasing Act, and NEPA. They asserted that BLM failed to offer a reasoned explanation for reversing its previous determination that the Waste Prevention Rule was necessary to fulfill its statutory mandates and alleged in particular that the "interim domestic social cost of methane" metric used by BLM to justify the repeal was arbitrary and not based on best available science. The states also asserted that "perfunctory" conclusion that the repeal would not have significant environmental impacts violated NEPA. The states alleged that the repeal would likely result in a number of significant adverse impacts, including climate change harms. The Western Energy Alliance and Independent Petroleum Association of America moved to intervene. They argued that they were entitled to intervene as of right because

they had legally protectable interests that the named defendants could not adequately protect. Alternatively, they argued for permissive intervention. After the final rule was published in the *Federal Register*, a number of environmental groups led by Sierra Club filed a separate lawsuit challenging the repeal. The groups asserted claims under the Mineral Leasing Act, the Federal Land Policy and Management Act, NEPA, and the Administrative Procedure Act. Their complaint alleged that BLM's use of an interim social cost of methane excluded significant domestic and global impacts. The groups contend that an environmental impact statement is required because "extensive record evidence" shows the repeal will have "significant negative public health and climate impacts, and there is a high degree of controversy and uncertainty surrounding the use of the social cost of methane." *California v. Zinke*, No. 3:18-cv-05712 (N.D. Cal., filed Sept. 18, 2018); *Sierra Club v. Zinke*, No. 3:18-cv-05984 (N.D. Cal., filed Sept. 28, 2018).

Center for Biological Diversity Filed FOIA Suit Seeking Federal Records on Aircraft Emissions Standards

The Center for Biological Diversity filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Department of State, the Federal Aviation Administration, and EPA in federal court in the District of Columbia seeking to compel the agencies' provision of documents related to U.S. aircraft emission standards and U.S. participation in the 2016 International Civil Aviation Organization (ICAO) carbon dioxide rulemaking process. The Center for Biological Diversity sought, among other documents, communications between aircraft manufacturers and airlines and U.S. officials. *Center for Biological Diversity v. U.S. Department of State*, No. 1:18-cv-02139 (D.D.C., filed Sept. 16, 2018).

Exxon Sought Reconsideration of Texas Federal Court's Decision to Let Securities Fraud Case Proceed

Exxon Mobil Corporation filed a motion for reconsideration of a Texas federal district's order that partially denied Exxon's motion to dismiss a lawsuit brought by investors who alleged that Exxon and Exxon officials made material misstatements concerning the company's use of proxy costs for carbon in business and investment decisions. Exxon argued that the court's conclusion that the investors had adequately pleaded scienter was inconsistent with the Private Securities Litigation Reform Act of 1995 and Fifth Circuit precedents. Alternatively, Exxon requested that the court certify its order for interlocutory appeal. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111 (N.D. Tex. Sept. 11, 2018).

Indian Tribes Filed Lawsuit Challenging Keystone XL Permit

The Rosebud Sioux Tribe and Fort Belknap Indian Community filed a lawsuit challenging the presidential permit for the Keystone XL Pipeline. The plaintiffs asserted claims under the Administrative Procedure Act, the National Environmental Policy Act, and the National Historic Preservation Act. Among other things, they alleged that the 2017 decision granting the permit lacked any analysis of the impacts the pipeline would have on climate change, foreign policy, national security, and the economy. They also alleged that the 2017 decision ignored or contradicted specific factual findings and analyses in then-Secretary of State John Kerry's 2015

decision denying the permit. *Rosebud Sioux Tribe v. U.S. Department of State*, No. 4:18-cv-00118 (D. Mont., filed Sept. 10, 2018).

Environmental Groups Challenged TVA's "Anti-Solar Rate Changes"

Five environmental groups filed a lawsuit in federal court in Alabama challenging the Tennessee Valley Authority's (TVA's) new rate structure, which the plaintiffs alleged would have the effect of "discouraging businesses and homeowners from investing in renewable energy and energy efficiency measures." The plaintiffs alleged that the rate changes—which they referred to as the "Anti-Solar Rate Changes"—involved lowering energy rates for large customers, reducing the wholesale service energy rate, and lowering rates for customers who use the most electricity. The complaint cited TVA's statements that without reductions in large companies' electricity rates, the companies would have "increased incentives to pursue uneconomic DER [distributed energy resources]" such as solar. The plaintiffs asserted that TVA violated the National Environmental Policy Act and acted arbitrarily and capriciously because TVA's environmental assessment had not "meaningfully" addressed the rate changes' environmental impacts. The plaintiffs also charged that TVA finalized the rate changes before completing an update to its integrated resource plan (due to be completed in 2019), in which the plaintiffs alleged TVA would "for the first time" address availability and use of DER, the effects of power production on the environment (including climate change), emissions of greenhouse gases, and air quality. *Center for Biological Diversity v. Tennessee Valley Authority*, No. 3:18-cv-01446 (N.D. Ala., filed Sept. 6, 2018).

Columbia Riverkeeper Brought FOIA Lawsuit Seeking Department of Energy Documents Regarding Proposed Methanol Refinery

Columbia Riverkeeper filed a FOIA against the U.S. Department of the Energy (DOE) in the federal district court for Oregon seeking to compel production of records related to "greenhouse gas emissions, climate change, and federal financial assistance for a petrochemical manufacturing and export facility called the Kalama methanol refinery." The plaintiff alleged that the refinery "would be among the worst causes of greenhouse gas pollution in Washington State." The FOIA request sought communications between DOE and the company that proposed the refinery. *Columbia Riverkeeper v. U.S. Department of Energy*, No. 3:18-cv-01544 (D. Or., filed Aug. 22, 2018).

Lawsuit Filed to Challenge Denial of Water Quality Certification for Coal Export Terminal in Washington

A company seeking approvals to build a coal export terminal in Washington filed a lawsuit in state court challenging the Washington Department of Ecology's (Ecology's) denial of a Clean Water Act Section 401 water quality certification. The company alleged that Ecology improperly used Washington's State Environmental Policy Act as the basis for denial. The company asserted claims under Washington's Administrative Procedure Act and under the Washington and U.S. Constitutions (violations of due process and equal protection rights). The complaint alleged that the process had been "driven by political considerations" and that "coal … is out of political favor with some in Washington State, including Washington's Governor, who has banked his

political career on fighting climate change." *Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology*, No. 18-2-00994-08 (Wash. Super. Ct., filed Sept. 6, 2018).

Sierra Club Challenged San Diego County Approval of Developments, Alleging Failure to Ensure Mitigation of Greenhouse Gas Emissions

Sierra Club filed a lawsuit in California Superior Court against San Diego County charging that the County's approvals of three residential developments did not require enforceable measures to mitigate the projects' impacts on greenhouse gas emissions and climate as required by the California Environmental Quality Act. The petition alleged that the approval of the "three large residential development projects in the County's rural back-country areas" would result in just under 4,000 new residential units and over 800,000 square feet of commercial office space. Sierra Club further alleged that the County allowed the projects' impacts to be mitigated with off-site greenhouse gas emissions offsets "anywhere in the world" at the discretion of a County planning official. Sierra Club contended that allowing offsets outside San Diego County violated a mitigation measure adopted for the County's general plan. Sierra Club also restated its challenge—previously made in separate lawsuits filed in March 2018—to the County's Climate Action Plan, which Sierra Club alleges also did not satisfy the general plan's mitigation requirements. *Sierra Club v. County of San Diego*, No. 37-2018-00043084-CU-TT-CTL (Cal. Super. Ct., filed Aug. 23, 2018).

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FEATURED CASE

Texas Federal Court Allowed Securities Fraud Suit to Proceed Against Exxon

The federal district court for the Northern District of Texas found that investors in Exxon Mobil Corporation (Exxon) had sufficiently pleaded claims that Exxon and certain Exxon officials made material misstatements concerning the company's use of proxy costs for carbon in business and investment decisions. Exxon argued that the investors' allegations that it stated a different proxy cost in public statements than it used in internal calculations were based on the investors' confusing of two separate proxy costs—one for carbon and one for greenhouse gases—as the same proxy cost. The court concluded, however, that "[w]hether the two differing proxy cost values represent two different costs or the same cost with different values applied internally than publicly purported to be applied is a factual dispute and cannot be determined at this motion to dismiss stage." The court also noted that the complaint alleged that Exxon had indicated to investors that it used only one proxy cost across all business units. The court also found that the plaintiffs had alleged sufficient facts to plead other material misstatements related to the condition of certain specific businesses. The court further ruled that the plaintiffs had adequately pleaded loss causation and had met the heightened scienter standard for all defendants except for Exxon's vice president of investor relations. The allegations supporting the court's finding that the scienter standard was met included allegations that Exxon's management committee regularly received detailed information on carbon-related risks and proxy costs, allegations that

Exxon was particularly motivated to maintain its AAA credit rating in advance of a $12 billion public debt offering, and allegations that three of the defendants signed documents filed with the Securities and Exchange Commission that allegedly contained materially misleading information. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-CV-3111 (N.D. Tex. Aug. 14, 2018).

DECISIONS AND SETTLEMENTS

Massachusetts High Court Upheld State's Greenhouse Gas Emissions Limits for Power Plants

The Massachusetts Supreme Judicial Court held that the Massachusetts Department of Environmental Protection (MassDEP) had authority under the Global Warming Solutions Act of 2008 (GWSA) to set greenhouse gas emissions limits for the electric sector. In addition, the court rejected the argument of parties challenging the emissions limitations that the limits were arbitrary and capricious and inconsistent with the GWSA because they would actually result in increased emissions. The court also disagreed with the challengers' reading of a sunset provision for regulations and concluded that the provision of the GWSA authorizing the emissions limits was intended to continue to apply after December 31, 2020 and to require that MassDEP promulgate new regulations to take effect after that date. *New England Power Generators Association, Inc. v. Department of Environmental Protection*, No. SJC-12477 (Mass. Sept. 4, 2018).

Washington State Court Said Courts Were Not Right Forum for Young Washingtonians' Climate Advocacy

A Washington Superior Court granted the State of Washington's motion for judgment on the pleadings in a lawsuit brought by 12 Washington residents under the age of 18 to compel the State to develop and implement an enforceable climate recovery program. The plaintiffs also asked the court to declare that the State's policies violated their "fundamental and inalienable constitutional rights to life, liberty, property, equal protection, and a healthful and pleasant environment, including a stable climate system." The court noted that both sides in the case "agree that climate change is an urgent problem," but that "they disagree on what action should be taken and how quickly it must be done." The court concluded that issues raised in the case were "quintessentially political questions that must be addressed by the legislative and executive branches of government" and that "cannot appropriately be resolved by a court." The court indicated that while the plaintiffs had attempted to "avoid the problem of nonjusticiability" by framing a constitutional claim, there was no right to a clean environment found in the Washington State constitution. The court also found that the plaintiffs had not stated a cognizable equal protection claim based on their age. The court said it appreciated the plaintiffs' "concerns about climate change, and their passion for and commitment to urgent action" and hoped they would not be discouraged and would continue "to help solve the problems related to climate change" by advocating before the political branches. *Aji P. v. State*, No. 18-2-04448-1 SEA (Wash. Super. Ct. Aug. 14, 2018).

D.C. Circuit Dismissed "Moot" Challenges to EPA's Withdrawn "No Action Assurance" for Small Manufacturers of Glider Vehicles

The D.C. Circuit dismissed proceedings challenging the U.S. Environmental Protection Agency's (EPA's) now-withdrawn "No Action Assurance" memorandum in which EPA provided assurance that it would not enforce its greenhouse gas emissions and fuel efficiency standards for trucks against small manufacturers of "glider" vehicles and kits. The D.C. Circuit said the challenges were moot. The D.C. Circuit said that although "voluntary cessation of challenged activity does not moot a case," EPA's voluntary conduct mooted the case both because EPA said it would not provide any other no action assurance and also because the D.C. Circuit would not be able to provide any meaningful relief concerning penalties that could be imposed in potential enforcement proceedings concerning glider vehicle production while the No Action Assurance memorandum was in effect. The states and environmental groups challenging the memorandum had urged the D.C. Circuit not to dismiss on mootness grounds. The environmental groups characterized the memorandum's withdrawal as "a shortcut by which EPA has tried to avoid judicial scrutiny of a fatally flawed agency action." They argued that EPA had not acknowledged the illegality of the memorandum or committed to enforcing the current standards. The state petitioners argued that the challenges would not be moot at least until the 60-day period for challenging the withdrawal had passed. *Environmental Defense Fund v. EPA*, No. 18-1190 (D.C. Cir. Aug. 22, 2018).

Ninth Circuit Said Aspects of Decision Not to List Arctic Grayling Population Under the Endangered Species Act Were Arbitrary and Capricious

The Ninth Circuit Court of Appeals ruled that the U.S. Fish and Wildlife Service (FWS) had acted arbitrarily and capriciously in certain respects when it determined not to list the Upper Missouri River Valley distinct population segment of arctic grayling as endangered or threatened. The arctic grayling prefers cooler waters and is threatened by climate change. While the Ninth Circuit held that the FWS did not err in considering only the current range of the arctic grayling when determining whether it was in danger of extinction "in all or a significant portion of its range," the Ninth Circuit found that the FWS acted arbitrarily and capriciously when it (1) ignored available data that a population of arctic grayling was declining; (2) arbitrarily relied on the ability of the arctic grayling to migrate to cold water refugia; and (3) failed to explain why the uncertainty of climate change favored not listing. The Ninth Circuit remanded to the FWS for reassessment of its findings. *Center for Biological Diversity v. Zinke*, No. 16-35866 (9th Cir. Aug. 17, 2018).

Montana Federal Court Stopped Grizzly Bear Hunt

On August 30, 2018, the federal district court for the District of Montana granted a motion for a temporary restraining order halting the hunting of grizzly bears. Plaintiffs challenging the delisting of the Greater Yellowstone Ecosystem distinct population segment of grizzly bears under the Endangered Species Act filed the motion after the court heard arguments on the merits of the case earlier in the day. The hunting season was scheduled to begin on September 1. The plaintiffs have asserted a number of problems with the FWS's decision-making, including a failure to adequately consider the impacts of climate change on the grizzly bears. *Crow Indian Tribe v. United States*, No. 17-cv-89 (D. Mont. Aug. 30, 2018).

Federal Court in Maine Rejected Pipeline Operator's Challenge to Local Law Prohibiting Crude Oil Loading at South Portland Harbor

The federal district court for the District of Maine ruled that the City of South Portland's ordinance prohibiting the loading of crude oil onto tankers and related activities and structures did not violate the dormant Commerce Clause or the Foreign Commerce Clause. The ordinance, known as the "Clean Skies Ordinance," was adopted after a pipeline operator (the plaintiff in this case) made plans to reverse the flow in a pipeline that extended from the harbor in South Portland to refineries in Quebec so that instead of transporting crude oil from the harbor to the refineries, the pipeline could transport crude oil from Canada to the harbor for shipment. Concerns regarding local pollution and other local impacts were raised in response to these plans, as well as concerns regarding climate change. The Clear Skies Ordinance's stated purposes are to "encourage the most appropriate use of land throughout the municipality"; "to protect citizens and visitors from harmful effects caused by air pollutants"; "to promote a wholesome home environment"; and "to conserve natural resources." The district court found that the ordinance did not regulate extraterritorially even if it had effects on the functions of the pipeline company's infrastructure outside the city. The court was not persuaded by the pipeline operator's arguments that the ordinance had an "extraterritorial purpose," including arguments that members of the public had cited the pipeline's potential impacts outside the city, including concerns about continued reliance on fossil fuels causing global climate change. The court said the "vast majority" of evidence regarding support of the ordinance focused on local impacts and that "[c]ourts have upheld other statutes more clearly motivated by extraterritorial concerns, as long as the regulatory effect did not control out-of-state transactions." The court also found that the ordinance did not discriminate against interstate or foreign commerce on its face or in practical effect and that the operator had not shown that the primary purpose of the ordinance was to discriminate against such commerce. In making this finding, the court noted that while several members of the City Council had "expressed their desire to see reduced reliance on fossil fuels in the economy in general through more renewables," they "also disclaimed an ability to accomplish that goal with an ordinance … and focused their comments on the developmental impacts within South Portland." The court also found that the ordinance did not impose burdens on foreign or interstate commerce that were clearly excessive in relation to the putative local benefit. Finally, the court found that the ordinance did not impermissibly interfere with the federal government's ability to speak with "one voice" when regulating commerce with foreign governments. *Portland Pipe Line Corp. v. City of South Portland*, No. 2:15-cv-00054-JAW (D. Me. Aug. 24, 2018).

Montana Federal Court Ordered Supplemental Environmental Review of New Route for Keystone XL Pipeline

In lawsuits challenging the presidential permit for the Keystone XL pipeline, the federal district court for the District of Montana ruled that the federal defendants must supplement the environmental impact statement to consider the impacts of an alternative route approved by the Nebraska Public Service Commission. The court concluded that the National Environmental Policy Act (NEPA) required supplementation in this situation where ongoing federal action remained and the defendants had not analyzed the alternative. The court said it would address

Endangered Species Act arguments and other remaining issues in a future order. *Indigenous Environmental Network v. U.S. Department of State*, No. CV-17-29 (D. Mont. Aug. 15, 2018).

Colorado Federal Court Upheld New Environmental Impact Statements Related to Coal Mine Expansion

Almost four years after a Colorado federal court vacated federal actions authorizing expansion of an underground coal mine in Colorado because the defendants had failed to adequately consider greenhouse gas impacts, the court rejected challenges to the new supplemental environmental impact reviews conducted by the federal government. The supplemental environmental impact statements (SEISs) addressed an exception to the Colorado Roadless Rule that allowed road construction related to coal mining on previously protected land in the Sunset Roadless Area (the "North Fork Exception") and lease modifications adding new lands to an existing coal mine. The court rejected the plaintiffs' contentions that the defendants improperly refused to consider an alternative to the North Fork Exception that protected a particular roadless area and an alternative to the lease modifications requiring methane flaring, which would have reduced greenhouse gas emissions. The court also rejected arguments that the defendants failed to adequately disclose climate change impacts. First, the court found that the defendants had properly considered and provided the basis for its conclusions regarding the effects on demand for electricity of increased supply of a particular type of coal. Second, the court rejected the contention that the SEIS for the lease modifications should have included an updated social cost of carbon analysis reflecting repeal of the Clean Power Plan. The plaintiffs unsuccessfully argued that an updated SEIS was required since EPA proposed to repeal the Clean Power Plan after preparation of the SEIS for the North Fork Exception (on which the SEIS for the lease modifications relied) but prior to the finalization of the lease modifications. *High Country Conservation Advocates v. U.S. Forest Service*, No. 17-cv-03025 (D. Colo. Aug. 10, 2018).

Arizona Supreme Court Allowed Clean Energy Constitutional Amendment to Go on General Election Ballot

On August 29, 2018, the Arizona Supreme Court affirmed a trial court judgment allowing the "Clean Energy for a Healthy Arizona Amendment" to be placed on the general election ballot. The amendment would require that electricity providers generate at least 50% of annual sales of electricity from renewable energy sources by 2030. The plaintiffs had contested the validity of the ballot initiative and had asserted that the backers of the ballot initiative had not obtained enough valid signatures to qualify the initiative for the ballot. After a five-day trial, the court found on August 27 that the backers had gathered enough signatures to qualify for the ballot. *Leach v. Reagan*, No. CV-18-0230-AP/EL (Ariz. Aug. 29, 2018).

Arizona Supreme Court Declined to Step in to Halt Disclosure of Climate Scientists' Emails

On August 29, 2018, the Arizona Supreme Court denied motions by the Arizona Board of Regents for stays of the release of emails of two climate scientists in response to a 2011 public records law request by the Energy & Environment Legal Institute (then known as the American Tradition Institute). The court also declined to accept jurisdiction of the Board of Regents'

Petition for Special Action. *Board of Regents v. Court of Appeals Division Two*, No. CV-18-0194-SA (Ariz. Aug. 29, 2018).

California Appellate Court Upheld Cumulative Greenhouse Gas Analysis for Timber Harvesting Plan

In an unpublished opinion, the California Court of Appeal affirmed a trial court decision upholding the California Department of Forestry and Fire Protection's (CDF's) approval of a timber harvesting plan. The court rejected arguments that CDF failed to meet its obligations under the California Environmental Quality Act and the Forest Practices Act to consider the plan's cumulative impacts on greenhouse gas emissions. First, the appellate court declined to "second guess" CDF's use of the California Air Resources Board's Climate Change Scoping Plan (as revised in 2014) as the threshold for significance, rather than greenhouse gas emissions reductions targets for 2020 and 2050 established by executive order. Second, the Court of Appeal found that substantial evidence supported the conclusion that cumulative impacts on global warming would be insignificant. The court rejected a number of arguments attacking CDF's analysis, including assertions that numerical calculations were required to support carbon sequestration projections, that the cumulative impacts analysis was flawed because it was based on carbon levels on the timber company's total ownership rather than only on the land subject to the timber harvesting plan, and that CDF acted "outside the norm" by focusing on future net carbon conditions rather than on existing or short-term carbon conditions. The appellate court also rejected the argument that reversal of the trial court's decision was required because the projections of future tree growth were not enforceable. *Forest Preservation Society v. Department of Forestry & Fire Protection*, No. A148182 (Cal. Ct. App. Aug. 28, 2018).

Maryland High Court Upheld Approval of Utility Acquisition That Challengers Alleged Could Harm Renewable Energy Markets

The Maryland Court of Appeals affirmed lower court decisions upholding the Maryland Public Service Commission's (Commission's) approval of Exelon Corporation's acquisition of Pepco Holdings, Inc. and its utility subsidiaries. One of the issues raised on appeal concerned whether the Commission's assessment of potential harms to renewable energy and distributed generation markets was arbitrary and capricious. The Court of Appeals found that the Commission's findings supported its conclusion that harm to these markets was speculative. The Court of Appeals also noted that courts may consider "policy goals stated in pertinent statutes or regulations" in determining whether agency action is arbitrary and capricious. In this case, the court said relevant policy goals included combatting the threat of global warming. The court found that the Commission properly considered these issues pursuant to the legislative directive to take the public interest into account in assessing an acquisition. *Maryland Office of People's Counsel v. Maryland Public Service Commission*, No. 15 (Md. Aug. 29, 2018).

Connecticut Court Upheld Variances for Rebuilding of Coastal Home, Cited Need to Prepare Homes for Sea Level Rise

A Connecticut Superior Court cited the need to accommodate sea level rise and flood hazards in a decision upholding variances for the razing and rebuilding of a cottage in the Town of

Greenwich. The owners of the cottage received approvals necessary to demolish the existing nonconforming cottage, which was destroyed by Hurricane Sandy in 2012, and to construct a smaller structure. The court found that the proposed new dwelling would not substantially affect the comprehensive zoning plan, which, the court noted, addressed sea level rise through a flood hazard overlay zone. The court said this regulatory response to sea level rise was consistent with Connecticut land use jurisprudence. The court also found that substantial evidence supported both the finding that compliance with regulations would pose an unusual hardship and the finding that the new dwelling would actually decrease nonconformities. The court stated: "Simply put, the existing home—and perhaps, other storm damaged waterfront homes—cannot realistically be rebuilt or elevated and comply with the new flood regulations without some elasticity in the application of the regulations." The court indicated that zoning regulations and rules concerning nonconforming uses had not been adopted with climate change and sea level rise in mind. The court recommended that the Connecticut legislature take action to encourage rebuilding or conforming of existing waterfront homes to comply with new building requirements and to address sea level rise. The court said such rebuilding should not depend "on the destruction of a dwelling as an antecedent." *Lauridsen Family Limited Partnership v. Zoning Board of Appeals of Town of Greenwich*, No. CV-17-6080201-S (Conn. Super. Ct. July 12, 2018).

New York Court Ordered Exxon to Respond to Attorney General's Document Requests, Interrogatory; Indicated That Investigation Should Conclude Soon

At a hearing on August 29, 2018, a New York trial court ordered Exxon to produce 14 "readily available" or "easily produceable" spreadsheets that the New York attorney general sought in its investigation into Exxon's climate change-related disclosures (but not 12 other spreadsheets requested by the attorney general that Exxon said would require extensive work). Exxon must also respond to an interrogatory to be served by the attorney general, which the attorney general indicated would concern whether Exxon applied a directive to use an "alternate methodology" to for accounting for greenhouse gas costs to assets and businesses across the company. In addition, Exxon agreed to provide documents it had already provided to the Securities and Exchange Commission but not to the attorney general. At the outset of the hearing, the judge told the attorney general that "this cannot go on interminably" and that "you've been investigating for two years. So you're either going to file a case or you're not going to file a case." The attorney general indicated it was coming to an end of the investigation. Exxon told the court, "If they have a theory, they should bring a case. They should either put up or shut up." *People v. PricewaterhouseCoopers LLP*, No. 451962/2016 (N.Y. Sup. Ct. Aug. 29, 2018).

FERC Denied Rehearing of Authorization of PennEast Pipeline

The Federal Energy Regulatory Commission (FERC) denied rehearing of its order authorizing construction of the PennEast Project, a 116-mile natural gas pipeline extending from Pennsylvania to New Jersey and related lateral pipelines and facilities. FERC rejected arguments that its environmental review did not adequately consider the impact of greenhouse gas emissions on climate change. FERC said its review had gone beyond what NEPA required by examining regional and national emissions to put the project's estimated greenhouse gas emissions in context. FERC also said it had appropriately used a qualitative approach in its

analysis of climate change effects. FERC reiterated its position that the social cost of carbon was not a useful tool for its NEPA reviews. Two commissioners dissented. Commissioner LaFleur said she believed the record demonstrated sufficient need for the project, but that she fundamentally disagreed with the majority's approach to examining climate impacts. She wrote that she believed the social cost of carbon "can meaningfully inform the Commission's decision-making to reflect the climate change impacts of an individual project." Commissioner Glick said the order denying rehearing was "not the product of reasoned decisionmaking," citing in particular the majority's assertions that upstream and downstream greenhouse gas emissions were not reasonably foreseeable and that it was not required to determine whether the impact from climate change was significant. *In re PennEast Pipeline Co.*, No. CP15-558-001 (FERC Aug. 10, 2018).

NEW CASES, MOTIONS, AND NOTICES

EPA and HFC Manufacturers Opposed Supreme Court Review of 2015 Refrigerant Replacement Rule

EPA joined manufacturers of hydrofluorocarbon (HFC) refrigerants in opposing Supreme Court review of the D.C. Circuit's August 2017 decision striking down a 2015 EPA regulation that prohibited or restricted use of certain HFCs as replacements for ozone-depleting substances due to the HFCs' high global warming potential. EPA told the Court that the case did not warrant Supreme Court review. EPA said that while it argued before the D.C. Circuit that it had authority to issue the 2015 regulation, it had revisited the issue and "now believes that the decision below reflects the better understanding" of the Clean Air Act provision at issue in the case. EPA said the question presented therefore was "of limited prospective importance" and also indicated that "[s]ome of petitioners' concerns, moreover, may be addressed in an upcoming EPA rulemaking." The HFC manufacturers argued that certiorari was not warranted because (1) the D.C. Circuit's decision did not conflict with any decision of any court, (2) the question presented was not sufficiently important, and (3) the D.C. Circuit's decision was correct.

Seventeen states and the District of Columbia filed an amicus brief in support of the petitioners. In addition, five of the leading U.S. manufacturers of heating, ventilation, air conditioning and commercial refrigeration (HVACR) equipment filed a brief in support of the petitioners, asserting that the D.C. Circuit's decision had "torn up" a "well-established and reasonable path toward new, environmentally safer alternatives" and "created enormous uncertainty and associated costs." Another HVACR equipment manufacturer that also manufactured refrigerants filed a separate brief in support of the petitioners, similarly citing the D.C. Circuit decision's disruption of a "well-established regulatory regime." *Honeywell International Inc. v. Mexichem Fluor, Inc.*, Nos. 17-1703 and 18-2 (U.S.).

EPA and Clean Power Plan Challengers Asked D.C. Circuit to Continue Holding Challenges in Abeyance Until EPA Completes New Rulemaking

After EPA Acting Administrator Andrew Wheeler signed a proposed rule to replace the Clean Power Plan regulations with the "Affordable Clean Energy Rule," EPA filed a status report in the D.C. Circuit asking that the cases challenging the Clean Power Plan "continue to be held in

abeyance pending the conclusion of this high priority rulemaking." EPA said it was committed to completing the rulemaking "as expeditiously as practicable." The petitioners and petitioners-intervenors in the case filed a status report in support of continued abeyance. North Dakota filed a separate status report in support of continued abeyance, asserting that it would suffer unique harms if the court removed the abeyance because it was the principal proponent of an argument that the Clean Power Plan violated the Clean Air Act's delegation to the states of authority to establish emission rate performance standards for existing power plants. North Dakota said that as a major lignite-producing coal state, it was disproportionately impacted by this "usurpation" of state authority and that its arguments on this issue "have not been emphasized by other petitioners" and "could potentially be lost if the case is remanded to the EPA." Intervenor-respondents in the case filed a response opposing the requests for further abeyance and a motion asking the court to decide the merits of the case. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Aug. 24, 2018).

Ninth Circuit Consolidated Fossil Fuel Companies' Appeals of Remand Orders in Cases Brought by San Mateo County and Other Local Governments

The Ninth Circuit Court of Appeals granted a joint motion to consolidate appeals of district court orders remanding cases brought by California cities and counties to hold fossil fuel companies liable for allegedly causing climate change impacts. The order consolidates the fossil fuel companies appeals in the cases brought by the County of San Mateo, County of Marin, City of Imperial Beach, County of Santa Cruz, City of Santa Cruz, and City of Richmond. The order also set a briefing schedule for the consolidated appeals: the fossil fuel companies' opening brief is due by October 22, the answering brief is due by November 21, and an optional reply brief is due 21 days after service of the answering brief. The order also referred San Mateo County, Marin County, and Imperial Beach's motion by for partial dismissal of the appeals to the merits panel. These appellees argue that the Ninth Circuit only has jurisdiction to review the issue of removal under the federal officer removal statute. *County of San Mateo v. Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503, 18-16376 (9th Cir. Aug. 20, 2018).

San Francisco and Oakland Appealed Dismissal of Climate Change Nuisance Cases as Well as Denial of Remand

On August 24, 2018, San Francisco and Oakland filed notices of appeal of district court orders denying the cities' motions to remand their climate change nuisance cases, dismissing the cases for failure to state a claim, and dismissing the cases against four oil and gas companies for lack of personal jurisdiction. *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal. Aug. 24, 2018); *City & County of San Francisco v. BP p.l.c.*, No. 3:17-cv-06012 (N.D. Cal. Aug. 24, 2018).

Boulder and Rhode Island Argued for Remanding Climate Change Cases to State Court; Amended Complaint and New Motions to Dismiss Filed in King County Case

On August 31, 2018, Boulder County, San Miguel County, and the City of Boulder filed a memorandum of law in the federal district court for the District of Colorado in support of their motion to remand their case seeking to hold fossil fuel companies liable for causing climate

change-related damages, including increased wildfires, extreme weather, and drought. They filed the remand motion on July 30, 2018. In the memorandum of law, the plaintiffs argued that they had "filed state law claims, in state court, for harms suffered entirely in Colorado." They argued that the well-pleaded complaint rule therefore foreclosed the fossil fuel companies' argument that their claims were actually federal common law claims. In addition, they asserted that even if an unpled federal common law claim could be the basis for removal, federal common law did not govern their claims. The plaintiffs also argued that federal issues raised by the defendants were defenses and therefore did not create federal jurisdiction. In addition, the plaintiffs asserted that the Clean Air Act did not completely preempt their claims, and that the defendants' other avenues for federal jurisdiction were not viable. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 1:18-cv-01672 (D. Colo. Aug. 31, 2018).

Rhode Island also moved to remand its climate change case against fossil fuel companies to state court. First, Rhode Island said the defendants' assertion that federal common law necessarily governed its claims was an ordinary preemption defense that did not confer federal jurisdiction. The State also contested the defendants' contention that climate change tort claims must be exclusively pleaded under federal common law and argued that its claims fell outside the scope of federal common law. The State also disputed the contentions that its claims necessarily raised substantial, disputed federal questions and that the Clean Air Act completely preempted its claims. In addition, the court argued against jurisdiction based on the Outer Continental Shelf Lands Act, enclave jurisdiction, the federal officer removal statute, bankruptcy removal provisions, and admiralty jurisdiction. *Rhode Island v. Chevron Corp.*, No. 1:18-cv-00395 (D.R.I. Aug. 17, 2018).

On August 17, 2018, King County filed an amended complaint in its nuisance and trespass case against oil and gas companies. The amended complaint included additional allegations regarding the companies' connections to the State of Washington. The defendants filed new motions to dismiss on August 31, both for failure to state a claim and on personal jurisdiction grounds. Briefing of the motions to dismiss will be completed by November 1, 2018. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash.).

Trade Group Asked for Detailed Status Report on Reconsideration of Medium- and Heavy-Duty Emissions Standards

A trade group challenging greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles filed a motion in the D.C. Circuit Court of Appeals asking the court to compel EPA and the National Highway Traffic Safety Administration (the Agencies) to submit a status report on its reconsideration of the standards, including a timeline for completion. The trade group said that if the Agencies could not commit to issuing a new proposed rule or announcing intent to retain the current rule within 90 days, the trade group would consider moving to lift the abeyance currently in place. The Agencies called the relief sought "not only unusual, but improper" and characterized the motion as "a bid to obtain the Agencies' internal timelines and deliberations with the goal of rearranging their regulatory priorities to suit Petitioner's own interests." *Truck Trailer Manufacturers Association, Inc. v. EPA*, No. 16-1430 (D.C. Cir. Aug. 6, 2018).

Exxon Argued for Reversal of District Court's Dismissal of Lawsuit Against Attorneys General; NAM, U.S. Chamber of Commerce, and 12 States Weighed in to Support Exxon

On August 3, 2018, Exxon Mobil Corporation (Exxon) filed its opening brief asking the Second Circuit Court of Appeals to reverse the dismissal of Exxon's lawsuit challenging the constitutionality of investigations by the New York and Massachusetts attorneys general of climate change-related disclosures. Exxon argued that the district court had failed to address its viewpoint discrimination claims, which Exxon described as the "centerpiece" of its complaint. Exxon also contended that the district court had erroneously imposed an evidentiary burden on Exxon rather than accepting what Exxon argued were plausible allegations while also improperly drawing inferences favoring the attorneys general. Exxon further argued that it had adequately pleaded its claims under the Fourth Amendment, Fourteenth Amendment, and Commerce Clause regardless of whether it had adequately pleaded that the attorneys general were motivated by an improper purpose. Exxon also sought to reverse the dismissal on res judicata grounds of its claims against the Massachusetts attorney general. Exxon argued that its constitutional claims were not raised or decided in Massachusetts state court proceedings and that it had not had a full and fair opportunity to raise the claims.

Two motions were filed seeking leave to amicus briefs in support of Exxon. The National Association of Manufacturers (NAM) and U.S. Chamber of Commerce—which characterized their organizations as "two of the main representatives of the business community"—asserted that their proposed brief would be helpful "because this matter presents important and complex issues regarding the scope of a state's power to subject private businesses to overbroad and burdensome legal investigations that chill First Amendment expression." Twelve states, led by Texas, said they had "a direct and vital interest in the issues before the Court" because "state attorneys general possess an inherent duty to preserve their roles as evenhanded enforcers of the law." The states argued that the New York and Massachusetts attorneys general were "embracing one side of a multi-faceted and robust policy debate, and simultaneously seeking to censor opposing viewpoints and that "[i]n doing so, they are violating ExxonMobil's constitutional rights, abusing their power, and eroding public confidence in public officers." The attorneys general's briefs are due on October 5. *Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir. Aug. 3, 2018).

Discovery Proceeded in *Juliana*; Court Set October Deadlines for Pretrial Filings

In the climate change case brought by young people against the federal government in the federal district court for the District of Oregon, the plaintiffs and defendants filed a status report on August 16, 2018. The issues discussed by the parties included the status of discovery, including the defendants' service of its expert reports on August 13. The parties also presented their positions in discovery disputes concerning, among other issues, the scheduling of depositions of the plaintiffs (which the plaintiffs asserted must be conducted during the summer before school started or be waived) and a late expert report served by the plaintiffs. At a status conference on August 16, the magistrate judge allowed the defendants' extra time to file a rebuttal report. He also set a deadline of September 19 for the plaintiffs' rebuttal expert reports. On August 24, the plaintiffs submitted a notice of supplemental disputed facts raised by defendants' expert reports to support their opposition to the defendants' motion for summary judgment, which is pending

before the court after oral argument in July. The defendants' eight expert reports were attached as exhibits to the plaintiffs' notice. The expert reports for both the plaintiffs and the defendants are available on the case page. During a status conference on August 27, the court set a deadline of October 15 for submission of witness lists, exhibits lists, trial memoranda, objections to exhibits and motions in limine and set a pretrial conference for October 23. *Juliana v. United States*, No. 6:15-cv-1517 (D. Or.).

WildEarth Guardians' Lawsuit in Montana Federal Court Alleged Federal Failure to Cause Examinations of Pipelines

WildEarth Guardians filed a lawsuit against the Secretary of Transportation, the Department of Transportation, the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the PHMSA administrator asserting that they violated the Mineral Leasing Act by failing to cause annual examinations of oil and gas pipelines and associated facilities on public lands. The complaint included allegations regarding health impacts of pipeline spills and failures as well as a catalog of recent pipeline failures in Colorado, Montana, Nevada, New Mexico, Utah, and Wyoming. The plaintiffs alleged that the spills result in both contamination on the ground and "also contribute to climate change because natural gas is primarily composed of methane[,] … a potent greenhouse gas." *WildEarth Guardians v. Chao*, No. 4:18-cv-00110 (D. Mont., filed Aug. 14, 2018).

Environmental Groups Filed FOIA Lawsuit Seeking Department of Energy Documents on Alleged Efforts to "Bail Out" Coal and Nuclear Power

On August 6, 2018, Sierra Club and Environmental Defense Fund (EDF) filed a Freedom of Information Act (FOIA) lawsuit to compel the U.S. Department of Energy (DOE) to respond to requests submitted earlier in 2018 for documents related to DOE's alleged efforts to "undermin[e] power markets through continued efforts to bail out or otherwise preference uneconomic coal and nuclear power." Sierra Club requested records related to (1) a March 2018 National Energy Technology Laboratory (NETL) report that plaintiffs characterized as asserting that coal-fired generation "played a critical role during a winter storm" and (2) any requests that DOE exercise its emergency authority under Section 202(c) of the Federal Power Act. EDF asked for records related to possible use of emergency authority under Section 202(c), including correspondence between certain DOE personnel and representatives of FirstEnergy Solutions Corporation (FirstEnergy), the owner of several coal and nuclear plants, and (2) correspondence between contributors to the NETL report, certain DOE personnel, and First Energy representatives. The plaintiffs alleged that in March 2018, FirstEnergy submitted a request that DOE exercise its emergency authority to provide assistance to certain coal and nuclear power plants. *Sierra Club v. U.S. Department of Energy*, No. 4:18-cv-04715 (D.D.C., filed Aug. 6, 2018).

Plaintiffs Sought Summary Judgment in Challenges to Resumption of Federal Coal Leasing Program

States, conservation groups, and the Northern Cheyenne Tribe filed motions for summary judgment in their lawsuits challenging the Trump administration's resumption of the federal coal

leasing program and its termination of the programmatic environmental impact review of the program. In March 2017, Secretary of the Interior Ryan Zinke issued Secretarial Order 3348, which revoked Secretarial Order 3338, issued by former Secretary of the Interior Sally Jewell in January 2016. Secretary Jewell's order commenced the process for the programmatic review and put in place a moratorium on new federal coal leases. The plaintiffs argued that Secretary Zinke's order was a "major federal action" that required consideration of potential environmental impacts, including climate impacts, under NEPA. The states also argued that the defendants had violated the Mineral Leasing Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act by failing to provide an reasoned explanation for the reversal of the defendants' prior position that comprehensive review of the federal program was necessary. The conservation groups and Northern Cheyenne Tribe argued that the order violated NEPA by failing to consider impacts to the Tribe and also argued that the defendants violated their trust obligation to the Tribe. An economist who is a former co-head of the federal Interagency Working Group on Social Cost of Greenhouse Gases submitted an amicus brief to assist the court in determining whether significant new scientific information justifies requiring supplemental environmental review of the coal leasing program and whether the decision to revoke Secretary Jewell's order was a major federal action that could significantly affect the environment. The federal defendants' response and cross-motion for summary judgment is due on September 7. *Citizens for Clean Energy v. U.S. Department of the Interior*, No. 17-cv-30 (D. Mont. July 27, 2018).

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FEATURED CASE

Supreme Court, Ninth Circuit Declined Federal Government's Requests to Halt Kids' Climate Lawsuit

On July 30, 2018, the U.S. Supreme Court denied the federal government's application for a stay of the young people's climate change lawsuit pending in the federal district court for the District of Oregon, which is scheduled for trial beginning on October 29, 2018. The federal government filed its stay application after the Ninth Circuit Court of Appeals denied the government's emergency motion for a stay pending consideration of a second petition for a writ of mandamus filed by the government on July 5, 2018. The federal government asked the Supreme Court for a stay pending the Ninth Circuit's consideration of the mandamus petition and any further proceedings in the Supreme Court, and also requested an administrative stay pending the Court's ruling on the stay application. Alternatively, the federal government suggested that the Supreme Court could construe its application as a petition for writ of mandamus or petition for writ of certiorari from the Ninth Circuit's March 2018 decision denying mandamus and directly order dismissal of the action or a stay pending the resolution of the federal government's pending dispositive motions. After the Ninth Circuit denied the government's second mandamus petition on July 20, the federal government indicated in a letter to the Supreme Court that this alternative course of action was "even more warranted" because "nothing relevant remains to be done in the lower courts."

The Supreme Court's order denying the stay application said the request for relief was premature and denied the request without prejudice. The Court also noted that "[t]he breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion." The Court said the district court "should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." After the Supreme Court denied the stay, the government filed a notice with the district court suggesting that the Court's order had two implications for the case. First, the government said the Court's order was relevant to its requests that the district court certify for interlocutory appeal any denial of its dispositive motions because the Court's order indicated that the "substantial grounds for difference of opinion" factor for interlocutory appeal was met. Second, the government said the district court should make the "prompt ruling" on the dispositive motions to which the Supreme Court referred. *United States v. U.S. District Court for the District of Oregon*, No. 18A65 (U.S. July 30, 2018); *Juliana v. United States*, No. 6:15-cv-1517 (D. Or. notice filed Aug. 1, 2018).

In its opinion denying the second petition for writ of mandamus without prejudice, the Ninth Circuit found that no new circumstances justified the second petition. The Ninth Circuit said the government had not satisfied the five factors for mandamus at this stage of the proceedings, and stated: "It remains the case that the issues that the government raises in its petition are better addressed through the ordinary course of litigation." The Ninth Circuit rejected, among other arguments, the government's contention that it would be prejudiced in a way not correctable on appeal because agency officials would have to answer questions on the topic of climate change. The Ninth Circuit characterized the government as arguing that answering such questions could constitute "agency decisionmaking," which would require adherence to the requirements of the Administrative Procedure Act (APA). The Ninth Circuit said the government "cites no authority for the proposition that agency officials' routine responses to discovery requests in civil litigation can constitute agency decisionmaking that would be subject to the APA." The Ninth Circuit also again rejected the argument that proceeding with discovery and trial would violate separation of powers. The Ninth Circuit indicated that the federal government could challenge "any specific discovery order that it believes would be unduly burdensome or would threaten the separation of powers" but that "[p]reemptively seeking a broad protective order barring *all* discovery does not exhaust the government's avenues of relief." *United States v. U.S. District Court for the District of Oregon*, No. 18-71928 (9th Cir. emergency stay denied July 16, 2018; mandamus denied July 20, 2018).

DECISIONS AND SETTLEMENTS

Federal Court Dismissed New York City's Lawsuit Against Fossil Fuel Companies

The federal district court for the Southern District of New York dismissed New York City's lawsuit seeking to hold oil and gas companies liable for climate change harms. The court said federal common law governed the City's claims because the claims were "ultimately based on the 'transboundary' emission of greenhouse gas emissions," and require a uniform standard of decision. The court further concluded that the Clean Air Act displaced any federal common law claims. The court said Congress had "expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act." The

court also rejected the City's argument that if the Clean Air Act displaced their federal common laws claims, state law claims should become available. The court said such a result would be "illogical." The court noted that the Clean Air Act regulates only domestic emissions but ruled that "to the extent the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City's claims are barred by presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'" The court said litigating an action for injuries from foreign greenhouse gas emissions in federal court would "severely infringe" upon matters "within the purview of the political branches." New York City is appealing the dismissal of its case to the Second Circuit. *City of New York v. BP p.l.c.*, No. 18-cv-182 (S.D.N.Y. July 19, 2018).

A Month After Rejecting Oakland and San Francisco's Climate Change Public Nuisance Claims, California Federal Court Also Concluded It Had No Personal Jurisdiction Over Four of Five Defendants

On July 27, 2018, the federal district court for the Northern District of California granted the motions of four oil and gas companies for dismissal on personal jurisdiction grounds of Oakland's and San Francisco's climate change public nuisance lawsuits. The court previously ruled in a June 25 order that the actions should be dismissed for failure to state a claim. In its July 27 order, the court concluded that it could not exercise specific jurisdiction over the four companies, none of which was a resident of California, because it was "manifest that global warming would have continued in the absence of all California-related activities of defendants." Because the plaintiffs "failed to adequately link" the four companies' alleged California activities to the alleged climate change harms such as sea level rise, they did not satisfy the "but-for" causation standard for specific jurisdiction. The court subsequently entered judgment in favor of all defendants. *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal. July 27, 2018).

California Federal Court Remanded Three More Municipal Climate Change Cases to State Court; Order Stayed Until Appeals of Other Remand Orders Are Resolved

The federal district court for the Northern District of California granted motions by the County of Santa Cruz, City of Santa Cruz, and City of Richmond to remand to state court their lawsuits seeking to hold fossil fuel companies liable for climate change harms. The court cited its previous remand order in cases brought by the County of San Mateo, County of Marin, and City of Imperial Beach. The court stayed the remand orders pending the outcome of appeals in those other cases. The defendants filed notices of appeal. *County of Santa Cruz v. Chevron Corp.*, No. 5:18-cv-00450 (N.D. Cal. July 10, 2018); No. 18-16376 (9th Cir.).

Third Circuit Affirmed Dismissal of Religious Order's Religious Freedom Restoration Act Challenge to Natural Gas Pipeline

The Third Circuit Court of Appeals affirmed the dismissal of a lawsuit filed in district court in Pennsylvania by a vowed religious order of Roman Catholic women who challenged the Federal Energy Regulatory Commission's (FERC's) authorization of a 200-mile natural gas pipeline that would cross the order's property. The religious order—Adorers of the Blood of Christ

(Adorers)—contended that use of their land as part of the project violated their rights under the Religious Freedom Restoration Act. The Third Circuit noted that the Adorers "followed an encyclical letter titled 'Laudato Si' of the Holy Father Francis on Care for our Common Home,' written by Pope Francis" that "provides a comprehensive theological basis that, as an act of religious belief and practice, members of the Roman Catholic Church must preserve the Earth as God's creation." The encyclical specifically mentioned climate change as a global problem. In their lawsuit, the Adorers alleged that natural gas development would contribute to global warming in a manner contrary to their religious beliefs. The Third Circuit found that the district court did not err in concluding that it lacked subject matter jurisdiction because the Adorers had failed to raised their claim using the procedures required by the Natural Gas Act for challenges to FERC actions. *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*, No. 17-3163 (3d Cir. July 25, 2018).

EPA Withdrew "No Action Assurance" for Small Manufacturers of Glider Vehicles and Kits After Environmental Groups and States Filed Lawsuits

On July 18, 2018, the D.C. Circuit Court of Appeals granted environmental groups' request for an administrative stay of the U.S. Environmental Protection Agency's (EPA's) "no action assurance" memorandum that provided assurance that EPA would not seek to enforce its greenhouse gas emissions and fuel efficiency standards for trucks against small manufacturers of "glider" vehicles and kits. Eight days later and after a coalition of states filed an emergency motion for summary vacatur or a stay pending judicial review, EPA withdrew the no action assurance. A glider is a "truck that utilizes a previously owned powertrain (including the engine, the transmission, and usually the rear axle) but which has new body parts." Emission standards for medium- and heavy-duty vehicles published in October 2016 apply to such vehicles. In November 2017, EPA proposed to repeal the emission requirements for glider vehicles, engines, and kits. On July 6, 2018, EPA issued the no action memorandum, stating that EPA intended to exercise its enforcement discretion through July 6, 2019 or the effective date of a final rule extending the compliance date applicable to small manufacturers. In the EPA administrator's letter withdrawing the no action memorandum, he said he had concluded that application of the current standards to the glider industry "does not represent the kind of extremely unusual circumstances that support the EPA's exercise of enforcement discretion." *Environmental Defense Fund v. EPA*, No. 18-1190 (D.C. Cir., filed July 17, 2018); *California v. EPA*, No. 18-1192 (D.C. Cir., filed July 19, 2018).

Tenth Circuit Allowed States and Environmental Groups to Appeal Stay of Waste Prevention Rule

In June 2018, the Tenth Circuit Court of Appeals ruled that California, New Mexico, and environmental groups could appeal a Wyoming federal court's order staying the U.S. Bureau of Land Management's Waste Prevention Rule. The Tenth Circuit agreed with the appellants that the stay order "has the practical effect of granting an injunction," "results in a serious, perhaps irreparable, consequence in that the environmental benefits of the Rule will not be realized," and could be challenged only by immediate appeal. The Tenth Circuit denied, however, the appellants' motion for a stay of the district court's stay order. On July 30, 2018, the appellants submitted their opening brief, arguing that the district court "committed an unprecedented legal

error" by enjoining the rule without concluding that the rule's challengers had satisfied the prerequisites for such relief. They also said the district court erred by invoking its authority to stay the rule "pending review" under Section 705 of the Administrative Procedure Act but then staying the litigation, which "effectively ended that review." In addition, the appellants said the district court had acted improperly by first concluding that prudential ripeness and mootness concerns weighed against exercising Article III jurisdiction to review the rule's merits, and then exercising such jurisdiction to stay the rule. *Wyoming v. U.S. Department of the Interior*, No. 18-8027 (10th Cir. June 4, 2018).

Delaware Federal Court Dismissed Appeal of Bankruptcy Court's Ruling Letting Power Plant's Purchaser Off Hook For California Cap-and-Trade Obligations

The federal district court for the District of Delaware dismissed the California Air Resource Board's appeal of a bankruptcy court ruling that held that the purchaser of a natural gas power plant owned by a company that had emerged from bankruptcy did not have successor liability for the debtor company's pre-transfer compliance obligations under California's cap-and-trade program. The district court concluded that the Bankruptcy Code's "statutory mootness" provision (11 U.S.C. § 363) compelled the conclusion that the appeal was moot because reversal or modification of the bankruptcy court's authorization of the power plant sale without the encumbrance of the compliance obligations (which amounted to approximately $63 million) would affect the validity of the facility's sale. *California Air Resources Board v. La Paloma Generating Co.*, No. 1:17-cv-01698 (D. Del. July 31, 2018).

Washington Federal Court Blocked Companies Challenging State's Alleged Efforts to Thwart Coal Export Terminal from Requesting Internal Documents from Environmental Group

The federal district court for the Western District of Washington granted the Washington Environmental Council's and others' (WEC's) motion for a protective order in a lawsuit brought by Lighthouse Resources, Inc. and other companies (Lighthouse) to challenge Washington State officials' efforts to block a coal export terminal. WEC—a coalition of organizations opposed to the terminal—contested Lighthouse's request for internal documents relating to its strategies, campaigns, plans, or policies regarding the coal export terminal. The court found that Lighthouse met the low threshold for establishing that the internal documents were relevant because such documents could support Lighthouse's theory that WEC and the State coordinated to block the project due to their shared animus towards coal and its export. The court concluded, however, that protective relief should be granted based on First Amendment protections for freedom of association. The court found that since the project was still underway and campaigns were ongoing, requiring discovery could chill speech immediately. The court also found that the internal documents were not "highly relevant" to Lighthouse's case and that Lighthouse had not "carefully tailored" its request "to avoid unnecessary interference with protected activities." The court also said the risk of interference with campaigners' associational rights was unrefuted, even if the documents produced were protected from public disclosure, given WEC's "concern that handing over internal documents would give the proverbial fox the keys to the henhouse." The court also found that a determination of whether the documents were otherwise unavailable would be premature. The court said it would not reach the issue of whether the discovery

requests imposed an "undue burden" on WEC but indicated that it would not have granted protective relief on such grounds because WEC had not demonstrated undue burden with any specificity. *Lighthouse Resources, Inc. v. Inslee*, No. 3:18-CV-05005 (W.D. Wash. July 30, 2018).

North Dakota Federal Court Dismissed Dakota Access Pipeline Operators' RICO Claims Against Dutch Foundation

The federal district court for the District of North Dakota found that Energy Transfer Equity, L.P. and Energy Transfer Partners, L.P. (Energy Transfer), the operators of the Dakota Access Pipeline (DAPL), had failed to state a Racketeer Influenced and Corrupt Organizations Act (RICO) claim against BankTrack, a Dutch not-for-profit foundation described as using "engagement and public pressure to stop banks from financing specific projects it disagrees with." The court found that Energy Transfer's allegations failed to state a plausible RICO claim. The court noted that BankTrack's individual RICO predicate conduct was limited to sending letters and posting blogs for the purpose of limiting funding for DAPL. The court said this conduct was not plausibly or reasonably related to arson and violence allegedly used by unassociated groups and individuals to stop construction of DAPL. In addition, the court found that Energy Transfer did not establish that it suffered injury caused by RICO predicate conduct, that it was a "victim" of BankTrack's alleged fraudulently induced donations, or that allegedly defamatory communications were within the zone of interests of mail and wire fraud statutes. Because the complaint's allegations against BankTrack were insufficient to sustain RICO claims, the court also concluded that it could not exercise personal jurisdiction over BankTrack based on nationwide RICO jurisdiction or Rule 4(k)(2). In addition, the court concluded that personal jurisdiction was not established under North Dakota's long-arm statute. *Energy Transfer Equity, LP v. Greenpeace International*, No. 1:17-cv-00173 (D.N.D. July 24, 2018).

Fourth Circuit Vacated EPA's Denial of Small Refinery Exemption from Renewable Fuel Standard Program

The Fourth Circuit Court of Appeals held that EPA's denial of an extension for a small refinery exemption from the renewable fuel standard program was arbitrary and capricious. The Fourth Circuit found that EPA relied "to an unexplained and unknown degree" on a "facially-deficient" recommendation from the U.S. Department of Energy on whether the refinery suffered disproportionate economic hardship. The court also said EPA ignored specific evidence suggesting that the prices of renewable identification numbers (RINs) had a negative effect. *Ergon-West Virginia, Inc. v. EPA*, No. 17-1839 (4th Cir. July 20, 2018).

Fifth Circuit Vacated Preliminary Injunction for Louisiana Oil Pipeline

In a split decision, the Fifth Circuit Court of Appeals vacated a preliminary injunction issued by a district court in Louisiana that temporarily halted construction of an oil pipeline through the Atchafalaya Basin. In March, the Fifth Circuit stayed the preliminary injunction. In the majority opinion vacating the injunction, the Fifth Circuit said the district court "misperceived" the applicable regulations and found that the Army Corps of Engineers' analysis "vindicates its decision that an Environmental Assessment sufficed" to satisfy the Corps' obligations under the

National Environmental Policy Act and Clean Water Act. The plaintiffs' complaint included allegations that the Corps failed to analyze climate impacts and that floodplain and coastal loss impacts had not been considered as part of the required "public interest" analysis (though these allegations were not at issue in the preliminary injunction rulings). *Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*, No. 18-30257 (5th Cir. July 6, 2018).

Ninth Circuit Affirmed Dismissal of Challenge to Ex-Im Bank's Financing of Australian LNG Projects

The Ninth Circuit Court of Appeals affirmed the dismissal on standing grounds of a lawsuit challenging U.S. Export-Import Bank (Ex-Im Bank) financing of liquefied natural gas (LNG) projects in Australia. The Ninth Circuit agreed with the district court that the plaintiffs—who brought claims under the Endangered Species Act and National Historic Preservation Act—had not demonstrated that performance of procedures required by these laws would redress the alleged environmental injury. *Center for Biological Diversity v. Export-Import Bank of the United States*, No. 16-15946 (9th Cir. June 28, 2018).

Settlement Resolved State and Federal Challenges to Riverside County Highway Projects

The Center for Biological Diversity and other groups reached a settlement with the Riverside County Transportation Commission and the California Department of Transportation that resolved three lawsuits concerning highway projects in Riverside County. In one of the lawsuits, brought in federal court, the court in May 2017 granted summary judgment to the Federal Highway Administration and other defendants, finding, among other things, that the defendants considered a reasonable range of alternatives, including alternatives that the plaintiffs contended could have reduced greenhouse gas emissions. The plaintiffs had appealed that decision to the Ninth Circuit. The settlement agreement provided for a number of mitigation measures, including investment in solar installations at transit station parking lots, requirements to only fund zero or near-zero emission buses, analysis of rail systems to reduce vehicle miles traveled, and funding of financial incentives to increase public transit and vanpools. *Center for Biological Diversity v. Federal Highway Administration*, No. 17-56080 (9th Cir. settlement agreement June 29, 2018; order granting voluntary dismissal July 5, 2018).

Montana Federal Court Set Schedule for Remedial NEPA Review for Resource Management Plans, Declined to Enjoin Issuance of Mineral Leases

On July 31, 2018, the federal district court for the District of Montana issued an order setting the remedy for a deficient environmental review the court identified in a March 26, 2018 opinion. In the March opinion, the court found that the U.S. Bureau of Land Management (BLM) had not adequately analyzed climate change issues when it approved resource management plans for two field offices in the Powder River Basin. In its July 31 order, the court adopted a 16-month expedited schedule for the remedial analyses under the National Environmental Policy Act (NEPA). Because the court had already required that the federal defendants conduct remedial NEPA analyses prior to issuing any new or pending oil, gas, or coal leases in the planning areas, the court found that the plaintiffs had failed to establish the irreparable injury necessary for an order enjoining issuance of new leases. The court also declined to vacate the record of decision,

which would have resulted in invalidating 12 resource management plans for millions of acres and would have caused the management plans for the areas at issue in this case to revert to plans approved in the 1980s and 1990s. The court also denied a motion by the defendants for reconsideration of a portion of its March opinion. *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, No. 4:16-cv-00021 (D. Mont. July 31, 2018).

Environmental Groups Settled Clean Air Act Citizen Suit Against Texas Refinery; Consent Decree Would Require Funding of Electric Vehicle Projects

On July 26, 2018, two environmental groups and the owner of a refinery in Texas filed a proposed consent decree in the federal district court for the Southern District of Texas to resolve the environmental groups' Clean Air Act citizen suit. On July 31, the court granted the parties' joint motion for entry of the consent decree, but the effective date of the consent decree was stayed until September 14, 2018 to allow EPA and the U.S. Department of Justice to review it. The proposed consent decree requires payment of a $350,000 civil penalty as well as a $3,175,000 payment to be used for a "Vehicle Emission Reduction Fund" that will disburse grants for projects to reduce mobile source emissions in nearby communities, including for replacing vehicles with zero emission or near-zero emission vehicles and for electric vehicle infrastructure. The consent decree also requires that the defendant revise its Hurricane Shutdown and Startup Plan to minimize emission of air contaminants and to require a review of "lessons learned" as a result of any plant-wide shutdown necessitated by a hurricane. *Environment America, Inc. d/b/a Environment Texas v. Pasadena Refining System, Inc.*, No. 4:17-cv-00660 (S.D. Tex. July 26, 2018).

Challenge to Repeal of BLM Hydraulic Fracturing Rule Will Stay in California Federal Court

The federal district court for the Northern District of California denied the federal government's motion to transfer lawsuits challenging BLM's repeal of 2015 regulations governing hydraulic fracturing on federal and tribal lands. The federal defendants sought to transfer the lawsuits to the District of Wyoming, where a judge heard challenges to the 2015 regulations and ultimately vacated the regulations as outside BLM's authority. (The Tenth Circuit vacated that holding in 2017.) The California federal court concluded that although the lawsuits could have been brought in Wyoming, the balance of the transfer factors weighed against transfer. The court was not persuaded that there was a risk of judicial inconsistency or that judicial economy weighed strongly in favor of transfer. The court said that "[t]hough there are some broadly related factual subject matter areas underlying the [hydraulic fracturing] Rule and the rule rescinding it, these commonalities are unlikely to save either court considerable time." On the other hand, plaintiffs' choice of forum and convenience weighed against transfer. The court also granted two motions to intervene, one by the Independent Petroleum Association of America and the Western Energy Alliance, and the other by the American Petroleum Institute. The court rejected the plaintiffs' request that the intervenors be limited to filing one joint brief. *California v. U.S. Bureau of Land Management*, No. 4:18-cv-00521 (N.D. Cal. July 17, 2018).

Jury Found for Property Owners Who Claimed Jetties Owned By Town of East Hampton Caused Shoreline Erosion; Town Sought Motion Judgment as Matter of Law or New Trial

On June 29, 2018, a federal jury found in favor of property owners on Montauk (on the eastern tip of New York's Long Island) on their intentional private nuisance and trespass claims against the Town of East Hampton. The plaintiffs alleged that jetties in Lake Montauk Harbor owned by the Town have caused erosion on the shoreline of their properties, in many cases entirely stripping the properties of "invaluable beach frontage" and leaving their properties more vulnerable to storm damages. On July 30, the Town filed a motion for judgment as a matter of law or for a new trial. The Town argued that no reasonable jury could have found in the plaintiffs' favor due to the Town's lack of control over the jetties and an inlet to Block Island Sound, the lack of evidence of intentional conduct on the Town's part, the lack of evidence that the jetties were the proximate cause of plaintiffs' damages or interfered with the plaintiffs' use and enjoyment of their properties, the lack of evidence that the jetties were unreasonable, and the lack of evidence that the Town intentionally caused water to enter the plaintiffs' properties. The Town's memorandum of law in support of its motion noted that the plaintiffs' expert "could not isolate interference by the Jetties from other factors that caused erosion on the western shoreline." The Town also noted that the expert acknowledged that sea level rise was among the factors causing erosion but did not include sea level rise as a factor in his present. Briefing on the Town's motion was to be completed by September 7, 2018. *Cangemi v. Town of East Hampton*, No. 2:12-cv-03989 (E.D.N.Y. jury verdict June 29, 2018; Town's motion July 30, 2018).

Minnesota Supreme Court Declined to Review Decision Allowing Climate Protesters to Present Necessity Defense

The Minnesota Supreme Court denied the State's petitions for further review of a trial court's determination that four climate change protesters could present a necessity defense. The defendants participated in a "valve turner" protest in 2016 in which they entered an oil pipeline valve station to shut off the pipeline. An intermediate appellate court dismissed the State's appeal in April 2018. The Climate Defense Project, which represents the defendants, said the trial would include expert testimony on the science of climate change and the efficacy of nonviolent civil disobedience. *State v. Klapstein*, No. A17-1649, *State v. Johnston*, No. A17-1650, *State v. Liptay*, No. A17-1651, *State v. Joldersman*, No. A17-1652 (Minn. July 17, 2018).

California Appellate Court Upheld Analysis of Greenhouse Gas Emissions for Kern County Development Plan

In an unpublished opinion, the California Court of Appeal upheld in all but one respect Kern County's California Environmental Quality Act (CEQA) review for a "Specific Plan" to guide future development in an area in the northeastern part of the county. The appellate court concluded the program environmental impact report's (EIR's) analysis of the significance of the Specific Plan's greenhouse gas emissions was adequate at the time it was released in 2011. The court also found that the EIR's approach to mitigating the impacts of greenhouse gas emissions was not an abuse of discretion. The one area where the court found the CEQA analysis inadequate was its formulation of air quality mitigation measures. *Sierra Club v. County of Kern*, No. F071133 (Cal. Ct. App. July 10, 2018).

New York Appellate Court Upheld Decision Keeping Attorney General's Personal Emails Off Limits from FOIL Requests Related to Climate Change Investigations

The New York Appellate Division affirmed rulings against organizations that sought to compel the search of the personal email account of then-Attorney General Eric Schneiderman pursuant to New York's Freedom of Information Law (FOIL). The organizations sought email correspondence with any of eight specified individuals that contained keywords that the organizations said related to Schneiderman's "decision to investigate those who disagree with him on climate change and climate change policies." The Appellate Division said the organizations failed to establish a reasonable likelihood that the personal accounts contained responsive records and also found that there was "an insufficient showing that respondent used private accounts or devices to carry out his official duties which would warrant ordering respondent's private email account(s), text messages or other private devices be searched." The Appellate Division also affirmed the court below's finding that the Attorney General did not waive the right to invoke the FOIL exemption for inter- or intra-agency materials for an email message sent to the Attorney General in which a third party was included in the "cc" field and instructed to print attached materials and deliver them to the Attorney General "in the absence of any expectation that the third party would review the substance of those materials or disclose them to others." *Energy & Environmental Legal Institute v. Attorney General*, No. 6819 (N.Y. App. Div. June 7, 2018).

FERC Again Said New York Department of Environmental Conservation Had Not Waived Authority to Issue Certification for Gas Pipeline

FERC denied a pipeline company's request for rehearing of its determination that the New York State Department of Environmental Conservation (NYSDEC) had not waived its authority to issue a water quality certification for the Constitution Pipeline Project. The company first submitted its application for the certification in August 2013. NYSDEC denied the water quality certification in April 2016, after twice requesting that the company withdraw and resubmit its application, with the final submission made in April 2015. FERC found that the record did not show that NYSDEC failed to act on the application outside of the one-year timeframe required by the Clean Water Act. The pipeline company said it would appeal FERC's decision. *In re Constitution Pipeline Company, LLC*, No. CP18-5-001 (FERC July 19, 2018).

NEW CASES, MOTIONS, AND NOTICES

Organizations Suggested Supreme Court Might Require Parties to Explain Why Stay of Clean Power Plan Should Remain in Effect; EPA Reported That Proposal for Replacement Was Under OMB Review

On July 27, 2018, public health and environmental organizations who intervened to defend the Clean Power Plan submitted a letter to Chief Justice John Roberts "to notify the Court of developments in the underlying litigation" challenging the Clean Power Plan. The organizations indicated that D.C. Circuit judges had suggested that litigants had a continuing duty to keep the Supreme Court—which stayed the Clean Power Plan in February 2016—informed of "any development which may conceivably affect the outcome." The organizations informed the Court

that the litigation had been held in abeyance since the D.C. Circuit granted EPA's March 2017 abeyance request. They asserted that "contrary to the premise" of the Court's stay orders, "the litigation has come to a protracted standstill with the support of the parties that sought a stay in this Court." The organizations indicated that "the Court may wish to require the parties to explain why the stay should continue in effect." On July 26, EPA submitted a status report to the D.C. Circuit indicating that it had completed its review of public comments received on the advance notice of proposed rulemaking for a replacement for the Clean Power Plan and had submitted its proposed rule to the Office of Management and Budget (OMB) on July 9. EPA said the cases should remain in abeyance pending the conclusion of this "high priority" rulemaking. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. status report July 26, 2018), Nos. 15A773 et al. (U.S. letter July 27, 2018).

Lawsuit Filed to Challenge FERC Approval for Natural Gas Infrastructure Project in New York

A local environmental organization and a married couple filed a petition in the D.C. Circuit Court of Appeals for review of FERC's order authorizing the New Market Project, which includes expansion of an existing natural gas compressor station on a site abutting the married couple's farm and home in New York. The petitioners asserted that FERC arbitrarily and capriciously departed from D.C. Circuit precedent requiring FERC to evaluate greenhouse gas emissions from fossil fuel production and transportation projects. *Otsego 2000 v. Federal Energy Regulatory Commission*, No. 18-1188 (D.C. Cir., filed July 16, 2018).

Boulder and San Miguel Counties and City of Boulder Moved to Remand Climate Change Lawsuits to State Court

On July 30, 2018, the Boulder County Board of County Commissioners, the San Miguel County Board of County Commissioners, and the City of Boulder moved to remand their climate change lawsuit against four fossil fuel companies to state court. The defendants filed their notice of removal on June 29, 2018—almost three weeks after the plaintiffs amended their complaint to add a civil conspiracy claim. The defendants asserted a number of bases for removal, including, "[f]irst and foremost," that the plaintiffs' claims could only arise under federal common law due to the "uniquely federal interests" at stake, including energy, environmental, and national security policy. The additional grounds for removal asserted by the defendants included complete preemption of plaintiffs' claims by the Clean Air Act; the necessary and unavoidable presence of disputed and substantial federal issues; federal enclave doctrine; the Outer Continental Shelf Lands Act; federal officer removal; and bankruptcy removal. The plaintiffs said they would fully brief the remand issues in accordance with a schedule ordered by the court. The plaintiffs' brief is due on August 31, the defendants must file a response by October 12, and the plaintiffs may file a reply on or before November 12. The court denied without prejudice a motion for an indefinite continuance of discovery and initial disclosures and said the parties could re-file before a magistrate judge if they consented to magistrate judge jurisdiction. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 1:18-cv-01672 (D. Colo. July 30, 2018).

Baltimore Filed Climate Change Lawsuit Against 26 Fossil Fuel Companies; Case Removed to Federal Court

On July 20, 2018, the Mayor and City of Baltimore (Baltimore) filed an action in Maryland state court seeking to hold 26 fossil fuel companies liable for injuries resulting from climate change. Like other municipalities, Baltimore alleged that the defendants' conduct—the production, promotion, and marketing of fossil fuel products; the simultaneous concealment of the products' known hazards; and their "championing of anti-science campaigns"—directly and proximately cause adverse climate change impacts. The alleged injuries included more frequent and more severe storms and flooding in the city and substantial increases in average sea level, as well as heatwaves, disruptions of the hydrologic cycle (including extreme precipitation and drought), and associated public health impacts. Baltimore asserted that it was particularly vulnerable to sea level rise and flooding due to 60 miles of waterfront land and that climate change impacts already adversely affected the City's infrastructure. Baltimore asserted causes of action for public nuisance, private nuisance, strict liability failure to warn, strict liability design defect, negligent design defect, negligent failure to warn, and trespass, as well as a cause of action under Maryland's Consumer Protection Act. The Chevron defendants removed the action to federal court on July 31, 2018, asserting that Baltimore's lawsuit "calls into question longstanding decisions by the Federal Government regarding, among other things, national security, national energy policy, environmental protection, development of outer continental shelf lands, the maintenance of a national petroleum reserve, mineral extraction on federal lands (which has produced billions of dollars for the Federal Government), and the negotiation of international agreements bearing on the development and use of fossil fuels." Chevron said the causes of action should be governed by federal common law. The defendants said the case should "be heard in this federal forum to protect the national interest by its prompt dismissal." *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 24-C-18-004219 (Md. Cir. Ct., filed July 20, 2018); No. 1:18-cv-02357 (D. Md., removed July 31, 2018).

Rhode Island Sued Fossil Fuel Companies for Allegedly Causing Climate Change Impacts; Defendants Removed Case to Federal Court; Case to Be Heard by Same Judge Hearing Adaptation Case Against Shell

On July 2, 2018, the State of Rhode Island filed a lawsuit in state court asserting that 21 fossil fuel companies should be held liable for climate change impacts that the State has experienced and will experience in the future. Alleged harms include substantial sea level rise; more frequent and severe flooding, extreme precipitation events, and drought; and a warmer and more acidic ocean. Rhode Island asserted that the defendants were directly responsible for 182.9 gigatons of carbon dioxide emissions between 1965 and 2015, representing 14.81% of total carbon dioxide emissions during that time period. The complaint alleges that the defendants' production, promotion, and marketing of fossil fuel products, along with their "simultaneous concealment of the known hazards of these products, and their championing of anti-science campaigns" actually and proximately caused Rhode Island's injuries. The complaint asserts claims of public nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect, negligent failure to warn, trespass, impairment of public trust resources, and violations of the State Environmental Rights Act. Rhode Island seeks compensatory damages, equitable relief (including abatement of nuisances), punitive damages, disgorgement of profits, and attorneys'

fees and costs of suit. On July 13, 2018, defendant Shell Oil Products Company, LLC (Shell) removed the action to federal court. Shell asserted multiple grounds for removal, but particularly argued that the district court had federal question jurisdiction because Rhode Island's claims should be governed by federal common law since they "implicate uniquely federal interests" such as nationwide economic development, international relations, and national security. Shell also contended that there was federal question jurisdiction because the lawsuit "necessarily raises disputed and substantial federal questions" and because federal law completely preempts Rhode Island's claims. In addition, Shell said the district court had original jurisdiction under the Outer Continental Shelf Lands Act, the federal officer removal statute, the federal enclave doctrine, and the bankruptcy removal statute. On July 19, 2018, the case was assigned to Chief Judge William E. Smith, who determined that the case was related to Conservation Law Foundation's lawsuit alleging that Shell violated federal environmental laws by failing to prepare its coastal facilities in Providence for climate change impacts. On July 31, 2018, the court set a schedule for a motion to remand. Rhode Island must file its motion by August 17, and briefing will be completed on October 5. *Rhode Island v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct., filed July 2, 2018); No. 1:18-cv-00395 (D.R.I., removed July 13, 2018).

Fossil Fuel Companies Asked Washington Federal Court to Dismiss King County's Climate Case

In the climate change public nuisance and trespass action filed by King County, the fossil fuel companies filed motions to dismiss on July 27, 2018. All of the companies joined in a motion to dismiss on the grounds that the County's claims arise under federal common law and have been displaced by the Clean Air Act. They also argued for dismissal on a number of other grounds, including infringement on the foreign affairs power, Commerce Clause, Due Process and Takings Clauses, preemption by federal law, and First Amendment, as well as violation of separation of powers. In addition, the companies asserted that the County failed to state viable claims. Five of the companies filed separate motions contesting personal jurisdiction. The County's responses to the motions are due on September 14, and the defendants must serve reply briefs by October 5. No motion for remand has been filed in this case. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash. motions to dismiss July 27, 2018).

EPA and Trade Groups Moved to Dismiss Challenges to Withdrawal of Obama-Era Determination on Vehicle Emissions Standards

The U.S. Environmental Protection Agency (EPA) and auto manufacturer trade groups asked the D.C. Circuit Court of Appeals to dismiss proceedings challenging EPA's decision to withdraw the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, which the Obama administration issued in January 2017. The Mid-Term Evaluation concluded that greenhouse gas emissions standards promulgated in 2012 for model year 2022-2025 light-duty vehicles should be retained. In their motions to dismiss, EPA and the trade groups argued that the proceedings were premature because they merely challenged EPA's decision to initiate a rulemaking. EPA also argued that the petitioners—which included states, environmental groups, utilities, and a coalition of electric vehicle and other "advanced transportation" companies—did not have standing. *California v. EPA*, No. 18-1114 (D.C. Cir. July 10, 2018).

Parties to Appeals on State Subsidies for Nuclear Power Disagreed on Significance of FERC Order Rejecting Grid Operator's Tariff Provisions

The plaintiffs appealing district court orders that upheld state subsidies for nuclear power plants sent letters to the Second Circuit and Seventh Circuit informing them of a June 2018 FERC order that rejected tariff provisions of PJM Interconnection, L.L.C. (PJM), which administers the wholesale capacity market in 13 states and Washington, D.C. The plaintiffs' letters noted that FERC's order began by stating that "the integrity and effective of the capacity market administered by [PJM] have become untenably threatened by out-of-market payments provided or required by certain states [to support] … continued operation of preferred generation resources …." The plaintiffs asserted that the FERC order refuted the market analysis in an amicus brief filed by the United States and FERC in the Seventh Circuit (Intervenor-appellees submitted the U.S. amicus brief to the Second Circuit.) The plaintiffs' letter to the Second Circuit stated: "This disruption of FERC, PJM, and the whole energy market is exactly why states are preempted from meddling with the wholesale market." In the Second Circuit, New York responded that in fact FERC's June 2018 order supported New York's position that zero-emission credits (ZECs) were valid exercises of state authority. The function of FERC's order, New York said, was to determine "how ZECS will affect auction prices by deciding how subsidized resources participate in PJM auctions." Intervenor-appellees, in letters to the Second and Seventh Circuits, characterized the FERC order as a "final blow" to the plaintiffs' case since the order "repeatedly recognizes states' authority to subsidize, and rejects Plaintiffs' preferred tariff changes in favor of 'accommodat[ing]' such subsidies." Exelon characterized the FERC order as proposing "a market design that complements states' choices." *Coalition for Competitive Electricity v. Zibelman*, No. 17-2654 (2d Cir. July 3, 2018); *Electric Power Supply Association v. Star*, No. 17-2445 (7th Cir. July 3, 2018).

Non-Profit Group Sought Treasury Department Official's Correspondence on Climate Disclosures

The Institute for Energy Research (IER)—a non-profit public policy institute—filed a Freedom of Information Act (FOIA) lawsuit in the federal district court for the District of Columbia against the U.S. Department of the Treasury. IER sought to compel a response to a May 31, 2018 request for certain correspondence sent over a period of time in 2017 and 2018 to or from the Director of the Office of Environment and Energy in the Department of the Treasury. The FOIA request sought correspondence that included the terms "Bloomberg task force," "G20," "G-20," "TCFD," "Task Force on Climate-Related Disclosures," "climate risk disclosure," or "climate financial disclosures." *Institute for Energy Research v. U.S. Department of the Treasury*, No. 1:18-cv-01677 (D.D.C., filed July 17, 2018).

Environmental Groups Challenged Offshore Oil and Gas Lease Sales in Gulf of Mexico

Gulf Restoration Network, Sierra Club, and Center for Biological Diversity filed a lawsuit against Secretary of the Interior Ryan Zinke and other defendants to challenge decisions to hold offshore lease sales for oil and gas development in the Gulf of Mexico. The plaintiffs asserted that the defendants relied on "arbitrary" environmental analyses in violation of NEPA and the

Administrative Procedure Act. The complaint alleges two "fundamental defects" in the NEPA analysis: (1) an "irrational reliance on the false assumptions that preexisting, safer policies would remain in place," even though the Department of the Interior had begun to implement repeals of drilling safety regulations and reductions in royalty rates, and (2) an assumption that the same projected environmental effects would occur even if the lease sales were not held. The complaint alleged that oil and gas development in the Gulf contributes significantly to climate change through emissions emitted by exploration, development, and production operations, as well as downstream combustion. *Gulf Restoration Network v. Zinke*, No. 1:18-cv-01674 (D.D.C., filed July 16, 2018).

California Local Governments and Officials Filed Briefs in Appeals of Texas Court's Order Finding Them Subject to Its Jurisdiction

In July, California cities and counties, local officials, and an outside attorney filed briefs in their appeals of a Texas state court determination that it had personal jurisdiction over the appellants in a proceeding initiated by Exxon Mobil Corporation (Exxon) to pursue pre-suit discovery. The appellants are plaintiffs (and officials and attorneys for the plaintiffs) in lawsuits seeking to hold Exxon and other fossil fuel companies liable for the companies' contributions to climate change. Exxon sought to conduct depositions and obtain documents relating to potential claims of abuse of process, civil conspiracy, and violations of Exxon's constitutional rights in connection with "abusive law enforcement tactics and litigation in California" that were "attempting to stifle ExxonMobil's exercise, in Texas, of its First Amendment right to participate in the national dialogue about climate change and climate policy." The appellants argued that there were no acts or contacts that could form a basis for a Texas state court to have personal jurisdiction over the appellants in its potential lawsuit. *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV (Tex. App., filed Apr. 2, 2018; appellants' briefs July 6, 2018).

Lawsuit Filed to Challenge Arizona Ballot Initiative Requiring That 50% of Electricity Come from Renewable Sources

On July 19, 2018, eight individuals filed a lawsuit in Arizona Superior Court challenging the legal sufficiency of a constitutional amendment initiative known as the "Clean Energy for a Healthy Arizona Amendment," which would require that electricity providers generate at least 50% of annual sales of electricity from renewable energy sources. The plaintiffs asserted that the initiative petition should not be placed on the ballot because it was circulated and submitted by an improperly registered entity that, among other things, failed to mention the California entity—Tom Steyer's NextGen Climate Action—that the plaintiffs alleged was the actual sponsor of the initiative. The plaintiffs also contended that employment of circulators of the petition was improperly conditioned on the number of signatures obtained, that the petition lacked sufficient signatures to qualify for the ballot, and that the petition was substantively defective and circulated under false pretenses. On August 1, 2018, the court issued a ruling. The ruling reportedly said that the initiative could not be challenged on the basis of the identity of its backers and that there would not be a line-by-line review of signatures but indicated that the challengers could proceed with their challenge on other issues. *Leach v. Reagan*, No. CV2018-9919 (Ariz. Super. Ct., filed July 19, 2018).

Civil Rights Leaders Challenged Greenhouse Gas Reduction Measures

A group of civil rights leaders filed a lawsuit in April 2018 in California Superior Court to challenge measures in the California Air Resources Board's (CARB's) 2017 Scoping Plan under the Global Warming Solutions Act of 2006. The petitioners said the measures were unlawful, unconstitutional, and would exacerbate a housing-induced poverty crisis. Their petition asserted that CARB's "cumulative gap" reduction metric, which required a "straight line trajectory" to reach the 2030 greenhouse gas emissions reductions target, was unlawful. The petition also identified four housing measures that the petitioners alleged would be counterproductive and would disproportionately harm minorities: (1) a "standalone" vehicle miles traveled (VMT) reduction requirement, (2) a "net zero" greenhouse gas threshold for all projects subject to CEQA, (3) per-capita greenhouse gas targets for local climate action plans, and (4) "Vibrant Communities" policies that incorporate the foregoing standards. The petition asserted violations of the California Fair Employment and Housing Act, the Federal Housing Act and Department of Housing and Urban Development regulations, CEQA, the California Administrative Procedure Act, the California Health and Safety Code, and the Congestion Management Plan Law. The petitioners also asserted violations of due process and equal protection and that CARB acted outside its authority. *The Two Hundred v. California Air Resources Board*, No. 18CECG1494 (Cal. Super. Ct., filed Apr. 27, 2018).

Free Market Environmental Law Clinic Sued Founder for Legal Malpractice and Breach of Fiduciary Duty

A lawsuit was filed in Virginia state court in April 2018 by a professional limited liability company (Free Market Environmental Law Clinic, PLLC (Free Market)) established in 2011 that has filed a number of freedom of information law requests and related litigation related to investigations and potential investigations by state attorneys general into fossil fuel companies' climate change disclosures. The defendant is David Schnare, the founder of Free Market. Free Market's complaint asserted that Schnare committed legal malpractice, breached his fiduciary duty, and misappropriated funds. The complaint's allegations included that Schnare formed Free Market as a limited liability corporation after representing to the Internal Revenue Service (IRS) that it was a non-stock corporation, and subsequently filed forms with the IRS declaring that Free Market was a proper tax-exempt organization, "despite its actual organizational structure making this untrue." Free Market alleged that Schnare hid his errors, told different stories to different audiences, and submitted different versions of organizational documents, "as circumstances dictated." Free Market said the conflict created by Schnare's negligent mistakes now required it to dissolve. *Free Market Environmental Law Clinic, PLLC v. Schnare*, No. 2018 05436 (Va. Cir. Ct., filed Apr. 6, 2018).

New York Attorney General Urged FERC to "Disavow" New Policy on Consideration of Greenhouse Gas Emissions

The New York attorney general submitted a letter to FERC concerning its May 2018 order denying a rehearing request of it approval of natural gas facilities. The letter described FERC as announcing "a sudden and unprompted departure from FERC's practice of evaluating the environmental impact of downstream greenhouse gas emissions from natural gas infrastructure

projects, and announced a new policy of not evaluating upstream or downstream greenhouse gas emissions in the vast majority of cases." New York contended that the denial order was "procedurally and substantively wrong" and urged FERC to "disavow" the majority opinion of the denial order and limit the determination to the instant proceeding. Delaware Riverkeeper and a number of other organizations and individuals submitted similar letters to FERC in May urging the agency to rescind its determination. Delaware Riverkeeper characterized the order as announcing FERC's "intention to violate its legal obligations pursuant to the National Environmental Policy Act to fully and properly consider the climate changing impacts of its pipeline infrastructure decisionmaking as pertains to both the Dominion 'New Market' pipeline expansion project and all pipeline infrastructure projects under its jurisdiction." *In re Dominion Transmission, Inc.*, No. CP14-497-001 (FERC July 10, 2018).

July 2, 2018, Update # 112

FEATURED CASE

California Federal Court Dismissed Oakland and San Francisco's Climate Change Nuisance Lawsuits

On June 25, 2018, the federal district court for the Northern District of California dismissed the public nuisance lawsuits brought by Oakland and San Francisco seeking to hold five fossil fuel companies liable for climate change harms. The court—which previously ruled that any nuisance claim necessarily would arise under federal, not state, common law—rejected the cities' attempt to differentiate their federal nuisance claims from claims based on greenhouse gas emissions previously found to be displaced by the Clean Air Act by the Supreme Court (in *American Electric Power Co. v. Connecticut* (*AEP*)) and Ninth Circuit (in *Native Village of Kivalina v. ExxonMobil Corp.* (*Kivalina*)). The district court held that *AEP* and *Kivalina*'s displacement rule would apply to the cities' claims even though the claims were based not on the defendants' own greenhouse gas emissions but on their sales of fossil fuels to other parties that will eventually burn the fuels. The district court stated: "If an oil producer cannot be sued under the federal common law for their own emissions, *a fortiori* they cannot be sued for someone else's." The district court said the other distinction offered by the plaintiffs to differentiate their claims from those found to be displaced in *AEP* and *Kivalina*—that the defendants' actions and the resulting emissions occurred outside the U.S.—placed the cities' claims outside the proper reach of the courts. The court said that while the Clean Air Act did not reach foreign emissions and thus would not necessarily displace plaintiffs' claims, such nuisance claims were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems." The court stated: "This order fully accepts the vast scientific consensus that the combustion of fossil fuels has materially increased atmospheric carbon dioxide levels, which in turn has increased the median temperature of the planet and accelerated sea level rise. But questions of how to appropriately balance these worldwide negatives against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate. Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with

reaching a worldwide consensus." In short, the court stated, "[t]he problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case."

The district court issued its order dismissing the cases after three of the defendants and the plaintiffs reached agreements to avoid the jurisdictional discovery ordered by the court in May. After dismissing the cases, the court issued a request that the parties submit a joint statement regarding whether it was still necessary to address the recently narrowed personal jurisdiction motions to dismiss. The court said it remained willing to decide the personal jurisdiction issue but that counsel might prefer to postpone such a ruling until after appellate review of the dismissal and no-remand orders. *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal. June 25, 2018).

DECISIONS AND SETTLEMENTS

D.C. Circuit Said NEPA Did Not Require Updated Review of Coal Leasing Program

The D.C. Circuit Court of Appeals affirmed dismissal of a lawsuit seeking to compel an update of the programmatic environmental impact statement (PEIS) for the federal coal leasing program. The U.S. Bureau of Land Management (BLM) completed the PEIS in 1979; plaintiffs argued that BLM was required to update the environmental review due to the availability of tens of thousands of scientific studies on climate change and coal combustion's contributions to climate change. The D.C. Circuit held that the National Environmental Policy Act (NEPA) did not require BLM to update the environmental review because the relevant "major Federal action" (establishment of the federal coal program) was completed in 1979 and no new action had been proposed. The D.C. Circuit said the plaintiffs raised "a compelling argument" that BLM "should now revisit the issue" of climate change and "adopt a new program or supplement its PEIS analysis," but concluded that the plaintiffs would have to pursue other avenues to raise this claim—either via a rulemaking petition or through challenges to specific licensing decisions (which "might challenge any attempt by BLM to rely on (or tier to) the 1979 PEIS on the ground that it is too outdated to support new federal action"). The D.C. Circuit also rejected the plaintiffs' contention that statements in the 1979 regulatory materials created an obligation for BLM to update the PEIS even if NEPA did not require it. The D.C. Circuit said that while the statements "might have created a binding duty … at one point," BLM's amendments to the coal leasing rules in 1982 freed it from any supplementation duty beyond that imposed by NEPA. *Western Organization of Resource Councils v. Zinke*, No. 15-5294 (D.C. Cir. June 19, 2018).

Second Circuit Issued Opinion with Rationale for Vacating Rule That Delayed Penalty Increases for Violations of CAFE Standards

The Second Circuit Court of Appeals issued an opinion explaining the rationale for its April 2018 order vacating a National Highway Traffic Safety Administration (NHTSA) rule that indefinitely delayed a previously published rule that increased civil penalties for noncompliance with Corporate Average Fuel Economy (CAFE) standards. The court found that the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 did not give NHTSA authority to indefinitely delay adjustments to civil penalties and that NHTSA did not otherwise

have authority to suspend the penalty increase rule. The Second Circuit also held that NHTSA violated the Administrative Procedure Act by failing to follow notice-and-comment rulemaking procedures when it adopted the delay rule. As a threshold matter, the Second Circuit also concluded that both the state petitioners and the environmental petitioners had standing. The Second Circuit also rejected the argument that the proceedings were untimely, finding that under the applicable Energy Policy and Conservation Act judicial review provision, the time for filing petitions for review was triggered by publication in the *Federal Register*, not by NHTSA's delivery of the agency action to the Office of the Federal Register. *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, Nos. 17-2780, 17-2806 (2d Cir. June 29, 2018).

D.C. Circuit Continued Abeyance for Long-Pending Challenges to Clean Power Plan, But Three Judges Expressed Concerns About Prolonged Delay

On June 26, 2018, the D.C. Circuit Court of Appeals ordered that the proceedings challenging the Clean Power Plan remain in abeyance for 60 more days. Two judges wrote statements, both of which were joined by a third judge, indicating a disinclination to approve future abeyances. Judge Wilkins wrote that the petitioners challenging the Clean Power Plan and EPA had "hijacked" the court's equitable powers for the purposes of maintaining the status quo while EPA decides the disposition of the Clean Power Plan. Judge Wilkins, joined by Judge Millett, said that if EPA or the petitioners wished to further delay operation of the Clean Power Plan, "then they should avail themselves of whatever authority Congress gave them to do so, rather than availing themselves of the Court's authority under the guise of preserving jurisdiction over moribund petitions." Judge Tatel, also joined by Judge Millett, wrote that "the untenable status quo derives in large part from petitioners' and EPA's treatment of the Supreme Court's order staying implementation of the Clean Power Plan pending judicial resolution of petitioners' legal challenges as indefinite license for EPA to delay compliance with its obligation under the Clean Air Act to regulate greenhouse gases." Judge Tatel suggested that the parties had an obligation to advise the Supreme Court of the "circumstances as they stand today" so that the Court may "decide for itself whether the temporary stay it granted pending *judicial* assessment of the Clean Power Plan ought to continue now that it is being used to maintain the status quo pending *agency* action." *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. June 26, 2018).

New Mexico Federal Court Ordered Analysis of Downstream Greenhouse Gas Emissions of Oil and Gas Leases

The federal district court for the District of New Mexico held that BLM failed to take a hard look at the greenhouse gas emissions and climate impacts of leases issued in 2015 for 13 parcels of federal mineral estate in the Santa Fe National Forest covering almost 20,000 acres. The court set aside the leases and remanded for additional review. The court rejected BLM's argument that it was not required to consider downstream greenhouse gas emissions that would result from combustion of oil and gas produced from development of wells on the leased areas and the downstream emissions' impact on climate change. The court said such impacts were required to be assessed as indirect impacts of the leases. In addition, the court said BLM must conduct a new cumulative impact analysis of greenhouse gas emissions due to the failure to consider downstream greenhouse gas emissions. The court also noted that the Intergovernmental Panel on

Climate Change had updated its reports since BLM conducted its review as had the U.S. Global Change Research Program. The court said that on remand BLM should not rely on outdated scientific tools and analyses. Although the court was not persuaded by the plaintiffs' attacks on BLM's mitigation measure analysis, the court indicated that BLM might need to conduct a new mitigation analysis once it had calculated downstream greenhouse gas emissions and analyzed their impact. The court also found that BLM did not adequately address impacts of water use. *San Juan Citizens Alliance v. U.S. Bureau of Land Management*, No. 1:16-cv-00376 (D.N.M. June 14, 2018).

District Court Judge Affirmed Denial of Discovery Stay in *Juliana* Case; Dispositive Motions Pending

On June 29, 2018, Judge Aiken of the federal district court for the District of Oregon affirmed a magistrate judge's denial of the federal government's motion for a protective order and stay of all discovery in the young people's lawsuit asserting violations of constitutional rights to a climate system capable of sustaining human life. The judge declined to certify the order for interlocutory appeal. Earlier in June, Judge Aiken denied the federal government's motion to stay discovery pending the resolution of their objections. In this earlier order, the judge said the defendants had not clearly explained what irreparable harm they would suffer in the absence of a stay and also found that irreparable harm was not likely under the circumstances. The court also said the defendants' concerns regarding the balance of hardships should be addressed with "specific objections to specific discovery requests, rather than by a blanket stay of all discovery."

Several motions are pending before the court: the defendants' motion for judgment on the pleadings (oral argument scheduled for July 18); the defendants' motion for summary judgment (briefing to be completed by July 12); and the plaintiffs' motion to defer consideration of the defendants' motion for summary judgment until after the conclusion of discovery and in conjunction with trial (defendants' opposition submitted on June 22). A narrower motion for a protective order also is still pending, but on June 27, the magistrate judge granted the plaintiffs' unopposed motion to hold this motion in abeyance. The plaintiffs said an abeyance would permit the court to decide whether plaintiffs could seek judicial notice of documents requested in their Requests for Admission since those documents were largely public government records. The plaintiffs also indicated that the parties were working to reach agreement on substituting contention interrogatories for depositions. A status conference before the magistrate judge is scheduled for July 17, the day before the hearing on the motion for judgment on the pleadings.

On June 28, the plaintiffs filed their opposition to the motion for summary judgment. They supported their opposition with declarations by the 21 plaintiffs and by 18 experts, as well as with "hundreds of government records." The plaintiffs also officially requested judicial notice of a number of government documents via a motion in limine. In their response opposing summary judgment, the plaintiffs said they had submitted sufficient evidence to establish Article III standing on summary judgment. They also countered the federal government's argument that the Administrative Procedure Act provided the sole mechanism for review of their claims. In addition, the plaintiffs argued that their claims did not violate separation of powers principles. Finally, they argued that their claims did not fail as a matter of law—they pointed to evidence of material facts that the federal government disputed regarding the plaintiffs' right to a climate

system capable of sustaining human life; demonstrating the federal government put them in a position of danger in violation of the Fifth Amendment; and addressing their claim that the public trust doctrine applies to the federal government's management of trust resources. The plaintiffs also contended that three of their Fifth Amendment claims were not at issue in the defendants' motion: a substantive due process claim for government infringement of enumerated rights of life and property and already recognized implied rights such as rights to move freely, to family, and to personal security; a substantive due process and equal protection claim for systemic government discrimination with respect to plaintiffs' exercise of their fundamental rights; and a substantive due process equal protection claim for government discrimination against plaintiffs as a class of children.

Other developments in the case include the U.S. solicitor general's request for another extension of time within which it may file a petition for writ of certiorari for review of the Ninth Circuit's denial of the U.S.'s petition for a writ of mandamus ordering dismissal of the case. The U.S. sought to extend the filing deadline from July 5 to August 6. Justice Kennedy granted an extension to August 4. *Juliana v. United States*, No. 6:15-cv-1517 (D. Or.).

Man Sentenced for Misuse of Funds Intended for Carbon Sequestration Study

The president and owner of a company that received federal funding for a carbon sequestration study was sentenced to 18 months in prison after he pleaded guilty to using the funds for personal use. He will also be on supervised release for three years after his release from prison and must pay a $50,000 fine and more than $2 million in restitution. *United States v. Ruffatto*, No. 2:16-cr-00167 (W.D. Pa. June 28, 2018).

Colorado Supreme Court Revived Challenge to Boulder Light and Power Utility

The Colorado Supreme Court ruled that the Public Service Company of Colorado's (Xcel's) lawsuit challenging a City of Boulder ordinance establishing a light and power utility was timely and viable. Xcel asserted that the ordinance violated the City Charter, which sets forth "metrics" that must be met for the City to have the authority to establish a utility. The Supreme Court did not weigh in on the merits of the case but directed that the case be returned to the district court for further proceedings on Xcel's claim that the City did not satisfy the required metrics, which included a requirement of demonstrating that the utility could create a plan for reduced greenhouse gas emissions and other pollutants and increased renewable energy. *City of Boulder v. Public Service Co. of Colorado*, No. 16SC894 (Colo. June 18, 2018).

Delaware Court Dismissed Challenge to RGGI Regulations

A Delaware trial court dismissed an action challenging Delaware regulations implementing the Regional Greenhouse Gas Initiative and its carbon dioxide emissions trading program. The court ruled that the plaintiffs—individuals who alleged that the increased costs of carbon dioxide allowances would be reflected in their electricity bills—did not have standing because they had failed to establish any financial harm or that success in the lawsuit would result in lowering their electricity prices. The court stated: "Instead of seeking to correct an actual harm, plaintiffs are officiously meddling with Delaware's RGGI Act." *Stevenson v. Delaware Department of*

Natural Resources & Environmental Control, No. S13C-12-025 RFS (Del. Super. Ct. June 26, 2018).

FERC Denied Rehearing of Natural Gas Pipeline Approval and Reasserted Limits on Consideration of Climate Impacts

A divided Federal Energy Regulatory Commission (FERC) denied rehearing of its order authorizing construction and operation of the Mountain Valley Pipeline Project in West Virginia and Virginia and a related project that would connect to Pennsylvania. Among the arguments rejected by the majority of FERC commissioners were that FERC should have evaluated whether energy demands could be met with "non-transportation alternatives" such as energy conservation or renewable energy resources, that FERC failed to adequately analyze the climate change impacts of the end use of natural gas transported by the project, and that FERC's consideration of climate change in the context of evaluating the public interest under Section 7 of the Natural Gas Act (NGA) was inadequate. The FERC majority said greenhouse gas emissions from the downstream use of natural gas did not fall within the definition of indirect impacts or cumulative impacts, and also concluded that the Social Cost of Carbon tool could not meaningfully inform decisions on natural gas transportation infrastructure projects under the NGA. FERC said it continued to believe the Social Cost of Carbon tool was "more appropriately used by regulators whose responsibilities are tied more directly to fossil fuel production or consumption." Two commissioners wrote dissents, both of which were critical of FERC's decisions to restrict its consideration of projects' impacts on climate change. *In re Mountain Valley Pipeline, LLC*, No. CP 16-10-001 (FERC June 15, 2018).

California Public Utilities Commission Denied Application for New Gas Pipeline for Failure to Demonstrate Need

On June 26, 2018, the California Public Utilities Commission issued its final decision denying a certificate of public convenience and necessity for a new 47-mile natural gas pipeline to replace an existing pipeline. The proposed decision found that the applicants had failed to demonstrate a need for the project and had not shown "why it is necessary to build a very costly pipeline to substantially increase gas pipeline capacity in an era of declining demand and at a time when the state of California is moving away from fossil fuels." The decision indicated that based on Commission precedent, the Commission could deny a proposed gas pipeline or transmission project based on insufficient need without completed CEQA analysis. The Commission directed that the preparation of a draft environmental impact report be halted. *In re San Diego Gas & Electric Co.*, No. A1509013 (Cal. PUC June 26, 2018).

NEW CASES, MOTIONS, AND NOTICES

NRDC and Chemical Manufacturers Sought Supreme Court Review of Decision That Struck Down HFC Replacement Rule

Two petitions for writ of certiorari were filed in the Supreme Court seeking review of the D.C. Circuit decision striking down key components of the U.S. Environmental Protection Agency (EPA) final rule prohibiting or restricting use of certain hydrofluorocarbons (HFCs) as

replacements for ozone-depleting substances due to the HFCs' high global warming potential. Both petitions were filed by parties that had intervened to defend the rule in the D.C. Circuit. One petition—filed by two chemical manufacturers that said they and their suppliers had invested more than $1 billion in creating and commercializing safer replacements for ozone-depleting substances—presented the question of whether EPA lacked authority under Section 612 of the Clean Air Act, which created the "safe alternatives policy," to prohibit use of a less-safe substitute for an ozone-depleting substance in favor of a safer alternative "just because a company has already begun using the less-safe substitute." The companies argued that the D.C. Circuit's interpretation was incorrect and that the decision "eviscerated" an "immensely consequential" and "extremely effective" federal program, upended the investment-backed expectations of companies such as the petitioners, and harmed the environment. The second petition was filed by Natural Resources Defense Council (NRDC). NRDC's petition presented the question of "[w]hether EPA has authority under Section 612 to prohibit use of dangerous but non-ozone-depleting substitutes by any person, including by product manufacturers who began using such substitutes before EPA placed them on the prohibited list." NRDC also argued that the D.C. Circuit majority's interpretation was at odds with the statute and destroyed a "core Clean Air Act program." *Honeywell International Inc. v. Mexichem Fluor, Inc.*, No. 17-1703 (U.S. June 25, 2018); *Natural Resources Defense Council v. Mexichem Fluor, Inc.*, No. 18-2 (U.S. June 25, 2018).

States and NRDC Filed Lawsuits Challenging EPA Decision to Suspend Enforcement of HFC Restrictions

NRDC, 11 states, and the District of Columbia filed petitions in the D.C. Circuit Court of Appeals for review of EPA's decision to suspend the 2015 final rule prohibiting or restricting certain uses of HFCs under the Clean Air Act's safe alternatives policy. EPA published notice in the April 27, 2018 issue of the *Federal Register* that it would not apply the final rule's listings of HFCs as "unacceptable" or as "acceptable subject to narrowed use limits" until it completed a rulemaking addressing the D.C. Circuit's opinion vacating the portion of the final rule that required manufacturers to replace HFCs with substitutes. *Natural Resources Defense Council v. Pruitt*, No. 18-1172 (D.C. Cir., filed June 26, 2018); *New York v. Pruitt*, No. 18-1174 (D.C. Cir., filed June 26, 2018).

Second Circuit Granted Exxon's Request to Slow Down Appeal of Dismissal of Action Against New York and Massachusetts Attorneys General

On May 31, 2018, a Second Circuit Court of Appeals motions panel granted Exxon Mobil Corporation's (Exxon's) motion to move Exxon's appeal of the dismissal of its challenge to the Massachusetts and New York attorneys general climate change investigations from the expedited calendar to the regular calendar. Exxon's opening brief is due on August 3. Exxon argued that the appeal did not meet the Second Circuit's requirements for expedited treatment because it had been dismissed in part on res judicata grounds based on a Massachusetts state court decision declining to set aside the attorney general's civil investigative demand. Exxon said the res judicata ruling was not for failure to state a claim and that the res judicata ruling's complexity and novelty made it unsuitable for expedited review, as did the appeal's raising of "novel issues with far-reaching consequences for the First Amendment's protection against viewpoint

discrimination." Both attorneys general opposed removing the appeal from the expedited calendar. The New York attorney general said removing the appeal from the expedited calendar would "harm the public interest by prolonging the pendency of this meritless and disruptive lawsuit" and noted that failure to state a claim was the sole basis for dismissal of claims against the New York attorney general. The Massachusetts attorney general argued that there was "nothing particularly complex or novel" about the district court's opinion, that it was a "paradigmatic case" for inclusion on the expedited docket, and that expedited appeal would serve the public interest by preserving the attorney general's ability to conduct her investigation without further delay. *Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir.).

California Municipalities Sought to Shut Down Fossil Fuel Companies' Appeal of Order Remanding Climate Cases to State Court

On June 6, 2018, San Mateo and Marin Counties and the City of Imperial Beach moved for partial dismissal of fossil fuel companies' appeal of a district court order remanding to state court the municipalities' lawsuits seeking to hold the companies' liable for climate change damages. The municipalities argued to the Ninth Circuit that the general bar on appellate review of orders remanding cases to state court applied to six of the seven grounds for removal that the companies' asserted. The municipalities contended that the Ninth Circuit therefore should only review the district court's rejection of the seventh ground for removal, which was based on the federal officer removal statute. The fossil fuel companies argued that precedent on the scope of appellate review of remand orders was unclear and that the entire remand order was reviewable. The companies said removal under the federal officer removal statute was a "necessary predicate" for appellate review, but that once that predicate was satisfied, the court of appeals could review the entire order. They characterized the plaintiffs' motion for partial dismissal as an attempt to prevent the merits panel from reaching the question of whether public nuisance claims based on alleged global warming effects necessarily arise under federal common law—a question on which two judges in the Northern District of California reached opposite answers. *County of San Mateo v. Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503 (9th Cir.).

Appeals Filed After Federal Court Nullified Oakland Ordinance Barring Coal Operations at Shipping Terminal

The City of Oakland and two environmental groups appealed a federal district court's nullification of an Oakland ordinance prohibiting coal operations at a shipping terminal developed at an old army base. The court ruled that the ordinance violated the terms of the City's agreement with the developer of the terminal. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 3:16-cv-07014 (N.D. Cal. June 13 and 19, 2018).

In Challenges to Repeal of BLM Hydraulic Fracturing Rule, Parties Keep Court Apprised of Recent Court Decisions

In the federal lawsuits in the Northern District of California challenging BLM's repeal of the regulations governing hydraulic fracturing on federal and tribal lands, the federal defendants and California (one of the plaintiffs) each filed a notice to inform the court of recent relevant decisions in other courts. On June 4, 2018, the federal defendants notified the court of the Tenth

Circuit's denial of motions to dismiss as moot the appeals of the District of Wyoming's 2015 decision invalidating the hydraulic fracturing rule. In September 2017, the Tenth Circuit found that the appeals were prudentially unripe because BLM was in the process of rescinding the rule. The Tenth Circuit therefore dismissed the appeals and also directed that the District of Wyoming's 2015 decision be vacated. After BLM finalized the regulations' repeal in December 2017 and before the Tenth Circuit's mandate issued, North Dakota and the Ute Indian Tribe moved to have the appeals dismissed as moot to revive the District of Wyoming's decision. On June 4, the Tenth Court denied those motions. On June 18, California notified the district court in the Northern District of California of two district court decisions—one in New York and the other in South Carolina—denying motions to transfer challenges to the Waters of the United States rule to other venues. The federal defendants in the challenge to the hydraulic fracturing rule moved in March 2018 to transfer the challenges to the District of Wyoming. *California v. U.S. Bureau of Land Management*, No. 4:18-cv-00521 (N.D. Cal. June 19, 2018).

New York Attorney General Asked State Court to Order Exxon to Turn Over Documents Showing How Company Accounted for Climate Change

The New York attorney general filed a motion to compel Exxon Mobil Corporation (Exxon) to produce certain documents in response to subpoenas issued by the attorney general in the investigation of Exxon's climate change-related disclosures. The attorney general said Exxon had failed to produce cash flow spreadsheets used to make investment decisions, conduct corporate planning reviews, estimate company reserves and resource base quantities, and conduct asset impairment evaluations with respect to 26 major projects and assets "that are among the company's largest and most at risk due to climate change." The attorney general argued that the spreadsheets were highly relevant to whether and the extent to which Exxon incorporated a proxy cost for greenhouse gas emissions in its decision-making—which the attorney general characterized as a "key safeguard that Exxon has frequently touted." The attorney general also said Exxon had continued to resist requests for documents provided by Exxon to the Securities and Exchange Commission (SEC) concerning impairment evaluations, reserves calculations, and climate change on the grounds of federal preemption. The attorney general argued that Exxon was precluded from arguing that SEC regulations preempted the attorney general's investigation since the federal district court for the Southern District of New York had already rejected this claim in its March 2018 dismissing Exxon's federal lawsuit challenging the investigation. *People v. PricewaterhouseCoopers LLP*, No. 451962/2016 (N.Y. Sup. Ct. June 19, 2018).

Parties Filed Appeals of California Court Ruling That Rejected CEQA Claims About Oil and Gas Ordinance's Greenhouse Gas Impacts

In June 2018, environmental groups and an almond farm appealed a California state court ruling that largely upheld the California Environmental Quality Act review for a Kern County ordinance that the environmental groups said would authorize thousands of oil and gas wells annually without additional assessment. In March 2018, the trial court rejected, among other arguments, the environmental groups' contention that greenhouse gas mitigation measures would not be effective. The court noted that three regulatory mitigation measures would apply and that for emissions not addressed by those measures applicants for permits could choose from three

options to reduce emissions to "no net increase": (1) verified reductions by the applicant; (2) acquisition of offset credits; and (3) inclusion in an emission reduction agreement. Because the environmental groups did not object to the effectiveness of directly reducing emissions, the court said their challenge to the remaining two options was academic. The court also said the groups did not exhaust administrative remedies, but nonetheless also concluded on the merits that substantial evidence supported the County's determination that the "no net increase" measures would be effective. The court also found that the environmental impact report adequately disclosed and analyzed long-term impacts to climate, including greenhouse gas emissions between 2035 and 2050. An energy company also appealed the trial court's order, which rejected the company's contract clause, equal protection, and due process claims. *Vaquero Energy v. County of Kern*, Nos. BCV-15-101645, BCV-15-101666, BCV-15-101679 (Cal. Super. Ct. ruling Mar. 12, 2018 and judgment Apr. 20, 2018); *King & Gardiner Farms LLC v. County of Kern*, No. F077656 (Cal. Ct. App. June 11, 13, and 18, 2018).

Environmental Groups Filed New Challenge to Delta Plan in California Superior Court, Alleging Failure to Consider Climate Change Effects on Hydrology

Six environmental groups filed a lawsuit in California Superior Court challenging the Delta Stewardship Council's approval of amendments to the Delta Plan, which is the long-term management plan for the Sacramento-San Joaquin Delta. The groups asserted that the action was in violation of the Delta Reform Act and that the Council had not complied with CEQA. The groups also asserted that the council had not complied with a 2016 judgment and writ finding that the original Delta Plan adopted in 2013 violated the Delta Reform Act. The petitioners alleged that the 2016 writ also required that the Council adopt new CEQA findings and recertify the 2013 programmatic environmental impact report (PEIR) to the extent the Council relied on it in the future. The shortcomings and failures alleged by the groups in their challenge to the 2018 amendments and PEIR include a failure to disclose and analyze climate change effects on hydrology. *Friends of the River v. Delta Stewardship Council*, No. 2018-80002901 (Cal. Super. Ct. May 25, 2018).

June 8, 2018, Update # 111

FEATURED CASE

Magistrate Denied Federal Government's Motion to Stay Discovery in Young People's Constitutional Climate Case; Government Defendants Filed Objections to Denial and Sought Judgment on Pleadings and Summary Judgment

On May 25, 2018, a magistrate judge in the federal district court for the District of Oregon denied the defendants' motion for a protective order precluding discovery in the lawsuit against the United States, the president, and other federal defendants in which young plaintiffs assert constitutional claims based on climate change impacts. The defendants had moved for a protective order and to put a hold on discovery on the grounds that the lawsuit must necessarily proceed under the Administrative Procedure Act (APA) and therefore must be heard on the administrative record. The defendants also argued that separation of powers made discovery

inappropriate. In addition, the defendants asked that the lawsuit be stayed while their motions for judgment on the pleadings and summary judgment were pending.

In the order denying the protective order, the magistrate judge said the plaintiffs' complaint did not contain an APA claim and that the defendants "have no ability to edit the complaint to cobble the claim into one [of] their choosing to derail discovery." The magistrate judge also characterized the motion as a recasting of the defendants' unsuccessful motion to dismiss. The magistrate judge indicated that he was "not at all persuaded" that the plaintiffs were limited to bringing an APA-based claim and noted that the district court had already rejected this argument when it denied the motion to dismiss. The magistrate judge also rejected the argument that separation of powers barred all discovery, saying that to broadly preclude discovery on such grounds would allow the government to avoid discovery "simply by asserting hypothetical discovery requests that a litigant *might* make during the litigation." The magistrate judge indicated that the defendants could, however, seek a protective order should specific discovery requests arise that implicate claims of privilege.

On June 1, the defendants filed objections asking for the district court's "immediate intervention." The defendants said the magistrate judge had failed to "substantively engag[e]" with any of their arguments and that his order was contrary to law and clearly erroneous. The defendants also asked the magistrate judge for a stay pending the resolution of their objections. On June 4, the defendants filed another motion for a protective order, this one targeting deposition notices served on the Departments of the Interior, Agriculture, and Transportation as well as requests for admissions. The defendants also asked that a protective order at least be granted while their objections to the denial of the earlier motion for a protective order of all discovery were pending.

In their motion for judgment on the pleadings, filed on May 9, the defendants argued that the court lacked jurisdiction over claims against the president because separation of powers principles bar federal courts from ordering injunctive relief against the president for official acts. The defendants also asserted that the plaintiffs' first amended complaint otherwise failed to state valid claims or stated claims that were barred by separation of powers principles. In particular, the defendants argued that the APA provided the "sole mechanism" for the plaintiffs to make their claims, and that all but one of the plaintiffs' claims made no effort to challenge "circumscribed, discrete" final agency action as required by the APA. The defendants also reasserted the arguments for dismissal from their November 2015 motion to dismiss, including lack of standing and failure to state a claim. The plaintiffs were allowed until June 15 to respond to the motion, with the defendants' reply due on June 29. Oral argument is scheduled for July 18. (The plaintiffs urged the court to defer resolution of this motion until trial, and had even asked that briefing on the motion be deferred. They argued that the motion was another dilatory tactic on the part of the defendants and said they had already devoted substantial time to informal discovery and had served 17 expert reports and requests for admissions. They also contended that further delay would significantly prejudice them, given the "urgency of the climate emergency." The defendants responded that deferring resolution of the threshold issues raised by their motion would severely prejudice them and potentially waste "vast amounts" of judicial and litigation resources.)

In their motion for summary judgment, filed on May 22, the defendants indicated that they were following the direction of the Ninth Circuit. The defendants argued that the Ninth Circuit, in denying their request for mandamus, had "observed that Plaintiffs' claims in this case may be too 'broad to be legally sustainable,' and that 'some of the remedies the plaintiffs seek may not be available as redress.'" The defendants also noted that the Ninth Circuit had said the defendants could reassert challenges to standing, seek summary judgment, and ask for interlocutory appeal. The defendants' May 22 motion therefore sought summary judgment on "three threshold grounds": plaintiffs' lack of Article III standing; plaintiffs' failure to comply with the requirements of the APA or identify another valid cause of action; and the absence of authority for the court to grant the relief sought by the plaintiffs. With respect to standing, the defendants argued that even if the plaintiffs' standing allegations were sufficient under a motion-to-dismiss standard, the plaintiffs subsequently had failed to set forth specific facts supporting the existence of a concrete and particularized injury that was traceable to the defendants' actions and redressable by the court. The defendants also argued that they were entitled to summary judgment because the plaintiffs' due process and public trust claims failed as a matter of law. In addition, the defendants requested that any denial of the motion be certified for interlocutory appeal.

On May 24, the defendants filed notice of their application to the U.S. Supreme Court for an extension of the time in which they may file a petition for writ of certiorari seeking review of the Ninth Circuit's denial of their petition for writ of mandamus. The defendants sought an extension of 30 days, to July 5, to allow the solicitor general to continue to consult with federal agencies to determine what course of action to take. Justice Kennedy granted the application on May 29. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or.).

DECISIONS AND SETTLEMENTS

Supreme Court Declined to Review New York's Denial of Water Quality Certification for Gas Pipeline

The U.S. Supreme Court denied certiorari to a pipeline developer seeking review of a Second Circuit decision that upheld the New York State Department of Environmental Conservation's denial of a water quality certification for an interstate natural gas pipeline. The developer had argued that denial of the certification interfered with the Federal Energy Regulatory Commission's exclusive jurisdiction and violated fundamental principles of federal supremacy. *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, No. 17-1009 (U.S. Apr. 30, 2018).

Federal Court Ordered EPA to Respond to Request for Documents Supporting Pruitt Statements on Climate Change

A D.C. federal court granted summary judgment to Public Employees for Environmental Responsibility (PEER) in PEER's Freedom of Information Act (FOIA) lawsuit against the U.S. Environmental Protection Agency (EPA) seeking documents that EPA Administrator Scott Pruitt relied on when he stated in a March 2017 television interview that "I would not agree that" carbon dioxide generated by humans is "a primary contributor to the global warming that we

see," and that "there's a tremendous disagreement about of [sic] the impact" of "human activity on the climate." In the second part of its FOIA request, PEER sought EPA documents supporting the conclusion that human activity is not the primary driver of climate change. The court characterized as "hyperbolic objection" EPA's argument that PEER's request was "an impermissible attempt to compel EPA and its Administrator to answer questions and take a position on the climate change debate." The court said it was "[p]articularly troubling" that EPA based its challenge to the first part of PEER's request on the premise that "the evidentiary basis for a policy or factual statement by an agency head, including about the scientific factors contributing to climate change, is inherently unknowable." The court also rejected the argument that the EPA administrator's public statements were not a proper focus of a FOIA request. Regarding the second part of PEER's FOIA request, the court said "EPA's apparent concern about taking a position on climate change is puzzling since EPA has already taken a public position on the causes of climate change" in the D.C. Circuit and Supreme Court, and also suggested that the FOIA request "may be viewed as seeking agency records underpinning a potential change in position signaled by" Pruitt's remarks. The court also rejected EPA's claim that the second part of the request failed to reasonably describe the records sought and found that EPA had not demonstrated that responding to the second part of the request would be unduly burdensome. *Public Employees for Environmental Responsibility v. EPA*, No. 17-cv-652 (D.D.C. June 1, 2018).

Federal Court Denied Washington State Officials' Motion to Dismiss Coal Terminal Lawsuit

At a hearing on May 30, 2018, the federal district court for the Western District of Washington denied Washington State officials' motion for partial dismissal of a lawsuit challenging the State's actions blocking a coal export facility in Longview, Washington. The defendants argued that neither the Interstate Commerce Commission Termination Act (ICCTA) nor the Ports and Waterways Safety Act preempted the State actions and that the State commissioner of public lands was immune from all the claims asserted in the lawsuit because they concerned her management of State-owned aquatic lands of a "unique and fundamentally sovereign nature." The defendants also argued that the federal court should apply *Pullman* or *Colorado River* abstention doctrine to allow parallel state court lawsuits to proceed. The plaintiffs—the operators of a "coal energy supply chain company"—asserted that their claims did not threaten to divest Washington State of its sovereignty; that the ICCTA preempted the State actions, which would "unduly interfere with rail transportation as a matter of fact"; that the PWSA claims could not be dismissed because the defendants were blocking the terminal based on vessel traffic and safety concerns; and that abstention was inappropriate since the plaintiffs were not pursuing their federal claims in state court. BNSF Railway Company (BNSF), which intervened as a plaintiff, argued that the defendants were misusing state law to justify regulating rail and interstate and international commerce, and to interfere with foreign affairs. BNSF contended that their claims were not related just to a single coal terminal but to the defendants' targeting of the coal supply chain "as part of a broader effort to stop coal use everywhere." Parties other than BNSF that have participated in the litigation include environmental organizations, represented by Earthjustice, as defendant-intervenors, and the following parties as amici curiae in support of the plaintiffs: Cowlitz County, Western States Petroleum Association, Association of American Railroads, six states (Wyoming, Kansas, Montana, Nebraska, South Dakota, and Utah), American Farm Bureau

Federation, American Fuel & Petrochemical Manufacturers, National Mining Association, and National Association of Manufacturers. *Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-05005 (W.D. Wash. May 30, 2018).

California Federal Court Nullified Oakland Ordinance Barring Coal Operations at Shipping Terminal

The federal district court for the Northern District of California ruled that the City of Oakland's adoption of an ordinance that barred coal operations at a bulk cargo shipping terminal breached the City's agreement with a developer for the conversion of an old army base into the terminal. The development agreement provided that regulations adopted after the agreement's signing would not apply to the terminal unless the City determined, based on "substantial evidence," that the failure to apply the new regulation would pose a "substantial danger" to the health or safety of the people of Oakland. The court found that the record before the City Council did not contain sufficient evidence to support a determination that coal operations would pose a substantial danger. The court rejected the City's primary argument that particulate matter from coal operations posed such a danger, and also found that the record did not support a determination that fire hazards, worker safety, or greenhouse gases would pose a substantial danger. The court noted that "[t]he hostility toward coal operations in Oakland appears to stem largely from concern about global warming." The court said the argument that global warming allowed it to invoke the development agreement's "substantial danger" exception "barely merits a response." The court stated: "It is facially ridiculous to suggest that this one operation resulting in the consumption of coal in other countries will, in the grand scheme of things, pose a substantial global warming-related danger to people in Oakland." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 3:16-cv-07014 (N.D. Cal. May 15, 2018).

Ninth Circuit Upheld Injunctive Relief at Federal Columbia River Power System for Climate Change-Related Violations of Endangered Species Act

The Ninth Circuit Court of Appeals upheld an injunction requiring federal defendants to take certain actions to address Endangered Species Act (ESA) violations identified in a May 2016 Oregon federal court order in connection with operations of the Federal Columbia River Power System (FCRPS). The district court found that the National Marine Fisheries Service (NMFS) failed to adequately consider climate change when it issued a biological opinion in 2014 concluding that the FCRPS management would not jeopardize endangered and threatened steelhead and salmon. In April 2017, the district court granted certain injunctive relief—including "increased spill" at dams to promote salmonid survival—to address the ESA violations. The Ninth Circuit noted that the ESA foreclosed consideration of all but the irreparable harm factor in the four-factor injunctive relief test and found that the district court had not erred in finding irreparable harm sufficient to support injunctive relief. The Ninth Circuit said that the district court was not required to find an "extinction-level threat" in the short term, but noted that the district court had found that continued low abundance of listed species made them vulnerable to extinction and that one of the shortcomings identified in the NMFS's analysis was failure to analyze how climate change increased chances of "shock events" that would be catastrophic for listed species' survival. The Ninth Circuit also dismissed an appeal of the district court's order requiring disclosure of planned capital expenditures at FRCPS dams to allow

plaintiffs the opportunity to file motions to enjoin projects that could bias the National Environmental Policy Action (NEPA) review on remand. (The district court had also found that the NEPA review did not give adequate attention to climate change). The Ninth Circuit said the district court's disclosure order was not appealable. *National Wildlife Federation v. National Marine Fisheries Service*, No. 17-35462 (9th Cir. Apr. 2, 2018).

Power Plant Owner-Operators Agreed to Stop Burning Coal to Resolve Citizen Suit

Sierra Club and the owners and operators of the Brunner Island Steam Electric Plant in Pennsylvania lodged a consent decree in the federal district court for the Middle District of Pennsylvania to resolve alleged violations of the Clean Water Act, the Pennsylvania Clean Streams Law, and the Resource Conservation and Recovery Act. Among other things, the consent decree requires the defendants to cease combustion of coal by the end of 2028, except during certain "Emergency Action" events. In addition, the facility must cease combusting coal during the ozone season by the end of 2022 ozone season, except that during an interim period from 2023 to 2028, the plant may burn coal during the ozone season so long as certain conditions are met, including that the facility's Units 1-3 shall emit less than 6.8 million tons of carbon dioxide each year. *Sierra Club v. Talen Energy Corp.*, No. 1:18-cv-01042 (M.D. Pa. May 17, 2018).

California Federal Court Said Fish and Wildlife Service's Withdrawal of Bi-State Sage Grouse Proposed Listing Was Arbitrary and Capricious, but Upheld Consideration of Cumulative Threats, Including Climate Change

The federal district court for the Northern District of California ruled for plaintiffs who challenged the U.S. Fish and Wildlife Service's withdrawal in 2015 of the proposed listing of the Bi-State Sage Grouse distinct population segment of the greater sage-grouse as threatened under the Endangered Species Act. The court rejected, however, the argument that the FWS had not considered cumulative threats to the Bi-State Sage Grouse, including climate change. The court noted that courts had generally found that the FWS met the requirement to consider cumulative threats when it provided "even a brief discussion" of such threats. In this case, the court said the FWS "offered sufficient explanation of its consideration of cumulative threats" by "identif[ying] the threats that may interact and provid[ing] some explanation of the implications of the interactions." The court found, however, that other aspects of the FWS's determination were otherwise arbitrary and capricious and that the definition of "significant" in the FWS's final policy on interpretation of the phrase "significant portion of its range" was an impermissible interpretation. *Desert Survivors v. U.S. Department of the Interior*, No. 3:16-cv-01165 (N.D. Cal. May 15, 2018).

Washington Appellate Court Upheld Convictions of Protestors, Affirmed Trial Court's Decision Not to Instruct Jury on Necessity Defense

The Washington Court of Appeals affirmed the trespass convictions of four protestors who entered a rail yard in Everett, Washington, and blocked tracks to protest coal and oil trains and raise awareness of rail safety and climate change. The appellate court found that the trial court had not abused its discretion when it denied the defendants' request for a jury instruction on the

necessity defense. The appellate court agreed that the defendants had failed to offer sufficient evidence for the fourth element of the necessity defense requiring that no reasonable legal alternatives existed. The appellate court also disagreed with the defendants' argument that their right to present a defense was violated by the trial judge allowing them to present evidence for the necessity defense but refusing to instruct the jury on the defense. The appellate court rejected, however, the State's argument that a necessity defense was never available in a civil disobedience context. *State v. Brockway*, Nos. 76242-7, 76242-5, 76242-3, 76242-1 (Wash. Ct. App. May 29, 2018).

California Court of Appeal Upheld Construction Greenhouse Gas Emissions Analysis Based on Statewide Goals

The California Court of Appeal affirmed the rejection of California Environmental Quality Act and other claims challenging the County of San Mateo's approval of a 19-home residential development. The organization challenging the project argued unsuccessfully that the County used flawed methodology to determine that greenhouse gas emissions during construction could be mitigated to a less than significant level. The environmental impact report's (EIR's) analysis concluded that there would be a less-than-significant cumulative impact on greenhouse gas emissions if mitigation measures were required to reduce project-related emissions by 26% below business-as-usual, to match the statewide goal for greenhouse gas emissions reductions. The Court of Appeal said this assumption did not suffer from the same flaws as the analysis struck down by the California Supreme Court in *Center for Biological Diversity v. Department of Fish & Wildlife*, which found insufficient evidence to support a conclusion that reducing business-as-usual emissions at the project level was consistent with achieving statewide goals. In an unpublished opinion, the Court of Appeal distinguished the instant case as involving "analysis of GHG emissions during a finite construction phase of the project" while the *Center for Biological Diversity* case involved "the impact of GHG emissions resulting from the operation of a massive development project." The Court of Appeal also noted that in this case the EIR assumed that construction emissions would be significant and an "objective concrete method" to reduce emissions was required, whereas the agency in *Center for Biological Diversity* concluded no greenhouse gas mitigation measures were required because impacts would not be significant. *Responsible Development for Water Tank Hill v. County of San Mateo*, No. A150883 (Cal. Ct. App. May 18, 2018).

California Court of Appeal Said Approvals for Newhall Ranch Could Remain in Place While Los Angeles County Fixed Greenhouse Gas Analysis

The California Court of Appeal upheld a trial court's decision to leave land use approvals of components of the Newhall Ranch development in Los Angeles County in place even though the court partially decertified the final EIR. The court partially decertified the EIR because Los Angeles County's analysis of greenhouse gas emissions was found to be insufficient based on the California Supreme Court's decision in *Center for Biological Diversity v. Department of Fish & Wildlife*, which concerned the same project and which found that the EIR's conclusion that impacts of greenhouse gas emissions would not be significant was not supported by sufficient evidence or a reasoned explanation. The appellate court found that the limited writ granted by the

trial court was a valid exercise of the trial court's equitable powers. *Friends of the Santa Clara River v. County of Los Angeles*, Nos. B282421, B282427 (Cal. Ct. App. May 11, 2018).

New York Appellate Court Upheld Order Requiring Attorney General to Pay Competitive Enterprise Institute's Attorney Fees in Freedom of Information Suit

The New York Appellate Division affirmed an order awarding costs and attorney fees to the Competitive Enterprise Institute (CEI) in CEI's lawsuit against the New York attorney general under New York's Freedom of Information Law (FOIL). CEI brought the lawsuit after the attorney general's office denied a request for any climate change "common interest agreements" entered into by New York and other state attorneys concerning the sharing of information and other matters related to ongoing and potential climate change investigations. The New York attorney general unsuccessfully sought to dismiss the lawsuit as moot based on the public release of a common interest agreement by another party to the agreement. A trial court denied the motion, required the attorney general to provide further explanation, and eventually ordered payment of $20,377.50 in attorney fees as well as costs. The Appellate Division agreed that an award of fees was warranted, concluding that CEI had substantially prevailed even though the common interest agreement—the only document responsive to CEI's request—had already been in the public domain. The Appellate Division also said there was not a reasonable basis for withholding the common interest agreement as attorney work product. The Appellate Division reduced the amount of the fees award to $16,312.50 because it did not agree with the court below's assessment that the attorney general "stonewalled" CEI during the FOIL process. *Matter of Competitive Enterprise Institute v. Attorney General of New York*, No. 525579 (N.Y. App. Div. May 3, 2018).

Connecticut Court Said Zoning Board's Failure to Consider Sea Level Rise Was "Contrary to Law and Logic"

The Connecticut Superior Court held that the City of Milford zoning board of appeals improperly denied variances for the rebuilding of a home destroyed by Hurricane Sandy. The court said the board's denial based on a local "aesthetic" height requirement had not considered "the nuances and immediacy of flood hazard or sea level rise and the elevation requirements … and is thus contrary to law and logic." The court also found that the plaintiffs' hardship was not self-imposed—the court said their hardship was the total destruction of their home by Hurricane Sandy and the need to comply with applicable elevation requirements in rebuilding. *Turek v. Zoning Board of Appeals for the City of Milford*, No. LNDCV156063404S (Conn. Super. Ct. Apr. 4, 2018).

FERC Denied Rehearing of Approval of Natural Gas Facilities, Pulled Back on Consideration of Climate Change Impacts

In a split decision, the Federal Energy Regulatory Commission (FERC) denied a request for rehearing of its issuance of a certificate of public convenience and necessity for a project involving two new natural gas compressor stations, upgrades and modifications to existing compressor stations, and changes to other related facilities in New York (the New Market Project). FERC concluded that the environmental assessment had appropriately excluded

analysis of upstream and downstream impacts because such impacts were neither cumulative nor indirect impacts of the New Market Project. The majority said that "[f]or a short time" FERC had gone "beyond that which is required by [the National Environmental Policy Act (NEPA)], providing the public with information regarding the potential impacts associated with unconventional natural gas production and downstream combustion of natural gas, even where such production and downstream use was not reasonably foreseeable nor causally related to the proposals at issue." The majority described such information as "generic in nature and inherently speculative" and said it did not "meaningfully inform … project-specific review" and was not "helpful to the public." The majority also indicated that it would not consider such information in its analysis of public convenience and necessity under Section 7(c) of the Natural Gas Act (NGA). Two commissioners dissented in separate statements. Commissioner LaFleur said FERC should not change its policy on upstream and downstream impacts to provide less information regarding climate impacts. Commissioner Glick said that the majority's consideration of climate change fell short of FERC's obligations under NEPA and the NGA. *In re Dominion Transmission, Inc.*, No. CP14-497-001 (FERC May 18, 2018).

California Administrative Law Judge Recommended Denial of Replacement Natural Gas Pipeline

A California administrative law judge (ALJ) issued a proposed decision recommending that the Public Utilities Commission deny an application for a new 47-mile natural gas pipeline to replace an existing pipeline. The proposed decision found that the applicants had not shown "why it is necessary to build a very costly pipeline to substantially increase gas pipeline capacity in an era of declining demand and at a time when the state of California is moving away from fossil fuels." *In re San Diego Gas & Electric Co.*, No. 15-09-013 (Cal. PUC May 2, 2018).

Minnesota Administrative Law Judge Recommended Replacement Oil Pipeline Be Approved Only if Constructed in Existing Corridor

A Minnesota administrative law judge recommended that the Public Utilities Commission grant a certificate of need for a "replacement" oil pipeline but only if the Commission also required in-trench replacement. The applicant sought to abandon the existing line in place and build a new pipeline that would require a new pipeline corridor for approximately 50% of its route. The ALJ expressed concern that abandonment of the existing line and creation of the new corridor "leaves open the possibility of thousands of miles of … pipelines someday being abandoned in-place when they are no longer economically useful," particularly "in a carbon-conscious world moving away from fossil fuels." The ALJ's decision also summarized the greenhouse gas analysis for the pipeline and found that the pipeline did not support Minnesota's renewable energy and greenhouse gas reduction goals, but the ALJ's ultimate recommendation did not turn on those issues. *In re Enbridge Energy, L.P.*, No. OAH 65-2500-32764 (Minn. OAH Apr. 23, 2018).

NEW CASES, MOTIONS, AND NOTICES

States, D.C., Electric Vehicle Coalition, and Environmental Groups Challenged EPA Determination That Obama Administration Greenhouse Gas Standards for Vehicles Were Too Stringent

Seventeen states and the District of Columbia filed a petition for review in the D.C. Circuit Court of Appeals challenging EPA's decision to withdraw the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles. The Mid-Term Evaluation, which was issued in January 2017 prior to President Trump's inauguration, concluded that the 2022-2025 vehicle standards remained appropriate. In April 2018, EPA said it had reconsidered the standards and determined "that the current standards are based on outdated information, and that more recent information suggests that the current standards may be too stringent." EPA indicated that it would work in partnership with the National Highway Traffic Safety Administration to promulgate new standards. EPA also indicated that this April 2018 revised determination was not a final agency action because its effect was "to initiate a rulemaking process whose outcome will be a final agency action." Seven organizations led by Center for Biological Diversity also challenged the EPA's action, as did the National Coalition for Advanced Transportation—a "coalition of companies that supports electric vehicle and other advanced transportation technologies and related infrastructure." The Coalition includes Tesla, Inc. and a number of utilities. *California v. EPA*, No. 18-1114 (D.C. Cir., filed May 1, 2018); *National Coalition for Advanced Transportation v. EPA*, No 18-1118 (D.C. Cir., filed May 3, 2018); *Center for Biological Diversity v. EPA*, No. 18-1139 (D.C. Cir., filed May 15, 2018).

States Challenged EPA's Failure to Implement Emission Guidelines for Existing Landfills

Eight states, led by California, filed a lawsuit in the federal district court for the Northern District of California asserting that EPA had failed to fulfill its statutory duty to implement and enforce emission guidelines for municipal solid waste landfills that would have controlled emissions of volatile, organic compounds, hazardous air pollutants, carbon dioxide, and methane. The states alleged that EPA had worked to undermine the emission guidelines by communicating that it does not intend to implement them and that EPA had violated statutory mandates to approve or disapprove state implementation plans and to impose federal plans on noncomplying states. *California v. EPA*, No. 4:18-cv-03237 (N.D. Cal., filed May 31, 2018).

Federal Government Weighed in to Support Illinois Nuclear Subsidies Before Seventh Circuit

The United States and FERC (together, the U.S.) submitted an amicus brief to the Seventh Circuit Court of Appeals in support of Illinois's law requiring "zero emission credits" for certain nuclear power plants. The U.S. submitted the brief at the invitation of the Seventh Circuit, which sought the federal government's views during the court's review of a district court decision upholding the law. The U.S. asserted that the Federal Power Act did not preempt the Illinois law and that the Illinois program would not impede FERC's regulation of wholesale markets. The U.S. also described guidance in FERC proceedings for how states may support renewable or clean power without interfering with FERC's authority over wholesale energy transactions. *Village of Old Mill Creek v. Star*, No. 17-2445 (7th Cir. May 29, 2018).

Lawsuit in Montana Federal Court Challenged NEPA Reviews for Oil and Gas Lease Sales

Two environmental groups, a Montana landowner, and the owners of an orchard in Montana filed a lawsuit in the federal district court for the District of Montana challenging the U.S. Bureau of Land Management's (BLM's) compliance with the National Environmental Policy Act (NEPA) in connection with BLM's oil and gas lease sales for almost 150,000 acres of public lands in Montana. The plaintiffs alleged that BLM failed to address impacts on groundwater and also failed to address impacts on greenhouse gas emissions and climate change impacts, "perpetuating the fundamental disconnect between the federal government's management of public lands and the changing climate." The plaintiffs asserted that BLM's environmental assessments for the lease sales failed to adequately quantify cumulative emissions; failed to accurately quantify direct and indirect emissions from oil and gas development; failed to monetize the economic costs of greenhouse gas emissions from the lease sales; and failed to provide any measure to demonstrate the context and intensity of the greenhouse gas emissions from the lease sales. The plaintiffs contended that in the absence of this information neither the public nor BLM could compare the costs and benefits of the lease sales or make informed choices between alternatives. *WildEarth Guardians v. U.S. Bureau of Land Management*, No. 4:18-cv-00073 (D. Mont., filed May 15, 2018).

Environmental Defense Fund Filed FOIA Lawsuit Seeking Documents Relevant to Efforts to Roll Back the Waste Prevention Rule

Environmental Defense Fund (EDF) filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Department of the Interior (DOI), BLM, and the DOI Office of the Secretary and Office of the Solicitor seeking to compel disclosure of documents related to efforts to suspend, delay, repeal, or revise the Waste Prevention Rule. The Waste Prevention Rule imposes requirements to reduce waste of natural gas, including methane, from oil and gas production activities on public and tribal lands. EDF said it submitted six FOIA requests in May 2017 and November 2017 as part of its efforts "to understand the coordination between DOI, Congress, and industry groups" to roll back the rule, which included an unsuccessful attempt to revoke the rule using the Congressional Review Act as well as regulatory actions to suspend the effective date of key provisions. EDF alleged that the defendants failed to provide timely responses to its requests, failed to provide responsive documents, failed to adequately search for records, and failed to provide reasonably segregable portions of documents that were otherwise exempt from disclosure. *Environmental Defense Fund v. Department of the Interior*, No. 1:18-cv-01116 (D.D.C., filed May 10, 2018).

Wilderness Society Filed FOIA Lawsuit Seeking Interior Department Documents Implementing Trump Energy Independence Executive Order

The Wilderness Society filed a FOIA lawsuit in the federal district court for the District of Columbia seeking to compel responses to 21 FOIA requests it submitted since April 2017 for documents related to the Department of the Interior's implementation of President Trump's Executive Order 13783, "Promoting Energy Independence and Economic Growth." The Wilderness Society alleged that it had requested numerous reports and related documents from DOI, including reports required as part of a "Climate Change Policy Review," in which the Secretary of the Interior ordered office and bureau heads to provide all actions adopted or under development that had been rescinded by Executive Order 13783 as well as drafts of revised or

substituted actions for review by the Secretary. The Wilderness Society asserted that DOI constructively denied its FOIA requests and withheld information, failed to abide by statutory deadlines, failed to conduct adequate searches, failed to inform of receipt and provide tracking numbers, failed to provide estimated dates for completion of action on requests or appeals, and engaged in a pattern of unlawful conduct or failure to provide estimated dates. *Wilderness Society v. U.S. Department of Interior*, No. 1:18-cv-01089 (D.D.C., filed May 9, 2018).

King County Sued Five Fossil Fuel Companies in Washington State Court to Compel Funding of Climate Change Adaptation Program; Chevron Removed to Federal Court

On May 9, 2018, King County in Washington State filed a public nuisance and trespass action in Washington Superior Court against the world's five largest investor-owned fossil fuel companies. The County asserted that the companies' "production and promotion of massive quantities of fossil fuels, and their promotion of those fossil fuels' pervasive use" created a public nuisance of "global warming-induced sea level rise and other climate change hazards." The County contended that the companies were individually and collectively "substantial contributors" to global warming who promoted the use of fossil fuels despite knowing "for many years that global warming threatened severe and ever catastrophic harms to coastal areas like King County." The County also contended that the companies knew that their actions would cause invasions of King County property due to sea level rise and storm surge. The County alleged that it was already experiencing climate change impacts, including "warming temperatures, acidifying marine waters, rising seas, increasing flooding risk, decreasing mountain snowpack, and less water in the summer," that rising sea levels posed an imminent threat of storm surge flooding that could inundate portions of the county, and that the County would be required to spend hundreds of millions of dollars to build infrastructure to protect King County and its residents. The County sought an order of abatement requiring the companies to fund a climate change adaptation program for the County as well as compensatory damages for the costs the County had already incurred.

On May 25, Chevron Corporation removed the case to federal court, stating that the court had both original federal diversity jurisdiction and original federal question jurisdiction. Regarding federal question jurisdiction, the notice of removal asserted that the plaintiff's claims implicated "uniquely federal interests" and were governed by federal common law, not state law; that the action "necessarily raises disputed and substantial federal questions that a federal forum may entertain without disturbing a congressionally approved balance of responsibilities between the federal and state judiciaries"; that the Clean Air Act and/or other federal statutes and the U.S. Constitution completely preempted the plaintiff's claims; that the plaintiff's claims were based on "alleged injuries to and/or conduct on federal enclaves"; and that the action necessarily implicated federal authority over the navigable waters of the United States and therefore fell within the federal court's original admiralty jurisdiction. Chevron also argued that the court had original jurisdiction under the Outer Continental Shelf Lands Act and pursuant to federal officer and bankruptcy removal statutes. *King County v. BP p.l.c.*, No. 2:18-cv-00758 (W.D. Wash. May 25, 2018); *King County v. BP p.l.c.*, No. 18-2-11859-0 (Wash. Super. Ct., filed May 9, 2018).

Three States Filed Amicus Brief Opposing Dismissal of Oakland and San Francisco Climate Change Nuisance Suits; United States Weighed in to Support Dismissal; Court Ordered Post-Argument Briefing

After the federal district court for the Northern District of California held oral argument on May 24, 2018 on fossil fuel companies' motions to dismiss the climate change nuisance lawsuits brought by Oakland and San Francisco, the court issued a written order granting the cities' requests to take jurisdictional discovery as to three of the defendants (BP p.l.c., ConocoPhillips Company, and Royal Dutch Shell plc) as well as concerning the nature of the relationship between Shell Oil Company and Royal Dutch Shell. The court also denied the plaintiffs' request for jurisdictional discovery as to Exxon Mobil Corporation and ordered supplemental briefing on the jurisdictional issues, with briefing to be completed by August 16. In addition, the court ordered the parties to submit briefs by May 31 on "the extent to which adjudication of plaintiffs' federal common law nuisance claims would require the undersigned judge to consider the utility of defendants' alleged conduct." In their supplemental brief, the defendants asserted that "well-established nuisance law" required that the court weigh the utility of fossil fuel extraction against alleged harms to determine if the defendants' conduct was unreasonable; the defendants also argued that engaging in such a balancing would require "second-guessing Congress." The plaintiffs argued that the court was not required to balance the utility of the conduct because they sought monetary relief—an abatement fund—and not to enjoin the defendants' conduct.

On May 8, 2018, the court granted California, New Jersey, and Washington's request to submit an amicus brief in support of Oakland and San Francisco's opposition to fossil fuel companies' motion to dismiss their climate change public nuisance suit. The three states characterized their brief as focusing on "a subset of issues where our States are in a position to offer a fuller picture of the case law and relevant statutes and regulations." First, they contested the position of the fossil fuel companies and other amici states advocating for dismissal of the lawsuits that Oakland and San Francisco's complaints asserted non-justiciable political questions. They also said that the complaints did not threaten state climate programs or jeopardize cooperative federalism. They also argued that the public nuisance alleged by Oakland and San Francisco was not authorized by law, that the Clean Air Act did not displace the public nuisance claims, and that the relief sought by the cities would not constitute extraterritorial regulation in violation of the dormant Commerce Clause.

On May 10, the United States filed an amicus brief in support of dismissal. Its brief argued that federal common law of nuisance afforded no relief to the cities; that federal law (including the Clean Air Act, federal authorities relating to international climate change, and federal statutes governing production of fossil fuels) displaced any such nuisance claims; and that the claims violated separation of powers principles. The United States asserted that it has "strong economic and national security interests in promoting the development of fossil fuels, among other energy resources," and that the lawsuit threatened to interfere with the U.S.'s "ongoing attempts to address the impacts of climate change, both domestically and internationally." *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal.).

Briefing Completed on Motion to Dismiss New York City's Lawsuit Against Fossil Fuel Companies; Oral Argument Set for June 13

On May 4, 2018, the parties completed the briefing on motions by the three U.S.-based fossil fuel company defendants to dismiss New York City's climate change nuisance and trespass lawsuit. Two of the U.S.-based companies, ConocoPhillips and Exxon Mobil Corporation, also raised personal jurisdiction issues in separate motions. The court deferred addressing these issues until after resolution of the defendants' arguments that the court lacks subject matter jurisdiction and that the amended complaint fails to state a claim. The court also allowed the two foreign-based defendants to defer responding to the complaint until after these issues are resolved.

The court will hear oral argument on non-personal jurisdiction issues on June 13, 2018. In support of their motion to dismiss, the U.S.-based defendants argued, among other things, that New York's claims, though labeled state law claims, actually arose under federal common law and that Congress displaced such global warming-based federal common law claims. Alternatively, the defendants asserted that the complaints' allegations failed to state viable federal common law claims. In addition, the defendants argued that the Commerce Clause and Due Process and Takings Clauses barred the claims, that federal law preempted the claims, that the claims impermissibly infringed on the federal foreign affairs power, that the claims did not present a justiciable case or controversy, that the claims presented non-justiciable political questions, and that New York City lacked standing. The defendants also contended that state law claims were not viable because, among other things, allegations of proximate causation were lacking and New York City was "an active, voluntary participant in the unlawful activity that is the subject of the suit" and the claims were thus barred by the *in pari delicto* doctrine. ConocoPhillips argued separately that "well-settled principles of proximate cause" barred liability in this case, as they had in similar cases against the gun and tobacco industries. Fifteen states filed an amicus brief in support of the motion to dismiss. They argued that the claims raised nonjusticiable political questions, jeopardized the U.S.'s system of cooperative federalism, and threatened extraterritorial regulation. The states also argued that federal statutes had displaced federal common law.

New York City responded that it had stated viable state law claims, that federal doctrines did not bar the claims, that the claims were justiciable, that the City had standing, that federal common law did not displace state law, and that, in any event, the City had pleaded viable federal common law claims that had not been displaced by the Clean Air Act. The City said the defendants' assertion that climate change tort litigation would intrude on federal legislative and executive authorities had been rejected by the Second Circuit in *Connecticut v. American Electric Power Corp.* and that the defendants' "overbroad" foreign powers argument would "invalidate a multitude of state laws on climate change." The City also contended that neither the Clean Air Act nor other federal statutes conflicted with its claims. In a separate memorandum of law responding to ConocoPhillips' argument that proximate causation principles barred liability, the City argued that basic tort law principles provided for individual tortfeasor liability where multiple tortfeasors have contributed to an indivisible harm and that the defendant companies could be held liable for the foreseeable consequences of their production and marketing of fossil fuels. The City distinguished its case from the gun and tobacco litigation cases cited by ConocoPhillips. On June 1, the Niskanen Center, a think tank "with a strong interest in protecting Americans property rights," sought to file an amicus brief in support of the City. The brief disputed the defendants' argument that applying state common law to their actions would

violate a federal interest in uniform regulation of their conduct. *City of New York v. BP p.l.c.*, No. 1:18-cv-00182 (S.D.N.Y.).

Lawsuit Filed in Connecticut Federal Court to Stop Transfer of Clean Energy and Energy Efficiency Funds

A group of individuals, organizations, and companies filed a lawsuit against Connecticut's governor, treasurer, and comptroller to stop the officials from "sweeping" the Connecticut Energy Efficiency Fund (CEEF) and Clean Energy Fund. The plaintiffs described themselves as "invested in improving the State's energy efficiency and clean energy economy" and asserted that the defendants were seeking to transfer funds to the State's General Fund that had been collected from ratepayers and held for certain purposes—including lowering carbon emissions and investing in Connecticut's Green Bank. The plaintiffs asserted that the diversion of the funds violated the Contracts Clause of the U.S. and Connecticut State Constitutions and the Equal Protection Clause of the U.S. Constitution. The plaintiffs also asserted that the sweep violated the legislation establishing the Green Bank and violated the tax-exempt status of one of the plaintiffs. In addition, they asserted a promissory estoppel claim. *de Mejias v. Malloy*, No. 2:18-cv-00817 (D. Conn., filed May 15, 2018).

Conservation Organizations Challenged Oil and Gas Leases in Sage-Grouse Habitat

Western Watersheds Project and Center for Biological Diversity filed a complaint in the federal district court for the District of Idaho asserting that the Trump administration's sale of hundreds of thousands of acres of oil and gas leases within or affecting sage-grouse habitat violated the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Administrative Procedure Act. The complaint alleged that the federal defendants violated NEPA by, among other things, failing to address likely climate change impacts to the sage-grouse and its habitat. The plaintiffs also challenged Bureau of Land Management guidance issued in late 2017 and early 2018. *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187 (D. Idaho, filed Apr. 30, 2018).

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FEATURED CASE

Federal Circuit Reversed Ruling That Held U.S. Liable for Louisiana Flood Damage

The Federal Circuit Court of Appeals reversed the Federal Court of Claims finding that the federal government was liable for flood damage in St. Bernard Parish and New Orleans that was caused by Hurricane Katrina and other hurricanes. The plaintiffs, who were property owners in St. Bernard Parish and the Lower Ninth Ward of New Orleans, contended that the government was liable for a taking based on its inaction, including the failure to properly maintain or modify the Mississippi River-Gulf Outlet (MRGO), and its actions, including the construction and operation of the MRGO channel. The Federal Circuit held that the government cannot be liable for inaction on a takings theory and that the construction and operation of MRGO had not been shown to be the cause of the flooding. The court found that the plaintiffs and the Court of Claims

had not applied the correct legal standard to the causation analysis, which was required to "account for government flood control projects that reduced the risk of flooding." The court said the plaintiffs failed to present evidence comparing the flood damage that occurred to what would have occurred had there been no government action at all and so had failed to take account of actions—including a system of levees and floodwalls known as the Lake Pontchartrain and Vicinity Hurricane Protection Project—that mitigated the MRGO impact. *St. Bernard Parish Government v. United States*, No. 2016-2301, 2016-2373 (Fed. Cir. Apr. 20, 2018).

DECISIONS AND SETTLEMENTS

Second Circuit Vacated Rule Delaying Increased Penalties for Violations of Fuel Efficiency Standards

In a one-page order, the Second Circuit Court of Appeals granted petitions from environmental groups and five states challenging the Trump administration's rule delaying the effective date for regulations that increase penalties for violations of vehicle fuel efficiency standards. The court vacated the delay rule and indicated that an opinion would follow "in due course." *Natural Resources Defense Council, Inc. v. National Highway Traffic Safety Administration*, Nos. 17-2780, 17-2806 (2d Cir. Apr. 23, 2018).

Ninth Circuit Stayed District Court Order Requiring Publication of Energy Conservation Rules

On April 11, 2018, the Ninth Circuit Court of Appeals granted emergency motions to stay a district court order requiring the U.S. Department of Energy (DOE) to publish final energy conservation rules for portable air conditioners, air compressors, commercial packaged boilers, and uninterruptible power supplies in the *Federal Register*. DOE and the Air-Conditioning, Heating, & Refrigeration Institute filed the appeals of the district court order, which held that DOE had a non-discretionary duty under the Energy Policy and Conservation Act to publish the standards, which DOE adopted in December 2016. The Ninth Circuit also sua sponte expedited the proceedings in the appeals. *Natural Resources Defense Council, Inc. v. Perry*, Nos. 18-15380, 18-15475 (9th Cir. Apr. 11, 2018).

In Partial Reversal, New Mexico Federal Court Rejected Challenges to Drilling Permits

On April 23, 2018, the federal district court for the District of New Mexico dismissed all claims in a lawsuit challenging the U.S. Bureau of Land Management's (BLM's) approval of more than 300 applications for permit to drill (APDs) wells in the Mancos Shale in the San Juan Basin. The court found that that BLM had not violated either the National Environmental Policy Act (NEPA) or the National Historic Preservation Act (NHPA). (The NHPA holding reversed the court's initial conclusion in a March 31 order that BLM had violated NHPA for some wells for which the areas of potential effect contained historic sites.) With respect to NEPA, the court found that BLM had "properly tiered" its environmental assessments (EAs) for the APDs to a resource management plan and environmental impact statement from 2003 and had determined that new developments since 2003 in horizontal drilling and fracking technology would not have significant environmental effects. The court noted, for instance, that an EA had indicated that

carbon dioxide emissions from a horizontal well would represent only a 0.0008% increase in New Mexico carbon dioxide emissions. *Diné Citizens Against Ruining Our Environment v. Zinke*, No. 1:15-cv-00209 (D.N.M. Apr. 23, 2018).

In Challenges to Keystone Pipeline Permit, Montana Federal Court Ordered Federal Defendants to Search for More Documents for Administrative Record

On April 16, 2018, the federal district court for the District of Montana ordered the federal defendants to complete the administrative record or provide a privilege log in pending challenges to the presidential permit granted in March 2017 for the Keystone XL Pipeline. The court found that the plaintiffs had rebutted the presumption of completeness of the administrative record by pointing to specific documents that were missing and that the federal defendants' failure to provide the whole record also was evidenced by their earlier supplementation of the record after the court required that they produce documents or prepare a privilege log for documents dated from January 26, 2017 to March 23, 2017. In addition, the court rejected the defendants' argument that internal agency communications and drafts could not comprise part of the administrative record. Recognizing the burden imposed on the defendants, the court required the plaintiffs to provide a "reasonable list" of no more than 50 search terms to narrow the scope of inquiry. The parties also agreed that the date range for the additional document production would be limited to May 2012 to November 2015. *Indigenous Environmental Network v. U.S. Department of State*, No. 4:17-cv-00029 (D. Mont. Apr. 16, 2018).

California Federal Court Granted Fossil Fuel Companies' Motion to Stay Order Remanding Counties' and City's Climate Case to State Court

The federal district court for the Northern District of California granted the defendants' motion to stay its remand orders pending appeal in the climate change lawsuits brought by the Counties of San Mateo and Marin and the City of Imperial Beach against a number of fossil fuel companies. The court also certified for interlocutory appeal all issues addressed in the remand order. *County of San Mateo v. Chevron Corp.*, No. 3:17-cv-04929 (N.D. Cal. Apr. 9, 2018).

Massachusetts High Court Ruled That Exxon Must Comply with Attorney General's Climate Change Investigation

The Massachusetts Supreme Judicial Court affirmed a Superior Court order denying ExxonMobil Corporation's (Exxon's) motion to bar the Massachusetts attorney general from pursuing her investigation of whether Exxon's marketing or sale of its fossil fuel products violated the Massachusetts consumer protection law. The Supreme Judicial Court held that Exxon was subject to personal jurisdiction in Massachusetts. The court also rejected Exxon's argument that the civil investigative demand (CID) was "overbroad and unduly burdensome" or that it was "arbitrary and capricious" because it was issued "solely as a pretext." In addition, the court concluded that disqualification of the attorney general's office was not necessitated by her participation in the "AGs United for Clean Power" press conference and found that the Superior Court had not abused its discretion by denying a stay pending the resolution of Exxon's federal lawsuit against the attorney general. The Supreme Judicial Court also affirmed the order granting

the attorney general's cross motion to compel Exxon's compliance with the CID. *Exxon Mobil Corp. v. Attorney General*, No. SJC-12376 (Mass. Apr. 13, 2018).

Divided Minnesota Appellate Court Dismissed State's Appeal of Trial Court Decision Allowing "Valve Turners" to Present Necessity Defense

In a split decision, the Minnesota Court of Appeals dismissed the State of Minnesota's appeal of a trial court decision allowing defendants who participated in a "valve turner" protest to present a necessity defense. Two defendants who used bolt-cutters to enter an oil pipeline valve station and to cut a chain securing a valve device and one defendant who filmed the activities were charged with felony criminal damage to property, aiding and abetting felony criminal damage to property, gross misdemeanor trespassing, and aiding and abetting gross misdemeanor trespassing, A fourth defendant who accompanied the other three defendants and contacted the pipeline operator to notify it of their actions was charged with conspiracy to commit felony criminal damage to property and aiding and abetting felony criminal damage to property. The appellate court said the State had not made the necessary showing that the trial court's ruling would have a critical impact on the prosecutors' case "in the absence of other yet-unmade rulings" regarding what testimony and evidence would be permitted, what objections the State would make, and what the trial court's rulings would be. One judge dissented, saying that permitting any evidence regarding global warming and the defendants' belief that the federal government's response to global warming had been ineffective "would have a critical impact on the outcome of the trial." The dissenting judge also wrote that the evidence the defendants wished to present did not relate to the necessity defense as interpreted under Minnesota law because the defendants could not establish the three essential elements of the defense: that there was no legal alternative to their actions, that the harm was imminent, and that there was a direct, causal connection between their actions and the prevention of global warming. *State v. Klapstein*, Nos. A17-1649, A17-1650, A17-1651, A17-1652 (Minn. Ct. App. Apr. 23, 2018).

Washington State Court Issued Written Decision Allowing Protestor to Present Necessity Defense

On March 13, 2018, a Washington District Court issued its written findings of fact and conclusions of law allowing a defendant who participated in a protest blocking a freight train to protest the transport of coal and oil to present a necessity defense at his trial. The defendant testified that he believed his actions were "acts of civil disobedience" that he believed "were necessary to avoid or minimize the imminent danger to the Earth due to climate change and the serious and imminent risk of danger to safety of Spokane citizens in the downtown area where [the rail company] transports volatile oil." Three expert witnesses testified or submitted a declaration on the defendant's behalf—a lead author of the Intergovernmental Panel on Climate Change Fourth Assessment, a professor of conflict resolution who teaches courses on nonviolent civil resistance, and a "recognized international analyst in nuclear waste storage and transportation and industrial chemical use, transportation and accident prevention, and emergency planning and homeland security." The court concluded that the defendant satisfied his burden of proof with respect to the necessity defense's four prongs: he "believed that his actions were necessary to avoid or minimize the immediate harms of global change to the Earth"; he presented evidence that the harm sought to be avoided was greater than the harm he and other

protestors created; he did not bring about the harm he sought to prevent; and he believed he had exhausted all legal alternatives and that no other reasonable alternative existed. *State v. Taylor*, No. 6Z0117975 (Wash. Dist. Ct. Mar. 13, 2018).

Montana Court Sentenced "Valve Turner" to Deferred Imprisonment

On March 22, Climate Defense Project announced that its client Leonard Higgins had been sentenced two days earlier by a Montana court to three years deferred imprisonment for participating in the coordinated "valve turner" protests in 2016. The court also ordered Higgins to pay $3,755.47 in restitution, less than the $25,630 requested by the pipeline company for costs incurred in responding to the protest. CDP also said it was pursuing an appeal of the court's denial of Higgins's request to present a necessity defense. *State v. Higgins*, No. DC-16-18 (Mont. Dist. Ct. Mar. 20, 2018).

NEW CASES, MOTIONS, AND NOTICES

Amended Complaint with New Standing Allegations Filed to Challenge Trump "Two-for-One" Order

After the federal district court for the District of Columbia ruled that it lacked jurisdiction to hear a challenge to President Trump's Executive Order on "Reducing Regulation and Controlling Regulatory Costs" because the plaintiffs did not have standing, the plaintiffs sought leave to file an amended complaint. The court granted the plaintiffs' motion on April 20. The plaintiffs asserted, among other things, that the new complaint's allegations and supporting declarations regarding the Department of Energy's failure to establish new energy-efficiency standards demonstrated the standing of two of the plaintiffs. The defendants did not oppose the motion, stating that while they believed the motion could be denied as futile under Rule 15, "given the important issues presented in this litigation, and in the interests of efficiency," the issue of standing should be resolved through a Rule 12 motion to dismiss. The defendants must file their motion to dismiss by May 14. *Public Citizen, Inc. v. Trump*, No. 1:17-cv-00253 (D.D.C. motion for leave to amend Apr. 2, 2018).

Environmental Groups, California, and New Mexico Unsuccessfully Sought to Lift Stay on Waste Prevention Rule Requirements in Wyoming District Court, Tenth Circuit Stay Requests Still Pending—Meanwhile BLM Appealed to Ninth Circuit to Reverse Injunction Barring Delaying of Rule's Requirements

Environmental groups and two states (California and New Mexico) that intervened on behalf of the federal respondents to defend the U.S. Bureau of Land Management's Waste Prevention Rule appealed a Wyoming federal district court's order staying implementation of the rule's "phase-in provisions." They moved in the Tenth Circuit for a stay pending appeal and also asked the district court to stay its order pending appeal; they argued that their members and citizens would suffer irreparable harm "from the irreversible loss of publicly-owned natural gas and associated emissions of harmful air pollution" and that the court was without authority to enjoin the regulations without having determined that the rule's challengers had met the four prerequisites for a preliminary injunction. Two states (Wyoming and Montana) and industry groups

challenging the rule, as well as the federal respondents, opposed the motion for stay pending appeal. In addition, Wyoming and Montana moved in the Tenth Circuit to dismiss the appeals of the stay order on the grounds that the district court's order was not reviewable. On April 30, the district court denied the motion for a stay pending appeal. The court found that the intervenors were unlikely to succeed on the merits of their appeal because the court had acted within the "broad discretionary authority" conferred by Section 705 of the Administrative Procedure Act "upon a reviewing court to preserve the status quo where irreparable injury would otherwise result." The court also found that the intervenors had overstated the harm that would result from the stay of the Waste Prevention Rule's phase-in provisions and that the public interest was best served by a stay of those requirements. *Wyoming v. U.S. Department of the Interior*, No. 2:16-cv-00285 (D. Wyo.); 18-8027, 18-8029 (10th Cir.).

In a related case in which a California federal court granted motions in February for a preliminary injunction barring BLM from enforcing its rule delaying provisions of the Waste Prevention Rule, the federal respondents filed an appeal in the Ninth Circuit on April 23. *California v. U.S. Bureau of Land Management*, No. 3:17-cv-07186 (N.D. Cal.); No. 18-15711 (9th Cir.).

Environmental Groups Challenged NEPA Compliance for Oil and Gas Lease Auctions in Western Colorado

Five environmental groups filed a lawsuit in the federal district court for the District of Colorado challenging the U.S. Bureau of Land Management's (BLM's) approval of 53 oil and gas lease parcels on public lands in the Upper Colorado River Basin in western Colorado. The plaintiffs alleged that BLM failed to adequately consider and disclose environmental impacts, including climate impacts, and had therefore failed to comply with the National Environmental Policy Act (NEPA). The alleged shortcomings in the environmental review included an alleged failure to take a hard look at direct, indirect, and cumulative greenhouse gas emissions that would result from lease auctions; the plaintiffs said there was no analysis of any site-specific greenhouse gas emissions or their climate change effects, and that the resource management plans and environmental impact statements (RMP-EIS) on which determinations of NEPA adequacy were based also failed to sufficiently analyze such impacts. The complaint also asserted that the RMP-EISs relied on outdated science with respect to methane's global warming potential, which resulted in understating the magnitude of impacts, and that the RMP-EISs failed to analyze whether opening new sources of emissions was consistent with global, U.S., regional, and state carbon budgets. *Wilderness Workshop v. U.S. Bureau of Land Management*, No. 1:18-cv-00987 (D. Colo., filed Apr. 26, 2018).

Exxon Filed Notice of Appeal of Dismissal of Lawsuit Against New York and Massachusetts Attorneys General

Exxon Mobil Corporation (Exxon) filed a notice of appeal on April 20, 2018, three weeks after the federal district court for the Southern District of New York dismissed the company's lawsuit seeking to bar the New York and Massachusetts attorneys general from pursuing their investigations of Exxon's climate change-related disclosures. *Exxon Mobil Corporation v. Schneiderman*, No. 1:17-cv-02301 (S.D.N.Y. Apr. 20, 2018).

Sierra Club Sued EPA to Compel Disclosure of Communications of New Hires with EPA Administrator and External Parties

Sierra Club filed a Freedom of Information Act lawsuit against the U.S. Environmental Protection Agency (EPA) to compel it to respond to four requests for agency records submitted between June 2017 and January 2018. Sierra Club said the requests were for communications between seven new employees in the Office of the Administrator and EPA Administrator Scott Pruitt or third parties and were in connection with four "troubling practices," including "[i]nappropriate and possibly illegal use of EPA staff time to covertly lobby for the United States' withdrawal from the Paris Climate Agreement and other policy changes" and "[p]olitically motivated changes to factual information about climate change on EPA's website." Sierra Club alleged that each of the seven new hires "lacks prior experience or expertise in environmental protection and instead has a strong connection with anti-EPA organizations, companies, or politicians." *Sierra Club v. EPA*, No. 3:18-cv-02372 (N.D. Cal., filed Apr. 19, 2018).

Colorado Local Governments Sued Fossil Fuel Companies for Climate Change Damages

Three Colorado local government entities—the City of Boulder and the Boards of County Commissioners of Boulder and San Miguel Counties—filed a lawsuit against fossil fuel companies seeking damages and other relief for the companies' role in causing climate change. The local governments alleged they already had suffered and incurred expenses to respond to climate change-related harms stemming from increased and more serious heat waves, wildfires, droughts, and floods, and that these harms would worsen over time. They asserted that the defendants—Exxon Mobil Corporation and affiliates of Suncor Energy Inc.—"*knowingly* and *substantially* contributed to the climate crisis by producing, promoting and selling a substantial portion of the fossil fuels that are causing and exacerbating climate change, while concealing and misrepresenting the dangers associated with their intended use." The plaintiffs asserted causes of action for public nuisance, private nuisance, trespass, and unjust enrichment, as well as a claim of deceptive trade practices under the Colorado Consumer Protection Act. They asked the court to award them monetary relief as compensation for their past and future damages and for costs to mitigate climate change's impacts and also sought remediation or abatement of the hazards by "practical means," though the complaint expressly disclaimed requests to enjoin oil and gas operations or sales, to enforce emissions controls, relief related to injuries on federal lands, or relief based on defendants' lobbying activities. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, No. 2018CV030349 (Colo. Dist. Ct., filed Apr. 17, 2018).

Eight Young Floridians Filed Climate Change Lawsuit Against State of Florida

Eight Florida residents, all age 19 or younger, filed a lawsuit in Florida state court alleging that the State of Florida, the Florida governor, and other state officials and agencies violated their fundamental rights to a stable climate system under Florida common law and the Florida constitution. The complaint asserted that the defendants' "contributions to climate change and creation and operation of a fossil fuel-based energy system have caused widespread harm to the

Plaintiffs and the natural resources in Florida." The plaintiffs claimed that the defendants had breached their fiduciary duty to protect Florida's public trust resources and asserted that defendants had such a duty under a common law public trust doctrine explicitly codified in the Florida constitution. The plaintiffs also asserted that their substantive due process rights under the Florida constitution had been violated. The plaintiffs seek declaratory relief as well as orders requiring the defendants to prepare a consumption-based inventory of Florida's greenhouse gas emissions and to "prepare and implement an enforceable comprehensive statewide remedial plan, including specific dates and benchmark targets, to phase out fossil fuel use and draw down excess atmospheric CO_2 through forest and soil protection." *Reynolds v. Florida*, No. 37 2018 CA 000819 (Fla. Cir. Ct., filed Apr. 16, 2018).

Trial Set to Begin on October 29 in Young People's Climate Change Lawsuit Against Federal Government

At a status conference on April 12, 2018, the federal district court for the District of Oregon set October 29, 2018 as the date for a trial to begin in the climate change lawsuit brought by young people against the federal government. The court also set deadlines for the disclosure of the defendants' expert witnesses (July 12), exchange of defendants' expert witness statements (August 13), and exchange of rebuttal expert witness statements (September 12). *Juliana v. United States*, No. 6:15-cv-1517 (D. Or. Apr. 12, 2018).

Fossil Fuel Companies Sought to Dismiss Oakland and San Francisco Amended Complaints; Hearing Scheduled for May 24

On April 19, 2018, the fossil fuel company defendants in Oakland and San Francisco's public nuisance climate change lawsuits moved to dismiss the plaintiffs' amended complaints. All of the defendants joined in a motion to dismiss for failure to state a claim, in which they reiterated arguments from their March 20 motion to dismiss the original complaint: that federal common law claims were either displaced by federal statutes or were "plainly improper"; that the plaintiffs failed to allege the elements of a nuisance claim; and that even if the plaintiffs pleaded a viable claim, judicial resolution would be inappropriate because it would violate separation of powers. Each defendant other than Chevron Corporation (Chevron) also filed a new motion to dismiss for lack of personal jurisdiction, and Royal Dutch Shell plc (Shell) again also sought dismissal on the basis of insufficient service of process. The defendants addressed four questions that the court on March 27 had requested be addressed in the briefing on the motion to dismiss. They said they were aware of no cases sustaining a nuisance theory of liability based on the otherwise lawful sale of a product where the seller finance or sponsored research or advertising intended to cast doubt on studies showing that use of the product was harmful. They also told the court that "no global-warming-based nuisance claim has ever made it past the pleadings," argued that the plaintiffs sought to hold them liable for speech "plainly immunized" by the *Noerr-Pennington* doctrine, and asserted that the plaintiffs' "expansive theory of liability has no limiting principle." The plaintiffs' response to the motions to dismiss is due by May 3, and defendants' replies are due by May 10. If the United States wishes to submit an amicus brief, it must also do so by May 10. On April 19, the court received an amicus motion on behalf of 15 states, led by Indiana, that argued that "[t]o permit federal adjudication of claims for abatement fund remedies would disrupt carefully calibrated state regulatory schemes devised by politically

accountable officials." The states argued that the plaintiffs' claims were non-justiciable political questions that jeopardized cooperative federalism and that the case could constitute extraterritorial regulation in violation of the dormant Commerce Clause. They also echoed the argument that federal statutes displaced common law claims. A hearing on the motions to dismiss is scheduled for May 24. On April 24, the court asked the parties to address the applicability of the Supreme Court's decision on that day in *Jesner v. Arab Bank, PLC*. The Court held foreign corporations could not be defendants under the Alien Tort Statute.

On April 4, 2018, the four fossil fuel companies that did not participate in the climate change tutorial before the court on March 21 submitted their responses to the court's order requiring them to submit statements explaining any disagreements with the presentation made by counsel for Chevron. Exxon Mobil Corporation set forth a seven-point list of statements regarding climate change risk, the contribution of human activities to greenhouse gas emissions, and the Intergovernmental Panel on Climate Change (IPCC)—and stated its position that the statements were not judicial admissions. ExxonMobil called the IPCC's reports "a reference point for understanding how scientific knowledge and confidence have evolved over the past 30 years and contain a wide range of data and potential outcomes" but that it did not adopt every statement made in the IPCC reports. Exxon also said it agreed with Chevron's counsel that the resolution of climate science issues would not be determinative in the case for the reasons set forth in the motion to dismiss. In its response, Royal Dutch Shell plc asserted that it did not "necessarily adopt each statement contained in the various IPCC reports" but agreed that they were an "appropriate source of information for the court to consider to further its understanding of the timeline and science surrounding climate change." ConocoPhillips Company said it did not conduct research on global warming and climate change science but deferred to the scientific community's consensus as reflected in the IPCC science assessments, which it understood to be the basis of Chevron's presentation. In its response, BP p.l.c. indicated it did not disagree with Chevron's counsel's presentation and that it reserved the right to advance positions supported by fact and scientific/expert evidence in support of its defense.

Also on April 4, Oakland and San Francisco submitted redlines showing the differences between their original complaints and the amended complaints filed on April 3, which added a federal nuisance cause of action. In their summary of additions to the complaints, the cities said they also had added, among other things, additional causation allegations based on a 2014 study that set forth the amount of carbon dioxide and methane in the atmosphere that is attributable to each defendant's production of fossil fuels. The plaintiffs also said the amended complaint contained additional allegations regarding sea level rise, expressly disavowed claims based on lobbying activities, and removed allegations regarding the "Global Climate Science Communications Team" to avoid "unnecessary debates" regarding whether the group was "strictly focused on lobbying." *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal.).

Center for Biological Diversity Asked Court to Compel Determination of Whether to Protect Tinian Monarch as Endangered or Threatened

The Center for Biological Diversity (CBD) filed a lawsuit against Secretary of the Interior Ryan Zinke and the U.S. Fish and Wildlife Service to challenge their failure to make a mandatory finding on whether to list the Tinian monarch as endangered or threatened under the Endangered

Species Act. The complaint alleged that the Tinian monarch was a "small forest flycatcher native to Tinian Island, a small island in the western Pacific Ocean" and that the species was "in imminent danger of extinction due to the loss and degradation of its highly restricted range …, predation and competition from invasive species, axian poxvirus, and the effects of climate change." The species was listed as endangered in 1970 but was declared fully recovered and delisted in 2004. The complaint alleged that CBD submitted a petition requesting that the Tinian monarch be listed as endangered or threatened in December 2013 and that the defendants had published a finding in September 201 that listing "may be warranted." CBD asked the court to set a deadline for a response to its petition. *Center for Biological Diversity v. Zinke*, No. 1:18-cv-00862 (D.D.C., filed Apr. 12, 2018).

California to Appeal Federal District Court Decision Upholding Environmental Waivers for Border Wall

California filed a notice that it would appeal the decision of the federal district court for the Southern District of California upholding waivers of environmental requirements granted by the Department of Homeland Security for construction of certain border wall projects in California. *People of the State of California v. United States*, No. 3:17-cv-01911 (S.D. Cal. Apr. 9, 2018).

States, D.C., and Chicago Filed Lawsuit to Compel EPA to Regulate Methane from Existing Oil and Gas Sources

New York, 13 other states, the City of Chicago, and the District of Columbia filed an action in federal district court in the District of Columbia alleging that EPA had failed to comply with its nondiscretionary duty under the Clean Air Act to establish guidelines for limiting methane emissions from existing sources in the oil and natural gas sector. The plaintiffs asserted that EPA's failure to publish such guidelines constituted agency action unreasonably delayed and asked the court to order EPA to propose and promulgate emissions guidelines. *New York v. Pruitt*, No. 1:18-cv-00773 (D.D.C., filed Apr. 5, 2018).

Massachusetts High Court to Hear Challenge to Power Sector Greenhouse Gas Emissions Limits

Briefing was completed in the Massachusetts Supreme Judicial Court on April 27, 2018 in the case challenging regulations that set greenhouse gas emissions limits for the electric power sector. A hearing is scheduled for May 8. The case was originally filed in Superior Court but was transferred to the County Court on January 31 and then reserved and reported to the full Supreme Judicial Court on February 9. (A second case challenging the regulations (*Calpine Corp. v. Department of Environmental Protection*, No. 1784CV02917 (Mass. Super. Ct.) was stayed pending the agencies' completion of amendments to the regulations.) The trade association and power plant owner challenging the regulation argued that the annually declining, mass-based emissions limits exceeded the state agencies' authority under the Global Warming Solutions Act (GWSA), that the regulations were arbitrary and capricious because they will likely increase statewide greenhouse gas emissions, and that the agencies were without authority to set emissions limits past the sunset date of December 31, 2020. The state agencies contended that the electric sector emissions limits were an "essential backstop that ensures the emissions

reduction path driven by other policies necessary to meet the GWSA's 2020 and 2050 limits" and that, by design, the emissions limits would work with Clean Energy Standard regulations to ensure net reductions in statewide and regional emissions. The agencies also argued that the GWSA's sunset clause did not bar electric sector regulations that extended beyond the sunset date. Conservation Law Foundation filed an amicus brief in support of the regulations, arguing that the regulations fulfilled the requirements set forth by the Supreme Judicial Court in *Kain v. Department of Environmental Protection*, which held that the GWSA required Massachusetts to promulgate regulations to ensure enforceable volumetric emissions limits. The Massachusetts Municipal Wholesale Electric Company, which operates fossil fuel-fired generating facilities for sale to its municipal members, and Footprint Power Salem Harbor Development LP, the developer of a planned electric generating facility, intervened as challengers of the regulations. *New England Power Generators Association v. Department of Environmental Protection*, No. SJC-12477 (Mass.).

Sierra Club Challenge to California Warehouse Facility Included Allegations of Failure to Consider Greenhouse Gas and Energy Impacts

Sierra Club filed a lawsuit in California Superior Court claiming that the City of Fontana did not comply with the California Environmental Quality Act when it approved the Southwest Fontana Logistics Project, which involves development of two industrial warehouse buildings totaling approximately 1.6 million square feet on 73.3 acres. Sierra Club asserted, among other things, that the City failed to adequately analyze potential greenhouse gas emission impacts and failed to consider or adopt feasible mitigation measures for significant greenhouse gas impacts. The petition alleged that the City failed to require sufficient analysis of the project's energy consumption and transportation energy impacts and failed to demonstrate that the project would take steps to reduce dependency on fossil fuels. *Sierra Club v. City of Fontana*, No. CIVDS 1804385 (Cal. Super. Ct., filed Feb. 22, 2018).

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FEATURED CASE

New York Federal Court Dismissed Exxon's Lawsuit Claiming Attorney General Investigations Violated Its Constitutional Rights

The federal district court for the Southern District of New York dismissed Exxon Mobil Corporation's action against the New York and Massachusetts attorneys general. Exxon alleged that the investigations of the attorneys general into Exxon's climate change-related disclosures were part of a conspiracy to "silence and intimidate one side of the public policy debate on how to address climate change." Exxon asserted that the attorneys general had violated its constitutional rights, and that the investigations were preempted, violated the dormant Commerce Clause, and constituted common law abuse of process. The court found that "Exxon's allegations that the [attorneys general] are pursuing bad faith investigations in order to violate Exxon's constitutional rights are implausible and therefore must be dismissed for failure to state a claim." The court also found that Exxon had not plausibly alleged essential elements of a dormant Commerce Claim and that its preemption claim also failed. In addition, the court found

that it had personal jurisdiction over the Massachusetts attorney general but that res judicata barred the claims against her, based on an ongoing proceeding in Massachusetts state court. *Exxon Mobil Corp. v. Schneiderman*, No. 1:17-cv-02301 (S.D.N.Y. Mar. 29, 2018).

DECISIONS AND SETTLEMENTS

Montana Federal Court Said Some Climate Change Analyses for Powder River Basin Resource Management Plans Were Inadequate

The federal district court for the District of Montana found that the U.S. Bureau of Land Management (BLM) had violated the National Environmental Policy Act when it approved Resource Management Plans (RMPs) for two field offices in the Powder River Basin. The court said BLM should have considered alternatives that would decrease the amount of extractable coal available for leasing based on climate change concerns. The court also said BLM was required to consider "the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs" and not defer such analysis until the leasing stage, and that BLM had based its assessment of methane pollution on outdated science and a scientifically inappropriate time horizon. The court deferred, however, to BLM's assessment of cumulative greenhouse gas impacts, rejecting the plaintiffs' assertion that BLM should have been required to use a metric such as a "global carbon budget" or "social cost of carbon protocol" as the standard for measuring cumulative climate impacts. The court also upheld BLM's consideration of methane mitigation measures and its reliance on national ambient air quality standards in its air quality analysis. *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, No. 4:16-cv-00021 (D. Mont. Mar. 26, 2018).

California Federal Court Remanded San Mateo, Marin, and Imperial Beach Climate Cases to State Court; Fossil Fuel Companies Filed Notice of Appeal

The federal district court for the Northern District of California remanded to state court the lawsuits brought by the Counties of San Mateo and Marin and the City of Imperial Beach against fossil fuel companies for damages arising from climate change. Citing the Supreme Court's and Ninth Circuit's decisions that the Clean Air Act displaced federal common law claims seeking abatement of greenhouse gas emissions (*American Electric Power Co. v. Connecticut*) and federal common law claims seeking damages for defendants' contributions to climate change (*Native Village of Kivalina ExxonMobil Corp.*), the district court concluded that the Clean Air Act also displaced federal common law in these three cases. The court disagreed with the determination in the Oakland and San Francisco cases that federal common law could apply to the claims in these cases because the claims were materially different from the damages claims in *Kivalina*. The court stated: "Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists." The court also rejected other bases for removal, including the doctrine of complete preemption; jurisdiction based on the presence of a specific issue of federal law that must necessarily be resolved to adjudicate state law claims (*Grable* jurisdiction); and specialized statutory provisions cited by the defendants (the Outer Continental Shelf Lands Act, federal officer removal, and bankruptcy removal). The court stayed the remand order for 42 days. On March 26, the defendants filed a notice of appeal and

moved for a stay pending appeal. They argued that all facets of the remand order were appealable as of right because removal was based in part on the federal officer removal statute. The defendants also asserted that appellate review of the remand order was the "only avenue for immediate appellate review of these important and complex questions of federal jurisdiction" since Oakland and Francisco had elected not to seek interlocutory review of the denial of remand in their cases. *County of San Mateo v. Chevron Corp.*, No. 17-cv-04929 (N.D. Cal. order denying remand Mar. 16, 2018; notice of appeal and motion to stay Mar. 26, 2018; opposition to motion to stay Apr. 2, 2018).

Massachusetts Court Acquitted Pipeline Protesters by Reason of Necessity

The Climate Disobedience Center announced on March 27, 2018 that a Massachusetts district court had acquitted—based on a necessity defense—13 defendants arrested in 2016 while protesting the West Roxbury Lateral Pipeline. The Climate Defense Project, one of the organizations whose attorneys represented the defendants, said the defense had prepared for a full trial in which they would mount a climate necessity defense—relying on experts including climate scientist James Hansen and the founder of 350.org, Bill McKibben—but that the prosecutor had reduced charges of trespass and disorderly conduct to civil infractions that did not require a trial. The Climate Disobedience Center said the judge nevertheless allowed each defendant to testify regarding the necessity of their actions. The Center has posted the official court audio here. *Massachusetts v. West Roxbury Protesters* (Mass Dist. Ct. Mar. 27, 2018).

Fifth Circuit Said District Court Erred in Enjoining Construction of Bayou Bridge Pipeline

The Fifth Circuit Court of Appeals stayed a preliminary injunction barring construction work on the Bayou Bridge Pipeline, a crude oil pipeline in Louisiana. The Fifth Circuit said a stay was warranted because the pipeline developer was likely to succeed on the merits of its claim that a Louisiana federal district court abused its discretion in granting the preliminary injunction. The Fifth Circuit said the district court should have allowed the case to proceed on the merits and sought additional briefing from the U.S. Army Corps of Engineers on the "limited deficiencies" the d03/istrict court identified in the Corps' analysis, which were related to the effectiveness of wetlands mitigation measures and cumulative impacts. One judge dissented, writing that he would have denied the developer's emergency motion for a stay. *Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*, No. 18-30257 (5th Cir. Mar. 15, 2018).

Fourth Circuit Dismissed Challenge to Atlantic Coast Pipeline for Lack of Jurisdiction as FERC Considered Rehearing Request

The Fourth Circuit Court of Appeals dismissed proceedings challenging the Federal Energy Regulatory Commission's (FERC) approval of the Atlantic Coast pipeline, a 604-mile gas pipeline extending from West Virginia to North Carolina. The court said it lacked jurisdiction to consider the appeal of the pipeline approval, for which FERC was still considering a rehearing request in which citizen groups argued, among other things, that FERC failed to adequately assess greenhouse gas emissions and climate change impacts. The Fourth Circuit also denied a motion for a stay and a separate petition for a writ staying FERC's order. *Appalachian Voices v.*

Federal Energy Regulatory Commission, No. 18-1114 (4th Cir. order Mar. 21, 2018); *In re Appalachian Voices*, No. 18-1271 (4th Cir. order Mar. 21, 2018).

Second Circuit Upheld FERC Determination That New York Department of Environmental Conservation Waived Authority to Provide Water Quality Certification for Pipeline

The Second Circuit Court of Appeals dismissed the New York State Department of Environmental Conservation's (NYSDEC's) appeal of FERC orders determining that NYSDEC waived its authority to provide a water quality certification under Section 401 of the Clean Water Act for a 7.8-mile natural gas pipeline that connects a new power plant to an existing interstate pipeline. The pipeline's developer submitted its request for certification in November 2015, and NYSDEC twice requested additional information to complete the application; in August 2016, the developer submitted responses to the second request. NYSDEC denied the pipeline developer's request for certification in August 2017, citing FERC's failure to adequately consider greenhouse gas impacts in its environmental review. The Second Circuit agreed with FERC that Section 401 required NYSDEC to act on the request for a certification within one year of receipt of the request, and that this time limit did not apply only for "complete" applications. The Second Circuit also rejected a challenge by intervenors to FERC's jurisdiction over the pipeline; the court said the 7.8-mile pipeline was part of an "integrated system" to transport gas in interstate commerce even though it was located entirely within New York. *New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*, No. 17-3770 (2d Cir. Mar. 12, 2018).

Ninth Circuit Declined to Intervene in Young People's Climate Change Case Against Federal Government

The Ninth Circuit Court of Appeals ruled on March 7 that the United States and other federal petitioners had not met the "high bar" for the appellate court to order a district court to dismiss the climate change lawsuit brought by 21 young people in the District of Oregon. The Ninth Circuit found that the issues raised by the petitioners—the threat of burdensome discovery and concerns regarding separation of powers—were "better addressed through the ordinary course of litigation." The Ninth Circuit said the request for relief from potentially burdensome discovery was "entirely premature" because the district court had not issued a single discovery order and the plaintiffs had not filed a single motion to compel discovery. The Ninth Circuit also said it was "not persuaded that simply allowing the usual legal processes to go forward" would threaten the separation of powers. The opinion noted that Congress had not exempted the government from the normal rules of appellate procedure, "which anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them." In addition, the Ninth Circuit found that the conceded absence of controlling precedent weighed strongly against finding clear error in the district court's denial of the motion to dismiss. The Ninth Circuit also said that the novelty of the issues presented did not warrant the relief sought because the denial of the motion to dismiss did not present a risk that the issues would evade appellate review. *United States v. United States District Court for District of Oregon*, No. 17-71692 (9th Cir. Mar. 7, 2018).

Texas Federal Court Dismissed ERISA Class Action Lawsuit Against Exxon That Alleged Breaches of Fiduciary Duties Related to Climate Disclosures

The federal district court for the Southern District of Texas dismissed a class action lawsuit alleging that Exxon Mobil Corporation (Exxon) and certain senior Exxon officials breached fiduciary duties under the Employee Retirement Income Security Act (ERISA) by making materially false and misleading statements that failed to disclose known climate change risks. The court said the plaintiffs failed to state a "duty of prudence" claim because of shortcomings in the plaintiffs' allegations that the defendants had insider information and should have known that the market price was based on materially false or misleading information. For instance, while Exxon's "decades-long misinformation campaign about the causes and effects of climate change should not be understated," the amended complaint provided no basis for believing that risks posed by climate change were not incorporated into Exxon's stock price. The court also said the plaintiffs had not alleged facts to show why the price of carbon used by Exxon was a misrepresentation or did not account for the regulatory landscape. In addition, the court found that even if there were sufficient allegations that the defendants knew the company's hydrocarbon reserves were overvalued before they wrote them down, the plaintiffs had not plausibly alleged alternative actions the defendants could have taken to benefit the retirement funds. *Fentress v. Exxon Mobil Corp.*, No. 4:16-cv-3484 (S.D. Tex. Mar. 30, 2018).

Alaska Federal Court Allowed Plaintiffs to Proceed with Lawsuit Challenging Reversal of Obama's Withdrawal of Arctic Coastal Areas from Oil and Gas Leasing

The federal district court for the District of Alaska denied motions to dismiss an action challenging President Trump's executive order reversing President Obama's withdrawals of coastal areas in the Arctic's Beaufort and Chukchi Seas from oil and gas leasing. The court said the doctrine of sovereign immunity did not apply because the plaintiffs asserted that President Trump acted beyond the powers delegated to him by the Outer Continental Shelf Lands Act (OCSLA) and under the Constitution. The court also concluded that plaintiffs did not need express congressional authorization to bring their claims under the OCSLA and the Constitution's Property Clause and that restrictions on the declaratory relief that courts could issue against the president did not warrant dismissal of the entire action. In addition, the court found that the plaintiffs had adequately alleged standing and that OCSLA did not require that the action be brought in the D.C. Circuit. *League of Conservation Voters v. Trump*, No. 3:17-cv-00101 (D. Alaska Mar. 19, 2018).

After California Federal Court Stopped BLM from Postponing Effective Dates of Waste Prevention Rule, Wyoming Federal Court Stayed Rule's Implementation

On April 4, 2018, the federal district court for the District of Wyoming stayed implementation of "phase-in provisions" of the U.S. Bureau of Land Management's Waste Prevention Rule and stayed the pending actions challenging the Rule pending BLM's finalization of a revised rule. The Waste Prevention Rule, adopted by the Obama administration in 2016, restricts the venting and flaring of methane associated with oil and gas development on public and tribal lands. In December 2017, the Wyoming federal court stayed challenges to the Rule, citing BLM's suspension of certain effective dates and BLM's ongoing reconsideration and review of the Rule.

In February, the federal district court for the Northern District of California enjoined enforcement of BLM's suspension of the effective dates. On March 7, the Wyoming federal court lifted its stay and ordered briefing on three pending motions: one to establish an expedited schedule for merits briefing, one to suspend implementation of certain provisions of the Waste Prevention Rule, and one to grant a preliminary injunction or vacatur of certain provisions of the rule. In its April 4 order, the Wyoming federal court noted that BLM's proposed revisions to the Rule would substantially change the phase-in regulations that were at the "heart" of this litigation and that "[t]o force temporary compliance with those provisions makes little sense and provides minimal public benefit, while significant resources may be unnecessarily expended." The court said that "to preserve the status quo, and in consideration of judicial economy and prudential ripeness and mootness concerns," a stay of the phase-in provisions and the challenges to the Rule while BLM completed its rulemaking was the "most appropriate and sensible approach." *Wyoming v. U.S. Department of the Interior*, No. 2:16-cv-00285 (D. Wyo. order Mar. 7, 2018; clarification Mar. 12, 2018; stay order Apr. 4, 2018).

BLM Dropped Appeal of Decision Requiring Notice-and-Comment Rulemaking for Postponement of Compliance Dates

In a separate development related to the Waste Prevention Rule, BLM and other federal defendants-appellants moved to voluntarily dismiss their appeal of the October 2017 decision of the federal district court for the Northern District of California vacating BLM's initial rule postponing certain compliance dates. The district court held that BLM had acted outside its authority to postpone the effective date of a rule and that BLM should have complied with the Administrative Procedure Act's notice-and-comment rulemaking requirements. *California v. U.S. Bureau of Land Management*, No. 17-17456 (9th Cir. motion to voluntarily dismiss appeal Mar. 14, 2018).

New Mexico Supreme Court Upheld Plan to Replace Generation from Retired Coal-Fired Units with Nuclear Generation and Coal Power from Different Unit

The New Mexico Supreme Court upheld the New Mexico Public Regulation Commission's approval of a contested stipulation allowing a utility to replace generation from two units at a coal-fired power plant that were being retired with generation from another coal-fired unit at the power plant and with generation from a nuclear plant. The court was not persuaded by the arguments of the appellant—a non-profit organization founded to "build a carbon-free energy future for our health and the environment"—that the utility had failed to consider less costly and less risky renewable resources as replacement generation and that the costs assigned to solar and wind generation facilities were inappropriate. The court said it would not second-guess a hearing examiner's findings on these issues. *New Energy Economy, Inc. v. New Mexico Public Regulation Commission*, No. S-1-SC-35697 (N.M. Mar. 5, 2018).

California Appellate Court Agreed That CEQA Exemption for Parking Impacts Applied to Development Near Commuter Rail

The California Court of Appeal upheld the City of Covina's approval of a 68-unit mixed-use infill project located a quarter-mile from a commuter rail station. The court agreed with the City

that the project's parking impacts were exempt from California Environmental Quality Act review under a statutory exemption enacted in 2013 that provided that aesthetic and parking impacts of certain types of development on infill sites in transit priority areas are not considered significant impacts on the environment. The court noted that the statutory exemption was part of a bill "to further the Legislature's strategy of encouraging transitoriented, infill development consistent with the goal of reducing greenhouse gases." *Covina Residents for Responsible Development v. City of Covina*, No. B279590 (Cal. Ct. App. Feb. 28, 2018).

New York Appellate Court Upheld Attorney General's Withholding of Records Related to Meetings Related to Exxon Climate Change Investigation

The New York Appellate Division ruled that the New York attorney general met its burden of establishing that it had properly withheld records related to meetings with representatives of outside organizations in 2015 that concerned the attorney general's investigation of ExxonMobil Corporation's climate change disclosures. The appellate court upheld the attorney general's determination that the records were exempt from disclosure under New York's Freedom of Information Law because they were compiled for law-enforcement purposes. The court did not consider whether the documents would also be exempt as intra-agency materials. *Free Market Environmental Law Clinic v. Attorney General of New York*, No. 5927 (N.Y. App. Div. Mar. 8, 2018).

New York Trial Court Said Attorney General Properly Withheld Documents Related to Exxon Climate Change Investigation

A New York trial court dismissed a Freedom of Information Law (FOIL) lawsuit against the New York attorney general in which the Energy & Environment Legal Institute sought to compel disclosure of email correspondence related to the attorney general's investigation of ExxonMobil Corporation's public statements regarding climate change. The court concluded the attorney general had properly invoked FOIL's statutory exemptions for disclosures that would interfere with law enforcement investigations, for inter- and intra-agency materials, and for records "specifically exempted from disclosure by state or federal statute" (in this case, attorney-client communications that contained "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making"). The court said the attorney-client exemption applied whether the attorney was a government attorney or outside counsel retained by the attorney general. *Energy & Environment Legal Institute v. Attorney General of New York*, No. 101678/2016 (N.Y. Sup. Ct. Mar. 8, 2018).

NEW CASES, MOTIONS, AND NOTICES

Manufacturers of HFC Substitutes Granted Extension for Filing of Certiorari Petition

On March 8, 2018, Chief Justice John Roberts granted an application by Honeywell International Inc. and The Chemours Company FC, LLC for a 60-day extension of time (until June 25) within which to file a petition for a writ of certiorari seeking review of the D.C. Circuit ruling that partially struck down the U.S. Environmental Protection Agency's (EPA's) regulation that barred uses of certain hydrofluorocarbons that contribute to climate change. Honeywell and

Chemours said they had "invested heavily to invent new substitutes for ozone-depleting substances; these new substitutes have a dramatically lower global warming potential than HFCs." *Honeywell International Inc. v. Mexichem Fluor Inc.*, No. 17A933 (U.S. application filed Mar. 5, 2018 and application granted Mar. 8, 2018).

Fossil Fuel Companies Asked Federal Court to Dismiss Oakland and San Francisco Climate Change Nuisance Lawsuits; Cities Amended Complaints; Court Held Climate Change Tutorial, Accepted Timely Amicus Contributions

On the eve of a climate change tutorial requested by a federal judge in California, fossil fuel companies filed motions to dismiss the nuisance lawsuits brought by San Francisco and Oakland. The five named defendants joined in a motion to dismiss for failure to state a claim. First, they argued that Congress had displaced federal common law claims based on domestic activities, whether those activities involved combustion of fossil fuels (in which case the Clean Air Act displaced federal common law) or production and promotion of fossil fuels (in which case "many federal statutes … expressly regulate (and, in fact, encourage) such conduct"). The defendants also argued that federal common law principles would not support recognition of a claim based on the defendants' foreign activities. Second, the fossil fuel companies argued that elements of a federal common law claim for public nuisance were absent. The defendants also argued that damages would violate the defendants' due process and First Amendment rights. Finally, the defendants asserted that judicial relief would violate separation of powers by invading the executive branch's authority to conduct foreign affairs and legislative authority to regulate interstate and foreign commerce. Four of the defendants filed separate motions to dismiss on personal jurisdiction grounds, arguing that the court could not exercise either general jurisdiction over the companies—two of which were non-U.S. companies and two of which were headquartered in Texas and incorporated in other states (one in New Jersey, one in Delaware)—or specific jurisdiction based on the companies' alleged activities in and contacts with California.

On March 27, the court issued a notice directing the parties to address four issues in the remainder of the briefing on the motion to dismiss for failure to state a claim: (1) all state and federal court decisions sustaining and rejecting a nuisance theory of liability "based on the otherwise lawful sale of a product where the seller financed and/or sponsored research or advertising intended to cast doubt on studies showing that use of the product would harm public health or the environment at large"; (2) all state and federal court decisions addressing a nuisance theory of liability in the context of global warming; (3) the extent to which the *Noerr-Pennington* doctrine (pursuant to which antitrust violations cannot be predicated on attempts to influence public officials or the passage or enforcement of laws) may apply; and (4) if the plaintiffs' theory of liability based on questioning or sponsoring research to question global warming science is correct, why everyone involved in supplying carbon-based fuels or otherwise involved in increasing carbon dioxide would not be liable if they questioned the science or sponsored research intending to question it.

On March 30, the plaintiffs filed a notice that they would amend their complaint, and on April 3 they filed the first amended complaint, which asserts nuisance claims under both federal and California law. The court has deemed the earlier motions to dismiss withdrawn, and new motions

to dismiss are due on April 19. Briefing on the motions to dismiss is to be completed by May 10, and a hearing was scheduled for May 24.

Other developments in the Oakland and San Francisco public nuisance cases included the climate tutorial convened by Judge William Alsup on March 21. Two weeks before the tutorial, Judge Alsup provided the parties with a list of "Some Questions for the Tutorial." Several scientists presented on behalf of the plaintiffs. An attorney for Chevron Corporation, the only defendant that did not contest personal jurisdiction, presented on behalf of the defendants. After the tutorial, the court issued a notice directing the other four defendants to "submit a statement explaining any disagreements with the statements" of Chevron's counsel at the tutorial. Chevron's presentation at the tutorial is available here. The cities' materials are available at the following links: curricula vitae, presentation on answers to Judge Alsup's questions, presentation on "Understanding how carbon dioxide emissions from human activity contribute to global climate change," presentation on Fourth National Climate Assessment, presentation on sea level rise, and presentation on history of climate change.

The court accepted two sets of amicus materials that it received before the tutorial. One was an amicus brief submitted by individuals who described themselves as "an international team of scientific researchers concerned that scientific questions should be answered scientifically, rationally, dispassionately and logically, who have been investigating climate change for up to 12 years, and have intensively studied the question how much global warming we may cause." The second amicus material accepted by the court was a presentation submitted by three professors, William Happer, Steven E. Koonin, and Richard S. Lindzen. The court denied a third amicus motion by the Concerned Household Electricity Consumers Council because the motion was submitted after the start of the tutorial and the parties did not have an opportunity to address it. *People of State of California v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal.).

Department of Energy and Trade Association Appealed and Sought Stay of Court Order Requiring Publication of Energy Conservation Standards

The U.S. Department of Energy (DOE) and the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) appealed a California federal court's February order requiring DOE to publish final energy conservation standards for for portable air conditioners, air compressors, commercial packaged boilers, and uninterruptible power supplies. DOE and AHRI also asked the district court to stay the order pending appeal, arguing that manufacturers would be harmed by having to incur costs to comply with the standards, and that temporarily delaying the regulations would cause the plaintiffs minimal harm. The plaintiffs—environmental and consumer groups and states—argued that delaying the emissions reductions that would result from the implementation of the standards would harm the plaintiffs and the public. The district court denied the stay motions on March 13 (DOE) and March 30 (AHRI). DOE must submit the regulations for publication by April 10. Emergency motions by DOE and AHRI for a stay are currently pending in the Ninth Circuit. *Natural Resources Defense Council, Inc. v. Perry*, Nos. 3:17-cv-03404, 3:17-cv-03406 (N.D. Cal.), Nos. 18-15380 & 18-15475 (9th Cir.).

FERC Reauthorized Southeast Market Pipelines Project After D.C. Circuit Allowed FERC More Time to Complete Review on Remand

After denying rehearing of its decision ordering additional environmental review of greenhouse gas emissions associated with the Southeast Market Pipelines Project, the D.C. Circuit on March 7 granted FERC's motion to stay issuance of the mandate. The D.C. Circuit ordered that the mandate be withheld through March 26, 2018. The D.C. Circuit denied the pipeline developer's motion for a longer stay. On March 14, FERC issued an order reinstating the certificate of public convenience and necessity for the project. FERC said its quantification of downstream greenhouse gas emissions did not alter its conclusion that the project was an environmentally acceptable action. FERC's supplemental environmental impact statement concluded that there was no way to determine the significance of the project's emissions using either the social cost of carbon tool—which FERC said was "not useful in determining whether, and under what conditions, to authorize a proposed natural gas transportation project"—or other methodologies. Two FERC commissioners dissented: one commissioner agreed that the project was in the public interest but said FERC needs to "more squarely address" greenhouse gas emissions and the social cost of carbon; the other dissenting commissioner said that FERC's order on remand failed to provide a "reasoned answer" to the inquiries required by the D.C. Circuit's August 2017 decision. On March 23, FERC informed the D.C. Circuit that it had issued its order on remand. *Sierra Club v. Federal Energy Regulatory Commission*, No. 16-1329 (D.C. Cir. Mar. 7, 2018).

FOIA Action Filed Seeking Communications Between EPA and Heartland Institute

Southern Environmental Law Center and Environmental Defense Fund filed a filed a Freedom of Information Act (FOIA) action against the U.S. Environmental Protection Agency (EPA) for allegedly failing to respond to requests for EPA's communications with the Heartland Institute, a non-profit think tank "with the self-described aim of promoting 'free-market solutions to social and economic problems.'" The complaint alleged that Heartland had recommended that the Trump administration take a number of actions to halt or reverse climate change initiatives and that EPA had reached out to Heartland for help identifying scientists to participate in a potential "red team/blue team" exercise to review climate science. The plaintiffs said reports of the correspondence between EPA and Heartland about the red team/blue team exercise had "surfaced through unofficial channels," but that "the public remains in the dark about the extent of those communications and any other topics that may have been addressed." *Southern Environmental Law Center v. EPA*, No. 3:18-cv-00018 (W.D. Va., filed Mar. 15, 2018).

Center for Biological Diversity Sought Records Regarding Status of U.S. Climate Action Report

The Center for Biological Diversity (CBD) filed a Freedom of Information Act lawsuit against the U.S. Department of State to compel a response to CBD's request for records regarding the preparation and production of the "overdue" seventh U.S. Climate Action Report. CBD alleged the U.S. was required to submit the report to the secretariat of the United Nations Framework Convention on Climate Change by January 1, 2018. On February 1, CBD submitted a FOIA request seeking a number of categories of records related to the delay and to the content and status of the report. *Center for Biological Diversity v. U.S. Department of State*, No. 1:18-cv-00563 (D.D.C., filed Mar. 13, 2018).

Center for Biological Diversity Challenged Decision Not to List Pacific Walrus as Endangered or Threatened

The Center for Biological Diversity filed a lawsuit in federal district court for the District of Alaska asserting that the U.S. Fish and Wildlife's decision not to list the Pacific walrus as a threatened or endangered species violated the Endangered Species Act. CBD alleged that best available science showed that massive loss of sea ice habitat due to climate change threatened the species's continued existence and was already having negative effects on the animals. CBD asserted five claims for relief under the Endangered Species Act and Administrative Procedure Act: failure to explain a change in position from the Service's 2011 conclusion that the Pacific walrus warranted protection; improper "foreseeable future" analysis based on the year 2060 when best available science provided projections of sea ice loss through 2100; failure to consider best available scientific data and reaching conclusions contrary to such data; improper and inconsistent treatment of scientific uncertainty; and failure to conduct a proper listing analysis. *Center for Biological Diversity v. Zinke*, No. 3:18-cv-00064 (D. Alaska, filed Mar. 8, 2018).

Arizona Board of Regents Gave Notice That It Would Appeal Trial Court Decisions Ordering Disclosure of Climate Scientists' Emails

The Arizona Board of Regents filed notice that it would appeal trial court decisions requiring disclosure of emails of two climate scientists at the University of Arizona pursuant to Arizona's public records law. This appeal will be the third time the case has reached the Arizona Court of Appeals. In the first appeal, the appellate court said the trial court applied the wrong standard of review when it upheld the withholding of the emails. After the trial court ordered production of the emails on remand, the appellate court said in the second appeal that the trial court's ruling failed to account for various exemptions from disclosure in the public records law. *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. C2013-4963 (Ariz. Super. Ct. Mar. 27, 2018).

Environmental Groups Challenged New San Diego County Climate Action Plan

Sierra Club and other organizations commenced challenges to a revised Climate Action Plan adopted by San Diego County in 2018. In one case, Sierra Club filed a third amended petition asserting that the County had failed to comply with earlier judicial directives requiring, among other things, that the Climate Action Plan contain enforceable measures to reduce greenhouse gas emissions. Sierra Club and six other groups also filed a new lawsuit seeking to set aside certain portions of the revised Climate Action Plan and the supplemental environmental impact report on which it was based, and also to set aside a threshold of significance established by the County that the petitioners alleged would allow development not contemplated by a 2011 General Plan Update, so long as developers obtained offsets, which could be obtained out of state or even outside of the country. In the new lawsuit, the petitioners asserted that this "offshoring of GHG emissions offsets" had been done without proper review under the California Environmental Quality Act. *Sierra Club v. County of San Diego*, No. 37-2012-00101054-CU-TT-CTL (Cal. Super. Ct. third supplemental petition for writ of mandate Mar. 16, 2018); *Sierra Club v. County of San Diego*, No. __ (Cal. Super. Ct., filed Mar. 16, 2018).

ExxonMobil Argued That California Municipalities and Officials Would Be Subject to Texas Court's Personal Jurisdiction

Exxon Mobil Corporation (ExxonMobil) argued to a Texas state court that it should deny special appearances filed by potential defendants and witnesses in ExxonMobil's possible lawsuit against California cities and counties that have filed lawsuits seeking to hold ExxonMobil and other fossil fuel companies liable for climate change damages. The potential defendants in ExxonMobil's threatened lawsuit also include officials and lawyers for the California cities and counties. ExxonMobil argued to the court that if it brought its lawsuit alleging constitutional violations, abuse of process, and civil conspiracy, the defendants would be subject to the court's personal jurisdiction because they had committed intentional torts in Texas. *In re Exxon Mobil Corp.*, No. 096-297222-18 (Tex. Dist. Ct. Mar. 1, 2018).

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FEATURED CASE

Federal Court Denied Oakland and San Francisco Motions to Return Climate Change Nuisance Cases to State Court; Found Federal Common Law of Nuisance Could Apply, Despite *AEP v. Connecticut*; Requested "Tutorial" on Climate Change

The federal district court for the Northern District of California denied Oakland's and San Francisco's motions to remand their climate change public nuisance lawsuits against five major fossil fuel producers to state court. The court held that federal common law necessarily governed the nuisance claims because "[a] patchwork of fifty different answers to the same fundamental global issue would be unworkable" and "the extent of any judicial relief should be uniform across our nation." The court stated: "Plaintiffs' claims for public nuisance, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available." The court dispensed with the cities' three primary arguments for remanding the cases. First, the court said the cities' novel theories of liability based on the defendants' sales of their product did not differentiate their claims from earlier transboundary pollution suits in which the Supreme Court (*American Electric Power Co. v. Connecticut*) and Ninth Circuit (*Native Village of Kivalina v. ExxonMobil Corp.*) applied federal common law. Second, the court said the Clean Air Act did not displace the plaintiffs' federal common law claims, allowing state law to govern; the court said that while the Clean Air Act spoke directly to the "domestic emissions" issues presented in *American Electric Power* and *Kivalina*, "[h]ere, the Clean Air Act does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law." Third, the court said the well-pleaded complaint rule did not bar removal. The court certified the decision for interlocutory appeal, finding that the issue of whether the nuisance claims were removable because such claims are governed by federal common law was a controlling question as to which there is substantial ground for difference of opinion and that resolution by the court of appeals would materially advance the litigation. The court's order also noted that six similar actions brought by other California municipalities were

pending before another judge in the district and those actions asserted additional non-nuisance claims. On March 1, the court set a schedule for motions to dismiss, with the parties' briefing to be completed by April 10. The court invited the United States to submit (by April 20, if possible) "an amicus brief on the question of whether (and the extent to which) federal common law should afford relief of the type requested by the complaints."

Separately, the court issued a "Notice re Tutorial" that invited counsel for the parties to conduct a two-part tutorial on global warming and climate change on March 21. The court gave each side an hour to "trace the history of scientific study of climate change" and an hour to "set forth the best science now available on global warming, glacier melt, sea rise, and coastal flooding."

Earlier in February, the court issued a request for supplemental briefing on the issue of how the concept of "navigable waters of the United States" related to removal jurisdiction. The court stated that the issue arose "because a necessary and critical element of the hydrological damage caused by defendants' alleged conduct is the rising sea level along the Pacific coast and in the San Francisco Bay, both of which are navigable waters of the United States." In its order denying remand, the court indicated in dicta that "the very instrumentality of plaintiffs' alleged injury — the flooding of coastal lands — is, by definition, the navigable waters of the United States. Plaintiffs' claims therefore necessarily implicate an area quintessentially within the province of the federal courts." The court said defendants had not waived this issue. *People of State of California v. BP p.l.c.*, No. 3:17-cv-06012 (N.D. Cal. order setting schedule Mar. 1, 2018; order denying remand and notice re tutorial Feb. 27, 2018; request for supplemental briefing Feb. 12, 2018).

DECISIONS AND SETTLEMENTS

Ninth Circuit Reinstated Listing of Arctic Ringed Seals as Threatened

The Ninth Circuit Court of Appeals reversed a district court decision that vacated the listing of the Arctic ringed seal as threatened under the Endangered Species Act (ESA). In an unpublished decision, the Ninth Circuit said its 2016 opinion reversing a district court's striking down of the listing of the bearded seal adjudicated the same issues and was the controlling law of the circuit. As in that case, the Ninth Circuit found that the National Marine Fisheries Service's finding that the Arctic ringed seal was likely to become endangered within the foreseeable future due to their reliance on sea ice was reasonable and supported by the record. The court said it was not arbitrary or capricious to rely on climate change models that projected through 2100. The Ninth Circuit also said the district court had misapplied Section 4 of the ESA by requiring quantitative data that was not available to pinpoint an extinction threshold. *Alaska Oil & Gas Association v. Ross*, No. 16-35380, 16-35382 (9th Cir. Feb. 12, 2018).

Louisiana Federal Court Halted Work on Crude Oil Pipeline in Swamp Area

The federal district court for the Middle District of Louisiana enjoined work on the Bayou Bridge Pipeline in the Atchafalaya Basin in Louisiana. The planned pipeline is to be 162.5 miles long and is intended to carry crude oil. The plaintiffs' complaint asserting National Environmental Policy Act (NEPA), Clean Water Act, and Rivers and Harbors Act violations

included allegations that the U.S. Army Corps of Engineers had failed to analyze climate impacts and that floodplain and coastal loss impacts had not been considered as part of the required "public interest" analysis. The court found that the plaintiffs had established the threat of irreparable harm, including loss of legacy trees in the cypress forest swamp that the pipeline would cross, threats to the Atchafalaya Basin's hydrology, and potential destruction of already diminishing wetlands. The court also found that the plaintiffs had demonstrated a likelihood of success on the merits of their claims that environmental assessment documents did not provide assurance that the mitigation plan would be successful in achieving the Clean Water Act's restorative goals and that the Corps' review did not adequately assess cumulative impacts. The pipeline's developer said it would appeal the ruling and asked the district court for a stay pending appeal. *Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*, No. 3:18-cv-00023 (M.D. La. motion for stay pending appeal Mar. 1, 2018; ruling Feb. 27, 2018).

California Federal Court Upheld Environmental Law Waivers for Border Wall

The federal district court for the Southern District of California rejected challenges to waivers of environmental laws granted by the Department of Homeland Security (DHS) for certain types of border wall construction projects in San Diego County. DHS had waived the requirements of NEPA, the Endangered Species Act, the Coastal Zone Management Act, and other laws pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. California and the California Coastal Commission—the plaintiffs in one of the three actions challenging the waivers—alleged that impacts of the projects' construction on climate change were some of the impacts that would not be assessed as a result of the waivers. In its decision granting summary judgment to DHS and the other defendants, the court found that the defendants had not violated any "clear and mandatory" obligations in Section 102 and that in the absence of any such violations Section 102 established a jurisdictional bar to hearing any non-constitutional claims. The court rejected all of the plaintiffs' constitutional claims. The court found that Section 102 did not violate the non-delegation doctrine or separation of powers principles; the Take Care Clause; Article I, Sections 2 and 3; the Presentment Clause (Article I, Section 7); constitutional protections of rights to petition the government and the courts; or the Tenth Amendment. *In re: Border Infrastructure Environmental Litigation*, No. 17cv1215, 17cv1873, 17cv1911 (S.D. Cal. Feb. 27, 2018).

D.C. Federal Court Dismissed Challenge to Executive Order on Reducing Regulation

The federal district court for the District of Columbia concluded that it lacked jurisdiction to consider an action challenging President Trump's Executive Order on "Reducing Regulation and Controlling Regulatory Costs" because the plaintiffs had failed to establish that they had standing to sue. First, the court said the non-profit groups that were the plaintiffs in the action failed to establish "associational" standing based on harm to their members from the delay or preclusion of regulatory actions by the executive order. For instance, the court found that the Natural Resources Defense Council—which contended that one of its members suffered harm due to delay of "rules to curb climate change"—had not identified a particular rule or regulatory action that would address the member's concerns. The court stated: "Any injury allegedly stemming from the prospect that the Executive Order has delayed the issuance of unspecified regulations relating to a broadly defined area of concern is too abstract and speculative to support

standing." Second, the court found that the plaintiffs had failed to establish "organizational" standing. The court said the plaintiffs had failed to show they suffered an injury in fact based on the executive order's alleged "chilling effect" on their mission to encourage agencies to adopt regulations or that such an injury was fairly traceable to the executive order. *Public Citizen, Inc. v. Trump*, No. 1:17-cv-00253 (D.D.C. Feb. 26, 2018).

California Federal Court Barred BLM from Enforcing Delay of Oil and Natural Gas Waste Prevention Rule; States, Trade Groups Asked Wyoming Court to Expedite Review of Rule and Suspend Deadlines

The federal district court for the Northern District of California granted motions for a preliminary injunction barring the U.S. Bureau of Land Management (BLM) from enforcing its rule delaying and suspending the requirements of its Waste Prevention Rule, which is intended to "to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian (other than Osage Tribe) leases." The court found that BLM's reasoning for delaying the rule was "untethered to evidence contradicting the reasons for implementing the Waste Prevention Rule" and that plaintiffs were therefore likely to prevail on the merits. The court also found that the plaintiffs had demonstrated irreparable injury based on "the waste of publicly owned natural gas, increased air pollution and associated health impacts, and exacerbated climate impacts." The court also denied motions to transfer the action to the District of Wyoming, where a challenge to the Waste Prevention Rule is pending. The California federal court said the substantive legal issues in the District of Wyoming case were distinct from the procedural issues at issue in this action. A few days after the California court issued its order, North Dakota and Texas asked the Wyoming federal court to lift a stay that the court had imposed in December 2017. The two states said the circumstances providing a basis for the stay (i.e., BLM's expressed intent to change the regulations and its rule delaying the regulations' effectiveness) no longer existed after the California court granted the preliminary injunction. The states said the Wyoming federal court should complete its review and do so on an expedited basis to prevent harm to the parties even though BLM published a proposal to revise and rescind certain requirements of the rule on February 22. On February 28, Montana and Wyoming filed a motion seeking to lift the stay and also seeking immediate suspension of the Waste Prevention Rule's implementation deadlines. In addition, two trade groups asked the Wyoming court either to bar BLM from enforcing the rule's core provisions or to exercise its equitable powers to vacate the core provisions until BLM completed its rulemaking process. *California v. Bureau of Land Management*, No. 3:17-cv-07187 (N.D. Cal. Feb. 22, 2018); *Wyoming v. U.S. Department of the Interior*, No. 2:16-cv-00285 (D. Wyo. Feb. 26, 2018).

California Federal Court Ordered Publication of Obama-Era Energy Conservation Standards in *Federal Register*

The federal district court for the Northern District of California ordered the U.S. Department of Energy to publish energy conservation standards adopted in December 2016 that had never taken effect because DOE failed to publish them in the *Federal Register*. The standards are for portable air conditioners, air compressors, commercial packaged boilers, and uninterruptible power supplies. DOE estimated that the standards would reduce carbon dioxide emissions by 99 million metric tons and save consumers and businesses $8.4 billion over a 30-year period. The court

found that DOE's failure to publish the standards violated its non-discretionary duty under the Energy Policy and Conservation Act to publish an energy standard in the *Federal Register* at the end of an error-correction process specified in the regulations. The court rejected the argument the regulations preserved "free-standing authority" for DOE to continue to assess, modify, or withdraw energy standards or created only a discretionary obligation. *Natural Resources Defense Council, Inc. v. Perry*, No. 3:17-cv-03404 (N.D. Cal. Feb. 15, 2018).

California Federal Court Found Inadequate Analysis of Climate Change Impacts on Water Transfer Project Under NEPA But Said Analysis Satisfied CEQA Requirements

The federal district court for the Eastern District of California held that more analysis of the impacts climate change would have on a water transfer program for the Sacramento/San Joaquin Delta was required under NEPA. The court ruled, however, that the California Environmental Quality Act (CEQA) did not require additional climate change analysis. The plaintiffs had challenged the CEQA "baseline" for "fail[ing] to account for ongoing increases in global temperatures," but the court found that the plaintiffs did not develop the argument "in any serious way" and said it would not "manufacture an argument where none is made and where none exists." With respect to the analysis of impacts associated with climate change, the court noted the general rule under CEQA that an environmental impact report need not evaluate the impacts of the environment on a project and found that the plaintiffs had not met their burden of identifying evidence that the project would "exacerbate" climate change impacts. Under NEPA, however, the court said the parties appeared to be in agreement that climate change's impact on the project needed to be considered. The court found that the final environmental impact statement/report (FEIS/R) disclosed predicted declines in snowpack and streamflow due to climate change but failed to explain why the declines would not have significant impacts. The decision also addressed a number of non-climate change claims under NEPA, the Endangered Species Act, CEQA, and other state law. *AquAlliance v. U.S. Bureau of Reclamation*, No. 1:15-cv-00754 (E.D. Cal. Feb. 15, 2018).

California Court Set Aside Environmental Reviews for Plant Pest Prevention and Management Program but Rejected Argument that Agency Failed to Consider Greenhouse Gas and Other Impacts of Program Modifications

A California state court granted petitions to set aside a program environmental impact report (PEIR) and PEIR addendum for the Statewide Plant Pest Prevention and Management Program, but not on grounds related to the petitioners' arguments that the greenhouse gas impacts of modifications to the Program had not been assessed. The petitioners contended that the Department of Food and Agriculture's finding that a supplemental environmental impact report was not required for the modifications was not supported by substantial evidence because the Department had not considered whether the modifications would alter categories of impacts the PEIR identified as significant or potentially significant, including impacts on greenhouse gas emissions. The court said that it agreed with the Department on this front and found that the petitioners had failed to meet their burden. *North Coast Rivers Alliance v. California Department of Food & Agriculture*, No. 34-2015-80002005 (Cal. Super. Ct. judgment Feb. 22, 2018; consolidated ruling Jan. 8, 2018).

Arizona Court Ordered Production of Climate Scientists' Emails Under Arizona's Public Records Law

The Arizona Superior Court denied the Arizona Board of Regents' motion for a new trial and request for further proceedings and findings in accordance with mandate in Energy & Environment Legal Institute's lawsuit seeking to compel disclosure of the emails of two climate scientists at the University of Arizona. The court ordered the Board of Regents to produce all requested records within 90 days. *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. C20134963 (Ariz. Super. Ct. Feb. 26, 2018).

Stanford Professor Withdrew Defamation Lawsuit Against Author and Publisher of Article That Critiqued Professor's Article

Stanford Professor Mark Jacobson withdrew his lawsuit against the lead author and publisher of an article that critiqued an article by Jacobson and others on grid reliability and renewable energy. Jacobson's lawsuit asserted defamation, breach of contract, and promissory estoppel claims. On the day he withdrew the lawsuit, Jacobson released a statement on "Questions and Answers Concerning the Lawsuit Around The Paper PNAS 114, 6722-6727 (2017) (hereinafter C17)" in which he said he withdrew the lawsuit because of the time it would take to prosecute it and because he felt he had succeeded in bringing some of the defendant author's allegedly false claims to light "so that at least some people reading C17 will be aware of the factually inaccurate statements." *Jacobson v. Clack*, No. 2017 CA 006685 B (D.C. Super. Ct. notice of dismissal and statement Feb. 22, 2018).

West Virginia Court Dismissed Defamation Suit Against John Oliver Brought by Coal Executive and His Companies

A West Virginia state court notified counsel that it would dismiss the lawsuit brought by coal executive Robert E. Murray and some of his coal companies against the comedian John Oliver and other defendants involved in the production and broadcasting of Oliver's television show *Last Week Tonight*. The plaintiffs asserted claims of defamation, false light invasion of privacy, and intentional infliction of emotional distress on the grounds that the defendants knowingly broadcast in a June 2017 episode malicious statements that they knew to be false based on information provided by the plaintiffs. The court adopted, "with little exception," the arguments in the defendants' motion to dismiss for failure to state a claim. A spokesperson for the defendants said they would appeal. *Marshall County Coal Co. v. Oliver*, No. 17-C-124 (W. Va. Cir. Ct. Feb. 21, 2018).

North Dakota Court Sentenced "Valve-Turner" Activist to Year in Prison

A North Dakota state court sentenced two environmental activists who participated in the #ShutItDown "valve-turners" action coordinated by the group Climate Direct Action. The action involved closing valves on pipelines in Washington, Montana, Minnesota, and North Dakota. The Climate Disobedience Action Fund reported that the North Dakota court sentenced an activist who disabled the TransCanada Keystone 1 tar sands pipeline in North Dakota to three years in prison, with two years deferred. He had been convicted of misdemeanor trespass and

felony criminal mischief and conspiracy to commit criminal mischief in October 2017. A second activist who filmed the action was convicted of felony conspiracy to commit criminal mischief and conspiracy trespass, a misdemeanor. CBAF reported that the second activist was sentenced to two years in prison, with both years deferred. *State v. Foster,* 34-2016-CR-00187 (N.D. Dist. Ct. Feb. 6, 2018).

NEW CASES, MOTIONS, AND NOTICES

FERC and Pipeline Project's Developers Sought to Delay D.C. Circuit's Revocation of Project Authorizations

After the D.C. Circuit denied rehearing of its decision requiring additional environmental review of greenhouse gas emissions associated with the Southeast Market Pipelines Project, the Federal Energy Regulatory Commission (FERC) and the project's developers filed motions to stay issuance of the mandate. In their motions, which were filed on February 6, 2018, FERC sought a 45-day stay, and the developers sought a 90-day stay. FERC stated that it had issued a final supplemental environmental impact statement on February 5 and that it would issue an order in compliance with the court's mandate within 45 days. In the meantime, FERC argued, a vacatur order by the court would revoke certificates of public convenience and necessity for pipelines currently providing natural gas to Florida power plants, which could potentially endanger the electricity supply to Florida residents. The developers' motion asserted that FERC had cured the environmental review deficiencies identified by the court (notwithstanding petitioners' criticisms of the methodologies used by FERC) and that vacatur would cause significant irreparable economic and environmental harms. The developers further argued that it was appropriate to stay the mandate to avoid irreparable harm during preparation of and disposition of a petition for writ of certiorari and that stay of the mandate was warranted even under the traditional test for stay pending appeal. On February 16, the petitioners filed a response opposing the motions for stay of issuance of mandate, arguing that there was not good cause to allow FERC and the developers to use a stay "to skirt the vacatur"; the petitioners also argued that the court should not "pre-judge" whether FERC's additional environmental review complied with the court's remand order. In addition, the petitioners argued that there would not be irreparable harm to consumers or to the environment and that economic harm to the developers did not justify delaying the mandate. The developers have also asked FERC to expedite reissuance of certificates authorizing the project or to issue temporary emergency certificates. *Sierra Club v. Federal Energy Regulatory Commission*, No. 16-1329 (D.C. Cir. FERC and intervenors' motions to stay issuance of mandate Feb. 6, 2018; petitioners' response Feb. 16, 2018; FERC and intervenors' replies Feb. 23, 2018).

Seventh Circuit Invited U.S. to Weigh in on Illinois Zero Emissions Credit Program for Nuclear Plants

In the pending appeal challenging an Illinois law that established a Zero Emissions Credit (ZEC) program to support certain nuclear plants, the Seventh Circuit Court of Appeals issued an order inviting the United States "to file a brief as amicus curiae expressing the views of the government in these consolidated cases." One issue raised by the Seventh Circuit is whether it should defer to the primary jurisdiction of the Federal Energy Regulatory Commission. The plaintiffs have argued that the ZEC program is preempted and that it violates the dormant

Commerce Clause. *Village of Old Mill Creek v. Star*, No. 17-2445 (7th Cir. Feb. 21, 2018).

U.S.-Based Fossil Fuel Companies Filed Motions to Dismiss New York City's Climate Change Lawsuit

The three U.S.-based fossil fuel companies sued by New York City in its lawsuit seeking damages for climate change impacts filed motions to dismiss on February 23, 2018. The three U.S.-based companies are Chevron Corporation, Exxon Mobil Corporation, and ConocoPhillips. In a joint memorandum of law, these companies argued that New York City's claims arise under federal common law and that the Clean Air Act has displaced the federal common law or, alternatively, that the plaintiffs' "expansive derivative theory of liability" fails to state a claim that complies with federal common law standards. The defendants also argued that the claims infringe on the federal foreign affairs power, are barred by the Commerce Clause and Due Process and Takings Clauses, and are preempted by federal law. In addition, the three companies contended that the City does not state viable state law claims and that the claims are not justiciable because they do not present a justiciable case or controversy; because they present political questions; and because the City lacks standing. In separate motions, Exxon Mobil and ConocoPhillips sought dismissal for lack of personal jurisdiction. In a letter to the court on March 2, the parties asked the court to defer further briefing on the U.S.-based defendants' personal jurisdiction motions and also to defer briefing on foreign-based defendants' motions to dismiss until after the court rules on the U.S.-based companies motion that raises issues under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. New York City's response to the 12(b)(1) and 12(b)(6) issues is due on March 30. *City of New York v. BP p.l.c.*, No. 18-cv-182 (S.D.N.Y. joint letter Mar. 2, 2018; motion to dismiss and ExxonMobil motion to dismiss for lack of personal jurisdiction Feb. 23, 2018).

Lawsuit Filed Challenging Environmental Review of Florida Passenger Railroad, Including Failure to Assess Sea Level Rise Impacts

Two Florida counties, a county emergency services district, and non-profit citizens group filed a lawsuit challenging federal allocation of tax-exempt private activity bonds for Phase II of the "All Aboard Florida Project," a proposed passenger railroad between Miami and Orlando. The plaintiffs asserted that the federal defendants did not take a hard look at the project's environmental impacts under NEPA, including adverse environmental impacts from sea level rise. The plaintiffs also asserted that the project was not eligible for private activity bonds and that the defendants violated the Internal Revenue Code's requirement for obtaining approval from all governmental units with jurisdiction over a project. *Martin County, Florida v. U.S. Department of Transportation*, No. 1:18-cv-00333 (D.D.C., filed Feb. 13, 2018).

Lawsuit Challenging Management of Lobster Fishery Said Agency Failed to Consider Fishery's Effects Added to Baseline Affected by Climate Change and Other Factors

Conservation Law Foundation filed a lawsuit challenging the National Marine Fisheries Service's ongoing authorization and management of the American lobster fishery for failing to prevent jeopardy and unlawful takes of North Atlantic right whales in violation of the Endangered Species Act, the Marine Mammal Protection Act, and the Administrative Procedure

Act. The complaint alleged, among other claims, that a 2014 biological opinion concerning the effects of continued operations of the lobster fishery on endangered and threatened species, including the right whale, was arbitrary and capricious. One of the shortcomings alleged in the complaint was the biological opinion's failure to add the fishery's direct and indirect effects (entanglement in fishing gear was alleged to be the "single greatest threat" to right whale survival) to the environmental baseline and the cumulative effects on the species. Climate change was among the factors discussed in the environmental baseline and cumulative effects analysis as potentially having a negative influence on right whale recovery. *Conservation Law Foundation v. Ross*, No. 1:18-cv-00283 (D.D.C., filed Feb. 7, 2018).

Competitive Enterprise Institute Filed New FOIA Lawsuit Seeking Additional Documents Regarding International Climate Negotiations

Competitive Enterprise Institute filed a Freedom of Information Act (FOIA) lawsuit seeking to compel disclosure of records from the Department of State related to the December 2015 Paris Agreement and the Conference of the Parties to the United Nations Framework Convention on Climate Change in Bonn in November 2017 (2017 COP). The complaint mentioned four FOIA requests: one for correspondence regarding "validators," which the complaint described as "unpaid outside voices" that promoted the Obama administration's stance on the Paris Agreement; one for the correspondence of the State Department's chief economist, who allegedly offered his office to colleagues for the purpose of "advancing the [Obama] administration's climate agenda"; one for encrypted instant messages during 2017 COP; and one for correspondence relating to accommodation arrangements at the 2017 COP. *Competitive Enterprise Institute v. U.S. Department of State*, No. 1:18-cv-00276 (D.D.C., filed Feb. 7, 2018).

FOIA Lawsuit Filed Seeking Records Regarding Policies Put in Place After EPA Cancelled Scientists' Participation in Climate Change Conference

Public Employees for Environmental Responsibility (PEER) filed a Freedom of Information Act (FOIA) lawsuit in the federal district court for the District of Columbia to compel the U.S. Environmental Protection Agency (EPA) to respond to requests for records related to actions EPA took after the agency cancelled presentations by two EPA scientists and a consultant at a conference on climate change at Narragansett Bay in Rhode Island in October 2017. In response to an inquiry from Senator Sheldon Whitehouse about the reason for the cancellations, EPA Administrator Scott Pruitt indicated that procedures had been put in place to prevent such occurrences in the future and to provide assurances that Office of Research and Development (ORD) senior leadership would make decisions about future event participation. Pruitt also said ORD would "continue to conduct research outlined in our Strategic Research Action Plans reflecting Congressional appropriations" and that he was committed to upholding EPA's Scientific Integrity Policy. PEER's FOIA request sought documents, records, and communications regarding the representations in Pruitt's letter. *Public Employees for Environmental Responsibility v. EPA*, No. 1:18-cv-00271 (D.D.C., filed Feb. 6, 2018).

Sierra Club Asked California Federal Court to Compel Department of Interior to Disclose Officials' External Communications

Sierra Club filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Department of the Interior seeking to compel a response to its September 2017 requests for documents related to external communications of six DOI officials, including the Secretary of the Interior. For these personnel, Sierra Club sought emails, text messages, faxes, voice mails, calendars, and sign-in sheets for meetings involving non-DOI persons. Sierra Club alleged that it submitted the requests "as part of its ongoing national effort to protect our public lands and promote the transition from fossil fuels to clean energy sources." Sierra Club alleged that "[b]ecause key DOI staff involved in agency decisionmaking appear to have strong industry ties, it is critical that the public be able to understand how the agency was influenced in these matters." *Sierra Club v. U.S. Department of Interior*, No. 4:18-cv-00797 (N.D. Cal., filed Feb. 6, 2018).

Environmental Groups Launched NEPA Challenges to Oil and Gas Leasing in National Petroleum Reserve–Alaska

Five environmental groups filed a lawsuit in federal court in Alaska challenging the federal decision to lease lands in the National Petroleum Reserve–Alaska. The plaintiffs asserted that the defendants violated NEPA because the U.S. Bureau of Land Management (BLM) failed to prepare either an environmental assessment or environmental impact statement before conducting an oil and gas lease sale in December 2017 for approximately 10.3 million acres in the Reserve. One of the environmental groups submitted comments to BLM prior to the sale, urging the agency not to conduct further leasing until it had completed site-specific environmental analysis by taking a hard look at direct, indirect, and cumulative impacts, including contributions to climate change. *Northern Alaska Environmental Center v. U.S. Department of the Interior*, No. 3:18-cv-00030 (D. Alaska, filed Feb. 2, 2018).

In a second lawsuit filed the same day, Natural Resources Defense Council, Inc. and three other environmental groups asserted that BLM failed to comply with NEPA when it held the 2017 oil and gas lease sale and also when it held a lease sale in 2016. The groups alleged, among other things, that BLM failed to consider the lease sales' effects on greenhouse gas emissions and climate change. *Natural Resources Defense Council, Inc. v. Zinke*, No. 3:18-cv-00031 (D. Alaska, filed Feb. 2, 2018).

Young People Filed Lawsuit Alleging State of Washington Violated Their Rights by Creating and Supporting Fossil Fuel-Based Energy and Transportation System

Thirteen young people filed a lawsuit in Washington Superior Court alleging that the State of Washington and state agencies and officials violated Washington's constitution and public trust doctrine through their creation, support, and operation of a "fossil-fuel based energy and transportation system." The complaint alleged that the plaintiffs "are and will continue to be mutually and adversely impacted by excessive human-caused atmospheric carbon dioxide … concentrations." The plaintiffs seek declaratory relief, including a declaration that a Washington statute setting greenhouse gas emission reduction targets is facially invalid because it authorizes dangerous levels of carbon dioxide in violation of the plaintiffs' rights. The plaintiffs also request injunctive relief, including an order requiring the defendants to prepare an accounting of Washington's greenhouse gas emissions and to develop an "enforceable state climate recovery plan." The young people's attorney submitted a letter to Washington's governor inviting him to

meet to discuss ways to achieve "a constitutionally-compliant Climate Recovery Plan that protects the rights of young people and future generations." *Aji P. v. State of Washington*, No. 18-2-04448-1 SEA (Wash. Super. Ct., filed Feb. 16, 2018 and letter sent Feb. 16, 2018).

Conservation Groups Asked FERC to Reconsider Authorization of PennEast Pipeline Project

Two conservation groups filed a request for rehearing and motion for stay of the Federal Energy Regulatory Commission (FERC) order granting a conditional certificate of public convenience and necessity for the PennEast Pipeline Project. The project includes approximately 116 miles of natural gas pipeline extending from Pennsylvania to New Jersey, multiple lateral connections, a compressor station, and other facilities. The groups asserted that the order granting the certificate violated the Natural Gas Act, the Takings Clause, the Clean Water Act, the National Historic Preservation Act, and NEPA. With respect to the Natural Gas Act, the groups contended that FERC's order failed to demonstrate that the project was required by the public convenience and necessity because, among other shortcomings, FERC failed to balance claimed economic benefits against potential adverse impacts, including adverse environmental impacts. The groups noted in their filing that if the pipeline would lead to a net increase in gas consumption, as claimed by the applicants, it would also enable upstream gas production (and fugitive emissions of methane) and downstream gas consumption (and combustion emissions of carbon dioxide). The groups also contended that the environmental impact statement for the project was "wholly deficient" because, among other reasons, it failed to include a robust alternatives analysis with adequate consideration of a no action alternative or clean energy or liquefied natural gas alternatives. *In re PennEast Pipeline Co.*, No. CP15-558-000, CP15-558-001 (FERC Feb. 12, 2018).

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FEATURED CASE

D.C. Circuit Denied Rehearing of Decision Vacating HFC Prohibition

The D.C. Circuit Court of Appeals denied petitions for panel rehearing and rehearing en banc of the court's August 2017 decision vacating the U.S. Environmental Protection Agency's (EPA's) rule prohibiting use of hydrofluorocarbons (HFCs) to replace ozone-depleting substances under EPA's Significant New Alternatives Policy program. HFCs are powerful greenhouse gases. Rehearing was sought by Natural Resources Defense Council and by two companies that had developed "new and better substitutes" for ozone-depleting substances. The court said that a majority of judges eligible to participate did not vote in favor of the rehearing en banc petitions and noted that Judges Millett and Katsas did not participate. The petitions for panel rehearing were denied because the current panel of two judges was equally divided. The third judge on the panel, Judge Brown, retired on August 31, 2017. She joined the entirety of the majority opinion, including the portion vacating the HFC prohibition. *Mexichem Fluor, Inc. v. EPA*, No. 15-1328 (D.C. Cir. Jan. 26, 2018).

DECISIONS AND SETTLEMENTS

Supreme Court Declined to Review Listing of Bearded Seal as Threatened Species

The U.S. Supreme Court declined to review a Ninth Circuit decision upholding the listing of the Beringia distinct population segment of the Pacific bearded seal subspecies as "threatened" under the Endangered Species Act. The Ninth Circuit had reversed a district court decision vacating the listing; the Ninth Circuit found that the National Marine Fisheries Service reasonably relied on loss of sea ice caused by global climate change over the next 50 to 100 years as the basis for the listing. The parties seeking certiorari asked the Supreme Court to consider whether a species could be listed as threatened when the government determined that the species "is not presently endangered" but "will lose its habitat due to climate change by the end of the century." *Alaska v. Ross*, Nos. 17-118, 17-133 (U.S. Jan. 22, 2018).

Supreme Court Declined to Consider Whether Federal Law Preempted Connecticut's Renewable Energy Programs

The U.S. Supreme Court denied certiorari to a petitioner seeking review of the Second Circuit's decision upholding Connecticut's renewable energy programs. The Second Circuit rejected claims that the programs were preempted by federal law or in violation of the dormant Commerce Clause. The petition for writ of certiorari presented two questions for review, one concerning whether State directives requiring local utilities to enter into long-term electricity contracts with certain generators were field preempted by federal authority to regulate interstate wholesale sales, and the other concerning whether "a long-term interstate wholesale electricity contract that would not have been entered into but for the coercive action of the State" was conflict preempted "because it provides incentives different from the incentives provided by the [Federal Energy Regulatory Commission]-supervised energy market." *Allco Finance Ltd. v. Klee*, No. 17-737 (U.S. Jan. 22, 2018).

Supreme Court Denied Certiorari in Coal Companies' Case Seeking to Compel Clean Air Act Jobs Study

On January 8, 2018, the U.S. Supreme Court denied a petition for writ of certiorari filed by the coal company Murray Energy Corporation and related companies, in which the companies sought review of the Fourth Circuit's dismissal of their action that sought to compel the U.S. Environmental Protection Agency (EPA) to conduct a study of the Clean Air Act's effects on employment, particularly in the coal industry. The Fourth Circuit held that the district court lacked jurisdiction to hear the case because EPA had "considerable discretion" to decide how to manage the Clean Air Act's statutory mandate that EPA "shall conduct continuing evaluations of potential loss or shifts of employment." *Murray Energy Corp. v. Pruitt*, No. 17-478 (U.S. Jan. 8, 2018).

Environmental Groups Agreed to Voluntary Dismissal of Challenge to Stay of Landfill Emission Standards After EPA Said Stay Had No Effect

After the parties filed a stipulation of voluntary dismissal, the D.C. Circuit Court of Appeals dismissed a challenge to the U.S. Environmental Protection Agency's (EPA's) stay of

performance standards and emission guidelines for municipal solid waste landfills. The stay was in place from May 31, 2017 to August 29, 2017, while EPA began a reconsideration process. On January 11, 2018, EPA withdrew plans for a further delay in implementation of the standards. In the stipulation of voluntary dismissal, the petitioners stated that they had decided to voluntarily dismiss the petition for review on the basis of EPA's representations in its initial brief that the stay only affected deadlines that would have applied during the 90 days the stay was in effect, that EPA was not aware of new landfills affected by the stay, and that the stay did not affect deadlines for existing landfills or for EPA obligations. *Natural Resources Defense Council v. Pruitt*, No. 17-01157 (D.C. Cir. order of dismissal Feb. 1, 2018; stipulation Jan. 31, 2018; respondents' brief Jan. 22, 2018; petitioners' brief Nov. 20, 2017).

D.C. Circuit Denied Rehearing of Decision Vacating Gas Pipeline Approval for Failure to Adequately Consider Greenhouse Gas Emissions

The D.C. Circuit Court of Appeals denied petitions for rehearing of its decision vacating the Federal Energy Regulatory Commission's (FERC's) authorization of an interstate natural gas pipeline in the southeastern United States. In August 2017, the D.C. Circuit found that FERC's analysis of the pipeline's impacts on greenhouse gas emissions was inadequate and required FERC to prepare a new environmental impact statement. FERC and the respondent-intervenors had argued that remand without vacatur would have been the proper remedy. *Sierra Club v. Federal Energy Regulatory Commission*, No. 16-1329 (D.C. Cir. Jan. 31, 2018).

D.C. Circuit Granted Sierra Club's Motion for Voluntary Dismissal of Remaining LNG Export Challenge

The D.C. Circuit Court of Appeals granted Sierra Club's motion for voluntary dismissal of its petition challenging the U.S. Department of Energy's authorization for increased exports of liquefied natural gas (LNG) exports to non-free trade agreement nations from a terminal in Louisiana (the Sabine Pass terminal). The D.C. Circuit previously denied Sierra Club's petition seeking review of a previous authorization of LNG exports from the Sabine Pass terminal. Sierra Club's arguments in the instant case, which concerned alleged violations of the Natural Gas Act and the National Environmental Policy Act, were similar to its arguments in the earlier case. *Sierra Club v. U.S. Department of Energy*, No. 16-1426 (D.C. Cir. Jan. 30, 2018).

Federal Circuit Upheld Dismissal with Prejudice of Action Claiming California Cap-and-Trade Program Infringed on Patent

The Federal Circuit Court of Appeals affirmed the dismissal of an action alleging that California's cap-and-trade program for greenhouse gas emissions infringed on a patent held by the plaintiff entitled "Pollution Credit Method Using Electronic Networks." The plaintiff alleged that the patent describes "an electronic method and apparatus for validating individuals' applications for pollution reduction credits, assigning a value to the activity associated with each application, and facilitating trading between individuals." In an unpublished decision, the appellate court found that the district court had not abused its discretion by dismissing the action with prejudice after the plaintiff failed to oppose motions to dismiss filed by the appellees. *Sowinski v. California Air Resources Board*, No. 2017-1219 (Fed. Cir. Dec. 18, 2017).

Federal Court Ordered New Evaluation of Petition to List Yellowstone Bison Under Endangered Species Act

The federal district court for the District of Columbia directed the U.S. Fish and Wildlife Service to conduct a new 90-day finding on whether the Yellowstone bison population should be added to the list of endangered and threatened species. The petitions to list the bison population had identified multiple threats to the bison's survival, including climate change. The court said the FWS applied an improperly heightened standard in its 90-day evaluation because it discounted a scientific study that supported the petition for listing without providing a reason for its rejection of the study. *Buffalo Field Campaign v. Zinke*, No. 1:16-cv-01909 (D.D.C. Jan. 31, 2018).

Colorado Federal Court Dismissed Case That Sought Recognition of Colorado River Ecosystem's Legal Personhood and Rights

On December 4, 2017, the federal district court for the District of Colorado granted a motion by plaintiff "Colorado River Ecoystem" to dismiss with prejudice the lawsuit seeking recognition of the Colorado River Ecosystem's status as a "person" possessing rights and a declaration that actions of the State of Colorado violated those rights. The plaintiff's motion to dismiss stated that the complaint "represented a good faith attempt to introduce the Rights of Nature doctrine to our jurisprudence" and that counsel for the plaintiff "continues to believe that the doctrine provides American courts with a pragmatic and workable tool for addressing environmental degradation and the current issues facing the Colorado River." *Colorado River Ecosystem v. State of Colorado*, No. 1:17-cv-02316 (D. Colo. plaintiffs' motion Dec. 3, 2017; order dismissing case Dec. 4, 2017).

California Appellate Court Said CARB's Modification of Truck and Bus Regulations Violated CEQA and California's Administrative Procedures Act

The California Court of Appeal affirmed a trial court's judgment that the California Air Resources Board (CARB) violated the California Environmental Quality Act (CEQA) and California's Administrative Procedures Act (APA) when it promulgated revised truck and bus regulations that extended compliance deadlines for small fleet operators. The truck and bus regulations are intended to reduce emissions of particulate matter, nitrogen oxides, and greenhouse gases from large diesel engines. The appellate court concluded that CARB violated CEQA by approving the project before it had completed its environmental analysis and by failing to consider the petitioners' "fair argument" that emissions would increase compared to emissions under the existing regulations and that the increases could be significant. The court also affirmed the trial court's determination that CARB's conduct violated the APA. The appellate court did not agree, however, with the trial court's conclusion that CARB used an inappropriate baseline; the appellate court stated that CARB "was within its discretion to adopt a baseline calculation that measured the current environment without further reducing figures based on regulations that should have taken effect during the course of the analysis." *John R. Lawson Rock & Oil, Inc. v. State Air Resources Board*, No. F074003 (Cal. Ct. App. Jan. 31, 2018).

Arizona Appellate Court Rejected Challenge to Transmission Project Intended for

Renewable Energy

The Arizona Court of Appeals rejected a challenge to the Arizona Corporation Commission's authorization of a transmission project that the developers said would provide service for growing demand for renewable energy. The challengers alleged that there was not substantial evidence that the project would ever transmit renewable energy. The Commission chose not to explicitly condition authorization of the project on compliance with renewable energy benchmarks but instead required the developer to "in good faith … use its best efforts to secure transmission service contracts for renewable energy generation." The appellate court found that there was substantial evidence supporting the authorization—including numerous environmental studies and statements about the project's anticipated energy sources—and that if the developer did not make good-faith efforts to secure renewable power, then there might be a future action for violation of the authorization's conditions. *Else v. Arizona Corporation Commission*, No. 1 CA-CV 17-0208 (Ariz. Ct. App. Jan. 25, 2018).

California Appellate Court Upheld Environmental Impact Report's Conclusion on Railyard's Consistency with Greenhouse Gas Reduction Goals

The California Court of Appeal reversed a trial court's determination that the review of greenhouse gas emissions associated with a proposed new railyard four miles from the Port of Los Angeles was deficient, but agreed that the final environmental impact report (FEIR) prepared pursuant to the California Environmental Quality Act (CEQA) had failed to adequately consider the project's air quality impacts, particularly impacts to ambient air pollutant concentrations. The FEIR for the project had found that the project would increase fuel efficiency of regional cargo movement and decrease greenhouse emissions by reducing truck traffic in a manner consistent with state and local policies and plans for greenhouse gas emissions and climate change, even though operational emissions would eventually exceed CEQA baseline levels. The appellate court disagreed with the trial court's conclusion that a project that increased greenhouse gas emissions could not be in harmony with a state and local plans requiring a decrease in emissions. The appellate court said that the FEIR had appropriately separated the quantitative analysis (where it identified a significant impact) from the qualitative analysis (where it found no inconsistency with state and local policies encouraging more efficient use of fossil fuels to move goods). *City of Long Beach v. City of Los Angeles*, No. A148993 (Cal. Ct. App. Jan. 12, 2018).

Oregon Appellate Court Said Portland Restrictions on Fossil Fuel Terminals Did Not Violate Dormant Commerce Clause

The Oregon Court of Appeals reversed the Land Use Board of Appeals' (LUBA's) conclusion that the City of Portland's zoning amendments banning new and expanded fossil fuel terminals violated the dormant Commerce Clause. The court concluded that the City's alleged discrimination against out-of-state producers and refiners of fossil fuels and favoring in-state end users of fossil fuels did not constitute discrimination under the dormant Commerce Clause because the alleged discrimination was not between "substantially similar" out-of-state and in-state entities. The court also concluded that the zoning amendments did not bar out-of-state commerce from entering or operating within the state and did not discriminate against out-of-

state consumers. In addition, the court found that the amendments survived the *Pike* balancing test because the business trade groups had not demonstrated the claimed burdens on interstate commerce were clearly excessive in relation to the putative local benefits. The court also reversed a LUBA finding that the ordinance violated one statewide planning goal but upheld a LUBA finding that the ordinance violated a different statewide planning goal. *Columbia Pacific Building Trades Council v. City of Portland*, No. A165618 (Or. Ct. App. Jan. 4, 2018).

New York Court Allowed Five Petitioners to Proceed with Claims Challenging "Zero-Emissions" Subsidies for Nuclear Plants

A New York trial court granted in part and denied in part motions to dismiss a lawsuit challenging the "zero-emissions credit" (ZEC) component of the Clean Energy Standard approved by the New York State Public Service Commission in 2016. The ZEC program provides for payments to certain nuclear power generators in the state based on the social cost of carbon. The court dismissed 56 of the 61 petitioners in the lawsuit because their claims were not timely and also dismissed the remaining petitioners' State Environmental Quality Review Act claim because they lacked standing. The court also ruled that arguments regarding the Indian Point nuclear facility's participation in the ZEC program were not ripe because there had been no showing that Indian Point would apply to or be approved for the program. The court otherwise found that the petitioners had adequately set forth cognizable causes of action and allowed their claims to proceed. The court also allowed an amended complaint. *Hudson River Sloop Clearwater, Inc. v. New York State Public Service Commission*, No. 7242/2016 (N.Y. Sup. Ct. Jan. 22, 2018).

FERC Declined to Find That New York Department of Environmental Conservation Waived Authority to Act on Water Quality Certification Application for Gas Pipeline

The Federal Energy Regulatory Commission (FERC) denied a petition from the company developing the Constitution Pipeline. The petition requested that FERC find that the New York State Department of Environmental Conservation had waived its authority to act on the company's application for a water quality certification. (The Constitution Pipeline would extend for approximately 124 miles from Pennsylvania through four counties in New York.) The company first submitted an application to NYSDEC in 2013, and subsequently withdrew and resubmitted applications in 2014 and again in 2015. NYSDEC denied the company's application in April 2016, citing, among other things, the risk of future flooding events that could expose the pipeline and noting that flooding conditions from extreme precipitation events were projected to increase during the pipeline's anticipated operational life due to climate change. NYSDEC also cited potential increases in water temperature related to the project's removal of riparian vegetation and said climate change could exacerbate the temperature increases in the long term, resulting in long-term loss of trout populations. The Second Circuit Court of Appeals upheld NYSDEC's denial in August 2017. In denying the company's request for a waiver finding, FERC found no reason to depart from its previous determinations that the reasonable period of time for action on a water quality certification application was one year and declined to review NYSDEC's review process for the company's application to determine whether it had been reasonable. FERC also said the company's voluntary withdrawal and resubmission of its application gave NYSDEC new deadlines. *In re Constitution Pipeline Co.*, CP18-5-000 (FERC

Jan. 11, 2018).

FERC Denied Rehearing on Pipeline Project, Including Arguments That Climate Change Analysis Was Inadequate

The Federal Energy Regulatory Commission (FERC) denied rehearing of its order authorizing the Atlantic Bridge Project, which consists of 6.3 miles of replacement natural gas pipeline, a new compressor station, a new meter and regulating station, and additional compression at three existing compressor stations at locations in New York, Connecticut, Maine, and Massachusetts. Among the arguments rejected by FERC was that it had failed to adequately consider the greenhouse gas and climate impacts and had failed to consider whether the project would interfere with achievement of state climate change goals. FERC also said the withdrawal of another project from FERC's pre-filing process mooted arguments that consideration of the Atlantic Bridge Project's greenhouse gas emissions together with emissions from the other project could make the combined projects a major source of greenhouse gases pursuant to the Clean Air Act. FERC also rejected the argument that it should have undertaken a comprehensive analysis of the cumulative impacts of natural gas production. In addition, FERC said its analysis regarding the potential impacts associated with unconventional natural gas production and downstream combustion of natural gas was prepared to provide additional information to the public, not to comply with the National Environmental Policy Act (NEPA); FERC therefore rejected the argument that the uncertainty in the analysis violated NEPA. *In re Algonquin Gas Transmission, LLC*, Nos. CP16-9-001, CP16-9-008 (FERC Dec. 13, 2017).

NEW CASES, MOTIONS, AND NOTICES

Pipeline Company Sought Supreme Court Review of New York's Denial of Water Quality Certification for Natural Gas Pipeline

Constitutional Pipeline Company, LLC filed a petition for a writ of certiorari in the U.S. Supreme Court seeking review of the Second Circuit's decision upholding the New York State Department of Environmental Conservation's (NYSDEC's) denial of a water quality certification for an interstate natural gas pipeline. The company argued that Congress had given the Federal Energy Regulatory Commission the authority to determine the location of interstate pipelines and that NYSDEC had interfere with this authority by denying the water quality certification on the ground that the company had not provided sufficient information about alternative pipeline routes. In its letter denying the certification, NYSDEC also cited potential climate change-related impacts to water resources. The company said the case presented the question of whether the denial of the certification interfered with FERC's exclusive jurisdiction and violated fundamental principles of federal supremacy. *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, No. 17-1009 (U.S., filed Jan. 16, 2018).

New Jersey Withdrew from Clean Power Plan Challenge; States, Cities, and Environmental and Public Health Groups Urged D.C. Circuit to Issue Decision on Merits

Two weeks after the inauguration of Democrat Phil Murphy as governor, New Jersey filed a motion to withdraw as a petitioner in the challenge to the Clean Power Plan. Earlier in January,

the U.S. Environmental Protection Agency (EPA) filed a 30-day status report in the D.C. Circuit requesting that the court continue to hold the case in abeyance pending the conclusion of rulemaking. EPA stated that the public comment period on its proposal to repeal the Clean Power Plan had closed on January 16 and that it had issued an advance notice of proposed rulemaking soliciting information on potential replacements in December. The state and municipal respondent-intervenors and public health and environmental respondent-intervenors asked the court to reject the request for indefinite abeyance. They urged the court to issue its decision on the merits of the case or, if it decided to continue abeyance, to limit the abeyance to a 60-day period and to require EPA to provide regular status reports. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. N.J. EPA status report Jan. 10, 2018; motion to withdraw Jan. 30, 2018).

Alleging Lack of Market Demand and Failure to Consider Climate Impacts, Environmental Groups Sought to Stay Construction of Mountain Valley Pipeline

Environmental groups filed lawsuits in the D.C. Circuit Court of Appeals challenging the Federal Energy Regulatory Commission's (FERC's) order authorizing the Mountain Valley Pipeline, a 303.5-mile gas pipeline extending from West Virginia to Virginia. On January 8, 2018, one set of environmental groups filed a separate proceeding pursuant to the All Writs Act seeking a writ staying FERC's order until FERC ruled on the merits of a pending request for rehearing. The groups said FERC had developed "a troubling pattern of preventing parties … from appealing FERC's orders until much (if not all) of a pipeline is complete, thereby depriving petitioners of effective means of protecting their property and environmental interests and effectively depriving courts of their jurisdiction to review FERC orders." The groups also filed motions for stays pending the D.C. Circuit's review of FERC's actions. The groups contended that they had demonstrated a high likelihood of success on the merits of their claims that FERC did not have sufficient evidence of market demand to support a finding of public convenience and necessity pursuant to the Natural Gas Act and had violated the National Environmental Policy Act by, among other things, failing to adequately consider the pipeline's climate impacts. On January 26, 2018, FERC filed a motion to dismiss the petitions for lack of jurisdiction. FERC argued that the challenged order was not final and that the petitions were "incurably premature" because requests for rehearing, including requests filed by the petitioners, remained pending. *Appalachian Voices v. Federal Energy Regulatory Commission*, No. 17-1721 (D.C. Cir., filed Dec. 22, 2017; motion for stay Jan. 8, 2018); *Blue Ridge Environmental Defense League v. Federal Energy Regulatory Commission*, No. 18-1002 (D.C. Cir., filed Jan. 3, 2018; motion for stay Jan. 11, 2018); *In re Appalachian Voices*, No. 18-1006 (D.C. Cir., filed Jan. 8, 2018).

In Federal Appeal Concerning Illinois Zero Emissions Credit Program, Parties Addressed Whether Court Should Defer to FERC, Whether Injunctive Relief Was Available

On January 3, 2018, after holding oral argument on an appeal of a district court decision upholding an Illinois law creating a Zero Emissions Credit (ZEC) program to support certain nuclear plants, the Seventh Circuit Court of Appeals directed the parties to submit supplemental memoranda addressing whether the court should defer to the Federal Energy Regulatory Commission's (FERC's) primary jurisdiction. The court also asked the parties to address whether *Ex Parte Young*, 209 U.S. 123 (1908), was available as the basis of equitable relief in the case and whether the lawsuits were prevented by the principle in *Illinois Brick Co. v. Illinois*,

431 U.S. 720 (1977), which limited antitrust suits by indirect purchasers. The plaintiffs-appellants argued that the defendants had waived the issue of primary jurisdiction, that the case was not appropriate for primary jurisdiction referral because FERC did not have special expertise in constitutional preemption issues, that referral to FERC would prejudicially delay resolution of the plaintiffs' claims, and that the court could seek FERC's views by requesting an amicus brief. The plaintiffs-appellants also asserted that prospective injunctive relief was available under *Ex parte Young* because the State's unlawful action caused them injury. The consumer plaintiffs also argued that *Illinois Brick* did not prevent their action because the company from which they purchased their electricity (the direct purchaser of ZECs) was controlled by the seller of the ZECs. A supplemental filing by the amicus curiae National Association of State Utility Consumer Advocates argued that *Illinois Brick* did not apply to suits filed pursuant to the Federal Power Act. The State defendants-appellees argued that the plaintiffs could not seek injunctive relief under *Ex parte Young*, but that if the court determined the plaintiffs had a cause of action for injunctive relief, the court should defer to FERC's primary jurisdiction. The State defendants said FERC had before it several ongoing proceedings related to the issues in this case that it should be allowed to resolve. The owner of the nuclear plants that would likely benefit from the ZECs argued that the plaintiffs lacked a cause of action under *Ex parte Young*, and that primary jurisdiction should not apply if the court permitted the suit. The State defendants and the plants' owner also said *Illinois Brick* prevented the retail plaintiffs' suits. *Village of Old Mill Creek v. Star*, Nos. 17-2433, 17-2445 (7th Cir. order Jan. 3, 2018; supplemental memoranda from Exelon, State, Electric Power Supply Association, consumer plaintiffs, and NASUCA Jan. 26 and 30, 2018).

City of Richmond Filed Lawsuit in California State Court Seeking Climate Change Damages

On January 22, 2018, the City of Richmond, California, filed a lawsuit in California Superior Court against 29 fossil fuel companies. The City seeks damages and other relief for climate change-related injuries allegedly resulting from the defendants' "production, promotion, marketing of fossil fuel products, simultaneous concealment of the known hazards of those products, and their championing of anti-science campaigns." The complaint alleged that the defendants were directly responsible for 17.5% of global carbon dioxide emissions between 1965 and 2015, and that during the past 50 years the defendants had taken steps to protect their own assets from climate change effects while simultaneously promoting use of their products and working to undermine support for greenhouse gas regulation. The climate change-related injuries alleged by the City included sea level rise, more frequent and more severe flooding and storms, drought, and heatwaves. The City alleged that it had already spent significant funds to study, mitigate, and adapt to the effects of climate change. The causes of action asserted by the City are public nuisance, strict liability based on both design defect and failure to warn, private nuisance, negligence, negligent failure to warn, and trespass. The City seeks compensatory damages, equitable relief including abatement of the nuisance, punitive damages, and disgorgement of profits, as well as attorneys' fees and other costs. *City of Richmond v. Chevron Corp.*, No. C18-00055 (Cal. Super. Ct., filed Jan. 22, 2018).

Fossil Fuel Companies Removed Santa Cruz Lawsuits to Federal Court

Richmond's lawsuit is very similar to the lawsuits filed by the City and County of Santa Cruz in December 2017. The defendants in the Santa Cruz lawsuits removed those cases to federal court on January 19, 2018. The defendants in the Santa Cruz cases asserted that the plaintiffs' claims implicated "uniquely federal interests" and were governed by federal common law. The defendants also asserted that the claims "attack federal policy decisions and threaten to upset longstanding federal-state relations, second-guess policy decisions made by Congress and the Executive Branch, and skew divisions of responsibility set forth in federal statutes and the United States Constitution" and therefore necessarily raised substantial and disputed questions of federal law. In addition, the defendants contended that the Clean Air Act completely preempted the claims and that the federal court had jurisdiction pursuant to the Outer Continental Shelf Lands Act, the federal officer removal statute, the federal enclave doctrine, and the bankruptcy removal statute. *County of Santa Cruz v. Chevron Corp.*, No. 5:18-cv-00450 (N.D. Cal. notice of removal Jan. 19, 2018); *City of Santa Cruz v. Chevron Corp.*, No. 5:18-cv-00458 (N.D. Cal. notice of removal Jan. 19, 2018).

New York City Sued Five Largest Fossil Fuel Companies for Climate Change Damages

New York City filed a federal lawsuit against the five largest investor-owned fossil fuel producers seeking costs the City alleges it had incurred and would continue to incur to protect itself and its residents from the impacts of climate change. The City filed the lawsuit in the federal district court for the Southern District of New York. The City alleged that the defendants "produced, marketed, and sold massive quantities of fossil fuels" despite knowing for many years that the use of fossil fuels caused emissions of greenhouse gas emissions that would accumulate and remain in the atmosphere for centuries, causing "grave harm." The City alleged that the five defendants were responsible "for over 11% of all the carbon and methane pollution from industrial sources that has accumulated in the atmosphere since the dawn of the Industrial Revolution" and that the defendants also were responsible "for leading the public relations strategy for the entire fossil fuel industry, downplaying the risks of climate change and promoting fossil fuel use despite the risks." The City charged that the defendants' actions constituted an unlawful public and private nuisance and an illegal trespass on City property. The climate change-related injuries alleged by the City included more frequent and more intense heat waves, extreme precipitation, and sea level rise. *City of New York v. BP p.l.c.*, No. 1:18-cv-00182 (S.D.N.Y., filed Jan. 9, 2018).

Chevron Filed Third-Party Complaint Against Statoil in San Mateo and Imperial Beach Climate Change Lawsuits; Federal Court to Hear Arguments on February 15 on Whether to Remand

On December 15, 2017, the Chevron defendants in the climate change lawsuits brought by the County of San Mateo and the City of Imperial Beach filed a third-party claim for indemnity and contribution against Statoil ASA (Statoil), an energy company for which the majority stakeholder is the Norwegian State. Statoil was originally a defendant in the cases, but the plaintiffs dismissed the complaint as to Statoil without prejudice in July 2017. The Chevron defendants asserted that City and County's underlying claims against them were without merit but that if the claims were found to have merit, the plaintiffs' allegations "would implicate Statoil as a party responsible for a portion of the injuries and damages Plaintiffs claim on the

same basis as they would implicate the Chevron Parties and the other named Defendants." On December 22, 2017, the defendants filed papers opposing the plaintiffs' motion to remand the actions to California state court. Their opposition papers argued that the plaintiffs' claims could only arise under federal common law, that they raised substantial and disputed federal issues, that they were completely preempted by federal law, and that the claims were based on the defendants' actions on federal lands and at the direction of the federal government or were removal under the bankruptcy removal statute. The defendants also made an alternative argument that even if plaintiffs were correct that state law applied to global climate change "of its own force," the complaints still presented removable federal questions because federal law determined which state law should apply and when state law should apply. A hearing was scheduled for February 15, 2018 on the remand motion. *County of San Mateo v. Chevron Corp.*, No. 17-cv-4929 (N.D. Cal. third-party complaint Dec. 15, 2017; joint opposition and supplemental opposition to remand Dec. 22, 2017).

Federal Judge to Hear Arguments on Whether Oakland and San Francisco Climate Cases Belong in Federal Court; Chevron Filed Third-Party Complaint Against Statoil

The federal district court for the Northern District of California is scheduled to hold a hearing on February 8, 2018 to hear arguments on the motion by the Oakland and San Francisco city attorneys to remand their climate change public nuisance actions against five fossil fuel companies to California state court. The parties completed their briefing on the remand motion on January 15, 2018. The plaintiffs argued that their actions did not arise under federal common law because they were based on the defendants' "production and improper promotion of fossil fuels in massive quantities – a basis of liability cognizable under state law but wholly foreign to federal common law." The plaintiffs also said the defendants "badly err[ed]" in arguing that the Ninth Circuit held in *Native Village of Kivalina v. ExxonMobil Corp.* that all tort claims related to global warming were governed by federal common law. The city attorneys also asserted that none of the other theories in the defendants' "kitchen-sink notices of removal" had merit: the plaintiffs argued that that their claim to relief did not necessarily raise a substantial and disputed federal issue and also asserted that no court had held that the Clean Air Act completely preempted state common law public nuisance claims. The plaintiffs also said that the fact that "some unspecified portion of [the defendants'] oil and gas production occurs on federal land" did not provide a basis for removal under the Outer Continental Shelf Lands Act or under a "federal officer" or "federal enclave" theory of removal. The plaintiffs also argued that the bankruptcy removal statute did not provide a basis for removal based on the 30-year-old bankruptcy of Texaco, a subsidiary of defendant Chevron Corporation.

In their opposition to the remand motion, the defendants asserted that the cases "implicate longstanding federal government policies, concerning matters of uniquely national importance, including the Nation's supply of energy and the global environment" and argued that the plaintiffs' actions necessarily were governed by federal common law and necessarily raised federal questions by seeking "to supplant federal domestic and foreign policy on greenhouse gas emissions to hold a handful of energy producers liable for the alleged consequences of rising ocean levels on a discrete portion of the U.S. coast." The defendants also argued that the Clean Air Act completely preempted the actions because the statute "provides the exclusive cause of action for regulation of nationwide emissions." The defendants also reiterated their arguments

that the actions were removable because they were based on the defendants' activities on federal lands and at the direction of the federal government, and because the claims would have an impact on a number of bankruptcy proceedings, not just Texaco's, and because exemptions from bankruptcy jurisdiction for governmental exercises of police power were construed narrowly.

In their reply, the city attorneys asserted that the defendants' assertions of federal jurisdiction "would federalize vast areas of traditional state law." They emphasized that they did not seek to limit anyone's emissions and that the only remedy sought was an "abatement fund" to shift adaptation costs from the public to the fossil fuel companies. The city attorneys also argued that the argument that the cases arose under federal law suffered from the "fatal defect" that they relied on "ordinary preemption doctrines" that did not provide a basis for removal. Other developments in this case included defendant Chevron's filing of a third-party complaint against Statoil ASA—an energy company of which the Norwegian State is majority stakeholder—for indemnity and contribution. Chevron asserted that while the plaintiffs' claims were meritless, Statoil, "as well as potentially the many other sovereign governments that use and promote fossil fuels," must be joined as third-party defendants. *People of State of California v. BP p.l.c.*, No. 3:17-cv-06011 (N.D. Cal. motion to remand Nov. 20, 2017; Statoil third-party complaint Dec. 14, 2017; opposition to remand Dec. 19, 2017; and reply in support of remand Jan. 15, 2018).

Exxon Asked Texas State Court to Allow Depositions of Municipal Officials and Lawyers Involved in Climate Change Tort Lawsuits Against Fossil Fuel Companies

On January 8, 2018, Exxon Mobil Corporation filed a petition in Texas state court requesting an order allowing the company to conduct pre-suit depositions and obtain documents pertaining to potential claims of abuse of process, civil conspiracy, and violations of Exxon's constitutional rights in connection with "abusive law enforcement tactics and litigation in California" that were "attempting to stifle ExxonMobil's exercise, in Texas, of its First Amendment right to participate in the national dialogue about climate change and climate policy." Exxon cited the tort lawsuits filed by California municipalities, as well as investigations being conducted by state attorneys general. The information sought by Exxon included the municipalities' communications with third parties "about the real purposes of the litigation" or risk disclosures contained in their municipal bonds. Exxon alleged that the "stark and irreconcilable conflict" between the municipalities' allegations in the lawsuits and their disclosures in bond offerings indicated that the lawsuits were brought "not because of a bona fide belief in any tortious conduct by the defendants or actual damage to their jurisdictions, but instead to coerce ExxonMobil and others operating in the Texas energy sector to adopt policies aligned with those favored by local politicians in California." Exxon also alleged that the municipalities' allegations were at odds with California's actions seeking to recoup the fair market value of fossil fuels extracted on state public lands and that the municipalities did not acknowledge their own contributions to greenhouse gas emissions. In addition, Exxon asserted that the respondents named in the petition—which included municipal officials and attorneys—had made "repeated efforts … to conceal and possibly destroy evidence potentially relevant" to Exxon's claims. *In re Exxon Mobil Corp.*, No. 096-297222-18 (Tex. Dist. Ct. Jan. 8, 2018).

Parties Completed Briefing on Whether Exxon Stated Viable Claims Challenging Massachusetts and New York Climate Change Investigations; Exxon Sought to Amend

Complaint

On December 21, 2017, the New York and Massachusetts attorneys general filed supplemental memoranda of law arguing that the federal district court for the Southern District of New York should dismiss Exxon Mobil Corporation's (Exxon's) lawsuit seeking to block their investigations of Exxon's climate change-related disclosures for failure to state a claim. The attorneys general previously filed motions to dismiss based on the absence of a ripe injury or the *Colorado River* abstention doctrine. The Massachusetts attorney general also argued that a Massachusetts state court decision precluded Exxon's claims and that the court lacked personal jurisdiction. At a hearing on November 30, 2017, the district court requested that the attorneys general update their briefing on dismissal pursuant to Rule 12(b)(6) (previously brief in Texas federal court) to reference Second Circuit law.

In its supplemental filing, the New York attorney general argued that Exxon's claim that the investigation was an attempt to "suppress Exxon's corporate viewpoint on climate change, in violation of the First Amendment," was not plausible. The New York attorney general also argued that Exxon's claims that the attorney general's subpoena called for an unreasonable search in violation of the Fourth Amendment and violated the dormant Commerce Clause were without merit. In addition, the attorney general contended that Exxon's allegations of "political bias" did not support a procedural due process claim, that Exxon's claim that a Securities and Exchange Commission rule preempted the investigation was premature, and that the court was without jurisdiction to hear state law claims.

The Massachusetts attorney general's supplemental memorandum of law argued that none of Exxon's claims were plausible or legally cognizable. The attorney general argued that Exxon's "bald, baseless" allegations that the investigation was undertaken "out of personal animus and in bad faith" to chill political speech did not meet pleading standards and could not sustain claims of conspiracy or abuse of process, or of violations of the First, Fourth, and Fourteenth Amendments. The Massachusetts attorney general further argued that Exxon's preemption, dormant Commerce Clause, and other state claims failed as a matter of law.

In its opposition to the motions for dismissal for failure to state a claim, Exxon contended that its allegations established viewpoint discrimination and unlawful conspiracy to violate its rights. Exxon also asserted that it had preserved its right to bring a Fourth Amendment unreasonable search claim and had adequately pled such a claim. In addition, Exxon argued that its allegations stated a due process violation based on the "impermissible bias" of the attorneys general, that the allegations stated a claim under the dormant Commerce Clause based on the attempts by the attorneys general to regulate out-of-state speech, that the claim that SEC reporting requirements preempted investigation of Exxon's reserves and asset impairments was timely, and that the Eleventh Amendment did not bar its state law claims.

Separately, Exxon sought permission to amend its complaint to incorporate "additional documentary evidence" that had "come to light" since Exxon last amended its complaint in November 2016. The additional allegations included that organizers of a 2012 workshop had lobbied the attorneys general to pursue the investigations and that the New York attorney general had contacts with "billionaire activist Tom Steyer about campaign support in connection with his

investigation of ExxonMobil." Exxon's proposed amended complaint also contained allegations regarding communications with the Rockefeller Family Fund and regarding the Fund's financing of "so-called investigative journalism that the Attorneys General have used as a pretext," and allegations of improper concealment of public records and regarding a shift in the New York attorney general's "investigative theory."

Both attorneys general objected to amendment of the complaint. In reply papers in support of dismissal, the Massachusetts attorney general asserted that the amended complaint added no further facts regarding Attorney General Healey and would not cure the "fatal defects" of the claims against her. The New York attorney general also asserted that the amendment "does nothing to shore up Exxon's deficient claims." In particular, the New York attorney general said controlling Second Circuit precedent foreclosed a claim of politically motivated conspiracy and that, in any event, the "purportedly new information" offered by Exxon "would not make this claim plausible." *Exxon Mobil Corp. v. Schneiderman*, No. 17-cv-2301 (S.D.N.Y. NYAG and Mass. AG supplemental memoranda of law Dec. 21, 2017; Exxon opposition, motion for leave to amend, proposed amended complaint, and redlined amended complaint Jan. 12, 2018).

Conservation Groups Challenged Recovery Plan for Mexican Wolves

WildEarth Guardians and Western Watersheds Project filed a lawsuit alleging that the final Mexican wolf recovery plan violated the Endangered Species Act and Administrative Procedure Act. The plaintiffs alleged, among other claims, that the recovery plan failed to utilize best available science to assess threats to the endangered Mexican wolf, including threats from ongoing and future impacts of climate change. *WildEarth Guardians v. Zinke*, No. 4:18-cv-00048 (D. Ariz., filed Jan. 30, 2018).

Federal Court Held Trial on Terminal Developer's Claim That Oakland's Ban on Coal Transport Violated Development Agreement

During the week of January 15, the federal district court for the Northern District of California held a three-day bench trial in an action challenging the City of Oakland's prohibition on the transportation and export of coal and petroleum coke to and through a rail and marine terminal for bulk and oversized cargo under development on land owned by the City. The bench trial concerned the terminal developer's claim that the prohibition breached a development agreement that granted the developer the right and obligation to develop the land. The City argued that the development agreement allowed it to impose regulations on the development based on "substantial evidence" that regulation was necessary to avoid placing occupants, users, or neighbors of the project "in a condition substantially dangerous to their health or safety." While the developer argued that the City could not rely on concerns regarding the potential for terminal operations to contribute to climate change because climate change is an issue of global scale, the City argued that "the unique, global nature of climate change doesn't mean communities cannot or should not consider local, incremental contributions to climate change." The City also cited other public health and safety concerns, including coal dust emissions. Prior to the trial, the court heard oral arguments on whether the City's prohibition violated the dormant Commerce Clause because it interfered with or discriminated against interstate or foreign commerce. Also at issue in the case is whether the Interstate Commerce Commission Termination Act, the Hazardous

Materials Transportation Act, or the Shipping Act of 1984 preempt the City's action. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 3:16-cv-07014 (N.D. Cal. Jan. 2018).

California and Environmental Groups Challenged BLM's Repeal of Hydraulic Fracturing Regulations

On January 24, 2018, California and eight environmental groups filed actions in the federal district court for the Northern District of California challenging the U.S. Bureau of Land Management's (BLM's) decision to repeal 2015 regulations that govern hydraulic fracturing on federal and tribal lands. California's and the environmental groups' complaints both alleged that BLM's repeal of the regulations violated the Administrative Procedure Act, the National Environmental Policy Act (NEPA), and several federal land management statutes (Mineral Leasing Act, Federal Land Policy and Management Act, and Indian Mineral Leasing Act). California's NEPA claim was based in part on the defendants' failure to consider potential significant adverse environmental impacts, including climate change harms. *California v. U.S. Bureau of Land Management*, No. 3:18-cv-00521 (N.D. Cal., filed Jan. 24, 2018); *Sierra Club v. Zinke*, No. 3:18-cv-00524 (N.D. Cal., filed Jan. 24, 2018).

Lawsuit Alleged That Management of Lobster Fishery Violated Federal Laws Protecting Climate-Threatened North American Right Whales

Three non-profit groups filed a lawsuit in the federal district court for the District of Columbia alleging that the authorization and management of the American lobster fishery violated the Endangered Species Act, Marine Mammal Protection Act, and Administrative Procedure Act due to impacts on endangered North American right whales. The National Marine Fisheries Service (NMFS) issued a biological opinion in 2014 determining that ongoing operations of the fishery were likely to kill or seriously injure more than three right whales every year but that fishery was not likely to jeopardize the right whales' continued existence. The complaint alleged, among other things, that the NMFS's jeopardy analysis was "patently unlawful" and had "improperly consider[ed] only the isolated share of responsibility for impacts to right whales from operation of the fishery, rather than adding the direct and indirect effects of operation of the fishery to all other activities and influences that affect the status of the species," which include threats from climate change. *Center for Biological Diversity v. Ross*, No. 1:18-cv-00112 (D.D.C., filed Jan. 18, 2018).

Environmental Organization Filed FOIA Lawsuit Seeking EPA Directives to Employees on Public Communications About and Political Review of Work

An environmental advocacy organization filed a Freedom of Information Act (FOIA) lawsuit in the federal district court for the Northern District of California seeking to compel the U.S. Environmental Protection Agency (EPA) to produce instructions issued to EPA employees since President Trump's inauguration about speaking publicly about their work or about review of EPA work by political appointees. The organization submitted its FOIA request on February 1, 2017 and alleged that EPA had failed to issue a final determination on the request. The complaint alleged that the documents sought were "crucial" because, among other reasons, they would "reveal the impact of partisan politics on the agency's priorities, operations, and implementation,

all of which have consequences for imperiled wildlife, catastrophic climate change, and public health in communities across the country." *Ecological Rights Foundation v. EPA*, No. 3:18-cv-00394 (N.D. Cal., filed Jan. 18, 2018).

Lawsuit Filed Challenging Resiliency Analysis for Railroad Bridge in Connecticut

A local conservation organization filed a lawsuit in federal district court in Connecticut challenging the environmental review pursuant to the National Environmental Policy Act for the Norwalk River Railroad Bridge replacement project in Norwalk, Connecticut. The organization contended that the defendant agencies had failed to consider the reasonable alternative of a fixed bridge at the level of the existing swing bridge. The organization alleged that the fixed bridge alternative would promote resiliency to climate change and severe weather events, and particularly to heatwaves, which the complaint alleged could cause rail tracks to expand, buckle, and warp and potentially prevent proper closure of the bridge and lead to the need for track repairs and speed restrictions. The organization asserted that although the environmental assessment (EA) for the project recognized resiliency to climate change and severe weather events as a "critical parameter" for evaluation of design alternatives, the EA had failed "to follow through with an adequate resiliency analysis." The complaint also alleged that the project's funding through a post-Superstorm Sandy grant program could be placed in jeopardy if the project was found not to advance the grant program's public transit resiliency priorities. *Norwalk Harbor Keeper v. U.S. Department of Transportation*, No. 3:18-cv-00091 (D. Conn., filed Jan. 17, 2018).

Shell Asked Rhode Island Federal Court to Dismiss Citizen Suit Asserting That Failure to Prepare Terminal for Climate Change Violated Clean Water Act and RCRA

On January 12, 2018, Shell Oil entities (Shell) moved to dismiss the citizen suit brought by Conservation Law Foundation (CLF) in the federal district court for the District of Rhode Island alleging that Shell violated the Clean Water Act and the Resource Conservation and Recovery Act (RCRA) at a bulk storage and fuel terminal in Providence. CLF alleged in an amended complaint filed in October 2017 that Shell had not taken information about climate change risks into account in designing, constructing, and operating the terminal. CLF asserted that Shell's disregard of the risks and continuing failure to protect the terminal from the risk made Shell liable for violations of the Clean Water Act and RCRA. In the motion to dismiss, Shell argued that CLF lacked standing because the alleged injuries were "highly speculative, remote, or hypothetical" and also flowed from severe precipitation and flooding events that were "wholly unrelated" to the defendants. Shell also asserted that the complaint's adaptation claims were not ripe and that CLF failed to state a claim under either the Clean Water Act or RCRA because its "failure to adapt" allegations amounted to "conclusory legal statements." Shell also said the court should defer to Rhode Island—which Shell said was "actively evaluating new measures for controlling the flow of stormwater discharges attributable to potential severe precipitation and flooding related to climate change"—and abstain from considering the Clean Water Act adaptation claims. Shell further asserted that the RCRA claim should be dismissed under the doctrine of primary jurisdiction because Rhode Island's environmental agency was overseeing cleanup of the facility and was obligated by statute to take climate change impacts into account. In addition, Shell said the court did not have subject matter jurisdiction over the terminal's

former owner/operator. *Conservation Law Foundation v. Shell Oil Products US*, No. 1:17-cv-00396 (D.R.I. amended complaint Oct. 25, 2017; motion to dismiss Jan. 12, 2018).

Exxon Sought to Dismiss Amended Claims Regarding Climate Change Preparation at Massachusetts Terminal

Exxon Mobil Corporation and related entities (Exxon) moved to dismiss Conservation Law Foundation's (CLF's) amended complaint alleging that Exxon violated the Clean Water Act and Resource Conservation and Recovery Act by failing to prepare a marine distribution terminal in Massachusetts for severe weather and other climatic events. CLF alleged that Exxon had failed to design the terminal or its waste water treatment system "to address precipitation and/or flooding, which is exacerbated by storms and storm surges, sea level rise, and increasing sea surface temperatures." CLF alleged that climate change was increasing the frequency and severity of events such as extreme rainfall. In support of motion to dismiss, Exxon argued that CLF had defied the court's earlier ruling that CLF lacked standing for injuries that would occur "in the far future" due to climate change impacts. Exxon asserted that CLF continued "to assert climate change claims premised on distant and speculative impacts" and had failed to identify violations of the facility's National Pollutant Discharge Elimination System permit. Exxon argued that the Clean Water Act's permit shield and the collateral attack doctrine barred CLF's claims. CLF responded that its amended complaint focused "only on the past, present, and near-term injuries associated with Exxon's violations." CLF characterized the issue before the court as "whether the climatic changes outlined by CLF were and are occurring during the relevant time frame and whether they should have been considered and addressed by Exxon." *Conservation Law Foundation v. Exxon Mobil Corp.*, No. 1:16-cv-11950 (D. Mass. motion to dismiss Dec. 20, 2017; plaintiff's opposition to motion to dismiss Jan. 19, 2018; Exxon corrected memorandum of law Jan. 25, 2018).

Lawsuit Filed Challenging Corps of Engineers Approvals for Crude Oil Pipeline in Louisiana; Court Denied TRO

On January 11, 2018, six organizations filed a lawsuit in the federal district court for the Middle District of Louisiana challenging permits and authorizations issued by the U.S. Army Corps of Engineers for the Bayou Bridge Pipeline, a 162.5-mile-long pipeline that would carry crude oil from Lake Charles, Louisiana, to St. James, Louisiana. The plaintiffs alleged that the Corps had not complied with the Clean Water Act, the Rivers and Harbors Act, or the National Environmental Policy Act, including by conducting a "plainly inadequate" environmental review that "failed to assess the climate impacts of 'locking in' future reliance on fossil fuels with a massive infrastructure investment." The complaint also alleged that the Corps' "public interest" review pursuant to the Clean Water Act and Rivers and Harbors Act did not adequately consider floodplains and coastal loss impacts. The complaint asserted that Executive Order 11988 required the Corps to "consider alternatives to avoid adverse effects and incompatible development in the floodplains." On January 29, the organizations filed motions for a temporary restraining order (TRO) and preliminary injunction. The court denied the TRO motion on January 30, finding that the plaintiffs had not demonstrated a substantial likelihood of success on the merits "at this early stage in the proceedings." A hearing on the preliminary injunction motion was scheduled for February 8, 2018. *Atchafalaya Basinkeeper v. U.S. Army Corps of*

Engineers, No. 3:18-cv-00023 (M.D. La., filed Jan. 11, 2018; motions for TRO and preliminary injunction Jan. 29, 2018; TRO denied Jan. 30, 2018).

Companies Sued Washington State Officials for Blocking Development of Coal Export Terminal

A coal company and other companies associated with the proposed development of a coal export terminal in Longview, Washington, filed a lawsuit in federal court against Governor Jay Inslee and two other Washington State officials, alleging that the defendants took actions to block a coal export terminal in violation of the dormant Commerce Clause. The plaintiffs also asserted that the defendants' actions were preempted by the Interstate Commerce Commission Termination Act and the Ports and Waterways Safety Act. The complaint alleged that the defendants had expressed "unyielding opposition to coal and coal exports," citing the governor's writings and statements regarding his concerns about coal combustion and export and climate change. The complaint also alleged that the defendants coordinated with other states to block coal exports. The plaintiffs asserted that the defendants violated the dormant foreign and interstate Commerce Clause by denying and refusing to process permits and expanding the scope of State Environmental Policy Act review beyond the boundaries of the state. *Lighthouse Resources Inc. v. Inslee*, No. 3:18-cv-05005 (W.D. Wash., filed Jan. 3, 2018).

Colorado Supreme Court Agreed to Consider Whether Oil and Gas Commission Correctly Interpreted State Law in Denying Kids' Rulemaking Petition

The Colorado Supreme Court agreed to review a ruling by the Colorado Court of Appeals that held that the Colorado Oil and Gas Conservation Commission (COGCC) had incorrectly concluded that it lacked statutory authority to undertake a proposed rulemaking sought by six children. The children submitted a rulemaking petition in 2013 asking COGCC to promulgate a rule "to suspend the issuance of permits that allow hydraulic fracturing until it can be done without adversely impacting human health and safety and without impairing Colorado's atmospheric resource and climate system, water, soil, wildlife, other biological resources." A district court affirmed COGCC's denial of the petition, but the Court of Appeals rejected COGCC's assertion that the requested rule was beyond the limited authority conferred by the Oil and Gas Conservation Act. The Court of Appeals concluded that the Act mandated that oil and gas development "be regulated subject to the protection of public health, safety, and welfare, including protection of the environment and wildlife resources." The Colorado Supreme Court granted petitions for writ of certiorari filed by COGCC and American Petroleum Institute and Colorado Petroleum Association. The court said it would consider the issue of "[w]hether the court of appeals erred in determining that the Colorado Oil and Gas Commission misinterpreted section 34-60-102(1)(a)(I), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare." *Colorado Oil & Gas Conservation Commission v. Martinez*, No. 2017SC297 (Colo. Jan. 29, 2018).

Environmental Groups Said California County's Permitting Plan for Dairies Did Not Adequately Address Greenhouse Gas Emissions

Three environmental groups filed a lawsuit in California Superior Court alleging that Tulare

County violated the California Environmental Quality Act (CEQA) when it approved an Animal Confinement Facilities Plan (ACFP), a related General Plan Amendment and zoning change, and a Dairy Feedlot and Dairy Climate Action Plan. The groups alleged that "[t]he dairy industry in Tulare County is a multi-billion dollar industry" and that the ACFP was "intended to make approval of new or expanded dairies quicker and easier." The groups said the environmental impact report (EIR) prepared by the County failed to adequately describe the environmental baseline, failed to consider any greenhouse gas mitigation measures that would result in substantial reductions of the EIR's projected increases in emissions, and improperly deferred formulation of greenhouse gas reduction mitigation measures without adopting a meaningful threshold of significance or performance standard or a commitment to ensuring emissions would be adequately mitigated. The groups also said the streamlined CEQA procedures described in the EIR improperly exempted new expansion projects from review if they generate less than 25,000 metric tons of greenhouse gas emissions and meet certain siting requirements. The EIR said that the three largest sources of greenhouse emissions would be manure decomposition, enteric digestion, and emissions from farm agricultural soils. *Sierra Club v. County of Tulare*, No. VCU272380 (Cal. Super. Ct., filed Jan. 11, 2018).

Trade Association and Power Plant Owner Told Massachusetts State Court That Greenhouse Gas Emissions Limitations for Electricity Generators Were Unlawful

On January 16, 2018, New England Power Generators Association (NEPGA) and GenOn Energy, Inc. (GenOn) moved for judgment on the pleadings in their action challenging regulations adopted by the Massachusetts Department of Environmental Protection and the Executive Office of Energy and Environmental Affairs that imposed greenhouse gas emissions reductions requirements on electricity generating facilities. NEPGA is a trade association representing competitive power generators; GenOn owns power plants in Massachusetts. NEPGA and GenOn argued that the regulations were beyond the agencies' authority because they were inconsistent with the Global Warming Solutions Act (GWSA), which NEPGA and GenOn said circumscribed the agencies' authority to regulate electric sector greenhouse gas emissions by requiring that regulations take the regional electricity market into account. NEPGA also contended that the GWSA barred the agencies from imposing emissions limitations that extended beyond the statute's sunset date in 2020. In addition, NEPGA and GenOn argued that the regulations were arbitrary and capricious because "[t]hey would have the perverse impact of causing an *increase* in statewide greenhouse gas emissions" due to the importing of electricity from less efficient power plants outside of Massachusetts—the plaintiffs said the only modeling in the record demonstrated that this increase would occur. *New England Power Generators Association v. Massachusetts Department of Environmental Protection*, No. 17-02918-D (Mass. Super. Ct. motion for judgment on the pleadings Jan. 16, 2018).

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FEATURED CASE

In Split Opinion, Hawai‘i Supreme Court Ruled That Due Process Hearing Was Required to Protect Right to Clean and Healthful Environment by Considering Greenhouse Gas Impacts of Utility’s Power Purchase Agreement

In a case concerning whether Sierra Club had a right to participate in proceedings before the Hawai‘i Public Utility Commission (Commission) concerning an electric utility company’s application for approval of a power purchase agreement between the utility and an electricity producer, the Hawai‘i Supreme Court ruled that Sierra Club and its members had asserted a property interest in a clean and healthful environment that was protectable under the Hawai‘i Constitution’s due process clause. The electricity producer had produced electricity at a bagasse-fired power plant that also burned other fuels including coal and petroleum. (Bagasse is a residue produced from sugar cane processing.) The power purchase agreement sought to restate, amend, and extend an existing agreement; the Commission approved it in 2015 after denying Sierra Club’s requests to intervene or participate in the proceedings. Although the plant closed after the Commission approved the agreement, the Supreme Court said Sierra Club’s claim fell within the public interest exception to the mootness doctrine because “[r]esolution of the issue may affect similarly situated parties who in the future seek to assert their right to a clean and healthful environment in proceedings before agencies and other governmental bodies.” On the merits, the Supreme Court concluded that the Hawai‘i Constitution established a substantive right to a clean and healthful environment and that the scope of that interest was defined by “existing law relating to environmental quality,” which the court said included statutory provisions requiring the Commission to “consider the need to reduce the State’s reliance on fossil fuels through energy efficiency and increased renewable energy generation” and to “explicitly consider” the effects the State’s reliance on fossil fuels would have on greenhouse gas emissions. The court concluded that these laws defined the right to a clean and healthful environment by requiring “that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Commission.” The court concluded that the utility’s application raised issues that directly affected Sierra Club’s members’ right to a clean and healthful environment and that the Commission’s approval of the power purchase agreement adversely affected the members’ interests. A due process hearing therefore was required to consider the impacts of approving the agreement on the members’ right to a clean and healthful environment, “including the release of harmful greenhouse gases” by the power plant. Two justices dissented, with the dissenting opinion stating that the majority’s decision “expands the limits of due process in ways that could have unintended consequences.” *In re Maui Electric Co.*, No. SCWC-15-0000640 (Haw. Dec. 14, 2017).

DECISIONS AND SETTLEMENTS

Ninth Circuit Issued Mixed Ruling on Assessment of Fishery Impacts on Climate Change-Threatened Sea Turtles

The Ninth Circuit Court of Appeals ruled that the National Marine Fisheries Service (NMFS) had acted arbitrarily and capriciously when it determined that a swordfish fishery’s expansion would not jeopardize the continued existence of the endangered loggerhead sea turtle despite scientific data suggesting that loggerhead population would significantly decline due to climate change and also to rising levels of marine debris. In doing so, the Ninth Circuit partially reversed

a Hawaii district court's granting of summary judgment upholding the NMFS's determinations under the Endangered Species Act in connection with the fishery expansion. (The court also ruled that the NMFS's grant of a permit under the Migratory Bird Treaty Act was arbitrary and capricious, but this aspect of the court's ruling did not address climate change.) The Ninth Circuit said the NMFS failed to articulate a "rational connection" between the climate-based population viability model and its no-jeopardy conclusion; the model showed the loggerhead facing high extinction risk even without the proposed action and additional loss of 4 to 11% with the proposed action. The Ninth Circuit found that the NMFS "improperly minimized" the proposed action's risks to loggerhead survival "by only comparing the effects of the fishery against the baseline conditions that have already contributed to the turtles' decline." The Ninth Circuit upheld, however, the NMFS's no-jeopardy conclusion for endangered leatherback sea turtles. The court was not persuaded by the plaintiffs' argument that the NMFS erred by limiting the "temporal scale" of its analysis to 25 years despite the NMFS's determination that rising temperatures would have impacts on sea turtles over the next century. The Ninth Circuit said the NMFS was entitled to rely on the climate-based population assessment model even though it could only predict changes for 25 years. The Ninth Circuit also was not persuaded that the NMFS had arbitrarily dismissed climate change impacts on sea turtles as uncertain. The court said that it could not conclude "from the NMFS's lack of precision that it failed to adequately consider the effects of climate change" and that the plaintiffs had failed to point to less speculative evidence that the agency had failed to consider. One judge dissented from the court's rejection of the no-jeopardy determination for loggerhead sea turtles, stating that "[w]hile the record data shows that the loggerhead is in decline, NMFS reasonably concluded that the fishery expansion would not appreciably reduce the likelihood of the loggerhead's survival and recovery." *Turtle Island Restoration Network v. U.S. Department of Commerce*, No. 13-17123 (9th Cir. Dec. 27, 2017).

Reversing District Court, Tenth Circuit Said Conservation Groups Could Intervene in Lawsuit Seeking Quarterly Mineral Lease Sales

The Tenth Circuit Court of Appeals reversed a district court's denial of conservation groups' motion to intervene in an oil and gas trade association's lawsuit that sought to compel the U.S. Bureau of Land Management (BLM) to hold quarterly lease sales for federal minerals. The Tenth Circuit concluded that the federal district court for the District of New Mexico had erred in denying the groups' motion to intervene as of right. Like the district court, the Tenth Circuit found that the groups' motion to intervene had been timely. The Tenth Circuit also agreed with the district court that the groups had an interest in protecting public lands from the impacts of oil and gas development. The Tenth Circuit concluded, however, that the conservation groups had an additional interest in preserving reforms they had worked implement, including a "Leasing Reform Policy" (Policy). While the district court had concluded that the lawsuit did not seek to set aside or modify the Policy, the Tenth Circuit found that "the district court overlooked two key points": (1) that increasing the frequency of lease sales could require BLM to abandon existing policies and (2) that the trade association asked the court to require BLM to revise or rescind the Policy if the court found that the Policy violated the Mineral Leasing Act. The Tenth Circuit therefore found that the conservation groups' interests might be impaired or impeded by the pending case and further concluded that BLM could not adequately represent the groups' interests. In finding that the federal defendants could not adequately represent the groups'

interests, the court cited executive orders signed by President Trump that directed review of agency regulations that potentially burden development of oil, gas, and other domestic energy resources. *Western Energy Alliance v. Zinke*, No. 17-2005 (10th Cir. Dec. 18, 2017).

D.C. Circuit Dismissed Challenges to Ohio-to-Michigan Pipeline Without Prejudice

The D.C. Circuit Court of Appeals dismissed without prejudice cases challenging the Federal Energy Regulatory Commission's (FERC's) approvals for the NEXUS pipeline between Ohio and Michigan. In doing so, the court granted Sierra Club's motion for voluntary dismissal, which Sierra Club made after learning that the pipeline's developer had purchased the property of one of the declarants supporting its emergency motion for a stay. FERC and pipeline developer had argued that the dismissal should be with prejudice. The emergency motion for stay, a motion to dismiss for lack of jurisdiction, and an emergency petition for writ of mandamus were dismissed as moot. *Sierra Club v. Federal Energy Regulatory Commission*, No. 17-1236 (D.C. Cir. Dec. 13, 2017).

Maine Federal Court Rejected Most Claims in Pipeline Operator's Challenge to City's Ban on Loading Crude Oil on Tankers; Dormant Commerce Claim Can Proceed

A federal district court in Maine ruled for the City of South Portland on all but one claim brought by a pipeline operator to challenge the City's "Clear Skies" ordinance, which prohibits loading crude oil on tankers in South Portland harbor. The pipeline operator currently pumps oil from South Portland to Montreal to bring the oil to refineries but asserted that it had plans to reverse the flow of oil. The pipeline operator said the City's prohibition on loading crude oil on tankers would prevent it from implementing those plans. While the Clear Skies ordinance's legislative findings focused on local air quality and land use impacts, City Council members also cited the need to take local action to address climate change and the ordinance's potential effects on "the health and safety of other global residents." The court ruled that the prohibition on loading crude oil was not preempted by the Pipeline Safety Act (because the prohibition was not a safety standard), by the Port and Waterways Safety Act, or by maritime law. The court also found that the prohibition did not impermissibly intrude on the federal government's federal affairs power. In addition, the court rejected a class-of-one equal protection claim and a claim that the ordinance violated the Due Process clause based on the void-for-vagueness doctrine. The court also concluded that the City could rationally have concluded that the ordinance was consistent with its comprehensive plan and ruled that Maine's Oil Discharge Prevention Law did not preempt the ordinance. The court concluded, however, that genuine disputes of material fact regarding the ordinance's purpose and practical effects on interstate and foreign commerce prevented summary judgment on the plaintiffs' dormant Commerce Clause claim. *Portland Pipe Line Corp. v. City of South Portland*, 2:15-cv-00054 (D. Me. Dec. 29, 2017).

Second Circuit Denied Stay Requested by New York Department of Environmental Conservation to Stop Pipeline Construction; District Court Enjoined Agency from Enforcing State Permitting Requirements to Stop Construction

The Second Circuit Court of Appeals denied the New York State Department of Environmental Conservation's (NYSDEC's) emergency motion for a stay of all construction activities for the

Valley Lateral Project, a 7.8-mile pipeline and related facilities that will transport natural gas from the mainline system to a new power plant in Orange County, New York. NYSDEC is challenging FERC's determination that NYSDEC waived its authority to consider an application for a water quality certification for the project. A hearing on the merits was scheduled for January 24, 2018. *New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*, No. 17-3770, -3503 (2d Cir. Dec. 7, 2017).

Six days after the Second Circuit order denying the stay, the federal district court for the Northern District of New York granted a pipeline company's request for a preliminary injunction barring NYSDEC from enforcing stream disturbance and freshwater wetlands permitting requirements to prevent the company from beginning construction on a pipeline. NYSDEC had denied the company's application for the permits on the ground that FERC's review of the pipeline project had not been sufficient because FERC did not adequately consider greenhouse gas impacts as required by a recent D.C. Circuit decision. The court denied NYSDEC's motion to dismiss; it held that the Second Circuit did not have exclusive jurisdiction of the pipeline company's claims and that the company had standing to challenge the permits that NYSDEC denied. In granting the preliminary injunction, the court found that the company had demonstrated irreparable harm and a strong likelihood of success on the merits of the argument that the federal Natural Gas Act preempted state permitting requirements. The court also found that the defendants had not shown that environmental damage caused by the "just 7.8 miles long" pipeline would outweigh the economic harm of a construction delay and that the public interest would not be disserved by a preliminary injunction. *Millennium Pipeline Co. v. Seggos*, No. 1:17-cv-01197 (N.D.N.Y. Dec. 13, 2017).

Washington State Court Invalidated at Least Some Aspects of State's Regulations of Greenhouse Gases

A Washington state court ruled from the bench that the Washington Department of Ecology lacked statutory authority to promulgate a component of its Clean Air Rule that regulated petroleum and natural gas suppliers. The Clean Air Rule capped and reduced greenhouse gas emissions from significant in-state stationary sources; petroleum product producers, importers, and distributors; and natural gas distributors operating within Washington. It was promulgated as a step towards achieving statutory targets for greenhouse gas emissions reductions. The court said it would take additional briefs on whether to sever the Clean Air Rule's provisions for stationary sources or to invalidate the entire rule. *Association of Washington Business v. Washington Department of Ecology*, No. 16-2-03923-34 (Wash. Super. Ct. Dec. 15, 2017).

SEC Said Apple Could Omit Climate Change-Related Shareholder Proposals from Proxy Materials

The U.S. Securities and Exchange Commission (SEC) issued letters to Apple, Inc. indicating that the SEC's Office of Chief Counsel would not recommend enforcement action if Apple omitted from its proxy materials certain shareholder proposals asking Apple to take actions to assess its greenhouse gas impacts. In one letter, the SEC addressed a shareholder proposal asking Apple to produce a report assessing the climate benefits and feasibility of adopting requirements that all retail locations implement a policy to keep store doors closed when climate control, especially

air-conditioning, was in use. The SEC said there "appear[ed] to be some basis" for Apple's view that it could exclude the proposal because it had already substantially implemented the proposal. The SEC did not find it necessary to address Apple's second basis for omitting the proposal—that the proposal concerned Apple's ordinary business operations. In another letter, the SEC said it appeared Apple had a basis for excluding a request that it prepare a report evaluating the potential for Apple to achieve net-zero emissions of greenhouse gases from operations directly owned by the company and major suppliers. The SEC agreed that the proposal appeared to relate to ordinary business operations because it sought "to micromanage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." SEC Response to Rule 14a-8 No-Action Request from Apple, Inc. Regarding Shareholder Proposal of Sustainvest Asset Management, LLC (Dec. 12, 2017); SEC Response to Rule 14a-8 No-Action Request from Apple, Inc. Regarding Shareholder Proposal of Christine Jantz (Dec. 21, 2017).

FERC Denied Rehearing of Approval of Atlantic Sunrise Pipeline

The Federal Energy Regulatory Commission (FERC) denied requests for rehearing of its order authorizing construction and operation of the Atlantic Sunrise Project, which includes approximately 200 miles of interstate natural gas pipeline and related facilities in Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. Environmental and citizen groups had asserted that FERC failed to take greenhouse gas impacts into account in several ways; FERC rejected each of these arguments. FERC said the National Environmental Policy Act (NEPA) did not require it to consider indirect effects of induced gas production, including greenhouse gas emissions, because there was not a causal relationship between FERC's action and additional production and, in any event, the scope of impacts from any such induced production was not reasonably foreseeable. FERC also found that it adequately considered the project's downstream impacts on greenhouse gas emissions and climate change, noting that it had estimated the greenhouse gas emissions associated with combustion of the gas to be transported by the project as required by the D.C. Circuit in its decision regarding the Southeast Market Pipelines Project. FERC said it could not quantify possible effects the project would have on renewable energy production. *In re Transcontinental Gas Pipe Line Co.*, No. CP15-138-001, -004 (FERC Dec. 6, 2017).

NEW CASES, MOTIONS, AND NOTICES

Lawsuits Filed in California Federal Court to Challenge One-Year Delay of BLM Waste Prevention Rule Requirements

On December 19, 2017, 16 conservation and tribal citizen organizations filed a lawsuit in the federal district court for the Northern District of California challenging BLM's final rule postponing most compliance dates in BLM's Waste Prevention Rule for one year. The Waste Prevention Rule, which was published in the Federal Register on November 18, 2016, imposed requirements on oil and gas companies to reduce the venting, flaring, and leaking of natural gas, including the greenhouse gas methane, during production activities on onshore federal and Indian leases. The organizations alleged that postponement of the compliance dates violated the Mineral Leasing Act (MLA), NEPA, the Federal Land Policy and Management Act (FLPMA),

and the Administrative Procedure Act (APA). On the same day and in the same court, the attorneys general of California and New Mexico filed a similar lawsuit challenging the postponement of the compliance dates. The states asserted that the one-year suspension of the Waste Prevention Rule's compliance dates "lacks any reasoned analysis, contravenes BLM's statutory mandates, and ignores significant environmental consequences." Like the conservation and tribal citizen groups, the states alleged violations of the MLA, NEPA, FLPMA, and APA; in addition, the states alleged that the delay rule violated the Federal Oil and Gas Royalty Management Act of 1982. *Sierra Club v. Zinke*, No. 3:17-cv-07187 (N.D. Cal., filed Dec. 19, 2017); *California v. U.S. Bureau of Land Management*, No. 3:17-cv-07186 (N.D. Cal., filed Dec. 19, 2017).

BLM Appealed Ruling Requiring APA Compliance for Postponement of Compliance Dates in Waste Prevention Rule

In a related case, BLM and other federal defendants filed a notice of appeal of the federal court decision ruling that they could not postpone compliance with rule's requirements without complying with the Administrative Procedure Act. In October 2017, the federal district court for the Northern District of California vacated a BLM rule that postponed the Waste Prevention Rule's compliance dates for one year. *California v. U.S. Bureau of Land Management*, No. 3:17-cv-03804 (N.D. Cal. Dec. 4, 2017).

Sierra Club Sought to Compel Issuance of Long-Overdue Efficiency Standards for Manufactured Housing

Sierra Club filed a lawsuit in the federal district court for the District of Columbia seeking to compel Secretary of Energy Rick Perry to establish energy efficiency standards for manufactured housing. Sierra Club alleged that the Secretary of Energy had failed to meet the December 19, 2011 deadline for prescribing such standards set by the Energy Independence and Security Act of 2007 (EISA). Sierra Club said the Secretary had violated EISA and that the failure to promulgate standards constituted an agency action unlawfully withheld under the Administrative Procedure Act. *Sierra Club v. Perry*, No. 1:17-cv-02700 (D.D.C., filed Dec. 18, 2017).

Conservation Groups Filed New Lawsuit Challenging Federal Approvals of Coal Mine's Expansion

On December 15, 2017, five conservation groups filed a complaint in the federal district court for the District of Colorado alleging that the U.S. Forest Service and BLM violated NEPA when they issued approvals authorizing expansion of an underground coal mine in the Sunset Roadless Area in Colorado. In 2014, a Colorado federal court vacated earlier approvals of the mine's expansion on the ground that the agencies had failed to take a hard look at greenhouse gas impacts. In the December 2017 complaint, the conservation groups said that, "despite having the benefit of a second opportunity to fully account for the mine expansions' harms, the agencies have, among other errors, again underestimated or obscured the climate pollution impacts of the expansion while improperly boosting the purported economic benefits." The groups alleged the following NEPA violations related to the agencies' assessment of greenhouse gas impacts: failure to acknowledge and account for the environmental impacts of the increased demand for

coal that the mine's expansion would induce; failure to disclose climate impacts using scientifically valid and available tools such as the social cost of carbon or to provide an explanation for why such an approach was not appropriate (as required by the 2014 decision); and failure to consider a reasonable alternative aimed at mitigating methane pollution. *High Country Conservation Advocates v. U.S. Forest Service*, No. 1:17-cv-03025 (D. Colo., filed Dec. 15, 2017).

City and County of Santa Cruz Filed Lawsuits Against Fossil Fuel Companies Seeking Damages for Climate Change-Related Injuries

The City and County of Santa Cruz each filed a lawsuit in California Superior Court against 29 fossil fuel companies, alleging that greenhouse gas pollution from production and use of the defendants' products had played "a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution and increased atmospheric CO_2 concentrations since the mid-20th century" and that the companies' production, promotion, and marketing of their products, along with their concealment of the products' known hazards and "championing of anti-regulation and anti-science campaigns," had caused injuries to the City and County. The City and County alleged that the defendants were directly responsible for 17.5% of total global emissions of carbon dioxide between 1965 and 2015. The climate change-related injuries alleged by the City and County included drought, extreme precipitation and landslides, heat waves, wild fires, and sea level rise. The causes of action asserted in the complaint were public nuisance, strict liability based on failure to warn and design defect, private nuisance, negligence, and trespass. The City and County sought compensatory damages, equitable relief including abatement of the nuisance, punitive damages, and disgorgement of profits, as well as attorneys' fees and other costs. *City of Santa Cruz v. Chevron Corp.*, No. 17CV03243 (Cal. Super. Ct., filed Dec. 20, 2017); *County of Santa Cruz v. Chevron Corp.*, No. 17CV03242 (Cal. Super. Ct., filed Dec. 20, 2017).

Coal Terminal Developer Challenged County's Denial of Shoreline Permits

The developer of a proposed coal terminal in Washington State filed a petition for review before the State Shorelines Hearings Board to appeal the decision of a Cowlitz County Hearing Examiner denying a shoreline permit application for the terminal. The hearing examiner had found, among other things, that the developer had failed to reasonably mitigate ten unavoidable, significant impacts, including impacts from greenhouse gas emissions. *In re Millennium Bulk Terminals - Longview, LLC Shoreline Permit Applications*, No. S17-17c (Wash. SHB Dec. 4, 2017).

December 6, 2017, Update # 105

FEATURED CASE

Montana Federal Court Denied Motions to Dismiss Challenges to Keystone XL Pipeline

The federal district court for the District of Montana denied motions to dismiss lawsuits challenging the presidential permit for the Keystone XL Pipeline. The court rejected the federal defendants' and intervenor TransCanada Corporation's (TransCanada's) contention that issuance of the permit was unreviewable presidential action. The court found that President Trump had waived any authority he retained to make the final decision on the presidential permit when he issued a presidential memorandum on the Keystone XL Pipeline on January 24, 2017. The court said the State Department had taken final agency action when it published the record of decision and national interest determination for the pipeline and issued the presidential permit. The court also found that the federal defendants and TransCanada had not met their burden of establishing that Congress had committed to agency discretion the State Department's determinations. In addition, the court found that the plaintiffs had alleged procedural injuries that could be redressed through the procedural remedy of adequate review under the National Environmental Policy Act (NEPA). The plaintiffs alleged, among other claims, that the defendants failed to adequately disclose climate impacts and failed to consider alternatives that would obviate the need for more crude oil. The court also allowed an Endangered Species Act claim to proceed and decided to hold a NEPA claim against the Bureau of Land Management in abeyance until BLM issued a final decision. *Indigenous Environmental Network v. U.S. Department of State*, No. 4:17-cv-00029 (D. Mont. Nov. 22, 2017); *Northern Plains Resource Council v. Shannon*, No. 4:17-cv-00031 (D. Mont. Nov. 22, 2017).

DECISIONS AND SETTLEMENTS

D.C. Circuit Denied Emergency Stay of Atlantic Sunrise Pipeline Project

On October 30, 2017, the petitioners challenging FERC's authorization of the Atlantic Sunrise pipeline project asked the D.C. Circuit Court of Appeals for an emergency stay. The petitioners contended that they had a high likelihood of success on their claims that FERC had not adequately analyzed the climate impacts of the end use of the natural gas transported by the project and had not considered indirect impacts of shale gas drilling that that the project would induce. The petitioners also argued that irreparable environmental injury would occur in the absence of a stay, that a stay would not substantially harm other parties, and that a stay was in the public interest. On November 8, the D.C. Circuit denied the motion for an emergency stay. *Allegheny Defense Project v. Federal Energy Regulatory Commission*, No. 17-1098 (D.C. Cir. order denying motion Nov. 8, 2017; emergency motion for stay Oct. 30, 2017).

Michigan Community College Reached Settlement with Students Whose Pro-Fossil Fuel Activities Were Halted

A Michigan federal court dismissed an action after a community college in Michigan reached a settlement agreement with several students and a student organization who alleged that the college and officials at the college violated their rights to free speech and equal protection. The students and the organization brought the lawsuit after campus police allegedly stopped the students from talking with other students at an open area on campus about fossil fuels and from offering "educational literature about the benefits of fossil fuels to human flourishing" and collecting signatures to support fossil fuels. The campus police allegedly told the students that their expressive activities required approval by college administrators. The settlement agreement

provided that the college would not enforce the advance permission requirements of its expressive activity policy for students and would undertake a revision of the policy. The college also agreed to pay $10,000 to Alliance Defending Freedom for the plaintiffs' attorneys' fees and costs. *Turning Point USA (TPUSA) v. Macomb Community College*, No. 2:17-cv-12179 (E.D. Mich. order of dismissal Nov. 13, 2017; settlement Nov. 8, 2017).

Delaware Bankruptcy Court Ruled That Purchaser of Debtor's Power Plant Was Not Liable for Pre-Transfer California Cap-and-Trade Obligations

The federal bankruptcy court for the District of Delaware ruled that the purchaser of a natural gas power plant in California from a company that had emerged from bankruptcy did not have successor liability for the debtor company's pre-transfer compliance obligations under California's cap-and-trade program. Triennial compliance obligations arising from emissions from 2015 to 2017 come due on November 1, 2018; the cost of complying with the debtors' compliance obligations was estimated to be approximately $63 million. The bankruptcy court said the cap-and-trade regulations covered only entities, not facilities themselves, and that a purchaser would only be covered after purchasing and operating a facility. The court also concluded that the regulations did not provide for successor liability or otherwise make purchasers liable for the emissions of an entity formerly covered by the regulations. In addition, the court rejected the California Air Resources Board's argument that the compliance obligations were not an "interest" under the Bankruptcy Code that could escape successor liability. *In re La Paloma Generating Co.*, No. 16-12700 (Bankr. D. Del. Nov. 9, 2017).

California Appellate Court Said Review of Oil Refinery Project's Greenhouse Gas Impacts Was Acceptable, But Found Fault with Other Aspects of Review

The California Court of Appeal found that the Kern County's review under the California Environmental Quality Act (CEQA) of a project modifying an oil refinery in Bakersfield to accept lighter crude oil from the Bakken formation in North Dakota was inadequate in two respects. The appellate court said the environmental impact report (EIR) contained factual error regarding federal railroad safety data and improperly concluded that the Interstate Commerce Commission Termination Act of 1995 preempted CEQA review of the environmental impacts of off-site rail activities. The appellate court rejected, however, claims that Kern County had used an inappropriate baseline year for the review, that the EIR's disclosure of greenhouse gas emissions was misleading and deceptive, and that the County had improperly based its determination that the project's greenhouse gas emissions would not be significant on the facility's compliance with the requirements of California's cap-and-trade program. *Association of Irritated Residents v. Kern County Board of Supervisors*, No. F073892 (Cal. Ct. App. Nov. 21, 2017).

California Court of Appeal Said 2011 EIR for San Diego Transportation Plan Did Not Adequately Address Mitigation of Greenhouse Gas Impacts

The California Court of Appeal ruled that substantial evidence did not support the determination of the San Diego Association of Governments (SANDAG) that an EIR prepared for a regional long-term transportation plan in 2011 adequately addressed mitigation for the plan's impacts on

greenhouse gas emissions. The Court of Appeal issued this decision on remand from the California Supreme Court, which in July 2017 upheld SANDAG's approach to disclosures of the plan's greenhouse gas emissions and potential inconsistency with statewide emissions reduction goals. As a threshold matter on remand, the Court of Appeal rejected SANDAG's argument that the challenges to the 2011 transportation plan and its EIR were moot because SANDAG had subsequently adopted versions of the transportation plan and EIR that superseded the versions under review. On the merits of the appeal, the court considered whether the 2011 EIR had adequately addressed mitigation of the significant greenhouse gas emissions impacts it disclosed and concluded that it had not. The Court of Appeal stated: "Missing from the EIR is what [the California Environmental Quality Act] requires: a discussion of mitigation alternatives that could both substantially lessen the transportation plan's significant greenhouse gas emissions impacts and feasibly be implemented." Instead, the EIR had "considered and deemed feasible three measures requiring little to no effort to implement and assuring little to no concrete steps toward emissions reduction" and had "considered and deemed infeasible three particularly onerous measures" that "would be difficult, if not impossible, to enforce and [that required] implementation resources not readily available." *Cleveland National Forest Foundation v. San Diego Association of Governments*, No. D063288 (Cal. Ct. App. Nov. 16, 2017).

Arizona Court Again Ordered Disclosure of Climate Scientists' Emails

On remand from the Arizona Court of Appeals, the Arizona Superior Court again granted a motion to require disclosure under the state public records law of emails of two climate scientists at the University of Arizona. The Superior Court indicated that the Court of Appeals had mistakenly concluded that the Superior Court had not considered an exemption from the public records law for certain university records in its earlier decision requiring the disclosure. The exemption at issue applies to "unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews." In its ruling on remand, the Superior Court made explicit findings (1) that to the extent the scientists' emails fell within this exemption's scope, the exemption was inapplicable because "the subject matter of the documents has become available to the general public," (2) that the subject matter of any emails that did not fall within the scope of the exemption also had become available to the general public, and (3) that disclosure of the emails would not be contrary to the best interests of the State. *Energy & Environmental Legal Institute v. Arizona Board of Regents*, No. C20134963 (Ariz. Super. Ct. Nov. 30, 2017). The Climate Science Legal Defense Fund, which filed an amicus brief in the appellate court in support of the scientists, today released a 50-state report on research protections in open records law. You can review the report here.

Jury Convicted Environmental Activist in Montana Valve-Turning Case

A jury in Montana state court in Chouteau County convicted an environmental activist on charges of criminal mischief and trespassing in connection with his closure of a valve on a pipeline carrying crude oil from Canada to the United States. Earlier in 2017, the court denied the defendant's request to present a necessity defense based on testimony about the risks of climate change. Sentencing was scheduled for January 2, 2018. The defendant's attorneys indicated he planned to appeal. *State v. Higgins*, No. DC-16-18 (Mont. Dist. Ct. Nov. 22, 2017).

NEW CASES, MOTIONS, AND NOTICES

California Counties and City Appealed Bankruptcy Court Order Enjoining Climate Change Lawsuits Against Peabody Energy

San Mateo and Marin Counties and the City of Imperial Beach appealed the order of a federal bankruptcy court in Missouri enjoining them from pursuing their climate change lawsuits against the coal company Peabody Energy Corporation (Peabody). The Counties and City filed their lawsuits in California state court seeking damages for injuries caused by the production, promotion, marketing and use of fossil fuel products and concealment of the hazards of such products by Peabody and other fossil companies. The fossil fuel companies removed the cases to federal court, where a motion to remand is pending. *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. notice of appeal Nov. 26, 2017); *County of San Mateo v. Chevron Corp.*, No. 3:17-cv-04929 (N.D. Cal. motion to remand and memorandum in support of motion Sept. 25, 2017 and Oct. 23, 2017).

Oil and Gas Companies Removed San Francisco and Oakland Climate Cases to Federal Court; Court Denied Companies' Motion to Relate to Other Pending Cases

On October 20, 2017, the five oil and gas company defendants in the City of San Francisco's and City of Oakland's climate change nuisance lawsuits removed the cases to federal court. The defendants asserted that the complaints arose under federal laws and treaties, presented substantial federal questions, and presented a claim preempted by federal law. The defendants then moved to relate the cases to the lawsuits brought by San Mateo and Marin Counties and the City of Imperial Beach. San Francisco and Oakland opposed relating the cases; the plaintiffs in the other actions did not take a position. On November 8, 2017, the Executive Committee for the Northern District of California denied the motion to relate the cases. *People of State of California v. BP p.l.c.*, No. 3:17-cv-06012 (N.D. Cal. order Nov. 8, 2017; notice of removal Oct. 20, 2017).

Climate Change-Based Constitutional Claims Filed Against Federal Government in Pennsylvania Federal Court

Clean Air Council and two children filed a federal lawsuit in the Eastern District of Pennsylvania asserting claims of due process and public trust violations against the United States, the president, the Department of Energy, Secretary of Energy Rick Perry, the Environmental Protection Agency (EPA), and EPA Administrator Scott Pruitt. The complaint seeks a declaration that the defendants cannot implement regulatory rollbacks that increase the frequency of or intensify the effects of climate change "based on junk science in violation of Plaintiffs' constitutional rights to a life-sustaining climate system and the public trust doctrine." *Clean Air Council v. United States*, No. 2:17-cv-04977 (E.D. Pa., filed Nov. 6, 2017).

Ninth Circuit to Hear Oral Argument on December 11 in Young People's Climate Case

The Ninth Circuit Court of Appeals scheduled oral argument for Monday, December 11 on the United States' petition for writ of mandamus seeking to bar the climate lawsuit filed by young

people and "future generations" from proceeding in federal district court in Oregon. In November 2016, the district court denied motions to dismiss the action, allowing public trust and due process claims to proceed. After unsuccessfully seeking permission for interlocutory appeal, the United States filed the petition for writ of mandamus, arguing that the district court committed clear error in denying the motions to dismiss and was acting outside its jurisdiction. *United States v. United States District Court for the District of Oregon*, No. 17-71692 (9th Cir. order Nov. 16, 2017).

Sierra Club Sought Stay of Ohio-to-Michigan Pipeline But Then Asked for Voluntary Dismissal After Learning Developer Had Purchased Member's Property

On November 13, 2017, Sierra Club filed an emergency motion for stay of construction of the 257-mile NEXUS natural gas pipeline between Ohio and Michigan. Sierra Club argued that it had a high likelihood of success on the merits because, among other things, the Federal Energy Regulatory Commission (FERC) had violated the National Environmental Policy Act by failing to evaluate the effects of greenhouse gas emissions. Sierra Club preemptively countered the FERC's anticipated argument that the D.C. Circuit lacked jurisdiction to consider the challenge to the pipeline because a request for rehearing was still pending before FERC. Sierra Club argued that FERC had denied the request for rehearing by operation of law by failing to act on the request within 30 days. On November 20, Sierra Club filed a motion seeking voluntary dismissal of the proceeding without prejudice after learning that the pipeline's developer had purchased the property of one of the declarants supporting its emergency motion—a Sierra Club member who owned properties through which the pipeline would cut. FERC and the pipeline developer opposed dismissal without prejudice. *Sierra Club v. Federal Energy Regulatory Commission*, No. 17-1236 (D.C. Cir. FERC and NEXUS opposition to dismissal without prejudice Nov. , 2017; motion for voluntary dismissal Nov. 20, 2017; stay motion Nov. 13, 2017).

FERC Denied Requests from New York Department of Environmental Conservation to Stop Valley Lateral Pipeline Project; Second Circuit Imposed Administrative Stay

On November 15, 2017, FERC denied the New York State Department of Environmental Conservation's (NYSDEC's) request for rehearing of FERC's determination that NYSDEC had waived its authority to issue a water quality certification for the Valley Lateral pipeline project, a 7.8-mile pipeline and related facilities that will transport natural gas from the mainline system to a new power plant in Orange County, New York. A day later, FERC denied NYSDEC's request to reopen the record or rehear FERC's November 2016 authorization of the project. FERC said NYSDEC's contention that the D.C. Circuit's decision in *Sierra Club v. FERC*, No. 16-1329, required FERC to quantify the project's downstream greenhouse gas emissions and consider their impacts was untimely and that, in any event, the analysis had already been done. Earlier in the month, the Second Circuit Court of Appeals granted an administrative stay pending its review of NYSDEC's emergency petition for a writ of prohibition asking the Second Circuit to stay the effectiveness of FERC's Notice to Proceed allowing the developer to construct the project. After FERC denied NYSDEC's request for rehearing, the pipeline's developer moved to dismiss the petition and dissolve the stay immediately. *New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*, No. 17-3503 (2d Cir.

petition Oct. 30, 2017; administrative stay Nov. 2, 2017); *In re Millennium Pipeline Company, L.L.C.*, No. CP16-17-003 (FERC order on rehearing of November 2016 authorization Nov. 16, 2017; order on rehearing of declaratory order Nov. 15, 2017).

Lawsuit Challenging Copper Mine Alleged Failures to Consider Climate Impacts

Environmental groups filed a lawsuit in federal court in Arizona challenging approvals for a copper mine. The complaint alleged, among other things, that the U.S. Forest Service had failed to analyze the greenhouse gas emissions that would result from the smelting of the ore. The complaint also alleged that the combined adverse effects of groundwater drawdown and climate change had not been examined quantitatively. *Save the Scenic Santa Ritas v. U.S. Forest Service*, No. 4:17-cv-00576 (D. Ariz., filed Nov. 27, 2017).

Plaintiff Opposed Exxon's Motion to Dismiss Securities Class Action

The lead plaintiff in a securities class action against Exxon Mobil Corporation (Exxon) filed its response in opposition to Exxon's motion to dismiss. The lead plaintiff contended that Exxon had admitted to internal use for planning purposes of "a separate, undisclosed set of proxy costs" of carbon that was significantly lower than the proxy costs described in defendants' representations to investors. The lead plaintiff argued that Exxon's justification of the internal use of the separate set of costs raised factual questions that could not be resolved on a motion to dismiss. The lead plaintiff also asserted that Exxon's explanations were "plainly inconsistent" with its representations. The lead plaintiff contended that the complaint alleged a strong inference of scienter "by alleging numerous particularized facts establishing that each of the defendants 'knowingly or recklessly made statements to the market while aware of facts that, if not disclosed, would render those statements misleading,'" and that the complaint sufficiently alleged loss causation by alleging partial disclosures that revealed fraudulent conduct and the value of Exxon's reserves and that caused significant declines in Exxon's stock price. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111 (N.D. Tex. Nov. 21, 2017).

WildEarth Guardians Filed Lawsuit to Compel Department of Interior to Produce Records About Secretarial Order on Onshore Mineral Leasing

WildEarth Guardians filed a lawsuit under the Freedom of Information Act (FOIA) seeking to compel production by the Department of the Interior of records related to Secretarial Order 3354, "Supporting and Improving the Federal Onshore Oil and Gas Leasing and Federal Solid Mineral Leasing Program." WildEarth Guardians alleged that the order "stands to undermine protection of the climate, human and environmental health, fish and wildlife, public lands, and clean energy development." WildEarth Guardians submitted FOIA requests to the Department of Interior in July and August 2017 seeking records related to the order. *WildEarth Guardians v. U.S. Department of the Interior Office of the Secretary*, No. 1:17-cv-02512 (D.D.C. Nov. 20, 2017).

Former Department of Interior Employee Filed FOIA Lawsuit Seeking Records on Department's Reorganization

A former employee of the U.S. Department of the Interior (DOI) filed a FOIA lawsuit against DOI. The former employee alleged that as part of his duties at DOI he formerly had "addressed the danger posed by melting permafrost and other climate change impacts to Alaska Native communities such as Kivalina, Shishmaref, and Shaktoolik" and "raised the threats to these communities and the opportunities for developing resilience plans publicly – at the United Nations, for example – as well as inside the federal government." The employee alleged that in June 2017 he was reassigned to a DOI office responsible for collection and accounting for and verifying natural resources revenue, a position for which he did not have experience or education. The plaintiff filed a whistleblower complaint alleging that the reassignment was in retaliation for raising concerns about the Alaska Native communities. In two FOIA requests in September and October 2017, the plaintiff sought 39 categories of records relating to reorganization of DOI staff in the Trump administration and to his employment. The plaintiff alleged that DOI had not produced any records or made a determination on his requests. *Clement v. U.S. Department of Interior*, No. 1:17-cv-02451 (D.D.C., filed Nov. 14, 2017).

Competitive Enterprise Institute Sought State Department Correspondence About "Legal Form" of Paris Agreement

Competitive Enterprise Institute (CEI) filed a FOIA lawsuit against the U.S. Department of State asking the federal district court for the District of Columbia to order the State Department to produce records requested by CEI related to negotiation of the Paris Agreement. CEI sought correspondence to or from two State Department employees: a diplomat who participated in negotiation of the Paris Agreement and another State Department employee who served as Capitol Hill liaison. In a press release, CEI said the individuals were members of the State Department when a decision was made to avoid characterizing the Paris Agreement as a treaty and that the Obama administration had "cut the Senate out of the treaty process" to join the Paris Agreement. CEI alleged that the Paris Agreement and its "legal form" were "the subject of great public and media interest." *Competitive Enterprise Institute v. U.S. Department of State*, No. 1:17-cv-02438 (D.D.C., filed Nov. 13, 2017).

Lawsuit Filed to Challenge Highway Widening Project in California State Park

Four individuals and four environmental groups filed a lawsuit in the federal district court for the Northern District of California challenging a highway widening project in Richardson Grove State Park, which the plaintiffs said "provides the gateway to majestic old-growth redwoods unique to California's northern coast." The plaintiffs' claims included that the California Department of Transportation and its director failed to evaluate the project's impacts under the National Environmental Policy Act, including effects on greenhouse gas emissions. *Bair v. California Department of Transportation*, No. 1:17-cv-06419 (N.D. Cal., filed Nov. 2, 2017).

Texas County Filed Lawsuit Against Chemical Manufacturer That Owned Facility Where Fires Burned After Harvey

Harris County, Texas, filed a petition in state court against Arkema, Inc. alleging, among other things, that a chemical manufacturing facility owned and operated by Arkema did not have required permits under the County's Floodplain Regulations for one or more structures that sit

beneath base flood elevation. As a result of Hurricane Harvey, the facility flooded, causing its primary and backup power to go offline. The County alleged that without refrigeration, the temperatures of certain organic peroxides manufactured at the facility increased to their "self-accelerating decomposition temperatures," the point at which the chemicals begin a "chemical decomposition process that leads to rapid burning," leading to fires and unauthorized air emissions. The flooding also resulted in industrial wastewater overflowing wastewater tanks and their containment dikes. The County asserted that Arkema had violated the Texas Clean Air Act and the Texas Water Code. The County sought civil penalties, response costs, and injunctive relief, including ordering an independent third-party audit of the facility's disaster preparedness and implementation of the auditor's recommendations and ordering Arkema to obtain all required permits under the Floodplain Regulations. *Harris County v. Arkema, Inc.*, No. 2017-76961 (Tex. Dist. Ct., filed Nov. 16, 2017).

Community Group Filed CEQA Challenge to Highway Interchange Project in San Diego

A community group filed a lawsuit in California Superior Court seeking to set aside a notice of exemption issued by the California Department of Transportation (Caltrans) for a highway interchange project in San Diego. The group said Caltrans had improperly concluded that the project was exempt from California Environmental Quality Act review without notice after members of the group had been "actively engaged" in commenting on the draft EIR for over five years. The group also charged that the EIR was inadequate. The group asserted a number of shortcomings in the EIR, including that it erroneously concluded that the project's contribution to climate change was too speculative and that it failed to quantify or analyze construction-related greenhouse gas emissions. *Citizens for a Responsible Caltrans Decision v. California Department of Transportation*, No. 37-2017-00041547-CU-TT- CTL (Cal. Super. Ct., filed Nov. 1, 2017).

EPA Proposed to Repeal Emission Standards for "Glider" Vehicles, Engines, and Kits

On November 16, 2017, EPA published a proposal to repeal greenhouse gas emissions standards and other requirements for heavy-duty glider vehicles, glider engines, and glider kits. EPA promulgated the standards, which apply to medium- and heavy-duty engines and vehicles, in October 2016; in July 2017, EPA received a petition for reconsideration of the standards' application to gliders, which EPA describes as a "truck that utilizes a previously owned powertrain (including the engine, the transmission, and usually the rear axle) but which has new body parts." EPA proposed a new interpretation of the Clean Air Act pursuant to which EPA would lack authority to issue the standards because glider vehicles would not constitute "new motor vehicles," glider engines would not constitute "new motor vehicle engines," and glider kits would not be treated as "incomplete" new motor vehicles. Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53442 (Nov. 16, 2017).

Rehearing Sought of FERC Approval of Atlantic Coast Natural Gas Pipeline

Environmental and community groups filed a request for rehearing and rescission of FERC's authorization for the Atlantic Coast Pipeline, a natural gas pipeline running through West Virginia, Virginia, and North Carolina. The environmental groups also asked for a stay of the

project. Among the errors asserted by the environmental groups were a failure to adequately assess the project's reasonably foreseeable greenhouse gas emissions and climate change impacts and a failure to adequately consider all reasonable direct and indirect impacts and cumulative impacts, including the upstream and downstream impacts associated with gas development and compressor stations. *In re Atlantic Coast Pipeline, LLC*, Nos. CP15-554-000 et al. (FERC Nov. 13, 2017).

Youth Petitioners Asked North Carolina Agencies to Reduce State's Carbon Emissions to Zero by 2050

The Duke Environmental Law & Policy Clinic submitted a rulemaking petition to the North Carolina Department of Environmental Quality and the North Carolina Environmental Management Commission (EMC) on behalf of three youth petitioners and present and future generations requesting that the agencies require that carbon dioxide emissions within the boundaries of the state be reduced to zero by 2050. The petition asserted that such action was required to meet the EMC's public trust obligations "to protect human health, prevent injury to animal and plant life, and ensure that the State's natural resources will be protected and conserved for future generations." Petition for Rulemaking to Limit North Carolina's Carbon Dioxide Emissions to Protect a Stable Climate System and Preserve the Natural Resources of North Carolina (Nov. 14, 2017).

November 7, 2017, Update # 104

FEATURED CASE

Bankruptcy Court Said California City and Counties Could Not Sue Coal Company for Climate Change Impacts

A federal bankruptcy court in Missouri enjoined San Mateo and Marin Counties and the City of Imperial Beach (the plaintiffs) from pursuing their climate change lawsuits against Peabody Energy Corporation (Peabody). The plaintiffs alleged that Peabody (and a number of other fossil fuel companies) caused greenhouse gas emissions that resulted in sea level rise and damage to their property. Peabody, a coal company, filed for bankruptcy in April 2016 and emerged from bankruptcy under a plan that became effective on April 3, 2017. As an initial matter, the bankruptcy court said the plaintiffs had not established any basis for a claim because the complaints' only Peabody-specific allegations were that Peabody had exported coal from terminals or ports in several California counties and was a member of organizations that plaintiffs said denied climate change. The court further concluded, however, that even assuming claims did exist, the claims were pre-bankruptcy petition claims that had been discharged under the bankruptcy plan because the plaintiffs had not filed proofs of claim. The court determined, moreover, that even if the plaintiffs' claims could be construed as post-effective date claims (i.e., claims concerning conduct and harm after Peabody emerged from bankruptcy), the claims did not fall within the scope of a settlement with the U.S. Environmental Protection Agency (EPA) and other governmental entities to allow continued enforcement of environmental laws related to ongoing mining operations. The bankruptcy court also rejected the plaintiffs' argument that one

of their nuisance claims did not constitute a "Claim" or "Liability" pursuant to the Bankruptcy Code and Peabody's bankruptcy plan and therefore could not be discharged and enjoined. *Reorganized Peabody Energy Corp. v. County of San Mateo (In re Peabody Energy Corp.)*, No. 16-42529 (Bankr. E.D. Mo. Oct. 24, 2017).

DECISIONS AND SETTLEMENTS

D.C. Circuit Upheld Department of Energy LNG Export Authorizations from Three More Facilities

In an unpublished decision, the D.C. Circuit Court of Appeals upheld the U.S. Department of Energy's (DOE's) authorization of liquefied natural gas (LNG) exports from three facilities in Louisiana, Maryland, and Texas. The court said its August 2017 decision rejecting challenges under the National Environmental Policy Act (NEPA) and Natural Gas Act to DOE's authorization of LNG exports at another Texas facility largely governed the resolution of the instant cases. The court addressed three narrow issues that remained in one or more of the cases. First, it said the determination not to prepare an environmental impact statement in two of the cases was not arbitrary and capricious. Second, it found that DOE had not acted arbitrarily and capriciously by not conducting more localized analysis of where exports would result in increased production. Finally, the court found that DOE adequately considered distributional impacts in its evaluation of "public interest" under the Natural Gas Act. *Sierra Club v. U.S. Department of Energy*, Nos. 16-1186, 16-1252, 16-1253 (D.C. Cir. Nov. 1, 2017).

D.C. Circuit Stayed Greenhouse Gas Emissions Standards for Truck Trailers

The D.C. Circuit Court of Appeals granted a motion by a truck trailer manufacturers trade group to stay the final rule adopted by the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration in August 2016 establishing greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles. The court said the trade group had satisfied the stringent requirements for a stay pending judicial review and stayed the rule "insofar as it purports to regulate trailers." The court also granted the respondents' motion to continue holding the case in abeyance pending the completion of administrative proceedings that the agencies said "could obviate the need for judicial resolution" of the issues raised by the trade group. The court directed the parties to file status reports every 90 days. *Truck Trailer Manufacturers Association, Inc. v. EPA*, No. 16-1430 (D.C. Cir. Oct. 27, 2017).

Second Circuit Declined to Rehear Decision Upholding New York's Denial of Water Quality Certificate for Pipeline

On October 19, the Second Circuit Court of Appeals denied a natural gas pipeline developer's petition for panel rehearing or rehearing en banc of its ruling that upheld the New York State Department of Environmental Conservation's (NYSDEC's) denial of a water quality certificate for the pipeline. The developer had argued that the Second Circuit's conclusion that New York could consider alternative routes for Natural Gas Act projects conflicted with other precedent of the Second Circuit as well as precedent of the Supreme Court and other circuit courts of appeals.

The developer also argued that the Second Circuit had prematurely decided the merits of the case when it should have held the case in abeyance until the Federal Energy Regulatory Commission (FERC) determined whether NYSDEC had waived the water quality certificate requirement by taking too long to render a decision on the developer's application. On October 11, the developer petitioned FERC for a declaratory order finding that NYSDEC had failed to act within a reasonable period of time on its application. *Constitution Pipeline Co. v. Seggos*, No. 16-1568 (2d Cir. Oct. 19, 2017); *In re Constitution Pipeline Co.*, No. CP18-5 (FERC Oct. 11, 2017).

Montana Federal Court Allowed Some Coal Mining Activity to Take Place While Federal Agency Completed Required NEPA Review

On October 31, 2017, the federal district court for the District of Montana modified its August 2017 injunction barring mining of federal coal within an area subject to a mining plan modification for which the court had vacated the environmental assessment. In an opinion issued on November 3 to explain the basis of the October 31 order, the court considered the factors for a permanent injunction. The court concluded that although the removal of federal coal would be an irreparable injury with consequences such as greenhouse gas emissions that could not be addressed through alternative judicial remedies, the balance of the hardships and the public interest warranted a "limited modification." The court found that the "blanket injunction" it originally issued would not completely address the harms of coal mining because mining of private coal would continue at the mine regardless of the scope of the injunction; the court found that a blanket injunction would, however, inflict economic harm on the coal company's employees and the local community. The court therefore permitted the mining company to conduct development work within federal coal in one section of the mining plan area, but ordered that the amount of federal coal "displaced" not exceed 170,000 tons. The court also required that the federal coal be stockpiled and stored at the mine and that it not be sold or shipped. In its August decision, the court had found that the Office of Surface Mining failed to comply with NEPA, including by failing to take a hard look at foreseeable greenhouse gas emissions and at the impacts of coal transportation. The mining company's emergency motion after the August 2017 order asked the court to amend its judgment and stay the injunction. The mining company argued that the district court should not have issued the injunction without hearing legal arguments and factual evidence on the appropriate remedy, and without weighing the mandatory factors for a mandatory injunction. The company said the injunction would "[i]n a matter of weeks … cause severe consequences to the mine and its employees, in an area of Montana that can ill-afford economic displacement." On October 2, the court denied the request for a stay of the injunction, after which the mining company appealed both the October 2 order and the court's August 2017 decision to the Ninth Circuit and requested emergency relief. On October 25 and against on October 30, the Ninth Circuit said the appeal was not yet effective and held it in abeyance pending the district court's resolution of the emergency motion. *Montana Environmental Information Center v. U.S. Office of Surface Mining*, No. 9:15-cv-00106 (D. Mont. emergency motion Sept. 11, 2017; order denying stay Oct. 2, 2017; notice of appeal Oct. 5, 2017; order modifying injunction Oct. 31, 2017; opinion and order Nov. 3, 2017), No. 17-35808 (9th Cir. emergency motion Oct. 5, 2017; order denying motion Oct. 25, 2017; emergency motion to reconsider Oct. 27, 2017; order denying motion to reconsider Oct. 30, 2017).

California Federal Court Dismissed Paper Products Company's RICO Lawsuit Against Environmental Groups

The federal district court for the Northern District of California dismissed an action brought against Greenpeace and another environmental advocacy organization by a forest products company and its affiliates. The forest products company claimed that the environmental groups had committed violations of the Racketeer Influenced and Corruption Organizations (RICO) Act by falsely and maliciously labeling the companies as "forest destroyers" whose activities created significant climate risk. The court dismissed the RICO claims for failure to meet the heightened pleading standard required for claims sounding in fraud. In addition, the court found that the company had failed to show that the alleged RICO violations proximately caused injury to its business or property. The court also dismissed defamation and related state tort claims. The court concluded that the forest products company had not pleaded actual malice with the level of specificity required to sustain the state law claims. The court also granted motions to strike the state law claims pursuant to California's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute. The court granted the company leave to amend its complaint with 21 days. *Resolute Forest Products, Inc. v. Greenpeace International*, No. 3:17-cv-02824 (N.D. Cal. Oct. 16, 2017).

As Compliance Date for Methane Waste Rule Nears, California Federal Court Ruled That BLM Could Not Postpone Compliance, Oil and Gas Trade Groups Again Asked Wyoming Federal Court for Preliminary Injunction

On October 4, the federal district court for the Northern District of California vacated the U.S. Bureau of Land Management's (BLM's) postponement of the compliance date for certain provisions of the methane waste rule, which was intended to reduce waste of natural gas through venting, flaring, and leaks during oil and gas production on federal and tribal lands. The rule took effect on January 17, 2017; on June 15, 2017, BLM issued a notice of postponement of January 17, 2018 compliance dates. The court—which in September denied a motion to transfer the case to the District of Wyoming where a challenge to the rule was pending—held that BLM had acted outside its authority to postpone the "effective date" of a rule under Section 705 of the Administrative Procedure Act (APA). The court rejected the defendants' argument that "effective date" in Section 705 also encompassed compliance dates; the court also found that BLM had violated the APA's notice-and-comment rulemaking requirements. In addition, the court held that BLM's postponement of the compliance dates was arbitrary and capricious because pending litigation challenging the review was not a true reason for the postponement, as required by Section 705, and because BLM "entirely failed" to consider the rule's benefits in its determination that justice required postponement. The court stated: "New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and 'address [the] prior factual findings' underpinning a prior regulatory regime." A day after the court's decision, BLM published a proposed rule to temporarily suspend or delay certain requirements until January 17, 2019. *California v. U.S. Bureau of Land Management*, Nos. 17-cv-03804-EDL, 17-cv-3885-EDL (N.D. Cal. Oct. 4, 2017).

In late October, Western Energy Alliance and Independent Petroleum Association of America filed a motion for preliminary injunction in the lawsuit challenging BLM's methane waste rule in the federal district court for the District of Wyoming. The rule requires that measures be taken, beginning in January 2018, to reduce venting and flaring from oil and gas production on federal and tribal lands. The court denied an earlier motion for a preliminary injunction in January 2017. The two trade groups contended that injunctive relief was warranted because their members were suffering "increasingly immediate and irreparable harm" as the compliance deadline approached. The trade groups also argued that the rule was unconstitutional and outside BLM's authority, and that the balance of the equities and public interest also favored an injunction. *Wyoming v. U.S. Department of Interior*, No. 2:16-cv-00285 (D. Wyo. Oct. 27, 2017).

Wisconsin Federal Court Dismissed Pro Se Lawsuit Claiming That Republican and Conservative Policies—Including Failure to Address Climate Change—Violated Plaintiff's Rights

The federal district court for the Western District of Wisconsin dismissed a pro se complaint that listed a number of grievances against more than 120 defendants, including the Republican National Committee, President Trump, Trump administration cabinet officials, and elected officials. The plaintiff said the defendants had violated her rights by, among other things, failing to act on global warming. The relief sought included removal of President Trump, his cabinet, and Republican senators, declaration of Hillary Clinton as president, and restructuring of the voting system. The court said the plaintiff had not alleged an injury connected to any particular action or law and that her allegations instead suggested disagreements with the defendants' policy positions, which made her claims nonjusticiable political questions. *Lindsay v. Republican National Committee*, No. 3:17-cv-00123 (W.D. Wis. Oct. 2, 2017).

California Appellate Court Upheld Climate Analysis in CEQA Review for Residential Development

The California Court of Appeal reversed a trial court's finding that the analysis of climate change and greenhouse gas emissions under the California Environmental Quality Act (CEQA) for a hillside residential development in the City of Brea was inadequate. On other issues, however, the appellate court largely affirmed the trial court's judgment in favor of the petitioners challenging the project. With respect to the analysis of climate change impacts, the appellate court said the City of Brea had appropriately selected a significance threshold for project greenhouse gas emissions that was higher than one used for a similar residential project in 2010. The appellate court also said that the final environmental impact report for the project was not inadequate for failing to address the City's Sustainability Plan, which the court said was not a regulation or requirement requiring an analysis of consistency under CEQA and was not detailed enough to serve as a basis for evaluating the project's effects on greenhouse gas emissions. In addition, the appellate court upheld the residential trip generation rate used by the City for its analysis of greenhouse gas impacts. *Hills for Everyone v. OSLIC Holdings LLC*, No. G053160 (Cal. Ct. App. Oct. 17, 2017).

Vermont Court Said Former Attorney General Could Be Deposed on Use of Private Email Account

In a case brought under Vermont's Public Records Law by Energy & Environment Legal Institute seeking communications of the Vermont attorney general regarding potential climate change-related investigations, a Vermont state court ruled that former Attorney General William Sorrell could be deposed on the extent to which he had documents and correspondence on a private email account that related to the plaintiff's records request. The court said the plaintiff had presented an exhibit that showed Sorrell conducted public business on a private account to at least some extent. The court said paper work kept "in a desk drawer at home rather than at the government office" would not be exempt from public access, "no matter whether that happened unintentionally, negligently, or deliberately"—and indicated that the electronic format of documents would not alter the treatment of documents. *Energy & Environment Legal Institute v. Attorney General of Vermont*, No. 349-6-16WNCV (Vt. Super. Ct. Oct. 18, 2017).

Minnesota and Washington Courts Said Climate Protesters Could Present Necessity Defense at Trial; Protester Found Guilty of Criminal Mischief and Trespass After North Dakota Court Denied Permission to Present Necessity Defense

A Minnesota trial court granted four environmental activists' motion to present a necessity defense. The defendants—two of whom acknowledged they had attempted to shut down tar sands crude oil pipelines by turning shut-off valves on the pipelines—were charged with criminal damage to property of critical public facilities, utilities, and pipelines; trespass on such facilities; and/or aiding and abetting criminal damage to property and/or trespass. The court noted that Minnesota's standard for the necessity defense was "high" and would require the defendants to show that "the harm that would have resulted from obeying the law would have significantly exceeded the harm actually caused by breaking the law, there was no legal alternative to breaking the law, the defendant was in danger of imminent physical harm, and there was a direct causal connection between breaking the law and preventing the harm." The court indicated that its grant of the motion to present evidence on the necessity defense was "not unlimited" and that it expected any evidence "to be focused, direct, and presented in a non-cumulative manner." *State v. Klapstein*, Nos. 15-CR-16-413, 15-CR-16-414, 15-CR-16-425, 15-CR-16-25 (Minn. Dist. Ct. Oct. 11, 2017).

A few days after the Minnesota court's decision, a Washington district court also ruled that a defendant could present a necessity defense. The defendant in the Washington case was charged with criminal trespass and obstructing and delaying a train in connection with a protest that blocked coal and oil trains. *State v. Taylor*, No. 6Z0117975 (Wash. Dist. Ct. Oct. 16, 2017).

Earlier in October, a jury in North Dakota state court found another defendant who participated in a protest by turning a valve on the Keystone Pipeline guilty of conspiracy to commit criminal mischief, criminal mischief, and criminal trespass, but not guilty of reckless endangerment. A second defendant was found guilty of trespass. The court in the North Dakota case had denied the defendants' request to present a necessity defense. The North Dakota court found that the defendants' offered proof would not allow a reasonable person to conclude that they had no reasonable legal alternative and that a reasonable person could not conclude based on the defendants' proof that the harms of climate change, "however serious they might be, were imminent and certain to occur absent defendants' acts." The court also found that expert

testimony both as to the efficacy of nonviolent civil disobedience as a means to political change and as to the defendants' belief that their actions would reduce the amount of tar sands transported through the pipeline did not reach the level of proof necessary to show a direct, causal relationship between the defendants' acts and the avoidance of harm. *State v. Foster*, No. 34-2016-CR-00187 (N.D. Dist. Ct. decision Sept. 29, 2017; verdict Oct. 6, 2017).

NEW CASES, MOTIONS, AND NOTICES

Murray Energy Sought Supreme Court Review of Fourth Circuit's Dismissal of Clean Air Act Jobs Study Case

The coal company Murray Energy Corporation and affiliated companies filed a petition for writ of certiorari asking the Supreme Court to overturn the Fourth Circuit's dismissal of their action that sought to compel EPA to conduct a study of the Clean Air Act's employment effects and particularly its effects on the coal industry. The Fourth Circuit concluded that courts lacked jurisdiction to review EPA's management of the "broad, open-ended" mandate of Section 321(a) of the Clean Air Act requiring EPA to conduct evaluations of potential employment losses and shifts resulting from its administration and enforcement. The petition to the Supreme Court presented two questions: (1) whether a federal court may decline jurisdiction to compel agency action where the statutory requirements for a claim have been satisfied, and (2) whether EPA's refusal to comply with Section 321 was within the bounds of a federal court's authority to correct. Murray Energy also moved in the federal district court for the Northern District of West Virginia to amend the order of dismissal with prejudice issued by the court on October 2, 2017. Murray Energy argued that the dismissal should have been without prejudice because the Fourth Circuit dismissed based on subject matter jurisdiction, not the merits of the case. On November 3, the district court granted Murray Energy's motion and dismissed the action without prejudice for want of jurisdiction. *Murray Energy Corp. v. Pruitt*, No. 17-478 (U.S. Sept. 27, 2017); No. 5:14-cv-00039 (N.D. W. Va. order granting motion Nov. 3, 2017; motion to amend Oct. 26, 2017; order of dismissal Oct. 2, 2017).

States and Environmental Groups Asked Second Circuit to Vacate or Stay Delay in Penalty Increases for Vehicle Standard Violations

States and environmental groups asked the Second Circuit Court of Appeals for summary vacatur of the National Highway Traffic Safety Administration's (NHTSA's) indefinite delay of a rule increasing civil penalties for violations of fuel economy standards. The states and environmental groups contended that summary vacatur was warranted because NHTSA lacked authority to delay the rule's effective date and failed to comply with the Administrative Procedure Act's notice and comment requirements. Alternatively, the states and environmental groups asked the D.C. Circuit to stay the delay pending judicial review. *Natural Resources Defense Council, Inc. v. National Highway Traffic Safety Administration*, Nos. 17-2780, 17-2806 (2d Cir. Oct. 24, 2017).

After Proposing Repeal of Clean Power Plan, EPA Sought Continued Abeyance of Pending Cases in D.C. Circuit

On the same day that EPA Administrator Scott Pruitt signed a proposal to repeal the Clean Power Plan, EPA asked the D.C. Circuit Court of Appeals to continue to hold the cases challenging the Clean Power Plan in abeyance pending the conclusion of rulemaking. States and public health and environmental organizations that intervened as respondents in the cases opposed the continued abeyance. The public health and environmental organizations argued that EPA had not satisfied the requirements for abeyance and that the court should decide the fully briefed and argued matter because "the case involves a time-sensitive statutory obligation to protect the public health and welfare from grave threats." The organizations argued that "[t]he impacts of climate change are increasingly evident and dire" and that the "unaddressed threats" and EPA's "unmet statutory duties" counseled against the court exercising its discretion in a way that would cause further delay. The states similarly argued that continued abeyance would be inappropriate because EPA had not proposed an alternative way to reduce greenhouse gas emissions from existing power plants and a "pure repeal … would put the agency in violation of its statutory duty to regulate carbon dioxide from existing power plants under the Clean Air Act, a duty the agency is not contesting it must fulfill." Both sets of intervenors also said the court should limit any abeyance period to 120 days. *West Virginia v. EPA*, Nos. 15-1363 (D.C. Cir. EPA status report Oct. 10, 2017; responses to status report Oct. 17, 2017).

Stanford Professor Sued Scientific Journal and Article Authors Who Critiqued His Work

Mark Jacobson (a professor at Stanford) sued Christopher Clack (founder and CEO of Vibrant Clean Energy, LLC) and the National Academy of Sciences (NAS) in the Superior Court of the District of Columbia alleging defamation, breach of contract, and promissory estoppel claims in connection with the publication of an article by Clack and other co-authors that critiqued an article published by Jacobson. In December 2015, *Proceedings of the National Academy of Sciences* (PNAS) published an article by Jacobson and co-authors, "Low-cost solution to the grid reliability problem with 100% penetration of intermittent wind, water, and solar for all purposes." In June 2016, Clack and co-authors submitted a critique of the Jacobson article to PNAS, which PNAS shared with Jacobson in February 2017 when the journal asked if he would like to submit a letter to the editor commenting on the Clack article. Jacobson alleged that he informed PNAS that the Clack article contained "thirty false statements and five materially misleading statements," and that he repeatedly complained to NAS and asked for corrections. He contended that when PNAS published a slightly revised version of the Clack article in June 2017, it corrected almost none of the statements that Jacobson said were false and misleading. The disputes concerned various modeling procedures and assumptions, issues concerning the amount of hydropower that would be available, and other technical matters. The complaint alleged that the Clack article received extensive press coverage and that "[t]he resulting headlines and articles made Dr. Jacobson and his co-authors look like poor, sloppy, incompetent, and clueless researchers." Jacobson asserted that the Clack article did not disclose alleged conflicts of interest of some of Clack's co-authors, including that one is associated with a nuclear advocacy organization and another has received funding from Exxon and various other fossil fuel companies. Jacobson also asserted that NAS violated its own publication policies in numerous ways and that only three of the 21 listed co-authors actually worked on the Clack article, artificially inflating its credibility. The complaint asserted defamation claims against both Clack and NAS and also asserted breach of contract and promissory estoppel claims against NAS for publishing Jacobson's initial article and then not adhering to its publication policies in the way it

handled the Clack article. Jacobson demanded damages from Clack and NAS "to be determined at trial believed to be in excess of Ten Million Dollars," plus punitive damages and attorney fees. *Jacobson v. National Academy of Sciences*, No. 2017 CA 006685 B (D.C. Super. Ct. Sept. 29, 2017).

Pipeline Company Asked Federal Court to Declare That Federal Law Preempted New York Permitting Requirements

A pipeline developer filed a lawsuit in the federal district court for the Northern District of New York claiming that the Natural Gas Act preempted NYSDEC from applying any state permitting requirements that would delay or interfere with the construction and operation of a 7.8-mile pipeline project known as the Valley Lateral Project. The project would provide natural gas to a new power plant in Orange County. In August 2017, NYSDEC conditionally denied the developer's joint application for state law stream disturbance and freshwater wetlands permits, as well as for a water quality certificate pursuant to Section 401 of the Clean Water Act, asserting that a recent D.C. Circuit case regarding FERC's obligation to consider greenhouse gas emissions in the environmental review for a pipeline rendered FERC's review of the Valley Lateral Project insufficient. Other developments regarding the Valley Lateral Project included NYSDEC request to FERC for rehearing and stay of the order finding that NYSDEC had waived its jurisdiction to act on the application for a water quality certificate pursuant to Section 401. *Millennium Pipeline Co. v. Seggos*, No. 1:17-cv-01197 (N.D.N.Y., filed Oct. 27, 2017); *In re Millennium Pipeline Co.*, No. CP16-17-000 (FERC Oct. 13, 2017).

Environmental Groups Filed Lawsuit Challenging Colorado River Diversion Project and Alleging Insufficient Analysis of Climate Change Impact on Water Availability

Five environmental groups filed a lawsuit in federal district court in Colorado challenging federal approvals of a project facilitating the diversion of water from the Colorado River to fill a new 90,000 acre-foot reservoir on Colorado's Front Range. The plaintiffs called the project "ill-conceived and unnecessary" and alleged that the federal government's predisposition to pursue the project to fix a failed project exemplified "sunk cost bias" and improperly limited its consideration of alternatives. The plaintiffs contended that the U.S. Bureau of Reclamation (Reclamation) had failed to comply with NEPA and that the U.S. Army Corps of Engineers had violated the Clean Water Act. The plaintiffs claimed among other things that Reclamation had failed to fully analyze the potential impacts of climate change on water availability for the project; the complaint alleged that "[a]lthough Reclamation considered climate change in a limited fashion, Reclamation did not include its effects quantitatively, did not utilize current scientific findings about climate change, and did not provide a rational explanation of how climate change influenced its decisionmaking." *Save the Colorado v. U.S. Bureau of Reclamation*, No. 10/ (D. Colo., filed Oct. 26, 2017).

Sierra Club Filed Lawsuit to Compel EPA to Complete Reports on Renewable Fuels Standards Environmental Impacts

Sierra Club filed a lawsuit against EPA Administrator Scott Pruitt alleging that the EPA administrator had failed to perform non-discretionary duties under the Clean Air Act and the

Energy Independence and Security Act (EISA) to submit triennial reports to Congress in 2013 and 2016 on the Renewable Fuel Standard program's environmental and resource impacts and to complete an "anti-backsliding" study to determine the program's impacts on air quality. The anti-backsliding study was due in June 2009, 18 months after EISA's enactment. Sierra Club asserted that the delays in preparing the reports undermined the purpose of the reporting requirements, which Sierra Club said was to ensure that the Renewable Fuel Standard program was addressing climate change without adversely affecting the environment. *Sierra Club v. Pruitt*, No. 1:17-cv-02174 (D.D.C., filed Oct. 19, 2017).

Wyoming Asked to Intervene to Defend Delisting of Yellowstone Grizzlies

Wyoming filed a motion in Montana federal court to intervene in support of the defendants in the lawsuit challenging the U.S. Fish and Wildlife Service's (FWS's) decision to remove the Greater Yellowstone Ecosystem grizzly bear from the list of threatened and endangered species. The plaintiffs' claims include that FWS failed to address climate change impacts on the grizzly bears' food sources. Wyoming argued that it was entitled to intervene as of right because it had a significant protectable interest that could be impaired if the plaintiffs prevailed. Wyoming argued that the vast majority of the grizzly bear distinct population segment at issue was located within its boundaries and that it had long participated in the management of grizzly bears in the Greater Yellowstone Ecosystem alongside the federal government, Montana, and Idaho. Wyoming asserted that it had a significant interest in exercising sovereign authority over wildlife in its borders and that its interests were different from those of the federal defendants. In the alternative, Wyoming argued that the court should grant permissive intervention. *Northern Cheyenne Tribe v. Zinke*, No. 9:17-cv-00119 (D. Mont. Oct. 11, 2017).

Competitive Enterprise Institute Sought State Department Correspondence on Climate Negotiations

Competitive Enterprise Institute (CEI) filed a Freedom of Information Act (FOIA) lawsuit in the federal district court for the District of Columbia seeking to compel the U.S. Department of State to produce correspondence of two officials related to climate change, the December 2016 Paris Agreement, the "legal form" of the Paris Agreement's provisions, the Kyoto Protocol, and the United Nations Framework Convention on Climate Change. The two officials were Todd Stern, the former Special Envoy for Climate Change, and Susan Biniaz, formerly the State Department's lead climate lawyer. CEI also sought email correspondence between the two officials and people at the Natural Resources Defense Council or World Wildlife Fund. *Competitive Enterprise Institute v. U.S. Department of State*, No. 1:17-cv-02032 (D.D.C., filed Oct. 3, 2017).

Center for Biological Diversity Filed Lawsuit Seeking Records on Termination of National Climate Assessment Advisory Committee

Center for Biological Diversity (CBD) filed a FOIA lawsuit against the National Oceanic and Atmospheric Administration and the Department of Commerce in the federal district court for the District of Columbia, seeking to compel the production of records "that would shed light on the recent and sudden termination of the 'Advisory Committee for the Sustained National

Climate Assessment.'" CBD alleged that the Committee was established after the charter for the National Climate Assessment and Development Advisory Committee expired in 2015 to support development of the National Climate Assessment pursuant to the Global Change Research Act. CBD sought records regarding the termination of the committee in August 2017, including information on who participated in the decisionmaking process, what factors were considered, and how the Committee's unfinished work—including work in support of the Fourth National Climate Assessment, which is due in 2018—would be completed. *Center for Biological Diversity v. National Oceanic and Atmospheric Administration*, No. 1:17-cv-02031 (D.D.C., filed Oct. 3, 2017).

Lawsuit Filed in Nevada Federal Court Alleging Inadequate Environmental Review for Oil and Gas Lease Sale

Center for Biological Diversity and Sierra Club filed a lawsuit in the federal district court for the District of Nevada seeking to overturn BLM's oil and gas lease sale for 195,732 acres of federal estate. The plaintiffs alleged that the environmental assessment on which BLM relied contained inadequate analysis of many of the environmental impacts of oil and gas development, including greenhouse gas emissions and climate change. They contended that BLM minimized impacts by determining that few environmental impacts resulted from the lease sale stage and that impacts would be avoided at future stages of review. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 3:17-cv-00553 (D. Nev., filed Sept. 11, 2017).

Youth Plaintiffs Commenced Lawsuit Alleging That Alaska's Climate and Energy Policy Violated Constitutional Rights

Sixteen youth plaintiffs filed a lawsuit against the State of Alaska, its governor, and Alaska state agencies in Alaska state court alleging that the defendants had violated their rights under the Alaska constitution by implementing a "Climate and Energy Policy" that authorized and facilitated activities producing greenhouse gas emissions and failed to implement climate mitigation standards. The plaintiffs alleged that the State's denial in September 2017 of their rulemaking petition requesting reductions of Alaska's greenhouse gas emissions provided evidence of this Climate and Energy Policy and violated their constitutional rights. The plaintiffs charged that the defendants' conduct infringed on their fundamental substantive due process rights to life, liberty, and property and other unenumerated rights, including the right to a stable climate system. The plaintiffs further contended that the defendants had knowingly and with deliberate indifference created a dangerous situation for the plaintiffs in violation of their substantive due process rights. In addition, the plaintiffs asserted an equal protection claim, contending that they should be treated as a protected class because some of the plaintiffs were below the voting age and because the "overwhelming majority of harmful effects" caused by the defendants' actions would occur in the future; the plaintiffs asserted that "the harm caused by Defendants has denied Youth Plaintiffs the same protection of fundamental rights afforded to prior and present generations of adult citizens." The complaint also alleged a violation of Alaska's Public Trust Doctrine. The plaintiffs sought declaratory relief, an injunction barring the defendants from further implementing their Climate and Energy Policy, and orders requiring the defendants to complete an accounting of the State's greenhouse gas emissions and to develop a climate recovery plan to achieve "science-based numeric reductions of Alaska's in-boundary and

extraction-based emissions consistent with global emissions reductions rates necessary to stabilize the climate system and protect the vital Public Trust Resources on which Youth Plaintiffs depend." *Sinnok v. Alaska*, No. 3AN-17-__ (Alaska Super. Ct., filed Oct. 27, 2017).

Coal Terminal Developer Filed Lawsuit Challenging Washington State's Denial of Water Quality Certification

A company proposing to develop a coal export terminal on the lower Columbia River in Washington State filed a lawsuit alleging that the Washington State Department of Ecology (Ecology) and its director had violated federal and state law and the U.S. and Washington State constitutions by denying "with prejudice" the company's application for a water quality certification under Section 401 of the Clean Water Act. The company contended that the defendants had "turned section 401 on its head by denying the certification based on purported impacts of every kind *other* than water quality" and said that Ecology "created from whole cloth a uniquely onerous and unfair environmental review process … that it justified based on its animus towards the commodity that would be handled." The company's claims included that the Clean Water Act preempted the denial and that the denial order was ultra vires, a misapplication or misinterpretation of the law, at odds with previous Ecology practice, arbitrary and capricious, and unsupported by substantial evidence. In support of its claim that the denial was arbitrary and capricious, the complaint alleged that "[a]lthough the Denial does not mention greenhouse gas … emissions (not even once)," the defendants had speculated on social media about the new emissions associated with the project; the company alleged that the defendants' social media posts demonstrated their bias against the project. The company also claimed that the denial constituted a deprivation of rights actionable under 42 U.S.C. § 1983 and violated equal protection. The complaint also disclosed claims of preemption under the Ports and Waterways Safety Act and the Interstate Commerce Clause Termination Act and violation of the Commerce Clause. The company said it would soon file a federal lawsuit to pursue these claims. In addition, the company filed an appeal with the Washington State Pollution Control Hearings Board. *Millennium Bulk Terminals-Longview, LLC v. Washington State Department of Ecology*, No. ___ (Wash. Super. Ct., filed Oct. 24, 2017); *Millennium Bulk Terminals-Longview, LLC v. Washington State Department of Ecology*, No. P17-090 (Wash. PCHB, filed Oct. 24, 2017).

Group Sought New York Attorney General's Emails Related to Alleged "Climate-RICO" Scheme

Energy & Environmental Legal Institute (E&E Legal) filed a lawsuit in New York Supreme Court to compel the New York attorney general to produce records in response to E&E Legal's Freedom of Information Law request for correspondence between Attorney General Eric Schneiderman and former Vermont Attorney General William Sorrell in which Schneiderman used a Gmail account. In a press release, E&E Legal said the lawsuit was part of its "ongoing attempt to obtain public records relating to Schneiderman's 'climate-RICO' scheme" with other state attorneys general. *Energy & Environmental Legal Institute v. Attorney General of New York*, No. __ (N.Y. Sup. Ct., filed Oct. 17, 2017).

Challenge to Settlement in Utility Rate-Setting Case in New Mexico Cited Failure to Quantify Coal Plant's Carbon Emission Risks

New Energy Economy—a non-profit organization founded "to build a carbon-free energy future for our health and the environment—filed a brief requesting that the New Mexico Public Regulation Commission reject a "black box settlement" reached by the parties to a case concerning the Public Service Company of New Mexico's (PNM's) request for a $791.6 million rate increase. New Energy Economy said the settlement was "not fair, just and reasonable, and in the public interest" and asked the Commission to deny PNM all costs associated with the Four Corners Power Plant, a coal-fired facility. New Energy Economy said PNM's testimony failed to include "even *one* word about the risks and uncertainties of the use of coal" and argued that PNM was required to quantify carbon emission risks or explain why it could not do so. *In re Public Service Company of New Mexico*, No. 16-00276-UT (NMPRC Sept. 8, 2017).

Update #103 (October 2, 2017)

FEATURED CASE

Tenth Circuit Said Analysis of Coal Leases' Greenhouse Gas Impact Was Arbitrary and Capricious

The Tenth Circuit Court of Appeals ruled that the U.S. Bureau of Land Management (BLM) acted arbitrarily and capriciously when it concluded that issuance of four coal leases in Wyoming's Powder River Basin would not result in higher national greenhouse gas emissions than declining to issue the leases. The leases extended the lives of two existing surface mines that account for approximately 19.7% of the U.S.'s annual domestic coal production. The Tenth Circuit rejected the argument that the environmental groups challenging the leases lacked standing, concluding that the plaintiffs were not required to assert a climate-related injury to challenge BLM's analysis of climate impacts. The Tenth Circuit also said the plaintiffs retained their standing on appeal even though they had dropped their challenges regarding the adequacy of BLM's consideration of the local environmental impacts that formed the basis for their alleged injuries. On the merits, the court held that BLM's reliance on a "perfect substitution assumption"—that the same amount of coal would be sourced from elsewhere even if BLM did not issue the leases—to compare the greenhouse gas emissions for the no-action alternative and issuance of the leases lacked support in the record. The court also said, however, that "[e]ven if we could conclude that the agency had enough data before it to choose between the preferred and no action alternatives, we would still conclude this perfect substitution assumption arbitrary and capricious because the assumption itself is irrational (i.e., contrary to basic supply and demand principles)." The Tenth Circuit rejected, however, the plaintiffs' contention that BLM's failure to use "readily available" modeling tools to determine climate impact was arbitrary and capricious. In rejecting BLM's use of the perfect substitution assumption, the Tenth Circuit distinguished the case from the Supreme Court's decision in *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983), in which the Court deferred to the Nuclear Regulatory Commission (NRC) in a matter regarding nuclear waste storage, in part because the matter was within NRC's expertise and at the "frontiers of science." The Tenth Circuit said BLM was not owed deference in this case because climate science was not a "scientific frontier"; the Tenth Circuit also noted that BLM had acknowledged that climate change was "a scientifically verified reality." In a concurring

opinion, Judge Baldock indicated that the court's "assertion that climate science is settled science is, in my view, both unnecessary to this appeal and questionable as a factual matter." *WildEarth Guardians v. U.S. Bureau of Land Management*, No. 15-8109 (10th Cir. Sept. 15, 2017).

DECISIONS AND SETTLEMENTS

Massachusetts Federal Court Said Organization Alleging Lack of Preparedness at Oil Terminal Had Standing for Near-Term Coastal Hazards but Not for Climate Change-Related Harms in "Far Future"

The federal district court for the District of Massachusetts granted in part and denied in part ExxonMobil Corporation's (Exxon's) motion to dismiss a Clean Water Act citizen suit alleging Exxon failed to prepare an oil terminal for severe storms and climate change. The court found that the plaintiff had adequately alleged standing for claims that there was a substantial risk that severe weather events such as storm surges, heavy rains, or flooding would cause the terminal to discharge pollutants in the near future and while the facility's current permit was in effect. The court also found, however, that the plaintiffs did not have standing "for injuries that allegedly will result from rises in sea level, or increases in the severity of storms and flooding, that will occur in the far future, such as in 2050 or 2100." The parties subsequently submitted a joint motion proposing a schedule under which the plaintiff will file an amended complaint in accordance with the court's order by October 20, 2017, after which the parties will negotiate for one month to resolve or narrow remaining disputed issues. *Conservation Law Foundation, Inc. v. ExxonMobil Corp.*, No. 1:16-cv-11950 (D. Mass. joint motion Sept. 19, 2017; order Sept. 13, 2017).

D.C. Circuit Declined to Vacate EPA Stay of Landfill Gas Regulations and Continued to Hold Challenge to Regulations in Abeyance

The D.C. Circuit denied a motion for summary vacatur of the U.S. Environmental Protection Agency's (EPA's) administrative stay of regulations restricting emissions of landfill gas (including methane) from municipal solid waste landfills. The D.C. Circuit asked the parties to address in their briefs whether the case was moot because the administrative stay being challenged expired on August 29, 2017. Other developments related to the landfill regulations included the D.C. Circuit's granting of a request by EPA and petitioners challenging the emission guidelines for existing sources to continue to hold the cases in abeyance for 90 days while EPA proceeded with its reconsideration of the guidelines. *Natural Resources Defense Council v. Pruitt*, No. 17-1157 (D.C. Cir. order Sept. 28, 2017); *National Waste & Recycling Association v. EPA*, Nos. 16-1371, 16-1374 (D.C. Cir. order Sept. 26, 2017; joint motion Sept. 12, 2017).

Ninth Circuit Said Forest Service Took Hard Look at Climate Change's Impact on Water Project

In an unpublished decision, the Ninth Circuit Court of Appeals upheld the U.S. Forest Service's authorization of a project to upgrade a water intake facility and construct a new water pipeline on Deschutes National Forest to serve the City of Bend, Oregon. The Forest Service also authorized

the City to operate the system for 20 years. The Ninth Circuit rejected the argument that the Forest Service had conducted an inadequate assessment of climate change impacts on the project and on water levels in a creek from which water was withdrawn. The Ninth Circuit said the Forest Service was not required to conduct a quantitative analysis, noting that climate change would have had the same impact on water flow as either alternative analyzed in the environmental assessment. The Ninth Circuit also said a provision for monitoring did not conflict with the Forest Service's "hard look" obligation because the Service's qualitative analysis of impacts was adequate on its own and the Service explained why future monitoring would allow for better evaluation of climate change and its impacts. *Central Oregon Landwatch v. Connaughton*, No. 15-35089 (9th Cir. Aug. 23, 2017).

Second Circuit Upheld State Denial of Water Quality Certificate for Natural Gas Pipeline

The Second Circuit Court of Appeals upheld the New York State Department of Environmental Conservation's (DEC's) denial of an interstate natural gas pipeline developer's application for a Water Quality Certificate under Section 401 of the Clean Water Act. As a threshold matter, the Second Circuit concluded that it lacked jurisdiction to consider the developer's argument that DEC had waived its right to rule on the application because it failed to act on the application within the time period required by the Clean Water Act. On the merits, the Second Circuit rejected the developer's contention that DEC's action was preempted by FERC's performance of its obligations under the National Environmental Policy Act. The Second Circuit said the Natural Gas Act and Clean Water Act entitled DEC to conduct its own review of the pipeline project's impacts on New York waterbodies. The Second Circuit found that the denial of the application after the developer failed to provide information DEC had requested was not arbitrary and capricious. In its brief defending the denial, DEC noted that removal of riparian vegetation to build the project could increase water temperatures and that climate change could exacerbate these impacts in the long term. The pipeline developer filed a petition for panel rehearing or rehearing en banc on September 1, 2017. *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, No. 16-1568 (2d Cir. Aug. 18, 2017).

Second Circuit Denied Rehearing of Decision Upholding Connecticut Renewable Energy Programs

On August 17, 2017, the Second Circuit Court of Appeals denied a petition for panel rehearing or rehearing en banc of its opinion upholding Connecticut renewable energy programs over claims that they violated the dormant Commerce Clause or were preempted by federal law. *Allco Finance Ltd. v. Klee*, Nos. 2946, 2929 (2d Cir. Aug. 17, 2017).

Arizona Federal Court Dismissed Challenges to Approvals for Extended and Expanded Operations at Four Corners Power Plant and Navajo Mine

The federal district court for the District of Arizona dismissed an action challenging federal authorizations for extending operations of the Four Corners Power Plant, renewing rights-of-way for transmission lines, and expanding strip mining in the Navajo Mine. The court agreed with Navajo Transitional Energy Company (NTEC)—a company formed by the Navajo Nation in 2013 to purchase the Navajo Mine—that NTEC was a necessary party that could not be joined

by virtue of its sovereign immunity. The court held that "[i]n equity and good conscience" the case could not continue. The groups challenging the approvals had alleged violations of the Endangered Species Act and the National Environmental Policy Act, including allegations that environmental review failed to consider alternatives that would have significantly reduced greenhouse gas emissions. *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, No. 3:16-cv-08077 (D. Ariz. Sept. 11, 2017).

New York High Court Denied Exxon Leave to Appeal Decision Requiring Accounting Firm to Comply with Attorney General's Subpoena

The New York Court of Appeals denied Exxon Mobil Corporation's motion for leave to appeal an intermediate appellate court's decision upholding a trial court order requiring Exxon's accounting firm to respond to a subpoena issued by the New York Attorney General in his investigation of Exxon's climate change-related disclosures. The intermediate appellate court had agreed with the trial court that an accountant-client privilege did not exist to shield the accounting firm from complying with the subpoena. *Matter of People of the State of New York v. PricewaterhouseCoopers LLP*, No. 2017-862 (N.Y. Sept. 12, 2017).

Newhall Ranch Developers Agreed to "Net Zero Plan" in Settlement with Project's Opponents

The developers of the Newhall Ranch multi-use development project in northwestern Los Angeles County reached a settlement agreement on September 22, 2017 with groups that had opposed the project to end ongoing litigation and avoid future litigation over the projects. The California Supreme Court ruled in November 2015 that the California Department of Fish and Wildlife lacked substantial evidence to support its conclusion that greenhouse gas emissions associated with the project would not result in a cumulatively significant impact under the California Environmental Quality Act. The settlement agreement indicated that in response to the court's decision, the developers committed to a "Net Zero Plan" that would, among other things, "result in more than approximately 10,000 solar installations producing approximately 250 million kWh of renewable electricity every year" and "installation of approximately 25,000 electric vehicle chargers within the development and across Los Angeles County, as well as approximately $14 million in subsidies toward the purchase of electric vehicles." *Center for Biological Diversity v. California Department of Fish and Wildlife*, No. BS131347 (Cal. Super. Ct.), No. B245131 (Cal. Ct. App.); *Friends of the Santa Clara River v. County of Los Angeles*, No. BS136549 (Cal. Super. Ct.); *California Native Plant Society v. County of Los Angeles*, No. BS138001 (Cal. Super. Ct.).

Arizona Appellate Court Sent Public Records Case Involving Climate Scientist Emails Back to Trial Court

The Arizona Court of Appeals reversed a trial court ruling that required that the University of Arizona produce emails of two climate scientists. The documents at issue were characterized as "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary." The trial court issued its ruling on remand from an earlier appellate decision finding that the trial court should have conducted a de novo review of the university's

justification for withholding the documents. In its latest decision, the appellate court said that the trial court's decision on remand did not refer to a section of the public records law providing for an exemption for "records of a university" and that the trial court seemed unaware of the existence of the academic privilege. The appellate court also said the trial court had not explained why the documents at issue did not fall within other exceptions to the public records law for unpublished research data, drafts of scientific papers, and information developed by university employees for which disclosure would be contrary to the best interests of the state. The appellate court remanded for further proceedings. *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. 2 CA-CV 2017-0002 (Ariz. Ct. App. Sept. 14, 2017).

Washington Appellate Court Reversed Trial Court Order Requiring State Agency to Set Greenhouse Gas Standards by End of 2016

The Washington State Court of Appeals reversed a May 2016 trial court decision ordering the Washington Department of Ecology (Ecology) to issue a final rule setting limits on greenhouse gas emissions by the end of 2016 and to make recommendations to the state legislature for changes to statutory emission standards. The May 2016 decision came after Ecology withdrew a proposal to set greenhouse gas standards and vacated in part the trial court's November 2015 judgment denying the youth petitioners' appeal from Ecology's denial of their request that the agency Ecology mandate greenhouse gas emission reductions. The November 2015 decision found that Ecology was fulfilling its obligations under the Clean Air Act, as well as the Washington constitution and public trust doctrine, because it had commenced rulemaking to establish greenhouse gas standards. As an initial matter, the appellate court found that Ecology's appeal was not moot despite Ecology having completed the tasks the trial court ordered May 2016. On the merits of the appeal, the appellate court held that the trial court had abused its discretion in granting the petitioners' motion for relief from the November 2015 judgment. The appellate court said the trial court had not found a violation of the Administrative Procedure Act and that the granting of affirmative relief to the petitioners was a misuse of the procedure for granting relief from a judgment. In addition, the appellate court said the petitioners had not demonstrated "extraordinary circumstances" warranting relief from the judgment—the appellate court said climate change could not be considered extraordinary circumstances for purposes of relief from the judgment because the trial court had already considered climate change as well as Ecology's alleged inaction in addressing climate change, climate change's "urgent and serious" nature was a component of the November 2015 judgment, and the parties did not contest the seriousness of climate change. Nor did Ecology's withdrawal of a proposed rule constitute extraordinary circumstances. *Foster v. Washington Department of Ecology*, No. 75374-6-1 (Wash. Ct. App. Sept. 5, 2017).

Review of Methanol Manufacturing Facility's Greenhouse Gas Impacts Found Inadequate

The Washington Shorelines Hearings Board ruled that Cowlitz County's environmental review for a proposed methanol manufacturing and shipping facility was adequate. The project would emit more than one million tons of greenhouse gas emissions annually, not including off-site emissions, increasing Washington's total emissions by more than one percent. The Board found that the final environmental impact statement (EIS) failed to adequately assess the project's greenhouse gas impacts. The Board said the EIS's conclusion that the project would not result in

unavoidable significant adverse greenhouse gas emissions-related impacts was based "almost entirely" on Washington State Department of Ecology guidance that Ecology had acknowledged was of "limited value" and that Ecology had withdrawn four months before the final EIS was issued. The Board said a condition subsequently imposed by Ecology requiring the facility to mitigate greenhouse gas emissions did not fix the inadequate EIS review because there was insufficient analysis of impacts to determine whether the condition was adequate and there had been no public review. *Columbia Riverkeeper v. Cowlitz County*, No. 17-010c (Wash. SHB order Sept. 18, 2017).

FERC Ruled That New York Department of Environmental Conservation Waived Authority to Act on Pipeline Application; DEC Request to Reopen FERC Record Still Pending

After the New York State Department of Environmental Conservation conditionally denied an application for a water quality certification for a natural gas pipeline project on the ground that the Federal Energy Regulatory Commission (FERC) had not adequately evaluated the project's downstream greenhouse gas emissions, FERC issued a declaratory order finding that DEC had waived its authority to act on the application by failing to issue a decision within the one-year timeframe required by the Clean Water Act. FERC indicated that it would assess in a separate order DEC's motion to reopen the record and to stay FERC's November 2016 authorization of the project. DEC had argued that FERC should reopen the record to take evidence on downstream greenhouse gas impacts or grant rehearing to conduct supplemental environmental review. *In re Millennium Pipeline Co.*, No. CP16-17-000 (FERC Sept. 15, 2017).

NEW CASES, MOTIONS, AND NOTICES

San Francisco and Oakland Asked State Courts to Require Oil and Gas Companies to Fund Climate Adaptation Programs

San Francisco and Oakland filed lawsuits in California Superior Court against five oil and gas companies alleging that the carbon emissions from their fossil fuel production had created an unlawful public nuisance. The complaints alleged that the defendants had produced and promoted the use of "massive amounts" of fossil fuels despite having been aware since the 1950s, based on information from the American Petroleum Institute, that emissions from fossil fuels would cause severe and even catastrophic climate change impacts. The complaints alleged that the cities were already experiencing impacts from accelerated sea level rise due to climate change. The cities asked the courts to require the companies to abate the nuisance by funding climate adaptation programs to build sea walls and other infrastructure necessary to protect public and private property from sea level rise and other climate impacts. *People of State of California v. BP p.l.c.*, No. CGC-17-561370 (Cal. Super. Ct., filed Sept. 19, 2017); *People of State of California v. BP p.l.c.*, No. RG17875889 (Cal. Super. Ct., filed Sept. 19, 2017).

Trade Association for Trailer Manufacturers Asked for Stay of Greenhouse Gas Standards

On September 25, 2017, the Truck Trailers Manufacturers Association (TTMA) asked the D.C. Circuit to stay the greenhouse gas and fuel efficiency standards for medium- and heavy-duty

engines and vehicles, which TTMA said impermissibly imposed standards on heavy-duty trailers. TTMA noted that the trailer standards—which TTMA argued EPA lacked statutory authority to impose—would take effect on January 1, 2018. TTMA said it was now clear that the D.C. Circuit would not complete its review by that time and that EPA, which agreed in August 2017 to reconsider the trailer standards, had not acted on TTMA's April 2017 request for an administrative stay. On September 18, 2017, EPA requested that the D.C. Circuit continue to hold the case in abeyance pending completion of administrative proceedings. TTMA said it opposed that request unless the court granted its request for the stay. In moving for the stay, TTMA said it was likely to succeed on the merits, that its members would be irreparably harmed in the absence of a stay, and that a stay would not harm any parties and would be in the public interest. *Truck Trailers Manufacturers Association v. EPA*, Nos. 16-1430 and 16-1447 (D.C. Cir. motion for stay Sept. 25, 2017; motion to continue abeyance Sept. 18, 2017).

Rehearing Sought of D.C. Circuit Decision Vacating Hydrofluorocarbon Prohibition

After the D.C. Circuit Court of Appeals vacated the U.S. Environmental Protection Agency's (EPA's) rule prohibiting use of hydrofluorocarbons (HFCs)—which are powerful greenhouse gases—as replacements for ozone-depleting substances, Natural Resources Defense Council (NRDC) and two companies that intervened as respondents to defend the rule filed petitions for panel rehearing and rehearing en banc. NRDC argued that the panel had committed "two serious errors": (1) it had reached beyond the 2015 rule at issue to improperly invalidate a rule issued in 1994, and (2) it had adopted a "patently unfounded interpretation of the statutory term 'replace' at Step 1" of its *Chevron* analysis. The two companies also argued that the court had exceeded its jurisdiction by invalidating the 1994 regulation and had incorrectly applied Step 1 of *Chevron*. The companies asserted that the court had "paradoxically held that even though EPA properly placed HFCs on the prohibited substances list, EPA lacked authority to prohibit pre-existing uses of HFCs" and that the court's holding amounted to finding that "EPA had one chance, and one chance only, to require a manufacturer to replace an ozone-depleting substance with a safer alternative, no matter how dangerous the replacement might turn out to be or how much safer a newly available alternative is." *Mexichem Fluor, Inc. v. EPA*, Nos. 15-1328, 15-1329 (D.C. Cir. Sept. 22, 2017).

With FERC and Court Proceedings Pending on Atlantic Sunrise Pipeline Project, Environmental Groups Said FERC Needed to Reassess Greenhouse Gas Impacts

While requests for rehearing regarding the Atlantic Sunrise natural gas pipeline expansion project were still pending with FERC, the D.C. Circuit Court of Appeals referred motions to dismiss petitions challenging FERC's February 2017 authorization of the pipeline project to the merits panel. The parallel proceedings resulted at least in part from FERC's lacking a quorum earlier in 2017 to rule on the rehearing requests within the required 30-day timeframe. The petitioners contended that FERC's failure to act on the rehearing requests operated as a denial of the requests and gave them the ability to challenge FERC's authorization in the D.C. Circuit. FERC and the pipeline project's developer argued that the D.C. Circuit did not have jurisdiction to hear the challenges. Environmental groups filed an amended request for rehearing with FERC on September 22, 2017, arguing that a supplemental environmental impact statement analyzing greenhouse gas emissions and climate change impacts was required in light of the D.C. Circuit's

August 22, 2017 decision in *Sierra Club v. FERC*, No. 16-1329, which required FERC to do more to assess downstream greenhouse gas emissions and other climate impacts with respect to another pipeline project. The groups contended that the environmental review of the Atlantic Sunrise project had "impermissibly downplay[ed] cumulative climate impacts" as well as downstream greenhouse gas emissions and asserted that FERC was required to use the social cost of carbon to assess the project's impacts and to analyze or explore mitigation for the project's combustion impacts. The groups said FERC should halt construction and rescind a notice to proceed issued earlier in September. *Allegheny Defense Project v. Federal Energy Regulatory Commission*, No. 17-1098 (D.C. Cir. order Sept. 21, 2017); *In re Transcontinental Gas Pipe Line Company, LLC*, No. CP15-138 (FERC amended request for rehearing Sept. 22, 2017).

Environmental Groups and States Challenged Indefinite Delay of Increase in Civil Penalties for CAFE Standard Violations

Two petitions for review were filed in the Second Circuit Court of Appeals seeking to set aside the National Highway Traffic Safety Administration's decision to indefinitely delay the effective date of a final rule increasing the civil penalty rate for violations of the Corporate Average Fuel Economy (CAFE) standards. Petitioners in one proceeding were the Natural Resources Defense Council and two other environmental groups. Petitioners in the other proceeding were the State of New York and four other states. The petitions were filed pursuant to the Energy Policy and Conservation Act. *Natural Resources Defense Council, Inc. v. National Highway Traffic Safety Administration*, No. 17-2780 (2d Cir., filed Sept. 7, 2017); *New York v. National Highway Traffic Safety Administration*, No. 17-2806 (2d Cir., filed Sept. 8, 2017).

EPA Reported That It Expected to Finalize Clean Power Plan Rule in Fall 2017

In a status report filed in the D.C. Circuit Court of Appeals on September 7, 2017 in the proceedings challenging the Clean Power Plan, EPA indicated that its review of the Clean Power Plan had inadvertently been classified as a "long term action" rather than as in the "proposed rule stage" in the Office of Information and Regulatory Affairs' unified regulatory agenda. EPA requested that the D.C. Circuit continue to hold the proceedings in abeyance. EPA said its review should have been classified as in the "proposed rule stage" because it expected the EPA Administrator to sign a proposed rule in the fall of 2017. EPA said OIRA was currently reviewing the draft proposed rule. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. Sept. 7, 2017).

Federal Highway Administration Said Lawsuit Challenging Suspension of Greenhouse Gas Highway Performance Measures Was Moot

On September 28, 2017, the Federal Highway Administration (FHWA) published notice that greenhouse gas performance measures for the national highway system that it suspended indefinitely in May 2017 would go into effect. FHWA also said it had initiated additional rulemaking procedures to repeal the greenhouse gas measures and expected to issue a proposed rule in 2017 with the goal of issuing a final rule in spring 2018. Two lawsuits had been filed challenging FHWA's delay and suspension of the greenhouse gas performance measures'

effective date. On September 25, 2017, the Acting U.S. Attorney for the Southern District of New York submitted a letter to the federal district court for the Southern District of New York, which was hearing one of the cases, indicating that the federal defendants believed the impending September 28 notice would make the lawsuit moot and asking that deadlines for the plaintiffs' motion for summary judgment be adjourned. The other case challenging the FHWA's delays and suspension of the performance measures was filed in the federal district court for the Northern District of California on September 20, 2017 by eight states. *Clean Air Carolina v. U.S Department of Transportation*, No. 1:17-cv-05779 (S.D.N.Y. Sept. 25, 2017); *People of State of California v. U.S. Department of Transportation*, No. 4:17-cv-05439 (N.D. Cal., filed Sept. 20, 2017).

Exxon Asked Federal Court to Dismiss Securities Class Action

Exxon Mobil Corporation (Exxon) and four of its current and former officers moved to dismiss a federal securities class action in the federal district court for the Northern District of Texas in which the complaint alleged that the defendants made materially false and misleading statements regarding the value and amount of Exxon's oil and gas reserves and regarding Exxon's purported efforts to incorporate carbon or greenhouse gas proxy costs into the investment and valuation process for its oil and gas reserves. Exxon asserted that it had fully disclosed the risks of climate change to its business and that it had not misrepresented the methodologies it used to analyze those risks. Exxon said the complaint's allegations "rest on confusing two distinct concepts": first, "a proxy cost of carbon," which Exxon said it used to represent the impact of climate change policies on future global demand and, second, a "greenhouse gas … costs," which Exxon said it used to "to estimate *its own expenses* for its emissions of carbon dioxide or other greenhouse gases." Exxon contended that the complaint's allegations "establish only the unremarkable fact that ExxonMobil used two different numbers for two different purposes, all for the purpose of prudently taking account of climate-change risks." Exxon also argued that the complaint did not adequately plead fraudulent intent or loss causation. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111 (N.D. Tex. Sept. 26, 2017).

California Counties and City Argued for Keeping Peabody in Climate Case

San Mateo and Marin Counties and the City of Imperial Beach (the plaintiffs) opposed Peabody Energy Corporation's (Peabody) motion in federal bankruptcy court in Missouri to enjoin them from pursuing their public nuisance and tort law claims against Peabody. The plaintiffs filed lawsuits in California state court, since removed to federal court, alleging that Peabody and other defendants' release of greenhouse gases into the atmosphere made them responsible for sea level rise and other climate change impacts affecting their communities. Peabody argued that the discharge and injunction contained in its plan for reorganization barred the claims. The plaintiffs argued that multiple carve-outs in the injunction allowed them to proceed with their claims against Peabody. They contended that they were governmental plaintiffs exercising their police powers, that their statutory public nuisance cause of action did not constitute a "claim" subject to the injunction, and that their claims fell within a carve-out for governmental claims brought under "Environmental Law." *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Sept. 26, 2017).

Lawsuit Filed Against State of Colorado Seeking Declaration That Colorado River Ecosystem Is "Person" Possessing Rights to Flourish

A social and environmental justice organization and five of its members filed a lawsuit as "next friends" for and guardians of the Colorado River Ecosystem against the State of Colorado. The complaint sought declaratory relief, including declarations that the Colorado River Ecosystem is a "person" capable of possessing rights and possesses "rights to exist, flourish, regenerate, be restored, and naturally evolve." The complaint also asked for a declaration that certain activities carried out or permitted by the State of Colorado may violate those rights and that the plaintiffs could proceed to seek injunctive relief. The complaint, filed in the federal district court for the District of Colorado, alleged that climate change was among the threats faced by the river. *Colorado River Ecosystem v. State of Colorado*, No. 1:17-cv-02316 (D. Colo., filed Sept. 25, 2017).

Center for Biological Diversity Challenged Biological Opinion for Copper Mine, Including Failure to Adequately Analyze Climate Impacts

The Center for Biological Diversity filed a lawsuit in the federal district court for the District of Arizona alleging the U.S. Fish and Wildlife Service's (FWS's) biological opinion for a proposed open-pit copper mine on the Coronado National Forest violated the Endangered Species Act (ESA). The Center also alleged that the U.S. Forest Service's reliance on the biological opinion violated the ESA. The complaint also alleged violations of the Administrative Procedure Act. The Center contended that the mine would significantly impact a number of endangered species, including the Gila chub as well as one of three known wild jaguars in the United States. The complaint's allegations included that the combined impacts of the mine and climate change would cause reduced flows in "key reaches" of a creek that had the only known stable and secure population of Gila chub in existence and also included more general allegations that the biological opinion failed to adequately describe and analyze the environmental baseline and cumulative effects, including the impacts of climate change. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 4:17-cv-00475 (D. Ariz., filed Sept. 25, 2017).

California and Its Coastal Commission Challenged Waiver for Border Wall Projects, Said Potential Climate Impacts Would Not Be Assessed

The People of the State of California and the California Coastal Commission filed a lawsuit in the federal district court for the Southern District of California alleging that the construction of a border wall and other border barrier projects would violate the National Environmental Policy Act, the Coastal Zone Management Act, and the Administrative Procedure Act. They contended that the Secretary and Acting Secretary of Homeland Security had acted outside their authority in authorizing and waiving review requirements for two border wall projects in California under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The complaint alleged that the impacts of the projects' construction on climate change would not be quantified or assessed as a result of the waivers. The plaintiffs also asserted that the waivers and the section of the IIRIRA pursuant to which the secretaries acted were unconstitutional. *People of State of California v. United States*, No. 3:17-cv-01911 (S.D. Cal., filed Sept. 20, 2017).

Sierra Club Filed FOIA Lawsuit Seeking EPA Officials' External Communications

Sierra Club filed a Freedom of Information Act (FOIA) lawsuit against EPA alleging that the agency failed to respond to four FOIA requests for communications between senior EPA officials, including Administrator Scott Pruitt, and outside people and organizations. Sierra Club also requested calendars for the EPA officials. Sierra Club said it sought the records "to shed light on secretive and potentially improper efforts by Mr. Pruitt and his core political team to nullify critical, lawful EPA regulations and policies." The complaint alleged that "Mr. Pruitt and his inner circle of political staff at EPA have apparently been implementing secretive and closed-door policies that imprudently reduce transparency about the agency's operations and activities," and that EPA had left the public without access to information previously publicly available, including by removing from its website "formerly prominent information about climate change—a phenomenon that, the scientific consensus warns, gravely impacts public health and the environment, but that tends to pressure Mr. Pruitt's supporters in the fossil fuel industry to reduce carbon emissions." *Sierra Club v. EPA*, No. 1:17-cv-01906 (D.D.C., filed Sept. 18, 2017).

New York Challenged EPA Designation of New Ocean Dumping Site, Saying EPA Failed to Account for Future Resilience Projects That Would Require Dredged Materials

The State of New York, its secretary of state, and the commissioner of its environmental regulatory agency sued EPA to challenge its designation of a permanent open water site in the eastern Long Island Sound for disposal of dredged materials. EPA designated the site as one of two new dumping sites in the sound pursuant to the Marine Protection, Research, and Sanctuaries Act, also commonly known as the Ocean Dumping Act. The plaintiffs charged that EPA had acted arbitrarily and capriciously, including by "unreasonably inflat[ing] the projected dredged material disposal needs for the area." The plaintiffs cited, among other factors, increased need for sand and coarse-grained sediment for beach nourishment and other coastal resilience projects due to sea level rise and increasingly frequent intense storm events. *Rosado v. Pruitt*, No. 1:17-cv-04843 (E.D.N.Y., filed Aug. 17, 2017).

Environmental and Conservation Groups Said CEQA Review for WaterFix Diversion Project Failed to Consider Impacts of Climate Change

Eleven environmental and conservation groups filed a lawsuit in California Superior Court challenging the approval of the Bay Delta Conservation Plan/California WaterFix Project, which would divert water from the San Francisco Bay-Delta estuary for export south. The groups said the California Department of Water Resources had failed to comply with the Delta Reform Act, the California Environmental Quality Act (CEQA), the "fully protected species" statutes, and the California Public Trust Doctrine. They asserted numerous shortcomings in the CEQA review, including the failure to discuss the implications of climate change for the project's water deliveries and failure to consider the cumulative impacts of climate change such as changing storm patterns and sea level rise or the potential climate change effects on hydrology. *California Sportfishing Protection Alliance v. California Department of Water Resources*, No. ___ (Cal. Super. Ct., filed Aug. 21, 2017).

Environmental Groups Notify EPA of Intent to Sue to Compel Issuance of Methane and VOC Guidelines for Existing Oil and Gas Sources

Eight environmental groups sent EPA a letter informing the agency that they intended to file a lawsuit under the Clean Air Act to compel EPA to issue emission guidelines for methane and volatile organic compounds (VOCs) from existing sources in the oil and gas sector. The groups said EPA had known for many years that methane and VOCs were harmful to public health and welfare, that the oil and gas sector emitted large amounts of methane and VOCs, and that low-cost controls were available to reduce emissions. The groups also asserted that that EPA's promulgation of methane and VOC standards for new sources in the sector imposed a mandatory obligation on it to issue the guidelines for existing sources. Notice of Intent to Sue EPA for Failure to Promulgate Emission Guidelines for Methane and VOC Emissions from the Oil and Gas Sector (Aug. 28, 2017).

Update #102 (September 7, 2017)

FEATURED CASE

D.C. Circuit Said FERC Needed to Provide More Information on Pipelines' Downstream Greenhouse Gas Emissions—Or Explain Why It Couldn't

In a split opinion, the D.C. Circuit Court of Appeals found that the environmental impact statement (EIS) prepared by the Federal Energy Regulatory Commission (FERC) for the Southeast Market Pipelines Project did not contain enough information on the greenhouse gas emissions that would result from combustion of the gas that the project would carry. When completed, the project—which comprises three interstate natural-gas pipelines in the southeastern United States—would be able to carry one billion cubic feet of natural gas per day. The D.C. Circuit concluded that "at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible" because it was reasonably foreseeable that the transported gas would be burned in Florida power plants. The court distinguished its conclusion in earlier cases that FERC had no legal authority to consider the environmental effects of natural gas that would be exported from the liquefied natural gas (LNG) facilities it authorized. The D.C. Circuit said that while FERC was forbidden from relying on the environmental effects of gas exports as a justification for denying an upgrade license for an LNG facility, FERC's authority over pipelines permitted FERC to deny a pipeline certificate on the ground that it would be too harmful to the environment. The D.C. Circuit also was not persuaded by FERC's "practical objection" regarding the impossibility of knowing "exactly what quantity of greenhouse gases will be emitted as a result of this project being approved." The court said FERC should have either made a quantitative estimate of downstream greenhouse gas emissions or "explained more specifically" why it could not do so. The court also indicated that the fact that downstream emissions might be offset by reductions elsewhere (from the retirement of coal-fired plants, for example) did not excuse FERC from making emissions estimates. In response to petitioner Sierra Club's argument that FERC should use the Social Cost of Carbon to convert emissions estimates to concrete harms, the D.C. Circuit directed FERC to explain in the EIS whether it would adopt the position it took in the EIS for an LNG terminal that the Social Cost of Carbon was not useful for purposes of environmental review under the National Environmental

Policy Act. In addition to its holdings regarding FERC's greenhouse gas emissions analysis, the D.C. Circuit also determined as a threshold matter that the petitioners had standing to challenge all three segments of the pipeline project, not just the segment alleged to have caused an injury-in-fact and upheld other aspects of FERC's environmental review. Judge Janice Rogers Brown dissented on the issue of downstream emissions, writing that in her view such emissions did not need to be considered because FERC did not control whether the greenhouse gas emissions would occur. *Sierra Club v. Federal Energy Regulatory Commission*, No. 16-1329 (D.C. Cir. Aug. 22, 2017).

DECISIONS AND SETTLEMENTS

Montana Federal Court Found NEPA Review of Coal Mine Expansion Should Have Included Downstream Greenhouse Gases

The federal district court for the District of Montana ruled that the U.S. Office of Surface Mining Reclamation and Enforcement's (OSM's) environmental review of a proposed federal mining plan modification for expansion of underground coal mining operations was not sufficient. The court found that OSM failed to take a hard look at indirect and cumulative effects of coal transportation and combustion and at foreseeable greenhouse gas emissions. Although OSM calculated the greenhouse gas emissions associated with coal transportation, the court found that it had not considered other reasonably foreseeable environmental impacts for which analysis would be "possible and not merely speculative." With respect to greenhouse gas emissions from coal combustion, the court found that OSM's quantification of such emissions was not sufficient, and that OSM should also have quantified the economic costs associated with emissions since it had quantified the modification's economic benefits. The Court also found that OSM should have considered non-greenhouse gas pollution associated with combustion. In addition, the court said OSM had improperly decided not to prepare an EIS despite "significant uncertainty about the critical issues," citing OSM's failure to adequately evaluate the plan modification's "context" beyond the local and regional levels and its failure to consider the plan modification's coal transportation and air pollution effects in its "intensity" analysis. *Montana Environmental Information Center v. U.S. Office of Surface Mining*, No. 9:15-cv-00106-DWM (D. Mont. Aug. 14, 2017).

D.C. Circuit Upheld Department of Energy's Environmental Review for Authorization of LNG Exports from Texas Terminal

The D.C. Circuit Court of Appeals upheld the U.S. Department of Energy's (DOE) authorization of the export of liquefied natural gas (LNG) from the Freeport Terminal on Quintana Island in Texas, rejecting claims that DOE had not sufficiently examined environmental impacts under the National Environmental Policy Act (NEPA) or fulfilled its obligations under the Natural Gas Act. The court ruled that DOE had provided a "reasoned explanation as to why it believed the indirect effects pertaining to increased gas production were not reasonably foreseeable" and had not failed to comply with NEPA "by declining to make specific projections about environmental impacts stemming from specific levels" of increased production. Similarly, the court found that DOE was not required to make specific projections about the indirect effects of a potential switch in the U.S. power sector from gas to coal in response to higher gas prices due to increased

exports. The court also found that DOE had adequately considered the potential greenhouse gas emissions resulting from the indirect effects of exports, noting that DOE had evaluated the upstream and downstream emissions of carbon dioxide and methane from producing, transporting, and exporting LNG in a "Life Cycle Report" commissioned by DOE to supplement the EIS prepared by FERC. (The D.C. Circuit said DOE "plainly relie[d]" on the Life Cycle Report and another supplemental report to justify its hard look. The D.C. Circuit therefore considered both supplemental reports to be part of DOE's environmental review even though DOE argued that it complied with NEPA by adopting FERC's EIS.) The court was not persuaded that DOE was required to consider the cumulative impacts of other pending and anticipated LNG export approvals. The court also upheld DOE's "public interest," finding under the Natural Gas Act, rejecting contentions that DOE had failed to thoroughly consider environmental concerns. *Sierra Club v. U.S. Department of Energy*, No. 15-1489 (D.C. Cir. Aug. 15, 2017).

Ninth Circuit Upheld Determination That Desert Eagles Were Not a Distinct Population Segment Eligible for Listing Under Endangered Species Act

The Ninth Circuit Court of Appeals upheld the U.S. Fish and Wildlife Service's (FWS's) determination that the Sonoran Desert Area bald eagle was not a distinct population segment (DPS) eligible for listing under the Endangered Species Act. The Ninth Circuit held that the FWS had reasonably concluded that though the unusual characteristics of the desert eagle population segment satisfied the "persistence" factor for significance, those characteristics did not necessarily require a conclusion that the population segment was ecologically or biologically significant for the bald eagle taxon as a whole. The Ninth Circuit also held that the FWS had reasonably found that extirpation of the desert eagle population segment would not create a significant gap in the range of the taxon. The Ninth Circuit also rejected the argument that the FWS had ignored climate change as a factor for determining the desert eagles' significance to the taxon, finding that the FWS "directly addressed climate change" and concluded that the best information available indicated that climate change was not a significant threat to the bald eagle. *Center for Biological Diversity v. Zinke*, No. 14-17513 (9th Cir. Aug. 28, 2017).

D.C. Circuit Denied Intervenors' Requests for Rehearing of Decision Vacating Stay of Methane Rule for Oil and Gas Facilities

The D.C. Circuit Court of Appeals denied petitions for rehearing en banc of its decision vacating the U.S. Environmental Protection Agency's (EPA's) administrative stay of methane standards for oil and gas sector. The petitions were filed by intervenor-respondents, not by EPA. The order denying rehearing indicated that Judges Henderson, Brown, and Kavanaugh would have granted the petitions. *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir. Aug. 10, 2017).

D.C. Circuit Vacated EPA Requirement to Replace HFCs

In a split opinion, the D.C. Circuit Court of Appeals ruled that EPA lacked authority to issue a 2015 rule restricting manufacturers from making certain products containing hydrofluorocarbons (HFCs). Because HFCs were greenhouse gases that contribute to climate change, EPA removed certain HFCs from a list of safe substitutes created pursuant to Section 612 of the Clean Air Act, which requires manufacturers to replace ozone-depleting substances with safe substitutes. EPA

added the HFCs, which are not ozone-depleting substances, to a list of prohibited substitutes. EPA said Section 612 gave EPA authority to prohibit manufacturers that had replaced ozone-depleting substances with HFCs previously on the safe substitutes list from making products containing the now-prohibited HFCs. The D.C. Circuit found that EPA's "novel reading" of Section 612 was "inconsistent with the statute as written" because it stretched the meaning of "replace" beyond its ordinary meaning. The D.C. Circuit said manufacturers "replace" an ozone-depleting substance only once—when they transition to making the same product with a substitute substance. The court said EPA's reading of "replace," in which manufacturers continue to "replace" the ozone-depleting substance every time the substitute is used, would render EPA's authority "boundless" and that such an interpretation "borders on the absurd." The D.C. Circuit did, however, uphold EPA's decision to remove the HFCs from the list of safe substitutes. The court also said EPA did not "squarely articulate" an alternative "retroactive disapproval" rationale for requiring manufacturers to replace HFCs, and said that EPA would have to justify such an approach on remand if it chose to rely on it. Judge Robert L. Wilkins dissented from the conclusion that Section 612 unambiguously prohibited EPA from requiring replacement of the HFCs. In his view, the statutory provision was ambiguous and EPA's interpretation of the statutory scheme was reasonable. *Mexichem Fluor, Inc. v. EPA*, No. 15-1328 & 15-1329 (D.C. Cir. Aug. 8, 2017).

D.C. Circuit Continued to Hold Clean Power Plan and NSPS Cases in Abeyance

On August 8, 2017, the D.C. Circuit ordered—on its own motion—that challenges to the Clean Power Plan continue to be held in abeyance for 60 more days and that EPA continue filing status reports at 30-day intervals. Five days earlier, public health and environmental organizations that had intervened as respondents asked the court to decide the case on the merits or terminate it by remanding the case to EPA. They said EPA's classification of its Clean Power Plan review as a "Long Term Action" in the Trump administration's Current Unified Agenda of Regulatory and Deregulatory Actions indicated a proposed rule might be delayed for at least another year. On August 10, the D.C. Circuit ordered—again on its own motion—that the cases challenging the carbon dioxide standards for new, modified, and reconstructed power plants (NSPS) remain held in abeyance pending further order of the court, with status reports to be filed at 90-day intervals. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. Aug. 8, 2017); *North Dakota v. EPA*, Nos. 15-1380 et al. (D.C. Cir. Aug. 10, 2017).

Virginia Federal Court Dismissed FOIA Lawsuit Seeking State Department Correspondence About Climate Change

The federal district court for the Eastern District of Virginia ruled in favor of the U.S. Department of State in a Freedom of Information Act (FOIA) lawsuit brought by two organizations that sought correspondence between five State Department employees and environmental organizations and the employees' correspondence containing the following terms: global warming, climate change, Paris, UNCCC, UNFCC, Kyoto, and APEC. The court's decision addressed one plaintiff's motion for summary judgment challenging redactions in 10 documents produced by the State Department and the State Department's cross-motion for summary judgment. The plaintiff contended that the 10 documents were a small sample of unjustified redactions and partial withholdings representing improper application of FOIA

Exemptions 1 (for classified material), 5 (for predecisional intra- or inter-agency documents), and 6 (for personnel and medical files that would constitute an invasion of privacy). The court found that the State Department had provided sufficient information about documents withheld pursuant to Exemption 1 to demonstrate that they were properly encompassed by the exemption and that the timing of the State Department's classification of the information as confidential was not automatically invalid based on its timing. The court also rejected challenges to redactions based on Exemption 5. The redacted information in one document related to formulating a response to a foreign official and to internal discussions about possible topics for a future meeting; redacted information in a second document was a draft list of names of "possible validators of … climate change work." A third document redacted discussions of potential State Department engagement with congressional staff. The court also concluded that documents were properly redacted based on Exemption 6 to exclude private and personal conversation between two individuals concerning career matters, the draft climate change "validators" list, and a summary of conversations between a private individual and Indian officials. The court also ruled that the second plaintiff could not file an additional motion for summary judgment and that this opinion therefore concluded the case. *Energy & Environment Legal Institute v. U.S. Department of State*, No. 1:15-cv-00423-LO-TCB (E.D. Va. Aug. 28, 2017).

Nevada Federal Court Rejected Claims of Inadequate Consideration of Climate Change for Water Pipeline

The federal district court for the District of Nevada largely upheld approvals for the first phase of "a massive water-redistribution pipeline" intended to carry millions of gallons of water to Nevada's most populous county, including by rejecting the plaintiff's argument that the U.S. Bureau of Land Management (BLM) did not take a hard look at the extent to which climate change might amplify the project's environmental impacts. The court found that BLM adequately considered climate change impacts by generally considering global climate change and regional climate change trends. The court rejected the plaintiffs' contention that BLM's assessment should have included specific climate change data, finding that the plaintiffs had failed to point to any "hard data" that BLM should have included in its analysis. The court also agreed with BLM that new climate change studies indicating an increased risk of drought in the Southwest did not warrant preparation of a supplemental EIS. The court concluded that the studies provided "no new, raw data about how climate change might affect the pipeline's environmental impact" and that BLM had already qualitatively considered the studies' conclusions in its EIS. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 2:14-cv-00226 (D. Nev. Aug. 23, 2017).

D.C. Federal Court Upheld NOAA's Withholding of Predecisional Documents Related to "Hiatus Study"

The federal district court for the District of Columbia granted summary judgment to the U.S. Department of Commerce in a FOIA lawsuit seeking documents in the possession of the National Oceanographic and Atmospheric Administration (NOAA) related to a study by several NOAA scientists known as the "Hiatus Paper." The Hiatus Paper found that recent ocean surface temperature increases were greater than other studies had indicated, and that there had been no "hiatus" in ocean warming as some had argued. The court's decision concerned three sets of

documents withheld by NOAA under FOIA's Exemption 5 for inter-agency or intra-agency memorandums or letters—drafts of the Hiatus Paper, internal correspondence among NOAA scientists about the Hiatus Paper, and outside peer reviewer comments. The court rejected the plaintiff's contention that the withheld documents were not within Exemption 5's scope because they concerned science, not policy. The district court said D.C. Circuit precedent resolved this question in NOAA's favor. The court also found that the plaintiff had not presented evidence "sufficient to raise the specter of such nefarious government misconduct" as would be required to override Exemption 5. (The court also noted that the D.C. Circuit had never held that government misconduct could abrogate Exemption 5.) The district court also found that the Department of Commerce had adequately alleged that it had released all reasonably segregable material and that the plaintiff had provided no evidence to contradict those allegations. *Judicial Watch, Inc. v. U.S. Department of Commerce*, No. 1:15-cv-02088-CRC (D.D.C. Aug. 21, 2017).

South Carolina Federal Court Ordered Removal of Sea Walls That Interfered with Sea Turtle Nesting

The federal district court for the District of South Carolina granted a motion for a preliminary injunction and ordered that temporary sea walls be removed from beaches in South Carolina and remain removed during the nesting period of sea turtles. The court found that the plaintiffs were likely to succeed on their argument that the sea walls interfered with the nesting activities of endangered sea turtles and that the state authorization of the sea walls constituted a "take" under the Endangered Species Act. The court also found that the plaintiffs had established irreparable harm; that the balance of the equities tipped in their favor (here, the court said it was skeptical that the sea walls effectively prevented erosion); and that an injunction would be in the public interest. The court also denied a motion to dismiss, finding that dismissal on *Burford* abstention grounds due to ongoing state administrative proceedings was not justified. The court said that although "protecting coastal real estate from sea level rise and extreme climate events such as hurricanes is an important state policy," abstention was not required merely because resolution of the federal question would result in overturning state policy. The court found that the defendants' attempt to frame the issue as a local matter fell short since protection of endangered species was a matter of national concern. *Sierra Club v. Von Kolnitz*, No. 2:16-cv-03815-DCN (D.S.C. Aug. 14, 2017).

Federal Court Said Bureau of Reclamation Considered Climate Change-Induced Turbidity in Review of Water Transfer Project

The federal district court for District of Columbia ruled that the Bureau of Reclamation had "finally done its work" of examining the potential impacts of the Northwest Area Water Supply Project (NAWS), the goal of which was to provide water from Lake Sakakawea in the Missouri River Basin to communities in need of water in North Dakota, which is in the Hudson River Basin. The court rejected an argument by the Province of Manitoba that a supplemental EIS prepared by the Bureau in 2015 did not adequately consider a climate change-induced increase in turbidity in the waters of Lake Sakakawea. The court said this argument arose from a "scientific disagreement as to the nature and impact" of the turbidity in the environment, not from a failure by the Bureau to consider the issue. *Government of Province of Manitoba v. Zinke*, Nos. 02-2057 & 09-373 (D.D.C. Aug. 10, 2017).

West Virginia Federal Court Remanded Murray Energy Defamation Action to State Court

The federal district court for the Northern District of West Virginia remanded to state court a defamation action brought against John Oliver, the host of *Last Week Tonight with John Oliver*, by the coal company Murray Energy Corporation (Murray Energy); Robert E. Murray, the founder, chairman, president, and chief executive officer of Murray Energy; and affiliated companies of which Mr. Murray was the president, CEO, and sole director (the affiliated companies). The other defendants included Home Box Office, Inc. (HBO), a Delaware corporation, which broadcasts *Last Week Tonight*. The plaintiffs alleged that the defendants were "persons and organizations fundamentally opposed to any revitalization of the coal industry, having described coal as 'environmentally catastrophic.'" The plaintiffs further alleged that in a June 2017 episode of *Last Week Night* the defendants knowingly broadcast malicious statements that they knew to be false based on information provided by the plaintiffs. The statements that the plaintiffs alleged were defamatory included statements indicating that Mr. Murray had no evidence to support his assertion that an earthquake caused a mine collapse that killed nine people; a statement that Mr. Murray and Murray Energy "appear to be on the same side as black lung" and that their position on a coal dust regulation was the equivalent of rooting for bees to kill a child; and a description of Mr. Murray as looking "like a geriatric Dr. Evil." The plaintiffs also asserted that the allegedly defamatory statements constituted false light invasion of privacy and that defendants intentionally inflicted emotional distress upon Mr. Murray. After the defendants removed the action to federal court on diversity jurisdiction grounds, the federal court remanded, rejecting the defendants' argument that the affiliated companies—which, like HBO, are Delaware corporations—had been fraudulently joined to defeat diversity jurisdiction. The court found that defamatory statements made about an executive of a business could be sufficient to defame the business where the statements were made about the executive in his professional capacity and reflected negatively on the operation of the business. The court therefore found that there existed "a glimmer of hope" that the affiliated companies would establish a cause of action and that diversity jurisdiction therefore was destroyed. *Marshall County Coal Co. v. Oliver*, No. 5:17-cv-00099-JPB (N.D. W. Va. Aug. 10, 2017); *Marshall County Coal Co. v. Oliver*, No. 17-C-124 (W. Va. Cir. Ct., filed June 21, 2017).

FERC Declined to Stay Atlantic Sunrise Pipeline Project; Rehearing Requests Still Pending

FERC denied requests for a stay of its February 3, 2017 order authorizing construction and operation of the Atlantic Sunrise pipeline project. FERC said the parties requesting the stay had not established that they would suffer irreparable harm. FERC noted that it had yet to consider the merits of any requests for rehearing. Parties had argued that flaws in FERC's review of the pipeline project included failure to address downstream greenhouse gas impacts. *In re Transcontinental Gas Pipe Line Co.*, No. CP15-138 (FERC Aug. 31, 2017).

New York Denied Water Quality Certificate for Pipeline Project, Citing D.C. Circuit Decision Requiring Consideration of Downstream Greenhouse Gas Emissions

The New York State Department of Environmental Conservation denied an application for a Water Quality Certificate under Section 401 of the Clean Water Act and state permits for a

natural gas pipeline project. DEC said FERC's environmental review of the project was inadequate due to the D.C. Circuit's decision in *Sierra Club v. FERC*, No. __ (D.C. Cir. Aug. 22, 2017), in which the D.C. Circuit found that FERC should have considered the downstream greenhouse gas emissions from combustion of natural gas transported by another pipeline project. NYSDEC said FERC had not conducted such an analysis for New York pipeline project and that the D.C. Circuit's decision was a material change in applicable law warranting denial of the application. NYSDEC also submitted a motion to FERC for reopening or rehearing and staying the project. *In re Valley Lateral Project*, No. 3-3399-00071/00001 (NYSDEC notice of decision Aug. 30, 2017).

NEW CASES, MOTIONS, AND NOTICES

State of Alaska and Trade Groups Sought Supreme Court Review of Bearded Seal Listing as Threatened Species

Petitioners led by the State of Alaska filed a petition for a writ of certiorari seeking U.S. Supreme Court review of the Ninth Circuit's decision upholding the listing of the bearded seal as a threatened species under the Endangered Species Act (ESA). Alaska Oil and Gas Association (AOGA) and American Petroleum Institute (API) filed a separate petition. The petitioners identified the question presented as whether a species could be listed as threatened when the government determined that the species "is not presently endangered" but "will lose its habitat due to climate change by the end of the century." The State of Alaska petitioners argued that the case isolated a single legal issue of "critical importance regarding the reach of the ESA" and that the case provided "an ideal vehicle" for reviewing the issue because the National Marine Fisheries Service (NMFS) "based its listing decision entirely on the speculative, long-term effects of climate change on a healthy species," the listing decision would take "a substantial, immediate toll on the State and its local population," and the listing lacked positive conservation effects because NMFS "disclaimed any power to address the threat it purported to identify. The Alaska petitioners argued that NMFS had disregarded the statutory text and structure," and that the agencies charged with implementing the ESA should not be allowed to "manhandle" the statute "to fit the square peg of climate change into the round hole of ESA regulation." The Alaska petitioners said immediate review was necessary because neither the Ninth Circuit nor the D.C. Circuit was "likely to impose any effective limit on the listing of cold-weather species." In their petition, AOGA and API argued that the Ninth Circuit's interpretation of the ESA allowing such a listing was incompatible with standards established by the Supreme Court and the D.C. Circuit and contrary to the statute's plain language. The petitioners said certiorari should be granted to address the "palpable consequences for both public and private entities" that the Ninth Circuit's "lax standard" would have and that the bearded seal listing presented "the perfect vehicle to set the Ninth Circuit's erroneous standard straight" because the National Marine Fisheries Service had "conceded that it has *no data* to make a concrete inference about how the bearded seal will react to climate change and proceeded to list as threatened a highly abundant species that has shown no population decline despite observed sea ice declines." The Alaska Federal of Natives, Resource Development Council for Alaska, Alaska Chamber, U.S. Chamber of Commerce, and 18 states filed amicus briefs in support of the petitioners. *Alaska v. Ross*, No. 17-118 (U.S. cert. petition July 21, 2017); *Alaska Oil & Gas Association v. Ross*, No. 17-133 (U.S. cert. petition July 21, 2017).

Environmental Groups Sought Vacatur of EPA's Administrative Stay of Landfill Methane Standards

Environmental groups asked the D.C. Circuit Court of Appeals to vacate EPA's administrative stay of regulations restricting emissions of landfill gas (including methane) from municipal solid waste landfills. The plaintiffs called their case "a carbon copy" of *Clean Air Council v. Pruitt*, in which the D.C. Circuit vacated EPA's administrative stay of regulations restricting emissions from the oil and gas sector. They argued that EPA's administrative stay suffered from the same flaws as the administrative stay in that case, citing EPA's failure to articulate any rationale for why reconsideration was mandatory for five of the six issues on which reconsideration was granted and the failure of the rationale for reconsideration of the sixth issue to meet statutory criteria for mandatory reconsideration. *Natural Resources Defense Council v. Pruitt*, No. 17-1157 (D.C. Cir. motion for summary vacatur Aug. 4, 2017).

Lawsuits Challenged Delisting of Yellowstone Grizzly Bears, Citing Climate Change Threats to Food Sources

Three lawsuits were filed in the federal district court for the District of Montana challenging the FWS decision to designate a Greater Yellowstone Ecosystem grizzly bear distinct population segment (DPS) and FWS's related determination that the DPS was recovered and did not qualify as endangered or threatened under the Endangered Species Act. In its lawsuit, WildEarth Guardians contended that the FWS's assessment of threats to the DPS was inadequate due to, among other reasons, its failure to account for climate change impacts on the grizzly bear's habitat and food sources. The complaint filed by the Northern Cheyenne Tribe, Sierra Club, Center for Biological Diversity, and National Parks Conservation Association also alleged that the FWS failed to address threats to Yellowstone grizzly bears, including their increasing reliance on a meat-based diet due in part to climate change impacts on food sources. The Humane Society of the United States and the Fund for Animals alleged in their complaint that the FWS had ignored best available science showing that climate change was and would continue to threaten the survival of grizzly bears in the Yellowstone area, including by posing threats to grizzly bears' food sources and forcing grizzly bears to migrate outside their primary conservation area and to face "cascading threats." *Humane Society of the United States v. U.S. Fish & Wildlife Service*, No. 9:17-cv-00117-DLC (D. Mont., filed Aug. 29, 2017); *WildEarth Guardians v. Zinke*, No. 9:17-cv-00118-DLC (D. Mont., filed Aug. 30, 2017); *Northern Cheyenne Tribe v. Zinke*, No. 9:17-cv-00119-DLC (D. Mont., filed Aug. 30, 2017).

Conservation Law Foundation Filed Lawsuit Alleging Shell Violated Clean Water Act by Failing to Prepare Providence Fuel Terminal for Climate Change

Conservation Law Foundation (CLF) filed a citizen suit against Shell Oil entities (Shell) alleging that they had failed to comply with the Clean Water Act and a Rhode Island Pollutant Discharge Elimination System permit at their bulk storage and fuel terminal in Providence, Rhode Island (Providence Terminal). CLF alleged that the Providence Terminal was "at risk from coastal flooding caused by sea level rise, increased and/or more intense precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm

surges—all of which will become, and are becoming, worse as a result of climate change." CLF also alleged that the terminal's location, elevation, and lack of preventative infrastructure made it "especially vulnerable to these risks" and that Shell Oil had not taken action to address these vulnerabilities at Providence Terminal, despite having "long been well aware" of climate change's impacts and risks and having incorporated such risks in "ongoing company investments," including projects off the coast of Nova Scotia and in the North Sea. CLF asserted that Shell's "knowing disregard of the imminent risks" of climate change and failure to fortify the Providence Terminal against such risks constituted violations of the Clean Water Act. CLF identified 19 separate causes of action for violation of the Clean Water Act and sought civil penalties, environmental restoration and compensatory mitigation to address past violations, and declaratory and injunctive relief to prevent future violations. *Conservation Law Foundation, Inc. v. Shell Oil Products US*, No. 1:17-cv-00396 (D.R.I. Aug. 28, 2017).

Peabody Energy Sought Dismissal of California County and City Lawsuits Against Fossil Fuel Companies; Defendants Removed Cases to Federal Court

On August 28, 2017, Peabody Energy Corporation (Peabody) asked the U.S. Bankruptcy Court for the Eastern District of Missouri to order San Mateo County, Marin County, and the City of Imperial Beach to dismiss complaints against Peabody filed in California Superior Court in July 2017. The Counties and City's complaints sought relief from a number of fossil fuel companies, including Peabody, for alleged damage arising from climate change. Peabody—which emerged from bankruptcy in April 2017—argued that the complaints sought to "obliterate" Peabody's "fresh start" by seeking damages and equitable relief based upon pre-bankruptcy petition conduct. Peabody asserted that the Counties and City's claims were therefore discharged and enjoined pursuant to Peabody's reorganization plan and the bankruptcy court's confirmation order. *In re Peabody Energy Corp.*, No. 16-42529-399 (Bankr. E.D. Mo. Aug. 28, 2017).

Earlier in August, defendants Chevron Corporation and Chevron U.S.A., Inc. (together, Chevron) removed all three of the actions to the federal district court for the Northern District of California. Chevron said all other defendants joined in or had consented to the notice of removal. Chevron also said the defendants would be moving "at the appropriate time" to dismiss the plaintiffs' claims. Chevron asserted that though the complaint nominally asserted state law claims, it should be heard in a federal forum because there was federal question jurisdiction. Citing the Ninth Circuit's opinion in *Native Village of Kivalina v. ExxonMobil Corp.*, Chevron argued that "[r]eflecting the uniquely federal interests posed by greenhouse gas claims like these," the Ninth Circuit had recognized "that causes of action of the types asserted here are governed by federal common law, not state law." Chevron also said removal was also authorized because the action "necessarily raises disputed and substantial federal questions that a federal forum may entertain without disturbing a congressionally approved balance of responsibilities between the federal and state judiciaries"; because the Clean Air Act and other federal statutes and the U.S. Constitution completely preempted the plaintiffs' claims; because the action arose under the Outer Continental Shelf Lands Act (OCSLA); because a causal nexus existed between the alleged actions taken by the defendants pursuant to a federal officer's directions and the plaintiffs' claims and because the defendants could assert colorable federal defenses; because the claims were based on alleged injuries to or conduct on federal enclaves; and because the state law claims were related to bankruptcy cases. *County of Marin v. Chevron Corp.*, No. 3:17-cv-

04935 (N.D. Cal. Aug. 24, 2017); *City of Imperial Beach v. Chevron Corp.*, No. 4:17-cv-04934 (N.D. Cal. Aug. 24, 2017); *County of San Mateo v. Chevron Corp.*, No. 3:17-cv-04929 (N.D. Cal. Aug. 24, 2017).

Dakota Access Pipeline Developers Filed RICO Action Against Environmental Groups

Two companies that led development of the Dakota Access Pipeline filed an action under the Racketeer Influenced and Corrupt Organizations Act (RICO) against Greenpeace International and other environmental activist groups. The companies—Energy Transfer Equity, L.P. and Energy Transfer Partners, L.P. (together, Energy Transfer)—alleged that they were the latest business to be targeted by "a network of putative not-for-profits and rogue eco-terrorist groups who employ patterns of criminal activity and campaigns of misinformation to target legitimate companies and industries with fabricated environmental claims." Energy Transfer asserted that the defendants and other parties had "manufactured" a crisis and engaged in an illegal campaign against the Dakota Access Pipeline, and had worked together to carry out racketeering activity, that included supporting acts of terrorism; defrauding donors, supporters, and state and federal treasuries; engaging in tax fraud and interstate drug trafficking; and transporting and transmitting misappropriated funds and property through interstate commerce. The complaint alleged numerous misrepresentations regarding the pipeline project, citing the campaign's charges that the project was a "climate destroying project" that would ensure "guaranteed destruction of the planet," which the complaint called "a sensational lie." The complaint asserted that the enterprise had exploited "legitimate concerns about mitigating climate change to dupe the public into supporting a campaign that does the opposite" and that the exploitation "lays bare that [the enterprise] is motivated entirely by money, not its proclaimed concerns about environmental impacts." Energy Transfer alleged that the "scheme's dissemination of negative misinformation devastated the market reputation of Energy Transfer as well as the business relationships vital to its operations and growth." In addition to racketeering and conspiracy counts under RICO, Energy Transfer also asserted claims of state law racketeering, defamation, tortious interference with business, and common law civil conspiracy. *Energy Transfer Equity, L.P. v. Greenpeace International*, No. 1:17-cv-00173-CSM (D.N.D., filed Aug. 22, 2017).

Sierra Club Filed FOIA Lawsuit Seeking Communications Regarding Department of Energy Grid Study

Sierra Club filed a lawsuit asking the federal district court for the Northern District of California to order the U.S. Department of Energy to produce documents requested under FOIA regarding DOE's study of U.S. electricity markets and the reliability of the electrical grid. Sierra Club alleged that it appeared that DOE had "intended from the outset to release a biased study containing pre-determined conclusions that 'baseload' plants utilizing fossil fuels are necessary for the reliability and resiliency of the grid, and that existing policies to encourage adoption of clean energy sources must be scaled back." Sierra Club had submitted a FOIA request to DOE on May 1, 2017 requesting communications between DOE officials and outside parties such as trade groups, representatives of the electricity utility or generation industries, FERC, regional transmission organizations, and independent system operators. *Sierra Club v. U.S. Department of Energy*, No. 3:17-cv-04663 (N.D. Cal., filed Aug. 14, 2017).

California Sought Records on EPA Procedures for Avoiding Appearance of Lack of Impartiality in Pruitt's Involvement in Rulemaking Processes

The State of California filed a lawsuit in the federal district court for the District of Columbia alleging that EPA had not complied with FOIA in response to California's request for records concerning EPA's process to ensure that Administrator E. Scott Pruitt was in compliance with federal ethics regulations and obligations and EPA's policies and procedures for determining who would assume the Administrator's powers if Pruitt was recused or disqualified from participating in a matter. California said that as EPA Administrator, Pruitt became responsible for implementing regulations he had worked to overturn as Oklahoma Attorney General "just moments earlier," including rules limiting greenhouse gas emissions from power plants and the oil and gas sector. California asserted that Pruitt's "public attacks on the legal and factual justification EPA provided for many rules … raise a question regarding his ability to participate in administrative processes and rulemakings concerning these same rules with the impartiality required by federal law." *California v. EPA*, No. 1:17-cv-01626 (D.D.C., filed Aug. 11, 2017).

Lawsuit Alleged That Renewal of Permit for Shellfish Aquaculture Did Not Consider Climate Impacts on Washington State Waters

Center for Food Safety (CFS)—a nonprofit organization "whose mission is to empower people, support farmers, and protect the earth from the adverse impacts of industrial food production"—filed an action challenging the U.S. Army Corps of Engineers' renewal of a nationwide permit to cover shellfish aquaculture in Washington State. CFS's complaint, filed in the federal district court for the Western District of Washington, asserted that the Corps failed to comply with the Clean Water Act and NEPA. CFS alleged, among other things, that the supplemental environmental assessment prepared by the Corps did not fully assess the incremental impact of expanding the area of commercial shellfish aquaculture in combination with existing impacts from other human activities, including climate change. *Center for Food Safety v. U.S. Army Corps of Engineers*, No. 2:17-cv-01209 (W.D. Wash., filed Aug. 10, 2017).

Update #101 (August 7, 2017)

FEATURED CASES

Federal Courts Upheld "Zero Emission Credits" for Nuclear Plants in Illinois and New York

Federal district courts in New York and Illinois upheld "zero emission credit" (ZEC) programs intended to subsidize old nuclear power plants in the two states. New York's ZEC program is one component of the Clean Energy Standard adopted by the New York Public Service Commission. Illinois's ZEC program was created by the Future Energy Jobs Act, which granted ZECs to qualifying facilities, which the Illinois court noted were "likely to be two nuclear power plants owned by Exelon in Illinois." Plaintiffs challenging the New York program were electric generators and trade groups of electric generators; plaintiffs in the Illinois challenge were electric generators and their trade groups in one case and utility customers in a second case. Plaintiffs in both cases unsuccessfully argued that the ZEC programs were unconstitutional because they

were preempted and violated the dormant Commerce Clause. The utility customers also made an equal protection claim. In the Illinois case, the court concluded that the plaintiffs largely lacked Article III standing for the preemption and dormant Commerce Clause claims but proceeded to address the merits. Both the Illinois and the New York federal courts agreed, though their reasoning was slightly different, that they did not have equity jurisdiction over the plaintiffs' claims that the Federal Power Act (FPA)—which grants the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over the interstate wholesale electricity market—preempted the state programs. The courts concluded that Congress intended to foreclose a private right of action, with both courts citing the FPA's provisions for a detailed remedial scheme before FERC and the Public Utility Regulatory Policies Act's addition to the FPA of a private cause of action for a narrow scope of challenges to state action. The Illinois court also found that the relief sought by the plaintiffs would require the court to apply "judicially unadministratable" standards, but the New York court did not find this to be a barrier to equitable jurisdiction. Both courts also held that the FPA preemption claims would, in any event, fail on the merits. The courts—looking to the Supreme Court's 2016 opinion in *Hughes v. Talen Energy Marketing, LLC*—said the states' ZEC programs did not impermissibly "tether" ZEC payments to participation in the wholesale capacity auctions and did not directly affect wholesale rates. The ZEC programs therefore avoided field preemption. The courts also found that the plaintiffs did not state a plausible claim for conflict preemption because the ZEC programs did not run afoul of FERC's goal of competitive and efficient energy markets. The New York court ruled that the plaintiffs did not have a cause of action to bring their dormant Commerce Clause claim because their alleged injuries did not fall within the zone of interests protected by the dormant Commerce Clause—i.e., the economic interests of out-of-state entities. The New York court also held that the plaintiffs failed to state a dormant Commerce Clause claim because New York State acted as a market participant when it created ZECs. The Illinois court held that the plaintiffs did not have Article III standing to make their dormant Commerce Clause claim, and also concluded that no dormant Commerce Clause claim was stated because Illinois's statute did not preclude out-of-state generators from submitting bids for ZECs and was therefore not facially discriminatory, and there were no plausible allegations that the procurement process would be facially discriminatory. The Illinois court also concluded there was a substantial possibility that the implementation of the statute would be non-discriminatory in effect, rejected the argument that the statute had a discriminatory purpose, and said the state-created ZECs only indirectly burdened other generators' ability to participate in the wholesale market. The Illinois court also dismissed the utility customer plaintiffs' equal protection claim, finding that the ZEC program had rational basis grounded in the legislative goals of increasing reliance on zero-emission energy. The generator plaintiffs in the Illinois case filed a notice of appeal on July 17. *Coalition for Competitive Electricity v. Zibelman*, No. 1:16-cv-08164-VEC (S.D.N.Y. July 25, 2017; *Village of Old Mill Creek v. Star*, Nos. 1:17-cv-01164 and 1:17-cv-01163 (N.D. Ill. notice of appeal July 17, 2017; memorandum opinion and order July 14, 2017).

DECISIONS AND SETTLEMENTS

D.C. Circuit Said Administrative Stay of EPA Methane Standards for Oil and Gas Facilities Must Be Vacated Immediately

On July 31, 2017, the D.C. Circuit Court of Appeals ordered immediate issuance of the mandate vacating the U.S. Environmental Protection Agency's (EPA's) administrative stay of portions of methane standards for oil and gas facilities. Earlier in July, the court held that the Clean Air Act did not authorize the stay and granted environmental groups' emergency motion to vacate the stay. The July 31 order followed a July 13 order partially granting EPA's motion to recall the mandate. The July 13 order recalled the mandate only for 14 days, stating that "[t]o stay issuance of the mandate for longer would hand the agency, in all practical effect, the very delay in implementation" that the court had determined was arbitrary, capricious, and in excess of EPA's authority. (Judge Janice Rogers Brown, in dissent, would have recalled the mandate and applied the court's normal timing rules rather than "a truncated time-frame which shortchanges all sides.") The court issued the July 31 order on its own motion after receiving petitions for rehearing en banc from two sets of intervenors (11 states and oil and gas trade groups) but not from EPA itself. Two judges—Judge Brown and Judge Brett M. Kavanaugh—would not have issued the mandate. Briefing on the rehearing petitions was completed on August 3, 2017. *Clean Air Council v. EPA*, No. 17-1145 (D.C. Cir. order July 31, 2017; state intervenor-respondents' petition for rehearing en banc July 28, 2017; trade group intervenor-respondents' petition for rehearing en banc July 27, 2017; order July 13, 2017; EPA motion to recall mandate July 7, 2017).

D.C. Circuit Remanded Renewable Fuel Volume Requirements to EPA

The D.C. Circuit Court of Appeals vacated and remanded EPA's decision to reduce the total renewable fuel volume requirements for 2016 based on its "inadequate domestic supply" waiver authority. The court held that the Clean Air Act Renewable Fuel Program's waiver provision authorized EPA to consider "*supply-side* factors affecting the volume of renewable fuel that is available to *refiners, blenders, and importers* to meet the statutory volume requirements" but did not permit EPA to "consider the volume of renewable fuel that is available to ultimate *consumers* or the *demand-side* constraints that affect the consumption of renewable fuel by consumers." The D.C. Circuit upheld other aspects of the renewable fuel volume requirements for 2014, 2015, and 2016, including EPA's authority to issue late biomass-based diesel volume requirements, EPA's use of actual volumes from 2014 and 2015 to minimize hardship to obligated parties, EPA's 2016 cellulosic biofuel projections, and EPA's interpretation and application of the cellulosic waiver provision, which the court said gave EPA discretion to consider demand-side constraints in the advanced biofuel marketplace. Because it remanded the final rule to EPA, the D.C. Circuit concluded it was not necessary to address the obligated parties' contention that EPA was required to reconsider its choice to apply the renewable fuel requirements to refiners and importers but not to blenders. The court said EPA could address the obligated parties' comments regarding this "point of obligation" issue on remand and noted that EPA also was in the process of reviewing petitions for reconsideration of its current point of obligation regulation. *Americans for Clean Energy v. EPA*, Nos. 16-1005 et al. (D.C. Cir. July 28, 2017).

Ninth Circuit Put Young People's Climate Lawsuit on Hold

On July 25, 2017, the Ninth Circuit Court of Appeals temporarily stayed district court proceedings in the lawsuit brought by a group of young people and "future generations" in federal district court in Oregon alleging that the federal government had violated their

constitutional rights by contributing to the accumulation of greenhouse gases in the atmosphere. The United States filed a petition for writ of mandamus and request for stay in the Ninth Circuit on June 9, 2017, arguing that the district court's denial of its motion to dismiss the lawsuit was based on clear error. On July 28, 2017, the Ninth Circuit ordered the real parties in interest (the plaintiffs in the district court action) to file a response within 30 days. The Ninth Circuit directed the parties to "address the status of all current discovery requests; report all pending discovery deadlines; and identify any ongoing or expected discovery disputes." The Ninth Circuit also said the parties should address whether the real parties in interest's constitutional challenge to Section 201 of the Energy Policy Act was within the district court's jurisdiction. (Section 201 concerns authorization of imports and exports of natural gas. In its petition, the United States contended that the plaintiffs' claim regarding an export authorization for an Oregon liquefied natural gas terminal was "indisputably" beyond the district court's jurisdiction because exclusive jurisdiction was vested in the courts of appeals.) The Ninth Circuit order said the district court could also file a response if it desired to do so. The judges on the panel are Alfred T. Goodwin (Nixon appointee), Alex Kozinski (Reagan appointee), and Marsha S. Berzon (Clinton appointee). *United States v. United States District Court for the District of Oregon*, No. 17-71692 (9th Cir. stay order July 25, 2017; order setting schedule July 28, 2017).

Montana Federal Court Allowed Wyoming to Intervene in Challenge to Lifting of Coal Leasing Moratorium

The federal district court for the District of Montana granted the State of Wyoming's motion to intervene in a lawsuit brought by four states to challenge the Department of the Interior's lifting of the Obama administration's moratorium on the federal coal leasing program. The court said Wyoming met the standard for intervention as of right because it contained a number of coal leases affected by the moratorium and because it occupied a different position than the United States due to its "unique interests as a high volume coal producing state." *California v. Zinke*, No. CV-17-42-GF-BMM (D. Mont. July 25, 2017).

Texas Federal Court Ordered Prison Officials to Address Extreme Heat Conditions at State Prison

The federal district court for the Southern District of Texas granted a request for a preliminary injunction to redress conditions at a state prison alleged to create an unconstitutional risk of heat-related illnesses. The court found that the plaintiffs had shown a likelihood of success on the merits of an Eighth Amendment claim. The court found that the extreme heat inside and outside the prison placed stress on the human body and caused a risk of illness, and a heightened risk for heat-sensitive men, and that mitigation measures imposed at the prison were insufficient. The court noted that "[t]he Court and the parties have no way of knowing when a heat wave will occur, but it is clear that one will come," taking judicial notice of a statement in a Sabin Center for Climate Change Law report on *Heat in U.S. Prisons and Jails: Corrections and the Challenge of Climate Change* regarding climate scientists' forecasts that heat waves will become more frequent, more severe, and more prolonged. *Cole v. Collier*, No. 4:14-cv-01698 (S.D. Tex. July 19, 2017).

Washington Federal Court Dismissed Challenge to Federal Preemption of Local Bans on Fossil Fuel Transit

The federal district court for the Eastern District of Washington dismissed an action in which the plaintiff alleged that the Interstate Commerce Commission Termination Act of 1995's (ICCTA's preemption of local restrictions on the transportation of coal and oil by rail within municipal boundaries violated their "constitutional right to a livable and healthy climate." The plaintiffs were the unsuccessful proponent of ballot initiatives that would have banned rail transit of coal and oil through Spokane, Washington and supporters of similar measures to ban fossil fuel trains in Spokane. The court held that the plaintiffs' claims were not justiciable because the issue was not ripe, the plaintiffs did not have standing, and any relief requested would amount to an advisory opinion. With respect to ripeness and standing, the court said the plaintiffs' alleged harm was not traceable to ICCTA, which did not prohibit passage of the ballot initiative but only application of certain laws. The court also found that any causal connection between the failed initiatives and Spokane's climate was "tenuous, at best." *Holmquist v. United States*, No. 2:17-CV-0046-TOR (E.D. Wash. July 14, 2017).

California Federal Court Hearing Challenge to Water Transfer Project Asked for More Briefing on Projected Climate Change Impacts

The federal district court for the Eastern District of California asked the parties to a challenge to a water transfer program for the Sacramento/San Joaquin Delta to submit supplemental briefing on three issues related to the incorporation of climate change into the baseline used in the environmental review of the proposed program. The environmental review was conducted pursuant to both the National Environmental Policy Act (NEPA) and California Environmental Quality Act. The court asked the parties to address what record evidence supported the final environmental impact statement/report's "apparently contradictory decision not to adjust the project baseline to reflect changes in water supply conditions projected to result from climate change" in light of the record evidence projecting such impacts. The court also asked for discussion of the extent to which existing modeling approaches incorporated foreseeable climate change impacts into the baseline. In addition, the court asked for briefing on the extent to which NEPA still imposed a responsibility to incorporate reasonably foreseeable climate change impacts into the baseline given the Trump administration's withdrawal of the Council on Environmental Quality NEPA climate change guidance. (The court refers to the 2010 CEQ draft guidance, not the final 2016 guidance.) *AquAlliance v. U.S. Bureau of Reclamation*, No. 1:15-cv-00754-LJO-BAM (E.D. Cal. July 14, 2017).

California Supreme Court Upheld San Diego Review of Long-Term Greenhouse Gas Impacts Associated with Regional Development Plan

The California Supreme Court ruled that the San Diego Association of Governments' (SANDAG's) review of greenhouse gas emissions associated with a regional development plan adequately disclosed information about the plan's greenhouse gas emissions and the plan's potential inconsistency with statewide goals for reductions in such emissions. The court therefore reversed lower courts' rulings that SANDAG's California Environmental Quality Act Review (CEQA) should have evaluated the significance of impacts against the 2005 executive order

issued by Governor Arnold Schwarzenegger that set a goal of reducing emissions 80% below 1990 levels by 2050. The Supreme Court found that SANDAG's environmental impact report (EIR) "[did] not obscure the existence or contextual significance of" the executive order's target and "[made] clear that the 2050 target is part of the regulatory setting in which the Plan will operate." The court said SANDAG's overall approach to evaluating greenhouse gas impacts was reasonable and adequately informed EIR readers. The Supreme Court stated, however, that "we do not hold that the analysis of greenhouse gas impacts employed by SANDAG in this case will necessarily be sufficient going forward. CEQA requires public agencies like SANDAG to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes." One justice filed a dissenting opinion, writing that the EIR managed "to occlude the elephant in the room—that the plan was associated with a major projected increase in greenhouse gas emissions, diverging sharply from emission reduction targets reflecting scientific consensus." *Cleveland National Forest Foundation v. San Diego Association of Governments*, No. S223603 (Cal. July 13, 2017).

Vermont Court Ordered Attorney General to Produce Some Documents Related to Climate Change Coalition Common Interest Agreement

A Vermont state court ordered the Vermont attorney general to deliver documents to the Energy & Environment Legal Institute (EELI) in response to EELI's request under the Public Records Act for certain documents related to the Climate Change Coalition Common Interest Agreement (Agreement), which the attorney general had entered into with the attorneys general of several other states. EELI limited the scope of documents it sought to documents reflecting requests by parties to the Agreement to share records and parties' responses to such requests. The court said the Public Records Act's professional ethics confidentiality exemption did not cover all attorney general records, "particularly those of an administrative or operational nature." The court also declined to allow the attorney general to withhold documents from disclosure based on privilege grounded in a "common interest doctrine." The court said that even if such a privilege existed, it would not apply to the documents sought by EELI, which were not attorney work product or attorney-client communications but "documents related to administrative implementation of the Common Interest Agreement, which is itself a public document." *Energy & Environment Legal Institute v. Attorney General of Vermont*, No. 558-9-16 (Vt. Super. Ct. July 27, 2017).

EPA Panel Concluded Pruitt Statements Regarding Carbon Dioxide's Contribution to Climate Change Did Not Violate Agency's Scientific Integrity Policy

A panel convened from the EPA Scientific Integrity Review Committee concluded that EPA Administrator Scott Pruitt's comments during a television interview that he would not agree that carbon dioxide was "a primary contributor to the global warming that we see" did not violate the EPA Scientific Integrity Policy. The panel, which was convened in response to a request filed by the Sierra Club with the EPA Inspector General, stated that "[e]xpressing an opinion about science is not a violation of the EPA Scientific Integrity Policy. Indeed, the Scientific Integrity Policy – in the spirit of promoting vigorous debate and inquiry – specifically encourages employees to express their opinion should the employee disagree with scientific data, scientific interpretations, or scientific conclusions." In his letter advising the Sierra Club of the panel's decision, the Director of the EPA Office of the Science Advisory said "[t]he freedom to express

one's opinion about science is fundamental to EPA's Scientific Integrity Policy even (and especially) when that point of view might be controversial." Letter from Director of EPA Office of the Science Advisor to Sierra Club (undated).

Oregon Land Use Board of Appeals Reversed Portland's Ban on New and Expanded Fossil Fuel Terminals

The Oregon Land Use Board of Appeals (Board) found that amendments to the City of Portland, Oregon, zoning ordinance prohibiting new bulk fossil fuel terminal and expansion of existing terminals violated the dormant Commerce Clause. The Board therefore reversed the amendments. The Board concluded the amendments were discriminatory in practical effect because, though facially neutral regarding the origin and destination of fossil fuels, the amendments were intended to preclude construction of new or expanded terminals that would serve interstate and international markets. The Board further found that the City had failed to demonstrate that the amendments served legitimate local interests—including a desire to reduce Portland's contribution to climate change—that could not adequately be served by reasonable nondiscriminatory alternatives. The Board said the City had identified nothing in the amendments directed at accomplishing the goal of reducing local contributions to greenhouse gas emissions and climate change and said that "we do not believe the city can, consistent with the dormant Commerce Clause, deliberately attempt to slow or obstruct the flow of fossil fuels from other states to consumers in other states or countries with the apparent goal or reducing generation of greenhouse gases elsewhere in the world, and justify that attempt as a legitimate *local* interest." The Board also considered whether the amendments, even if deemed nondiscriminatory, could meet the *Pike* balancing test under the dormant Commerce Clause and concluded that they could not, citing local benefits that were "attenuated at best" and the potentially significant burdens on national and international markets in fossil fuels. The Board also sustained some challenges to the amendments based on local, regional, and state standards. *Columbia Pacific Building Trades Council v. City of Portland*, LUBA No. 2017-001 (July 19, 2017).

NEW CASES, MOTIONS, AND NOTICES

California Counties and City Sued Fossil Fuel Companies for Climate Change Damages

Three local governments in California (San Mateo County, Marin County, and the City of Imperial Beach) filed separate lawsuits in California Superior Court alleging that fossil fuel companies' "production, promotion, marketing, and use of fossil fuel products, simultaneous concealment of the known hazards of those products, and their championing of anti-regulation and anti-science campaigns, actually and proximately caused" injuries to the plaintiffs, including more frequent and more severe flooding and sea level rise that jeopardized infrastructure, beaches, schools, and communities. Their complaints included claims for public nuisance, strict liability for failure to warn, strict liability for design defect, private nuisance, negligence, negligent failure to warn, and trespass. The relief sought by the local governments includes compensatory damages, abatement of the alleged nuisance, attorneys' fees, punitive damages, and disgorgement of profits. *City of Imperial Beach v. Chevron Corp.*, No. C17-01227 (Cal.

Super. Ct., filed July 17, 2017); *County of Marin v. Chevron Corp.*, No. CV1702586 (Cal. Super. Ct., filed July 17, 2017); *County of San Mateo v. Chevron Corp.*, No. 17CIV03222 (Cal. Super. Ct., filed July 17, 2017).

Groups Challenged Suspension of Greenhouse Gas Performance Measure for Highway System

Three organizations filed a lawsuit alleging that the Federal Highway Administration (FHWA) violated the Administrative Procedure Act when it suspended a greenhouse gas performance measure for tracking and setting reduction targets for carbon dioxide emitted from on-road mobile sources on the national highway system. The plaintiffs alleged that FHWA had suspended the measure without notice and comment and lacked good cause to do so. The measure was included in a final rule published on January 18, 2017, which was to take effect on February 17, 2017. The final rule was subject to the regulatory freeze instituted by the Trump administration on January 20. Subsequently, FHWA twice suspended the entire rule—which contained provisions other than the greenhouse gas measure—for set periods of time. On May 29, 2017, FHWA published notice that it was suspending the effective date for the greenhouse gas measure indefinitely. The greenhouse gas measure was promulgated under the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Fixing America's Surface Transportation Act (FAST Act). *Clean Air Carolina v. U.S. Department of Transportation*, No. 1:17-cv-5779 (S.D.N.Y. complaint filed July 31, 2017).

Briefing Completed on Motions by Attorneys General to Dismiss Exxon Federal Lawsuit; Massachusetts Supreme Judicial Court to Hear Exxon Appeal of Order Requiring Compliance with Attorney General's Investigation

Briefing was completed for the motions by the Massachusetts and New York attorneys general to dismiss Exxon Mobil Corporation's (Exxon's) action in New York federal court to block the states' investigation of its climate change-related disclosures. New York Attorney General Eric Schneiderman in his reply papers asserted that Exxon's federal claims were not ripe and that the *Colorado River* abstention doctrine compelled dismissal of "this duplicative and wasteful federal action." Schneiderman said Exxon's representations in New York state court that it had fully and voluntarily complied with the attorney general's subpoena "fatally undermine[d]" any claim of ripe injury. Schneiderman also said "the only conceivable effect of *prospective* federal relief" would be to interfere with the attorney general's inquiry into Exxon's alleged withholding or spoliation of evidence. Massachusetts Attorney General Maura Healey argued in her reply that a Massachusetts Superior Court order requiring Exxon to comply with her office's Civil Investigative Demand precluded Exxon's federal court action. Healey also argued that Exxon's opportunities to present its case in state court made its federal claims unripe and that the federal court should abstain on *Colorado River* abstention grounds. On July 28, 2017, the Massachusetts Supreme Judicial Court *sua sponte* ordered that Exxon's appeal of the Superior Court order be transferred to it from the intermediate appellate court, where the appeal had been fully briefed. In a subsequent letter to the federal court, Healey's office contended that this development provided additional support for abstention by the court. *Exxon Mobil Corp. v. Schneiderman*, No. 1:17-cv-02301-VEC (S.D.N.Y. Mass AG letter Aug. 1, 2017; NYAG reply June 30, 2017; Mass AG reply June 30, 2017); *Exxon Mobil Corp. v. Office of the Attorney General*, No. 2017-P-0366

(Mass. App. Ct. order transferring case July 28, 2017), No. SJC-12376 (Mass. transferred from Appeals Court Aug. 1, 2017).

California, New Mexico, and Conservation and Tribal Groups Challenged Postponement of Compliance Dates for BLM's Methane Waste Rule

Two lawsuits were filed in the federal district court for the Northern District of California challenging the U.S. Bureau of Land Management's (BLM's) postponement of compliance dates for its "Waste Prevention Rule," which set requirements to prevent the venting, flaring, or leaking of natural gas, including methane, on public and tribal lands. The Waste Prevention Rule went into effect in January 2017, and the notice of the postponement was published on June 15, 2017. The notice said "serious questions" had been raised regarding some of the rule's provisions and that postponement would preserve the regulatory status quo while litigation was pending (in the District of Wyoming) and while the Interior Department reviewed and reconsidered the rule. One lawsuit was filed by California and New Mexico; the other lawsuit was filed by conservation and tribal groups. On July 26, the federal defendants moved to transfer the cases to the District of Wyoming, arguing that a transfer would be in the interests of justice because it would conserve judicial resources and prevent inconsistent judgments and that the Wyoming forum was also more convenient. Also on July 26, the states filed a motion for summary judgment, arguing that the Administrative Procedure Act did not authorize postponement of compliance states after the effective date for regulations had passed and that the postponement notice violated notice-and-comment requirements. The states also argued that BLM's justification for postponement was arbitrary and capricious. The conservation and tribal groups filed a motion for summary judgment on July 27. Like the states, the groups argued that the Secretary of the Interior lacked authority to stay compliance dates for an already-effective rule and that he could not alter the compliance dates without notice-and-comment rulemaking. *Sierra Club v. Zinke*, No. 3:17-cv-03885 (N.D. Cal. motion for summary judgment July 27, 2017; complaint July 10, 2017); *California v. Zinke*, No. 3:17-cv-03804 (N.D. Cal. motion to transfer July 26, 2017; motion for summary judgment July 26, 2017; complaint July 5, 2017).

Trump Administration and Trade Group Sought Dismissal of Lawsuit Challenging Revocation of President Obama's Withdrawal of Atlantic and Arctic Ocean Areas from Oil and Gas Leasing

Federal defendants and the American Petroleum Institute (API) moved to dismiss an action in Alaska federal court challenging President Trump's authority to issue the executive order of April 28, 2017 on "Implementing an America-First Offshore Energy Strategy" that reversed President Obama's withdrawal of lands in the Atlantic and Arctic Oceans from future oil and gas leasing. The federal defendants argued that the plaintiffs had not identified a private right of action or waiver of sovereign immunity and that separation of powers principles barred the relief sought. The federal defendants also said the plaintiffs' claims were unripe and that the plaintiffs lacked standing. API adopted and incorporated by reference the federal defendants' arguments and also argued that the judicial review was not yet available under the Outer Continental Shelf Lands Act (OCSLA) and would not in any event be available in the District of Alaska. *League of Conservation Voters v. Trump*, No. 3:17-cv-00101 (D. Alaska API motion to dismiss July 28, 2017; federal defendants' motion to dismiss June 30, 2017).

Consolidated Complaint Filed in Securities Class Action Against Exxon

On July 26, 2017, the lead plaintiff in a federal securities class action against Exxon Mobil Corporation (Exxon) and four Exxon officers filed a 186-page consolidated complaint. The consolidated complaint alleged that Exxon was a "company with a well-documented history of intentionally misleading the general and investing public with regard to the science concerning global climate change and its connection to fossil fuel usage, as well as the impact the changing climate is likely to have on Exxon's reserve values and long-term business prospects." The proposed class includes persons who acquired Exxon's publicly traded common stock between March 31, 2014 and January 30, 2017. The consolidated complaint alleged that the defendants made materially false and misleading statements regarding the value and amount of Exxon's oil and gas reserves and regarding Exxon's purported efforts to incorporate carbon or greenhouse gas proxy costs into the investment and valuation process for its oil and gas reserves. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111-K (N.D. Tex. July 26, 2017).

Trump Administration Sought to Stay Action Alleging That Obama Administration Immigration Actions Required NEPA Review

A group of plaintiffs filed a complaint in the federal district court for the Southern District of California in October 2016 in which they alleged that the U.S. Department of Homeland Security (DHS) had failed to comply with NEPA when taking discretionary actions with respect to immigration. The plaintiffs included Arizona conservation districts, conservation district officials, nonprofit groups with missions to reduce or stabilize population growth and reduce immigration, and members of such organizations. The plaintiffs alleged that DHS discretionary actions resulted in in significant environmental impacts, including increases in greenhouse gas emissions, throughout the United States. The complaint alleged, among other things, that U.S. carbon dioxide emissions were increasing due to "immigration-driven population growth" and that emissions associated with immigration to the U.S. were equal to five percent of the increase in global emissions since 1980. On June 1, 2017, the federal defendants filed a motion to stay the action, arguing that executive orders issued by President Trump required DHS to review and potentially rescind or revise many of the policies at issue, rendering the proceeding moot. *Whitewater Draw Natural Resource Conservation District v. Johnson*, No. 3:16-cv-02583-L-BLM (S.D. Cal. motion to stay June 1, 2017; filed Oct. 15, 2016).

Sierra Club Challenged Inclusion of Fossil Fuel Generation in California Distributed Resources Program

The Sierra Club commenced a proceeding in the California Court of Appeal to challenge the California Public Utilities Commission's decision to include fossil fuel generation within the scope of distributed resources eligible to participate in a distributed resources procurement program. The Sierra Club contended that inclusion of fossil fuel generation violated the plain meaning of the authorizing statute (Cal. Pub. Util. Code § 769), which defines distributed resources as "renewable generation resources, energy efficiency, electric vehicles, and demand response technologies." *Sierra Club v. California Public Utilities Commission*, No. A152005 (Cal. Ct. App. petition for writ of review July 31, 2017).

Group Asked for Investigation into Whether Pruitt's Statements About Paris Accord Constituted Misuse of Appropriated Funds

American Democracy Legal Fund requested that the U.S. Comptroller General investigate whether EPA Administrator Scott Pruitt violated the Antideficiency Act by misusing appropriated funds. ADLF contended in a July 17, 2017 letter that Pruitt's public statements denouncing the Paris climate accord and encouraging lawmakers to defeat measures that would have affirmed U.S. support for the accord constituted unlawful communications for grassroots lobbying and publicity and propaganda purposes in violation of provisions of the Consolidated Appropriations Act of 2017. The letter said Pruitt's comments represented a misuse of appropriated funds. Letter from American Democracy Legal Fund to Comptroller General of the United States (July 17, 2017).

Citing Trump Executive Order, Companies Asked EPA to Reconsider Application of Greenhouse Gas and Fuel Efficiency Standards to "Gliders"

Three companies submitted a petition for reconsideration of the application of EPA's greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles to "gliders," which the petition describes as "medium- and heavy-duty trucks that are assembled by combining certain new truck parts (that together constitute a 'glider' kit) with the refurbished powertrain—the engine, the transmission, and typically the rear axle—of an older truck." The companies asserted that application of the standards to glider kits, glider vehicles, and rebuilt engines based on their date of assembly rather than on the age of the engine was "sudden and onerous" and would have a "devastating impact" on the glider industry and force small business to buy more expensive new vehicles. The companies argued that the Clean Air Act did not authorize EPA to regulate gliders, that EPA's prior decision to regulate gliders was based on unsupported assumptions rather than data, and that reconsideration was warranted based on President Trump's Executive Order on Promoting Energy Independence and Economic Growth. Petition for Reconsideration of Application of the Final Rule Entitled "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2 Final Rule" to Gliders (July 10, 2017).

Update #100 (July 6, 2017)

FEATURED CASE

D.C. Circuit Vacated EPA's Administrative Stay of Methane Standards for Oil and Gas Facilities

A divided D.C. Circuit Court of Appeals ruled that the U.S. Environmental Protection Agency (EPA) lacked authority to administratively stay portions of new source performance standards for the oil and gas sector for which it had granted requests for reconsideration. The stayed aspects of the standards related to fugitive emissions requirements, alternative means of compliance, standards for pneumatic pumps at well sites, and requirements for certification by a professional engineer. The D.C. Circuit concluded that the administrative stay constituted

reviewable final agency action because it was consummation of EPA's decision-making process with respect to the standards' effective date even though EPA's underlying decision to reconsider portions of the standards would not by itself be subject to review. The D.C. Circuit also rejected EPA's argument that the court did not have authority to review stays issued under Section 307(d)(7)(D) of the Clean Air Act. The court said the statutory language authorized courts to grant stays and that EPA's reading of the statute "would have the perverse result of empowering this court to act when the agency denies a stay but not when it chooses to grant one." The D.C. Circuit further concluded that Section 307(d)(7)(B) expressly linked EPA's power to stay to regulatory provisions meeting the requirements for "mandatory reconsideration"—that it was "impracticable to raise" an objection during the public comment period and that the objection was "of central relevance to the outcome of the rule." The D.C. Circuit concluded that EPA had acted arbitrarily and capriciously in determining that the four elements of the regulations that had been stayed met these requirements. The court said the administrative record "makes clear that industry groups had ample opportunity to comment on all four issues on which EPA granted reconsideration." The court therefore found that the stay was unauthorized and vacated it. (The D.C. Circuit also rejected EPA's argument that it had inherent authority outside of Section 307(d)(7)(B) to issue the stay.) The court emphasized, however, that even though EPA did not have an obligation to reconsider the four provisions, "nothing in this opinion in any way limits EPA's authority to reconsider the final rule … as long as 'the new policy is permissible under the statute … , there are good reasons for it, and … the agency believes it to be better.' " Judge Brown wrote a dissenting opinion, indicating that she believed the stay did not constitute final agency action because it did not represent "consummation of the agency's decision-making process" and because it did not "impose legal or practical requirements on anyone," noting that EPA was not compelling compliance and that "[i]f a regulated entity wants to comport its conduct to the requirements of the stayed rule, it is free to do so." (The majority responded to this latter point by saying that "[t]he dissent's view is akin to saying that incurring a debt has legal consequences, but forgiving one does not. A debtor would beg to differ.")

A number of different parties had lined up on either side of the issue of whether EPA's stay was lawful. Six environmental groups launched the proceeding challenging the stay after EPA published notice of the stay in the June 5, 2017 issue of the *Federal Register*. Thirteen states, the District of Columbia, and the City of Chicago sought leave to intervene on behalf of the petitioners. These potential intervenors alleged that the additional emissions during the stay period would harm their interest in protecting their residents from the effects of air pollution and climate change. Colorado separately sought leave to intervene in support of the petitioners, noting that it had already undertaken significant steps to control ozone-forming pollutants and methane from oil and gas sources and also contending that the stay would "concretely and negatively" affect Colorado's interests in, among other things, protecting its citizens from air pollution and climate change. Eleven states or state agencies or officials sought to intervene on EPA's behalf, as did oil and gas trade groups and a number of independent oil and gas producers, who argued that the stay did not constitute reviewable final agency action. Two other states—Texas and North Dakota—filed an amicus brief supporting EPA; the petitioners opposed their participation on procedural grounds. *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir., filed June 5, 2017; emergency motion for stay granted July 3, 2017).

DECISIONS AND SETTLEMENTS

Fourth Circuit Said West Virginia District Court Lacked Jurisdiction to Consider Coal Companies' Clean Air Act Jobs Study Lawsuit

The Fourth Circuit Court of Appeals ruled that a West Virginia federal district court had erred in concluding that it had jurisdiction to consider the coal company Murray Energy Corporation's and its affiliates' lawsuit that sought to compel EPA to conduct evaluations of the Clean Air Act's employment effects. The district court ruled that EPA was required to conduct such evaluations in October 2016 and set an expedited schedule for EPA's compliance. The Fourth Circuit ruled that the provision at issue—Section 321(a) of the Clean Air Act—did not "impose on the EPA a specific and discrete duty amenable to" judicial review under Section 304(a)(2) of the Clean Air Act. (Section 321(a) provides that EPA Administrator "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the [Clean Air Act] including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.") The Fourth Circuit said Section 321(a) imposed "a broad, open-ended statutory mandate" and that EPA was left with "considerable discretion" in managing this mandate, including getting to decide "how to collect a broad set of employment impact data, how to judge and examine this extensive data, and how to manage these tasks on an ongoing basis"—a process that a court "is ill-equipped to supervise." The Fourth Circuit also distinguished Section 321(a)'s mandate from other Clean Air Act provisions that offered "discrete directives accompanied by specific guidance on matters of content, procedure, and timing." The Fourth Circuit also dismissed as moot an environmental group's appeal of the district court's denial of its motion to intervene. *Murray Energy Corp. v. EPA Administrator*, Nos. 16-2432 et al. (4th Cir. June 29, 2017).

California Supreme Court Denied Petitions to Review Ruling That Upheld Cap-and-Trade Program

The California Supreme Court declined to review an intermediate appellate court's decision upholding the statewide greenhouse gas cap-and-trade program. The plaintiffs in lawsuits challenging the cap-and-trade program had argued that it was not authorized by the Global Warming Solutions Act of 2006 and that the requirement to purchase emissions allowances constituted a tax that required approval by a two-thirds majority of the State legislature. The California Supreme Court denied three petitions for review. *California Chamber of Commerce v. State Air Resources Board*, No. S241948 (Cal. June 28, 2017).

Second Circuit Rejected Challenges to Connecticut Renewable Energy Programs

The Second Circuit Court of Appeals affirmed the dismissal of claims by Allco Finance Limited (Allco) that federal law preempted Connecticut's renewable energy solicitations and that Connecticut's Renewable Portfolio Standard (RPS) program violated the dormant Commerce Clause. Allco is an owner, operator, and developer of solar energy projects throughout the country, including in Georgia and New York. The Second Circuit rejected the claim that the renewable energy solicitations exceeded the limited authority granted to states with respect to

wholesale sales of electricity under the Federal Power Act and the Public Utility Regulatory Policies Act. The Second Circuit said the Connecticut statutes authorizing the solicitations did not compel utilities to enter into contracts with specific bidders. The Second Circuit also distinguished the Connecticut program from a Maryland regulatory scheme that the U.S. Supreme Court determined was preempted in *Hughes v. Talen Energy Marketing, LLC*, and found that the renewable energy solicitation process was a permissible exercise of state power under the Federal Power Act. The Second Circuit also rejected Allco's claims that Connecticut's RPS discriminated against its facilities in Georgia (by barring the facility's renewable energy certificates from counting towards utilities' RPS requirements) and New York (by requiring payment of transmission fees) in violation of the dormant Commerce Clause. The Second Circuit agreed with Connecticut that the RECs produced by the Georgia facility were different products from RECs produced by facilities in the Northeast and that the RPS merely treated different products differently. The court further concluded that the burden imposed by Connecticut's RPS program was not excessive in relation to the putative local benefits. The Second Circuit found that Allco had not sufficiently pled an excessive burden stemming from the transmission fees its New York facility had to pay to qualify for the RPS program. *Allco Finance Ltd. v. Klee*, Nos. 16-2946 & 16-2949 (2d Cir. June 28, 2017).

Trade Groups Released and Trial Date Set in Young People's Climate Lawsuit in Oregon Federal Court; United States Asked Ninth Circuit to Stay Proceedings

A magistrate judge in the federal district court for the District of Oregon granted motions by three trade groups to withdraw from the lawsuit seeking to hold the United States liable for its actions and inaction leading to the accumulation of greenhouse gases in the atmosphere. The magistrate judge's order also set the trial to begin on February 5, 2018. The magistrate granted the motions to withdraw without conditions, finding that the trade groups' participation in the case had not been in bad faith or solely for the purpose of harassment or delay. The magistrate recounted the sequence of events leading up to the motions for withdrawal "to emphasize that the court has endeavored to ensure that all parties to this obviously novel and unprecedented lawsuit have a full and fair opportunity to address both the legal questions presented and the factual basis underlying those legal issues." The magistrate said the trade group intervenors "no doubt have thoroughly studied the issue at the core of this case and are in a position to tender their own scientific evidence regarding climate change if they desire to challenge Plaintiffs' evidence or the admissions of the United States"—but noted that the intervenors had chosen to withdraw rather than take the opportunity to "put the Plaintiffs to their proof at trial."

Earlier in June, the district court denied the defendants' motions to certify the denial of their motions to dismiss to the Ninth Circuit Court of Appeals, agreeing with the magistrate judge's conclusion that certification for interlocutory appeal was not warranted. A day later the federal defendants filed a petition for writ of mandamus in the Ninth Circuit Court of Appeals requesting a stay of the proceedings in the district court. The federal government argued that denial of the motion to dismiss was based on clear error and that mandamus was warranted to confine the district court to the lawful exercise of its jurisdiction. The plaintiffs filed a brief opposing the petition on June 19. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. order denying interlocutory appeal June 8, 2017; order granting intervenors' motions to withdraw and setting

trial date June 28, 2017); *United States v. U.S. District Court for District of Oregon*, No. 6:15-cv-01517-TC (9th Cir., filed June 9, 2017).

California Federal Court Dismissed Preemption Claims Against Low-Carbon Fuel Standard but Allowed Commerce Clause Claim to Proceed

In a longstanding constitutional challenge to California's low-carbon fuel standard (LCFS), a California federal court found that its prior ruling that challengers of the LCFS had stated a preemption claim was clearly erroneous. The court therefore dismissed preemption claims with prejudice. In addressing the plaintiffs' dormant Commerce Clause claims, the court found that the Ninth Circuit's decision in *Rocky Mountain Farmers Union v. Corey* foreclosed the plaintiffs' claim that the LCFS's ethanol provisions had a discriminatory purpose but found that the plaintiffs had stated a claim that the LCFS ethanol provisions discriminated in practical effect against Midwestern ethanols and had "plausibly alleged that that burden far outweighs the benefits California will obtain as a result of the LCFS." The court dismissed, however, dormant Commerce Clause claims against the LCFS's crude oil provisions, finding that the plaintiffs had not and could not state a claim that the provisions discriminated against foreign crude oils in practical effect. The court rejected the argument that claims against the original and 2012 versions of the LCFS were moot, noting that these earlier versions affected how credits were calculated under the 2015 version. The court said, however, that the plaintiffs' relief would be limited to declaratory and injunctive relief to address the present and future effects of the original and 2012 versions. The court said recalculation of past credits would be barred by the Eleventh Amendment. *Rocky Mountain Farmers Union v. Corey*, No. 1:09-cv-2234 (E.D. Cal. June 15, 2017).

Oregon Federal Court Dismissed Challenge to Bull Trout Recovery Plan

The federal district court for the District of Oregon adopted a magistrate judge's recommendation that it dismiss a citizen suit challenging the Recovery Plan for the Coterminous United States Population of Bull Trout. The court agreed with the magistrate's conclusion that the plaintiffs failed to state a claim for violation of a nondiscretionary duty under the Endangered Species Act and that the court therefore lacked jurisdiction. (The magistrate judge had found that the challenged aspects of the recovery plan, including the alleged failure to address the effects of climate change on cold water habitat, were discretionary.) The court, however, granted the plaintiffs leave to amend their complaint to assert additional facts that would demonstrate a violation of a nondiscretionary duty. A claim under the Administrative Procedure Act was dismissed with prejudice. *Friends of the Wild Swan v. Thorson*, No. 3:16-cv-00681-AC (D. Or. June 1, 2017).

New Jersey Appellate Court Affirmed State Authority to Take Easements for Coastal Protection Projects

The New Jersey Appellate Division ruled that the New Jersey Department of Environmental Protection (NJDEP) had authority to condemn private property to take perpetual easements for shore protection purposes and that the easements could allow public access to, and use of, the areas covered by the easements. The court held that NJDEP had acted within its authority when

it acquired property interests to construct a dune and berm system along Long Beach Island and along 14 miles of coastline in northern Ocean County after Superstorm Sandy. *State of New Jersey v North Beach 1003, LLC*, Nos. A-3393-15T4 et al. (N.J. App. Div. June 22, 2017).

Washington Appellate Court Said Climate Goals in County's Shoreline Master Program Were Not Unconstitutionally Vague

The Washington Court of Appeals upheld Jefferson County's 2014 Shoreline Master Program, which is a combination of planning policies and development regulations that address shoreline uses and development. One party challenging the Master Program—Citizen's Alliance for Property Rights Jefferson County (CAPR)—had argued that a provision in the Master Program goals section addressing climate change and sea-level rise was unconstitutionally vague. The court said that the Master Program guidelines acknowledged that policy goals might not be achievable and should only be pursued via development regulations that would unconstitutionally infringe on private property rights. The court rejected the argument that the provisions were vague and held that "CAPR's mere assertions that the Master Program will be administered arbitrarily or capriciously are speculative and do not meet CAPR's burden of proof to establish that the Master Program is unconstitutionally vague." *Olympic Stewardship Foundation v. State of Washington Environmental and Land Use Hearings Office*, No. 47641-0-II (Wash. Ct. App. June 20, 2017).

New York Trial Court Set Parameters for Exxon's Compliance with Attorney General's Climate Change Investigation

At a hearing on June 16, 2017, the New York Supreme Court indicated that the New York Attorney General could conduct interrogatories and depositions in its investigation of Exxon Mobil Corporation's (Exxon's) climate change-related disclosures but that the court would not require Exxon to respond to the attorney general's second round of document requests. The court ordered Exxon to produce four witnesses to testify about their compliance with the attorney general's earlier document requests, to produce an employee of a federal subsidiary for a deposition, and to update production of documents in accordance with the attorney general's requests through 2016. The court indicated that the attorney general had broad power to propound the interrogatories. The court, which issued its orders in response to motions to quash (by Exxon) and to compel (by the attorney general), indicated that the matter should be taken to the Appellate Division if the parties disagreed with the scope of compliance with the attorney general's subpoenas that the court was ordering. *People v. PricewaterhouseCoopers LLP*, No. 451962/2016 (N.Y. Sup. Ct. June 16, 2017).

In Dismissing Challenge to Six Flags Solar Facility, New Jersey Court Said Township Appropriately Considered Benefits of Renewable Energy

A New Jersey Superior Court dismissed a challenge to municipal approvals for a 21 megawatt solar array on 67 acres owned by Six Flags Theme Parks, Inc. at its theme park in Jackson Township in Ocean County. The plaintiffs alleged that land use ordinances that permitted the solar array conflicted with the Jackson Township's Master Plan. The court noted that the solar array would meet substantially all of the Six Flags theme park's energy needs and reduce

reliance on carbon-emitting sources of power. The court found that the ordinances were substantially consistent with the objectives and goals of the Master Plan. Although the court said the plaintiffs had put forward compelling arguments against the solar arrays, the court noted that the Township had weighed the "need for energy independence and the reduction of carbon emissions as legitimate objectives of zoning." The court further found that the use of solar energy was "an inherently beneficial use, which is of value to the community, serves a public good, and promotes public welfare." The court also found that use of the land for solar arrays was consistent with "a natural use of the land" and that it was "within the prerogative of the legislative body to consider the environmental advantage of renewable solar energy and to balance that against other environmental impacts." *Clean Water Action v. Jackson Township Council*, No. L-001251-15 (N.J. Super. Ct. June 19, 2017).

Climate Activist Convicted and Sentenced for "Valve Turning"

On June 7, 2017, a Washington state court jury convicted climate change activist Kenneth Ward of second-degree burglary but could not reach a verdict on a related sabotage charge in connection with Ward's breaking into an oil pipeline facility and turning off a valve to shut off the pipeline. In a press release after the verdict, the Climate Disobedience Action Fund said: "There is no dispute about the facts in the case. Ward freely admits he closed an emergency valve on a tar sands pipeline to prevent harm to the climate, as part of a coordinated action in four states …. What is disputed is whether it is just or legal to convict Ward of felony crimes for acting peacefully and responsibly to prevent greater harm to the climate." The press release noted that the court did not allow Ward to present a "necessity defense" to justify his actions with evidence regarding climate change-related harms stemming from the tar sands. On June 23, 2017, the court sentenced Ward to two days in custody (which he had already served), 30 days of community service, and six months of community supervision. The Climate Disobedience Action Fund's press release indicated that the State would not re-file the sabotage charge and that the State could still file for restitution. *People v. Ward*, No. 16-1-01001-5 (Wash. Super. Ct. verdict June 7, 2017; sentencing June 23, 2017).

NEW CASES, MOTIONS, AND NOTICES

Environmental Groups Challenged Delay in Enforcement of Landfill Methane Regulations

Natural Resources Defense Council (NRDC), Clean Air Council, and Clean Wisconsin filed a petition seeking review of EPA's administrative stay of performance standards and emission guidelines for municipal solid waste landfills. The standards and guidelines were published on August 29, 2016. In a letter dated May 5, 2017, EPA announced the commencement of a reconsideration proceeding for six elements of the regulations. EPA published notice of the administrative stay on May 31, 2017, stating that it was necessary to stay the regulations in their entirety because provisions that were a subject of the reconsideration proceeding were integral to how the rules functioned as a whole. *Natural Resources Defense Council v. Pruitt*, No. 17-1157 (D.C. Cir., filed June 15, 2017).

Environmental Groups Said California Water Diversion Project Would Increase Water Temperatures and Harm Threatened Delta Smelt

A San Francisco-based conservation group, along with NRDC and Defenders of Wildlife, filed a lawsuit in the federal district court for the Northern District of California challenging a biological opinion prepared under the Endangered Species Act for the California WaterFix project. The proposed project involves construction of three new water intakes to divert water from the Sacramento River. The plaintiffs asserted that WaterFix was "the latest in a long line of water diversion projects and policies" that have had "devastating effects" on the threatened Delta Smelt, a small fish that lives only in San Francisco Bay/Sacramento-San Joaquin River Delta. The plaintiffs claimed that the U.S. Fish and Wildlife Service's biological opinion's conclusion that WaterFix would not jeopardize the survival and recovery of the Delta Smelt or cause adverse modification of its designated critical habitat was contrary to evidence in the record, including evidence that in combination with the likely effects of climate change, WaterFix was likely to result in increased water temperatures in the Delta that would decrease the size of Delta Smelt and increase mortality rates. *Bay.org d/b/a The Bay Institute v. Zinke*, No. 3:17-cv-03739-SK (N.D. Cal., filed June 29, 2017).

Center for Biological Diversity Asked Court to Compel FOIA Response Regarding Federal Coal Program

The Center for Biological Diversity filed a lawsuit seeking to compel the U.S. Bureau of Land Management to respond to the Center's Freedom of Information Act (FOIA) request for communications and records related to federal lands coal policy. The lawsuit was filed in the federal district court for the District of Columbia. Department of the Interior Secretarial Order No. 3338 in 2016 ordered a programmatic environmental review of the federal coal program and place a moratorium on federal coal leasing pending completion of the review. Secretary of the Interior Ryan Zinke revoked the order. *Center for Biological Diversity v. U.S. Bureau of Land Management*, No. 1:17-cv-01208-BAH (D.D.C., filed June 20, 2017).

Exxon Said Federal Court Should Not Dismiss Its Constitutional Claims Against Attorneys General

Exxon Mobil Corporation (Exxon) argued to the federal district court for the Southern District of New York that its lawsuit against the attorneys general of New York and Massachusetts to bar their investigations into Exxon's climate change-related disclosures should not be dismissed. Exxon argued that its constitutional claims were ripe, and that the "exceptionally narrow" *Colorado River* abstention doctrine was not justified because there was no pending state court proceeding that could result in comprehensive disposition of the litigation. Exxon also said the "narrow" decision in a pending Massachusetts state court action did not preclude its federal claims and that Massachusetts Attorney General Healey was subject to the court's jurisdiction. Exxon said dismissal would "set a precedent with nationwide consequences" by "granting state officials license to harass perceived political opponents unimpeded by review in federal courts." *Exxon Mobil Corp. v. Schneiderman*, No. 1:17-cv-02301-VEC (S.D.N.Y. June 16, 2017).

University of California Regents Filed Lawsuit Challenging Termination of Wildfire Mitigation Grants

The Regents of the University of California filed a lawsuit against the Federal Emergency Management Agency (FEMA) and other parties after FEMA terminated three of four grants awarded in 2015 for hazardous fire risk reduction in the East Bay Hills, California. The Regents alleged that the final environmental impact statement (FEIS) for the grant applications had concluded that failure to move forward with all four of the grants would result in adverse impacts including climate impacts. The Regents said the FEIS indicated that supplemental environmental review should be conducted should FEMA decide not to fund all four applications. The Regents asserted that the defendants had violated the National Environmental Policy Act by failing to prepare a supplemental environmental impact statement. The Regents also asserted that the defendants' amendment of the Record of Decision violated the Administrative Procedure Act and that the defendants had violated regulations issued under the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988. *Regents of University of California v. Federal Emergency Management Agency*, No. 3:17-cv-03461 (N.D. Cal., filed June 14, 2017).

States, New York City, and Environmental Groups Filed Lawsuits Challenging Department of Energy's Failure to Publish Energy Efficiency Standards

Eleven states and New York City filed a complaint in the federal district court for the Northern District of California challenging the U.S. Department of Energy's (DOE's) failure to publish final energy efficiency standards for five categories of appliances and industrial equipment: portable air conditioners, uninterruptible power supplies, air compressors, walk-in coolers and freezers, and commercial packaged boilers. A second lawsuit challenging the failure to publish final standards was filed by NRDC, Sierra Club, and Consumer Federation of America. The states and New York City said that DOE's failure to publish the final standards "directly harms Plaintiffs' interests by adversely impacting the environment, consumers, economies, public health, natural resources, energy efficiency strategies, and climate change reduction goals of each Plaintiff." They alleged that the standards could reduce annual greenhouse gas emissions by more than 26 million metric tons and save $24 billion over 30 years. The state-New York City plaintiffs contended that DOE had violated the Energy Policy and Conservation Act (EPCA) by failing to take required non-discretionary actions related to the standards and by failing to meet deadlines prescribed by EPCA. They also asserted that DOE had violated the Administrative Procedure Act (APA) and the Federal Register Act by failing to timely publish the standards. The environmental and consumer groups asserted that DOE had violated EPCA, the APA, and the Federal Register Act by failing to submit the standards for publication in the *Federal Register* and had failed to meet statutory deadlines for issuing standards for uninterruptible power supplies and walk-in coolers and freezers. The relief sought by the plaintiffs included an order compelling DOE to send the new standards to the Office of Federal Register for immediate publication. *California v. Perry*, No. 4:17-cv-03406 (N.D. Cal., filed June 13, 2017); *Natural Resources Defense Council v. Perry*, No. 3:17-cv-03404 (N.D. Cal., filed June 13, 2017).

Federal Government Moved to Dismiss Keystone Pipeline Challenges

The federal government filed motions to dismiss the lawsuits challenging the presidential permit for Keystone XL pipeline. In one case, brought by two groups representing indigenous peoples and conservation interests, the federal government argued that the court lacked jurisdiction to review issuance of a presidential permit. In addition, the government argued that the plaintiffs

lacked standing to make their Endangered Species Act (ESA) claim as well as claims under the Migratory Bird Treaty Act (MBTA) and the Bald Eagle and Golden Eagle Protection Act (Eagle Act). The government also asserted that the MBTA and Eagle Act claims were barred by controlling precedent. In the second case, brought by local and national environmental groups, the government also argued that the court lacked jurisdiction to review issuance of a presidential permit and that claims against the U.S. Bureau of Land Management should be dismissed because there was no final agency action and because they had not alleged standing for their claim under the ESA. *Northern Plains Resource Council v. Shannon*, No. 4:17-CV-00031-BMM (D. Mont. June 9, 2017); *Indigenous Environmental Network v. U.S. Department of State*, No. 4:17-cv-00029-BMM (D. Mont. June 9, 2017).

Plaintiffs Said Fish and Wildlife Service Misconstrued Evidence of Potential Climate Change Impacts on Yellowstone Bison in Rejecting Listing Petition

Plaintiffs filed a motion for summary judgment in their lawsuit in the federal district court for the District of Columbia claiming that the U.S. Fish and Wildlife Service (FWS) had improperly decided not to conduct a comprehensive status review of the Yellowstone bison pursuant to the ESA. The plaintiffs argued that FWS's 90-day finding on their petition to list the Yellowstone bison distinct population segment did not follow the statutory requirements of the ESA, misconstrued and was often contrary to the evidence before the agency, failed to use the best available science, and was not supported by an explanation of FWS's underlying analysis or rationale. The plaintiffs argued, among other things, that FWS had misstated and misconstrued evidence in their petition regarding climate change's potential large-scale impacts on bison dispersal patterns. The plaintiffs said climate change could pose risks to the demographic and genetic composition and integrity of the Yellowstone bison, which the plaintiffs asserted were the only significant population of non-hybridized bison. *Buffalo Field Campaign v. Zinke*, No. 1:16-cv-1909-CRC (D.D.C. June 9, 2017).

Environmental Groups Filed NEPA Challenge of Montana Coal Mine Expansion

WildEarth Guardians and Montana Environmental Information Center filed a lawsuit in the federal district court for the District of Montana challenging the approval of a mining plan modification for the Spring Creek Mine in southeastern Montana, the seventh largest coal strip-mine by production in the United States. The plaintiffs asserted that the federal defendants had violated the National Environmental Policy Act (NEPA) by failing to fully disclose the environmental impacts of coal mining, including the indirect effects of coal transportation, air pollution and greenhouse gas pollution from coal combustion, and the cumulative impacts of another mining plan modifications and a separate coal lease at the mine. The plaintiffs also said the underlying coal lease might be void as a matter of law because it was approved by a field manager who did not have authority to approve the lease. *WildEarth Guardians v. Zinke*, No. 1:17-cv-00080 (D. Mont., filed June 8, 2017).

Groups Cited Public Health and Climate Benefits of Nutrition Labeling Rules in Challenge to Federal Delay in Implementation

A non-profit organization "dedicated to obtaining a healthier food system" and a consumer advocacy group brought a lawsuit against the Secretary of Health and Human Services, the U.S. Food and Drug Administration (FDA), and the FDA commissioner challenging a rule that delayed implementation of nutrition labeling requirements for chain restaurants and similar food establishments. The plaintiffs contended that FDA did not provide a rationale for the rule instituting the delay and had not complied with rulemaking procedures, in violation of the Administrative Procedure Act. The plaintiffs alleged that the labeling rules could "reduce the environmental degradation associated with food production and disposal." They asserted that "[r]oughly 40 percent of U.S. food is wasted, and food waste decomposing in landfills releases gases that contribute to climate change," and that nutrition labeling rules "contributes to closing the gap between the amount of food consumers order and the amount they eat, thereby reducing the quantity of wasted food and limiting associated environmental harm." *Center for Science in the Public Interest v. Price*, No. 1:17-cv-01085 (D.D.C., filed June 7, 2017).

States, D.C., Chicago Threatened Lawsuit Against EPA for Failing to Regulate Methane from Existing Oil and Gas Sources

On June 29, 2017, 14 states, the District of Columbia, the City of Chicago, and the California Air Resources Board sent a notice of intent to sue under the Clean Air Act to EPA for failing to establish guidelines limiting methane emissions from existing sources in the oil and natural gas sector. They contended that EPA's promulgation of methane standards for new oil and gas sources pursuant to Section 111(b) of the Clean Air Act triggered a mandatory duty to issue guidelines for existing sources under Section 111(d). They noted that EPA had taken an initial step towards developing such guidelines by issuing an information collection request (ICR) in November 2016. The ICR sought information on the types of equipment at production facilities as well as information on sources of methane emissions at oil and gas facilities and emissions control devices or practices in place at such facilities. On March 2, 2017, EPA withdrew the ICR. The states and other parties asked EPA to reconsider the withdrawal of the ICR and reissue it or to otherwise explain how it would fulfill its legal obligation to address methane pollution. Clean Air Act Notice of Intent to Sue for Failure to Establish Guidelines for Standards of Performance for Methane Emissions from Existing Oil and Gas Operations under Clean Air Act Section 111(d) (June 29, 2017).

Update #99 (June 6, 2017)

FEATURED CASE

Environmental Groups Challenged President Trump's Reversal of Prohibition on Future Oil and Gas Leases in Arctic and Atlantic Ocean Areas

Ten environmental groups filed a lawsuit in the federal district court for the District of Alaska challenging the portions of President Trump's executive order of April 28, 2017 on "Implementing an America-First Offshore Energy Strategy" that purported to eliminate protections for lands in the Arctic and Atlantic Oceans. President Obama withdrew the lands from future oil and gas leasing in January 2015 and December 2016 pursuant to presidential authority under the Outer Continental Shelf Lands Act (OCSLA). The complaint noted that in

withdrawing the lands, President Obama and the White House had cited a number of factors supporting the withdrawal, including the need to make a transition from fossil fuels to address climate change, stresses to Arctic species resulting from climate change, and the contribution of withdrawn Atlantic Ocean canyons to climate stability as well as threats to the canyons from climate change. In their complaint, the environmental groups asserted that President Trump's executive order exceeded his constitutional authority and intruded on congressional authority under the Property Clause of the Constitution in violation of the separation of powers doctrine. They also asserted that his actions exceeded authority granted by OCSLA, which they argued did not authorize presidents to re-open lands for disposition once they had been withdrawn. *League of Conservation Voters v. Trump*, No. 3:17-cv-00101 (D. Alaska, filed May 3, 2017).

DECISIONS AND SETTLEMENTS

D.C. Circuit Granted EPA Request to Hold Challenges to Oil and Gas Methane Standards in Abeyance

On May 18, 2017, the D.C. Circuit Court of Appeals granted a request by the U.S. Environmental Protection Agency (EPA) to hold cases challenging methane emissions standards for sources in the oil and natural gas sector in abeyance while EPA reviewed the regulations pursuant to President Trump's executive order on "Promoting Energy Independence and Economic Growth." EPA must file status reports with the court every 60 days. After EPA requested that the cases be held in abeyance in early April, the agency also sent a letter on April 18 indicating that it would convene a proceeding for reconsideration of two issues related to fugitive emissions in the final standards published in June 2016. On June 5, EPA published notice in the Federal Register that it was granting reconsideration of two additional elements of the June 2016 standards—the standards for well site pneumatic pumps and the requirements for certification by a professional engineer. EPA also stayed implementation of those aspects of the regulations for 90 days pending reconsideration. *American Petroleum Institute v. EPA*, Nos. 13-1108 et al. (D.C. Cir. May 18, 2017).

Oral Argument Postponed in Industry Challenge to 2013 Waiver for California Nonroad Vehicle Standards

The Ninth Circuit Court of Appeals granted EPA's request to postpone oral argument in a proceeding challenging EPA's September 2013 authorization of California standards for in-use nonroad diesel fleet vehicles such as tractors, lawnmowers, bulldozers, cranes, locomotives, and marine craft. Oral argument had been scheduled to take place on May 18. EPA indicated in its motion to continue oral argument that newly appointed EPA officials needed time to review the "significant legal and policy issues" raised by EPA's decision to grant the waiver for California's more stringent standards. The California Air Resources Board opposed the delay, arguing that the matter was "long overdue for adjudication" and suggesting that if EPA believed it had authority to review the 2013 determination it should initiate its review independent of the Ninth Circuit's resolution of the pending challenge. *Dalton Trucking, Inc. v. EPA*, No. 13-74019 (9th Cir. order May 10, 2017; CARB response May 8, 2017; EPA motion May 5, 2017).

Georgia Federal Court Transferred Forest-Products Companies' RICO Lawsuit Against Greenpeace to California

The federal district court for the Southern District of Georgia transferred forest-products companies' lawsuit alleging federal and state Racketeer Influenced and Corrupt Organizations Act (RICO) claims against Greenpeace International and other organizations (Greenpeace) to the Northern District of California. The forest-products companies asserted that the defendants illegally attacked their forestry practices, including by suggesting that the companies created climate change risks by harvesting the Boreal forest. The Georgia federal court found that the companies' alleged loss of Georgia customers had not occurred in its district and that a trip by the defendants to the district did not give rise to the plaintiffs' claims. Because two Greenpeace employees who were integral to the plaintiffs' forestry campaign were based in San Francisco, the court concluded that that a substantial part of events giving rise to the plaintiffs' claims occurred in the Northern District of California and that venue was therefore proper there. *Resolute Forest Products, Inc. v. Greenpeace International,* No. CV 116-71 (S.D. Ga. May 16, 2017).

California Federal Court Rejected Challenge to Riverside County Highway Project

The federal district court for the Central District of California entered judgment for the Federal Highway Administration (FHWA) in a lawsuit challenging a highway project in Riverside County. Four environmental groups had alleged violations of the National Environmental Policy Act, as well as violations of Section 4(f) of the Department of Transportation Act. The court ruled that the plaintiffs had failed to exhaust administrative remedies for all but two of their arguments. One of the two remaining arguments concerned whether FHWA and the other defendants had considered a reasonable range of alternatives, including transit and high-occupancy vehicle lane options that could result in reduced greenhouse gas emissions. The court said that the plaintiffs had made incorrect assertions about the defendants' consideration of alternatives and that the defendants had engaged in "a lengthy and detailed consideration of alternatives" and had given reasons for why alternatives that combined transit, HOV, and roadway upgrades were not viable. *Center for Biological Diversity v. Federal Highway Administration,* No. 5:16-cv-00133 (C.D. Cal. May 11, 2017).

New York Appellate Court Affirmed That Exxon's Accounting Firm Had to Comply with Attorney General's Subpoena in Climate Investigation

The New York Appellate Division affirmed a trial court order requiring Exxon Mobil Corporation's (Exxon's) accounting firm to comply with a subpoena from the New York State Attorney General in its investigation into Exxon's climate change-related disclosures. The Appellate Division ruled that the court below had properly found that New York law on privilege applied and did not recognize an accountant-client privilege. The appellate court rejected Exxon's contention that courts should apply an "interest-balancing analysis" to decide whether New York or Texas choice of law should govern the evidentiary privilege. *People of State of New York v. PriceWaterhouseCoopers, LLP*, No. 3685N (N.Y. App. Div. May 23, 2017). See discussion below in "New Cases, Motions, and Notices" for additional developments in this case.

California Court Rejected Claims That Greenhouse Gas Emissions Associated with High-Speed Rail Delays Invalidated Scoping Plan Update for Achieving AB 32 Goals

A California Superior Court dismissed a lawsuit challenging the California Air Resources Board's (CARB's) Scoping Plan Update prepared in 2014 pursuant to the Global Warming Solutions Act (AB 32) and the environmental analysis conducted for the 2014 Update pursuant to the California Environmental Quality Act (CEQA). The court ruled that the petitioner, Transportation Solutions Defense and Education Fund (TRANSDEF), had not exhausted its administrative remedies because it had not raised certain comments related to an increase in greenhouse gas emissions that would result from changes to and delays in California's high-speed rail project, one of the emissions reduction measures relied upon in the Scoping Plan to achieve AB 32's goals. The court found, moreover, that TRANSDEF had not shown the existence of a significant impact associated with the delay in construction. The court said that TRANSDEF had made "very little attempt" to quantify the increase in greenhouse gas emissions associated with the delay. The court also noted that high-speed rail was only one of many measures CARB proposed in the Scoping Plan update to reduce greenhouse gas emissions. The court also found that TRANSDEF had not established that CARB abused its discretion by not responding to comments. In addition, the court concluded that CARB's approval of the Scoping Plan Update did not violate AB 32, even if the high-speed rail component of the plan would result in a short-term increase in greenhouse gas emissions during its construction while delays in construction meant that emissions reductions from the operations of high-speed rail would not offset the temporary increase by 2020. *Transportation Solutions Defense & Education Fund*, No. 34-2014-80001974 (Cal. Super. Ct. May 16, 2017).

Washington Court Ruled Again That Necessity Defense Was Not Available to Climate Activist

A Washington Superior Court ruled for a second time that a climate change activist who entered a pipeline facility and turned off a valve to stop the flow of oil could not present a necessity defense at trial. The court initially ruled that the defendant could not rely on the necessity defense in January 2017; the defendant's first trial subsequently ended in a mistrial. The defendant—charged in the second trial with sabotage and burglary—asked for reconsideration, arguing that the court had erred by incorporating an "imminence" element into the defense, requiring the potential for immediate harm. The defendant further argued, however, that if given the opportunity he could establish the imminence of harm from climate change. The defendant also argued that the court erred in ruling that he had reasonable legal alternatives and that he had not actually avoided or minimized the targeted harm. In opposing the motion for reconsideration, the State of Washington said that given the defendant's "grandiose depiction of impending doom, it seems we are indeed fortunate to still be alive to argue the matter further more than six months after the defendants' actions." The State also said that the defendant's actions had not avoided any harm and that he could not qualify for the necessity defense because his actions were planned ahead of time. The trial was scheduled to begin on June 5, 2017. *People v. Ward*, No. 16-1-01001-5 (Wash. Super. Ct. May 10, 2017; state response May 5, 2017; motion for reconsideration Apr. 27, 2017).

New York Court Awarded Attorney Fees to Competitive Enterprise Institute in FOIL Lawsuit Against Attorney General

The New York Supreme Court awarded more than $20,000 in attorney fees and litigation costs to the Competitive Enterprise Institute (CEI), which brought a lawsuit against the New York Attorney General under the New York Freedom of Information Law (FOIL). CEI filed the proceeding after the Attorney General denied its FOIL request for common interest agreements with private parties and other state attorneys general regarding climate change investigations. In awarding fees to CEI, the court cited its November 2016 decision in favor of CEI and said that law of the case precluded further examination of the Attorney General's arguments that CEI had not substantially prevailed or had not met statutory requirements for eligibility for fees. The court said that the Attorney General had "stonewalled" rather than provide the "straightforward response" to which CEI was entitled and that an award of substantial attorney fees was "particularly appropriate" to promote FOIL's purpose and policy. *Competitive Enterprise Institute v. Attorney General of New York*, No. 5050-16 (N.Y. Sup. Ct. Apr. 19, 2017).

NEW CASES, MOTIONS, AND NOTICES

After Agreeing to Reconsider Landfill Emission Standards and Guidelines, EPA Asked D.C. Circuit to Hold Challenges to Standards in Abeyance

On May 5, 2017, EPA notified parties that had requested reconsideration of EPA's new source performance standards and emission guidelines and compliance times for municipal solid waste landfills that it was granting reconsideration of six topics. The regulations chiefly targeted methane emissions from landfills. EPA also said it would issue a 90-day stay of the regulations in their entirety because the six topics were integral to both rules. On May 26, EPA filed a motion in the D.C. Circuit Court of Appeals asking the court to hold the case challenging the landfill regulations in abeyance for 90 days. *National Waste & Recycling Association v. EPA*, Nos. 16-1371 & 16-1374 (D.C. Cir. May 26, 2017).

EPA Asked D.C. Circuit to Continue Hold on Clean Power Plan Cases; Intervenors Said Court Should Remand

In a supplemental brief, EPA urged the D.C. Circuit Court of Appeals to continue to hold challenges to the Clean Power Plan in abeyance while it reviewed the regulations and considered its next steps. In a status report submitted two weeks later, EPA indicated that it "may be prepared to begin the interagency review process of a … proposed regulatory action in the near future" and that the cases should remain in abeyance pending the conclusion of EPA's review and any resulting rulemaking. EPA submitted its supplemental brief in response to the D.C. Circuit's request that the parties address whether the cases should be remanded rather than held in abeyance. EPA said continuing to hold the cases in abeyance would "better preserve the status quo, conserve judicial resources, and allow the new Administration to focus squarely on completing its current review … as expeditiously as possible." EPA indicated that a remand order "would raise substantial questions" regarding the status of the Supreme Court's stay of the Clean Power Plan. The petitioners and petitioner-intervenors supported EPA's view, arguing that holding the cases in abeyance would best protect their rights to judicial review and the court's

ability to resolve challenges to the Clean Power Plan if EPA decided not to revise or rescind the rule. The petitioners and petitioner-intervenors also argued that holding the cases in abeyance would be consistent with the D.C. Circuit's established practices, while remand would jeopardize the Supreme Court's stay. Parties that intervened as respondents to defend the Clean Power Plan—including environmental and public health groups, power companies, and states and municipalities—argued against continuing the hold. The environmental and public groups asserted that doing so would "convert temporary enforcement relief pending judicial review into a long-term suspension of the Clean Power Plan, without any court having issued a decision on its legal merits and without following the administrative steps necessary to amend, suspend, or withdraw a regulation." While they said that remand would be a more appropriate solution, they also urged the D.C. Circuit to issue a decision on the merits. The state and municipal respondent-intervenors likewise argued for a decision on the merits but said that remand would be "less detrimental" than an open-ended abeyance. They urged the court to limit the duration of the abeyance period to six months. The power companies also indicated that in the event the court did not issue a merits decision, remand would be the "sounder" alternative. The parties submitted similar arguments to the D.C. Circuit in the proceedings challenging EPA's new source performance standards for carbon emissions from power plants. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. EPA status report May 30, 2017; EPA supp. briefs May 15, 2017); *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. supp. briefs May 15, 2017).

D.C. Circuit Paused Challenges to Greenhouse Gas Standards for Heavy-Duty Vehicles for EPA Review of Request for Reconsideration

The D.C. Circuit granted EPA's motion to hold the cases challenging its greenhouse gas emissions and fuel efficiency standards for new large and heavy-duty vehicles in abeyance while EPA considered a request for reconsideration of the standards from one of the petitioners. The court ordered that the cases be held in abeyance pending further order of the court and directed the parties to file motions to govern further proceedings by July 20, 2017. The court said it would not address a request to defer deadlines in the standards because the stay factors had not been addressed in the request. *Truck Trailer Manufacturers Association, Inc. v. EPA*, Nos. 16-1430 & 16-1447 (D.C. Cir. May 8, 2017).

EPA Told West Virginia Federal Court How It Would Attempt Evaluation of Facility-Level Employment Impacts of Clean Air Act

On May 15, 2017, EPA submitted its initial filing in compliance with the order of the federal district court for the Northern District of West Virginia requiring EPA to prepare a study of the employment impacts of the Clean Air Act. EPA's filing came six days after the Fourth Circuit Court of Appeals heard oral arguments in EPA's appeal, which EPA hopes will moot its obligation to complete the work described in this initial compliance filing. EPA must file its employment evaluation by July 1 to meet the district court's deadline. In the initial filing, EPA indicated that it had assembled a workgroup of 80 EPA employees to develop the evaluation and that it would use as guidance the Economic Dislocation Early Warning System (EDEWS), a program jointly administered by EPA and the U.S. Department of Labor in the 1970s that tracked information on facility closures for which environmental regulation was alleged to be a significant factor. EPA cautioned, however, that it had "serious concerns about the analytical

challenges associated with facility-level evaluations generally" and believed that resuming EDEWS would result in enormous costs with little gain in reliable information. EPA indicated that time constraints would prevent it from gathering information on plant closures and employment reductions through state and local governments and the firms themselves and that it was instead undertaking "a significant data-gathering effort by utilizing publicly available information on facilities in the coal-mining and coal-fired-generation industries, compiling that information, and then conducting a qualitative assessment of the factors that may have contributed to actual or potential closures or reductions in employment." Because of the limitations of facility-level analysis, EPA said it also would include sector-level overviews to provide context. To comply with the district court's requirement that it adopt measures by December 2017 to continuously evaluate losses and shifts in employment, EPA said it was assembling another workgroup and developing a work plan that would involve development of a system to collect facility-level information, development of a process for compiling and evaluating the information, and determining how to make the information publicly available. *Murray Energy Corp. v. Pruitt*, No. 5:14-CV-00039 (N.D. W. Va. May 15, 2017).

Industry Groups Sought to Withdraw from Young People's Climate Lawsuit Against Federal Government as Court Weighed Magistrate's Recommendation Not to Certify Appeal of Denial of Motion to Dismiss

Three trade groups moved to withdraw from the federal lawsuit in which young people alleged that the United States, the president, and other federal defendants had violated their constitutional rights by allowing greenhouse gases to accumulate in the atmosphere. The federal district court for the District of Oregon granted the three groups—National Association of Manufacturers (NAM), American Petroleum Institute (API), and American Fuel & Petrochemical Manufacturers (AFPM)—permission to intervene as defendants in January 2016, over the plaintiffs' opposition. In their motions to withdraw, NAM, API, and AFPM indicated that just as a plaintiff retains rights to decide not to pursue particular claims, so could an intervenor decide that "it no longer wishes to pursue currently the particular interests and rights that led to intervention in a particular case." Noting that the plaintiffs had opposed their intervention in the first place, the groups asserted that withdrawal would serve judicial economy and would not prejudice remaining parties. On June 5, the plaintiffs filed a response to NAM's motion to withdraw, saying that while they did not "outright oppose" the motion, they believed it should only be granted with conditions, including that the withdrawal be with prejudice and that NAM be required to pay plaintiffs' attorneys' fees and costs attributable to NAM's participation in the case.

The trade groups' motions to withdraw were filed less than a month after a federal magistrate judge recommended rejecting a request for immediate appeal of the district court's denial of the defendants' and intervenor-defendants' motions to dismiss the lawsuit, and after the federal defendants and the intervenor-defendants filed objections to the magistrate's recommendation. The federal defendants contended that the magistrate judge's recommendation was primarily based on "an incorrect perception that additional fact-finding is necessary, while largely ignoring the purely legal Constitutional, jurisdictional, and separation-of-powers issues that make continued litigation improper." The federal defendants also objected to and asked for reconsideration of the magistrate judge's denial of a motion to stay the litigation. The intervenor-

defendants—who argued that the case "checks all of the boxes for immediate review"—focused their objections on the issue of whether the plaintiffs' claims raised a nonjusticiable political question, an issue that the federal defendants did not identify for certification, focusing instead on standing and the validity of the plaintiffs' due process and public trust claims. The plaintiffs' responses to the objections to magistrate judge's findings and recommendations argued that the magistrate judge had properly concluded that no controlling questions of law were present and that there were no substantial grounds for differences of opinion on the plaintiffs' standing, their due process rights, or their public trust claim. (The plaintiffs also asserted that the intervenors' withdrawal would "obviate" the need for review of their objections.) The plaintiffs also defended the denial of a stay; they asserted that the federal defendants' only evidence of prejudice resulting from moving forward with the litigation was "general grievances about the normal rigors of responding to discovery" and that, on the other hand, plaintiffs would be irreparably injured because carbon dioxide levels increased with each passing day. *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. API motion and AFPM motion May 25, 2017; plaintiffs' response to opposition to denial of stay May 23, 2017; NAM motion May 22, 2017; intervenor-defendants' objections and federal defendants' objections to denial of stay May 9, 2017; federal defendants' objections May 5, 2017).

Colorado Oil and Gas Conservation Commission Sought Colorado Supreme Court Review of Appellate Division That Reversed Denial of Youth Activists' Rulemaking Petition

The Colorado Oil and Gas Conservation Commission (COGCC) asked the Colorado Supreme Court to review an intermediate appellate court's decision holding that COGCC had wrongly denied a rulemaking petition on the grounds that the requested COGCC to take action outside its statutory authority. The rulemaking petition, which was submitted by a group of young people, sought to bar issuance of permits for oil and gas drilling unless best available science demonstrated that there would not be adverse impacts to the environment or human health or a contribution to climate change. COGCC said that the appellate court's interpretation of the Oil and Gas Conservation Act improperly required the agency to prioritize environmental concerns over other policy considerations that the Act required COGCC to take into account. COGCC said this "novel interpretation" conflicted with Supreme Court and other appellate court precedent, was at odds with the Act's actual language, and implicitly endorsed the public trust doctrine, which had not been adopted in Colorado. The particular issue COGCC asked the court to consider was whether, "[w]hen the Commission engages in rulemaking, is it permitted to disregard the Act's policy of fostering oil and gas development in Colorado?" COGCC and the Colorado Attorney General decided to pursue the appeal despite objections by Governor John W. Hickenlooper. In response to a request from the governor's office not to pursue the appeal, the attorney general sent a letter asserting that the governor did not have authority to direct COGCC's decision-making and that the attorney general had independently determined that the issues raised in the case should be determined by the Colorado Supreme Court. *Colorado Oil & Gas Conservation Commission v. Martinez*, No. 17 SC 297 (Colo. petition and letter May 18, 2017).

Conservation Groups Sought to Restart Appeal of Dismissal of Challenge to Federal Coal Leasing Program

Western Organization of Resource Councils and Friends of the Earth asked the D.C. Circuit Court of Appeals to reactivate their appeal of a district court August 2015 decision dismissing their action alleging that federal agencies failed to conduct an adequate analysis of the environmental effects—including climate change-related effects—of the federal coal leasing program. In January 2016, Secretary of the Interior Sally Jewell directed the U.S. Bureau of Land Management to prepare a programmatic environmental impact statement (PEIS) and paused issuance of new coal leases until the PEIS was completed. In June 2016, the D.C. Circuit granted a joint request by the two conservation groups and the federal defendants to hold the groups' appeal in abeyance while the PEIS was prepared. On March 29, 2017, Secretary of the Interior Ryan Zinke revoked Secretary Jewell's order. The conservation groups said that Secretary Zinke's action restored the federal coal leasing program to its status at the time of the district court decision and their noticing of the appeal. They therefore asked the D.C. Circuit to end the abeyance, establish a briefing schedule, and calendar the case for oral argument. *Western Organization of Resource Councils v. Zinke*, No. 15-5294 (D.C. Cir. May 26, 2017).

States Challenged Restarting of Federal Coal Leasing Program

California, New Mexico, New York, and Washington sued Secretary of the Interior Ryan Zinke, the U.S. Bureau of Land Management, and the U.S. Department of the Interior in the federal district court for the District of Montana, seeking to stop the defendants from restarting the federal coal leasing program. The states asked the court to set aside Secretarial Order 3348, in which Secretary Zinke revoked a secretarial order issued by his predecessor Sally Jewell that ordered a programmatic environmental impact review of the coal leasing program and placed a moratorium on new coal leases pending the completion of the review. The states alleged that the defendants had failed to comply with the National Environmental Policy Act, the Mineral Leasing Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act. The states asserted that they had been leaders in working to reduce greenhouse gas emissions and to impede climate change and that they had a significant interest in ensuring that the federal coal leasing program did not undermine these efforts. The states also alleged that they had experienced and would continue to experience the adverse impacts of climate change. They asserted that previously conducted environmental reviews of the coal leasing program did not consider and evaluate the program's climate change impacts. On May 31, 2017, the states' action was consolidated with a lawsuit brought by the Northern Cheyenne Tribe and environmental groups. *California v. Zinke*, No. 4:17-cv-00042 (D. Mont. consolidation order June 2, 2017; motion to consolidate May 31, 2017; filed May 9, 2017).

Plaintiffs Alleged Endangered Species Act Violation in Keystone XL Pipeline Challenge

Six environmental organizations challenging the Trump administration's approval of the Keystone XL pipeline in Montana federal court added an Endangered Species Act claim to their complaint. The organizations contended that the federal defendants had not adequately considered the pipeline's impacts on whooping cranes, interior least terns, and piping plovers, which are listed as endangered or threatened species under the Endangered Species Act. *Northern Plains Resource Council*, No. 4:17-cv-00031 (D. Mont. May 24, 2017).

Center for Biological Diversity Filed FOIA Lawsuit Against Federal Agencies Seeking Records on Removal of Climate Change from Agency Communications

The Center for Biological Diversity filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Department of the Interior, EPA, the U.S. Department of Energy, and the U.S. Department of State in the federal district court for the District of Columbia seeking to compel the agencies to provide records of any directives or communications barring or removing climate change-related words or phrases from formal communications. The Center for Biological Diversity also sought production of information, including webpages, that had allegedly been removed at the direction of the Trump administration. The Center submitted its FOIA requests in late March and early April 2017. *Center for Biological Diversity v. U.S. Department of Interior*, No. 1:17-cv-0974 (D.D.C. filed May 23, 2017).

New York and Massachusetts Attorneys General Asked Federal Court to Dismiss Exxon Action

New York Attorney General Eric Schneiderman and Massachusetts Attorney General Maura Healey asked the federal district court for the Southern District of New York to dismiss Exxon Mobil Corporation's (Exxon's) action seeking to block their investigations into Exxon's climate change-related disclosures. Healey argued that a January 2017 decision in her favor by the Massachusetts Superior Court precluded Exxon from litigating its claims in federal court; that abstention was warranted under the *Colorado River* doctrine; and that Exxon's claims were not ripe because Exxon had—and was pursuing—an avenue for relief in state court. Healey also said that the New York federal court did not have personal jurisdiction over her. Schneiderman's motion to dismiss relied on the absence of ripe claims and the *Colorado River* abstention doctrine. Schneiderman contended that there was no ripe injury because his office's subpoena was not self-executing and Exxon had purported to have voluntarily complied with the subpoena. He also argued that the federal court should defer to the parallel state proceeding rather than allow Exxon to assert some objections to the investigation in federal court and others in state court. *Exxon Mobil Corp. v. Schneiderman*, No. 1:17-cv-02301 (S.D.N.Y. May 19, 2017).

Exxon Sought to Quash New Subpoenas from New York Attorney General; Attorney General Filed Cross-Motion to Compel

On May 8, 2017, the Office of the New York State Attorney General served 10 subpoenas on Exxon Mobil Corporation (Exxon) in its investigation of Exxon's climate change-related disclosures. One subpoena sought information and documents related to oil, gas, and other hydrocarbon projects approved, deferred, or declined by Exxon and "proxy costs" associated with those projects to reflect policies to stem greenhouse gas emissions. The subpoena also demanded information related to Exxon's decisions regarding impairment or write-downs for oil and gas projects and Exxon's estimates of its oil and gas reserves. In addition, the subpoena sought more recent documents responsive to the Attorney General's November 2015 subpoena and documents provided to the U.S. Securities and Exchange Commission in its climate change investigation of Exxon. The other nine subpoenas were testimonial subpoenas. On May 19, 2017, Exxon filed an order to show cause seeking to quash the document subpoena and four testimonial subpoenas that related to past subpoena compliance. Exxon argued that the Attorney

General had not provided a factual basis to justify the demand for additional records and, moreover, that the Attorney General had impermissibly demanded that Exxon review and synthesize information and compile spreadsheets and summaries not already in existence. Exxon also contended that the Attorney General was probing areas foreclosed from state inquiry by federal regulation. On June 2, 2017, the Attorney General filed papers defending the subpoenas and cross-moving to compel. The Attorney General said in a brief and affirmation that the investigation had uncovered evidence of potentially false and misleading statements regarding Exxon's application of the proxy cost of greenhouse gases in its decision-making. The Attorney General argued that the new subpoenas were necessary to fill in gaps in Exxon's production of documents related to the company's risk-management practices, and that the testimonial subpoenas were also reasonably related to the investigation. The Attorney General disputed Exxon's characterization of the subpoenas as unduly burdensome and as making improper demands for information. The Attorney General also argued that its prospective enforcement actions under New York's anti-fraud statutes were not subject to federal preemption. *People of State of New York v. PricewaterhouseCoopers LLP*, No. 451962/2016 (Sup. Ct. New York County May 23, 2017).

Environmental Groups Charged That Oil and Gas Leasing Authorizations in Ohio Did Not Comply with NEPA

Four environmental organizations filed a lawsuit in the federal district court for the Southern District of Ohio alleging that the U.S. Forest Service and U.S. Bureau of Land Management failed to comply with the National Environmental Policy Act (NEPA) when they authorized oil and gas leasing in the Wayne National Forest. The plaintiffs contended that the agencies relied on outdated analyses that did not take into account significant new information about climate change and other issues. In particular, they alleged that the documents upon which the agencies relied did not consider climate change effects on the forest or on species protected under the Endangered Species Act. *Center for Biological Diversity v. U.S. Forest Service*, No. 2:17-cv-00372 (S.D. Ohio, filed May 2, 2017).

Parties Sought California Supreme Court Review of Decision Upholding Greenhouse Gas Cap-and-Trade Program

Three petitions were filed in the California Supreme Court seeking review of the California Court of Appeal decision that upheld the state's cap-and-trade program for greenhouse gas emissions. The lead parties for the petitions were the California Chamber of Commerce, the National Association of Manufacturers, and Morning Star Packing Company. All three petitions asked the Supreme Court to review the question of whether the auction of greenhouse gas emissions constituted a "tax" that would need the approval of two-thirds of the California legislature under Proposition 13. The California Chamber of Commerce also asked the Supreme Court to review whether the California Air Resources Board's design of the cap-and-trade system was outside the authority granted to it by AB 32, the Global Warming Solutions Act. *California Chamber of Commerce v. State Air Resources Board*, No. S241948 (Cal. NAM petition and Morning Star petition May 16, 2017; Cal. Chamber of Comm. petition May 15, 2017).

EPA Received Second Petition Seeking Undoing of 2009 Endangerment Finding

Six companies and an individual represented by the Texas Public Policy Foundation submitted a petition to EPA requesting that the agency reconsider its 2009 endangerment finding for greenhouse gases. The petition referred to the endangerment finding as "the product of serious legal, scientific, evidentiary, and procedural errors" that resulted from the Obama administration's "rush to judgment, which was spurred by political expediency." The petition focused on an alleged "glaring statutory violation"—that EPA issued the endangerment finding without seeking peer review from the Science Advisory Board. A separate petition for new rulemaking on the endangerment finding was submitted by the Competitive Enterprise Institute and the Science and Environmental Policy Project was submitted in February 2017. Petition to Reconsider Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act (May 1, 2017).

Update #98 (May 3, 2017)

FEATURED CASE

California Appellate Court Upheld Cap-and-Trade Program; Parties Planned Appeal to California Supreme Court

In a split opinion, the California Court of Appeal upheld California's cap-and-trade program for greenhouse gas emissions. The court ruled that the state legislature had given the California Air Resources Board "broad discretion" to design a system for reducing emissions and that the auction of emissions allowances did not exceed the scope of CARB's delegated authority. The court further found that the legislature's subsequent specification of how to spend the auction proceeds ratified use of the auction system. The court also held that auction sales of the emissions allowances were not a tax (which would have been barred unless approved by a two-thirds supermajority of the legislature) because purchase of the allowances was voluntary and because the allowances were "valuable, tradable commodities, conferring on the holder the privilege to pollute." The purchase of allowances therefore did not bear the "hallmarks" of a tax. One justice dissented from the holding that the sale of the allowances did not constitute a tax. The dissenting justice contended that the purchase of allowances was not voluntary, that the allowances did not confer property rights, and that the court should have considered the use of the auction proceeds as relevant to the question of whether the sales were a tax. The dissenting justice further indicated that he was not convinced by the State's labeling of "wide and varied uses" of the auction proceeds as "uses that address (not necessarily reduce), however tangentially, greenhouse gas emissions." Counsel for one set of plaintiffs indicated that its clients would appeal to the California Supreme Court. *California Chamber of Commerce v. California Air Resources Board*, Nos. C075930, C075954 (Cal. Ct. App. Apr. 6, 2017).

DECISIONS AND SETTLEMENTS

In Young People's Climate Lawsuit Against U.S., Federal Magistrate Recommended Denial of Motions to Certify Case for Appeal

A magistrate judge in the federal district court for the District of Oregon recommended denial of motions by federal defendants and by intervenor oil and gas trade groups to certify the district court's denial of motions to dismiss the lawsuit brought by young people alleging that the defendants violated rights protected by the Constitution by allowing greenhouse gas emissions to accumulate. The magistrate rejected the intervenors' contention that the issue of whether the political question doctrine barred the plaintiffs' claims should be certified. The magistrate judge said that the court would be capable of granting equitable relief that would not "micro manage" federal agencies or make policy judgments in the event the plaintiffs prevailed. The magistrate "emphatically rejected" any contention that the topic of "climate change" was "formed and determined by political values and is thus a non-justiciable political question" and said that climate change was "quintessentially a subject of scientific study and methodology, not solely political debate" and that courts were "particularly well-suited for the resolution of factual and expert scientific disputes." The magistrate further indicated that the issues in the case "and the fundamental constitutional rights presented" would not be "well served by certifying a hypothetical question to the Court of Appeals bereft of any factual record or any record at all beyond the pleadings." The magistrate judge indicated that the federal defendants' significant admissions regarding the threats posed by human-induced climate change had, "if anything, … enhanced" the plaintiffs' due process claim and that any appeal would be premature because the taking of evidence was necessary to "flesh out… critical issues." The magistrate judge also was not persuaded that certification should be granted for the public trust claim, indicating that the federal defendants were relying on an overly expansive reading of Supreme Court precedent to narrow the scope of the federal public trust obligations. In recommending denial of certification on the issue of the plaintiffs' standing, the magistrate said that the alleged harms to the plaintiffs from climate change should not be "minimalized by the fact that vast numbers of the populace are exposed to the same injuries." The magistrate noted that numerous factual questions would be addressed at trial (e.g. "Is climate change occurring?" "If so, to what extent is it being caused by fossil fuel production?), and said the defendants and the intervenors "would put the cart before the horse" by certifying hypothetical questions before the relevant factual issues were addressed. The parties were given 14 days to file written objections to the magistrate judge's recommendation, followed by 14 days to file a response to the objections. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. May 1, 2017).

Supreme Court Denied Certiorari in Polar Bear Critical Habitat Case

On May 1, 2017, the U.S. Supreme Court declined to review the Ninth Circuit's February 2016 decision upholding the designation of critical habitat for polar bears. The State of Alaska, Alaska native communities, Alaska Oil and Gas Association, and American Petroleum Institute had asked the Court to take up the question of whether the Ninth Circuit's "exceedingly permissive standard" for critical habitat designation allowed the U.S. Fish and Wildlife Service to designate "huge geographic areas" that failed to meet the Endangered Species Act's criteria for critical habitat. *Alaska v. Zinke*, No. 16-596 (U.S. May 1, 2017); *Alaska Oil & Gas Association v. Zinke*, No. 16-610 (U.S. May 1, 2017).

D.C. Circuit Put Clean Power Plan Challenges on Hold

On April 28, 2017, the D.C. Circuit Court of Appeals granted the U.S. Environmental Protection Agency's (EPA's) motions to hold the cases challenging the Clean Power Plan and the greenhouse gas standards for new power plants in abeyance while EPA undertakes its review of the regulations. The court ordered that both cases be put on hold for 60 days and that EPA file status reports every 30 days. The court further ordered the parties to file supplemental briefs addressing whether the cases should be remanded to EPA rather than held in abeyance. Those briefs were to be submitted by May 15. In the Clean Power Plan case, the court deferred ruling on multiple motions requesting that petitions challenging EPA's January 2017 denial of requests for reconsideration of the Clean Power Plan rule be severed and consolidated with the pending Clean Power Plan challenges. The D.C. Circuit held oral arguments in the Clean Power Plan case in September 2016. In Executive Order No. 13783 issued on March 28, 2017, President Trump ordered EPA to review both regulations and, if appropriate, to suspend, revise, or rescind them. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. Apr. 28, 2017); *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. Apr. 28, 2017).

New York Federal Court Declined to Reopen Jurisdictional Discovery in Exxon's Action Against Attorneys General; Schedule Set for Renewed Motions to Dismiss

After the transfer of Exxon Mobil Corporation's (Exxon's) lawsuit seeking to block investigations by the New York and Massachusetts attorneys general from Texas federal court to the federal district court for the Southern District of New York, the New York court declined to reopen jurisdictional discovery into the attorneys general's motivations for commencing the investigations. The court also ordered the dismissal without prejudice of the attorneys' general pending motions to dismiss and set a schedule for renewal of the motions. Briefing on the motions was to be completed by June 30, 2017. The order authorized the attorneys general to seek dismissal on the grounds of personal jurisdiction, ripeness, abstention pursuant to the *Colorado River* doctrine (which may apply where there are concurrent federal and state lawsuits pending), and collateral estoppel and res judicata. The court did not authorize the defendants to seek dismissal based on *Younger* abstention—the abstention doctrine on which the attorneys general primarily had relied in their motions before the Texas federal court. (*Younger* abstention applies when ongoing state judicial proceedings implicate important state interests and provide adequate opportunity to raise constitutional challenges.) Expressing concern that the attorneys general had commenced their investigations in bad faith, the Texas federal court had ordered discovery into the motivations of the attorneys general to determine whether the "bad faith" exception to *Younger* abstention applied.

The New York court's order followed a status conference held on April 21, at which the judge reportedly stated that she had a "different view" of the case than the Texas judge. Prior to the conference, the parties submitted a joint letter at the direction of the court in which Exxon proposed that jurisdictional discovery continue and the attorneys general requested that their motions to dismiss be decided after rebriefing under Second Circuit law. The attorneys general asserted that developments in the ongoing state court proceedings made *Younger* abstention particularly appropriate.

One day before the status conference, the attorneys general from Texas and 10 other states sought permission to file an amicus brief in support of Exxon. The 11 attorneys general said that

the Massachusetts and New York investigations were "an attempt to establish and enforce a singular climate change viewpoint despite the fact that climate change is the subject of an ongoing international debate and far from settled" and that they would provide the court with a different perspective than the defendants "on the nature of the power being employed, the correct use of [civil investigative demands] and subpoenas, and where the boundaries of government power end and the protections of the First Amendment begin." In their proposed brief, the 11 attorneys general argued that the Massachusetts and New York attorneys general were targeting critics and abusing their power, and argued that the politicized investigations would undermine public confidence. Echoing the concerns raised by the Texas federal district court, the 11 attorneys general argued that abstention under the *Younger* doctrine was not warranted because the defendants had commenced their investigations in bad faith. *Exxon Mobil Corp. v. Schneiderman*, No. 1:17-cv-02301 (S.D.N.Y. order Apr. 24, 2017; joint letter Apr. 12, 2017; states' amicus motion and proposed amicus brief Apr. 20, 2017).

Challenge to Keystone Pipeline Permit Denial Dismissed After Trump Administration Granted Permit

After the Trump administration granted a presidential permit for the Keystone XL pipeline, the federal district court for the Southern District of Texas granted TransCanada Keystone Pipeline, LP and a related entity's motion for voluntary dismissal of their lawsuit challenging the Obama administration's denial of the permit. *TransCanada Keystone Pipeline, LP v. Kerry*, No. 4:16-cv-00036 (S.D. Tex. Apr. 6, 2017).

Missouri Federal Court Dismissed ERISA Class Action Against Peabody Energy

The federal district court for the Eastern District of Missouri dismissed a class action under the Employee Retirement Income Security Act of 1974 (ERISA) that had been brought against the coal company Peabody Energy Corporation (Peabody) and related entities and individuals. The court concluded that the plaintiffs, who were participants in Peabody employee stock option plans, had failed to state a claim that the defendants breached their duty of prudence under ERISA by retaining and continuing to purchase Peabody stock in light of public information that established that doing so was unreasonable. The court also found that the plaintiff's "nonpublic information" claim—based on Peabody's allegedly deceptive representations regarding the future of coal—failed because the plaintiffs had not established that a prudent fiduciary could not have concluded that alternatives to continued investment in Peabody stock would do more harm than good. *Lynn v. Peabody Energy Corp.*, No. 4:15CV00916 (E.D. Mo. Mar. 30, 2017).

Oregon Federal Court Upheld Decision to Allow Continued Grazing on Forest Lands

The federal district court for the District of Oregon rejected a challenge to the U.S. Forest Service's decision to allow continued livestock grazing on forest lands in the Upper Klamath Basin. The court was not persuaded by the plaintiffs' claims that the National Environmental Policy Act (NEPA) review was insufficient, including by a claim that the Forest Service should have supplemented its 2009 NEPA analysis based on 2013 and 2014 reports by the U.S. Fish and Wildlife Service indicating that climate change and drought posed threats to endangered fish species. The court found that the information was not new and did not impose an obligation to

supplement the 2009 review. *Oregon Wild v. Cummins*, No. 1:15-cv-01360 (D. Or. Mar. 8, 2017).

California Court of Appeal Found Fault (Again) with CARB's Assessment of Increased Nitrogen Oxide Emissions Associated with Low Carbon Fuel Standard

On April 10, 2017, the California Court of Appeal ruled that the California Air Resources Board (CARB) had failed, for a second time, to comply with the California Environmental Quality Act (CEQA) in its promulgation of a Low Carbon Fuel Standard (LCFS). In 2013, the court identified CEQA violations in CARB's original LCFS and directed CARB to correct the violations. The primary issue that CARB was to consider was the potential increase in nitrogen oxide emissions associated with increased biodiesel consumption. In its April 2017 decision, the Court of Appeal concluded that CARB had failed to comply with the court's 2013 directive because CARB had improperly used 2014 emissions of nitrogen oxides as a baseline for its review of the LCFS adopted in 2015, rather than emissions levels prior to the adoption of the original LCFS in 2009. The appellate court determined that it would be appropriate and in the public interest, however, to leave the remainder of the LCFS regulations in place and to allow the 2017 standards for diesel fuel and its substitutes to remain in effect until CARB remedied the CEQA violations. *POET, LLC v. California Air Resources Board*, No. F073340 (Cal. Ct. App. Apr. 10, 2017).

NEW CASES, MOTIONS, AND NOTICES

EPA Asked D.C. Circuit to Hold Challenges to Oil and Gas Sector Emissions Standards in Abeyance

On April 7, 2017, EPA asked the D.C. Circuit Court of Appeals to hold challenges to the new source performance standards (NSPS) for oil and gas facilities in abeyance while the agency reviewed the standards in accordance with President Trump's executive order on "Promoting Energy Independence and Economic Growth." The oil and gas sector NSPS, which included limitations on methane emissions, was one of the regulations identified by the executive order for review and possible suspension, revision, or rescission. Industry and state petitioners urged the D.C. Circuit to grant EPA's request to pause the litigation. Their submissions to the court acknowledged the complexity of the case—which also concerns two earlier regulations on emissions from oil and gas sources—but said that holding the case in abeyance would be an appropriate step that would not prejudice any parties. Two sets of respondent-intervenors—one made up of states that support the NSPS and another comprising environmental groups—opposed holding the case in abeyance, arguing that issues raised were neither moot nor unripe, and that it was not certain that the EPA would be successful in promulgating a different or weaker rule. On April 18, EPA granted requests for reconsideration by oil and gas trade groups and also agreed to postpone initial compliance dates, indicating that the petitions raised at least one objection concerning monitoring of fugitive emissions that related to provisions in the final rule that did not appear in the initial rule. *American Petroleum Institute v. EPA*, Nos. 13-1108 et al. (D.C. Cir. Apr. 7, 2017).

EPA Requested Pause in Litigation Challenging Greenhouse Gas Standards for Heavy-Duty Vehicles

On April 20, 2017, EPA asked the D.C. Circuit Court of Appeals to pause challenges to greenhouse gas and fuel efficiency standards for new large and heavy-duty vehicles to allow the agency to review a request for reconsideration submitted by the petitioner in one of the proceedings challenging the standards. That petitioner—the Truck Trailers Manufacturers Association, Inc. (TTMA)—partially opposed the pause in the litigation because EPA did not propose to stay or extend the standards' effective dates. TTMA argued that the 90-day abeyance sought by EPA would unfairly prejudice it and its members because they faced "imminent compliance obligations." TTMA indicated it was willing to support a 30-day delay in setting a briefing schedule. *Truck Trailers Manufacturers Association, Inc. v. EPA*, No. 16-1430 (D.C. Cir. Apr. 20, 2017).

Briefs Submitted in Conservation Groups' Tenth Circuit Appeal of Intervention Denial in Case Seeking Quarterly Oil and Gas Lease Sales

Briefing was completed in April in the Tenth Circuit Court of Appeals on the issue of whether a New Mexico federal court properly denied conservation groups' motion to intervene in a lawsuit in which Western Energy Alliance sought to compel the United States Bureau of Land Management (BLM) to hold quarterly oil and gas lease sales for public lands. The district court found that the groups had not shown that their interests would be impeded by the litigation or that their interests could not be adequately represented by existing parties. On appeal, the conservation groups argued that they were entitled to intervene as of right because the relief sought by the Alliance would impair their interests by increasing the frequency of lease sales and undermining leasing reforms that had provided greater public participation and more environmental review. The groups also argued that they had met their "minimal" burden of demonstrating that BLM might not adequately represent their interests; the groups said BLM, which was charged with "balancing" different uses of public lands, would not adequately represent the groups' interest in "protecting" those lands. The groups also asserted that the district court abused its discretion by not granting permissive intervention. In its response brief, Western Energy Alliance said that the conservation groups mischaracterized the relief sought in the lawsuit, which the Alliance said was limited to enforcing BLM's nondiscretionary duty under the Mineral Leasing Act to conduct quarterly lease sales when lands were eligible. The Alliance said it did not seek to change the definition of "eligible" or modify the process by which lands were identified as eligible. The federal government, which had not opposed intervention in the district court, submitted an amicus brief supporting the district court's denial of intervention. The amicus brief argued that Western Energy Alliance had conceded that it would not seek to limit BLM's discretion to decide when eligible mineral lands were available for oil and gas leasing and that the case therefore did not threaten to impair the conservation groups' interests. *Western Energy Alliance v. Zinke*, No. 17-2005 (10th Cir. opening brief Mar. 6, 2017; Western Energy Alliance brief Apr. 5, 2017; U.S. amicus brief Apr. 12, 2017; appellants' reply brief Apr. 19, 2017).

States, D.C. Asked to Intervene in Challenge to Energy Efficiency Standards for Lamps

Six states and the District of Columbia filed a motion to intervene to defend federal energy efficiency standards for lamps in the Fourth Circuit Court of Appeals. The United States Department of Energy (DOE) issued the standards for "general service lamps" on January 19, 2017, after which the National Electrical Manufacturers Association filed its petition for review challenging the regulations. The states and the District of Columbia asserted that energy conservation resulting from the lamp standards would be critical to their efforts to reduce energy use and costs and to reduce greenhouse gas emissions. The states noted that since federal law generally preempted their own efforts to impose standards on lamps, their interests would therefore be impaired by weakening or delay of the lamp standards. The states also contended that their interests in defending the lamp standards might not be aligned with DOE's interests in the future. *National Electrical Manufacturers Association v. United States Department of Energy*, No. 17-1341 (4th Cir. Apr. 17, 2017).

Briefing Completed in EPA's Appeal of Jobs Study Order; States Weighed in on Side of Coal Company Appellees

Sixteen states, led by West Virginia, filed an amicus brief in the Fourth Circuit Court of Appeals urging it to uphold the decision by a West Virginia federal court requiring EPA to prepare a study of the Clean Air Act's effects on employment. The district court concluded, in an action brought by coal companies, that EPA had a nondiscretionary obligation to conduct such a study. The states argued that the study would provide necessary and useful information about the impacts of Clean Air Act regulations, including the Clean Power Plan and carbon standards for new power plants, that the states could use to devise economic policies and for budgeting. A nonprofit group called the Cause of Action Institute also filed an amicus brief, arguing that EPA's failure to conduct the employment studies required by the Clean Air Act as well as a similar studies called for by the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, revealed "systemic problems with the EPA" and reflected "a lack of concern regarding the employment effects of its activities." EPA submitted its reply brief in the appeal on April 14. Environmental groups that unsuccessfully sought to intervene on EPA's behalf filed a final brief on April 17 seeking reversal of the denial of their request. Oral argument is to take place on May 9. *Murray Energy Corp. v. EPA Administrator*, No. 16-2432 (4th Cir. EPA response brief in support of order denying intervention Mar. 31, 2017; states' amicus brief and Cause of Action Institute amicus brief Apr. 7, 2017; EPA reply brief Apr. 14, 2017; applicants-in-intervention-appellants reply brief Apr. 17, 2017).

States and New York City Challenged Delay in Implementation of Energy Efficiency Standards

Ten states and the City of New York filed a petition in the D.C. Circuit Court of Appeals seeking review of the U.S. Department of Energy's (DOE's) decision to delay the effective date for final energy conservation standards for ceiling fans. On January 31, 2017, DOE published notice that it would postpone the effective date to March 21, 2017; on March 21, DOE published notice that it would further delay the effective date to September 30, 2017 to allow the Secretary of Energy time to review and consider the regulations. *New York v. U.S. Department of Energy*, No. 17-916 (2d Cir., filed Mar. 31, 2017).

In Challenge to Update to Manual Governing Apalachicola Dams and Reservoirs, Environmental Groups Alleged NEPA Violations, Including Failure to Take Climate Change into Account

Three environmental organizations filed a lawsuit in the federal district court for the District of Columbia claiming that the U.S. Army Corps of Engineers' approval of an update to the Master Water Control Manual for federal dams and reservoirs in the Apalachicola-Chattahoochee-Flint River Basin violated the National Environmental Policy Act (NEPA), the Water Resources Development Act, and the Fish and Wildlife Coordination Act. The alleged flaws in the Corps' review included that the Corps allegedly relied on a "fundamentally flawed" model to simulate freshwater flows. The plaintiffs contended that the model's flaws included a reliance on historical hydrological data that was "inadequate in light of known, foreseeable and anticipated changes in climate, including related increases in the frequency, duration and severity of droughts." The plaintiffs said that the updated Water Control Manual would withhold freshwater flows necessary to sustain the Apalachicola ecosystem and local economies. *National Wildlife Federation v. U.S. Army Corps of Engineers*, No. 1:17-cv-00772 (D.D.C., filed Apr. 27, 2017).

Lawsuit Sought Disclosure of Trump Transition Climate Questionnaire Documents at Department of Energy

On April 27, 2017, the Protect Democracy Project, Inc. filed a lawsuit pursuant to the federal Freedom of Information Act (FOIA) asking the federal district court for the District of Columbia to order the U.S. Department of Energy (DOE) to search for and produce Trump administration transition team questionnaires regarding climate change. The plaintiff submitted a FOIA request for the documents on February 15, 2017. The request also sought records regarding personnel changes, assignments, and assignment policies at DOE. *Project Democracy Project, Inc. v. U.S. Department of Energy*, No. 1:17-cv-00779 (D.D.C., filed Apr. 27, 2017).

FERC Declined Invitation to Weigh in on Nuclear Subsidies in Illinois Federal Court; Parties Briefed Motions to Dismiss Challenges to Subsidies

On April 24, 2017, the federal district court for the Northern District of Illinois invited the Federal Energy Regulatory Commission (FERC) to submit an amicus brief stating "its views, if any, on the intersection of Illinois's Zero Emission Credit [(ZEC)] program and the Federal Power Act and/or FERC's jurisdiction over wholesale electricity sales." The court sought FERC's views in the context of two lawsuits challenging the ZEC program in which the plaintiffs claimed that the program was preempted and violated the Commerce Clause. On April 26, 2017, FERC submitted a letter to the court indicating that it would not submit a brief. FERC noted that a complaint related to the ZEC program and filed by one of the plaintiffs in the lawsuits was currently pending before FERC. FERC also noted that it was operating without a quorum and would not be able to act on the pending complaint until the quorum was restored, after which it would be able to address the complaint and potentially provide a more definitive statement on its views.

Earlier in April, the state defendants and the owner of nuclear plants eligible for ZEC credits filed motions to dismiss the two lawsuits, arguing that the plaintiffs failed to state valid claims, that the plaintiffs lacked a cause of action for bringing their preemption claims, and that the plaintiffs lacked standing to bring their dormant Commerce Clause claims. In response, the plaintiffs argued that their complaint stated claims of field and conflict preemption and of a dormant Commerce Clause violation. The plaintiffs also contended that FERC did not have primary jurisdiction over the conflict preemption claim, and that the court had equitable jurisdiction to consider the preemption claims. The plaintiffs also disputed the foundation of the defendants' arguments—that the ZEC program and the statute that created it were environmental programs aimed at reducing carbon emissions.

Other parties sought to intervene or to file amicus briefs in the lawsuits, including both of the regional transmission operators that oversee the electric grid in Illinois. Midcontinent Independent System Operator, Inc. (MISO)—which oversees the electric grid in 15 states (including in southern Illinois) and the Canadian province of Manitoba—submitted an amicus brief arguing that the case should be dismissed because a decision by the court could prematurely limit ongoing efforts before FERC involving MISO stakeholders to resolve questions related to issues before the court. PJM Interconnection, L.L.C. (PJM)—the grid operator for 13 states (including northern Illinois) and the District of Columbia—filed an amicus brief opposing the motion to dismiss, arguing that the ZEC program would substantially harm the wholesale energy markets PJM operated. The Independent Market Monitor for PJM earlier moved to intervene as a plaintiff "to promote and protect the competitive wholesale electric power markets and to avoid the burden that would be imposed on its resources in efforts to avert failure of the market if Defendants prevail." A group of four non-profit groups that included Environmental Defense Fund sought leave to file an amicus brief urging dismissal of the lawsuit, arguing that the ZEC program operated within the "collaborative federalism" framework and was within Illinois's authority to craft energy policy to address environmental and public health concerns. Natural Resources Defense Council also sought to file an amicus brief in support of the ZEC program. The American Wind Energy Association filed a proposed brief on behalf of neither party, asserting that it had a substantial interest in the case "because state-conducted resource procurement efforts for renewable energy could be called into question by a verdict for the Plaintiffs that is not narrowly tailored to the facts at hand." *Electric Power Supply Association v. Star*, No. 1:17-cv-01164, and *Village of Old Mill Creek v. Star*, No. 1:17-cv-01163 (N.D. Ill. PJM Independent Market Monitor motion to intervene Mar. 16, 2017; Environmental Defense Fund et al. amicus motion, NRDC amicus brief, and American Wind Energy Association amicus motion and brief Apr. 12, 2017; MISO amicus brief and PJM amicus brief Apr. 24, 2017; FERC letter Apr. 26, 2017).

Plaintiffs Cited Cumulative Climate Effects as One Reason Why Northern Long-Eared Bat Should Have Been Listed as Endangered

In an action challenging decisions under the Endangered Species Act related to the northern long-eared bat, the plaintiffs filed a motion seeking summary judgment on their claim that the bat should have been listed as endangered rather than threatened. The plaintiffs' arguments included that the United States Fish and Wildlife Service had focused solely on white-nose syndrome (WNS)—a fungal disease affecting hibernating bats that has killed millions of bats—and had

failed to consider the cumulative effects of other stressors, including climate change. *Center for Biological Diversity v. Kurth*, No. 1:15-cv-00477 (D.D.C. Apr. 14, 2017).

Nonprofit Group Sought Records Providing Basis for EPA Administrator's Statements About Climate Change

The nonprofit organization Public Employees for Environmental Responsibility filed an action under the Freedom of Information Act requesting that the federal district court for the District of Columbia order EPA to respond to the organization's request on March 10, 2017 for records relied upon by EPA Administrator Scott Pruitt in statements he made about climate change in a televised interview. The complaint cited Pruitt's statements that he would not agree that human activity was a "primary contributor to the global warming that we see" and that "there's a tremendous disagreement about of the impact" of "human activity on the climate." The complaint alleged that these remarks "stand in contrast to the published research and conclusions of the EPA." *Public Employees for Environmental Responsibility v. EPA*, No. 1:17-cv-00652 (D.D.C., filed Apr. 13, 2017).

Parties Notified Arizona Federal Court That They Could Not Settle Dispute Over Impacts of Forest Plans on Mexican Spotted Owl

Four months after requesting a stay to explore settlement possibilities, WildEarth Guardians and federal defendants asked the federal district court for the District of Arizona to proceed to resolve their motions for summary judgment in WildEarth Guardians' lawsuit challenging biological opinions issued by the United States Fish and Wildlife Service that found that forest plans developed by the United States Forest Service (USFS) were not likely to jeopardize the continued existence of the Mexican spotted owl or to destroy or adversely modify the owl's critical habitat. The Mexican spotted owl has been designated a threatened species under the Endangered Species Act. WildEarth Guardians argued, among other things, that the biological opinions were arbitrary and capricious because they failed to contain any meaningful discussion of climate change even though the USFS's Mexican spotted owl experts had concluded that climate change "may be the biggest issue" facing the species. In December 2016, the court granted a joint request for a stay after the parties indicated they were meeting in person in January 2017 to discuss new science pertaining to the owl as well as current and planned owl-management efforts with the hope of reaching a settlement. In their status report on April 4, 2017, the parties stated that "[i]t has now become apparent to the parties that it will not be possible to achieve a negotiated resolution of the matters raised in this litigation." *WildEarth Guardians v. United States Fish & Wildlife Service*, No. 4:13-cv-00151 (D. Ariz. Apr. 4, 2017).

Exxon Filed Motion to Dismiss ERISA Class Action

Exxon Mobil Corporation and individual defendants (Exxon) filed a motion to dismiss a class action brought under the Employee Retirement Income Security Act (ERISA) on behalf of participants in an Exxon retirement savings plan. The complaint asserted that the defendants violated their fiduciary duties by investing in Exxon stock when they knew the stock price was artificially inflated because Exxon had failed to make disclosures concerning climate change risks. In the motion to dismiss, Exxon asserted that the complaint did not satisfy the "exacting"

pleading standard and did not plausibly allege either the existence of material information that Exxon misrepresented or improperly failed to disclose or that the individual defendants knew nonpublic information about Exxon's assets. Exxon also said that the complaint did not sufficiently allege a claim that the company failed to monitor the individual defendants. *Attia v. Exxon Mobil Corp.*, No. 4:16-cv-03484 (S.D. Tex. Apr. 4, 2017).

Citing Climate Models Showing Reduced Water Levels, Environmental Groups Challenged Authorization of Increased Diversions from Lake Michigan

Four environmental organizations filed a lawsuit in Illinois state court challenging an Illinois Department of Natural Resources (IDNR) order permitting the Metropolitan Water Reclamation District of Greater Chicago to divert an additional 420 billion gallons of water from Lake Michigan. The plaintiffs alleged that IDNR had violated the Level of Lake Michigan Act and its implementing regulations, the Great Lakes-St. Lawrence River Basin Water Resources Compact, and a consent decree entered by the United States Supreme Court in 1967 by failing to make a proper determination of the volume of the diversion and failing to impose conservation practices as conditions. The plaintiffs contended that ensuring that water from the Great Lakes was "diverted to the least extent possible" was "particularly important because scientific models project that climate change will produce a drop of two feet in the average water level of the Great Lakes during this century." *Alliance for the Great Lakes v. Illinois Department of Natural Resources*, No. 2017CH05445 (Ill. Cir. Ct., filed Apr. 14, 2017).

Lawsuit Filed Challenging Water Project in San Bernardino

Center for Biological Diversity and San Bernardino Valley Audubon Society filed a lawsuit challenging the California Environmental Quality Act (CEQA) review for the "Clean Water Factory Project" approved by the City of San Bernardino. The petition alleged that the project would divert up to 22 million gallons of treated water per day from the Santa Ana River. The petition asserted numerous failures in the environmental review for the project, including a failure to adequately disclose, analyze, and mitigate the project's significant and cumulative impacts to air quality and greenhouse gas emissions. *Center for Biological Diversity v. City of San Bernardino Municipal Water Department*, No. CIVDS1706284 (Cal. Super. Ct., filed Apr. 6, 2017).

Conservation Groups Launched CEQA Lawsuit Challenging Aquaculture Expansion Project in Climate-Threatened Habitat

Two wildlife conservation organizations filed a lawsuit alleging that the Humboldt Bay Harbor, Recreation and Conservation District had not complied with CEQA in connection with the District's approval of an expansion of shellfish aquaculture activities into 256 acres of undeveloped eelgrass habitat and other sensitive tidelands habitat. The organizations alleged that declines in eelgrass habitat due to climate change impacts such as increased temperatures and disease already had been reported along the California and Baja California coasts and that climate change was likely to exacerbate adverse impacts to eelgrass and mudflat habitats in the future due to sea level rise resulting in submersion of the habitats in waters too deep to allow

sunlight and growth. *National Audubon Society v. Humboldt Bay Harbor, Recreation & Conservation District*, No. CV170248 (Cal. Super. Ct., filed Mar. 30, 2017).

Groups Asked U.S. to Protect Giraffe Under Endangered Species Act

On April 19, 2017, five environmental and animal protection groups submitted a petition to the Secretary of the Interior and United States Fish and Wildlife Service requesting that the giraffe be listed under the Endangered Species Act. The petition described a number of threats to the giraffe's survival, including climate change, which the petition said could increase the frequency and magnitude of droughts, increase bushfires, and reduce food availability. Petition to List the Giraffe (*Giraffa Camelopardalis*) Under the Endangered Species Act (Apr. 19, 2017).

California Asked EPA for More Stringent Federal Emission Standards for Locomotives

On April 13, 2017, the California Air Resources Board sent a letter to EPA Administrator Scott Pruitt requesting that EPA adopt more stringent emission standards for locomotives. CARB said its proposed standard could achieve 99% control of emissions of nitrogen oxides and diesel particulate matter, 98% control of hydrocarbon emissions, and 10–25% control of greenhouse gas emissions. The proposed standards would apply to newly built and remanufactured locomotives and locomotive engines. CARB, Petition for Rulemaking Seeking Amendment of Locomotive Emission Standards (Apr. 13, 2017).

Update #97 (April 4, 2017)

FEATURED CASE

Texas Federal Court Transferred Exxon Lawsuit Against Attorneys General to New York Federal Court, Expressed Concerns Regarding Prosecutors' Motivations

The federal district court for the Northern District of Texas transferred Exxon Mobil Corporation's (Exxon's) lawsuit challenging climate change investigations by the New York and Massachusetts attorneys general to the Southern District of New York. The Texas federal court said that the Southern District of New York was the proper venue because a substantial part of the events or omissions giving rise to Exxon's claims occurred in New York City at the AGs United for Clean Power press conference on March 29, 2016. The Texas federal court continued to express concerns about the motives of the attorneys general for commencing their investigations, citing evidence offered by Exxon that the attorneys general acted to further their own political goals in conjunction with the 2016 national election. The court also asked whether the reluctance of the attorneys general to disclose information shared at the March 2016 meeting and information shared after state attorneys general entered into a Climate Change Coalition Common Interest Agreement suggested the attorneys general were "trying to hide something from the public." The court also noted Exxon's assertions that the New York attorney general's investigation had shifted in focus from focusing on historic climate change research to Exxon's disclosures regarding oil and gas reserves and assets, which Exxon said indicated that the attorney general was "searching for a way to have leverage over Exxon in the public policy

debate about climate change." The court indicated that if the attorney general was "genuinely concerned about seeking protection for New York's citizens for Exxon's possible securities fraud regarding its oil and gas reserves and assets," then he could seek protection for them in a securities class action, *Ramirez v. Exxon Mobil Corp.*, currently pending before the court. *Exxon Mobil Corp. v. Schneiderman*, No. 4:16-cv-00469-K (N.D. Tex. Mar. 29, 2017).

DECISIONS AND SETTLEMENTS

Challenge to Obama Administration Determination on Vehicle Greenhouse Gas Standards Withdrawn After EPA Said It Would Reconsider

The Alliance of Automobile Manufacturers (AAM) asked the D.C. Circuit Court of Appeals to dismiss its petition for review of the U.S. Environmental Protection Agency's (EPA's) Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation. EPA issued the Final Determination eight days before the change in administrations. AAM filed a protective petition for review on March 13 and had also submitted letter to EPA Administrator Scott Pruitt on February 21 requesting withdrawal of the Final Determination. AAM withdrew the petition for review on March 20 after EPA announced its intention to reconsider the Final Determination in coordination with the National Highway Traffic and Safety Administration. EPA indicated that it would issue a new determination by April 1, 2018. *Alliance of Automobile Manufacturers v. EPA*, No. 17-1086 (D.C. Cir., filed Mar. 13, 2017; motion to dismiss Mar. 20, 2017; Federal Register notice Mar. 22, 2017).

California Federal Court Directed Fish and Wildlife Service to Reconsider Whether Coastal Marten Should Be Listed Under Endangered Species Act

The federal district court for the Northern District of California remanded a 12-month finding that the coastal marten was not warranted for listing under the Endangered Species Act. The coastal marten is a small mammal in the weasel family of which three populations remain, one in California and two in Oregon. The court said that the U.S. Fish and Wildlife Service (FWS) had failed to recognize that the evidence showed that the California coastal marten population was small and declining. The court also found that best available evidence did not support the FWS's conclusion that the three populations of the coastal marten were not functionally isolated. The court said that the FWS needed to redo its analysis of whether the coastal marten was endangered or threatened throughout a significant portion of its range because its "erroneous" conclusion about the California population's size might have influenced this analysis. The court noted that the plaintiffs had argued that "stressors," including habitat loss caused by climate change, were concentrated in the California portion of the marten's range. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 15-cv-05754 (N.D. Cal. Mar. 28, 2017).

Georgia Federal Court Said Greenhouse Gas Emissions from Leaking HVAC Units Did Not Establish Standing for Negligence and Strict Liability Claims

The federal district court for the Southern District of Georgia dismissed an action alleging that heating, ventilation, and air conditioning (HVAC) units manufactured by the defendants were

defective. The plaintiff's allegations included that the HVAC units damaged the environment by leaking a potent greenhouse gas. Among the claims dismissed were negligence and strict liability claims. The court said that an alleged injury to the environment due to emissions of greenhouse gas emissions did not provide a basis for standing to make these claims because the plaintiff—a company that installed the HVAC units in its offices—failed to allege an injury different from the common injury to the public. *PAWS Holdings, LLC v. Daikin Industries, Ltd.*, No. CV 116-058 (S.D. Ga. Feb. 22, 2017).

Pennsylvania Supreme Court Left in Place Lower Court's Determination That State Constitution's Environmental Rights Amendment Did Not Establish Right to Development of Greenhouse Gas Plan

In a one-sentence order, the Pennsylvania Supreme Court affirmed the Pennsylvania Commonwealth Court's dismissal of a proceeding to compel Pennsylvania agencies and officials to develop and implement a comprehensive plan to regulate greenhouse gases. The petitioners had contended that the Environmental Rights Amendment of the Pennsylvania Constitution obligated the respondents to undertake such actions. The Commonwealth Court concluded that the petitioners did not have a "clear right" to have the respondents to pursue the studies, regulations, and other actions sought by the petitioners. *Funk v. Wolf*, No. 88 MAP 2016 (Pa. Mar. 28, 2017).

Kansas High Court Upheld Coal Plant PSD Permit Addendum That Did Not Include Greenhouse Gas Emission Limits

The Kansas Supreme Court upheld a 2014 addendum to a 2010 Prevention of Significant Deterioration (PSD) permit issued by the Kansas Department of Health and Environment (KDHE) for construction of a new coal-fired electric generating unit. KDHE issued the 2010 permit several weeks before the effective date of federal regulations requiring greenhouse gas emissions limits in PSD permits for certain sources. In 2013, the Kansas Supreme Court remanded the 2010 permit to KDHE to apply federal standards for nitrogen dioxide and sulfur dioxide. In its 2013 opinion, the court noted that KDHE would also have to apply the mercury and air toxics standards that had gone into effect during the pendency of the litigation but indicated that the scope of other issues to be considered on remand would be determined by KDHE. On remand, KDHE elected to omit greenhouse gas limits on the grounds that it had stayed the effect of regulations that would have invalidated the approval to construct after 18 months and had not issued a new permit. In Sierra Club's challenge to the addendum, the court rejected the argument that the addendum was required to incorporate the greenhouse gas regulations that went into effect after issuance of the 2010 permit. The court said its 2013 opinion had not vacated the 2010 PSD permit and had left KDHE with discretion to make "broad determinations" regarding the scope of remand proceedings. The court said that Sierra Club had not established that the addendum constituted a new permit and found that Sierra Club had failed to establish that KDHE's decision not to include greenhouse gas limits erroneously interpreted or applied the law, was not supported by substantial evidence, or was unreasonable, arbitrary, or capricious. *Sierra Club v. Mosier*, No. 112,008 (Kan. Mar. 17, 2017).

Colorado Appellate Court Said Oil and Gas Commission Had Misinterpreted Its Statutory Authority in Denying Children's Rulemaking Petition

The Colorado Court of Appeals ruled that the Colorado Oil and Gas Conservation Commission (COGCC) had incorrectly concluded that a proposed rulemaking sought by six children was outside its statutory authority. The proposed rulemaking would have required COGCC to deny drilling permits unless "best available science demonstrates, and an independent, third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change." COGCC determined—and a district court agreed—that the rule was outside its statutory authority because it would have required readjustment of the balance between oil and gas production and public health, safety, and welfare required by the Oil and Gas Conservation Act. The Act declares that it is in the public interest to "[f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources." The appellate court said that "[i]nterpreting the phrase 'in a manner consistent with' as a balancing test disregard[ed] the plain meaning of the phrase," which "denotes more than a mere balancing." The court concluded that the statute provided that promotion of oil and gas development was in the public interest "when that development is completed subject to the protection of public health, safety, and welfare." The court said that other sections of the Act were not contrary to this interpretation and that the interpretation was supported by the "evolution" of legislation regulating the oil and gas industry. The appellate court also said the administrative record would not support an affirmance of COGCC's decision on other grounds such as the need for other COGCC priorities to take precedence over the proposed rulemaking or COGCC's reference to the proposed rule's impermissible delegation to third parties. One judge dissented from the majority's conclusion that the statutory scheme required consideration of public health, safety, and welfare "as a determinative factor," noting that the language relied on by the majority was in the Act's "legislative declaration," which the dissenting judge said should not have overridden language in other sections of the statute. *Martinez v. Colorado Oil & Gas Conservation Commission*, No. 16CA0564 (Colo. Ct. App. Mar. 23, 2017).

California Appellate Court Indicated CARB Would Have to Redo CEQA Review for Low Carbon Fuel Standard

The California Court of Appeal issued a tentative ruling in its review of the California Air Resources Board's (CARB) compliance with a 2013 ruling that CARB had not complied with the California Environmental Quality Act (CEQA) when it first adopted its Low Carbon Fuel Standard (LCFS). The court—which provided the tentative ruling to guide counsel at oral argument on March 23—indicated that CARB had failed to comply with its earlier directives concerning the CEQA review. The appellate court said that on remand CARB had misinterpreted the scope of the "project" under review in a way that was "not objectively reasonable" and had used an inappropriate baseline for nitrogen oxide (NO_x) emissions. (NO_x emissions associated with potential increased biodiesel use under the LCFS were the primary substantive concern of the court's 2013 ruling.) The appellate court said that CARB had resolved the question of

whether increased biodiesel usage would result in increase NO_x emissions in the affirmative but said that questions regarding whether the LCFS would cause increased biodiesel usage remained open and would have to be resolved on remand. The court indicated that the parties should assume that the order discharging the 2013 writ would be reversed, and that parties should be prepared to address the functional impacts of severing the biodiesel provisions from the remainder of the LCFS and what standards should remain "frozen in place" while CARB undertook the additional CEQA review. *POET, LLC v. California Air Resources Board*, No. F073340 (Cal. Ct. App. Mar. 20, 2017).

New York Court Ordered Exxon to Provide More Information About Tillerson's Secondary "Wayne Tracker" Email Account

A New York State Supreme Court reportedly ordered Exxon Mobil Corporation (Exxon) to submit affidavits by March 31 explaining its procedures for searching for and providing documents in response to a subpoena issued by the New York Attorney General in its investigation of potential violations of New York consumer, business, and investor-fraud laws in connection with Exxon's climate change disclosures. The attorney general's office notified the court on March 13 of its concerns regarding Exxon's good faith in responding to the subpoena and asked the court to schedule a compliance conference. The attorney general noted, among other things, that Exxon had produced only 700 documents associated with its management committee members, including former chairman and chief executive Rex Tillerson. The attorney general said that new information regarding a secondary email account used by Tillerson under the name "Wayne Tracker" lent "additional urgency" to the request that the court intervene. Exxon defended its response to the subpoena, noting that the Wayne Tracker email account was used by "a limited group of senior executives" for purposes of organizing and prioritizing emails. Exxon said that it had searched the Wayne Tracker account when complying with the subpoena, though the company acknowledged that the account had not been subject to the automatic litigation hold after receipt of the subpoena and that documents in certain timeframes had therefore not been available for review. Exxon indicated that other email custodians did not use secondary accounts. The court ordered Exxon to explain what documents might have been lost and to explain how they might have been lost. The court also directed Exxon to provide documents associated with its management committee by March 31. A written order was not available at the time of this writing. Massachusetts Attorney General Maura Healey also expressed concerns regarding the Wayne Tracker email account in a letter to Exxon's counsel in connection with her office's investigation. *People of the State of New York v. PricewaterhouseCoopers, LLP*, No. 451962/2016 (N.Y. Sup. Ct. Mar. 22, 2017).

NEW CASES, MOTIONS, AND NOTICES

Trump Administration Asked D.C. Circuit to Stay Clean Power Plan and NSPS Cases; Oral Arguments Cancelled in NSPS Case

Two days after President Trump signed the Promoting Energy Independence and Economic Growth executive order on March 28, the D.C. Circuit cancelled oral arguments scheduled for April 17 in the proceedings challenging EPA's new source performance standards (NSPS) for carbon dioxide emissions from new, modified, and reconstructed power plants. The executive

order directed EPA to review both the NSPS and the Clean Power Plan (CPP), which established carbon dioxide emission limits for existing power plants, and also indicated that the attorney general should request stays in the proceedings challenging the NSPS and CPP. On the same day that the president signed the order, the Department of Justice filed notices of the executive order, EPA's review of the regulations, and potential forthcoming rulemaking, and moved to hold the NSPS and CPP cases in abeyance. Respondent-intervenors indicated they would oppose the motions to hold the cases in abeyance. Earlier in the month, the D.C. Circuit assigned Judges Sri Srinivasan, Cornelia Pillard, and Karen Lecraft Henderson to hear the NSPS case. *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. notice of executive order and motion to hold case in abeyance Mar. 28, 2017; order removing oral argument from calendar Mar. 30, 2017); *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. notice of executive order and motion to hold case in abeyance Mar. 28, 2017).

Environmental Groups Challenged East Coast Pipeline Project in D.C. Circuit

Environmental organizations filed a petition for review in the D.C. Circuit Court of Appeals challenging the Federal Energy Regulatory Commission's (FERC's) approvals for the Atlantic Sunrise natural gas pipeline expansion project. The petitioners said that their request for rehearing had been denied because FERC had not acted on it within 30 days. The petitioners asserted that a tolling order issued by FERC staff was invalid. In the request for rehearing, the environmental groups had contended that the environmental review of the project, including its consideration of climate impacts, was deficient. *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir., filed Mar. 23, 2017).

Industry Groups, Alaska Native Organizations, and State of Alaska Urged Ninth Circuit Not to Reinstate Threatened Listing for Arctic Ringed Seal

Three briefs were filed defending an Alaska district court's decision vacating the listing of the Arctic ringed seal as a threatened species under the Endangered Species Act. Two of the briefs—filed by oil and gas trade groups and Alaska Native regional corporations and tribal governments—focused on the argument that the National Marine Fisheries Service (NMFS) had unlawfully relied on speculative and unreliable evidence that loss of sea ice would bring the ringed seal to the brink of extinction by the end of the century. These two briefs also asserted that the Ninth Circuit's decision in a similar case reinstating the listing of the bearded seal as threatened was not controlling. The third brief, which the State of Alaska submitted, argued that the NMFS had not adequately considered or responded to State agency comments and submissions. *Alaska Oil & Gas Association v. Pritzker*, Nos. 16-35380, 16-35382 (9th Cir. Mar. 23, 2017).

Lawsuit Filed Challenging Repeal of Federal Coal Leasing Moratorium

Seven environmental organizations and the Northern Cheyenne Tribe filed a lawsuit in the federal district court for the District of Montana challenging the Secretary of the Interior's decisions to repeal the moratorium on federal coal leasing and to abandon an ongoing programmatic environmental review of the coal leasing program. The Obama administration imposed the moratorium and commenced the review in January 2016. The plaintiffs alleged that

the Secretary of the Interior's actions violated the National Environmental Policy Act because they would allow new coal leasing to occur without a review of the leasing program's impacts, including climate impacts caused by the burning of coal. The complaint alleged that U.S. Bureau of Land Management (BLM) had completed the original programmatic environmental review of the leasing program in 1979 "at a time when the threat of climate change had not yet been fully realized or understood" and that BLM had never undertaken "a review of whether it can continue its coal leasing program and fulfill its climate commitments, as well as its land-stewardship obligations that are placed in jeopardy by a changing climate." The plaintiffs contended that the repeal of the moratorium was a major federal action requiring a programmatic environmental impact statement (EIS) or, alternatively, that new information about climate change since 1979 required the preparation of a supplemental programmatic EIS. *Citizens for Clean Energy v. U.S. Department of Interior*, No. 4:17-cv-00030 (D. Mont., filed Mar. 29, 2017).

Two Challenges to Keystone XL Pipeline Filed in Montana Federal Court

Two lawsuits were filed in the federal district court for the District of Montana to challenge the U.S. Department of State's issuance of a presidential permit for the Keystone XL Pipeline. The approval of the cross-border permit superseded Secretary of State John Kerry's denial of the permit in November 2015. The Obama administration had determined that the project was not in the national interest, citing climate change as well as other environmental and health impacts.

The first lawsuit was filed on March 27 by two groups representing indigenous peoples and conservation interests. The groups alleged that the pipeline project "would pose grave risks to the environment, including the climate, water resources and wildlife, and to human health and safety" and would violate the National Environmental Policy Act, the Endangered Species Act, the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act. Alleged shortcomings in the environmental review for the permit included narrowing the project's purpose and need to "unduly constrain[] the available options to those that are preemptively locked into fossil fuel dependence"; failure to "consider the feasible and environmentally beneficial alternatives of adopting aggressive renewable energy and energy efficiency measures to obviate the claimed need for more crude oil"; and failure to adequately disclose climate impacts. The complaint also alleged that the supplemental environmental impact statement was prepared by a consulting firm with an illegal conflict of interest. *Indigenous Environmental Network v. United States Department of State*, No. 4:17-cv-00029 (D. Mont., filed Mar. 27, 2017).

The second lawsuit was filed by six local and national environmental groups on March 30. The groups contended that the environmental impact statement (EIS) completed in 2014 was "inadequate at that time" and was "now woefully out of date." The complaint alleged that the Department of State had acknowledged that greenhouse gas emissions from the crude oil the pipeline would convey would be 5–20% higher than previously indicated but had denied the significance of this new information and concluded that the 2014 EIS still reflected expected impacts. Other alleged shortcomings in the environmental review included failure to analyze the combined greenhouse gas impacts of the Keystone XL and Alberta Clipper pipelines and failure to analyze viable clean energy alternatives. The complaint also alleged that the State Department had not discussed what impact the approval of the permit would have on global action to address

climate change. The plaintiffs asserted that the State Department had arbitrarily reversed its position on whether the pipeline project was in the national interest. The U.S. Bureau of Land Management (BLM), Secretary of the Interior, and Department of the Interior were included as defendants on the grounds that BLM would soon grant rights-of-way for the pipeline in reliance on the inadequate 2014 EIS. *Northern Plains Resource Council v. Shannon*, No. 4:17-cv-00031 (D. Mont., filed Mar. 30, 2017).

Bird Groups Challenged Installation of Wind Turbine on Shore of Lake Erie

Two bird conservation groups filed a lawsuit in the federal district court for the District of Columbia seeking to block the installation and operation of a wind turbine at an Ohio Air National Guard (ANG) training facility on the shore of Lake Erie. The plaintiffs alleged that the ANG was aware that the wind turbine would be located in a major bird migration corridor and in proximity to many bald eagle nests and that the turbine would kill birds, including birds protected under the Endangered Species Act (ESA). The plaintiffs said that federal officials nonetheless had failed to take required actions under the ESA, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the National Environmental Policy Act. The plaintiffs asserted that "bird-smart" wind energy was "an important part of the renewable energy solution to climate change" and that it required "careful site selection, effective operational and compensatory mitigation, and ongoing bird mortality monitoring." *American Bird Conservancy v. Disbrow*, No. 1:17-cv-00547-JDB (D.D.C., filed Mar. 27, 2017).

Federal Government and Industry Groups Asked Oregon District Court for Immediate Appeal of Denial of Motions to Dismiss in Young People's Climate Case; Plaintiffs Asked Court for Accelerated Schedule

In the action brought by young people in Oregon alleging violations of their constitutional rights arising from the federal government's actions and inaction leading to increased carbon dioxide emissions, the federal government and industry trade groups intervening on the federal government's behalf filed motions to certify for appeal the federal district court's order denying their motions to dismiss. The federal defendants' motion sought review of five questions that the defendants said were controlling questions of law for which "there is substantial ground for difference of opinion and for which an immediate appeal may materially advance the ultimate termination of the litigation." The questions involved whether plaintiffs had adequately alleged "invasion of a legally protected and judicially-cognizable interest in maintaining 'a climate system capable of sustaining human life,'" whether they had adequately pleaded the causation and redressability elements of standing, whether they had a "constitutionally-protected fundamental life, liberty, or property interest in a 'climate system' with a particular atmospheric level of CO_2" that federal agencies had a duty to protect even if taking action would contravene existing statutes and regulations, and whether they had a cognizable public trust doctrine claim. The intervenor-defendants—National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, and American Petroleum Institute—joined in requesting review of these questions and also sought review of the question of whether the political question doctrine barred the plaintiffs' claims. The federal defendants and intervenor-defendants both sought expedited review of their motions and to stay litigation. On the day the federal defendants filed their motions, the plaintiffs filed a status report in which they indicated that the intervenor-

defendants had not responded to the plaintiffs' request for substantive responses to the complaint's factual allegations. The plaintiffs also asked the court to issue an order requiring the federal defendants to provide climate change-related information from federal websites as it existed on January 19, 2017, to facilitate plaintiffs in conducting informal discovery. The plaintiffs said they had served document requests on the United States, the Executive Office of the President, and each of the intervenors in March, and argued that the intervenors should be subject to fact discovery. The plaintiffs also proposed dates for a scheduling order that would allow a trial to start on November 6, 2017, citing "the urgency of the climate crisis and in light of the well-publicized fact that the Federal Defendants are acting now to accelerate fossil fuel development." *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. plaintiffs' status report Mar. 7, 2017; federal government motion to certify order for interlocutory appeal, supporting memorandum, and motion to stay Mar. 7, 2017; intervenor-defendants' motion for certification and supporting memorandum Mar. 10, 2017).

Sierra Club Asked EPA Inspector General to Investigate Whether Pruitt Violated Agency's Scientific Integrity Policy

Sierra Club requested that the EPA inspector general conduct an inquiry into whether EPA Administrator Scott Pruitt's statements regarding climate change in a television interview on March 9 violated EPA's Scientific Integrity Policy. When asked whether he believed that "it's been proven that carbon dioxide is the primary control knob for climate," Pruitt answered "no" and said that he "would not agree that it's a primary contributor to the global warming that we see." Sierra Club asserted that Pruitt's statements violated principles of the Scientific Integrity Policy adopted by EPA in 2012 "[b]y stating that carbon dioxide is not a 'primary contributor' to global warming, remaining silent on the scientific consensus to the contrary, and exaggerating the disagreement among scientists." Sierra Club Letter to EPA Office of the Inspector General regarding Violation of Scientific Integrity Policy by Administrator Scott Pruitt (Mar. 14, 2017).

Petition Filed Seeking New Rulemaking to Undo 2009 Endangerment Finding

In February 2017, two organizations submitted a petition to EPA asking the agency to initiate a rulemaking proceeding on the subject of the public health and welfare impacts of greenhouse gases. The organizations contended that "evidence has continued to mount" contradicting EPA's 2009 endangerment finding that greenhouse gases threatened public health and welfare. In particular, the groups argued that there had been no statistically significant atmospheric warming despite continued increases in carbon dioxide levels; that recent changes in global temperatures were not unusual; and that accumulation and refinement of data demonstrated that the atmosphere was less sensitive to carbon dioxide forcing than predicted by climate models. The petition said that growing evidence showed EPA's regulations would have "no discernible climate impact" and that the rationale for the 2009 endangerment finding therefore required reexamination. Competitive Enterprise Inst. & Science & Envtl. Policy Project, Petition for Rulemaking on the Subject of Greenhouse Gases and Their Impact on Public Health and Welfare, in Connection with EPA's 2009 Endangerment Finding (Feb. 23, 2017).

Update #96 (March 6, 2017)

FEATURED CASE

Lawsuit Filed Seeking Temperature TMDL for Rivers in Pacific Northwest

Environmental and conservation groups and a trade association for commercial fishermen filed a lawsuit in the federal district court the Western District of Washington seeking a declaratory judgment that EPA violated the Clean Water Act by failing to issue a total maximum daily load (TMDL) for temperature pollution in the Columbia and Snake Rivers in Oregon and Washington. The plaintiffs also asked the court to order EPA to promptly prepare a temperature TMDL. The complaint alleged that multiple segments of the rivers were on Oregon's and Washington's Section 303(d) lists of impaired waters because they failed to meet temperature water quality criteria intended to protect salmon and steelhead spawning, rearing, and migration. The complaint also alleged that the high water temperatures—for which dams were largely responsible—were expected to worsen due to continuing climate change. The complaint asserted that EPA had agreed to issued a temperature TMDL in a 2000 agreement with Oregon and Washington but had subsequently failed to issue a final TMDL. The plaintiffs alleged that the states had "clearly and unambiguously expressed their intent not to prepare or submit" TMDLs, thereby triggering EPA's duty to issue the TMDL. The plaintiffs also said that failure to issue the temperature TMDL constituted unreasonable delay under the Administrative Procedure Act. *Columbia Riverkeeper v. Pruitt*, No. 2:17-cv-00289 (W.D. Wash., filed Feb. 23, 2017).

DECISIONS AND SETTLEMENTS

Ninth Circuit Denied Rehearing of Decision Upholding Threatened Status for Bearded Seal

The Ninth Circuit Court of Appeals denied rehearing en banc of its decision reinstating the listing of a distinct population segment of the Pacific bearded seal subspecies as threatened. The Ninth Circuit upheld the listing in October 2016, reversing an Alaska district court. The Ninth Circuit said that the National Marine Fisheries Service had reasonably relied on loss of sea ice cause by global climate change over the next 50 to 100 years as basis for the listing. *Alaska Oil & Gas Association v. Pritzker*, Nos. 14-35806 & 14-35811 (9th Cir. Feb. 22, 2017).

Federal Court Rejected Climate Change Cumulative Effects Argument in Decision Upholding Canada Lynx Incidental Take Permit

The federal district court for the District of Maine upheld an incidental take permit granted by the U.S. Fish and Wildlife Service (FWS) to the Maine Department of Inland Fisheries and Wildlife to exempt Maine from liability for incidental takes of Canada lynx resulting from state-regulated trapping programs. The court found that FWS's actions "were in keeping with" requirements of the Endangered Species Act and the National Environmental Policy Act (NEPA). The court rejected an argument that FWS should have prepared an environmental impact statement because the environmental assessment (EA) for the incidental take permit concluded that there would be significant cumulative effects, including from climate change. The court said this characterization of the EA's conclusion was not correct. *Friends of Animals v. Phifer*, No. 1:15-cv-00157 (D. Maine Feb. 15, 2017).

California Supreme Court Declined to Take Up CEQA Challenge to New Golden State Warriors Arena

The California Supreme Court denied a petition seeking review of a lower appellate court's decision upholding the review conducted under the California Environmental Quality Act (CEQA) for a development project in San Francisco that included a new arena for the National Basketball Association's Golden State Warriors. The California Court of Appeals had rejected challenges to analysis used to evaluate the project's impacts on climate change impacts. *Mission Bay Alliance v. Office of Community Investment & Infrastructure*, No. S239371 (Cal. Jan. 17, 2017).

Oklahoma Supreme Court Stayed Enforcement of Order Requiring Oklahoma Attorney General to Produce Documents Regarding Scott Pruitt's Industry Ties

The Oklahoma Supreme Court stayed enforcement of a trial court order that directed the Oklahoma attorney general to respond to requests under the Oklahoma Open Records Act (ORA) for records regarding alleged industry ties of former Oklahoma Attorney General Scott Pruitt. As Oklahoma attorney general, Pruitt challenged a number of EPA regulations, including the Clean Power Plan. The ORA lawsuit was filed after Pruitt's nomination as EPA administrator. The plaintiff was Center for Media and Democracy, which submitted seven records requests between January 2015 and January 2017. The attorney general's office acknowledged receipt of each request, but responded only to say that it continued to review the potentially responsive documents and was limited in its ability to respond because it had received so many other ORA requests. On February 16, 2017, the day before Pruitt's confirmation as EPA administrator, the trial court issued an order finding that for the documents requested in January 2015 there had been an "abject failure to provide prompt and reasonable access." The court ordered that those documents be produced by February 21. The trial court also ordered the Oklahoma attorney general to produce documents in response to requests made between November 2015 and August 2016 within 10 days. The Oklahoma attorney general produced documents responsive to the January 2015 request but asked the Oklahoma Supreme Court for an emergency stay of the remainder of the order, arguing that the trial court had in effect granted the plaintiff partial summary judgment sua sponte, without allowing the attorney general a meaningful opportunity to be heard. The Oklahoma Supreme Court did not comment on the merits of the attorney general's appeal in its order granting the stay. *Center for Media & Democracy v. Pruitt*, No. CV 2017-223 (Okla. Dist. Ct., filed Feb. 7, 2017; order Feb. 16, 2017); *Center for Media & Democracy v. Hunter*, No. 115,796 (Okla. emergency motion for stay Feb. 23, 2017; order Feb. 28, 2017).

South Coast Air Quality Management District and Southern California Gas Reached Settlement Over Aliso Canyon Natural Gas Leak

Southern California Gas Company (SoCalGas), the owner of the Aliso Canyon Natural Gas Storage Facility that experienced a natural gas leak beginning in October 2015, reached a settlement with the South Coast Air Quality Management District (SCAQMD) to resolve claims by SCAQMD related to the leak. SoCalGas agreed to pay the SCAQMD $8.5 million, including

$1 million to fully fund a health study, $5.650 million for annual emissions fees, $1.6 million for air quality monitoring costs incurred by SCAQMD, and $250,000 for legal fees and costs. One million dollars of the emissions fees were to fund a project in conjunction with a company that produces fuel from biosolids or, if an agreement could not be reached with that company, to fund another clear air technology project. *People of State of California ex rel. South Coast Air Quality Management District v. Southern California Gas Co.*, No. BC608322 (Cal. Super. Ct. Feb. 7, 2017).

Mistrial Followed Washington Trial Court's Rejection of Necessity Defense in Climate Protester Case

In January, a Washington trial court denied a request by a defendant to use the necessity defense against charges of burglary and criminal sabotage in connection with his breaking into a Trans Mountain oil pipeline facility and turning off a valve to shut off the pipeline. The court was reported to have said that the necessity defense standard required the threat posed "to have some immediacy, some imminence, more so than this particular threat and harm, which is climatic change, global warming, whatever." On February 1, the court declared a mistrial after a jury was unable to reach a verdict. The defendant said that he took the actions "because I believe that it is the obligation of every thinking person to find a way to stave off climate cataclysm, and there is no effective, legal alternative to personal direct action." The charges were refiled later in February. The defendant again pleaded not guilty on February 17, 2017. *People v. Ward*, No. __ (Wash. Super. Ct.).

NEW CASES, MOTIONS, AND NOTICES

North Carolina Withdrew from Litigation Challenging to Clean Power Plan

After the election of Democrat Roy Cooper as governor, the North Carolina Department of Environmental Quality moved to withdraw as a petitioner from the litigation challenging EPA's Clean Power Plan. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 23, 2017).

EPA Argued for Reversal of West Virginia District Court's Order Requiring Agency to Evaluate Clean Air Act Employment Impacts; District Court Partly Denied Request to Extend Compliance Deadlines

The United States Environmental Protection Agency (EPA) and would-be intervenor environmental groups filed their principal briefs in their Fourth Circuit appeals of a West Virginia district court's orders requiring EPA to evaluate the impact of Clean Air Act implementation and enforcement on employment, including in the coal industry. The court also had denied the environmental groups' motion to intervene as moot because the court had not granted the nationwide injunction on new air regulations that the plaintiffs sought and that the environmental groups wished to oppose. The district court ruled that EPA had failed to conduct such evaluations and had therefore violated Section 321(a) of the Clean Air Act. In its principal brief, EPA argued that the district court lacked jurisdiction because Section 321(a) did not impose a non-discretionary duty. EPA also argued that the coal company Murray Energy Corporation and its co-plaintiffs' (Murray Energy) failed to establish Article III standing and that

the court erred in finding that a collection of documents prepared by EPA "in the normal course of business" had not complied with Section 321(a). EPA also contended that the district court exceeded its remedial power by issuing a "detailed injunction" that imposed obligations on EPA that had no basis in the statute. The environmental groups argued in their brief that their motion to intervene was not moot because Murray Energy still had time to appeal the denial of the nationwide injunction and because EPA could abandon its opposition to the injunction. Oral argument in the Fourth Circuit was tentatively calendared for the May 9–11, 2017 argument session. In other developments, the district court only partially granted a joint motion to extend the deadlines for complying with its order. The parties had asked for extensions of between three and four months for submission of the "comprehensive filing detailing the actions the agency is taking to comply," the jobs study, and evidence of adoption of measures to ensure that loss and shifts in employment are continuously evaluated. The parties said additional time was necessary to allow EPA to brief new administration officials. The court granted a two-month extension to allow EPA additional time to complete the initial "comprehensive filing" requirement, but said that the change in administration did not warrant more time for preparation of the employment evaluation (which must be filed with the court by July 1, 2017) or for adoption of measures to continuous evaluate employment effects (evidence of which must be filed by the end of 2017). *Murray Energy Corp. v. Administrator of Environmental Protection Agency*, No. 16-2432 (4th Cir. EPA brief and intervenor brief Feb. 21, 2017); *Murray Energy Corp. v. McCabe*, No. 5:14-cv-00039 (N.D. W. Va. joint motion Feb. 16, 2017; order Feb. 23, 2017).

LNG Terminal Companies Defended Department of Energy Export Authorizations in D.C. Circuit

In two proceedings in which Sierra Club challenged the U.S. Department of Energy's (DOE's) authorizations of the export of liquefied natural gas (LNG) to non-free trade agreement nations, intervenor-respondents filed briefs defending DOE's compliance with NEPA and the Natural Gas Act (NGA). The intervenor-respondents were the companies that developed and operated the facilities in Corpus Christi, Texas, and in Cameron Parish, Louisiana, for which exports were authorized. The intervenor-respondents argued that neither DOE's NEPA analyses nor its public interest analyses under the NGA were arbitrary and capricious. They contended that DOE had reasonably concluded that "theoretical impacts" of future impacts of emissions, including greenhouse gas emissions, from increased gas production and coal consumption were not cognizable indirect effects under NEPA because they were "too tenuously connected to the export authorization." The intervenor-respondents further argued that DOE reasonably determined that Sierra Club's assertions regarding unequal distribution of economic benefits and environmental concerns did not overcome the presumption in favor of exports in the public interest analysis under the NGA. *Sierra Club v. United States Department of Energy*, No. 16-1252 (D.C. Cir. Feb. 13, 2017); *Sierra Club v. United States Department of Energy*, No. 16-1253 (D.C. Cir. Feb. 13, 2017).

Challenges Filed to Renewable Fuel Standards for 2017 and 2018 Biodiesel Standard

Seven petitions for review were filed in the D.C. Circuit Court of Appeals seeking review of EPA's final Renewable Fuel Standards for 2017 and Biomass-Based Diesel Volume for 2018. The lead case was brought by Coffeyville Resources Refining & Marketing, LLC and

Wynnewood Refining Company, LLC, companies that operate refineries in Kansas and Oklahoma. Other petitioners included other refinery and energy companies, American Petroleum Institute (API), American Fuel & Petrochemical Manufacturers, and National Biodiesel Board. In its petition, API said that the standards were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that they were in excess of statutory jurisdiction, authority, or limitations. API also said that EPA had not complied with procedural requirements. *Coffeyville Resources Refining & Marketing, LLC v. EPA*, Nos. 17-1044 et al. (D.C. Cir., filed Feb. 9, 2017).

Biofuel Trade Association Sought Rehearing of D.C. Circuit Decision Upholding EPA Authorization of Argentine Biofuel Producers' Renewable Fuel Standard Compliance Plan

National Biodiesel Board (NBB) asked the D.C. Circuit Court of Appeals for panel rehearing or rehearing en banc after the court dismissed NBB's challenge to an EPA decision allowing Argentine biofuel producers to use alternative recordkeeping procedures to show that their products sold in the U.S. complied with Renewable Fuel Standard requirements intended to ensure that biofuel production does not result in land use changes such as deforestation that would exacerbate greenhouse gas emissions. NBB asserted that the court had erroneously characterized EPA's decision as an "order" rather than as a "rule," contravening D.C. Circuit precedent, and that EPA's decision was therefore procedurally defective. NBB also said that the court had mischaracterized aspects of the alternative recordkeeping plan and NBB's challenges to the plan. *National Biodiesel Board v. EPA*, No. 15-1072 (D.C. Cir. Feb. 3, 2017).

FERC Said Environmental Review for Gas Pipeline Adequately Assessed Greenhouse Gas Impacts

The Federal Energy Regulatory Commission (FERC) defended its approval of natural gas pipeline projects in the southeastern United States. FERC argued that it satisfied the requirements of the National Environmental Policy Act, including by taking a hard look at potential impacts on climate change. FERC said that it had reasonably determined that the projects would not significantly contribute to greenhouse gas cumulative impacts. FERC's brief noted that power plants receiving gas from the pipeline projects would be using it to convert from burning coal, thereby reducing those plants' greenhouse gas emissions and potentially offsetting some regional emissions. FERC rejected the contention that it should have quantified downstream effects using a life-cycle analysis, which FERC had concluded would require it to engage in speculation. FERC said its approach to assessing climate change impacts was consistent with Council on Environmental Quality guidance and with D.C. Circuit precedent. *Sierra Club v. Federal Energy Regulatory Commission*, No. 16-1329 (D.C. Cir. Jan. 31, 2017).

FOIA Lawsuit Sought State Department Communications with Climate Change Activists About China

Energy & Environment Legal Institute filed an action in the federal district court for the District of Columbia to compel the United States Department of State to produce communications to and from State Department employees in response to a Freedom of Information Act (FOIA) request. The complaint alleged that the communications were related to an alleged effort to coordinate

climate change activists in developing alternative post-Obama diplomatic channels with China. The FOIA request was submitted to the agency on January 25, 2017. *Energy & Environment Legal Institute v. United States Department of State*, No. 1:17-cv-00340 (D.D.C., filed Feb. 27, 2017).

Summary Judgment Motions Filed in FOIA Dispute Over Records Related to NOAA Scientists' "Hiatus" Paper; Three Organizations Sought to File Amicus Brief

Competing motions for summary judgment were filed in the dispute in D.C. federal court over the disclosure under the Freedom of Information Act (FOIA) of National Oceanic and Atmospheric Administration (NOAA) scientists' records and communications concerning temperature data and a paper ultimately published in the journal *Science*. The paper "sought to properly account for the alleged 'hiatus,' " or slowing of global temperatures increases, between 1998 and 2012. NOAA argued that the records search it had conducted under agreed-upon parameters was reasonable and adequate, and that it had properly withheld certain records—(1) drafts of the paper; (2) internal deliberations, including email exchanges; and (3) formal and informal peer review materials—based on the deliberative process privilege of FOIA Exemption 5. NOAA said disclosure of such materials would "chill the open and frank exchange of comments and opinions that NOAA officials engage in." Judicial Watch, the organization seeking the documents, contended that the documents withheld based on Exemption 5 were not validly exempt because they were "factual, investigative, scientific research related to a study published in a non-agency, peer-review journal." Judicial Watch also asserted that information revealed by a former NOAA scientist to a British news blog in February 2017 had provided evidence of NOAA misconduct that should defeat any privilege. Judicial Watch also said that NOAA had not produced "reasonably segregable" non-exempt information. Three organizations—Climate Science Legal Defense Fund, American Meteorological Society, and Union of Concerned Scientists—filed a motion seeking permission to participate as amici curiae and filed a proposed brief. They asserted that they had a special interest in the case because of their commitment to "ensuring robust, independent scientific research into vitally important subjects like climate change." The organizations expressed concern that disclosure of the records sought by Judicial Watch would "significantly damage government scientists' ability and willingness to conduct research into politically charged subjects like climate change." The organizations also told the court that they had relevant expertise and familiarity with the issues presented by the case that could benefit the court's consideration of the case. Judicial Watch opposed their participation, arguing that the "perspective" offered by the organizations was merely a "veiled attack" on Judicial Watch and its motives for requesting the documents, and that the proposed brief did not provide additional analysis that would benefit the court. *Judicial Watch, Inc. v. United States Department of Commerce*, No. 1:15-cv-02088 (D.D.C. federal motion for summary judgment Dec. 15, 2016; amicus motion and brief Jan. 27, 2017; plaintiff response to amicus motion Feb. 10, 2017; cross-motion for summary judgment Feb. 22, 2017).

Power Producers Challenged Illinois Law That Created Zero Emissions Credits for Nuclear Power Facilities

A trade association representing independent power producers and four power producers filed a lawsuit in Illinois federal court challenging an Illinois law that created a Zero Emissions Credit

(ZECs) program allegedly to "prop up … two uneconomic nuclear power plants" in the state. The law, known as the Future Energy Jobs Act (FEJA), provides that certain zero-carbon resources (which the complaint says are limited to the two failing nuclear plants) will receive ZEC payments in an amount tied to the social cost of carbon and wholesale energy prices. The plaintiffs claimed that FEJA intruded on the Federal Energy Regulatory Commission's exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce under the Federal Power Act. The plaintiffs contended that FEJA therefore was preempted on both field preemption and conflict preemption grounds. The plaintiffs also asserted that the ZEC program was invalid under the dormant Commerce Clause. They stated that "[a]though the reduction of carbon emissions is important, this can be achieved much more effectively by means that would neither discriminate against interstate or international commerce nor frustrate the progress competitive markets have been delivering in the form of environmental benefits." *Electric Power Supply Association v. Star*, No. 17-cv-01164 (N.D. Ill., filed Feb. 14, 2017).

Environmental Groups Asked California Federal Court to Grant or Deny Petition Regarding Permits for New Generators at Gas Plant

Center for Biological Diversity, Association of Irritated Residents, Sierra Club, and Climate Change Law Foundation filed a complaint in the federal district court for the Northern District of California seeking to compel EPA to respond to a petition submitted in July 2016 requesting that EPA object to a proposed Title V permit that authorized construction of eight new natural gas-fired steam generators at a natural gas plant in the McKittrick Oil Field in California. The plaintiffs alleged that the project would "exacerbate the poor air quality and respiratory illnesses that plague San Joaquin Valley communities already unfairly burdened with industrial pollution" and that the authorized activities would contribute to climate change. *Center for Biological Diversity v. United States Environmental Protection Agency*, No. 3:17-cv-720 (N.D. Cal., filed Feb. 13, 2017).

Consumer, Environmental, and Labor Groups Challenged Executive Order on Reducing Regulation

Public Citizen, Natural Resources Defense Council, and an international labor union filed a complaint in the federal district court for the District of Columbia challenging President Trump's Executive Order on "Reducing Regulation and Controlling Regulatory Costs" as well as interim guidance for the order's implementation. The order directed federal agencies to (1) ensure that "incremental costs" of all new regulations finalized in fiscal year 2017, including repealed regulations, are no greater than zero, and (2) identify two regulations for potential repeal for every new regulation that is proposed. The complaint alleged that the order was unconstitutional in two ways. First, the plaintiffs alleged that the order violated separation of powers by asking agencies to consider factors not specified in or inconsistent with their governing statutes when making decisions about the promulgation or repeal of regulations. Second, the complaint alleged that the order violated the Constitution's Take Care Clause, which establishes the President's core executive duty to "take care that the law shall be faithfully executed." The complaint also alleged that the order required agencies to act beyond their legal power (or ultra vires) and violated the Administrative Procedure Act. The plaintiffs enumerated examples of pending regulations that the order would affect, including vehicle safety standards and standards to

protect the health and safety of miners. On climate change, the complaint noted that the Executive Order would run afoul of specific statutory requirements in the Clean Air Act, such as the definition of the "best system of emission reduction" in Section 111, the provision used in the Clean Power Plan, which requires that EPA consider not only cost but also environmental impacts and energy requirements. *Public Citizen, Inc. v. Trump*, No. 1:17-cv-00253 (D.D.C., filed Feb. 8, 2017).

Spokane Residents and Workers Challenged Federal Law Preempting Local Bans on Rail Transportation of Fossil Fuels

A physician from Spokane, Washington, and six other individuals who live or work in Spokane filed a lawsuit against the United States alleging that the Interstate Commerce Commission Termination Act of 1995 (ICCTA) was unconstitutional to the extent that it preempted local prohibitions on rail transportation of fossil fuels. The plaintiffs alleged that the Spokane City Council had removed from the ballot for November 2016 an initiative that would have banned rail transportation of fossil fuels through the city. The plaintiffs alleged that local officials removed the initiative because the ICCTA would have preempted such a law. The plaintiffs asserted that such preemption violated their "federally-guaranteed constitutional right to a liveable climate" as well as their right to constitutional right to local community self-government. The plaintiffs also alleged that ICCTA's preemption provisions violated their rights under the Washington constitution to local community self-government. *Holmquist v. United States*, No. 2:17-cv-00046 (E.D. Wash., filed Jan. 31, 2017).

Center for Biological Diversity Sent Notice of Violations, Intent to Sue in Connection with Gas Pipeline Leak Off Alaska Coast

The Center for Biological Diversity submitted a notice of violations to EPA in connection with an ongoing natural gas leak from a pipeline in the Cook Inlet off the Alaska coast. The Center asserted that EPA was required to take action to enforce violations of the Clean Water Act and Clean Air Act. The Center also said that its letter served a notice of intent to sue the pipeline's owner under the Clean Water Act, Clean Air Act, Endanged Species Act (due to the presence of the endangered Cook Inlet beluga whale), and Pipeline Safety Act. The Center asserted that natural gas was bubbling to the surface and polluting the atmosphere in violation of Section 112(r)(1) of the Clean Air Act and noted that the primary component of the natural gas, methane, was a potent greenhouse gas. Center for Biological Diversity, Notice of Violations for Hilcorp's Pipeline Leak in the Cook Inlet, Alaska (Feb. 27, 2017).

Sierra Club Told EPA It Would Sue Over Failure to Report on Renewable Fuel Standard's Environmental and Conservation Impacts

Sierra Club submitted a notice of intent to file a Clean Air Act citizen suit against EPA for failing to report to Congress triennially on the environmental and resource conservation impacts of the Renewable Fuel Standard (RFS) program. Sierra Club asserted that EPA also had failed to comply with a requirement that it complete an "anti-backsliding" study to determine whether RFS volumes adversely impact air quality. Sierra Club, Notice of Intent to File Suit for Failure to Conduct Triennial Reports to Congress on Environmental and Conservation Impacts of the

Renewable Fuel Standard and Failure to Conduct Anti-Backsliding Analysis or Determine if Mitigation Measures are Necessary (Feb. 23, 2017).

Automobile Manufacturers Requested Withdrawal of EPA Determination on Greenhouse Gas Standards for Model Year 2022-2025 Light-Duty Vehicles

On February 21, 2017, the Alliance of Automobile Manufacturers (AAM) submitted a letter to EPA Administrator G. Scott Pruitt requesting that EPA withdraw the Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation. EPA issued the final determination a week before President Obama left office. AAM asked that EPA resume the Midterm Evaluation of the standards to rectify procedural and substantive defects, including failure to provide opportunity for meaningful notice and comment and failure to harmonize the greenhouse gas standards with the National Highway Traffic Safety Administration fuel economy standards. AAM also asserted that the final determination was "riddled with indefensible assumptions, inadequate analysis, and a failure to engage with contrary evidence" and that EPA had not received certain "highly relevant" studies and data because they were still pending. Letter from Alliance of Automobile Manufacturers to Scott Pruitt (Feb. 21, 2017).

Environmental and Community Groups Seek FERC Rehearing on Atlantic Sunrise Pipeline Project

Two requests for rehearing filed with FERC asked the Commission to withdraw its order authorizing the Atlantic Sunrise natural gas pipeline expansion project and the final environmental impact statement for the project and to redo the environmental analysis and public convenience and necessity analysis in compliance with NEPA and the NGA. The Atlantic Sunrise project included approximately 200 miles of new pipeline, mostly in Pennsylvania, and related infrastructure in Pennsylvania and at other locations on the East Coast. One request for rehearing was filed by seven environmental and community organizations led by Allegheny Defense Project; the other request was filed by Accokeek, Mattawoman, Piscataway Creeks Communities Council Inc. The requests enumerated numerous alleged deficits in the environmental review, including a "fatally flawed" cumulative impacts analysis that "all but ignor[ed] the substantial impacts of Marcellus and Utica shale gas development and climate change" and a failure to adequately consider the project's downstream impacts on greenhouse gas emissions and climate change. *In re Transcontinental Gas Pipe Line Company, LLC*, Docket No. CP15-138 (FERC Allegheny Defense Project et al. request for rehearing Feb. 10, 2017; Accokeek, Mattawoman, Piscataway Creeks Communities Council Inc. request for rehearing Feb. 24, 2017).

Update #95 (February 6, 2017)

FEATURED CASE

Massachusetts State Court Said Exxon Must Comply with Attorney General's Civil Investigative Demand Seeking Climate Change Information

A Massachusetts Superior Court denied ExxonMobil Corporation's (Exxon's) motion to set aside a civil investigative demand (CID) issued by the Massachusetts attorney general seeking information on Exxon's study of carbon dioxide emissions and their effect on climate change. The court also denied Exxon's request that it stay its adjudication of the motion pending the resolution of the federal lawsuit brought by Exxon in Texas against the attorney general in which Exxon sought to bar enforcement of the CID. The Superior Court said that Massachusetts state courts would be more familiar with the state consumer protection act pursuant to which the CID was issued and further noted that the statute directed challenges to CID be brought in state court. The court concluded that it had personal jurisdiction over Exxon, finding that Exxon's due process rights were not offended given its establishment of "minimum contacts" in Massachusetts. The court also said that the state consumer protection act would provide "hollow protection against non-resident defendants" if the court did not assert jurisdiction. The court also found that Exxon had not met its burden of showing that the attorney general acted arbitrarily and capriciously in issuing the CID, indicating her concerns regarding potential misrepresentations to Massachusetts consumers justified the CID. The court therefore was not swayed by Exxon's argument that it was being subjected to viewpoint discrimination for its views on global warming. The court also rejected Exxon's arguments that the CID lacked the requisite specificity and was unreasonably burdensome. In addition, the court denied Exxon's request for disqualification of the attorney general and appointment of an independent investigator. The court noted that the attorney general's public remarks at a March 2016 press conference with other attorneys general did not evidence actionable bias and that her comments did nothing more than explain her reasons for the investigation to the consumers she represents. The court granted the attorney general's request to compel Exxon to respond to the CID. *In re Civil Investigative Demand No. 2016-EPD-36*, No. 2016-1888-F (Mass. Super. Ct. Jan. 11, 2017).

DECISIONS AND SETTLEMENTS

Ninth Circuit Affirmed Dismissal of Constitutional Challenge to Automatic Enrollment Procedures for Seller of Cleaner Power

In an unpublished memorandum, the Ninth Circuit Court of Appeals affirmed dismissal of an electricity customer's constitutional claims concerning Sonoma Clean Power Authority's (SCPA) procedure for automatically enrolling customers. SCPA is a not-for-profit public agency run by municipalities in northern California; it says it provides "cleaner electricity at a competitive rates from sources like solar, wind, geothermal and hydropower." The Ninth Circuit said the customer's First Amendment claims for compelled contribution to speech and compelled association or disassociation failed because "he has not been compelled to do anything." The Ninth Circuit said that a Fourteenth Amendment economic substantive due process claim would fail even if the automatic enrollment procedures constituted a deprivation of the plaintiff's liberty interest in contracting with the other electricity service provider because the government's goals in establishing the regulatory framework in which SCPA operated—including reducing greenhouse gas emissions and reducing energy consumption—were legitimate legislative purposes. *Schmid v. Sonoma Clean Power*, No. 14-17288 (9th Cir. Jan. 23, 2017).

D.C. Circuit Upheld EPA Authorization of Argentine Biofuel Producers' Use of Alternative Plan for Complying with Renewable Fuel Land Use Requirements

The D.C. Circuit Court of Appeals dismissed a challenge by a U.S. biofuel industry trade association to a U.S. Environmental Protection Agency (EPA) decision allowing Argentine biofuel producers to use alternative recordkeeping procedures to show that their products sold in the U.S. complied with Renewable Fuel Standard requirements intended to ensure that biofuel production does not result in land use changes such as deforestation that would exacerbate greenhouse gas emissions. The D.C. Circuit said that the trade association's challenge of the 2010 regulations establishing the alternative recordkeeping program was untimely. The D.C. Circuit also concluded that EPA's authorization of the alternative procedures "comports with agency regulations and rests upon the kind of highly technical judgments to which we owe agencies great deference." *National Biodiesel Board v. EPA*, No. 15-1072 (D.C. Cir. Dec. 20, 2016).

Texas Federal Court Halted TransCanada's Challenge to Denial of Keystone Pipeline Permit After President Trump Invited New Application

After President Trump issued a presidential memorandum inviting TransCanada Keystone Pipeline, LP to re-apply for State Department approval of the Keystone XL pipeline, the federal district court for the Southern District of Texas abated TransCanada's challenge to the Obama administration's denial in November 2015 of a presidential permit for the pipeline's cross-border facilities. The presidential memorandum directed the State Department to reach a final decision on the permit within 60 days of TransCanada's resubmission of its application. TransCanada resubmitted the application on January 26, 2017. Finding that the State Department's decision could render TransCanada's claims moot, the court abated the action for 90 days (until May 1, 2017) to allow TransCanada time to obtain the State Department's decision. The court indicated it would reinstate the case after the 90 days expired and adjudge any remaining issues. *TransCanada Keystone Pipeline, LP v. Kerry*, No. 4:16-cv-00036 (S.D. Tex. Jan. 30, 2017).

Oregon Federal Court Said That Secretary of State-Designate Tillerson Was Not Required to Appear for Deposition in Young People's Climate Lawsuit

In the lawsuit brought by young people asserting that the federal government's actions and inaction led to increased carbon dioxide emissions and violated their constitutional rights, the federal district court for the District of Oregon denied the plaintiffs' motion to compel the intervenor-defendant trade groups to make Rex Tillerson available for a deposition. Tillerson, now Secretary of State, is the former chairman and chief executive officer of Exxon Mobil Corporation (Exxon); at the time the plaintiffs served a notice of deposition for Tillerson, he was also a member of the Executive Committee of the Board of Directors of defendant-intervenor American Petroleum Institute (API). Tillerson left Exxon and the API board after President Trump nominated him as Secretary of State. The court said the intervenor-defendants—API, National Association of Manufacturers, and American Fuel & Petrochemical Manufacturers—were not obligated to produce Tillerson for a deposition because he was no longer affiliated with them. In other developments, the federal defendants filed their answer a week before President Obama left office. The answer included admissions regarding factual allegations of climate

change's impacts, but the federal defendants denied that they had caused climate change or specific climate change impacts such as increased temperatures, drought conditions, warmer water temperatures, rising sea levels, and ocean acidification. The intervenor-defendants filed their answer a month earlier than the federal defendants. The intervenors' answer denied most of the complaint's factual allegations, including those related to climate change impacts, on the ground that the intervenors lacked sufficient information to admit or deny them. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. defendant-intervenors answer Dec. 15, 2016; federal defendants' answer Jan. 13; order denying motion to compel Jan. 27, 2017).

Montana Federal Court Kept NEPA Challenges to Wyoming and Montana Resource Management Plans in One Court

The federal district court for the District of Montana declined to sever National Environmental Policy Act (NEPA) claims concerning a resource management plan (RMP) for a field office in Wyoming from an action that also concerned an RMP for a Montana field office. The court said that while there was "great benefit in local controversies being decided at home," other factors tilted slightly in favor of considering the claims together, citing the deference owed to plaintiffs' choice of forum. The plaintiffs—a collection of environmental groups—contended that the United States Bureau of Land Management's NEPA review for the RMPs was insufficient because it failed to consider reasonable alternatives that would allow less coal leasing, failed to consider an alternative requiring reasonable and cost-effective mitigation of methane emissions from oil and gas development, failed to address indirect impacts from downstream combustion of fossil fuels, omitted discussion of the "breadth and scale" of greenhouse gas emissions, failed to take a hard look at methane pollution, and failed to consider cumulative air impacts. *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, No. 4:16-cv-00021-BMM (D. Mont. Jan. 25, 2017).

Wyoming Federal Court Expressed Concerns About BLM Methane Rule But Denied Preliminary Injunction

On January 16, 2017, a Wyoming federal court declined to issue a preliminary injunction staying the effective date of the United States Bureau of Land Management's (BLM's) final rule related to the reduction of waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on federal and Indian lands. The rule went into effect on January 17, 2017. It has been identified by congressional Republicans as one of the regulations they would like to use the Congressional Review Act to overturn. The court found that the petitioners had not shown a "clear and unequivocal right to relief" because the court was unable to conclude that the rule's provisions "lack a legitimate, independent waste prevention purpose or are otherwise so inconsistent with the [Clean Air Act] as to exceed BLM's authority and usurp that of the EPA, states, and tribes." Though the court questioned whether the "social cost of methane" was an appropriate factor to consider in issuing a "resource conservation rule" pursuant to the Mineral Leasing Act, the court said it could not conclude "at this point" that the rule was arbitrary and capricious. The court also found that the petitioners had not established that irreparable injury was likely. The court noted, however, that a preliminary injunction would not necessarily have been adverse to the public's interest in resource conservation and air quality since BLM already had other waste prevention regulations in place and a preliminary injunction would "sidestep the

costly implementation of duplicative and potentially unlawful regulations." *Wyoming v. United States Department of the Interior*, Nos. 2:16-CV-0285-SWS, 2:16-CV-0280-SWS (D. Wyo. Jan. 16, 2017).

New Mexico Federal Court Allowed Lawsuit Seeking Quarterly Federal Mineral Lease Sales to Proceed, Denied Environmental Groups' Motion to Intervene

The federal district court for the District of New Mexico denied a motion to dismiss a lawsuit brought by Western Energy Alliance (WEA) claiming that BLM violated the Mineral Leasing Act by failing to hold lease sales at least quarterly. The court rejected the federal defendants' arguments that WEA had not met the requirements for associational standing, had not shown injury-in-fact, and had alleged only injuries that were not traceable or redressable. The court also concluded that WEA's action was not an impermissible programmatic challenge. In a separate opinion, the court denied environmental groups' motion to intervene, saying that the groups had not shown that their interests would be impeded by the litigation or that their interests could not be adequately represented by existing parties. The groups filed a notice of appeal on January 17, 2017. *Western Energy Alliance v. Jewell*, No. 1:16-cv-00912 (D.N.M. mem. op. & order on motion to dismiss and mem. op. & order on motion to intervene Jan. 13, 2017; notice of appeal Jan. 17, 2017).

West Virginia Federal Court Ordered EPA to Complete Clean Air Act Jobs Analysis by July; Murray Energy Sought $3.9 Million in Fees

The federal district court for the Northern District of West Virginia issued its final order in *Murray Energy Corporation v. McCarthy*, the lawsuit in which Murray Energy and affiliated companies successfully sought to compel EPA to undertake evaluations of the Clean Air Act's employment impacts. After the court ruled in October 2016 that EPA had not fulfilled its mandatory duty to undertake such evaluations, EPA proposed a plan under which it would begin by undertaking an approximately two-year consultation with its Science Advisory Board. The court's final order called EPA's plan "wholly insufficient, unacceptable, and unnecessary" and said that the plan "evidence[d] the continued hostility on the part of the EPA to acceptance of the mission established by Congress" in Section 321(a) of the Clean Air Act. The court ordered EPA to submit an evaluation of the coal industry and other entities affected by Clean Air Act regulations no later than July 1, 2017. The court directed that the evaluation include specific components, including identification of facilities at risk of closing or reducing their workforce, information about the number of employees potentially affected and communities impacted, identification of coal mines or coal-fired power generators that had closed or reduced employment since January 2009 and analysis of whether administration or enforcement of the Clean Air Act contributed to the closures and workforce reductions, and identification of subpopulations at particular risk of being affected. The court also directed EPA to submit evidence by December 31, 2017 that the Agency had adopted measures to continuously evaluate the loss and shifts in employment caused by implementation of the Clean Air Act. The court concluded, however, that it lacked jurisdiction to grant the plaintiffs' request that it bar EPA from proposing or finalizing regulations that affect the coal industry until it complied with the court's orders. Because it had denied this relief, the court also denied as moot a motion to intervene by several West Virginia-based environmental organizations that had sought to resist

an injunction on EPA rulemaking. The groups filed notice that they would appeal the denial of their motion. Two weeks after the court's final order, Murray Energy filed a motion seeking approximately $3.9 million in fees under Clean Air Act Section 304(d). The fees sought included expert witness fees, attorney fees, and other disbursements. *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39 (N.D. W. Va. final order Jan. 11, 2017; order denying intervention Jan. 17, 2017; motion for fees Jan. 25, 2017).

Federal Magistrate Recommended Dismissal of Challenge to Bull Trout Recovery Plan, Including Claims of Failure to Address Climate Change

A federal magistrate judge in the District of Oregon recommended that a citizen suit challenging the Recovery Plan for the Coterminous United States Population of Bull Trout be dismissed. The magistrate judge agreed with the federal defendants that the challenged aspects of the plan, including the alleged failure to address the effects of climate change on cold water habitat, were discretionary and therefore not subject to challenge under the Endangered Species Act's citizen suit provision. *Friends of the Wild Swan v. Thorson*, No. 3:16-cv-00681-AC (D. Or. Jan. 5, 2017).

Connecticut Supreme Court Said State Energy Strategy Did Not Require Environmental Review

The Connecticut Supreme Court affirmed a trial court's ruling that the Connecticut Environmental Policy Act (CEPA) did not require preparation of an environmental impact evaluation (EIE) for a comprehensive energy strategy issued by the Department of Energy and Environmental Protection in 2013. A trade association of energy marketers that sold gasoline and heating fuel to residential and commercial customers had argued that the strategy—which provided for increased capacity of natural gas infrastructure in the state—would exacerbate global warming by increasing the amount of methane-containing natural gas into the atmosphere and was subject to CEPA. The Supreme Court said that the strategy was not an "action which may significantly affect the environment" requiring an EIE because private entities, not state agencies, would undertake and fund the activities, including construction of new gas pipelines, that allegedly would have a major impact on the environment. *Connecticut Energy Marketers Association v. Department of Energy & Environmental Protection*, No. SC 19620 (Conn. Dec. 29, 2016).

New York Court Rejected Pipeline Protesters' Justification Defense

A New York Justice Court found nine protesters who blocked the driveway of a parking lot used by workers constructing a natural gas pipeline project guilty of disorderly conduct. The court rejected the protesters' "justification" defense, finding that their conduct was not "necessary" to avoid "imminent" injury to the public. The court said that the defendants—who said they believed the pipeline project was dangerous and/or harmful to the environment, with most of them citing climate change—had based their defense "primarily on subjective and speculative personal views and opinions." The court also rejected a First Amendment defense, saying that the defendants were offered opportunities to continue their protests "if only they would move a few feet either to the north or to the south along the sidewalk rather than blocking vehicular

traffic in and out of the driveways." *People of New York v. Bucci*, No. 15110186 (N.Y. Justice Ct. Dec. 1, 2016).

Connecticut Court Cited Adaptation to Increased Flooding, Climate Change as Valid Rationales for Zoning Change

A Connecticut state court rejected an argument that the City of Stamford Zoning Board did not include sufficient reasons for changes to the definition of building height in zoning regulations for areas within the city's Coastal Boundary. The court noted that a City staff report contained "a clear rationale for the appropriateness, indeed necessity, for the regulation of the elevation of residential buildings in order to protect against coastal flooding." The report said that the zoning amendment was an "appropriate and measured response to climate change and expected increases in coastal flooding." The court said such a purpose was "reasonably and rationally related to one of the principal purposes of zoning." *Murphy v. Zoning Board of City of Stamford*, No. FSTCV145014294S (Conn. Super. Ct. Nov. 16, 2016).

EPA Denied Rulemaking Petition Seeking Water Quality Criteria to Address Ocean Acidification

In December 2016, EPA denied a 2013 rulemaking petition from the Center for Biological Diversity (CBD) asking EPA to promulgate water quality criteria for ocean acidification. CBD also asked EPA to issue guidance that included information on factors necessary to prevent dangerous changes in seawater chemistry caused by anthropogenic carbon dioxide emissions. EPA declined to take these actions, saying that it had decided to prioritize other actions that it believed would have greater utility in addressing ocean acidification, including allocating resources to states and territories to assist them in understanding and mitigating ocean acidification in near-shore coastal and estuarine waters. EPA Letter to Center for Biological Diversity (Dec. 14, 2016).

NEW CASES, MOTIONS, AND NOTICES

Environmental Groups Argued Against Certiorari for Polar Bear Critical Habitat Designation

Environmental groups filed a brief opposing petitions seeking U.S. Supreme Court review of the Ninth Circuit's decision upholding the designation of critical habitat for polar bears. The groups defended the designation's compliance with the Endangered Species Act and said that the petitioners had made policy arguments that misconstrued or ignored facts, including facts related to the need for a large area to be designated. *State of Alaska v. Jewell*, No. 16-596 (U.S. Jan. 6, 2017).

Department of Energy Defended Authorization of LNG Exports from Gulf Coast Facilities

In two briefs submitted to the D.C. Circuit Court of Appeals, the U.S. Department of Energy (DOE) defended its review of the potential environmental impacts of the export of liquefied natural gas (LNG) from terminals in Louisiana and Texas. In both briefs, DOE argued that it had

taken a hard look at the impacts of export-induced gas production, induced domestic coal consumption, and the climate impacts of induced gas production. DOE also said that it had complied with the Natural Gas Act and that its conclusion that LNG export's benefits would outweigh potential environmental harms was reasonable. *Sierra Club v. United States Department of Energy*, No. 16-1252 (D.C. Cir. Jan. 30, 2017). *Sierra Club v. United States Department of Energy*, No. 16-1253 (D.C. Cir. Jan. 30, 2017).

Clean Power Plan Opponents Launched Challenges to EPA's Denial of Requests for Reconsideration

Twenty states and state agencies, as well as utilities, utility trade groups, the National Association of Home Builders, and the coal company Murray Energy Corporation, filed petitions for review in the D.C. Circuit of Appeals to challenge EPA's denial of petitions for reconsideration of the Clean Power Plan regulations. Notice of EPA's denial of the petitions was published in the January 17, 2017 issue of the *Federal Register*. The petitioners said that they would show that the final regulations were in excess of EPA's authority and were arbitrary, capricious, an abuse of discretion, and not in accordance with law. On January 27, 2017, a group of 17 states and seven municipalities moved to intervene as respondents. *West Virginia v. EPA*, Nos. 17-1014, 17-1015, 17-1018, 17-1019, 17-1020, 17-1022, 17-1023, 17-1031 et al. (D.C. Cir.).

Final Briefs Filed in Challenges to Greenhouse Gas Standards for New Power Plants

Opponents of EPA's new source performance standards (NSPS) for greenhouse gas emissions from fossil fuel-fired power plants filed their reply briefs in the D.C. Circuit Court of Appeals. Oral argument was scheduled for April 17, 2017. The group of 24 states opposing the NSPS argued that EPA had misstated the legal standard for determining whether the "best system of emissions reduction" (BSER) was adequately demonstrated and that the record did not support EPA's determination that the BSER was adequately demonstrated when the correct legal standard was applied. The states also said that any ambiguity should be resolved in the states' favor because energy policy was an area of traditional state concern and that EPA had failed to reasonably consider costs and benefits had failed to make required findings. In a separate brief, North Dakota reiterated its argument that EPA's failure to separately regulate power plants fired by lignite coal made the standards invalid. Non-state petitioners argued that the BSER was not adequately demonstrated, that the BSER improperly relied on off-site unregulated parties, and that EPA's "achievability" analysis was flawed because it did not examine what coal-fired steam units could achieve. The non-state petitioners also argued that requiring coal-fired plants but not gas-fired plants to use carbon capture and sequestration constituted unlawful disparate treatment. *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. Jan. 23, 2017).

Trade Associations Challenged Refrigerant Management Requirements

Two trade associations filed petitions for review challenging EPA's updates to refrigerant management requirements under the Clean Air Act. The regulations were published in the *Federal Register* on November 18, 2016 and went into effect on January 1, 2017. EPA said that the updates—which include strengthened leak repair requirements and recordkeeping

requirements for the disposal of appliances containing more than five and less than 50 pounds of refrigerant—would result in reduced emissions of ozone-depleting substances and gases with high global warming potentials. *National Environmental Development Association's Clean Air Project v. EPA*, No. 17-1016 (D.C. Cir., filed Jan. 17, 2017); *Air Permitting Forum v. EPA*, No. 17-1017 (D.C. Cir., filed Jan. 17, 2017).

D.C. Circuit to Consider Challenges to Consider EPA Methane Standards for Oil and Gas Sector Alongside Earlier Challenges to 2012 Standard

The D.C. Circuit Court of Appeals granted EPA's request that it consolidate challenges to EPA's 2016 methane standards for the oil and gas sector with earlier challenges to the 2012 new source performance standards (NSPS) for the sector and a 2014 rule in response to petitions for reconsideration of the 2012 NSPS. The court said that it would not bifurcate the issues to be addressed in the proceedings. The court severed and placed in a new docket (No. 16-1425) environmental groups' challenge to the 2012 NSPS, which the groups filed to argue that EPA was required to determine whether methane regulation was appropriate and to move forward with methane standards for the oil and gas sector under Section 111 of the Clean Air Act. The groups had asked that their petition be severed since it could be rendered moot by a decision upholding the 2016 methane standards but said that their claims could become relevant again if the court struck down the methane standards. *American Petroleum Institute v. EPA*, Nos. 13-1108 et al. (D.C. Cir. Jan. 4, 2017).

Challenges Filed to Greenhouse Gas-Fuel Efficiency Standards for Medium- and Heavy-Duty Vehicles

In December 2016, Truck Trailer Manufacturers Association, Inc. (TTMA) and the Racing Enthusiasts and Suppliers Coalition filed petitions for review in the D.C. Circuit Court of Appeals challenging EPA and the National Highway Traffic Safety Administration's greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles. The TTMA said that it sought review on the grounds that the regulations exceeded respondents' authority, were contrary to the Clean Air Act and Energy Independence and Security Act, and were arbitrary, capricious, and otherwise contrary to law. The TTMA asked the court to set aside the provisions of the standards that were applicable to trailers. In January 2017, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Center for Biological Diversity, and Union of Concerned Scientists moved to intervene on EPA's behalf, arguing that they had a "demonstrable interest" in defending the standards on behalf of their members, to whom the standards' health, environmental, and economic benefits would accrue. *Truck Trailer Manufacturers Association, Inc. v. EPA*, No. 16-1430 (filed Dec. 22, 2016); *Racing Enthusiasts and Suppliers Coalition v. EPA*, No. 16-1447 (D.C. Cir., filed Dec. 27, 2016).

Briefing Completed on New York's Motion to Dismiss Challenge to Its Zero Emissions Credits for Nuclear Power Plants

The parties to a challenge to New York's plan to give certain nuclear power plants "zero-emission credits" (ZECs) completed their briefing on the motion to dismiss the challenge. The ZECs program, approved by the New York State Public Service Commission (PSC) in 2016, is

intended to serve as "bridge to a 50-percent-renewable energy supply" by 2030. The program's challengers—owners of fossil fuel-fired power plants—argued that the federal district court for the Southern District of New York had equity jurisdiction over their claim that the Federal Power Act preempted the PSC's action. The plaintiffs also asserted that their complaint stated claims that the ZECs program was both field preempted and conflict preempted. The plaintiffs also argued that they had stated a claim of violation of the dormant Commerce Clause. The PSC defendants argued that their action was not preempted because it fell within the field of regulation reserved to the states in the Federal Power Act. They also reasserted that the plaintiffs had no private cause of action for their preemption claim and had failed to state a dormant Commerce Clause Claim. The beneficiaries of the ZECs program—owners of nuclear facilities—submitted a reply brief reiterating that the plaintiffs' preemption and dormant Commerce Clause claims should fail. *Coalition for Competitive Electricity v. Zibelman*, No. 1:16-cv-08164 (S.D.N.Y. Jan. 6 and 27, 2017).

Parties Said They Would Appeal Portland's Restrictions on Fossil Fuel Terminals

The Columbia Pacific Building Trades Council, the Portland Business Alliance, and the Western States Petroleum Association filed notice of their intent to appeal the City of Portland's enactment of an ordinance directing adoption of zoning amendments that prohibited new bulk fossil fuel terminals and limit the expansion of existing terminals. The notice was filed in the Oregon Land Use Board of Appeals. In the ordinance, the City found that extraction and combustion of fossil fuels were significant sources of greenhouse gas emissions and major contributors to climate change and pollution, and that the amendments were consistent with local and statewide planning goals and also with local and statewide climate change and public safety objectives. Environmental and public health groups moved to intervene on the City's behalf. *Columbia Pacific Building Trades Council v. City of Portland*, LUBA No. 2017-001 (Or. LUBA, filed Jan. 4, 2017; motion to intervene Jan. 25, 2017).

Rural Counties Challenged Federal Coal Leasing Moratorium in Utah Federal Court

Two rural Utah counties and a nonprofit group of which they and other rural counties were members filed a lawsuit in federal court challenging the Secretary of the Interior's order that imposed a moratorium on federal coal leasing while BLM prepared a programmatic environmental impact statement (EIS) addressing climate change. The plaintiffs asserted that the moratorium was arbitrary and capricious, an abuse of discretion, and contrary to law in violation of the Administrative Procedure Act (APA). The plaintiffs also contended that the defendants violated the APA by failing to prepare an EIS prior to implementing the moratorium. *Kane County, Utah v. Jewell*, No. 2:16-cv-01211 (D. Utah, filed Nov. 30, 2016).

Two Lawsuits Filed Challenging CEQA Analysis of Greenhouse Gas Impacts for Amendment to San Diego County General Plan

Two local environmental organizations challenged San Diego County's approval of a "Forest Conservation Initiative Amendment" to the County's general plan. The Amendment applied to more than 70,000 acres of the Cleveland National Forest. The petitioners alleged that the Amendment would have "devastating, long-term consequences" for San Diego's backcountry

and would result in increased greenhouse gas emissions. They asserted that the County had failed to comply with the California Environmental Quality Act (CEQA), including by improperly relying on guidance issued in July 2016 to conduct the analysis of greenhouse gas impacts instead of relying on thresholds set forth in a legally adequate Climate Action Plan (which the County had not adopted). They also asserted that the County's analysis had relied on statewide per-person greenhouse gas goals necessary to achieve statewide goals, "without substantial evidence that they are relevant to projects in San Diego County" and that the environmental impact report (EIR) did not provide substantial evidence to support the emissions disclosed. In addition, the petitioners said that the County had failed to adopt feasible mitigation measures to address the Amendment's significant greenhouse gas impacts. The petitioners further alleged that the Amendment violated the California Planning and Zoning Law because it was inconsistent with the County's general plan, which required that evaluation of greenhouse gas impacts be based on a Climate Action Plan. *Cleveland National Forest Foundation v. County of San Diego*, No. 37-2017-00001635-CU-TT-CTL (Cal. Super. Ct., filed Jan. 13, 2017).

Sierra Club also filed a CEQA challenge to the Forest Conservation Initiative Amendment to the San Diego County general plan. Like the local environmental organizations, Sierra Club contended that the County had relied on unlawfully adopted guidance in its analysis of greenhouse gas impacts, instead of on greenhouse gas thresholds established in a Climate Action Plan. A 2011 update to the general plan included a mitigation measure requiring preparation of a Climate Action Plan with greenhouse gas emission reduction targets and deadlines. Sierra Club alleged that the County's approval of the Amendment violated CEQA because it was allowing new development without having implemented the required mitigation measure. Sierra Club noted that it had filed a lawsuit in 2016 challenging the greenhouse gas guidance and the prospective adoption of general plan amendments. *Sierra Club v. County of San Diego*, No. 37-2017-00001635-CU-TT-CTL (Cal. Super. Ct., filed Jan. 13, 2017).

Group Challenged San Diego's Removal of Bridge Project from Planning Document

A nonprofit group filed a lawsuit challenging the CEQA review for the City of San Diego's removal of a bridge project from a community plan. The group said that the CEQA review failed to adequately disclose and analyze environmental impacts, including significant adverse impacts on greenhouse gas emissions. *Citizens for the Regents Road Bridge, Inc. v. City of San Diego*, No. 37-2017-00000453-CU-TT-CTL (Cal. Super. Ct., filed Jan. 5, 2017).

Nonprofit Groups Cited CEQA Violations in Challenge to San Diego's Update to Community Plan

Two nonprofit groups filed a lawsuit in California Superior Court challenging the City of San Diego's approval of a community plan update. The groups alleged that the City had not complied with the procedural or substantive requirements of CEQA. The groups cited numerous shortcomings in the final environmental impact report, including failure to adequately assess climate change impacts. The groups also asserted that the update was inconsistent with the City's Climate Action Plan. *Mission Hills Heritage v. City of San Diego*, No. 37-2017-00000295 (Cal. Super. Ct., filed Jan. 4, 2017).

CEQA Challenge Filed to San Diego Development Projects

A San Diego resident and an unincorporated association filed a challenge to the City of San Diego's approval of two development projects—a 60-story mixed-use building and a 20-story hotel tower. The petitioners alleged that the respondents had erroneously concluded that the project would have insignificant impacts on greenhouse gas emissions. They also said the projects would undermine the City's "highly-touted" Climate Action Plan. *Gonzalez v. City of San Diego*, No. 37-2016-0042702-CU-TT-CTL (Cal. Super. Ct., filed Dec. 6, 2016).

Update #94 (January 9, 2017)

FEATURED CASE

D.C. Appellate Court Said Climate Scientist Michael Mann's Defamation Claims Could Proceed Against Authors and Publishers of Two Articles

The District of Columbia Court of Appeals upheld in part and reversed in part a trial court's denial of special motions to dismiss defamation claims made by the climate scientist Michael Mann against three authors of online articles and Competitive Enterprise Institute and National Review, Inc., which published the articles on their websites. The Court of Appeals also reversed the denial of special motions to dismiss Mann's claim of intentional infliction of emotional distress because the appellate court concluded that Mann had not demonstrated that he was likely to succeed in proving that he suffered severe emotional distress. The articles at issue in the action asserted that Mann had been "shown" to have behaved in a "deceptive" and "most unscientific manner" because he "molested and tortured data in the service of politicized science"; that he engaged in "academic and scientific misconduct"; that an investigation by his employer Pennsylvania State University was a "whitewash" or "cover-up"; and that a lawsuit threatened by Mann was "fraudulent" or "intellectually bogus and wrong." The articles also likened Penn State's investigation of Mann's work to the university's investigation regarding its former assistant football coach Jerry Sandusky, who was convicted of child sexual abuse. The appellate court concluded that a reasonable jury could find that statements in two of the articles were false, defamatory, published by appellants to third parties, and made with actual malice. In finding that Mann had met his burden of showing that a jury could find "actual malice" with respect to two of the articles, the appellate court said it would be for a jury to determine the credibility of the appellants' assertions of "honest belief" in the truth of their statements and whether the belief was maintained "in reckless disregard of its probable falsity." It would also be for a jury to consider the appellants' objections to multiple investigation reports that found no evidence of misconduct by Mann. *Competitive Enterprise Institute v. Mann*, Nos. 14-CV-101, 14-CV-126 (D.C. Ct. App. Dec. 22, 2016).

DECISIONS AND SETTLEMENTS

Washington Trial Court Allowed Children to Allege Public Trust Doctrine Climate Claims, Found Earlier Appellate Decision Affirming Dismissal of Such Claims Unpersuasive

A Washington Superior Court denied a request by eight children who asked that the Washington Department of Ecology be found in contempt for failing to comply with earlier court orders requiring Ecology to issue a rule regulating carbon dioxide emissions. However, the court sua sponte granted leave for the children to add claims that Ecology, the State of Washington, and Washington's governor had violated the Washington State Constitution and the public trust doctrine by failing to protect the children from climate change. The court acknowledged that an unpublished decision issued by the Washington Court of Appeals four years earlier affirmed dismissal of climate change-related public trust doctrine claims. The court said, however, that the appellate decision was not binding and that it did not find the decision persuasive "considering the alleged emergent and accelerating need for science based response to climate change and the governmental actions and inactions" since the decision was issued. The Superior Court also said that since 2013 courts had recognized "the role of the third branch of government in protecting the earth's resources that it holds in trust," citing the November 2016 decision of an Oregon federal district court in *Juliana v. United States* denying a motion to dismiss constitutional claims against federal respondents for failing to act to reduce carbon emissions. In the instant case, the Superior Court concluded that it was "time for these youth to have the opportunity to address their concerns in a court of law." The youth petitioners submitted a proposed supplemental and amended petition for review on December 6, 2016. *Foster v. Washington Department of Ecology*, No. 14-2-25295-1 SEA (Wash. Super. Ct. proposed supplemental and amended petition for review Dec. 6, 2016; order Dec. 19, 2016).

Texas Federal Court Suspended Discovery in Exxon's Action Against Attorneys General

On December 15, the federal district court for the Northern District of Texas stayed all discovery pending further order of the court in Exxon Mobil Corporation's (Exxon's) lawsuit seeking to bar ongoing climate change-related investigations by the attorneys general of Massachusetts and New York. This order followed two December 12 orders, one cancelling a previously ordered deposition of the Massachusetts attorney general scheduled for December 13 in Dallas and a second ordering briefs on the issue of whether the court had personal jurisdiction over the attorneys general. (The briefs on personal jurisdiction were originally due on January 4, but the court changed the date to February 1.) On December 9, the Massachusetts attorney general had asked the Fifth Circuit Court of Appeals for an emergency stay of discovery pending the Fifth Circuit's disposition of the attorney general's petition for a writ of mandamus challenging the district court's jurisdictional discovery orders, in which the district court raised concerns regarding whether the attorney general commenced her investigation of Exxon in good faith. The Massachusetts attorney general filed the petition for writ of mandamus after the district court denied her motion for reconsideration of the jurisdictional discovery order and her request for stay of discovery and vacatur and reconsideration of the order requiring her to appear for the deposition. Other developments in the case included the New York attorney general's December 5 motion to dismiss the action on the grounds that the court lacked personal and subject matter jurisdiction, that venue was improper, that action was not ripe, and that Exxon did not have a plausible claim for relief. The New York attorney general filed a motion on the same day to quash discovery, calling Exxon's efforts to obtain internal information about New York's ongoing state investigation "highly improper." (In opposing the motion to quash, Exxon characterized its efforts as a "a set of narrowly tailored party discovery requests—including requests for production, requests for admission, interrogatories, and notices of deposition.") The

court denied the motion to quash on December 9 in the same order in which it denied the Massachusetts attorney general's request for a stay pending appellate review. Outside of court, the organization 350.org sent a letter to Exxon's attorneys objecting to a subpoena it had received seeking, among other things, communications between 350.org and state attorneys general and other climate activists. After discovery was suspended, briefing on the Massachusetts attorney general's motion to dismiss the first amended complaint was completed, with Exxon submitting its opposition on December 19 and the attorney general submitting her reply on January 3. *Exxon Mobil Corp. v. Schneiderman*, No. 4:16-CV-469-K (N.D. Tex.); *In re Healey*, No. 16-11741 (5th Cir.).

Federal Court Said Most Redactions in FOIA Disclosure of U.S. Climate Negotiators' Communications Were Appropriate

The federal district court for the Eastern District of Virginia ruled on whether portions of four documents exchanged between senior-level White House and Department of State staff responsible for setting climate policy and negotiating at the Paris conference had been properly redacted pursuant to the Freedom of Information Act's deliberative process privilege. The court found that all of the communications were predecisional because they were part of the U.S.'s preparation for the Paris conference negotiations. The court found that the Department of State justified nondisclosure by showing how the withheld information, which included information about the weight attributed to different scientific studies and personal opinions about the credibility of the studies, "related to formulation of actual agency policy." The court further found that most of the redacted portions of the documents were deliberative and therefore not required to be disclosed, but said that several "merely factual statements" had been improperly redacted. *Competitive Enterprise Institute v. United States Department of State*, No. 1:16-cv-00080 (E.D. Va. Dec. 1, 2016).

Maryland High Court Said Condition for Power Plant Approval Requiring Donation to Clean Energy Fund Was Not Unauthorized Tax

The Maryland Court of Appeals upheld the Maryland Public Service Commission's (PSC's) approval for an electric generating station intended to power the Dominion Cove Point natural gas liquefaction facility. Like the trial court and the Court of Special Appeals, the Court of Appeals rejected the argument that a condition of approval requiring a $40-million contribution to a State fund for investing in projects—including projects involving renewable and clean energy resources, greenhouse gas reduction or mitigation programs, cost-efficiency and conservation programs, or demand response programs—was not an unauthorized tax. After noting that the PSC was required by law to consider and weigh positive economic or environmental impact against negative impacts, the Court of Appeals found that the condition was "particular to that end" and "not for the primary purpose of raising revenue." Instead, the condition was a "primarily regulatory" exaction imposed to offset the impact of emissions of pollutants. *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Public Service Commission of Maryland*, S.T. 2016, No. 26 (Md. Ct. App. Dec. 16, 2016).

E&E Legal Withdrew Lawsuit Seeking Climate Investigation Records from Virginia Attorney General Following Disclosure of Additional Documents

The Energy & Environment Legal Institute (E&E Legal) submitted an order of non-suit to the Virginia Circuit Court in its action seeking disclosure of the Virginia attorney general's documents related to climate change and communications between the offices of Virginia and New York attorneys general. E&E Legal said that the non-suit order followed the Virginia attorney general's disclosure of additional documents. *Richardson v. Herring*, No. CL 16005149-00 (Va. Cir. Ct. Dec. 7, 2016).

EPA Granted Petition to Object to Operating Permit for Biomass Power Plant in Georgia but Denied Claim That BACT Analysis for Greenhouse Gases Was Required

The United States Environmental Protection Agency (EPA) granted in part a petition requesting that EPA object to a Title V operating permit issued by the Environmental Protection Division of the Georgia Department of Natural Resources for a biomass-fired power plant. EPA agreed with the petitioner, Partnership for Policy Integrity, that the permit should have included monitoring and recordkeeping requirements to ensure compliance with the requirement that the plant burn clean cellulosic biomass. EPA also concluded that limits on hazardous air pollutant emissions to which the plant operator had agreed were not enforceable as a practical matter. EPA denied, however, the petitioner's claim that EPA should object to the permit on the basis that the plant was a major source for greenhouse gases and should have gone through Prevention of Significant Deterioration permitting, including a Best Available Control Technology analysis for greenhouse gases; EPA said the claim was not raised with reasonable specificity in comments on the draft permit. EPA published notice of its final order on the petition in the December 29, 2016 issue of the *Federal Register*. *In re Piedmont Green Power, LLC,* Petition No. IV-2015-2 (EPA Dec. 13, 2016), 81 Fed. Reg. 95992 (Dec. 29, 2016).

NEW CASES, MOTIONS, AND NOTICES

EPA and Other Parties Defended Carbon Dioxide Standards for New Power Plants

In early December, EPA submitted a brief defending its New Source Performance Standards for carbon dioxide emissions from new, modified, and reconstructed fossil fuel-fired power plants. EPA asserted that its selection of highly efficient supercritical pulverized coal boilers implementing partial carbon capture and sequestration (CCS) as the best system of emission reduction for new steam generating units was reasonable. EPA defended its decision not to create a subcategory for new power plants that burn lignite coal, for which some petitioners and intervenors had argued that partial CCS was not adequately demonstrated. EPA also said that it had reasonably considered the costs of partial CCS at an industry-wide level as well as for individual plants and that it appropriately declined to use a monetized cost-benefit analysis. EPA also argued that it had reasonably explained why the best system of emission reduction for new natural gas-fired combustion turbines did not include partial CCS, that it had established appropriate standards for modified and reconstructed steam units, that it was not required to issue a new endangerment finding for carbon dioxide emissions from fossil fuel-fired power plants (or, alternatively, that the record constituted such a finding), and that it had properly declined to docket emails that related to superseded proposals for emission standards . Later in December, a number of parties joined EPA in defending the standards: environmental and public health

organizations; 18 states, Washington D.C., and New York City; power companies; CCS scientists; the operator of a CCS facility; experts on technology innovation and diffusion; and the Institute for Policy Integrity at the New York University School of Law. In other developments in this proceeding, the D.C. Circuit denied a request by petitioners and petitioner-intervenors for extension of the briefing schedule. The extension was sought to allow the parties to determine whether an alternative resolution of the proceedings could be achieved with the incoming Trump administration, in which case there might be no need for reply briefs. Oral argument was currently scheduled for April 17, 2017. *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. EPA brief Dec. 14, 2016; other briefs Dec. 21, 2016; motions for extension of briefing schedule Dec. 16, 2016; order denying extension Jan. 4, 2017).

EPA Filed Notice of Appeal in Clean Air Act Jobs Study Case

EPA filed a notice of appeal in the action in the federal district court for the Northern District of West Virginia in which Murray Energy Corporation and its subsidiaries won summary judgment requiring EPA to conduct evaluations of the Clean Air Act's impacts on employment, including in the coal industry. *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-00039 (N.D. W. Va. Dec. 16, 2016).

Department of Energy Defended Conclusion That LNG Exports Would Not Have Significant Environmental Impact

The United States Department of Energy (DOE) submitted a brief to the D.C. Circuit arguing that it had reasonably concluded that its authorization of exports of liquefied natural gas (LNG) from the Dominion Cove Point terminal in Maryland would not have a significant impact on the environment. DOE said that it had taken a hard look at potential impacts of export-induced gas production, potential impacts from induced domestic coal consumption, and the climate impacts of induced gas production. DOE defended the reasonableness of its determination that it could not "meaningfully forecast" indirect effects from induced natural gas production and from foreign consumption of U.S.-produced LNG, but noted that it had nonetheless prepared an "Environmental Addendum" on potential impacts of accelerated natural gas production and a Life Cycle Analysis of the potential upstream and downstream effects on global greenhouse gas emissions of LNG production, transport, and export. DOE also argued that it had reasonably concluded pursuant to the Natural Gas Act that the benefits of LNG export outweighed potential environmental harms and that it had considered possible unequal distribution of impacts. At the end of November, Sierra Club filed two other briefs challenging DOE authorization of LNG exports from facilities in Louisiana and Texas. The arguments in those proceedings were similar to the arguments made by Sierra Club in this case. *Sierra Club v. United States Department of Energy*, No. 16-1186 (D.C. Cir. Dec. 15, 2016); *Sierra Club v. United States Department of Energy*, No. 16-1252 (D.C. Cir. Nov. 30, 2016); *Sierra Club v. United States Department of Energy*, No. 16-1253 (D.C. Cir. Nov. 30, 2016).

EPA Defended Renewable Fuel Standards

EPA filed a brief in the D.C. Circuit Court of Appeals defending the Renewable Fuel Standards (RFS) program's annual standards for 2014, 2015, and 2016. EPA argued that the standards were

neither too high nor too low, asserting that it had reasonably exercised its waiver authority to reduce the volumes of advanced biofuel and total renewable fuel required by the statute and that it used a reasonable methodology to set the standards. EPA also contended that its late promulgation of volume requirements for bio-based diesel was a reasonable exercise of its authority and satisfied its obligation to consider the relative benefits and burdens of the rule. EPA also argued that it was not required to reconsider its "point of obligation" regulation that made refiners and importers the obligated parties under the RFS program. *Americans for Clean Energy v. EPA*, Nos. 16-1005 et al. (D.C. Cir. Dec. 15, 2016).

EPA, Permittee Opposed Ninth Circuit Rehearing of Challenge to Permit for Biomass Power Plant

EPA and the permittee for a biomass-fired power plant in California urged the Ninth Circuit Court of Appeals not to grant a rehearing of its opinion upholding the plant's Prevention of Significant Deterioration (PSD) permit. The Ninth Circuit had deferred to EPA's application of its Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production (Bioenergy BACT Guidance) and had also found that EPA reasonably concluded that the Clean Air Act did not require consideration of solar power and a greater natural gas mix as control alternatives at the facility. EPA said the "core" of the Center for Biological Diversity's (CBD's) petition for rehearing was "little more than a rehashing of its merits arguments" and that CBD's arguments misconstrued EPA's conclusions regarding the carbon dioxide contributions of different types of feedstocks. EPA also said that modification of the Ninth Circuit's opinion's statements about the Bioenergy BACT Guidance was not warranted. The permittee argued that the Ninth Circuit had correctly applied the law and had correctly described CBD's arguments. *Helping Hands Tools v. EPA*, Nos. 14-72553, 14-72602 (9th Cir. Dec. 14, 2016).

Environmental Groups Said FERC's Failure to Consider Gas Pipeline's Downstream Effects Violated NEPA

Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper filed their opening brief in their challenge to the Federal Energy Regulatory Commission's (FERC's) authorizations for a natural gas pipeline project extending from Alabama to Florida. One of the petitioners' three primary arguments was that FERC violated the National Environmental Policy Act (NEPA) and acted arbitrarily and capriciously by not considering the reasonably foreseeable indirect downstream environmental effects of the pipeline project, including "the greenhouse gas, health, and climate effects of burning 1.1 billion cubic feet of natural gas per day for several decades" when tools were available and used by other federal agencies exist to measure such impacts. *Sierra Club v. Federal Energy Regulatory Commission*, No. 16-1329 (D.C. Cir. opening brief Dec. 9, 2016).

Parties Agreed That Tenth Circuit Could Consider Challenge to Federal Coal Leases During Peabody Bankruptcy

The parties to an appeal by environmental groups of a district court's dismissal of their challenge to federal coal leases in the Powder River Basin in Wyoming told the Tenth Circuit Court of Appeals that the automatic stay provisions of the United States Bankruptcy Code did not

preclude the court from considering the appeal during the pendency of bankruptcy proceedings for Peabody Energy Corporation and its subsidiaries, one of which held two of the leases at issue. The environmental groups, the United States Bureau of Land Management, and the Peabody subsidiary and two trade organizations noted in their briefs that the environmental groups and the subsidiary had entered into a stipulation in which the groups agreed to withdraw their request for vacatur of the leases. Since the sole relief sought by the groups was a determination that the federal respondents violated the National Environmental Policy Act, including by failing to consider the leases' impacts on the amount of carbon dioxide in the atmosphere, the parties agreed that the Tenth Circuit was not required to abate the appeal. *WildEarth Guardians v. United States Bureau of Land Management*, No. 15-8109 (10th Cir. Nov. 18, 2016 and Dec. 9, 2016).

United States Appealed Takings Liability for Hurricane Katrina Flooding

The United States filed its principal brief in the Federal Circuit Court of Appeals in its appeal of a May 2015 decision of the Court of Federal Claims holding the United States liable for a taking resulting from flooding in Louisiana during and after Hurricane Katrina. The Court of Federal Claims had concluded that federal construction of the Mississippi River-Gulf Outlet (MRGO) navigation channel changed the environment in ways that increased storm surge during Hurricane Katrina, causing a taking. The United States argued that the Court of Federal Claims' ruling "unmoors takings law from its traditional limits" and "threatens to impose vast and startling liability on the public for damage caused by natural disasters." The United States further argued that the Court of Federal Claims had erred in concluding that MRGO caused the flooding and that the flooding was foreseeable. *St. Bernard Parish Government v. United States*, Nos. 16-2301, 16-2373 (Fed. Cir. Dec. 9, 2016).

New York Public Service Commission Asked Federal Court to Dismiss Challenge to Subsidies to Nuclear Generation in State's Clean Energy Standard

The New York Public Service Commission (PSC) moved to dismiss an action challenging the portion of its Clean Energy Standard (CES) that would compensate certain nuclear power facilities at risk of retiring for the "zero-emission generation" they provide. The PSC argued a preemption cause of action was not available to the plaintiffs under the Federal Power Act and that the preemption claims failed as a matter of law because the CES was a "a straightforward exercise of state authority to regulate generation facilities and their environmental impacts." The PSC said that the dormant Commerce Clause claim also failed as a matter of law because plaintiffs had not shown discrimination against interstate commerce. The owners of the nuclear facilities that would receive payments under the CES plan moved to intervene and moved to dismiss, largely echoing the PSC's arguments. The environmental organizations Environmental Defense Fund and Natural Resources Defense Council each filed an amicus brief in support of the PSC's motion to dismiss. *Coalition for Competitive Electricity v. Zibelman*, No. 1:16-cv-08164 (S.D.N.Y. Dec. 9, 2016).

ExxonMobil Sought Dismissal of Climate Change Citizen Suit Alleging RCRA and Clean Water Act Violations at Massachusetts Marine Terminal

Exxon Mobil Corporation and two related entities (ExxonMobil) asked the federal district court for the District of Massachusetts to dismiss a citizen suit brought pursuant to the Clean Water Act and the Resource Conservation and Recovery Act (RCRA) in connection with ExxonMobil's operation of a marine distribution terminal in Massachusetts. ExxonMobil argued that the plaintiff, Conservation Law Foundation (CLF), lacked standing because the climate change impacts alleged by CLF were speculative and too far in the future to satisfy standing requirements. For the same reason, ExxonMobil said that CLF's allegations failed to allege the "imminent and substantial endangerment" necessary to state a RCRA claim. ExxonMobil also argued that CLF's climate change-related Clean Water Act claims were jurisdictionally and facially defective because EPA had clearly taken the position that remote and speculative climate change impacts did not need to be considered with respect to NPDES permits, Stormwater Pollution Prevention Plans, and Spill Prevention, Control and Countermeasure (SPCC) plans. In addition, ExxonMobil contended that CLF did not state valid non-climate change Clean Water Act claims. ExxonMobil also said that the court did not have subject matter jurisdiction to consider the claim that the SPCC plans for the terminal should consider climate change because the Clean Water Act's citizen suit provision did not encompass such a claim. In response to ExxonMobil's motion to dismiss, CLF asserted that ExxonMobil's failures to properly disclose and manage risks of discharges caused by climate change resulted in "real and imminent, not exaggerated or uncertain" injuries. CLF contended that it had standing to bring its claims and that it had adequately alleged claims under RCRA and the Clean Water Act. *Conservation Law Foundation, Inc. v. Exxon Mobil Corp.*, No. 1:16-cv-11950 (D. Mass, motion to dismiss Dec. 6, 2016; opposition to motion to dismiss Dec. 20, 2016).

California Sought Penalties for Violations of Low Carbon Fuel Standard

The California attorney general commenced an action against a provider of transportation fuels seeking civil penalties for violations of the State's Low Carbon Fuel Standard (LCFS) regulations. The complaint alleged that the defendants introduced fuels into California that did not meet LCFS carbon intensity standards, and that the defendants should have obtained credits to offset the fuels' greenhouse gas emissions. The complaint also alleged that the defendants submitted false information to the California Air Resources Board in compliance reports and other documents. *People of State of California* ex rel. *California Air Resources Board v. Paramount Petroleum Corp.*, No. BC643285 (Cal. Super. Ct., filed Dec. 9, 2016).

Waterkeeper Asked EPA to Suspend or Debar Exxon, Citing "Willful Misrepresentation" Regarding Climate Change

Waterkeeper Alliance, Inc. (Waterkeeper) submitted a petition to EPA for suspension or debarment of ExxonMobil Corporation and related entities (Exxon) as contractors doing business with the United States. The petition cited and set forth a summary of a "pervasive pattern of deceptive and damaging conduct related to environmental issues generally and climate change issues in particular," including "willful misrepresentation of climate facts … and harassment of climate scientists." Waterkeeper also asserted that Exxon had a decades-long history of violating environmental, health, and safety regulatory requirements. Waterkeeper argued that suspension or debarment was warranted based on Exxon's "pattern of behavior reflecting a lack of business integrity and honesty." Waterkeeper Alliance, Inc., Petition for Suspension or Disbarment (EPA,

submitted Dec. 14, 2016).

Update #93 (December 5, 2016)

FEATURED CASE

Oregon Federal Court Said Young People Could Pursue Constitutional Claims to Compel Federal Climate Action

In an action seeking to compel federal action to reduce carbon dioxide emissions, the federal district court for the District of Oregon denied motions to dismiss public trust and due process claims against the United States and federal officials and agencies. The plaintiffs—young people who alleged that excessive carbon emissions were threatening their future, a non-profit group, and "Future Generations" represented by a climate scientist—alleged that the defendants had known for decades of the dangers of carbon dioxide pollution and had nonetheless take actions that increased emissions. The court held that the action did not raise a nonjusticiable political question because it asked the court to determine whether defendants had violated the plaintiffs' constitutional rights, a question "squarely within the purview of the judiciary." The court also concluded that the plaintiffs had adequately alleged standing to sue. In determining that the plaintiffs had adequately alleged a due process claim, the court said that the plaintiffs had asserted a fundamental right "to a climate system capable of sustaining human life" and that the plaintiffs' allegations regarding the defendants' role in creating the climate crisis, the defendants' knowledge of the consequences of their actions, and the defendants' deliberate indifference in failing to act to prevent the harm were sufficient to state a "danger-creation" due process claim. In finding that the plaintiffs had adequately stated a public trust claim, the court said that it was not necessary to determine whether the atmosphere was a public trust asset because the plaintiffs had also alleged the claim in connection with the territorial sea, to which the Supreme Court had said "[t]ime and again" that the public trust doctrine applies. The court also rejected the arguments that the public trust doctrine does not apply to the federal government and that federal environmental statutes displaced public trust claims. The court also was not persuaded that plaintiffs lacked a cause of action to enforce public trust obligations, concluding that the public trust claims were substantive due process claims and that the Fifth Amendment provided a right of action. *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. Nov. 10, 2016).

DECISIONS AND SETTLEMENTS

D.C. Circuit Stayed Challenge to Aircraft Endangerment Finding to Permit Attempt at Administrative Resolution of Biogenic Issue

The D.C. Circuit Court of Appeals stayed a proceeding brought by Biogenic CO2 Coalition challenging the United States Environmental Protection Agency's (EPA's) endangerment finding for greenhouse gas emissions from commercial aircraft. In a consent motion requesting that the case be held in abeyance, the Coalition said that a stay would allow it to attempt to administratively resolve discrete issues with EPA concerning regulation of biogenic emissions. The Biogenic CO2 Coalition represents a cross-section of agricultural stakeholder interests, including producers of biomass feedstocks. The Coalition objects to EPA's failure to distinguish

between biogenic and fossil fuel emissions, and has challenged the Clean Power Plan and the new source performance standards for greenhouse gas emissions on similar grounds. In those two proceedings, the D.C. Circuit has agreed to consider biogenic issues separately from other claims, and is also holding the biogenic claims in abeyance. Environmental Defense Fund moved for leave to intervene on EPA's behalf in the proceeding, as did Center for Biological Diversity, Friends of the Earth, and Sierra Club. *Biogenic CO2 Coalition v. EPA*, No. 16-1358 (D.C. Cir. Nov. 16, 2016).

D.C. Circuit Denied Another LNG Facility NEPA Challenge

In a two-page unpublished judgment, the D.C. Circuit Court of Appeals denied Sierra Club's petition for review challenging the Federal Energy Regulatory Commission's (FERC's) environmental review for a liquefied natural gas (LNG) project in Corpus Christi, Texas. The court said that it had explicitly rejected Sierra Club's arguments regarding consideration of indirect and cumulative effects in its earlier opinion in *Sierra Club v. FERC*, No. 14-1275 (D.C. Cir. 2016), another challenge by Sierra Club to the National Environmental Policy Act (NEPA) review for an LNG project. The court also said it had already rejected Sierra Club's arguments regarding the social cost of carbon and regarding use of projects' consistency with federal greenhouse gas emission reduction goals as a tool. *Sierra Club v. Federal Energy Regulatory Commission*, No. 15-1133 (D.C. Cir. Nov. 4, 2016).

Texas Federal Court Allowed Exxon to Add New York Attorney General as Defendant in Challenge to Climate Change Investigations and Ordered Attorneys General to Appear in Texas for Depositions

On November 17, 2016, the federal district court for the Northern District of Texas ordered Massachusetts Attorney General Maura Healey to appear for a deposition in Texas on December 13 in Exxon Mobil Corporation's action against Healey and New York Attorney General Eric Schneiderman challenging the states' climate change investigations. A week earlier, the court granted Exxon leave to add Schneiderman as a defendant over Healey's objections; Exxon's amended complaint also added a conspiracy claim and a claim that federal law requiring disclosures to investors preempted the states' investigations. The court's deposition order also advised that Schneiderman should be available for deposition in Texas on December 13 but said that it would wait to enter an order until after Schneiderman filed an answer to the first amended complaint. On November 26, Healey filed a motion to vacate both the court's deposition order and an earlier jurisdictional discovery order in which the court expressed concern that Healey had commenced the Massachusetts investigation in "bad faith," based in part on Healey's participation in a press conference with other state attorneys general and climate change advocates. Healey also asked the court to stay discovery until it had ruled on Healey's motion to dismiss the amended complaint, which was filed on November 28, and to issue a protective order prohibiting Exxon from taking her deposition. Healey also said the court should defer all activity in the case while a Massachusetts Superior Court considered Exxon's motion to set aside the civil investigative demand (CID). Healey argued that the court had abused its discretion by ordering discovery and issuing the deposition order where the court lacked personal jurisdiction, the action was unripe, and venue was improper. In addition, Healey argued that circumstances did not warrant deposition of a top executive department official or discovery in a collateral

action challenging a lawful CID, and that the court's concerns regarding Healey's "bad faith" in commencing the Exxon climate change investigation would not justify discovery because the concerns would not trigger the bad faith exception to abstention under the *Younger* doctrine. Healey also argued that it was common for state attorneys general to coordinate and to make public statements regarding coordinated investigations. Exxon opposed Healey's motion to vacate the deposition and discovery orders, arguing that the motion was improper and that the court had acted within its discretion to order jurisdictional discovery and Healey's deposition. In other developments in the case, Exxon issued a subpoena to Union of Concerned Scientists, seeking documents and other materials related to communications with state attorneys general, including materials related to the press conference involving the state attorneys general, and certain materials related to other events regarding climate change litigation against fossil fuel companies, to political fundraising, and to Exxon and other fossil fuel companies. *Exxon Mobil Corp. v. Schneiderman*, No. 4:16-cv-00469-K (N.D. Tex.).

Federal Court Allowed Oil and Gas Trade Groups to Intervene in NEPA Challenge to Leases

The federal district court for the District of Columbia allowed three oil and gas trade associations to intervene in a challenge to federal approvals of oil and gas leases on public lands in Colorado, Utah, and Wyoming. WildEarth Guardians and Physicians for Social Responsibility argued that the federal defendants had not complied with their obligations under the National Environmental Policy Act (NEPA) in approving the leases because the environmental review had not analyzed direct, indirect, and cumulative climate effects associated with the specific leasing authorizations challenged in this case as well as with federal oil and gas leasing at a programmatic level. The court said that the trade associations were entitled to intervene as of right because their members, who held leases challenged in the litigation, had legally protectable interests that might be impaired by the litigation. The court also said that the federal defendants did not adequately represent the intervenors' interests. The court declined to limit the associations' participation by requiring joint briefing or by confining their arguments to the existing claims. *WildEarth Guardians v. Jewell*, No. 16-1724 (D.D.C. Nov. 23, 2016).

Washington Federal Court Said Biological Opinion Had to Consider Climate Change Effects

The federal district court for the Eastern District of Washington ruled that a biological opinion prepared pursuant to the Endangered Species Act to consider the effects a fish hatchery's operations would have on endangered salmon and chinook was arbitrary and capricious because it did not adequately consider climate change effects. The court said that "[t]he best available science indicates that climate change will affect stream flow and water conditions throughout the Northwest" and that the lack of a model or study specifically addressing local climate change effects did not permit the National Marine Fisheries Service to ignore this factor. The court said that NMFS had included "no discussion whatsoever" of the potential effects of climate change on the hatchery's future operations and water use, and that it was not sufficient for NMFS to say that the local area at issue was less prone to climate change effects than other areas in the region. The court rejected other arguments regarding shortcomings in the biological opinion and related

incidental take statement. *Wild Fish Conservancy v. Irving*, No. 2:14-CV-0306-SMJ (E.D. Wash. Nov. 22, 2016).

California Appellate Court Said Environmental Review for Basketball Arena Did Not Need to Quantify Greenhouse Gas Emissions

The California Court of Appeal affirmed the denial of two petitions that challenged the environmental review and permitting for an arena for the National Basketball Association's Golden State Warriors and associated development in San Francisco. Among the arguments rejected by the appellate court was the petitioners' contention that the environmental review was inadequate due to its "exclusive reliance" on the project's compliance with San Francisco's greenhouse gas strategy to determine that the project would not have a significant effect on greenhouse gas emissions. The court said that guidelines issued pursuant to the California Environmental Quality Act (CEQA) explicitly authorized reliance on performance-based standards such as the greenhouse gas strategy and that the environmental impact report was not required to quantify expected emissions and the amount by which those emissions would be reduced by implementation of the greenhouse gas strategy and mitigation measures. The court also noted that in *Center for Biological Diversity v. Department of Fish & Wildlife*, No. S217763 (2015), the California Supreme Court had "expressed approval for a methodology that uses consistency with greenhouse gas reduction plans as a significance criterion for project emissions under CEQA." The appellate court said that, contrary to the petitioners' argument, the Supreme Court had not held that quantification was necessary in every case. *Mission Bay Alliance v. Office of Community Investment and Infrastructure*, No. A148865 (Cal. Ct. App. Nov. 29, 2016).

Court of Appeals Followed California Supreme Court's Lead and Reversed Trial Court Decision That Upheld Greenhouse Gas Significance Analysis for Newhall Ranch

After the California Supreme Court ruled that CEQA findings regarding the significance of greenhouse gas emissions associated with the Newhall Ranch development in Los Angeles County were not supported by substantial evidence, the California Court of Appeal reiterated that conclusion in another case involving Newhall Ranch. In an unpublished opinion, the court cited the California Supreme Court's opinion in *Center for Biological Diversity v. Department of Fish and Wildlife*, No. S217763 (2015), and noted that the parties agreed that the greenhouse gas emissions discussion in the instant case paralleled the discussion that the Supreme Court found lacking. The court therefore reversed the portions of a trial court's ruling that upheld the Los Angeles County Board of Supervisors' conclusion that the development's greenhouse gas emissions would not have a significant impact. *Friends of the Santa Clara River v. County of Los Angeles*, No. B256125 (Cal. Ct. App. Nov. 3, 2016).

New York Court Said Attorney General's Response to Competitive Enterprise Institute Request Did Not Comply with Freedom of Information Law

A New York Supreme Court agreed with the Competitive Enterprise Institute (CEI) that the New York Attorney General had not complied with its obligations under the Freedom of Information Law (FOIL) in response to CEI's request for common interest agreements with private parties and other state attorneys general regarding climate change investigations. The court indicated

that the publication by a third party of a common interest agreement between state attorneys general did not moot CEI's claims, and ordered the New York Attorney General to provide more detail regarding its search for common interest agreements involving non-state parties. The court also said that the New York Attorney General had the burden of demonstrating that FOIL exemptions applied to any responsive records that it determined were not subject to disclosure. The court also ruled that CEI was entitled to attorney fees. *Competitive Enterprise Institute v. Attorney General of New York*, No. 5050-16 (N.Y. Sup. Ct. Nov. 21, 2016).

Delaware Court Said It Could Not Yet Resolve Question of Electric Consumers' Standing to Challenge RGGI Regulations

The Delaware Superior Court vacated its denial of a motion to amend a complaint challenging Delaware's regulations implementing the Regional Greenhouse Gas Initiative to correct the middle initial of a plaintiff. The court reversed its conclusion that amendment would be futile after the plaintiff (with the corrected initial) along with another plaintiff submitted affidavits indicating that they were personally responsible for payment of electric bills. (The court had previously ruled that the plaintiff would not have had standing as a stakeholder in a company that was a commercial purchaser of electricity.) Although the court allowed submission of the affidavits and amendment of the complaint, it said that the plaintiffs had not established standing and that discovery might show they had not paid electric bills during pertinent times or had not incurred increased costs. The court also denied the defendants' motion for summary judgment as to all the plaintiffs, indicating that it needed to hear the defendants' expert's testimony and cross-examination as to financial benefits received by electric consumers. *Stevenson v. Delaware Department of Natural Resources & Environmental Control*, No. S13C-12-025 RFS (Del. Super. Ct. Nov. 7, 2016).

FERC Reaffirmed Limitations on Scope of NEPA Review for Louisiana LNG Facility

FERC denied rehearing of its approvals for a liquefied natural gas (LNG) export terminal near Lake Charles, Louisiana, and related pipeline and compression facilities. FERC reaffirmed its conclusion that effects related to natural gas production, gas-to-coal switching, and foreign consumption of natural gas were not causally related to its approval of the Louisiana facilities, and stated that recent D.C. Circuit decisions concerning NEPA reviews for LNG facilities supported this determination. FERC said that even if such indirect effects, including greenhouse gas emissions, were causally related, they were not reasonably foreseeable. FERC also rejected the argument that it was required to consider the effect that the project would have together with other past, present, and future LNG export projects throughout the entire nation. *In re Magnolia LNG, LLC*, Nos. CP14-347-001, CP14-511-001 (FERC Nov. 23, 2016).

NEW CASES, MOTIONS, AND NOTICES

Supreme Court Review Sought of Polar Bear Critical Habitat Designation

Two petitions for writ of certiorari were filed in the United States Supreme Court seeking review of the Ninth Circuit Court of Appeals decision upholding the designation of critical habitat for the polar bear. The State of Alaska, Alaska native communities, Alaska Oil and Gas Association,

and American Petroleum Institute asked the Court to take up the question of whether the Ninth Circuit's "exceedingly permissive standard" for critical habitat designation allowed it to designate "huge geographic areas," much of which allegedly failed to meet statutory criteria, as critical habitat. Alaska Oil and Gas Association and American Petroleum Institute told the Court that the Ninth Circuit's "exceptionally lax and inexact standard" for the specificity with which the U.S. Fish and Wildlife Service (FWS) must make critical habitat designations allowed FWS to impose "sweeping designations" without regard to whether all areas were critical or even helpful to species conservation. Alaska and Alaska native communities told the court that FWS's "hugely overbroad approach" threatened the viability of "longstanding, Native *human* communities." *State of Alaska v. Jewell*, No. 16-596 (U.S. Nov. 4, 2016); *Alaska Oil & Gas Association v. Jewell*, No. 16-610 (U.S. Nov. 4, 2016).

Waste Management Industry Filed Challenge to EPA Emissions Controls for Landfills

The National Waste & Recycling Association, the Solid Waste Association of North America, and three waste management companies filed a petition for review in the D.C. Circuit Court of Appeals challenging the United States Environmental Protection Agency's (EPA's) final rule establishing emission guidelines for municipal solid waste landfills. EPA published the final rule on August 29, 2016. The rule lowered the emissions threshold at which landfills—which are a significant source of methane—must install controls. Utility Air Regulatory Group also filed a petition for review challenging the emission guidelines. *National Waste & Recycling Association v. EPA*, No. 16-1371 (D.C. Cir., filed Oct. 27, 2016); *Utility Air Regulatory Group v. EPA*, No. 16-1374 (D.C. Cir., filed Oct. 28, 2016).

Former Exxon Employee Filed Class Action Alleging Company and Officers Breached Fiduciary Duties to Retirement Plan Investors

A former employee of Exxon Mobil Corporation filed a class action lawsuit on behalf of himself and other current and former Exxon employees who participated in an Exxon retirement savings plan and invested in Exxon stock between November 1, 2015 and October 28, 2016. The complaint asserted claims under the Employee Retirement Income Security Act (ERISA) that Exxon and senior Exxon officials breached their fiduciary duties to participants in the Plan because they knew or should have known that Exxon's stock price was artificially inflated, making it an imprudent investment. The complaint alleged that the stock price was artificially inflated because Exxon failed to disclose that internally generated reports concerning climate change recognized the environmental risks caused by global warming and climate change; that due to risk associated with climate change Exxon would not be able to extract existing hydrocarbon reserves it claimed to have; and that Exxon had used an inaccurate price of carbon to calculate the value of certain oil and gas prospects. *Fentress v. Exxon Mobil Corp.*, No. 4:16-cv-03484 (S.D. Tex., filed Nov. 23, 2016).

Exxon Investor Filed Securities Class Action for Failure to Disclose Climate Risks

A man who invested in Exxon stock during 2016 filed a securities fraud class action against Exxon and three Exxon officers in the federal court for the Northern District of Texas. The action was filed on behalf of purchasers of Exxon common stock between February 19, 2016 and

October 27, 2016. The complaint alleged that Exxon's public statements during that period were materially false and misleading because they failed to disclose that internally generated reports concerning climate change recognized the environmental risks caused by global warming and climate change; that due to risk associated with climate change Exxon would not be able to extract existing hydrocarbon reserves it claimed to have; and that Exxon had used an inaccurate price of carbon to calculate the value of certain oil and gas prospects. The complaint alleged that as a result of positive statements Exxon made during the class period, the common stock price was artificially inflated, and that Exxon's release of its third quarter financial results on October 28, 2016, in which it disclosed it might have to write down 20% of its oil and gas assets, resulted in the stock price falling by more than $2 per share. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-3111 (N.D. Tex., filed Nov. 7, 2016).

States, Oil and Gas Groups Challenged BLM Methane Rule for Oil and Gas Operations

Two petitions were filed in the federal district court for the District of Wyoming challenging the United States Bureau of Land Management's (BLM) final rule concerning methane emissions from oil and gas operations on federal and tribal lands. BLM said that the rule would cut flaring in half, curbing waste of public resources and reducing harmful methane emissions. One petition was filed by Western Energy Alliance and Independent Petroleum Association of America; the other was filed by Wyoming and Montana. The states called the regulations "a blatant attempt by a land management agency to impose air quality regulations on existing oil and gas operations under the guise of waste prevention" and charged that BLM did not have authority to regulate. The states asserted that the regulations' air quality controls conflicted with those established by EPA and the states under the Clean Air Act, and that the rule unlawfully attempted to take over regulation of state leases when state and federal tracts were combined through communitization agreements. The oil and gas trade groups also asserted that BLM was without authority to regulate air quality and also argued that the rule placed arbitrary limits on flaring; relied on flawed scientific, engineering, and economic assumptions and methodologies; improperly relied on EPA air quality rules; and conflicted with or usurped the primary jurisdiction of state and tribal governments. North Dakota has intervened in the state proceeding. Both sets of petitioners have asked the court for a preliminary injunction, and the court has scheduled a hearing on the requests for January 6, 2017. The states argued that they would suffer "immediate sovereign and economic harm" should the rule go into effect and that BLM would experience no actual harm if the court issued a preliminary injunction. The states argued that an injunction was in the public interest because it would prevent an illegal program from taking effect and because the injunction would not harm the interest in a clean environment or cause waste of federal minerals since the states were already taking action to control emissions. *Wyoming v. United States Department of Interior*, No. 2:16-cv-00285 (D. Wyo., filed Nov. 18, 2016); *Western Energy Alliance v. Jewell*, No. 2:16-cv-00280-MLC (D. Wyo., filed Nov. 15, 2016).

After EPA Proposed Two-Year Consultation on Jobs Evaluation, Murray Energy Objected to Delay and Asked Court to Enjoin Rulemaking

On October 31, 2016, EPA submitted its plan for complying with the order by the federal district court for the Northern District of West Virginia requiring EPA to conduct evaluations pursuant to Section 321(a) of the Clean Air Act of loss or shifts in employment that result from

implementation of the Clean Air Act. EPA said it would first consult with its Science Advisory Board (Board) regarding the analytic tools and methodologies for the evaluations, a process that EPA estimated could take more than two years. EPA said it would then take approximately 90 days to consider the Board's advice and set an evaluation schedule. Murray Energy Corporation and the other plaintiffs objected to EPA's plan, describing it as "yet another in a long line of tactics to avoid timely recognition of the job losses caused by EPA's war on coal." The plaintiffs asked the court to order EPA to promptly comply with Section 321(a), to evaluate and report to the court "the job loss and shifts that may be attributable to EPA's war on coal"; and to cease publication of new proposed and final rules "in furtherance of the war on coal" until it complied. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-39 (N.D. W. Va. compliance plan Oct. 31, 2016; plaintiffs' response Nov. 14, 2016).

Groups Argued that Coal Mine Expansion Environmental Review Should Have Used Social Cost of Carbon

The plaintiffs in an action challenging federal approvals that would permit a Montana coal mine to expand by 7,000 acres filed a brief in the federal district court for the District of Montana setting forth the shortcomings in the federal agencies' NEPA review. The plaintiffs' arguments included that the environmental assessment (EA) for expansion had failed to adequately consider the indirect and cumulative impacts of greenhouse gas emissions because, while the EA quantified the life-cycle emissions from mining, shipping, and burning the coal, it did not "evaluate" the impact. The plaintiffs argued that the defendants should have used the federal social cost of carbon to fulfill the obligation to evaluate the impact. The plaintiffs also cited the "highly uncertain and highly controversial" nature of air pollution emissions, including greenhouse gas emissions, as one factor warranting preparation of an environmental impact statement. *Montana Elders for a Livable Tomorrow v. U.S. Office of Surface Mining*, No. 9:15-cv-106-DWM (D. Mont. Nov. 4, 2016).

Oil and Gas Trade Association Opposed Intervention by Conservation Groups in Suit to Compel Quarterly Federal Mineral Lease Sales

Western Energy Alliance opposed intervention by nine conservation groups in its action in the federal district court for the District of New Mexico seeking to compel the United States Bureau of Land Management to hold quarterly federal mineral sales. Western Energy Alliance said that the groups' request to intervene was premised on "straw man" arguments that the Alliance had not raised in the action. The Alliance said its action was focused on the narrow issue of the BLM's ministerial obligation under the Mineral Leasing Act to conduct oil and gas lease sales at least quarterly whenever eligible lands are available, and that it was not seeking to curtail federal discretion over leasing or to limit environmental review. The Alliance said that the lawsuit therefore did not implicate an interest of the advocacy groups and that the federal defendants would adequately represent the groups' position, and that the groups therefore were not entitled to intervene as of right. The Alliance also urged the court not to grant permissive intervention. *Western Energy Alliance v. Jewell*, No. 1:16-cv-00912 (D.N.M. Nov. 2, 2016).

Environmental Organization and Organic Farm Challenged New York's Plan to Subsidize Nuclear Plants

Hudson River Sloop Clearwater, Inc. and a commercial organic farm filed a proceeding in New York Supreme Court challenging what the petitioners characterized as the New York Public Service Commission's (PSC's) "bailout program" for nuclear power plants in New York. The action challenged by the petitioners was the Tier 3 Zero-Emissions Credit portion of the PSC's Order Adopting a Clean Energy Standard, which will require load-serving entities to purchase zero-emissions credits that a State entity will purchase from the qualifying nuclear facilities based on a formula for the social cost of carbon. The petitioners contended that the PSC's action violated the New York Public Service Law, including by using the social-cost-of-carbon metric to determine the nuclear subsidy. The petitioners also claimed that the PSC had committed procedural violations and had violated the State Environmental Quality Review Act. The petitioners asserted that the PSC had not used words with "common and everyday meanings" in violation of the State Administrative Procedure Act because nuclear energy "is not, nor has ever been zero-emissions" since it "routinely emits greenhouse gases and radioactive and thermal emissions." The petitioners also said that the PSC had relied on the social cost of carbon in "an unclear, incoherent and inconsistent manner." *Hudson River Sloop Clearwater, Inc. v. New York State Public Service Commission*, No. __ (N.Y. Sup. Ct., filed Nov. 30, 2016).

New York Attorney General Asked State Court to Order Exxon's Production of Documents in Climate Change Investigation

In New York Supreme Court, the New York Attorney General moved to compel Exxon Mobil Corporation to respond to its November 2015 subpoena seeking climate change-related documents pursuant to New York anti-fraud laws. The attorney general said that approximately five months prior to its motion it had asked Exxon to prioritize production of documents concerning the company's valuation, accounting, and reporting of its assets and liabilities, and the impact of climate change on those processes, but that Exxon had not cooperated with this request. The attorney general told the court that despite acknowledging in New York court that the subpoena was valid, Exxon was "effectively moving to quash the subpoena" in federal court in Texas. The attorney general attributed Exxon's delay in responding to its prioritization request as an effort to "forestall judicial intervention" in New York until it obtained an injunction from the federal court. On November 21, the New York court said it would deny the motion to compel but that if the parties could not reach an agreement on a date for production, it would fix a date and, if necessary, "arbitrate what are reasonable or unreasonable search terms." On December 1, the attorney general informed the court that though the parties had agreed in principle to a production schedule, they disagreed on "the parameters of what constitutes a reasonable production." The attorney general asserted that Exxon continued "to insist on producing from a select group of custodians using search terms it has been advised repeatedly are inadequate." Specific gaps mentioned in the attorney general's letter to the court included documents regarding the proxy cost of carbon that Exxon said it used to integrate the impact of climate change into its business and information related to climate change and oil and gas reserves. The court scheduled a hearing for December 6. *People v. PricewaterhouseCoopers LLP*, No. 451962/2016 (N.Y. Sup. Ct. Nov. 14, 2016).

E&E Legal Asked Virginia Court to Compel Attorney General to Release Climate Investigation Records

Energy & Environment Legal Institute and its executive director filed a lawsuit under the Virginia Freedom of Information Act seeking to compel the Attorney General of Virginia to release documents related to climate change and communications between the offices of Virginia and New York attorneys general. The petitioners had submitted two requests for records related to investigations of "climate denial," including documents related to the Common Interest Agreement among Virginia and other states. *Richardson v. Herring*, No. __ (Va. Cir. Ct., filed Nov. 15, 2016).

Update #92 (November 1, 2016)

FEATURED CASE

Ninth Circuit Reinstated Listing of Bearded Seal as Threatened Based on Climate Change Projections

The Ninth Circuit Court of Appeals reversed a district court decision that vacated the listing of the Beringia distinct population segment (DPS) of the Pacific bearded seal subspecies as "threatened" under the Endangered Species Act (ESA). A threatened species is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The Ninth Circuit found that the National Marine Fisheries Service (NMFS) had acted reasonably based on best available scientific and commercial data when it relied on projections of loss of sea ice through the end of the century as the basis for its listing decision. The Ninth Circuit concluded that the fact that climate projections from 2050 to 2100 might be "volatile" did not deprive those projections of value because "[t]he ESA does not require NMFS to make listing decisions only if underlying research is ironclad and absolute." The court rejected the plaintiffs' argument that NMFS had impermissibly diverged from its previous practice of using 2050 "as the outer boundary" of the "foreseeable future." The court also was not persuaded by the plaintiffs' contention that NMFS did not adequately establish the relationship between loss of sea ice and the bearded seal's risk of extinction or by the argument that NMFS was required to calculate or demonstrate the magnitude of the threat of sea ice loss to the seals. The Ninth Circuit concluded: "NMFS has provided a rational and reasonable basis for evaluating the bearded seal's viability over 50 and 100 years, and it has candidly disclosed the limitations of the available data and its analysis. The ESA does not require more, and NMFS did not act arbitrarily or capriciously in concluding that the effects of global climate change on sea ice would endanger the Beringia DPS in the foreseeable future." In a separate but similar Ninth Circuit appeal, the federal government filed a brief on October 18 urging the court to overturn a district court decision vacating the listing of a ringed seal subspecies as threatened based on climate change threats through the end of the century. *Alaska Oil & Gas Association v. Pritzker*, Nos. 14-35806, 14-35811 (9th Cir. opinion Oct. 24, 2016); *Alaska Oil & Gas Association v. Pritzker*, Nos. 16-35380, 16-35382 (9th Cir. opening brief Oct. 18, 2016).

DECISIONS AND SETTLEMENTS

West Virginia Federal Court Ordered EPA to Evaluate Clean Air Act's Impacts on Coal

Industry

The federal district court for the Northern District of West Virginia ruled that the U.S. Environmental Protection Agency (EPA) had failed to fulfill its non-discretionary obligation under Section 321(a) of the Clean Air Act to conduct evaluations of loss or shifts in employment that might result from implementation of the Clean Air Act. The court again rejected EPA's argument that the obligation was discretionary as well as the argument that the coal companies that brought the action did not have standing. The court also was not persuaded by EPA's "new interpretation" of Section 321(a) pursuant to which EPA claimed it had complied with its requirements by preparing regulatory impact analyses and economic impact analyses as part of rulemaking processes, even though they were not prepared for the explicit purpose of complying with Section 321(a). The court said that EPA's previous "consistent acknowledgement" that it had no employment evaluations "coupled with testimony from various experts that EPA's claimed attempts do not comply" demonstrated that EPA had not fulfilled its duty. The court ordered EPA to file a plan and schedule for compliance within 14 days. The plan must specifically address how EPA will consider the effects of Clean Air Act regulation on the coal industry. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-39 (N.D. W. Va. Oct. 17, 2016).

Texas Federal Court Ordered Jurisdictional Discovery in Exxon Case Against Massachusetts Attorney General, Citing Concern That State's Investigation Was Undertaken in Bad Faith

The federal district court for the Northern District of Texas ordered the parties to conduct jurisdictional discovery to aid the court in determining whether it lacked subject matter jurisdiction over Exxon Mobil Corporation's (ExxonMobil's) action seeking to block the civil investigative demand (CID) issued by Massachusetts Attorney General Maura Healey. Healey issued the CID in connection with an investigation into unfair or deceptive acts or practices in trade or commerce with respect to fossil fuel products and securities. Healey argued in a motion to dismiss that *Younger* abstention—which is based on a "a strong federal policy against federal court interference with pending state judicial proceedings"—should apply because ExxonMobil was pursuing a parallel action in Massachusetts state court to challenge the CID. The Texas federal court said that ExxonMobil's allegations raised concerns that Healey had issued the CID in bad faith, which would preclude *Younger* abstention. The court said that Healey's actions and remarks leading up to issuance of the CID caused the court concern and presented the question of whether Healey "issued the CID with bias or prejudgment about what the investigation of Exxon would discover." The court cited Healey's participation in the AGs United for Clean Power Press Conference in March 2016 and her attendance at a pre-press conference closed-door meeting with a climate change activist and a lawyer with a "well-known global warming litigation practice." The court also cited "anticipatory" remarks made by Healey about the ExxonMobil investigation. On October 20, Healey asked the court to reconsider its order, arguing that the action should be dismissed based on a lack of personal jurisdiction. Healey also argued that venue was improper, and that "ample substantive evidence" was already in the record regarding the decision to issue the CID. Other developments in this case are discussed below in New Cases and Filings. *Exxon Mobil Corp. v. Healey*, No. 4:16-cv-00469 (N.D. Tex. Oct. 13, 2016).

New York Court Ordered Exxon and Its Accountant to Comply with Attorney General's

Subpoena

On October 26, 2016, the New York Supreme Court ordered Exxon Mobil Corporation (Exxon) and its accounting firm, PricewaterhouseCoopers LLP (PwC), to comply with a subpoena issued by the New York Attorney General to PwC in August 2016. The court rejected Exxon's argument that it could withhold documents based on an accountant-client privilege under Texas law. The court concluded that Texas law would not preclude production of the requested documents, but that, in any event, New York law—which does not recognize an accountant-client privilege—was applicable. The attorney general filed the order to show cause on October 14 after Exxon notified it that it intended to assert the privilege to shield some documents requested in the PwC subpoena from disclosure. The attorney general issued the subpoena as part of its investigation into Exxon's representations to investors and to the public about risks related to climate change. The subpoena sought documents and communications related to PwC's audits of Exxon, including documents concerning the impacts on Exxon's financial statements or business of climate change, climate change policies, the cost of carbon, regulations limiting or discouraging use of fossil fuels, policies incentivizing renewable energy, and changes in the prices of oil, gas, and other hydrocarbons. In its papers supporting the order to show cause, the attorney general said that PwC had served as Exxon's independent auditor since before 2010 (the time period covered by the subpoena), a role in which PwC examined whether Exxon's financial statement disclosures were supported by evidence. The attorney general said that PwC also served from at least 2008 to 2013 as global advisor and report writer for the Carbon Disclosure Project, a non-profit organization that functions as a global disclosure system for environmental information, including greenhouse gas emissions, from companies including Exxon. *People v. PricewaterhouseCoopers LLP*, No. 451962/2016 (N.Y. Sup. Ct. Oct. 24, 2016).

Massachusetts Appellate Court Affirmed Dismissal of Divestment Action Against Harvard

The Massachusetts Appeals Court affirmed the dismissal of a lawsuit brought by a Harvard University student group and its members to compel the university to divest its endowment's investments in fossil fuel companies. The appellate court agreed with the Superior Court that the students had failed to demonstrate special standing to challenge management of charitable funds. The appellate court cited the Superior Court's rejection of the students' argument that they had standing based on negative impacts that fossil fuel investments had on academic freedom and education at the university. The appellate court also agreed with the court below that it was not appropriate to recognize a new tort of "intentional investment in abnormally dangerous activities" advocated by the plaintiffs on behalf of future generations. The appellate court quoted the Superior Court in concluding that the students "have brought their advocacy, fervent and articulate and admirable as it is, to a forum that cannot grant the relief they seek." *Harvard Climate Justice Coalition v. President & Fellows of Harvard College*, No. 15-P-905 (Mass. App. Ct. Oct. 6, 2016).

Ninth Circuit Upheld Forest Service Determination That Climate Change Documents Did Not Require Supplemental NEPA Review for Ski Area

In an unpublished memorandum, the Ninth Circuit Court of Appeals upheld the U.S. Forest Service's decision not to prepare a supplemental environmental impact statement (EIS) for the

expansion of a ski area in Oregon. Environmental groups had identified five categories of new information since the 2004 preparation of an EIS that they contended warranted supplemental review under the National Environmental Policy Act (NEPA). The new information included ten documents with information on climate change (eight climate change studies and two internal climate change guidance documents). The Ninth Circuit said it owed its "highest" deference to the Forest Service's explanations regarding why the climate change documents were either irrelevant or did not otherwise provide significant new information area that necessitated supplemental NEPA review. *Oregon Wild v. Connaughton*, No. 14-35251 (9th Cir. Oct. 19, 2016).

Company Owner Pleaded Guilty to Using Funds for Carbon Sequestration Study for Personal Use

The U.S. Attorney's Office for the Western District of Pennsylvania announced that the president and owner of a company that received federal funds to study the potential use of a Wyoming site for carbon sequestration had pleaded guilty to a charge of filing a false claim against the United States. The U.S. Attorney's Office said that the defendant did not perform work under a cooperative agreement, which required his company to conduct field studies and drill wells; instead, the defendant transferred millions of dollars to his personal bank account. The count to which the defendant pleaded guilty involved a request for reimbursement of $363,668.50 in 2011. Sentencing was scheduled for February 3, 2017. *United States v. Ruffatto*, No. 2:16-cr-00167 (W.D. Pa. Oct. 21, 2016).

Minnesota Federal Court Said State Biofuel Mandate Was Not Preempted

The federal district court for the District of Minnesota ruled that the "Minnesota Mandate," which requires diesel fuel sold in the state to contain a specific percentage of biodiesel, was not preempted by the federal Renewable Fuel Standard. The court also ruled that the plaintiffs did not have standing to bring their preemption claims against some of the defendants. The plaintiffs were associations representing the trucking industry, car and truck dealers, automobile manufacturers, the oil and gas industry, and refiners and petrochemical manufacturers. The court also ruled that the Eleventh Amendment barred the plaintiffs' claims that the defendants violated state rulemaking procedures. *Minnesota Automobile Dealers Association v. National Biodiesel Board*, No. 15-cv-02045 (D. Minn. Sept. 29, 2016).

NEW CASES, MOTIONS, AND NOTICES

Sierra Club Enumerated Shortcomings in Department of Energy NEPA Review for LNG Exports

Sierra Club filed its opening brief in its challenge to the U.S. Department of Energy's (DOE's) authorization of the export of natural gas from Dominion Cove Point LNG, LP's (Dominion's) facility in Maryland. Prior to approving Dominion's application to export, DOE issued a finding of no significant impact (FONSI) based on an environmental assessment (EA) prepared by the Federal Energy Regulatory Commission for modifications to Dominion's Maryland facility. Sierra Club argued that DOE had failed to comply with the National Environmental Policy Act

(NEPA) because the EA did not consider the impacts, including climate impacts, of the increased domestic gas production and coal use that the authorized exports would cause. Sierra Club also argued that DOE should have considered the "downstream" impacts, including end users' combustion of the exported gas. Sierra Club also contended that the FONSI was arbitrary because DOE had acknowledged that there would be increased gas production and that gas production had many potentially significant environmental impacts. Sierra Club said that DOE could not cite documents prepared outside the NEPA process as evidence of its "hard look," including an "addendum" prepared by DOE or three reports prepared by the National Energy Technology Laboratory, including a "Global Life Cycle Report" that considered greenhouse gas emissions from electricity generation abroad, including generation using liquefied natural gas (LNG) from the United States. Sierra Club also argued that DOE's findings under the Natural Gas Act that the exports would be in the public interest were arbitrary and capricious because DOE had failed to identify and characterize environmental impacts to weigh against the benefits of exports. *Sierra Club v. United States Department of Energy*, No. 16-1186 (D.C. Cir. Oct. 24, 2016).

Opponents of EPA Carbon Standards for New Coal-Fired Power Plants Filed Initial Briefs

Petitioners challenging EPA's new source performance standards for carbon emissions from power plants filed their opening briefs in the D.C. Circuit Court of Appeals. The performance standard for new coal-fired electric utility steam generating units is based on a highly efficient supercritical pulverized coal unit with partial carbon capture and storage as the best system of emission reduction (BSER). A group of 23 states argued in an opening brief that EPA had not applied the correct legal standard to its determination that this BSER was adequately demonstrated; the states argued that EPA was required to show that "the entire selected system is *commercially available* for implementation at new, full-scale facilities." The states also argued that EPA had failed to show that the BSER was adequately demonstrated, had failed to adequately consider costs and benefits, and not made the statutorily required endangerment and significant contribution findings required to set NSPS for a source category. North Dakota filed its own opening brief focused on the application of the standards to power plants fueled by lignite coal. North Dakota argued that EPA had failed to establish that the BSER for new steam generating units was adequately demonstrated for lignite or that the performance standard was achievable. North Dakota also contended that EPA's failure to create a subcategory for lignite-fueled units was arbitrary and capricious. (A brief from petitioner-intervenors Lignite Energy Council and Gulf Coast Lignite Coalition also focused on the rule's application to lignite-fired facilities.) The non-state petitioners also argued that the BSER was not adequately demonstrated and that EPA had not made the required endangerment and significant contribution findings. The non-state petitioners also asserted the performance standards for modified and reconstructed sources were unlawful, and that EPA's inconsistent analysis of the availability of CCS for coal-fired and gas-fired baseload units rendered the standards arbitrary and capricious. The non-state petitioners further argued that EPA had improperly rejected petitions for reconsideration that raised the issue of EPA's *ex parte* contacts prior to the notice and comment period for the proposed rule. *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. opening briefs Oct. 13, 2016; petitioner-intervenors' opening brief Oct. 24, 2016).

Groups Asked D.C. Circuit to Expedite Consideration of Challenge to Natural Gas Pipeline

Three environmental groups challenging a natural gas pipeline from Alabama to Florida asked the D.C. Circuit Court of Appeals to expedite consideration of their petition for review. The petitioners said they wished to obtain a ruling on the merits prior to the scheduled May 2017 completion date for the pipeline in the event that the D.C. Circuit did not grant a stay. The petitioners also said that they would still request an expedited schedule if a stay were granted to minimize harm to the other parties. The groups argued that FERC's determinations were subject to "substantial challenge" and appropriate for expedited review because of FERC's failure to consider downstream environmental impacts, including greenhouse gas emissions. The groups said FERC's review was at odds with EPA and Council on Environmental Quality guidance, caselaw, and the NEPA regulations. *Sierra Club v. FERC*, No. 16-1329 (D.C. Cir. Oct. 24, 2016).

Petitioners Asked D.C. Circuit to Consolidate Methane Standards Challenge with Other Challenges to Emissions Standards in Oil and Gas Sector

Petitioners challenging EPA's final methane and volatile organic compound (VOC) emission standards for new, reconstructed, and modified sources in the oil and natural gas sector filed a motion to govern further proceedings. The petitioners asked the court consolidate the methane standards challenge with two pending proceedings that also challenged new source performance standards for the oil and gas sector. The petitioners also requested that the consolidated proceedings be bifurcated to allow the court to first consider "fundamental legal issues," including EPA's authority to regulate, and then to move to consideration of "implementation-based challenges." *North Dakota v. EPA*, Nos. 16-1242 et al. (D.C. Cir. Oct. 21, 2016).

Challenge to Aircraft Greenhouse Gas Endangerment Finding Filed

The Biogenic CO2 Coalition filed a petition in the D.C. Circuit Court of Appeals seeking review of EPA's endangerment finding for greenhouse gas emissions from aircraft. The coalition's members for purposes of the petition include American Bakers Association, Corn Refiners Association, and National Cotton Council of America. *Biogenic CO2 Coalition v. EPA*, No. 16-1358 (D.C. Cir., filed Oct. 14, 2016).

Center for Biological Diversity Asked Ninth Circuit for Rehearing in Biomass Permit Challenge

The Center for Biological Diversity (CBD) filed a petition for rehearing and/or modification of opinion after the Ninth Circuit Court of Appeals deferred to EPA and upheld a Prevention of Significant Deterioration (PSD) permit for a biomass-burning power plant at a lumber mill in California. CBD argued that the court had improperly applied deference to "unsupported and arbitrary" factual conclusions reached by EPA. CBD said that even if rehearing were not granted, the court should modify its "overbroad" conclusion that EPA's Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production (Bioenergy BACT Guidance) was rational. CBD also called for modification of the opinion to correct factual errors regarding prior environmental review of the facility and the final list of fuels EPA approved in the permit. *Helping Hand Tools v. EPA*, No. 14-72553 (9th Cir.

petition for rehearing Oct. 14, 2016).

Exxon Sought to Block New York Attorney General Investigation in Texas Federal Court

On October 17, 2016, Exxon Mobil Corporation (Exxon) filed a motion for leave to add the Attorney General of New York as a defendant in the action in the federal district court for the Northern District of Texas in which Exxon seeks to bar enforcement of a civil investigative demand issued by Massachusetts Attorney General Maura Healey. Exxon indicated that the New York attorney general's "sweeping subpoena" issued in November 2015 seeking 40 years of climate change-related documents was issued in furtherance of the illegal objective of depriving Exxon of its constitutional rights. (Exxon's filings included the subpoena itself, which had not previously been publicly available.) Exxon said that it initially cooperated with the New York attorney general's investigation believing it would be "fair and impartial" but that subsequent events—including a March 2016 press conference at which state attorneys general pledged to use their enforcement powers to address climate change and the disclosure of a common interest agreement between state attorneys general—had revealed the political and "pretextual nature" of the investigation. In addition to adding the New York attorney general as a defendant, Exxon also sought leave to add claims of federal preemption and for conspiracy to deprive Exxon of its constitutional rights. In support of the preemption claim, Exxon contended that the attempt by the Massachusetts and New York attorneys general to impose liability on Exxon for failing to take into account future climate change regulation was at odds with Securities and Exchange Commission rules and regulations for incorporating assumptions about future events. After Exxon filed a motion requesting that the court expedite consideration of the motion for leave to amend, the Massachusetts attorney general asked the court to deny the request. The Massachusetts attorney general argued that the "actual but unstated reason" for the "rush" to add the New York attorney general was to avoid the jurisdiction of the New York Supreme Court, which was then considering the New York attorney general's motion to compel Exxon and its accountant to respond to a subpoena (discussed above). *Exxon Mobil Corp. v. Healey*, No. 4:16-cv-00469-K (N.D. Tex., motion for leave to amend Oct. 17, 2016; motion to expedite Oct. 19, 2016; opposition to motion to expedite Oct. 21, 2016).

Conservation Groups Asked to Intervene in Oil and Gas Trade Association's Suit to Compel Quarterly Federal Mineral Lease Sales

Nine conservation groups moved to intervene in Western Energy Alliance's (WEA's) action seeking to compel the Bureau of Land Management to hold quarterly federal mineral sales. In the lawsuit, WEA alleged that BLM was failing to meet the Mineral Leasing Act's requirements for regular lease sales. The environmental groups asserted that the relief sought by WEA would harm their interests by eliminating important environmental protections on public lands and fundamentally changing the way the federal oil and gas leasing program operates. The groups seek intervention as of right, or, alternatively, permissive intervention. *Western Energy Alliance v. Jewell*, No. 1:16-cv-00912 (D.N.M., motion to intervene Oct. 19, 2016).

Action Filed in California Federal Court to Challenge Decision Not to List Pacific Fisher as Threatened Species

The Center for Biological Diversity and three other organizations filed a lawsuit in the federal district court for the Northern District of California challenging the withdrawal of the proposed designation of a distinct population segment of the fisher (the Pacific fisher) as threatened under the Endangered Species Act. The complaint described Pacific fishers as "slender mammals with long, bushy tails, closely related to minks, martens, and wolverines." The plaintiffs charged that the U.S. Fish and Wildlife Service had "inexplicably and illegally abandoned years of work" and that the withdrawal was contrary to the best scientific and commercial data available. The plaintiffs cited climate change as one of the threats to the Pacific fisher and its habitat. In their notice of intent to sue, the plaintiffs said that FWS had arbitrarily misconstrued uncertainty regarding the effects of climate change on fisher habitat as evidence that climate change was not contributing to significant habitat loss. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 4:16-cv-06040 (N.D. Cal., filed Oct. 19, 2016).

Power Plant Owners Challenged New York "Zero Emission Credits" for Nuclear Plants

Owners of fossil fuel-fired power plants that supply electricity to New York and two trade associations filed an action in the federal district court for the Southern District of New York challenging the New York Public Service Commission's (PSC's) plan to provide "Zero Emissions Credits" to four nuclear power plants. The Zero Emission Credit (ZEC) program was established as part of the PSC's proceeding to establish a Clean Energy Standard to achieve the statewide goal of obtaining 50% of New York's electricity from renewable sources by 2030. The plaintiffs alleged that the ZEC program, though "[o]stensibly" intended to avoid the loss of carbon-free nuclear generation before new renewable power sources could be developed, would in fact "simply serve[] to keep the uneconomic capacity and energy from [the four nuclear plants] in the … wholesale markets, notwithstanding the fact that wholesale market price signals are indicating that these units should be retired." The plaintiffs alleged that the ZEC program was field preempted because the Federal Energy Regulatory Commission has exclusive jurisdiction over wholesale electricity sales. The plaintiffs also contended that the ZEC program was barred by conflict preemption and invalid under the dormant Commerce Clause. *Coalition for Competitive Electricity v. Zibelman*, No. 1:16-cv-08164 (S.D.N.Y. Oct. 19, 2016).

Fish and Wildlife Service Said It Reasonably Determined That Climate Change Did Not Threaten Pacific Marten's Existence

The U.S. Fish and Wildlife Service defended its decision not to list the coastal marten as endangered or threatened. The coastal marten is a small mammal in the weasel family that lives in coastal northern California and coastal southern and central Oregon. In a cross motion for summary judgment, FWS said it had reasonably determined that historic threats to the coastal marten's habitat had been abated and that current stressors, including climate change, were not expected to have significant impacts. The FWS said that climate change's potential impacts on the coastal marten's habitat "ranged from negative to neutral to potentially beneficial" and that it had determined that "there was not reliable information to conclude that climate change would cause the coastal marten to be in danger of extinction now or in the foreseeable future." *Center for Biological Diversity v. United States Fish & Wildlife Service*, No. 3:15-cv-05754 (N.D. Cal. Oct. 16, 2016).

After Issuing FONSI for Amendment to Coal Mine Plan, Agency Notified Court It Had Complied with Order Requiring Analysis of Indirect and Direct Effects

The United States Office of Surface Mining Reclamation and Enforcement (OSMRE) filed a notice in the federal district court for the District of Montana to inform the court that it had complied with the court's January 2016 order requiring it to perform additional environmental review in conjunction with the approval of a modification to a coal mining plan. OSMRE told the court that it had completed an environmental assessment (EA) that considered the direct, indirect, and cumulative environmental effects of the modification, and that it had issued a finding of no significant impact (FONSI) based on the EA. The FONSI said that the proposed action's contribution to greenhouse gas emissions locally and nationally would be minor to moderately adverse and short-term. The NEPA documents for the modification are available here. *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enforcement*, Nos. 14-cv-13, 14-cv-103 (D. Mont. notice of compliance Oct. 3, 2016).

Utilities and Natural Gas Distribution Companies Filed Commerce Clause Challenge to Washington Greenhouse Gas Regulations

Electric utilities and natural gas local distribution companies filed an action in the federal district court for the Eastern District of Washington challenging greenhouse gas emission regulations known as the "Clean Air Rule" adopted by the Washington State Department of Ecology. The plaintiffs asserted that the regulations—which apply to stationary sources, natural gas distributors located in Washington, and petroleum product producers located in or importing to Washington—violated the Commerce Clause because it establishes a program that restricts the market for greenhouse gas emissions offsets and favors in-state offsets over out-of-state offsets. *Avista Corp. v. Bellon*, No. 2:16-cv-00335 (E.D. Wash. Sept. 27, 2016).

Business Groups Said Washington Greenhouse Gas Regulations Exceeded Statutory Authority, Violated State Laws

Eight business and trade groups filed a challenge to Washington's "Clean Air Rule" in Washington Superior Court. The petitioners contended that the legislature had not delegated the Washington Department of Ecology the authority to establish Clean Air Rule's greenhouse gas regulatory program, which Ecology established at the instruction of the governor. In addition, the petitioners asserted that Ecology's adoption of the regulations violated the State Environmental Policy Act because an environmental impact statement should have been prepared. The petitioners also said that the program violated the Administrative Procedure Act because of its arbitrary treatment of Energy Intensive, Trade Exposed industries and based on arbitrary cost-benefit analysis and least-burdensome alternative analysis. The petitioners also alleged violations of Washington's Regulatory Fairness Act, which requires preparation of a small business economic impact statement, and of the Washington constitution's limits on taxation. *Association of Washington Business v. Washington State Department of Ecology*, No. __ (Wash. Super. Ct., filed Sept. 27, 2016).

Texas Resident Filed RICO Action Alleging Harms Inflicted by "Climate Alarmism Enterprise"

A Texas resident filed a Racketeer Influenced and Corrupt Organizations Act (RICO) action against Climate Action Network and 39 other organizations, as well as 99 John and Jane Does, alleging that the defendants had acted in concert to further a criminal scheme based on false claims that anthropogenic emissions of carbon dioxide cause climate change. The plaintiff labeled this scheme the "Climate Alarmism Enterprise." The complaint also alleged that the Climate Alarmism Enterprise had "powerful allies with immunity from prosecution," chiefly the Intergovernmental Panel on Climate Change. The complaint's allegations also included that a number of other parties, including websites, scientific organizations, and the New York Times, aided and abetted the enterprise. The plaintiff sought compensatory, punitive, and exemplary damages and asked the court to order the defendants to disgorge improperly secured monies. In October, the plaintiff sought to intervene in Exxon Mobil Corporation's lawsuit against the Massachusetts attorney general. The plaintiff asserted in his motion to intervene that Exxon could not adequately represent his interests, citing the "pressure" exerted on Exxon by "climate alarmist politicians at home and abroad." *Goldstein v. Climate Action Network*, No. 5:16-cv-00211 (N.D. Tex., filed Sept. 13, 2016); *Exxon Mobil Corp. v. Healey*, No. 4:16-cv-00469-K (N.D. Tex., motion to intervene Oct. 25, 2016).

Arizona Board of Regents Filed Notice of Appeal in Climate Scientist Public Records Case

The Arizona Board of Regents filed a notice of appeal a month after the Arizona Superior Court filed a judgment ordering production of previously withheld emails of two University of Arizona climate scientists pursuant to the State's public records law. The Superior Court's judgment was based on a June 2016 "Under Advisement Ruling" in which the court concluded that the potential chilling effect of disclosure did not overcome the presumption favoring disclosure. *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. C20134963 (Ariz. Super. Ct., notice of appeal Oct. 17, 2016).

Competitive Enterprise Institute Cited Texas Federal Court's Concerns Regarding Massachusetts Attorney General's Exxon Investigation as Support for Sanctions in D.C. Court

The Competitive Enterprise Institute (CEI) argued to the District of Columbia Superior Court that a Texas federal court's order in Exxon's case against the Massachusetts attorney general supported CEI's request for sanctions against the United States Virgin Islands (USVI) attorney general. As part of a climate change-related investigation of Exxon, the USVI attorney general issued, but later revoked, a subpoena to CEI asking for certain documents and communications. CEI argued that sanctions were warranted, in part due to the USVI attorney general's bad faith in commencing the Exxon investigation. CEI said that the Texas federal court's expressions of concern regarding whether the Massachusetts attorney general undertook her investigation of Exxon in good faith supported CEI's arguments regarding the pretextual nature of the USVI attorney general's investigatory demands. CEI noted that the same events cited by the Texas federal court as warranting concern—including a climate change press conference held by a number of state attorneys general—also demonstrated bad faith on the part of the USVI attorney general. *United States Virgin Islands Office of the Attorney General v. ExxonMobil Oil Corp.*, No. 2016 CA 2469 (D.C. Super. Ct., motion for leave to file notice of supplemental authority

Oct. 17, 2016).

Proceeding in New York State Court Seeks Correspondence About Attorney General's Climate Change Investigations

Energy & Environment Legal Institute (EELI) filed a new proceeding against the New York attorney general under New York's Freedom of Information Law (FOIL) seeking to compel release of correspondence of the attorney general and employees that "related to the Attorney General's decision … to investigate those who disagree with him on climate change and climate change policies." EELI said that the attorney general had improperly withheld documents in response to their FOIL requests on the basis of attorney-client privilege and the work product doctrine and also on the grounds that the disclosure would interfere with a law enforcement investigation and that the documents requested were inter- or intra-agency memoranda. *Energy & Environment Legal Institute v. Attorney General of New York*, No. 101678/16 (N.Y. Sup. Ct., filed Oct. 6, 2016).

Environmental Groups Told California Appellate Court That CEQA Review for Golden State Warriors Arena Lacked Greenhouse Gas Information

Environmental groups asked the California Court of Appeal for permission to file an amicus curiae brief in support of the appellants challenging the California Environmental Quality Act (CEQA) review for a mixed-use development project that includes a new arena for the National Basketball Association's Golden State Warriors. One of the amicus brief's primary arguments was that the project's CEQA review did not provide sufficient information regarding the project's greenhouse gas impacts. The brief said that the project proponent had not demonstrated that its commitment to implement the project in accordance with San Francisco's greenhouse gas strategy would lead to reductions in greenhouse gases, and that the environmental impact report provided no information regarding the magnitude of the project's greenhouse gas emissions. *Mission Bay Alliance v. Office of Community Investment and Infrastructure*, No. A148865 (Cal. Ct. App. Oct. 3, 2016).

Bird Groups Sent Notice of Violations in Connection with Ohio Wind Turbine Project

The American Bird Conservancy and the Black Swamp Bird Observatory provided notice of violations of the Endangered Species Act in connection with a wind turbine project sponsored by the Ohio Air National Guard at Camp Perry in Ottawa County, Ohio. The organizations said that construction and operation of the wind turbine would also violate the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and NEPA. The organizations said that the proposed site for the turbine was in a major bird migration corridor and in "extremely close proximity" to the Ottawa National Wildlife Refute and was "one of the worst possible locations to construct and operate a wind power project." The organizations contended that the NEPA review conducted for the project should have considered other means of reducing Camp Perry's greenhouse gas emissions, and that the Air National Guard's conduction of the base of the turbine prior to issuing an environmental assessment violated NEPA. The groups said they would consider litigation should the Air National Guard proceed with the project. Notice of Violations

in Connection with the Camp Perry Air National Guard Wind Energy Project in Ottawa County, Ohio (Oct. 24, 2016).

Update #91 (October 3, 2016)

FEATURED CASE

Ninth Circuit Upheld Air Permit for Biomass Power Plant at Lumber Yard

The Ninth Circuit Court of Appeals upheld a Prevention of Significant Deterioration (PSD) permit for a biomass-burning power plant at a lumber mill in California. The Ninth Circuit concluded that the U.S. Environmental Protection Agency (EPA) had reasonably concluded that the Clean Air Act did not require consideration of solar power and a greater natural gas mix as control alternatives at the facility because doing so would impermissibly "redefine the source." The Ninth Circuit also deferred to EPA's application of its Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production (Bioenergy BACT Guidance). The court said that this case appeared to be the first time a circuit court had addressed EPA's framework for evaluating BACT for greenhouse gas emissions from biomass facilities and concluded that deference to the Bioenergy BACT Guidance was required because EPA was acting "at the frontiers of science." *Helping Hand Tools v. EPA*, No. 14-72553 (9th Cir. Sept. 2, 2016): added to the "Stop Government Action/Project Challenges" slide.

DECISIONS AND SETTLEMENTS

Texas Federal Court Ordered Mediation in ExxonMobil's Suit Against Massachusetts Attorney General

In Exxon Mobil Corporation's (ExxonMobil's) action challenging a civil investigative demand (CID) issued by Massachusetts Attorney General Maura Healey, the federal district court for the Northern District of Texas appointed a mediator and ordered Exxon Mobil Corporation and Massachusetts Attorney General Maura Healey to mediate within 16 days of the court's order (by October 8). ExxonMobil's lawsuit alleged that the CID—which sought up to 40 years of ExxonMobil records related to climate change—violated constitutional and common law rights. The court's mediation order followed a hearing at which the judge encouraged the parties to attempt to resolve their dispute out of court. Prior to the hearing, ExxonMobil filed its opposition to the attorney general's motion to dismiss the case, arguing that the court had personal jurisdiction over the attorney general and that abstention would not be appropriate. ExxonMobil also said that the constitutional claims were ripe for adjudication and that the venue was proper, and asserted that the attorney general had not contested the adequacy of the complaint's allegations. In reply, the attorney general stated that it was not conceding the sufficiency of ExxonMobil's claims and argued that ExxonMobil had misapplied precedents regarding personal jurisdiction. The attorney general reiterated that the court should abstain because ExxonMobil could pursue—and was pursuing—relief in Massachusetts state court. The attorney general also reiterated that Texas was not the proper venue. Parties that interceded in the lawsuit on ExxonMobil's behalf included 11 states that expressed concern regarding unconstitutional use of

investigative powers by state attorneys general, and a Massachusetts doctor to whom the attorney general had submitted a CID in an unrelated Medicaid fraud investigation. *Exxon Mobil Corp. v. Healey*, No. 4:16-cv-00469-K (N.D. Tex. Sept. 22, 2016): added to the "Regulate Private Conduct" slide.

Montana Federal Court Said Canadian Lynx Critical Habitat Need Not Include "Climate Change Refugia"

The federal district court for the District of Montana ruled that the U.S. Fish and Wildlife Service (FWS) should reconsider whether areas in southern Colorado and on national forest lands in Montana and Idaho should be designated as critical habitat for the Canadian lynx. The court rejected, however, a claim by the plaintiffs that FWS erred by not designating areas that could serve as "climate change refugia" in the future. The court said the plaintiffs' arguments for such designations were at odds with a 2010 decision in which the court rejected essentially the same arguments. *WildEarth Guardians v. U.S. Department of Interior*, Nos. CV 14–270–M–DLC, 14–272–M–DLC (D. Mont. Sept. 7, 2016): added to the "Endangered Species Act" slide.

Federal Court Said Fish and Wildlife Service Adequately Considered Climate Change in Determination Not to List Arctic Grayling Distinct Population Segment as Endangered

The federal district court for the District of Montana upheld an FWS determination not to list the Upper Missouri River distinct population segment of Arctic grayling as endangered or threatened under the Endangered Species Act. The Arctic grayling is a freshwater fish only found in two locations in the conterminous United States, the upper Missouri River system above the Great Falls in Montana and in northwest Wyoming within Yellowstone National Park. The court rejected the plaintiffs' assertion that the analysis of climate change impacts had been inadequate and arbitrary, finding that FWS had reasonably concluded that the species would likely survive and adapt to a warming climate. *Center for Biological Diversity v. Jewell*, No. 2:15-cv-00004-SEH (D. Mont. Sept. 2, 2016): added to the "Endangered Species Act" slide.

Colorado Appellate Court Said Court Lacked Jurisdiction to Consider City of Boulder Ordinances That Took Steps Toward Establishment of New Utility That Would Increase Renewable Generation

The Colorado Court of Appeals ruled that a district court lacked jurisdiction over a challenge by Public Service Company of Colorado (Xcel) to ordinances passed by the City of Boulder to implement a charter amendment that authorized the City to establish a new light and power utility if certain conditions were met. (Xcel is the current provider of electricity to Boulder customers.) One of the charter amendment's conditions required that the new utility have a plan for reduced greenhouse gas emissions and increased renewable energy. The two ordinances challenged by Xcel accepted a third-party expert's conclusion that the conditions precedent had been met and stated the City's intention to establish a new utility. The appellate court said that the district court had erred in dismissing Xcel's action as time-barred, but that the district court did not have jurisdiction because the ordinances were not final actions. *Public Service Co. of Colorado v. City of Boulder*, No. 2016COA138 (Colo. Ct. App. Sept. 22, 2016): added to the "Challenges to Local Action" slide.

Vermont Court Set Deadline for Attorney General to Produce Climate Investigation Records to E&E Legal and Free Market Environmental Law Clinic

A Vermont Superior Court denied a motion by the Attorney General of Vermont to dismiss an action seeking to compel disclosure of documents under the Vermont Public Records Act. Energy & Environmental Legal Institute and Free Market Environmental Law Clinic had requested emails that included the terms "climate denial" or "climate denier" or the names or email addresses of certain lawyers at environmental nongovernmental organizations or the names or email addresses of the New York State Attorney General (NYAG) or the chief of the NYAG's Environmental Protection Bureau. The court rejected the attorney general's defense that the plaintiffs had failed to exhaust administrative remedies, but said that the attorney general had shown that "exceptional circumstances" existed given the breadth of the request and the need for individual review of documents and redaction of privileged material. The court ordered the attorney general to complete its review by October 3, 2016. *Energy & Environment Legal Institute v. Attorney General of Vermont*, No. 349-6-16WNCV (Vt. Super. Ct. Sept. 19, 2016): added to the "Force Government to Act/Other Statutes" slide.

SoCalGas Agreed to Pay Up to $4.3 Million to Resolve Criminal Charges Arising from Natural Gas Leak

The Los Angeles County District Attorney and Southern California Gas Company (SoCalGas) agreed to a proposed settlement in the criminal case stemming from the 2015 methane link from SoCalGas's Aliso Canyon natural gas storage facility. SoCalGas agreed to plead no contest to a misdemeanor violation of failing to timely report the leak. SoCalGas must pay approximately $550,000 for fines, penalty assessments, and response costs and must also install and maintain an infrared methane leak detection system, and must hire and maintain six full-time employees for at least three years to operate and maintain the system. The settlement agreement indicated that the settlement's requirements would cost SoCalGas between $4,004,172 and $4,304,172. *People v. Southern California Gas Co.*, No. 6SC00433 (Cal. Super. Ct. Sept. 13, 2016): added to the "Regulate Private Conduct" slide.

Los Angeles Settled CEQA Lawsuit Over Airport Expansion

On August 24, 2016, the Los Angeles City Council approved a memorandum of understanding (MOU) between the City and the Alliance for a Regional Solution to Airport Congestion (ARSEC) that resolved a lawsuit ARSEC brought in 2013 under the California Environmental Quality Act to challenge a major redevelopment and expansion of the Los Angeles International Airport. ARSEC's arguments had included a claim that an alternative with lower greenhouse gas emissions should have been chosen. The MOU provided that the City would not proceed with a key feature of the selected alternative, the relocation of a runway to be 260 feet closer to residential neighborhoods. *Alliance for a Regional Solution to Airport Congestion v. City of Los Angeles*, No. BS143086 (Cal. Super. Ct.): added to the "State NEPAs" slide.

Environmental Appeals Board Said Energy Storage Option Did Not Have To Be Considered at Outset of BACT Analysis for New Gas Turbines

EPA's Environmental Appeals Board (EAB) upheld a PSD permit issued for the construction of five new natural gas-fired combustion turbines at a power plant in Tempe, Arizona. The EAB rejected petitioner Sierra Club's contention that the Maricopa County Air Quality Department abused its discretion in conducting its greenhouse gas BACT analysis and in concluding that a control alternative that paired energy storage with combustion turbines to reduce greenhouse gas emissions would impermissibly "redefine the source." The EAB cautioned that its decision should not be read as "an automatic off-ramp for energy storage technology" as a consideration in Step 1 of future BACT analyses. *In re Arizona Public Service Co. Ocotillo Power Plant*, PSD Appeal No. 16-01 (EAB Sept. 1, 2016): added to the "Stop Government Action/Project Challenges" slide.

NEW CASES, MOTIONS, AND NOTICES

Environmental Group Sued ExxonMobil for Failing to Prepare Massachusetts Facility for Climate Change

Conservation Law Foundation (CLF) filed a citizen suit under the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act against ExxonMobil Corporation and two related companies (ExxonMobil) alleging that the defendants had failed to take climate change impacts into account in connection with their operation of the Everett Terminal, a marine distribution terminal in Massachusetts. The complaint, filed four months after CLF submitted a notice of intent to ExxonMobil, alleged that the terminal was vulnerable to sea level rise, increased precipitation, increased magnitude and frequency of storm events, and increased magnitude and frequency of storm surge, and that ExxonMobil had not taken action to address these vulnerabilities despite having "long been well aware of" climate change impacts and risks. In the RCRA cause of action, the complaint said that the threats of storm surge and sea level rise were imminent and that the failure to adapt the Everett Terminal would result in the release of hazardous and solid wastes into the environment and surrounding residential communities. In the Clean Water Act causes of action, the complaint asserted that the facility was violating its National Pollutant Discharge Elimination System (NPDES) permit because discharges from the facility were occurring more frequently than allowed under the permit and numeric effluent limitations were exceeded. In addition, the complaint alleged that discharges from the facility violated state water quality standards and that the facility's stormwater pollution prevention plan and spill prevention, control and countermeasures plan were inadequate because they failed to address climate change impacts. *Conservation Law Foundation v. ExxonMobil Corp.*, No. 1:16-cv-11950-MLW (D. Mass., filed Sept. 29, 2016): added to the "Regulate Private Conduct" slide.

Environmental Groups Challenged Natural Gas Pipeline Southeastern U.S.

Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper filed a petition in the D.C. Circuit Court of Appeals seeking review of Federal Energy Regulatory Commission (FERC) orders authorizing construction and operation of a natural gas pipeline project extending from Alabama to Florida. In a statement, Sierra Club said the petitioners would argue that FERC failed to disclose the pipeline's climate impacts, including the impacts of power plants supplied by the pipeline. The environmental organizations filed the lawsuit after FERC denied their

request for rehearing. FERC rejected the organizations' call for consideration of indirect effects related to induced upstream production and downstream natural gas consumption. Sierra Club and Flint Riverkeeper also joined Gulf Restoration Network in filing a petition in the Eleventh Circuit Court of Appeals for review of the U.S. Army Corps of Engineers issuance of Clean Water Act permits for the pipeline. *Sierra Club v. Federal Energy Regulatory Commission*, No. 16-1329 (D.C. Cir., filed Sept. 20, 2016); *In re Florida Southeast Connection, LLC*, Nos. CP14-554-001, CP15-16-001, CP15-17-001 (FERC Sept. 7, 2016); *Gulf Restoration Network v. U.S. Army Corps of Engineers*, No. 16-15545 (11th Cir., filed Aug. 17, 2016): added to the "Stop Government Action/NEPA" slide.

FERC Defended Environmental Review for Constitution Pipeline Project

FERC and proponents of the Constitution Pipeline Project filed briefs defending FERC's environmental review of the project, which includes a 124-mile natural gas pipeline between Pennsylvania and New York and associated facilities. The briefs also defended FERC's compliance with the Natural Gas Act and the Clean Water Act. FERC argued that the National Environmental Policy Act (NEPA) did not require it to consider potential impacts from increases in natural gas production and that it had "reasonably analyzed" the pipeline project's greenhouse gas emissions. FERC said it had explained its exclusion from emissions calculations of alleged loss of carbon sinks, that it had not improperly rejected the significance of the project's potential emissions based on a comparison to total U.S. greenhouse gas emissions, and that it was not required to assess the project's incremental contribution to climate change. FERC also said that it had not impermissibly segmented its review of the Constitution Pipeline Project from consideration of the impacts of other pipeline proposals. Three intervening parties—the pipeline project's developer, the owner and operator of an existing pipeline system to which the Constitution Pipeline would connect, and the Natural Gas Supply Association—also filed briefs defending FERC's authorizations of the pipeline, including FERC's consideration of greenhouse gas and climate change impacts. In their reply brief, four environmental groups argued that FERC should have considered the impacts of increased gas production because the pipeline would be the "legally relevant cause" of such upstream impacts and impacts were reasonably foreseeable. The groups also reiterated their arguments that FERC's evaluation of greenhouse gas emissions did not comply with NEPA. *Catskill Mountainkeeper, Inc. v. Federal Energy Regulatory Commission*, Nos. 16-0345, 16-0361 (2d Cir. opposition briefs Sept. 12, 2016; reply brief Sept. 23, 2016): added to the "Stop Government Action/NEPA" slide.

NYSDEC, Environmental Groups Filed Briefs Defending Denial of Water Quality Certification for Constitution Pipeline

The New York State Department of Environmental Conservation (NYSDEC) filed a brief opposing Constitution Pipeline Co., LLC's challenge to NYSDEC's denial of a Clean Water Act Section 401 water quality certification for the Constitution Pipeline Project, approximately 100 miles of which passes through New York. DEC said that its denial was "timely, rational, supported by the record, and consistent with the applicable federal and state legal standards." In its brief, DEC noted that increased water temperatures caused by removal of riparian vegetation could limit habitat suitability for cold-water species, and that such impacts could be exacerbated by climate change in the long term. Two other briefs were filed by intervenors opposing the

challenge, including a brief from a group called Stop the Pipeline (STP). STP's arguments included a call for additional environmental review to consider supplemental material regarding risks of extreme weather caused by climate change. *Constitution Pipeline Co., LLC v. Seggos*, No. 16-1568 (2d Cir. Sept. 12, 2016): added to the "Challenges to State Action" slide.

Opening Briefs Filed in Challenges to EPA's Latest Renewable Fuel Standard Rule

Parties challenging various aspects of EPA's final renewable fuel standard rule filed initial briefs in the D.C. Circuit Court of Appeals. The final rule established percentage standards for blending renewable fuels into motor vehicle gasoline and diesel produced and imported in 2014, 2015, and 2016. One brief filed by "obligated parties" (i.e., companies required to purchase credits to meet the rule's volume requirements) argued that the 2016 cellulosic fuel volume requirement was unreasonable and unlawful and that EPA acted outside its authority in setting biomass-based diesel requirements. A second obligated-party brief argued that EPA arbitrarily and capriciously failed to obligate appropriate parties, namely by excluding blenders. Renewable energy companies and trade groups argued in their brief that EPA had improperly used a waiver to reduce the statutory volume requirements. In a separate brief, the National Biodiesel Board also argued that EPA had exceeded its waiver authority and argued that the final rule's advanced biofuel volumes were arbitrary and capricious. On September 15, 2016, three motions were filed seeking leave to file amicus briefs in support of the petitioners. The movants were CVR Energy, Inc., the Small Retailers Coalition, and multiple "Biodiesel Associations." Petitioner-intervenor American Petroleum Institute (API) opposed these motions, arguing that they should have been filed earlier and that the delay prejudiced API. API also said that the parties had not explained why they were not adequately represented by other parties. *Americans for Clean Energy v. EPA*, Nos. 16-1005 et al. (D.C. Cir. Sept. 8, 2016): added to the "Challenges to Other Federal Action" slide.

Center for Biological Diversity Filed Lawsuit Seeking EPA Response to Ocean Acidification Petition

The Center for Biological Diversity filed an action in the federal district court for the District of Columbia challenging EPA's failure to respond to its April 2013 petition requesting that EPA amend water quality criteria and publish guidance to address ocean acidification. The complaint asked the court to find that EPA had failed to act in a reasonable timeframe and to order EPA to formally respond. The complaint noted that the existing criteria for ocean acidity were developed in 1976 and said that a "robust body of science" had been developed since that time that could assist in revising the water quality criteria. *Center for Biological Diversity v. EPA*, No. 1:16-cv-01791 (D.D.C., filed Sept. 8, 2016): added to the "Force Government to Act/Other Statutes" slide.

Plaintiffs Sought Summary Judgment in Case Challenging Riverside County Highway Project

Four environmental groups moved for summary judgment in their challenge to a major highway project in Riverside County, California. In their motion, filed in the federal district court for the Central District of California, the plaintiffs argued, among other things, that the Federal Highway

Administration's review under the National Environmental Policy Act failed to consider a reasonable range of alternatives, including certain alternatives that could reduce greenhouse gas emissions. *Center for Biological Diversity v. Federal Highway Administration*, No. 5:16-cv-00133 (C.D. Cal. Sept. 22, 2016): added to the "Stop Government Action/NEPA" slide.

Environmental Groups, EPA Agreed to Dismissal of Lawsuit Seeking Regulation of Aircraft Emissions

Center for Biological Diversity, Friends of the Earth, and EPA filed a joint stipulation of dismissal without prejudice of the environmental groups' lawsuit that sought to compel EPA to respond to their petition seeking regulation of aircraft greenhouse gas emissions. The dismissal came after EPA issued a final endangerment finding in July 2016 for certain aircraft greenhouse gas emissions. EPA said in July that it anticipated proposing emissions standards that would be at least as stringent as standards that the International Civil Aviation Organization is expected to formally adopt in March 2017. *Center for Biological Diversity v. EPA*, No. 16-cv-681 (D.D.C. Sept. 9, 2016): added to the "Force Government Action/Clean Air Act" slide.

West Virginia and Other States Supported Murray Energy in Clean Air Act Jobs Study Case; EPA Urged Court to Decide Case Without Trial

Twelve states and one state agency submitted an amicus brief to the federal district court for the Northern District of West Virginia in support of Murray Energy Corporation and its affiliates in their lawsuit seeking to compel EPA to perform a study of the Clean Air Act's impact on employment. The states, led by West Virginia, said their brief was intended to "highlight the unique challenges they face resulting from the job-loss information vacuum caused by EPA's unlawful refusal to comply with Section 321," the Clean Air Act provision that is the crux of the case. The states urged the court to deny EPA's motion for summary judgment. EPA filed its reply in support of its motion, reiterating its view that the case was ripe for adjudication and that a trial was not necessary. EPA argued that if the court found it had not performed a non-discretionary duty, the remedy should be limited to ordering EPA to fulfill its obligation—and that other relief sought by Murray Energy, including an injunction on new regulations, was barred as a matter of law. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-39 (N.D. W. Va.): added to the "Challenges to Federal Action/Other Federal Action" slide.

Group Sought Vermont Attorney General Records Related to Identities of Outside Parties Participating in States' Climate Change Investigations

Energy & Environmental Legal Institute filed a complaint in Vermont Superior Court under the Vermont Public Records Law seeking to compel disclosure of documents it had requested from the Attorney General of Vermont related to an allegedly invalid common interest agreement with other states. The agreement related to climate change-related investigations of fossil fuel companies. E&E Legal sought communications and other documents discussing states' requests to share records with outside parties. E&E Legal contended that the attorney general had improperly withheld the documents based on attorney-client privilege and the attorney work product doctrine. *Energy & Environmental Legal Institute v. Attorney General of Vermont*, No. __ (Vt. Super. Ct., filed Sept. __, 2016): added to the "Force Government to Act/Other Statutes"

slide.

Tesla Shareholder Filed Suit Challenging Proposed Acquisition of SolarCity, Said Founder's Desire to Change the World by Combatting Climate Change Was at Odds with Company's Interests

A Tesla Motors, Inc. (Tesla) stockholder filed a stockholder derivative complaint asserting that Tesla's proposed acquisition of SolarCity Corporation (SolarCity) would cause substantial damage to Tesla. Tesla is in the energy storage and electric car business. SolarCity describes itself as "America's #1 full-service solar provider." The defendants were Tesla co-founder, chairman, and chief executive officer Elon Musk; other Tesla board members; SolarCity, for which Musk is chairman and the largest stockholder; other SolarCity directors and officers; and a Tesla subsidiary created for the purpose of acquiring SolarCity. The complaint, filed in the Delaware Court of Chancery, stated claims of breach of fiduciary duty, waste, and unjust enrichment. It is one of at least four complaints filed in the court in connection with the SolarCity acquisition. The complaint asserted that Tesla's proposed acquisition of SolarCity—a company that the complaint alleged was started "to support Musk's quest to fix climate change"— was driven by Musk's desire to "ensure his legacy to change the world" by shifting to a solar electric economy. The complaint alleged that the acquisition was intended to protect Musk and his family's and friends' financial interests, and that the acquisition would not be in the best interests of Tesla and its shareholders. *Prasinos v. Musk*, No. 12723 (Del. Ch., filed Sept. 6, 2016): added to the "Regulate Private Conduct" slide.

Environmental Groups Threatened Lawsuit Over Failure to Consider Colorado Oil and Gas Development Impacts—Including Climate-Related Impacts—on Endangered Fish Species

Three environmental groups sent a notice of intent to sue to the U.S. Bureau of Land Management (BLM) and the U.S. Fish and Wildlife Service asserting that the agencies had not complied with the Endangered Species Act (ESA) when BLM authorized oil and gas exploration and development in the Upper Colorado River Basin of western Colorado. The notice said that BLM's approval of resource management plans in August 2015 would allow development of almost 19,000 oil and gas wells in the region that would affect four endangered fish species and their critical habitat. The notice asserted that the agencies' failure to consider the water depletion and spill impacts on the four species violated the ESA. The groups contended, among other arguments, that the agencies relied on a 2008 programmatic biological opinion that did not take into account threats posed by climate change. Center for Biological Diversity, Living Rivers, and Rocky Mountain Wild, 60-Day Notice of Intent to Sue the BLM and U.S. Fish and Wildlife Service Pursuant to the Endangered Species Act Regarding Oil and Gas Exploration and Development (Sept. 12, 2016): added to the "Stop Government Action/Other Statutes" slide.

Update #90 (September 6, 2016)

FEATURED CASE

Seventh Circuit Upheld Department of Energy's Reliance on Social Cost of Carbon for Efficiency Standards

The Seventh Circuit Court of Appeals upheld the United States Department of Energy's (DOE's) energy efficiency standards for commercial refrigeration equipment, including DOE's analysis of the standards' environmental benefits based on the Social Cost of Carbon (SCC). The court concluded that DOE had "acted in a manner worthy of our deference." The court found that the analytical model upon which the standards were based and DOE's cost-benefit analysis were supported by substantial evidence and not arbitrary and capricious. The court also said that DOE's cost-benefit analysis was within its statutory authority. With respect to environmental benefits and the SCC, the court rejected the petitioners' argument that the Energy Policy and Conservation Act did not permit consideration of environmental factors and also the petitioners' contention that DOE's calculation of the SCC was "irredeemably flawed." The court also rejected arguments that DOE had improperly considered long-term environmental benefits such as carbon reductions but not long-term costs such as worker displacement and that DOE arbitrarily considered global benefits but only national costs. *Zero Zone, Inc. v. United States Department of Energy*, Nos. 14-2147 et al. (7th Cir. Aug. 8, 2016): added to the "Challenges to Other Federal Action" slide

DECISIONS AND SETTLEMENTS

American Petroleum Institute, Dominion to Defend DOE's NEPA Review for LNG Exports

The D.C. Circuit Court of Appeals authorized intervention by the American Petroleum Institute and Dominion Cove Point LNG, LP in Sierra Club's challenge to DOE's authorization of the export of liquefied natural gas (LNG) from the Cove Point LNG Terminal in Maryland. During the administrative process leading up to the export approval, DOE rejected Sierra Club's arguments that its environmental review should have accounted for indirect effects including greenhouse gas emissions from induced natural gas production and increased coal consumption. *Sierra Club v. United States Department of Energy*, No. 16-1186 (D.C. Cir. Aug. 8, 2016): added to the "Stop Government Action/NEPA" slide.

Alaska Federal Court Entered Final Judgment Dismissing Challenges to Polar Bear Critical Habitat

The federal district court for the District of Alaska entered final judgment dismissing three actions that sought to undo critical habitat designation for polar bears under the Endangered Species Act. The dismissal came several months after the Ninth Circuit Court of Appeals reversed the district court's earlier decision vacating the designation. *Alaska Oil & Gas Association v. Salazar*, Nos. 3:11-cv-00025-RRB et al. (D. Alaska Aug. 8, 2016): added to the "Endangered Species Act" slide.

California Appellate Court Barred Routine Reliance on Significance Thresholds Based on Existing Environment's Impacts on Project, But Said Such Thresholds Had Some Valid Uses

On remand from the California Supreme Court, the California Court of Appeal concluded that thresholds of significance based on impacts on a proposed project's occupants (receptor thresholds) could be used for some purposes in reviews under the California Environmental Quality Act (CEQA), though such thresholds could not be used to require an environmental impact report or mitigation measures based solely on the impacts of the existing environment on a proposed project. (The California Supreme Court held in December 2015 that portions of the statewide CEQA guidelines that required consideration of the impacts of existing conditions were not valid.) The California Court of Appeal considered how the Supreme Court's decision applied to receptor thresholds established by the Bay Area Air Quality Management District (BAAQMD) for toxic air contaminants and fine particulate matter. (BAAQMD's receptor thresholds for greenhouse gases were not specifically at issue in this case.) In its August 2016 decision, the appellate court said that permissible uses of the receptor thresholds included voluntary application by lead agencies when considering their own projects and when considering whether a proposed project would exacerbate existing environmental conditions, as well as for school projects and in connection with certain CEQA exemptions for housing developments. The appellate court left open whether the thresholds could be used for determining whether a proposed project is consistent with a general plan. *California Building Industry Association v. Bay Area Air Quality Management District*, Nos. A135335, A136212 (Cal. Ct. App. Aug. 12, 2016): added to the "State NEPAs" slide.

Court Said a Plaintiff in Challenge to Delaware RGGI Program Lacked Standing

The Delaware Superior Court denied as futile a motion to amend a complaint challenging Delaware's regulations implementing the Regional Greenhouse Gas Initiative. The plaintiffs sought to correct the middle initial of a plaintiff. They argued that the defendants were aware of the actual identity of the plaintiff and knew that he—not his deceased father, with whom the actual plaintiff shared a first and last name but not a middle initial—was the intended plaintiff. The court said that amendment would be futile because the plaintiff would not have had standing based on his stake in a company that was a commercial purchaser of electricity. *Stevenson v. Delaware Department of Natural Resources and Environmental Control*, No. S13C-12-025 RFS (Del. Super. Ct. Aug. 19, 2016): added to the "Challenges to State Action" slide.

California Court Ordered Suspension of Work on Intermodal Rail Facility Pending CEQA Compliance

A California Superior Court granted a peremptory writ of mandate setting aside approvals for the Southern California International Gateway project, an intermodal railyard facility intended to handle containerized cargo moving through the Ports of Los Angeles and Long Beach. The court required respondents to suspend all project activities until actions had been taken to bring the respondents' determinations, findings, and decisions into compliance with the California Environmental Quality Act (CEQA). The court's judgment followed a March 2016 opinion and order that identified numerous shortcomings in the CEQA review, including inadequate consideration of greenhouse gas impacts. *Fast Lane Transportation, Inc. v. City of Los Angeles*, Nos. BS143332 et al. (Cal. Super. Ct. July 26, 2016): added to the "State NEPAs" slide.

Illinois Attorney General Settled With Alternative Retail Electricity Supplier Over Alleged

Misrepresentations Regarding "Clean Energy Option" Product

On August 8, 2016, Illinois Attorney General Lisa Madigan announced a settlement with Ethical Electric, Inc., an alternative retail electricity supplier (ARES) that the attorney general contended misled consumers regarding the sources of energy provided through its "Clean Energy Option" product. The ARES direct mail solicitations promoted the product as providing power exclusively from renewable sources but the product instead provided power from a mix of sources matched with the purchase of renewable energy certificates (RECs). The attorney general also alleged that the ARES misrepresented the cost of the Clean Energy Option and misrepresented the Clean Energy Option as "licensed" for "green energy" supply. The settlement, which the attorney general entered into under authority of the Illinois Consumer Fraud Act, provided for a $10 refund for consumers enrolled in the product as well as additional refunds to eligible consumers upon request, a renaming of the product, and increased transparency regarding products, including disclosure of the purchase of RECs. *In re Ethical Electric, Inc.* (Ill. Att'y Gen. Aug. 8, 2016): added to the "Regulate Private Conduct" slide.

EPA Said It Would Not Investigate Nonprofit Group's Allegations of Methane Leakage Cover-Up in Natural Gas Industry

The United States Environmental Protection Agency (EPA) Office of the Inspector General declined to open an investigation into an alleged cover-up regarding the extent of methane venting and leakage in the natural gas industry. EPA notified NC WARN, a nonprofit group that had submitted a complaint and request for information, of its decision on July 20, 2016. On August 4, 2016, NC WARN requested that EPA reconsider its decision not to pursue an investigation, or provide a written explanation for not looking into NC WARN's allegations. *NC WARN Complaint and Request for Investigation*, Hotline No. 2016-021(EPA OIG NC WARN letter Aug. 4, 2016; EPA letter July 20, 2016): added to the "Force Government to Act/Clean Air Act" slide.

NEW CASES, MOTIONS, AND NOTICES

D.C. Circuit Set Schedule for Clean Power Plan Oral Argument, Parties Argued for Relevance of Recent Clean Air Act Precedents

Oral argument on the Clean Power Plan will take place on September 27 in the D.C. Circuit Court of Appeals. The D.C. Circuit allocated time for argument over approximately three and a half hours on five categories of issues: statutory issues other than Section 112 of the Clean Air Act, Section 112, constitutional issues, notice issues, and record-based issues. In July and August, the petitioners and EPA submitted letters to the court to notify it of supplemental authorities—recent opinions issued by the D.C. Circuit and other circuit courts of appeal—that the parties believed to be pertinent and significant. Petitioners argued that the Fifth Circuit Court of Appeals' stay of an EPA rule that disapproved state implementation plans from Texas and Oklahoma supported their argument that EPA's assessment of grid reliability was insufficient. EPA said the ruling had minimal relevance and that none of the deficiencies identified by the Fifth Circuit were present in this case. EPA told the D.C. Circuit that the Seventh Circuit's analysis upholding DOE's consideration of the global benefits of reducing carbon emissions

when setting energy efficiency standards would support EPA's accounting for global benefits in the Clean Power Plan. The Clean Power Plan petitioners responded that the Seventh Circuit decision was not binding, involved a different statutory scheme, and did not address their arguments regarding comparison of global benefits and domestic costs. Clean Power Plan challengers also told the D.C. Circuit that its decision in a challenge to solid waste incineration units supported their argument that EPA could not base a standard based on averaging regulated sources' and non-sources' emissions, and that its decision upholding EPA's withdrawal of a Clean Water Act disposal permit supported its arguments concerning consideration of costs. EPA said that these decisions did not support petitioners' arguments. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir.): added to the "Challenges to Federal Action/Clean Power Plan" slide.

Briefing Schedule Set for Challenges to Carbon Emissions Standards for New Power Plants

After the D.C. Circuit Court of Appeals consolidated appeals of EPA's denial of reconsideration of its final performance standards for carbon emissions from new, modified, and reconstructed power plants with the challenges to the original rule, the parties submitted a proposed briefing schedule, which the D.C. Circuit approved on August 30. Briefing will conclude on February 6, 2017. *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. joint scheduling motion Aug. 4, 2016): added to the "Challenges to Federal Action/Clean Power Plan" slide.

Lawsuit Filed to Void Oil and Gas Leases Until BLM Considers Climate Impacts

WildEarth Guardians and Physicians for Social Responsibility asked the federal district court for the District of Columbia to vacate authorizations for almost 400 oil and gas leases on public lands in three states because the United States Bureau of Land Management (BLM) had not complied with the National Environmental Policy Act (NEPA). The plaintiffs asked the court to enjoin BLM from approving drilling applications until it had complied with NEPA by preparing an environmental impact statement that analyzed direct, indirect, and cumulative climate effects associated with the specific leasing authorizations challenged in this case as well as with BLM's oil and gas leasing at a programmatic level. *WildEarth Guardians v. Jewell*, No. 1:16-cv-01724 (D.D.C, filed Aug. 25, 2016): added to the "Stop Government Action/NEPA" slide.

Oil and Gas Trade Association Filed Suit to Compel BLM to Hold Quarterly Mineral Lease Sales

Western Energy Alliance, which represents over 300 companies involved in oil and gas exploration and production, filed an action in the federal district court for the District of New Mexico asserting that the United States Bureau of Land Management (BLM) had failed to meet the Mineral Leasing Act's (MLA's) requirement that lease sales for federal minerals be held at least quarterly. Western Energy Alliance asked the court to compel BLM to abandon its current leasing schedule and adopt a new schedule in compliance with the MLA. Western Energy Alliance also alleged that BLM had unjustifiably denied requests under the Freedom of Information Act. In a blog post announcing the action, Western Energy Alliance said that the lawsuit would counter the "Keep-It-in-the-Ground" movement. *Western Energy Alliance v. Jewell*, No. 1:16-cv-00912 (D.N.M., filed Aug. 11, 2016): added to the "Challenges to Other Federal Action" slide.

More Parties Joined Challenge to EPA Oil and Gas Methane Standards

Fifteen states and a number of trade groups joined early filer North Dakota in challenging EPA's methane emission standards for new, reconstructed, and modified sources in the oil and natural gas sector. The D.C. Circuit consolidated all nine petitions, with North Dakota's proceeding as the lead case. The petitioners said they would establish that the regulations exceeded EPA's statutory authority and were arbitrary, capricious, an abuse of discretion, and not in accordance with law. Six environmental groups filed a motion seeking to intervene on EPA's behalf, as did nine states and the City of Chicago. *North Dakota v. EPA*, Nos. 16-1242 et al. (D.C. Cir. states' and environmental groups' motions to intervene Aug. 15, 2016): added to the "Challenges to Federal Action" slide.

Murray Energy Argued Against Summary Judgment for EPA in Jobs Case, Said Court Had Power to Enjoin EPA from Approving New Regulations

Murray Energy Corporation and affiliated coal companies (Murray Energy) filed papers opposing EPA's motion for summary judgment in Murray Energy's action to compel EPA to undertake an evaluation of the impact of the Clean Air Act on employment. Murray Energy argued that EPA did not have discretion to ignore the duty to conduct such an evaluation and urged the court to reject EPA's argument that it had fulfilled its obligation to conduct the employment evaluations. Murray Energy also disputed EPA's claim that the plaintiffs lacked standing and asserted that the court had authority to issue an injunction to ensure compliance and to preserve the status quo pending compliance by enjoining enforcement activities and the approval of further regulations. The Chamber of Commerce of the United States of America and the National Mining Association submitted an amicus curiae brief in support of the plaintiffs, arguing that EPA had a mandatory duty to conduct the employment analysis and that Murray Energy had standing to challenge EPA's failure to do so. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-00039-JPB (N.D. W. Va. U.S. Chamber amicus brief Aug. 24, 2016; Murray Energy opposition to summary judgment Aug. 19, 2016): added to the "Challenges to Federal Action/Clean Air Act" slide.

After Endangerment Finding for Aircraft Carbon Dioxide Emissions, EPA Argued That Lawsuit Seeking Emissions Standards Should Be Dismissed

EPA asked the federal district court for the District of Columbia to dismiss an action in which environmental groups sought to compel EPA to regulate aircraft carbon dioxide emissions. EPA argued that its issuance in July of a final endangerment finding for such emissions made the entire action moot. After EPA issued the final determination, the court ordered the environmental groups to show cause why the action should not be dismissed. The environmental groups concurred that the portion of their lawsuit seeking a final endangerment finding was moot (and the court subsequently dismissed that count), but the groups argued that EPA's ongoing failure to set emissions standards constituted unreasonable delay. In support of its motion to dismiss, EPA argued that the groups could not make an unreasonable delay claim because EPA had no obligation to take action at the time the groups filed the action; only EPA's issuance of the final endangerment finding triggered any duty. Briefing on the motion to dismiss was scheduled to be

completed on September 23. *Center for Biological Diversity v. EPA*, No. 1:16-cv-00681 (D.D.C. motion to dismiss Aug. 19, 2016; plaintiffs' response to court's order Aug. 5, 2016; order July 27, 2016): added to the "Force Government to Act/Clean Air Act" slide.

Massachusetts Attorney General Asked Texas Federal Court to Dismiss ExxonMobil Challenge to Civil Investigative Demand

Massachusetts Attorney General Maura Healey filed a motion to dismiss Exxon Mobil Corporation's (ExxonMobil's) lawsuit against her in a Texas federal court. Healey argued that the federal district court for the Northern District of Texas was not the proper forum for ExxonMobil's action, which sought to bar enforcement of a civil investigative demand (CID) issued by Healey in connection with her office's investigation into unfair or deceptive acts or practices in trade or commerce with respect to fossil fuel products and securities. Healey said the federal court did not have personal jurisdiction over her, that abstention was warranted, that the action was unripe, and that the venue was improper. Healey also opposed ExxonMobil's motion for a preliminary injunction, stating that ExxonMobil had not demonstrated that it would suffer irreparable harm or that it was substantially likely to prevail on its constitutional claims. Healey also argued that a preliminary injunction would undermine Massachusetts' investigatory powers and harm the state's consumers and investors and the public interest. In reply, ExxonMobil reiterated its arguments that the CID violated the First, Fourth, and Fourteenth Amendments of the Constitution, as well as the dormant Commerce Clause, and argued that a violation of constitutional rights constituted irreparable harm and that the public had an interest in ensuring that law enforcement powers were executed constitutionally. Eighteen states, the District of Columbia, and the Virgin Islands submitted an amicus curiae brief supporting Healey. They argued that Exxon could not ask a federal court to impede a state attorney general's investigation where a process for challenging the subpoena was available in state court. *Exxon Mobil Corp. v. Healey*, No. 4:16-cv-00469-K (N.D. Tex. ExxonMobil reply Aug. 24, 2016; states' amicus brief Aug. 17, 2016; motion to dismiss and opposition to preliminary injunction Aug. 8, 2016): added to the "Regulation of Private Conduct" slide.

Competitive Enterprise Institute Asked New York Court to Order Attorney General to Produce Climate Change Common Interest Agreements

Competitive Enterprise Institute (CEI) filed a proceeding in New York State Supreme Court under the New York Freedom of Information Law (FOIL) seeking to compel the New York Attorney General (NYAG) to produce documents in response to CEI's request for common interest agreements entered into by the NYAG during a specified period in 2016. CEI said it believed that the NYAG had shared information, consulted, and communicated with private parties and other attorneys general regarding climate change policies and possible investigation of entities opposed to climate policies. CEI's FOIL request came after ExxonMobil confirmed in November 2015 that it had received a subpoena from the NYAG and after the NYAG participated in a press conference in March 2016 with other state attorneys general to announce a coalition to pursue climate change-related initiatives. The NYAG denied CEI's FOIL request, asserting that the records were exempt from disclosure because they were shielded by attorney-client privilege and the work product doctrine, were compiled for law enforcement purposes, and were inter-agency or intra-agency materials. *Competitive Enterprise Institute v. Attorney General*

of New York, No. 05050-16 (N.Y. Sup. Ct., filed Aug. 31, 2016): added to the "Force Government to Act/Other Statutes" slide.

Groups Sought Climate Emails from Rhode Island Attorney General

Free Market Environmental Law Clinic and Energy & Environment Legal Institute filed an action in Rhode Island Superior Court under the Access to Public Records Act seeking disclosure by the Rhode Island Department of the Attorney General of certain emails between a person in the Department and the New York State Attorney General's office. The plaintiffs also sought the employee's emails containing the terms RICO, climate denial, climate denier, climate risk, or Gore. The plaintiffs contended that none of the documents they sought were properly exempted from disclosure. *Free Market Environmental Law Clinic v. Rhode Island Department of the Attorney General*, No. __ (R.I. Super. Ct., filed July 27, 2016): added to the "Force Government to Act/Other Statutes" slide.

Groups Said New York Attorney General Improperly Refused to Disclose Climate Correspondence

Free Market Environmental Law Clinic and Energy & Environment Legal Institute filed a proceeding in New York Supreme Court seeking documents from the Office of the New York Attorney General (NYAG) under FOIL. The petitioners said that they sought the correspondence of the attorney general with eight individuals—six private parties, an NYAG employee, and the California attorney general. The groups said the requested correspondence "contained certain keywords relating to the Attorney General's recent decision to investigate those who disagree with him on climate change and climate change policies." The NYAG denied the groups' FOIL request, citing FOIL exemptions for documents subject to attorney-client privilege and the work product doctrine and for intra-agency and inter-agency documents. In their lawsuit, the groups contended that NYAG did not have a reasonable basis for withholding the documents. *Energy & Environment Legal Institute v. Attorney General of New York*, No. 101181/2016 (N.Y. Sup. Ct., filed July 25, 2016): added to the "Force Government to Act/Other Statutes" slide.

Sierra Club Said Virginia Should Have Considered Solar Component, Fugitive Pipeline Emissions in Natural Gas Plant Air Permit

The Virginia Chapter of the Sierra Club (Sierra Club) filed a proceeding in Virginia Circuit Court challenging a Prevention of Significant Deterioration (PSD) permit issued for a combined-cycle natural gas-fired power plant. Sierra Club's arguments included an assertion that the PSD permit was required to address emissions—including fugitive greenhouse gas emissions—associated with the pipeline that would deliver fuel to the power plant. Sierra Club also asserted that the Virginia State Air Pollution Control Board failed to conduct a proper best available control technology (BACT) analysis because the BACT analysis should have considered a solar-powered auxiliary component as an available control technology for reducing greenhouse gas and other air emissions. *Virginia Chapter of the Sierra Club v. Virginia State Air Pollution Control Board*, No. __ (Va. Cir. Ct., filed Aug. 16, 2016): added to the "Stop Government Action/Project Challenges" slide.

Update #89 (August 1, 2016)

FEATURED CASE

Pennsylvania Commonwealth Court Said Environmental Rights Amendment Did Not Obligate Officials and Agencies to Regulate Greenhouse Gases

The Pennsylvania Commonwealth Court dismissed a proceeding in which petitioners sought to compel the Pennsylvania Public Utility Commission, the Pennsylvania governor, and other officials and entities in the executive branch to develop and implement a comprehensive plan to regulate greenhouse gases. The petitioners unsuccessfully alleged that the Environmental Rights Amendment of the Pennsylvania Constitution obligated the respondents to undertake such actions. The court concluded that it did have subject matter jurisdiction and that plaintiffs had standing, but concluded that it could not issue a writ of mandamus compelling the respondents to take the actions sought by the petitioners because the petitioners did not have a "clear right" to have the respondents conduct studies, promulgate or implement regulations, or issue executive orders regarding greenhouse gases. The court also declined to grant declaratory relief because doing so would have no practical effect. *Funk v. Wolf*, No. 467 M.D. 2015 (Pa. Commw. Ct. July 26, 2016): added to the "Common Law Claims" slide.

DECISIONS AND SETTLEMENTS

D.C. Circuit Again Rejected Challenge to FERC Environmental Review of LNG Facility

The D.C. Circuit Court of Appeals upheld the Federal Energy Regulatory Commission's (FERC's) environmental review for the conversion of the Cove Point liquefied natural gas (LNG) facility in Maryland from an import terminal to a facility that could both import and export LNG. Citing its June 28 decision in *Sierra Club v. FERC*, No. 14-1275, which concerned FERC authorizations for an LNG export terminal in Texas, the D.C. Circuit reiterated that FERC was not required to consider the indirect effects, including climate impacts, of increased natural gas exports through facilities authorized by FERC. The D.C. Circuit said that the Department of Energy alone had legal authority to authorize increased export of LNG and that FERC's actions therefore were not the "legally relevant cause" for such effects. The D.C. Circuit said that while its earlier decision and a companion decision regarding a Louisiana LNG facility did not address emissions from the transport and consumption of exported gas, FERC authorizations were also not the cause of such effects. The D.C. Circuit noted that petitioners remained free to raise these issues in a challenge to the DOE's authorization for the export of LNG from the Cove Point facility. (In June, a petitioner in this case, Sierra Club, filed a petition for review of DOE's export authorization (*Sierra Club v. Department of Energy*, No. 16-1186 (D.C. Cir.).) The D.C. Circuit also found that the petitioners had not supported their argument that FERC's failure to use the federal social cost of carbon in its analysis of environmental impacts was unreasonable. *EarthReports, Inc. v. Federal Energy Regulatory Commission*, No. 15-1127 (D.C. Cir. July 15, 2016): added to the "Stop Government Action/NEPA" slide.

West Virginia Federal Court Ordered EPA to Produce Some Documents, Allowed Murray Energy to Continue Depositions in Jobs Case

The federal district court for the Northern District of West Virginia continued to address discovery issues in the lawsuit brought by Murray Energy Corporation and subsidiaries (together, Murray Energy) alleging that the United States Environmental Protection Agency (EPA) failed to perform a mandated study of the Clean Air Act's impact on employment. The trial had been scheduled to begin in July, but the court vacated the trial deadline and other deadlines in June and indicated that the deadlines would be rescheduled at a later date. On July 5, 2016 granted EPA's request that it restrict access to the transcript for a hearing held on June 29 during which documents stamped confidential were discussed. Murray Energy had objected to EPA's motion. On July 20, the court granted in part and denied in part a motion by Murray Energy to compel disclosure of certain documents. The court agreed with EPA that certain documents were protected by the deliberative process privilege, but directed that other documents be produced in whole or in part. The court also permitted Murray Energy to continue depositions of two EPA witnesses due to the late production of documents. A motion by EPA for summary judgment remained pending. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-00039-JPB (N.D. W. Va. order July 5, 2016; order July 20, 2016): added to the "Challenges to Federal Action" slide.

Environmental Group and Rhode Island Landfill Operators Settled Citizen Suit

After reaching a settlement, Conservation Law Foundation (CLF) and the owners and operators of the Central Landfill in Johnston, Rhode Island agreed to dismissal with prejudice of CLF's citizen suit under the Clean Air Act. The stipulation of dismissal was entered by the federal district court for the District of Rhode Island on July 6, 2016. CLF had charged that pollutants emitted from the landfill "pose risks to human health, cause foul odors in areas surrounding the Landfill, and contribute to climate change," and that the landfill was violating multiple provisions of the Clean Air Act. CLF said that the settlement agreement required the defendants to hire an engineering firm to perform an assessment and recommend projects that will enhance gas generation and the performance of the landfill gas collection system, and that the parties would evaluate the firm's recommendations and undertake projects. CLF also reported that for the first time the Rhode Island Department of Environmental Management intended to issue a single Clean Air Act operating permit to govern the landfill. *Conservation Law Foundation v. Broadrock Gas Services, LLC*, No. 13-777 (D.R.I. July 6, 2016): added to the "Regulate Private Conduct" slide.

Montana Federal Court Dismissed Challenge to Oil and Gas Leases After Plaintiffs Reached Agreement with Federal Defendants

In a lawsuit brought by environmental groups to challenge authorizations for federal oil and gas lease sales in Montana, the federal district court for the District of Montana approved a stipulated agreement between federal defendants and environmental groups and dismissed the action. In the stipulated agreement, the federal defendants agreed to notify the plaintiffs and hold public comment periods when applications for permits to drill (APDs) were submitted on the leases. The federal defendants also agreed to consider requiring measures to account for and reduce natural gas emissions as conditions of approval of the APDs. The stipulated agreement also noted that the United States Bureau of Land Management was proposing to update its regulations

to reduce the waste of natural gas from flaring, venting, and leaks from oil and gas production operations on public and Indian lands. It left open the possibility that the plaintiffs could seek attorney fees under the Equal Access to Justice Act. Four trade groups that had intervened in the lawsuit said they would not object to dismissal of the action, but that they believed the federal defendants would have prevailed on the National Environmental Policy Act claims and that the plaintiffs were not entitled to attorney fees. *Montana Environmental Information Center v. United States Bureau of Land Management*, No. 11-15-GF-SHE (D. Mont. order July 7, 2016; intervenors' response June 24, 2016; stipulated agreement June 17, 2016): added to the "Stop Government Action/NEPA" slide.

California Appellate Court Affirmed Dismissal of Challenge to Crude Oil Transloading Facility as Time-Barred

The California Court of Appeal agreed with a trial court that a lawsuit challenging an authorization to convert a rail-to-truck ethanol transloading facility to a facility that could transload crude oil was time-barred. The petitioners alleged that the Bay Area Air Quality Management District (BAAQMD) had unlawfully evaded review under the California Environmental Quality Act (CEQA) when it authorized the conversion, and argued that the discovery rule should apply to extend the time in which they could initiate their lawsuit because BAAQMD had not given public notice of its action. The petitioners asserted that the facility's conversion could have significant adverse environmental impacts, including significant increases in greenhouse gas emissions. The Court of Appeal concluded that under the relevant statute, the petitioners were deemed to have constructive notice of BAAQMD's authorization and that the discovery rule did not apply where there was constructive notice. *Communities for a Better Environment v. Bay Area Air Quality Management District*, No. A143634 (Cal. Ct. App. July 19, 2016): added to the "State NEPAs" slide.

California Court of Appeal Upheld Environmental Review for Downtown Fresno Project

The California Court of Appeal declined to overturn approvals for the reconstruction of the Fulton Mall area in downtown Fresno. The appellate court found that the City of Fresno had not prematurely approved the project in advance of its CEQA review. The court also found that the CEQA review was legally adequate, including its assessment of the project's greenhouse gas emissions. The court noted that the City had presented an "extensive rationale" for its determination in its initial study that impacts on greenhouse gas emissions would not be significant and that the City therefore had no legal obligation to do more than "succinctly discuss" such impacts in the environmental impact report. *Downtown Fresno Coalition v. City of Fresno*, No. F070845 (Cal. Ct. App. July 14, 2016): added to the "State NEPAs" slide.

California Court of Appeal Set Course for New Review of Newhall Ranch

On remand from the California Supreme Court's decision finding that the California Department of Fish and Wildlife had not supported its conclusion that the 12,000-acre Newhall Ranch development's greenhouse gas emissions would not have significant impacts, the California Court of Appeal issued an opinion directing the trial court to take certain actions to direct the course of future environmental review of the project. The appellate court directed the trial court

to find that the Department could use State greenhouse gas emissions reduction goals as a significance criterion and could use a hypothetical business-as-usual scenario to evaluate greenhouse gas impacts. The appellate court affirmed the trial court's original finding that there was no substantial evidence that the development's greenhouse gas emissions would not result in a cumulatively significant environmental impact. The appellate rejected the developer's argument that it should retain jurisdiction and supervise completion of the environmental review. *Center for Biological Diversity v. Department of Fish and Wildlife*, No. B245131 (Cal. Ct. App. July 11, 2016): added to the "State NEPAs" slide.

California Court of Appeal Upheld Bay Area Sustainable Communities Strategy's Reliance on Emission Reductions Beyond Statewide Mandates

The California Court of Appeal upheld "Plan Bay Area," a regional transportation plan update and "sustainable communities strategy" adopted by Bay Area regional planning agencies to meet greenhouse gas emission reduction targets set by the California Air Resources Board (CARB) pursuant to the Sustainable Communities and Climate Protection Act of 2008 (SB 375). Plan Bay Area was challenged by petitioners who contended that Plan Bay Area should have relied on emission reductions from statewide mandates to achieve the SB 375 targets to avoid "draconian" land use and transportation measures. The Court of Appeal found that the "only legally tenable interpretation" of SB 375 was that it required its targets to be met using regional land use and transportation strategies that achieved emission reductions independent of reductions achieved by statewide mandates. The Court of Appeal further concluded that CARB had discretion to require that the SB 375 emission reductions be in addition to those stemming from statewide standards. The Court of Appeal also found that the agencies had complied with the California Environmental Quality Act (CEQA) regardless of SB 375 and CARB requirements. *Bay Area Citizens v. Association of Bay Area Governments*, No. A143058 (Cal. Ct. App. June 30, 2016): added to the "State NEPAs" slide.

California Court Dismissed CEQA Challenge to New Arena Project in San Francisco

A California Superior Court rejected challenges to the environmental review and approvals for a mixed-use development in San Francisco that featured a new arena for the Golden State Warriors. Among the arguments rejected by the court was a contention that a quantitative analysis of greenhouse gas emissions was required. The court noted that the lead agency had appropriately evaluated the project based on a local greenhouse gas strategy. The court also said that the California Environmental Quality Act (CEQA) did not require that project components considered in the greenhouse gas analysis be treated as mitigation measures. In response to the petitioners' challenge to the project's acquisition of greenhouse gas emissions offsets, the court noted that the project sponsor had agreed to obtain the offsets (in order to be certified as an "Environmental Leadership Development Project," in addition to complying with the local greenhouse gas strategy and that the commitment to purchase the offsets was further evidence that the project's greenhouse gas emissions were not significant. On July 25, 2016, the petitioners filed a notice of appeal. *Mission Bay Alliance v. Office of Community Investment and Infrastructure*, Nos. CPF-16-514892, CPF-16-514811 (Cal. Super. Ct. July 18, 2016; notice of appeal July 25, 2016): added to the "State NEPAs" slide.

NEW CASES, MOTIONS, AND NOTICES

North Dakota Challenged EPA Methane Emission Standards for Oil and Gas Sources

North Dakota filed a petition in the D.C. Circuit Court of Appeals for review of EPA's final rule establishing methane emission standards for new, reconstructed, and modified sources in the oil and natural gas sector. North Dakota asserted that the rule exceeded EPA's statutory authority, was unconstitutional, and was arbitrary, capricious, an abuse of discretion, and not in accordance with law. *North Dakota v. EPA*, No. 16-1242 (D.C. Cir., filed July 15, 2016): added to the "Challenges to Federal Action" slide.

Environmental Groups Challenged FERC's Approval of PJM Capacity Market Rules

Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists challenged two orders issued by FERC approving PJM Interconnection L.L.C.'s (PJM's) proposed changes to its Reliability Pricing Model, also referred to as its capacity market rules. PJM is the grid operator for 13 states and the District of Columbia, and the Reliability Pricing Model rules dictate how PJM will secure power resources to meet power demands. In the press release announcing the lawsuit, the organizations said that the rule changes approved by FERC "would impose significant costs on customers and severely handicap clean energy participation in PJM's capacity markets." *Natural Resources Defense Council v. Federal Energy Regulatory Commission*, No. 16-1236 (D.C. Cir., filed July 8, 2016): added to the "Stop Government Action/Other Statutes" slide.

Plaintiffs Who Successfully Challenged Minnesota Low-Carbon Power Law Sought Attorney Fees for Appeal; Minnesota Said It Would Ask Supreme Court for Review

After the Eighth Circuit Court of Appeals ruled that Minnesota's low-carbon power law was unlawful, North Dakota and its co-plaintiffs asked the Eighth Circuit to remand the case to the federal district court for the District of Minnesota for a determination on their motion for attorney fees. The district court previously concluded that the plaintiffs were entitled to attorney fees under 42 U.S.C. § 1988, and the plaintiffs argued that they were also entitled to attorney fees and costs incurred during the appeal. The plaintiffs asserted that they had obtained all the relief they sought and prevailed in a case that asserted a substantial claim under 42 U.S.C. § 1983 (based on the dormant Commerce Clause), that they had succeeded on their Section 1983 claim (even though the Eighth Circuit "proffered additional rationales for affirmance" based on preemption and only one judge based affirmance on the dormant Commerce Clause), and that they had succeeded on other claims (i.e., the preemption claims) that arose from the same nucleus of operative fact. On July 22, *Law360* reported that Minnesota had decide to file a petition for writ of certiorari with the United States Supreme Court rather than seeking en banc rehearing from the Eighth Circuit. *North Dakota v. Heydinger*, Nos. 14-2156, 14-2251 (8th Cir. June 29, 2016): added to the "Challenges to State Action" slide.

Lawsuit Brought by Los Angeles County to Force SoCalGas to Take Safety Measures at Gas Wells

Los Angeles County and the People of California, acting through the Los Angeles County Counsel, commenced a lawsuit against Southern California Gas Company (SoCalGas) to compel SoCalGas to install subsurface safety shut-off valves on the active gas wells and distribution pipelines it owns and operates in the county. Those facilities include wells in the Aliso Canyon gas storage field where the largest gas leak in U.S. history occurred over the course 112 days beginning in October 2015. The plaintiffs also sought civil penalties, response costs, punitive and exemplary damages, and attorney fees. The plaintiffs asserted causes of action for public nuisance, unfair competition, and breaches of a franchise agreement and a lease agreement, and for damages under the County Code. The complaint alleged that the methane released during the Aliso Canyon leak would exacerbate the impacts of climate change and affect the health and well-being of the County's citizens, even after the leak ended. The complaint also asserted that the four-month leak contributed roughly the same amount of warming as the greenhouse gas emissions produced by the entire country of Lebanon. *California v. Southern California Gas Co.*, No. BC628120 (Cal. Super. Ct., filed July 25, 2016): added to the "Regulate Private Conduct" slide.

Washington Department of Ecology Said It Would Appeal Order Requiring Final Greenhouse Gas Rule by End of Year

On June 15, 2016, the Washington Department of Ecology (Ecology) filed a notice of appeal in Washington Superior Court in a lawsuit brought by children to compel the State to take action to reduce greenhouse gas emissions. The filing came a month after the court issued an order requiring Ecology to issue a final rule setting limits on greenhouse gas emissions by the end of 2016. Ecology released a draft of the rule on June 1, but Our Children's Trust, an organization that represents the children in the lawsuit, said that the proposed rule "defie[d]" the court's order because it was based on outdated emissions data and would not require emission reductions sufficient to place the state "on a path toward climate stability." *Foster v. Washington Department of Ecology*, No. 14-2-25295-1 (Wash. Super. Ct. order May 16, 2016; notice of appeal June 15, 2016): added to the "Common Law Claims" slide.

Environmental Group Asked Interior for Moratorium on Leasing Public Land Fossil Fuels

On July 12, 2016, the Center for Biological Diversity (CBD) filed a petition with the United States Department of the Interior asking it to impose a moratorium on the leasing of federal public land fossil fuels under the Mineral Leasing Act. CBD said that the moratorium should be put in place immediately and that it should remain in effect until a comprehensive review of all federal fossil fuel leasing programs was completed and policies were developed to ensure that future leasing would be consistent with the United States' goals of holding global warming "well below 2°C above pre-industrial levels" and pursuing efforts to "limit the temperature increase to 1.5°C above pre-industrial levels." Center for Biological Diversity, Petition for a Moratorium on the Leasing of Federal Public Land Fossil Fuels Under the Mineral Leasing Act, 30 U.S.C. §§ 226, 241 (July 12, 2016): added to the "Force Government to Act/Other Statutes" slide.

Update #88 (July 6, 2016)

FEATURED CASE

Eighth Circuit Panel Agreed That Minnesota Low-Carbon Power Law Was Unlawful But Disagreed as to Why

The Eighth Circuit Court of Appeals affirmed a district court's conclusion that Minnesota's Next Generation Energy Act (NGEA) was unlawful. The NGEA barred importing energy from a "new large energy facility" outside Minnesota or entering into new long-term power purchase agreements, where such activities would contribute to statewide carbon dioxide emissions. Only one judge on the Eighth Circuit panel agreed with the district court conclusion that the statute constituted impermissible extraterritorial regulation under the dormant Commerce Clause. The other two judges concluded that the law was preempted by the Federal Power Act, with one of the two judges also concluding that the law conflicted with the Clean Air Act. A blog post about this decision appears here. *North Dakota v. Heydinger*, Nos. 14-2156, 14-2251 (8th Cir. June 15, 2016): added to the "Challenges to State Action" slide.

DECISIONS AND SETTLEMENTS

Virgin Islands Withdrew Subpoena as ExxonMobil Agreed to Dismissal of Lawsuit; Competitive Enterprise Institute Subpoena Also Withdrawn

On June 29, 2016, Exxon Mobil Corporation (ExxonMobil) and the Attorney General for the United States Virgin Islands (USVI) told the federal district court for the Northern District of Texas that they had reached an agreement pursuant to which the Attorney General would withdraw the subpoena issued to ExxonMobil in March 2016 and ExxonMobil would dismiss its lawsuit against the Attorney General. In the lawsuit, ExxonMobil had alleged that the USVI Attorney General's subpoena—issued the investigation under the territory's Criminally Influenced and Corrupt Organizations Act into suspected misrepresentations regarding ExxonMobil's contributions to climate change—violated ExxonMobil's constitutional rights and common law due process. The agreement came eight days after the federal court denied ExxonMobil's motion to remand the action to state court. A day after the parties notified the Texas federal court of their agreement, a law firm representing the Virgin Islands sent a letter to counsel for the Competitive Enterprise Institute (CEI) providing notice that it would withdraw the third-party subpoena issued to CEI as part of the USVI ExxonMobil climate investigation. CEI then asked the District of Columbia Superior Court for leave to file a "Notice of Supplemental Authority" in support of its special motion to dismiss and motions for sanctions and costs and attorney's fees. CEI said the withdrawal of the ExxonMobil subpoena confirmed the "pretextual nature" of the USVI Attorney General's investigation, raised "serious questions about the veracity" of the Attorney General's representations to the D.C. court, and supported the argument that the Attorney General's demands on CEI were unsupported by need. *Exxon Mobil Corp. v. Walker*, No. 4:16-CV-00364-K (N.D. Tex. joint stipulation June 29, 2016); *United States Virgin Islands Office of the Attorney General v. ExxonMobil Oil Corp.*, No. 2016 CA 2469 (D.C. Super. Ct. consent motion for leave to file notice of supplemental authority June 30, 2016): added to the "Regulate Private Conduct" slide.

In Two Challenges to LNG Terminals, D.C. Circuit Upheld FERC's Environmental

Reviews, Left Door Open for Challenges of Energy Department Authorizations of Natural Gas Export

The D.C. Circuit Court of Appeals ruled against environmental groups in two challenges to Federal Energy Regulatory Commission (FERC) authorizations of liquefied natural gas (LNG) export facilities. The environmental groups had argued that FERC's review of the projects under the National Environmental Policy Act (NEPA) did not fully consider the environmental consequences of FERC's authorizations of the facilities' construction, including impacts of induced natural gas production. In one case, in which Sierra Club and Galveston Baykeeper challenged FERC's authorization of modifications to facilities in Texas to support LNG export, the D.C. Circuit held that Sierra Club had established standing, rejecting FERC's argument that petitioners were required to tie their injury to the increase in natural gas production allegedly caused by FERC's actions. The D.C. Circuit also said that the challenge to FERC's approvals was not mooted by reports prepared by the Department of Energy (DOE) on environmental consequences of LNG production and export. On the merits, however, the D.C. Circuit held that FERC did not have to consider the indirect effects—including potential increases in domestic natural gas production—of exporting LNG because only DOE had authority to license the export of LNG from the facilities. The court said that FERC had "reasonably explained that the asserted linkage [between induced production and the FERC approvals] was too attenuated to be weighed" in FERC's NEPA review. The D.C. Circuit also upheld FERC's analysis of cumulative impacts, rejecting the contention that FERC should have conducted a "nationwide analysis" of other pending or approved LNG export terminals. The D.C. Circuit also declined to consider the petitioners' argument that emissions from the LNG facilities' electricity use should have been disclosed in pounds per megawatt-hour instead of in tons per year. The D.C. Circuit said it was without jurisdiction to consider this argument because it had not been raised in the underlying FERC proceeding. In the second case, in which Sierra Club challenged FERC's authorization of increased production at a Louisiana LNG terminal, the court again held that Sierra Club had standing. The court said Sierra Club had satisfied the causation and redressability requirements for standing based on harm to a member's aesthetic and recreational interests if the volume of tanker traffic to and from the terminal increased. As with the FERC authorizations for the Texas LNG facility, the court concluded, however, that FERC's authorization of increases in production capacity were "not the legally relevant cause of the indirect effects Sierra Club raises." The court stated: "Sierra Club, of course, remains free to raise these issues in a challenge to the Energy Department's NEPA review of its export decision. Nothing in our opinion should be read to foreclose that challenge or predetermine its outcome." The court also concluded that it lacked jurisdiction to consider Sierra Club's arguments regarding FERC's cumulative impacts analysis because Sierra Club had not raised the issue in its motion for rehearing before FERC. The court also rejected the cumulative impact argument on the merits for the same reasons given in the decision on the Texas facility. *Sierra Club v. Federal Energy Regulatory Commission*, No. 14-1275 (D.C. Cir. June 28, 2016); *Sierra Club v. Federal Energy Regulatory Commission*, No. 14-1249 (D.C. Cir. June 28, 2016): added to the "Stop Government Act/NEPA" slide.

Tenth Circuit Dismissed Mining Company Appeals of Coal Mine NEPA Decisions

The Tenth Circuit Court of Appeals dismissed an appeal by two mining companies of a Colorado district court decision that said the United States Office of Surface Mining Reclamation and

Enforcement (OSM) had violated NEPA when it approved mining plan modifications for mines owned by the companies. While the appeal was pending, OSM completed new NEPA analyses and reapproved the plans, but the mining companies said that OSM's reapprovals reset the statute of limitations for third-party challenges and included conditions adversely affecting their lease rights and requiring downstream studies. The Tenth Circuit concluded that the appeal was moot because it addressed only the now-superseded OSM actions and did not fall into the "capable of repetition but evading review" exception to the mootness doctrine. *WildEarth Guardians v. United States Office of Surface Mining Reclamation & Enforcement*, Nos. 15-1186 and 15-1236 (10th Cir. June 17, 2016): added to the "Stop Government Action/NEPA" slide.

Eighth Circuit Affirmed Dismissal of Competitors' Clean Air Act Citizen Suit Against Steel Mill

The Eighth Circuit Court of Appeals affirmed dismissal on subject matter jurisdiction grounds of a Clean Air Act citizen suit brought by companies that operated steel mills in Arkansas to stop construction of a competitor's steel mill. The original complaint alleged that the defendant company had failed to satisfy Best Available Control Technology (BACT) requirements, including by conducting an improper greenhouse gas BACT analysis and by improperly eliminating carbon capture and sequestration as a control technology. The Eighth Circuit's opinion did not address the greenhouse gas-specific allegations of the lawsuit but noted that BACT requirements did not impose ongoing duties to apply BACT and that failure to comply with BACT requirements therefore could not constitute the ongoing or repeated violations required for a citizen suit. *Nucor Steel-Arkansas v. Big River Steel, LLC*, No. 15-1615 (8th Cir. June 8, 2016): added to the "Regulate Private Conduct" slide.

Ninth Circuit Denied Rehearing on Polar Bear Critical Habitat Decision

The Ninth Circuit Court of Appeals denied a petition for rehearing en banc of its ruling upholding the United States Fish and Wildlife Service's (FWS's) designation of critical habitat for polar bears. The court said no judge had requested a vote on whether to rehear the matter en banc. *Alaska Oil & Gas Association v. Jewell*, Nos. 13-35619 (9th Cir. June 8, 2016): added to the "Endangered Species Act" slide.

Ninth Circuit Upheld NEPA Review for California Wind Farm, Including Greenhouse Gas Analysis

The Ninth Circuit Court of Appeals affirmed a district court ruling that upheld the United States Bureau of Land Management's (BLM's) granting of a right-of-way on federal lands for a wind energy project in San Diego County. The court upheld BLM's actions under NEPA, as well as under the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Administrative Procedure Act. The Ninth Circuit concluded, among other things, that BLM's environmental impact statement (EIS) took a hard look at greenhouse gas emissions and global warming. The court found that the EIS's "passing projection of potential emissions reductions, simply by virtue of the Project's creation of a new source of renewable energy, is reasonable enough and does not mandate the provision of conclusive proof through additional evidence and analysis beyond that already provided in the EIS." The court also deferred to BLM's

determination that estimation of greenhouse gas emissions from manufacture and transportation of equipment to the project area would be too speculative. *Backcountry Against Dumps v. Jewell*, Nos. 14-55666, 14-55842 (9th Cir. June 7, 2016): added to the "Stop Government Action/NEPA" slide.

Federal Government Reached Refrigerant Settlement with Trader Joe's

The United States and Trader Joe's Company (Trader Joe's) filed a proposed consent decree in the federal district court for the Northern District of California to resolved alleged violations by Trader Joe's of Clean Air Act requirements regarding leak repair and recordkeeping for commercial refrigeration equipment. The consent decree would require Trader Joe's to pay a $500,000 civil penalty and to establish a refrigerant compliance management system, to maintain a company-side average refrigerant leak rate of 12.1% or less, and to use refrigerants with lower global warming potential values in new and remodeled stores. In its announcement of the consent decree, the United States Environmental Protection Agency (EPA) said that the "[t]he total estimated greenhouse gas emissions reductions from this settlement are equal to the amount from over 6,500 passenger vehicles driven in one year, the CO2 emissions from 33 million pounds of coal burned, or the carbon sequestered by 25,000 acres of forests in one year." The Department of Justice published notice of the proposed consent decree in the June 28 issue of the Federal Register. *United States v. Trader Joe's Co.*, No. 3:16-cv-03444–EDL (N.D. Cal. complaint and proposed consent decree June 21, 2016): added to the "Regulate Private Conduct" slide.

Federal Court Said Biological Assessment Need Not Consider Cumulative Effects or Climate Change

The federal district court for the District of Oregon upheld actions by the U.S. Forest and Service and U.S. Fish and Wildlife Service authorizing continued livestock grazing on or around the Sycan River in Oregon. The area included recently designated critical habitat for the Klamath River bull trout, which had been designated as threatened under the Endangered Species Act (ESA). Among the arguments rejected by the court was that the Forest Service's analysis of potential impacts on the bull trout critical habitat in an informal biological assessment was inadequate because it did not fully analyze the cumulative effects of public land grazing with other activities taking place in the area or consider other factors such as climate change. The court said that the ESA imposed no duty on federal agencies to consider cumulative effects in informal consultation, and that the Forest Service therefore "had no obligation to consider cumulative effects at all, let alone in conjunction with the proposed action and climate change." *Oregon Wild v. U.S. Forest Service*, No. 1:15-cv-00895 (D. Or. June 17, 2016): added to the "Stop Government Action/Other Statute" slide.

Federal Court Said Former EPA Official Could Testify in Murray Energy Jobs Study Case

The federal district court for the Northern District of West Virginia denied a motion by EPA to disqualify or exclude a former EPA official from testifying in a lawsuit in which the coal company Murray Energy Corporation argues that EPA failed to fulfill its statutory obligation to study the Clean Air Act's employment impacts. The court said that disqualification was a

"drastic remedy" and that EPA had failed to sustain its burden of demonstrating that disqualification was warranted. The court stressed that the official had left EPA more than 10 years ago. The court said it could not discern any part of the official's report that could be based on confidential information, and indicated there was no merit to the argument that the former official should be disqualified from serving as an expert witness adverse to EPA because he had once worked for the agency. The court also said that EPA's argument that the former official lacked "scientific, technical or other specialized knowledge" was "ridiculous." The court further concluded that policy objectives weighed in favor of allowing the former official to testify. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-00039 (N.D. W. Va. June 17, 2016): added to the "Challenges to Federal Action" slide.

California Federal Court Allowed Plaintiffs to Amend Challenges to Low Carbon Fuel Standard

The federal district court for the Eastern District of California granted in part motions by two sets of plaintiffs to amend their complaints in their "years-long and complex challenge" to California's Low Carbon Fuel Standard (LCFS). The plaintiffs sought to add constitutional challenges to the current version of the LCFS, which the California Air Resources Board (CARB) amended in November 2015 in response to a state court lawsuit. The court noted that the defendants had not objected to the amendments, except with respect to as-applied constitutional claims made by one set of plaintiffs. The court agreed with the defendants that, despite the intervening changes to the LCFS, the law of the case foreclosed standing for all but one of the plaintiffs wishing to add the as-applied claims. *Rocky Mountain Farmers Union v. Corey*, No. 1:09-CV-2234 (E.D. Cal. June 13, 2016): added to the "Challenges to State Action" slide.

EPA Agreed to Respond to Petition Regarding Georgia Biomass Facility by December

EPA and the Partnership for Policy Integrity (PPI) filed a proposed consent decree in the federal district court for the Middle District of Georgia to resolve PPI's claims that EPA had failed to perform its nondiscretionary duty to respond to PPI's petition requesting that the agency object to a Title V permit issued by the Georgia Department of Natural Resources for a biomass-fueled power plant in Lamar County. PPI submitted the petition in May 2015 and filed its lawsuit in January 2016. The organization asked EPA to object to the Title V permit because it would not assure compliance with the Clean Air Act. PPI said that EPA should direct that the facility be required to go through the Prevention of Significant Deterioration permitting process. PPI argued, among other things, that the facility was a major source for greenhouse gases and should undergo a BACT analysis. The consent decree would require EPA to sign a response to PPI's petition by December 16, 2016. *Partnership for Policy Integrity v. McCarthy*, No 5:16-cv-00038 (M.D. Ga. proposed consent decree May 16, 2016): added to the "Force Government to Act/Clean Air Act" slide.

Texas Supreme Court Cited Global Warming Hypothetical In Rejecting Takings Theory for Municipal Liability for Flooding

The Texas Supreme Court held that municipal governments were not liable under a takings

theory for flood damage when they approved development without implementing mitigation measures to address known flood risks. The court withdrew a 2015 opinion in which it had said that homeowners who suffered flood damage had raised an issue of fact in their takings claim. The new majority opinion noted that many public and private amicus curiae had urged rehearing because the homeowners' theory of liability would "vastly and unwisely expand the liability of governmental entities." The court described some of the hypothetical situations in which liability might be expanded, including a "disturbing" hypothetical raised by the Harris County Metropolitan Transit Authority that suggested that imposition of liability under a takings theory in the instant case could serve as precedent for holding governments liable for hurricanes allegedly caused by global warming. The court quoted the amicus brief, which stated: "Experts can be hired who will testify that burning fossil fuels raises sea levels and makes storms more intense. Yet governments issue permits allowing exploration and production of fossil fuels, and construction and operation of the power plants that burn them." *Harris County Flood Control District v. Kerr*, No. 13-0303 (Tex. June 17, 2016): added to the "Adaptation" slide.

California Appellate Court Said City's Analysis of Energy Impacts of Costco Store Was Inadequate

The California Court of Appeal found that the City of Ukiah had not sufficiently analyzed the energy impacts of a proposed Costco retail store and gas station in an environmental impact report (EIR) prepared under the California Environmental Quality Act (CEQA). The EIR was certified in December 2013. The court said that the EIR had improperly relied on building code compliance to mitigate construction and operational energy impacts and on mitigation measures to reduce greenhouse gas emissions. The court noted that these shortcomings were similar to inadequacies identified in the Court of Appeals' decision in February 2014 (several months after the City of Ukiah certified the Costco EIR) in *California Clean Energy Committee v. City of Woodland*. In that case, the Court of Appeals stated that "[a]lthough there is likely to be a high correlation between reducing greenhouse emissions and energy savings, this court cannot assume the overlap is sufficient under CEQA's study and mitigation requirements." After the court issued its *City of Woodland* decision, the City of Ukiah issued an addendum to the EIR to address energy impacts; the trial court considered this addendum when it upheld the EIR. The Court of Appeals ruled, however, that the addendum "does not cure the prior approval of an inadequate EIR." *Ukiah Citizens for Safety First v. City of Ukiah*, No. A145581 (Cal. Ct. App. June 21, 2016): added to the "State NEPAs" slide.

California Appellate Court Said Environmental Review for Shopping Center Was Inadequate

The California Court of Appeal ruled that the environmental review for a shopping center in the City of Victorville did not comply with CEQA. The court found that substantial evidence did not support the City's finding that the project was consistent with a provision of the general plan requiring new commercial and industrial projects to generate electricity on-site to the maximum extent feasible. The court also found that the record did not support a finding that the project would comply with the general plan's energy efficiency objective and therefore did not support the City's conclusion that the project would not have significant air quality impacts from greenhouse gas emissions. *Spring Valley Lake Association v. City of Victorville*, No. D069442

(Cal. Super. Ct. May 25, 2016): added to the "State NEPAs" slide.

Arizona Court Ordered Release of Climate Scientists Emails

The Arizona Superior Court ordered the Arizona Board of Regents to produce previously withheld emails of two University of Arizona climate scientists pursuant to the State's public records law. The Board had asserted that it was entitled to withhold the emails from its response to a public records request from the Energy & Environment Legal Institute because the emails were prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary. The court issued its ruling on remand from an appellate court decision that said the court had applied a too-deferential standard in an earlier review of the Board's determinations to withhold the emails. In the new ruling, the court said it was cognizant of the concerns regarding the "chilling effect" disclosure could have, but it concluded that the potential harm was "speculative at best" and did not overcome the presumption favoring disclosure. The court indicated that the establishment of an "academic privilege exception" to the public records law was an issue for the legislature, not the courts. A blog about this decision appears here. *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. C20134963 (Ariz. Super. Ct. June 14, 2016): added to the "Climate Protesters and Scientists" slide.

California Court Ruled That CARB's Environmental Review of Amendments to Heavy-Duty Vehicle Standards Was Improper

A California Superior Court ruled in favor of the challengers to amendments adopted in 2014 to the 2010 emissions standards for on-road heavy duty diesel vehicles. The amendments allowed small fleets of trucks and low-use vehicles extra time to come into compliance with the standards. The court held that CARB had engaged in post hoc environmental review by approving the amendments before it finished its CEQA review. The court also found that there was substantial evidence supporting a fair argument that the amendments would have a significant effect on the environment, including on criteria pollutant and greenhouse gas emissions. The court said that CARB used an improper baseline when it used existing environmental conditions and ignored the 2010 regulations. *John R. Lawson Rock & Oil, Inc. v. California Air Resources Board*, No. 14CECG01494 (Cal. Super. Ct. June 7, 2016): added to the "Challenges to State Action" slide.

California Court Invalidated Delta Management Plan, But Rejected Argument That Plan's Sea Level Rise Assumptions Were Flawed

A California Superior Court invalidated the long-term management plan for the Sacramento-San Joaquin Delta but was not persuaded by an argument that the plan relied on sea level rise projections that were too high and not based on best available science. The management plan was prepared by the Delta Stewardship Council pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009. A draft conservation strategy report was based on an assumption of a rise in sea level of 55 inches over the next 50 to 100 years, a projection also referenced in the Act. While petitioners argued that data in the report predicted a rise of only 13.8 inches by 2050 and 35 inches by 2100, the court noted that the 55-inch level was supported in other studies cited by the Council. *Delta Stewardship Council Cases*, JCCP No. 4758 (Cal. Super. Ct. ruling on

motions for clarification and tentative ruling May 18, 2016): added to the "Stop Government Action/Other Statutes" slide.

NEW CASES, MOTIONS, AND NOTICES

TransCanada Filed Arbitration Request Under NAFTA, Seeking More Than $15 Billion for Keystone Permit Denial

TransCanada Corporation and TransCanada PipeLines Limited submitted a formal request for arbitration seeking damages arising from the United States government's denial of a presidential permit for the Keystone XL Pipeline. The companies asserted that the U.S. had breached its obligations under the North American Free Trade Agreement (NAFTA), including under Articles 1102 (National Treatment), 1103 (Most-Favored Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation). The two Canadian companies submitted claims for damages of more than $15 billion on their own behalf as well as on behalf of U.S. companies owned or controlled by the Canadian companies. They sought to arbitrate the dispute before the International Centre for Settlement of Investment Disputes. The companies asserted that the U.S. had unjustifiably delayed the decision on the pipeline based on "arbitrary and contrived" excuses; that the unjustified denial of the permit was based not on the merits of the application but on "how the international community might react to an approval in light of [the] erroneous perception that the pipeline would result in higher GHG emissions"; and that the U.S. had unjustifiably discriminated against the Keystone XL Pipeline, having previously approved pipeline applications from other investors. *TransCanada Corp. v. Government of the United States of America* (request for arbitration June 24, 2016): added to the "Challenges to Federal Action" slide.

Challenges Filed to EPA Denial of Reconsideration of Greenhouse Gas Standards for New and Modified Power Plants

Utility Air Regulatory Group, American Public Power Association, and 23 states or state agencies or officials filed petitions for review in the D.C. Circuit Court of Appeals challenging the United States Environmental Protection Agency's (EPA's) denial of petitions for reconsideration of its new source performance standards for greenhouse gas emissions from power plants. EPA published notice of its denial of the petitions for reconsideration in May. On June 24, 2016, the D.C. Circuit granted a motion to suspend the briefing schedule in pending challenges to the standards to allow parties to consolidate their challenges of the denial of reconsideration with their challenges to the original rule. Motions to consolidate must be filed by July 12, and motions for an amended briefing schedule must be filed by August 4. *West Virginia v. EPA*, No. 16-1220 (D.C. Cir., filed July 1, 2016); *Utility Air Regulatory Group v. EPA*, No. 16-1221 (D.C. Cir., filed July 1, 2016); *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. order June 24, 2016): added to the "Challenges to Clean Power Plan" slide.

Sierra Club Challenged Authorization to Export LNG from Cove Point Terminal

Sierra Club filed a petition for review in the D.C. Circuit Court of Appeals seeking to overturn the Department of Energy's authorizations of the export of LNG from the Cove Point LNG

Terminal in Maryland. The Department of Energy denied Sierra Club's request for rehearing in April, rejecting Sierra Club's arguments that it had not adequately considered greenhouse gas impacts and that it should have considered induced natural gas production and increased coal consumption as indirect effects of its action. *Sierra Club v. Department of Energy*, No. 16-1186 (D.C. Cir., filed June 15, 2016): added to the "Stop Government Action/NEPA" slide.

In Briefs, Parties Attacked and Defended SNAP Program Delisting of Hydrofluorocarbons

Parties filed a first round of briefs in a D.C. Circuit Court of Appeals proceeding in which two chemical manufacturers challenge EPA's final rule prohibiting or restricting use of certain hydrofluorocarbons (HFCs) under its Significant New Alternatives Policy (SNAP) program. The program implements Section 612 of the Clean Air Act, which concerns alternatives to ozone-depleting substances. In their opening brief, the chemical manufacturers argued that EPA had exceeded its statutory authority by banning HFCs that were not ozone-depleting. The manufacturers also contended that EPA had acted arbitrarily and capriciously, arguing that EPA had not explained why differences in global warming potential (GWP) between banned HFCs and other chemicals were significant, had improperly used GWP as a "proxy" for atmospheric effects, and had not provided an objective standard for what levels of GWP are acceptable. In its brief, EPA responded that it had authority to change the listing of a non-ozone-depleting substance where alternatives were available that posed a lower risk to human health and the environment. EPA also defended its use of GWP in its analysis of atmospheric effects. Other industry participants intervened on EPA's behalf and argued, among other things, that Section 612 was intended to foster continued development of safer alternatives to ozone-depleting substances. NRDC also intervened on EPA's behalf, arguing that EPA acted within its statutory and regulatory authority. A manufacturer of composite preform products used in the marine and transportation industries also challenged the rule. That challenge has been held in abeyance while EPA considers the manufacturer's request for reconsideration. *Mexichem Fluor, Inc. v. EPA*, Nos. 15-1328 and 15-1329 (D.C. Cir.); *Compsys, Inc. v. EPA*, No. 15-1334 (D.C. Cir. order May 31, 2016): added to the "Challenges to Federal Action" slide.

ExxonMobil Asked Texas Federal Court to Block Civil Investigative Demand from Massachusetts Attorney General

ExxonMobil filed a complaint in the federal district court for the Northern District of Texas against the Massachusetts Attorney General, asking the court to bar enforcement of a civil investigative demand (CID) issued to ExxonMobil in April 2016 and to declare that the CID violated ExxonMobil's rights under federal and state law. ExxonMobil also moved for a preliminary injunction in the Texas federal court, and said that it would file a protective motion in Massachusetts state court to argue that the court lacked personal jurisdiction. ExxonMobil said it would lodge its objections to the CID in state court but would ask the Massachusetts court to stay its consideration of the objections because the Texas federal court should resolve the issue of the CID's enforceability in the first instance. ExxonMobil's complaint in the Texas federal court said that the CID indicated that ExxonMobil was the subject of an investigation under a Massachusetts statute concerning unfair or deceptive acts or practices in trade or commerce. ExxonMobil argued that it could not have violated the statute because it had not sold fossil fuel products, operated retail stores, or sold any form of equity to the general public in Massachusetts

in the past five years. ExxonMobil alleged that the CID violated its rights under the First, Fourth, and Fourteenth Amendments and Dormant Commerce Clause of the U.S. Constitution and constituted an abuse of process under common law. At the end of June, the Texas federal court granted the parties' joint motion to enlarge the time period for the Massachusetts Attorney General to respond to the complaint and motion for preliminary injunction "[i]n light of the complex nature of the case and the extensive documents filed by ExxonMobil." *Exxon Mobil Corp. v. Healey*, No. 4:16-cv-00469 (N.D. Tex. filed June 15, 2016; joint motion June 22, 2016; order June 30, 2016): added to the "Regulate Private Conduct" slide.

Forest Products Company Sued Greenpeace Under RICO for "Forest Destroyer" Campaign

A company in the forest products industry and six of its subsidiaries sued Greenpeace, another environmental organization, and a number of individual employees of the organizations under the Racketeer Influenced and Corruption Organizations (RICO) Act in the federal district court for the Southern District of Georgia. The plaintiffs alleged that Greenpeace and the other defendants mounted a campaign identifying the forest products company as a "Forest Destroyer." The complaint's allegations included that the defendants told a "whopping lie" by suggesting that the plaintiffs created climate change risks by harvesting the Boreal forest. The plaintiffs claimed that the defendants created and disseminated false and misleading reports and information concerning the plaintiffs, "under the guise of protecting the environment, but in truth, for the unlawful purpose of soliciting fraudulent donations from the public at-large." In addition to RICO claims, the plaintiffs asserted claims for defamation, tortious interference with prospective business relations, tortious interference with contractual relations, common law civil conspiracy, and trademark dilution. *Resolute Forest Products, Inc. v. Greenpeace International*, No. 1:16-tc-05000 (S.D. Ga., filed May 31, 2016): added to the "Climate Protesters and Scientists" slide.

Groups Sought Vermont Attorney General Emails About Climate Denial

Energy & Environmental Legal Institute and Free Market Environmental Law Clinic filed a lawsuit in Vermont Superior Court against the Vermont attorney general under the State's Public Records Law. The organizations asked the court to require the attorney general's office to respond to a public records request submitted in May 2016. The organizations asked for emails of the Vermont attorney general and an assistant attorney general that included the terms "climate denial" or "climate denier" or the names or email addresses of certain lawyers at environmental nongovernmental organizations or the names or email addresses of the New York State Attorney General (NYAG) or the chief of the NYAG's Environmental Protection Bureau. *Energy & Environment Legal Institute v. Attorney General of Vermont*, No. 349-6-16WNCV (Vt. Super. Ct., filed June 13, 2016): added to the "Force Government to Act/Other Statutes" slide.

Environmental Group Said EPA Covered Up Problems with Methane Measurement in Natural Gas Industry

NC WARN, a nonprofit group in North Carolina, submitted a complaint and request for

investigation to the EPA Office of Inspector General (OIG) in which the organization alleged that there had been a "persistent and deliberate cover-up" at EPA that had prevented the agency from taking action to reduce methane venting and leakage in the natural gas industry. The complaint said that a whistleblower engineer had brought concerns regarding problems with measurement of methane emissions from natural gas facilities to the attention of a University of Texas engineering professor who served as chair of EPA's Science Advisory Board and led a study co-sponsored by Environmental Defense Fund (EDF). The complaint said the whistleblower had also brought his concerns to the attention of other participants in the EDF project and various EPA officials. NC WARN contended that the failure to address these concerns had set back efforts to under methane leakage and its impact on climate. The complaint asked the OIG to conduct an expedited investigation and asked that certain studies be retracted and new studies be undertaken. The complaint also asked OIG to investigate EPA's use of researchers with "industry bias and direct conflicts of interest." NC WARN also recommended certain policy changes: a zero-emission goal for methane; a "full regimen" for oversight, testing, and remediation of methane emissions by EPA; and taking into account the global warming potential of methane over a 20-year, instead of a 100-year, timeframe. NC WARN, Complaint and Request for Investigation of Fraud, Waste and Abuse by a High-Ranking EPA Official Leading to Severe Underreporting and Lack of Correction of Methane Venting and Leakage Throughout the US Natural Gas Industry (June 8, 2016): added to the "Force Government to Act/Clean Air Act" slide.

Local and State Agencies Asked EPA to Lower NO_x Emission Standard for Heavy-Duty Trucks

Eleven local and state environmental agencies, led by the South Coast Air Quality Management District in California, petitioned EPA to reduce the on-road heavy-duty engine exhaust emission standards for oxides of nitrogen (NO_x) to a level ten times lower than the current level. The petitioners said that the lower standard was necessary in order for a number of areas to meet the national ambient air quality standard (NAAQS) for ozone. They asserted in the petition that it would be more cost-effective for engine manufacturers to simultaneously develop engines that met both the related EPA Phase 2 greenhouse gas reduction requirements and an ultra-low NO_x standard because the two standards would require modifications to the same engine system. Petition to EPA for Rulemaking to Adopt Ultra-Low NOx Exhaust Emission Standards for On-Road Heavy-Duty Trucks and Engines (June 3, 2016): added to the "Force Government Action/Clean Air Act" slide.

Update #87 (June 1, 2016)

FEATURED CASE

Massachusetts High Court Ordered State to Impose Limits on Annual Aggregate Greenhouse Gas Emissions

The Massachusetts Supreme Judicial Court ordered the Massachusetts Department of Environmental Protection (MassDEP) to take additional measures to implement the Global

Warming Solutions Act, a state law enacted in 2008. Specifically, the court held that the Act required MassDEP to impose volumetric limits on aggregate greenhouse gas emissions from certain types of sources and that these limits were required to decline on an annual basis. The court was not persuaded by MassDEP's argument that it had complied with the Act's requirements by implementing several regulatory initiatives, such as the Regional Greenhouse Gas Initiative cap-and-trade program and a low emission vehicle program. The court said that these other initiatives were "important to the Commonwealth's overall scheme of reducing greenhouse gas emissions over time," but that more must be done to attain the "actual, measurable, and permanent emissions reductions" required by the Act. *Kain v. Department of Environmental Protection*, No. SJC-11961 (Mass. May 17, 2016): added to the "Force Government to Act/Other Statutes" slide.

DECISIONS AND SETTLEMENTS

D.C. Circuit Rescheduled Clean Power Plan Oral Argument for En Banc Hearing

On its own motion, the D.C. Circuit Court of Appeals ordered that oral argument on the challenges to the United States Environmental Protection Agency's Clean Power Plan be rescheduled to occur before the en banc court on September 27, 2016, rather than before a three-judge panel on June 2, 2016. The Federal Rules of Appellate Procedure provide that an en banc hearing "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." The order indicated that Judge Merrick Garland and Judge Cornelia Pillard had not participated in the matter. An en banc court without Judges Garland and Pillard would be composed of three judges appointed by President Obama, three judges appointed by President George W. Bush, two judges appointed by President Clinton, and one judge appointed by President George H.W. Bush. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. May 16, 2016): added to the "Challenges to Clean Power Plan" slide.

Federal Government Withdrew Appeal of District Court Decision That Vacated Listing of Lesser Prairie Chicken as Threatened Species

The United States Department of the Interior and the United States Fish and Wildlife Service (FWS) moved to voluntarily withdraw their appeal of a Texas federal district court decision that vacated the FWS's listing of the lesser prairie chicken as a threatened species under the Endangered Species Act. The district court found that the listing was arbitrary and capricious. One of the numerous aspects of the listing determination that the district court found to be arbitrary and capricious was the FWS's "critical assumption" that a plan implemented by five states to protect the lesser prairie chicken's habitat and range did not address the threat of drought and climate change. The court said that this assumption might have tainted FWS's assessment. *Permian Basin Petroleum Association v. United States Department of the Interior*, No. 16-50453 (5th Cir. May 10, 2016): added to the "Challenges to Other Federal Action" slide.

Federal Court Asked for Further Briefing on Whether As-Applied Challenges to California's 2015 Low Carbon Fuel Standard Were Barred

The federal district court for the Eastern District of California asked the parties to an action challenging California's Low Carbon Fuel Standard (LCFS) to provide additional briefing on the issue of whether the plaintiffs could make "as-applied" constitutional challenges to LCFS amendments finalized in November 2015. The plaintiffs had requested leave to amend their complaints to add challenges to the 2015 LCFS, but the defendants objected to addition of the as-applied constitutional claims based on the court's prior rulings and statements made by the plaintiffs. The court determined that it would need additional briefing to understand whether the 2015 LCFS was materially different from the original LCFS, and to determine whether its prior rulings concerning the plaintiffs' lack of standing to make certain claims applied and whether the law of the case or other doctrine barred the as-applied claims. *Rocky Mountain Farmers Union v. Corey*, No. 1:09-cv-2234-LJO-BAM (E.D. Cal. order for supplemental briefing May 13, 2016): added to the "Challenges to State Action" slide.

Federal Court in Idaho Stopped Work on Timber Salvage Project, Said It Would Consider Climate Change Arguments in Merits Adjudication

The federal district court for the District of Idaho granted a motion for a preliminary injunction to prevent on-the-ground timber harvesting operations on federal land surrounding the Lower Selway and Middle Fork Clearwater watersheds in Idaho. The plaintiffs in the action asserted that the United States Forest Service and other federal defendants did not comply with the National Environmental Policy Act (NEPA), the Wild and Scenic Rivers Act, the National Forest Management Act, and the Endangered Species Act when they approved a timber salvage project after a 2014 wildfire. The district court found that the plaintiffs had established that they were likely to succeed on the merits of two NEPA claims and one Wild and Scenic Rivers Act claim. The court also found that the plaintiffs had shown irreparable harm and that preservation of the status quo was in the public interest. The court noted that the plaintiffs had raised arguments in their reply papers regarding the environmental review's failure to consider climate effects on sedimentation in detail. The court said it would defer these issues for full consideration during further proceedings. The court asked the parties to file a joint litigation plan providing for an expedited schedule for adjudication on the merits. *Idaho Rivers United v. Probert*, No. 3:16-cv-00102-CWD (D. Idaho May 12, 2016): added to the "Stop Government Action/NEPA" slide.

Federal Court Allowed Discovery in FOIA Case over Video That Connected Polar Vortex to Climate Change

The federal district court for the District of Columbia said it would allow discovery in an action brought by the Competitive Enterprise Institute (CEI) to compel the Office of Science and Technology Policy (OSTP) to produce records pursuant to the Freedom of Information Act (FOIA) related to a video posted on the White House's website that connected the 2014 polar vortex to climate change. The court found that CEI had raised a "sufficient question as to the agency's good faith" in processing the FOIA request. The court said that OTSP had made inconsistent representations regarding the scope and completeness of its searches. *Competitive Enterprise Institute v. Office of Science and Technology Policy*, No. 14-cv-01806 (D.D.C. May 9, 2016): added to the "Climate Protesters and Scientists" slide.

Plaintiffs and Federal Government Reached Settlement on Attorneys' Fees in National

Petroleum Reserve Wetlands Permit Case

On May 4, 2016, the plaintiffs in a lawsuit that succeeded in requiring the United States Army Corps on Engineers to conduct supplemental environmental analysis for a wetlands fill permit in the National Petroleum Reserve withdrew their petition for attorneys' fees and other costs under the Equal Access to Justice Act. The plaintiffs said that reached an agreement with the federal defendants that settled their request for fees and costs. *Kunaknana v. U.S. Army Corps of Engineers*, No. 3:13-cv-00044-SLG (D. Alaska May 4, 2016): added to the "Stop Government Action/NEPA" slide.

Virgin Islands Withdrew Competitive Enterprise Institute Subpoena in ExxonMobil Climate Change Investigation

On May 20, 2016, the United States Virgin Islands (USVI) Office of the Attorney General agreed to revoke an investigative subpoena issued by the District of Columbia Superior Court to the Competitive Enterprise Institute (CEI). The subpoena requested climate change-related documents and communications from or to ExxonMobil Corporation (ExxonMobil). The USVI attorney general filed a notice terminating its subpoena action against CEI in the District of Columbia Superior Court, but indicated in a May 13 letter that the USVI Department of Justice would reissue the subpoena if the attorney general intended to ask the court to compel CEI's compliance with the subpoena in its current form. On May 16, 2016, CEI moved to dismiss the action under the District of Columbia Anti-SLAPP Act of 2010. In its motion papers, CEI said it intended to seek attorneys' fees and other litigation costs should the subpoena be withdrawn. *United States Virgin Islands Office of the Attorney General v. ExxonMobil Corp.*, No. 2016 CA 002469 (D.C. Super. Ct. notice of termination May 20, 2016; motion to dismiss May 16, 2016): added to the "Regulate Private Action" slide.

California Appellate Court Upheld Arbitrators' Ruling That Contract Required Power Producer to Bear AB 32 Compliance Costs

The California Court of Appeal reinstated an arbitration panel's determination that a producer of electricity in California had assumed the cost of implementing the Global Warming Solutions Act of 2006 (AB 32). The producer entered into a power purchase and sale agreement (PPA) with a utility in 2006, prior to AB 32's enactment. The arbitration panel found that the PPA's contract price took into account AB 32's potential costs after the producer had been forewarned that it would have to cover compliance costs. A California Superior Court had vacated the arbitration award, finding that the producer had been "substantially prejudiced" by the arbitrators' refusal to delay the arbitration while the California Public Utilities Commission and the California Air Resources Board considered regulations that addressed, among many other things, how the AB 32 program would deal with "legacy contracts" such as the PPA. In reversing the Superior Court, the Court of Appeal rejected the producer's argument that final regulations providing relief to the producer and similarly situated parties rendered the utility's appeal moot. The appellate court also said that the contractual dispute had been ripe when arbitration commenced despite the pending regulatory proceedings. The appellate court said that the producer therefore had not shown sufficient cause for postponement of the arbitration. *Panoche Energy Center, LLC v. Pacific Gas & Electric Co.*, No. A140000 (Cal. Ct. App. May 5, 2016):

added to the "Common Law Claims" slide.

California Appellate Court Upheld CEQA Review for Condo Building in Los Angeles

In an unpublished opinion, the California Court of Appeal upheld approvals granted by the City of Los Angeles for a six-story building with 49 condominium units. The appellate court concluded that the City had complied with the California Environmental Quality Act (CEQA). The parties that challenged the CEQA review had contended that the greenhouse gas study commissioned by the developer did not analyze greenhouse gas emissions from mobile sources and construction, and that the mitigated negative declaration for the project did not address greenhouse gas emission impacts. The appellate court said that the study had considered both stationary and mobile source emissions and had indicated that the project's emissions would be below the significance thresholds proposed by the South Coast Air Quality Management District. The court also found that the plaintiffs had not cited substantial evidence to support the argument that greenhouse gas mitigation measures were inadequate, or that there would be a significant impact. *Brentwood Stakeholders Alliance for Better Living v. City of Los Angeles*, No. B263037 (Cal. Ct. App. Apr. 26, 2016): added to the "State NEPAs" slide.

NEW CASES, MOTIONS, AND NOTICES

Petitioners Asked D.C. Circuit to Delay Briefing on Greenhouse Gas New Source Performance Standards to Permit Addition of Challenges to EPA Denial of Reconsideration

Petitioners challenging the United States Environmental Protection Agency's (EPA's) greenhouse gas emissions standards for new, modified, and reconstructed power plants asked the D.C. Circuit Court of Appeals to suspend briefing to permit the parties to add challenges to EPA's denial of administrative petitions for reconsideration of the standards. EPA published notice of its denial of reconsideration in the May 6, 2016 issue of the *Federal Register*. The motion to suspend the briefing schedule said that three petitioners in the D.C. Circuit proceedings—Wisconsin, the Utility Air Regulatory Group, and Energy & Environment Legal Institute—would be challenging the denial of their petitions for reconsideration, and that the petitioners would seek to consolidate those challenges with the pending D.C. Circuit proceedings. *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir. May 24, 2016): added to the "Challenges to Clean Power Plan" slide.

Rehearing Sought of Ninth Circuit Decision That Reinstated Polar Bear Critical Habitat Designation

The State of Alaska, Alaska Native organizations, oil and gas industry trade groups, and an Alaska municipality submitted a petition for rehearing en banc to the Ninth Circuit Court of Appeals, which in February reinstated the United States Fish and Wildlife Service's (FWS's) designation of critical habitat for polar bears. The petitioners said that rehearing was "urgently needed" because the February opinion conflicted with precedent requiring that the Endangered Species Act's best scientific data available standard required decisions based on "substantial

evidence." The petitioners also said that the February opinion improperly relied on "post hoc explanations." The petition contended that the opinion mischaracterized the district court's decision—which vacated the critical habitat designation—as requiring "current use" by polar bears in order for designation to be warranted. (The Ninth Circuit had said that the FWS had properly taken future climate change into account in designating the critical habitat.) *Alaska Oil & Gas Association v. Jewell*, Nos. 13-35619 et al. (9th Cir. petition for rehearing May 6, 2016): added to the "Endangered Species Act" slide.

Alabama and Texas Intervened in ExxonMobil Lawsuit to Quash Virgin Islands Subpoena; Lawsuit Removed to Federal Court

The States of Alabama and Texas intervened in the Texas state court action brought by Exxon Mobil Corporation (ExxonMobil) to quash the subpoena issued by the United States Virgin Islands (USVI) Office of the Attorney General. The USVI attorney general issued the subpoena in its investigation of whether ExxonMobil misrepresented its contributions to climate change to defraud consumers and the government. In their plea in intervention, Alabama and Texas said that their "sovereign power and investigative and prosecutorial authority" were implicated by the USVI attorney general's tactics. Alabama and Texas asserted that the USVI attorney general's representation by a private law firm in the proceeding and the potential use of contingency fees in a criminal or quasi-criminal matter raised due process considerations that they had an interest in protecting. Subsequently, the USVI attorney general removed ExxonMobil's action to federal court, asserting that there was federal question jurisdiction over ExxonMobil's federal constitutional and statutory claims and supplemental jurisdiction over state law claims. ExxonMobil asked the federal court to remand the action to state court and to award it costs and fees. ExxonMobil argued that the federal court did not have jurisdiction because its action was a pre-enforcement challenge to the subpoena that would be treated as unripe under Fifth Circuit Court of Appeals precedent. ExxonMobil contended that Texas state courts had a more expansive conception of ripeness for declaratory judgment actions and would exercise jurisdiction over the action. *Exxon Mobil Corp. v. Walker*, No. 4:16-CV-00364-K (N.D. Tex. memorandum of law in support of motion to remand May 23, 2016; notice of removal May 18, 2016); *Exxon Mobil Corp. v. Walker*, No. 017-284890-16 (Tex. Dist. Ct. plea in intervention May 16, 2016): added to the "Regulate Private Conduct" slide.

Trade Groups Sought to Block BLM Settlement with Environmental Groups Over Challenged Oil and Gas Lease Sales

Four trade groups—the American Petroleum Institute, Montana Petroleum Association, Montana Chamber of Commerce, and Western Energy Alliance—notified the federal district court for the District of Montana that they opposed an anticipated settlement between environmental groups and the United States Bureau of Land Management and other federal defendants concerning the sale of oil and gas leases in Montana and the Dakotas. The court had permitted the trade groups to intervene in the action on behalf of the defendants. The trade groups said that they had not been allowed to participate in the settlement discussions and that as parties to the action, whose members had bid successfully in the challenged lease sales, they believed that the settlement would substantially infringe on their lease rights. The trade groups also said that the settlement would not be in the public interest because it would restrict BLM's discretion. On May 26, 2016,

the court ordered the federal defendants and environmental groups to file a final settlement by June 17, 2016, and said that the defendant-intervenors would have until June 24 to file a brief opposing any terms of the settlement. *Montana Environmental Information Center v. United States Bureau of Land Management*, No. 11-15-GF-SHE (D. Mont. May 18, 2016): added to the "Stop Government Action/NEPA" slide.

EPA Asked West Virginia Federal Court to Decide Murray Energy's Jobs Study Case as a Matter of Law

On May 2, 2016, EPA asked the federal district court for the Northern District of West Virginia to grant summary judgment in its favor in a lawsuit brought by Murray Energy Company and affiliated companies (Murray Energy) seeking to compel EPA to perform evaluations of the Clean Air Act's impacts on employment. Murray Energy alleged that Section 321 of the Clean Air Act imposed a mandatory duty on EPA to conduct such evaluations. In its motion for summary judgment, EPA said that it had "expended millions of dollars of public funds to review and produce hundreds of thousands of documents and privilege logs over the course of tens of thousands of hours" in the lawsuit. EPA said that a trial—scheduled to start on July 19, 2016—was not warranted because Murray Energy's claim should be decided as a matter of law. In particular, EPA said that summary judgment in its favor should be granted (1) because Section 321(a) did not establish a nondiscretionary duty enforceable through a citizen suit, (2) because the plaintiffs had not established standing, and (3) because EPA had in fact conducted the employment evaluations described in Section 321(a). Alternatively, EPA said that if the court determined that EPA had not satisfied its obligations under Section 321(a), the court should enter judgment against EPA and order EPA to perform the job impact evaluations "and nothing more." On May 16, 2016, EPA filed a motion to disqualify or exclude the testimony of a former EPA Assistant Administrator for the Office of Air and Radiation in the administration of President George W. Bush. EPA said the former official's testimony should be disqualified because EPA could not depose or cross-examine him without revealing confidential or privileged EPA information. Alternatively, EPA said that his testimony should be excluded because it included legal conclusions or was otherwise unreliable. *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-00039 (N.D. W. Va. EPA memorandum in support of motion to disqualify expert witness May 16, 2016; EPA motion for summary judgment May. 2, 2016): added to the "Challenges to Federal Action" slide.

Environmental Groups Challenged Issuance of Oil and Gas Leases in New Mexico

Five environmental groups filed an action in the federal district court for the District of New Mexico seeking review of the authorization of oil and gas leases in the Santa Fe National Forest. The environmental groups alleged that the United States Bureau of Land Management and the United States Forest Service had not complied with the National Environmental Policy Act (NEPA). The groups said that the agencies had failed to acknowledge or analyze the environmental consequences of the actions, including climate change. They alleged that the leases could significantly increase methane emissions and also increase carbon dioxide emissions. *San Juan Citizens Alliance v. United States Bureau of Land Management*, No. 1:16-cv-00376 (D.N.M., filed May 3, 2016): added to the "Stop Government Action/NEPA" slide.

Federal Government Completed Court-Mandated NEPA Review for Mining Plan Modifications for Colorado Coal Mine

On April 29, 2016, the United States Office of Surface Mining Reclamation and Enforcement (OSMRE) and its codefendants filed a notice in the federal district court for the District of Colorado that they had conducted new analysis under NEPA for mining plan modifications that increased the amount of coal that would be mined at a Colorado mine. The additional analysis was required by a May 2015 decision of the court, which concluded that the NEPA review for the mining plan modifications should have considered coal combustion impacts. The notice filed with the court in April 2016 indicated that OSMRE had completed an environmental assessment and concluded that mining operations were not expected to have any significant environmental effects. The notice indicated that the mining plan modifications had been approved. *WildEarth Guardians v. United States Office of Surface Mining Reclamation and Enforcement*, No. 13-cv-00518 (D. Colo. Apr. 29, 2016): added to the "Stop Government Action/NEPA" slide.

Conservation Law Foundation Sent Notice to ExxonMobil of Its Intent to Sue Under RCRA and Clean Water Act

Conservation Law Foundation (CLF) sent a letter to ExxonMobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Pipeline Company notifying them that it intended to file a lawsuit alleging violations of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act in connection with the Everett Terminal, a marine distribution terminal in Massachusetts. With respect to RCRA, CLF asserted that ExxonMobil's past or present handling, storage, treatment, transportation, or disposal of hazardous and solid waste might present an imminent or substantial endangerment to health or the environment. CLF contended that ExxonMobil was aware that a significant rise in sea level would put the Everett Terminal under water but that the companies had not taken any action to protect the public or the environment from this risk. CLF also said that failures to disclose information regarding climate change risks could also expose ExxonMobil to liability under other theories. With respect to the Clean Water Act, CLF said that ExxonMobil had not disclosed climate change information in its applications for coverage under National Pollutant Discharge Elimination System (NPDES) permits and had failed to address sea level rise, increased precipitation, and increased magnitude and frequency of storm events and storm surges in its Stormwater Pollution Prevention Plan. Conservation Law Foundation, Notice of Violations and Intent to File Suit under the Resource Conservation and Recovery Act and Clean Water Act (May 17, 2016).

Sierra Club Sought FERC Rehearing on Lake Charles LNG Project

Sierra Club asked the Federal Energy Regulatory Commission (FERC) to withdraw its environmental impact statement and approvals for natural gas liquefaction equipment, liquefied natural gas (LNG) export facilities, and related pipeline infrastructure in Lake Charles, Louisiana. Sierra Club contended that FERC erred in determining that indirect effects on the supply and consumption of natural gas were outside the scope of its Natural Gas Act and NEPA analyses. Sierra Club also argued that FERC had erred by failing to consider the cumulative impacts of the Lake Charles project together with other approved and pending LNG export projects. *In re Magnolia LNG, LLC*, Nos. CP14-347, CP14-511 (FERC request for rehearing

May 16, 2016): added to the "Stop Government Action/NEPA" slide.

EPA Denied Reconsideration of Power Plant Greenhouse Gas New Source Performance Standards

On May 6, 2016, EPA published notice in the *Federal Register* of its denial of five petitions for reconsideration of its performance standards for greenhouse gas emissions from new, modified, and reconstructed electric utility generating units. A number of the issues on which EPA denied reconsideration were related to the performance of carbon capture systems, and whether carbon capture was an adequately demonstrated technology. EPA also denied a petition that objected to allegedly impermissible communications between an EPA official and nongovernmental organizations. EPA said it was deferring action on the issue of its treatment of biomass emissions when co-fired with fossil fuels. Reconsideration of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 81 Fed. Reg. 27442 (May 6, 2016); EPA Basis for Denial of Petitions to Reconsider the CAA Section 111(b) Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Utility Generating Units (Apr. 2016): added to the "Challenges to Clean Power Plan" slide.

Update #86 (May 5, 2016)

FEATURED CASE

Montana Federal Court Said Fish and Wildlife Service Ignored Science When It Withdrew Proposal to List North American Wolverine as Threatened

The federal district court for the District of Montana vacated the withdrawal by the United States Fish and Wildlife Service (FWS) of a proposal to list the distinct population segment of the North American wolverine as threatened under the Endangered Species Act (ESA). The court described at length the 20-year period over which the FWS considered whether to list the DPS. The process culminated in the withdrawal of the proposed listing 18 months after it was proposed. In withdrawing the proposal, the FWS reversed course on its previous determinations regarding climate change's impacts on the wolverine and said it did not have sufficient information to suggest the wolverine population would be at risk of extinction due to climate change. The court agreed with the plaintiffs that the FWS unlawfully ignored the best available science by dismissing the threat to the wolverine posed by climate change and also by dismissing the threat to the wolverine posed by genetic isolation and small population size. The court remanded the matter to the FWS, stating: "It is the undersigned's view that if there is one thing required of the [FWS] under the ESA, it is to take action at the earliest possible, defensible point in time to protect against the loss of biodiversity within our reach as a nation. For the wolverine, that time is now." *Defenders of Wildlife v. Jewell*, Nos. CV 14-246-M-DLC, CV 14-247-M-DLC,CV 14-250-M-DLC (D. Mont. Apr. 4, 2016): added to the "Endangered Species Act" slide.

DECISIONS AND SETTLEMENTS

Supreme Court Said Federal Law Preempted Maryland Program That Subsidized New

Power Generation, But Indicated Other New or Clean Energy Incentives Could Pass Muster

The United States Supreme Court ruled that a Maryland program that subsidized new electricity generation in the state was preempted because it disregarded an interstate wholesale rate required by the Federal Energy Regulatory Commission. The Court said that Maryland impermissibly guaranteed a new generator a price for interstate sales of capacity other than the clearing price determined through the capacity auction operated by the entity that oversees the regional electricity grid. The Court noted, however, that states were not foreclosed from adopting programs to encourage development of clean energy generation "[s]o long as a State does not condition payment of funds on capacity clearing the auction." *Hughes v. Talen Energy Marketing, LLC*, No. 14-614 (U.S. Apr. 19, 2016): added to the "Challenges to State Action" slide.

Federal Court Ordered Federal Defendants to Redo Biological Opinion and EIS for Federal Columbia River Power System

The federal district court for the District of Oregon ruled that the National Marine Fisheries Service (NMFS or NOAA Fisheries), the U.S. Army Corps of Engineers (Corps), and the U.S. Bureau of Reclamation (BOR) had acted arbitrarily and capriciously when they undertook reviews of the Federal Columbia River Power System (FCRPS) pursuant to the Endangered Species Act and the National Environmental Policy Act (NEPA). The FCRPS is a system of hydroelectric dams, powerhouses, and reservoirs on the Columbia and Snake Rivers, which are also home to 13 species or populations of endangered or threatened salmon and steelhead. In 2014, NOAA Fisheries issued a Biological Opinion (BiOp) that concluded the FCRPS would avoid jeopardy to listed species based on implementation of 73 "reasonable and prudent alternatives." No new environmental impact statement (EIS) was prepared in connection with the records of decisions issued by the Corps and BOR that implemented the reasonable and prudent alternatives. The court identified a number of deficiencies in the agencies' determinations. Among other shortcomings, the court found that the 2014 BiOp had not adequately assessed the effects of climate change. The court said that NOAA Fisheries had not applied the best available science, had overlooked important aspects of the problem, and had failed to analyze climate change effects, including the "additive harm" of climate change; its impacts on the effectiveness of reasonable and prudent alternative actions, particularly long-term habitat actions; and the increased chances of an event that would be catastrophic for protected species. The court said that NOAA Fisheries had apparently failed to consider information indicating that climate change could diminish or eliminate the effectiveness of habitat mitigation efforts and that the agency had not explained why a "warm ocean scenario" it rejected was less representative of expected future climate conditions than the scenario on which it relied. With respect to the NEPA review, the court found that the Corps and the Bureau of Reclamation could not continue to rely on EISs prepared in the 1990s and some more recent narrowly focused documents. The court said that there had been "significant developments in the scientific information relating to climate change and its effects" that "leads to the conclusion that the relevant physical environment has changed." The court directed NOAA Fisheries to produce a new BiOp by March 1, 2018 (but kept the 2014 BiOp in place in the meantime) and ordered preparation of a new EIS to consider the 2014 BiOp's reasonable and prudent alternatives. *National Wildlife*

Federal v. National Marine Fisheries Service, No. 3:01-cv-00640 (D. Or. May 4, 2016): added to the "Stop Government Action/Other Statutes" slide.

Federal Magistrate Said Constitutional Claims on Climate Change Should Survive Motion to Dismiss

A magistrate judge in the federal district court for the District of Oregon recommended denial of motions to dismiss a suit brought against the United States by a group of young people who alleged that excessive carbon emissions are threatening their future. The magistrate judge emphasized that, on a motion to dismiss, he was accepting all the complaint's allegations as true. With respect to standing, the magistrate judge found that the plaintiffs had established that action or inaction contributing to climate change had injured the plaintiffs in "a concrete and personal way" and that plaintiffs "differentiate[d] the impacts by alleging greater harm to youth and future generations." With respect to redressability, the magistrate judge said that it could not say, "without the record being developed, that it is speculation to posit that a court order to undertake regulation of greenhouse gas emissions to protect the public health will not effectively redress the alleged resulting harm." The magistrate also recommended that the court decline to dismiss on political question grounds, and that the court should not dismiss for failure to state a substantive due process claim. The magistrate also recommended against dismissal of "any notions" that the Due Process Clause provides a substantive right under the public trust doctrine. This recommendation now goes to a district court judge, who after briefing will decide whether to adopt, modify, or reject it. *Juliana v. United States*, No. 6:15-cv-1517 (D. Or. Apr. 8, 2016): added to the "Common Law Claims" slide.

Parties Agreed to Dismissal of Challenge to Colorado Coal Mining Authorizations

WildEarth Guardians and federal defendants filed a stipulation of dismissal in a case that challenged authorizations for mining on coal leases in Colorado that served as the sole source of fuel for a coal-fired power plant in Uintah County, Utah. The stipulation was filed after WildEarth Guardians and the United States Environmental Protection Agency finalized a settlement concerning the Clean Air Act Title V permit for the power plant. *WildEarth Guardians v. United States Bureau of Land Management*, 1:14-cv-01452 (D. Colo. Mar. 25, 2016): added to the "Stop Government Act/NEPA" slide.

Washington Court Said Department of Ecology Must Issue Greenhouse Gas Rule by End of 2016

In a ruling from the bench, a Washington Superior Court said it would require the Washington Department of Ecology (Ecology) to issue a final rule by the end of 2016 setting limits on greenhouse gas emissions. The court indicated that it would also require Ecology to make recommendations to the state legislature during the 2017 session on what changes should be made to statutory emission standards to make them consistent with current climate science. The court vacated portions of a November 2015 order that had denied relief to petitioners (who were minor children) on the grounds that Ecology was not acting arbitrarily and capriciously because it was undertaking a rulemaking. The petitioners asked the court to vacate the earlier order after Ecology withdrew its proposed rule in February 2016. The court said there were "extraordinary

circumstances" that justified vacating the earlier order and imposing a court-ordered schedule "because this is an urgent situation. This is not a situation that these children can wait on. Polar bears can't wait, the people of Bangladesh can't wait." *Foster v. Washington Department of Ecology*, No. No. 14-2-25295-1 (Wash. Super. Ct. Apr. 29, 2016): added to the "Common Law Claims" slide.

Virginia Court Ordered George Mason University to Produce Climate Communication Professor's Emails

A Virginia state court found that George Mason University should have produced records, including emails, of a professor who served as director of the university's Center For Climate Change Communication in response to a request under the Virginia Freedom of Information Act. The request was submitted by the Competitive Enterprise Institute (CEI), which sought communications that CEI said would show that the professor helped to organize a campaign to prosecute fossil fuel companies and lobbyists for deceiving the public about the risks of climate change. The court found that the university's search for records was inadequate and was not persuaded by the university's argument that the records sought were not records relating to "the transaction of public business." *Horner v. Rector & Visitors of George Mason University*, No. CL15-4712 (Va. Cir. Ct. Apr. 22, 2016): added to the "Climate Protesters and Scientists" slide.

Delaware Court Said Electricity Customers Who Challenged RGGI Regulations Had Not Established Standing

The Delaware Superior Court denied summary judgment to individual electricity customers who challenged amendments to Delaware's Regional Greenhouse Gas Initiative (RGGI) regulations that would have the effect of increasing the cost of carbon dioxide allowances. The court said that the individuals had not established that they had standing, finding that the defendants had introduced evidence that called into question whether the plaintiffs would be financially harmed and that the plaintiffs had not produced solid evidence that their electricity prices would increase. The court also denied the plaintiffs' motion for a stay. *Stevenson v. Delaware Department of Natural Resources & Environmental Control*, No. S13C-12-025 RFS (Del. Super. Ct. Apr. 5, 2016): added to the "Challenges to State Action" slide.

California Court Found Problems with Greenhouse Gas Analysis in CEQA Review for Intermodal Rail Yard

A California Superior Court ruled that the California Environmental Quality Act (CEQA) review for the Southern California International Gateway Project—"a near-dock intermodal rail yard to handle containerized cargo moving through the Ports of Los Angeles and Long Beach"—had not adequately considered greenhouse gas impacts. In its 200-page opinion, the court also found numerous other shortcomings in the CEQA review. With respect to greenhouse gas impacts, the court said the environmental impact report (EIR) had failed to consider impacts with respect to continued operations at an existing rail yard. In addition, the court said the EIR did not support its assertion that the project was consistent with emissions reductions called for in key legislation, regulations, plans, and policies. *Fast Lane Transportation, Inc. v. City of Los Angeles*, No. CIV. MSN14-0300 (Cal. Super. Ct. Mar. 30, 2016): added to the "State NEPAs"

slide.

Administrative Law Judge Recommended Use of Federal Social Cost of Carbon in Minnesota Utility Proceedings

An administrative law judge (ALJ) with the Minnesota Public Utilities Commission (Commission) recommended that the Commission adopt the federal social cost of carbon (FSCC) as reasonable and as the best available measure to determine the environmental costs of carbon dioxide. Under Minnesota law, utilities must use environmental costs "when evaluating and selecting resource options in all proceedings before the [Commission], including resource planning and certificate of need proceedings." The ALJ found that various assertions by parties challenging the use of the FSCC were not adequately demonstrated, including assertions that climate change was not occurring, that climate change impacts were beneficial, and that the discount rates used in the FSCC's development were arbitrary. The ALJ also said that it was necessary to consider a global scope for damages, not just damages to the United States or Minnesota. The ALJ found, however, that state agencies and environmental organizations had not presented a reasonable basis for their calculation of a value for the social cost of carbon that took into account the risk of a "tipping point," even though the ALJ concluded that the agencies and organizations had demonstrated that the FSCC likely understated damages associated with this risk. The ALJ also concluded that a 2300 time horizon for the FSCC was not reasonably supported by adequate evidence, but said that it would be reasonable to extrapolate to the year 2200. The ALJ also recommended that the Commission open a separate proceeding for considering issues related to "leakage," i.e., the replacement of lower-emissions power in one jurisdiction by higher-emissions power in other jurisdictions. *In re Further Investigation into Environmental and Socioeconomic Costs Under Minnesota Statutes Section 216B.2422, Subdivision 3*, OAH 80-2500-31888 MPUC E-999/CI-14-643 (Minn. Pub. Utils. Comm'n Apr. 15, 2016): added to the "Force Government to Act/Other Statutes" slide.

Department of Energy Denied Request to Reconsider Export of LNG from Terminal in Maryland

The United States Department of Energy (DOE) denied a request by Sierra Club for reconsideration of its authorization for export to non-free trade agreement nations of liquefied natural gas (LNG) from the Dominion Cove Point LNG terminal in Maryland. DOE said it had thoroughly considered the greenhouse gas impacts of its actions and rejected Sierra Club's other arguments regarding shortcomings in the environmental review. Among other things, DOE said induced natural gas production attributable to the project was not required to be assessed because it was not reasonably foreseeable. DOE also rejected the argument that the impacts of potential increased use of coal in power generation should be examined, finding that the relationship between DOE's determination and increased coal consumption was even more attenuated than for increased natural gas production. DOE also found that the methodology used for the Life Cycle Greenhouse Gas Report was reasonable and that DOE had properly considered economic benefits and impacts. *In re Dominion Cove Point LNG, LP*, No. 11-128-LNG (U.S. Dep't of Energy Apr. 18, 2016): added to the "Stop Government Action/NEPA" slide.

NEW CASES, MOTIONS, AND NOTICES

Environmental Groups Said Solar Facility Threatened Recovery of Species in California, Cited Climate Change Impacts on Habitat

Three environmental groups filed a complaint in the federal district court for the Northern District of California alleging that the FWS and the U.S. Army Corps of Engineers had not complied with the Endangered Species Act and the Clean Water Act in connection with a proposed solar energy project in the Panoche Valley in California. The ESA claims involved allegations that a Biological Opinion (BiOp) issued for the endangered blunt-nosed leopard lizard failed to adequately consider the project's impacts on the recovery of the lizard. The complaint alleged that recent science indicated that climate change would have a "devastating range-wide impact" on the species. The ESA claims also concerned the BiOp for the giant kangaroo rat; the complaint said destruction and fragmentation of habitat could cause "localized extirpations" that might not recover, particularly if climate change projections for the species' habitat were correct. *Defenders of Wildlife v. U.S. Fish & Wildlife Service*, No. 5:16-cv-1993 (N.D. Cal., filed Apr. 15, 2016): added to the "Stop Government Action/Project Challenges" slide.

Environmental Groups Asked Federal Court to Force EPA to Act on Aircraft Greenhouse Gas Emissions

The Center for Biological Diversity and Friends of the Earth filed a complaint in the federal district court for the District of Columbia to compel EPA to take action to address carbon dioxide emissions from aircraft engines. The plaintiffs alleged that EPA had unreasonably delayed both issuing an endangerment finding for emissions from aircraft and also promulgating emissions limitations. The plaintiffs said they had petitioned EPA to take these actions in 2007 and noted that the court had previously ruled in 2011 that EPA had a duty to issue an endangerment finding determining whether greenhouse gas emissions from aircraft engines cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. EPA published a proposed finding in July 2015. *Center for Biological Diversity v. EPA*, No. 16-cv-00681 (D.D.C., filed Apr. 12, 2016): added to the "Force Government Action/Clean Air Act" slide.

ExxonMobil Filed Lawsuit in Texas to Block Enforcement of Virgin Islands Climate Change Subpoena; Competitive Enterprise Institute Said It Would Fight Related Subpoena

Exxon Mobil Corporation (ExxonMobil) filed a lawsuit in a Texas state court against the Attorney General of the United States Virgin Islands (USVI), whose office had issued a subpoena to ExxonMobil under the territory's Criminally Influenced and Corrupt Organizations Act. The subpoena said that ExxonMobil misrepresented its contributions to climate change to defraud consumers and the government. ExxonMobil's petition for declaratory relief asserted that the subpoena was "a pretextual use of law enforcement power to deter ExxonMobil from participating in ongoing public deliberations about climate change and to fish through decades of ExxonMobil's documents with the hope of finding some ammunition to enhance" the attorney general's policy stance. The lawsuit also named a Washington law firm that represented the

attorney general and one of the law firm's lawyers as defendants. ExxonMobil alleged causes of action for violations of the First, Fourth, Fifth, and Fourteenth Amendments, as well as abuse of process under common law. The petition sought a declaration that the subpoena was unenforceable. On April 7, 2016, the Competitive Enterprise Institute announced that it would fight a related investigative subpoena issued by the USVI attorney general that demanded documents and communications from or to ExxonMobil dating from 1997 to 2007 that concerned climate change. *Exxon Mobil Corp. v. Walker*, No. 017-284890-16 (Tex. Dist. Ct., filed Apr. 13, 2016); *United States Virginia Islands Office of the Attorney General v. Exxon Mobil Corp.*, No. 16-002469 (D.C. Super. Ct., CEI subpoena Apr. 4, 2016): added to the "Regulate Private Conduct" slide.

New Lawsuit Filed to Challenge Approvals for Continued Operations at Four Corners Power Plant and Navajo Mine

Environmental groups filed a lawsuit against federal defendants in the federal district court for the District of Arizona challenging expanded coal strip-mining operations at the Navajo Mine and extended coal combustion at the Four Corners Power Plant. The facilities are located in New Mexico and Arizona, including on tribal lands. The groups challenged a Biological Opinion (BiOp) prepared pursuant to the Endangered Species Act that concluded that operations at the mine and power plant would neither jeopardize the survival and recovery of, nor adversely modify designated critical habitat of, two endangered species of fish. The groups' allegations included that the BiOp's analysis of cumulative effects failed entirely to address evidence of significant impacts to the fishes' habitat from climate change. The groups also challenged compliance with the National Environmental Policy Act. They alleged that the final environmental impact statement rejected alternatives such as conversion to natural gas that were technically and economically feasible and that would have greatly reduced greenhouse gas emissions at the power plant, which the complaint said was one of the largest domestic sources of greenhouse gas emissions. *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, No. 3:16-cv-08077 (D. Ariz., filed Apr. 20, 2016): added to the "Stop Government Action/NEPA" slide.

California Appellate Court Asked Parties for Further Briefing on Greenhouse Gas Auction Issues

The California Court of Appeal ordered additional briefing in an appeal concerning the legality of California's auction of greenhouse gas allowances in its cap-and-trade program. A California Superior Court upheld the auction in 2013. The appellate court asked the parties to address specific questions related to the argument that the auction constitutes an unconstitutional tax. *Morning Star Packing Co. v. California Air Resources Board*, No. C075954; *California Chamber of Commerce v. California Air Resources Board*, No. C075930 (Cal. Ct. App. Apr. 8, 2016): added to the "Challenges to State Action" slide.

Shareholder Suit Filed in Connection with SoCalGas Natural Gas Leak

A Sempra Energy (Sempra) shareholder filed a stockholder derivative complaint in California Superior Court alleging that officers and directors of Sempra and its subsidiary Southern

California Gas Company (SoCalGas) violated their fiduciary duties in connection with the months-long leak from a natural gas storage facility in southern California. The complaint alleged that the leak was the largest methane leak in United States history and that the link had undermined California's "vaunted program to combat climate change," "erasing years of the progress made under California's effort to overhaul its energy industry, a program that has cost consumers tens of billions since 2006." *Shupak v. Reed*, No. BC617444 (Cal. Super. Ct., filed Apr. 19, 2016): added to the "Regulate Private Conduct" slide.

Environmental Group Asked CEQ and Interior Secretary to Require Consideration of Climate Impacts in Public Lands Grazing Programs

Public Employees for Environmental Responsibility (PEER) submitted complaints to the Council on Environmental Quality (CEQ) and the Secretary of the Interior contending that the United States Bureau of Land Management (BLM) was systematically failing to consider climate change issues in its public lands grazing programs. The complaint letters asserted that public land grazing has "three-fold" climate-related consequences: (1) domestic cattle are a significant source of methane; (2) overgrazing has reduced the ability of public lands to offset greenhouse gas emissions through carbon sequestration; and (3) degraded rangelands have reduced resiliency to climate impacts. The letters said that BLM had "consistently shirked" its obligation to consider climate change in NEPA reviews despite guidance instructing it to do so. The letters asked CEQ and the Interior Secretary to take certain actions, including requiring BLM to adopt a climate change adaptation strategy and greenhouse gas emission reduction plan for the public lands livestock grazing program and to review and alter its NEPA practices to take climate change into account. PEER Letter to CEQ regarding U.S. Bureau of Land Management NEPA Noncompliance (Apr. 11, 2016); PEER Letter to Interior Department regarding BLM Violation of Climate Change Directives (Apr. 11, 2016): added to the "Force Government to Act" slide.

Environmental Group Protested Oil and Gas Lease Sales, Sought Programmatic Review of Climate Impacts

The Center for Biological Diversity (CBD) filed two protests of oil and gas lease sales in Montana and Wyoming with BLM. CBD contended that BLM should halt all leasing until it had conducted a programmatic review of the climate impacts of its fossil fuel extraction programs. The protest letters said that "[p]roceeding with new leasing proposals ad hoc in the absence of a comprehensive plan that addresses climate change and fracking is premature and risks irreversible damage." CBD urged BLM to consider limiting greenhouse gas emissions by keeping fossil fuels in the ground and to consider banning new oil and gas leasing and fracking. In its protest letter filed with the Montana state office, CBD also said that BLM had failed to comply with the Endangered Species Act's consultation requirements and had failed to consider impacts to a sensitive bird species in violation of BLM regulations. CBD said that climate change would continue to exacerbate threats to the bird's habitat and would change natural fire cycles in a way that would harm the species. In the Wyoming letter, CBD said that the lease sale was not consistent with its obligations to prioritize development outside greater sage-grouse habitat. Center for Biological Diversity, Protest of Bureau of Land Management Oil and Gas Lease Sale (Montana State Office) (BLM Mar. 7, 2016); Center for Biological Diversity, Protest

of Bureau of Land Management Oil and Gas Lease Sale (Wyoming State Office) (BLM Mar. 2, 2016).

Update #85 (April 4, 2016)

FEATURED CASE

Reversing District Court, Ninth Circuit Upheld Critical Habitat Designation for Polar Bears

The Ninth Circuit Court of Appeals upheld the United States Fish and Wildlife Service's (FWS's) designation of critical habitat for polar bears. The Ninth Circuit reversed a decision by the district court for the District of Alaska that vacated the entire designation. The Ninth Circuit said that the district court had improperly required that FWS identify specific elements within the designated critical habitat areas that were essential to polar bear conservation and currently in use by polar bears. The Ninth Circuit said this requirement was directly counter to the Endangered Species Act's conservation purposes. The Ninth Circuit instead considered whether the designated areas "contained the constituent elements required for sustained preservation of polar bears," and found that FWS's designation of terrestrial denning habitat and barrier island habitat was not arbitrary and capricious. In reaching this conclusion, the Ninth Circuit said that FWS had properly taken future climate change into account in designating the critical habitat. The Ninth Circuit also said that FWS had satisfied its obligations to consider concerns raised by the State of Alaska. *Alaska Oil & Gas Association v. Jewell*, No. 13-35619 (9th Cir. Feb. 29, 2016): added to the "Endangered Species Act" slide.

DECISIONS AND SETTLEMENTS

Ninth Circuit Dismissed Greenpeace Appeal of Preliminary Injunction That Barred Protests That Interfered with Shell's Arctic Oil Exploration

The Ninth Circuit Court of Appeals held that Greenpeace, Inc.'s (Greenpeace's) appeal of a preliminary injunction obtained by Shell Offshore Inc. and Shell Gulf of Mexico Inc. (together, Shell) to stop Greenpeace protesters from impeding Shell's oil exploration activities off the Alaskan coast was moot. The Ninth Circuit noted that the preliminary injunction granted by the federal district court for the District of Alaska had expired in November 2015 and that Shell had not sought to renew it. The court was not persuaded by Greenpeace's argument that preliminary civil contempt sanctions against Greenpeace rescued the appeal from mootness. The Ninth Circuit said that the sanctions imposed by the district court—which imposed escalating fines on Greenpeace while its protesters blocked a Shell vessel from leaving port—were coercive, not compensatory, and therefore did not survive the termination of the underlying injunction. The Ninth Circuit vacated the pending contempt proceedings in the district court and remanded the action to the district court for consideration of whether Shell had established that it suffered compensable injuries due to Greenpeace's protest campaign. *Shell Offshore Inc. v. Greenpeace, Inc.*, No. 15-35392 (9th Cir. Mar. 4, 2016): added to the "Protesters and Scientists" slide.

Federal Court Said Information on Impact of Sea-Ice Loss on Ringed Seals Was Too

Speculative to Support Listing as Threatened Species

The federal district court for the District of Alaska struck down the listing of the Arctic subspecies of ringed seal as threatened under the Endangered Species Act. The court said that the listing was not reasonable because the subspecies population was currently strong and healthy and the listing was grounded primarily in "speculation as to what circumstances may or may not exist 80 to 100 years from now." The court said that the National Marine Fisheries Service had acknowledged that it lacked reliable data regarding the impacts of loss of sea-ice due to climate change in that extended timeframe. *Alaska Oil & Gas Association v. National Marine Fisheries Service*, No. 4:14-cv-00029 (D. Alaska Mar. 17, 2016): added to the "Endangered Species Act" slide.

SEC Advised Oil and Gas Companies to Allow Shareholders to Vote on Climate Change Resolutions

The United States Securities and Exchange Commission (SEC) issued letters to Exxon Mobil Corporation (ExxonMobil) and Chevron Corporation (Chevron) advising them to include proposals in their shareholder proxy materials that would, if approved, require the companies to provide additional information to investors about, and to take actions to address, climate change risks. The proposals to be included in the proxy materials included requests for annual assessments of the long-term portfolio impacts of possible climate change policies. The SEC rejected Chevron's argument that this proposal could be excluded based on the exclusion for matters related to "ordinary business operations." The SEC said this exclusion did not apply because the proposal related to the significant policy issue of climate change. The SEC's letter to ExxonMobil said that the proposal was not "so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the company in implementing the proposal, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." The letter to ExxonMobil also indicated that the SEC did not agree that the company's previous public disclosures substantially implemented the disclosure guidelines set forth in the proposals. The SEC also said in March letters that Chevron and ExxonMobil should include proposals to increase the total amount authorized for capital distributions to shareholders as a prudent response to the climate change-related risks of stranded assets. In two other letters to ExxonMobil, the SEC said that the company could not omit either a proposal asking the company to "quantify and report to shareholders its reserve replacements in British Thermal Units, by resource category, to assist the company in responding appropriately to climate change induced market changes" or a proposal that the company commit to supporting the goal of limiting global warming to less than 2°C. SEC Letter to Exxon Mobil Corp. (Mar. 23, 2016); SEC Letter to Chevron Corp. (Mar. 23, 2016); SEC Letter to Exxon Mobil Corp. (Mar. 22, 2016); SEC Letter to Exxon Mobil Corp. (Mar. 22, 2016); SEC Letter to Exxon Mobil Corp. (Mar. 14, 2016) and SEC Letter to Exxon Mobil Corp. denying Commission review (Mar. 23, 2016); SEC Letter to Chevron Corp. (Mar. 11, 2016): added to the "Regulate Private Conduct" slide.

NEW CASES, MOTIONS, AND NOTICES

Briefs Filed in Defense of Clean Power Plan

On March 28, the United States Environmental Protection Agency (EPA) filed its initial brief defending the Clean Power Plan, which regulates carbon dioxide emissions from existing power plants. The brief defended EPA authority to rely on shifting generation of electricity to cleaner sources of power as the best system of emission reduction. EPA also argued that regulation of hazardous air pollutants from power plants under Section 112 of the Clean Air Act did not bar regulation of carbon dioxide emissions under Section 111 and struck back at arguments that the Clean Power Plan unconstitutionally impinged on state authority. The brief also addressed procedural claims regarding changes made to the regulations between the proposed and final versions and defended the reasonableness of specific facets of the rule. In the days after EPA filed its brief, a number of intervenor-respondents and amicus parties filed their briefs in support of the Clean Power Plan, including 18 states; power companies representing almost 10 percent of the nation's total generating capacity; renewable energy trade associations; environmental and public health groups; more than 200 current and former members of Congress; two former EPA administrators in Republican administrations; and more than 50 city and county governments along with three mayors, the U.S. Conference of Mayors, and the National League of Cities. Earlier in March, the D.C. Circuit denied a motion by petitioner Energy & Environment Legal Institute (EELI) to file a supplemental brief that addressed EELI's claims that an EPA official engaged in improper communications with environmental advocacy groups using a personal email account. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. Mar 28, 2016; amicus briefs Mar. 31, 2016; order denying EELI motion to file supplemental brief Mar. 21, 2016): added to the "Challenges to Federal Action/Clean Power Plan" slide. [*Editor's Note:* Many petitions, motions, and other documents filed with respect to the Clean Power Plan are available on pages 15–16 of the chart.]

Groups Asked Arizona Federal Court to Force Decision on Listing Monarch Butterfly as Threatened

The Center for Food Safety and the Center for Biological Diversity filed an action in the federal district court for the District of Arizona to compel action on a 2014 petition asking FWS to list the monarch butterfly as a threatened species under the Endangered Species Act (ESA). The plaintiffs cited a number of threats to the butterfly, including global climate change. The plaintiffs alleged that FWS and the Secretary of the U.S. Department of the Interior had failed to comply with nondiscretionary deadlines for responding to petitions under the ESA. *Center for Food Safety v. Jewell*, No. 4:16-cv-00145 (D. Ariz., filed Mar. 10, 2016): added to the "Endangered Species Act" slide.

Update #84 (March 7, 2016)

FEATURED CASE

Supreme Court Stayed Clean Power Plan; Merits Briefing Commenced in D.C. Circuit

In five identical half-page orders, the United States Supreme Court granted five applications requesting that it stay implementation of the Clean Power Plan, which regulates carbon emissions from existing power plants. The orders indicated that Justices Ginsburg, Breyer,

Sotomayor, and Kagan voted to deny the applications. A blog post by Sabin Center Director Michael Gerrard about the stay is available here. Ten days later, the petitioners filed a joint opening brief in the D.C. Circuit, and on February 23, a number of briefs were filed by amicus parties in support of the petitioners, including members of Congress, former state public utility commissioners, and a group of "organizations that represent women, minorities, and seniors, and those who advocate for free-market solutions to help these vulnerable populations." In their joint brief, the petitioners contended that the Clean Power Plan was outside the authority vested in the United States Environmental Protection Agency (EPA) by Section 111 of the Clean Air Act, and that Section 112 expressly prohibited the Clean Power Plan. They also argued that the Clean Power Plan rule unconstitutionally abrogated state authority and "commandeer[ed] and coerc[ed]" states into implementing federal energy policy. *West Virginia v. EPA*, Nos. 15A773 et al. (U.S. Feb. 9, 2016); *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. joint opening brief Feb. 19, 2016; amicus briefs Feb. 23, 2016): added to the "Challenges to Federal Action/Clean Power Plan" slide. [*Editor's Note:* Many petitions, motions, and other documents filed with respect to the Clean Power Plan are available on pages 15–16 of the chart.]

DECISIONS AND SETTLEMENTS

Second Circuit Declined to Stop Construction Activity on Natural Gas Pipeline for Which Environmental Groups Alleged Climate-Related Shortcomings in Environmental Review

The Second Circuit Court of Appeals denied a request to stay construction activity associated with the development of the Constitution Pipeline Project, a natural gas transmission line that would travel through Pennsylvania and New York. The stay was sought by Clean Air Council and Sierra Club, two of the five petitioners that have asked the Second Circuit to review orders of the Federal Energy Regulatory Commission (FERC) approving the project and authorizing it to proceed. In their memorandum of law supporting the request for the stay, the petitioners contended that FERC violated the National Environmental Policy Act by failing to consider the project's indirect impacts, and particularly impacts of natural gas development induced by the project. They also contended, among other arguments, that FERC's analysis of cumulative impacts did not capture harms from additional greenhouse gas emissions and that FERC's approval of the project violated the Clean Water Act. *Catskill Mountainkeeper, Inc. v. Federal Energy Regulatory Commission*, No. 16-345 (2d Cir. order Feb. 24, 2016; petition for review filed Feb. 5, 2016; emergency motion for stay and brief Feb. 5, 2016): added to the "Stop Government Action/NEPA" slide.

Seventh Circuit Said Challenge to FutureGen Carbon Injection Permits Was Moot

The Seventh Circuit Court of Appeals dismissed Illinois landowners' challenges to permits issued under the Safe Drinking Water Act that authorized FutureGen Industrial Alliance (FutureGen) to construct and operate wells to store carbon dioxide. The permits were part of FutureGen's plan to use carbon capture and storage to develop a near-zero emissions coal-fired power plant. The United States Department of Energy suspended funding for the project in January 2015, and the permits expired as of February 2, 2016. The Seventh Circuit said the proceedings challenging the permits were moot because the permits were no longer in effect and could not be reissued without new regulatory proceedings. *DJL Farm LLC v. EPA*, Nos.

15-2245, 15-2246, 15-2247, & 15-2248 (7th Cir. Feb. 23, 2016): added to the "Stop Government Action/Other Statutes" slide.

Challenge to "Tailoring Rule," a Casualty of *UARG v. EPA*, Was Voluntarily Dismissed

The American Petroleum Institute and other petitioners voluntarily dismissed a petition filed in 2012 to challenge Step 3 in EPA's "tailoring rule," which addressed thresholds for regulating greenhouse gas emissions from large stationary sources. The proceeding had been held in abeyance since 2013. The Supreme Court's 2014 decision in *Utility Air Regulatory Group v. EPA* made the tailoring rule invalid. *American Petroleum Institute v. EPA*, No. 12-1276 (D.C. Cir. Feb. 18, 2016): added to the "Challenges to Federal Action/Clean Air Act" slide.

D.C. Circuit Denied Rehearing on Improper Venue Ruling for Challenge to California Nonroad Diesel Engine Regulations

The D.C. Circuit Court of Appeals denied a petition for rehearing of its December 2015 ruling that it was not the proper venue for a challenge to EPA's authorization of California regulations concerning in-use nonroad diesel engine emissions. In its December opinion, the D.C. Circuit agreed with petitioners led by Dalton Trucking, Inc. that venue was not proper because EPA's determination did not have national applicability and because EPA had not made a determination of nationwide scope or effect. Rehearing was sought by another petitioner, American Road & Transportation Builders Association, which objected to language in the court's opinion that indicated that the California regulations could be adopted by other states. The challenge will instead be heard by the Ninth Circuit. *Dalton Trucking, Inc. v. EPA*, Nos. 13-1283, 13-1287 (D.C. Cir. denial of rehearing Feb. 11, 2016; opinion Dec. 18, 2015): added to the "Challenges to Federal Action/Clean Air Act" slide.

Federal Court Ordered White House Office of Science & Technology Policy to Produce Some Documents Related to Director's Polar Vortex Video

The federal district court for the District of Columbia ruled that the White House Office of Science & Technology Policy (OSTP) could for the most part withhold—based on the deliberative process privilege—drafts of a letter prepared in response to the Competitive Enterprise Institute's request that OTSP correct claims made by the OSTP director in an online video about the link between climate change and the Polar Vortex. The court ruled, however, that OSTP had to disclose draft pages that were shared with a Rutgers University professor whose research supported the theory that climate change had led to more severe winter cold. The court said that the "consultant corollary" did not apply in this situation. The court also said that emails concerning the video could not be withheld because OSTP had asserted that the video expressed the director's personal opinion and expert judgment, and the deliberative process privilege was primarily concerned with protecting the policymaking process. *Competitive Enterprise Institute v. Office of Science & Technology Policy*, No. 14-cv-01806 (D.D.C. Feb. 10, 2016): added to the "Climate Protesters and Scientists" slide.

Washington Federal Court Dismissed Challenge to Snake River Maintenance Plan, Rejected Argument That Corps Failed to Consider Increased Sediment Accumulation

Caused by Climate Change

The federal district court for the Western District of Washington granted summary judgment to the United States Corps of Engineers in a case in which environmental and conservation groups alleged that the Corps' plan for maintaining the Snake River navigation channel violated the National Environmental Policy Act (NEPA) and the Clean Water Act. The court rejected the plaintiffs' argument that the Corps had violated NEPA by failing to incorporate the impacts of climate change on sediment deposition in its decision-making. The court said that "[p]laintiffs' climate change argument boils down to an assertion that the Corps should have forecasted future climate change sediment yields …, despite the speculation inherent in such an exercise," and that NEPA did not require consideration of speculative information. *Idaho Rivers United v. United States Army Corps of Engineers*, No. 14-cv-1800 (W.D. Wash. Feb. 9, 2016): added to the "Stop Government Action/NEPA" slide.

California Supreme Court Denied Rehearing in CEQA Case Concerning Significance of Major Development's Greenhouse Gas Emissions

The California Supreme Court denied a petition for rehearing in *Center for Biological Diversity v. Department of Fish and Wildlife*, in which the court ruled that the California Environmental Quality Act (CEQA) review for a 12,000-acre development had not supported the conclusion that the development's greenhouse gas emissions would not have significant impacts. The court also made a non-material alteration to its November 2015 opinion. *Center for Biological Diversity v. Department of Fish and Wildlife*, No. S217763 (Cal. Feb. 17, 2016): added to the "State NEPAs" slide.

Maryland Court Upheld Approval of Power Plant for Dominion Cove Point Liquefied Natural Gas Facility

The Maryland Court of Special Appeals affirmed the Maryland Public Service Commission's (PSC's) approval of an electric generating station intended to power the Dominion Cove Point natural gas liquefaction facility. An environmental organization unsuccessfully argued that the PSC's requirement that the project's sponsor contribute $40 million to the Strategic Energy Investment Fund (SEIF)—which finances investments in energy efficiency and conservation programs, renewable energy resources, low-income energy assistance, and other purposes—was an impermissible tax. The court said that the purpose of requiring the contribution to SEIF was to offset "societal harms" identified by the PSC, including increased carbon emissions and use of a limited supply of industrial greenhouse gas emission allowances under the Regional Greenhouse Gas Initiative. *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Public Service Commission*, No. 2437 (Md. Ct. Spec. App. Feb. 16, 2016): added to the "Stop Government Action/Other Statutes" slide.

Washington State Court Rejected Climate Protesters' Necessity Defense After Allowing Them to Present Evidence in Support of It

Five individuals who blocked a rail yard in Washington state to draw attention to climate change and the risks of coal and oil trains were convicted of trespass in Washington state court on

January 15, 2016. Before the trial, the judge in Snohomish County District Court initially dismissed the protesters' necessity defense—in which the individuals argued that civil disobedience was necessary to address climate change and harms caused by oil trains. On reconsideration, however, the judge allowed the defense to present testimony in support of the necessity defense at the trial. The defense relied on the testimony of a climate scientist, a physician, a rail-safety specialist, an environmental policy researcher, and a former rail company employee. Ultimately, the judge directed the jury to disregard the testimony, saying that the defendants had not shown that they had exhausted legal means of advocating for changes in climate change and rail safety policies. The judge said from the bench that the defendants were "tireless advocates whom we need in this society to prevent the kind of catastrophic effects that we see coming and our politicians are ineffectually addressing." The defendants were not convicted on charges of obstructing or trying to delay trains. *Washington v. Brockway*, Nos. 5035A-14D, 5039A-14D, 5040-14D, 5041-14D, 5042-14D (Wash. Dist. Ct. order initially dismissing necessity defense Jan. 6, 2016; motion to reconsider Jan. 6, 2016; verdict Jan. 15, 2016): added to "Climate Protesters and Scientists" slide.

Connecticut Court Upheld Denial of Approvals for Single-Family Home Where Owner Had Not Considered Sea Level Rise

A Connecticut Superior Court rejected a property owner's challenge to the denial of variances and coastal site plan approval for a single-family home on a parcel in the town of Old Saybrook that was formerly part of a larger parcel containing Katharine Hepburn's home. Among the reasons cited by the court for upholding the decisions of the Borough of Fenwick Zoning Board of Appeals was the owner's failure to consider impacts on coastal resources, including impacts of sea level rise. Citing a 2010 report on climate change impacts prepared by a subcommittee to the Governor's Steering Committee on Climate Change, the court noted that the required review was "underscored by the likely impact on Long Island Sound from rising sea levels—with estimates ranging from twelve to fifty-five inches by the end of the century." *A Piece of Paradise, LLC v. Borough of Fenwick Zoning Board of Appeals*, No. LNDCV136047679S (Conn. Super. Ct. Dec. 23, 2015): added to the "Adaptation" slide.

NEW CASES, MOTIONS, AND NOTICES

More Companies Challenged Renewable Fuel Standard Rule

Additional parties joined the proceedings in the D.C. Circuit Court of Appeals challenging EPA's final renewable fuel standard rule (RFS rule), which was published in December 2015. E.I. du Pont de Nemours and Company (DuPont) moved to intervene on the ground that was a leading supplier to the "first generation" ethanol industry and also that it had recently completed a "second generation" ethanol project—a cellulosic ethanol plant in Iowa. DuPont said it could bring the perspective of the "nascent cellulosic renewable fuel industry" to the proceedings. Monroe Energy, LLC, a petroleum products refiner, filed a separate petition for review, as did another group of refiners, the American Petroleum Institute, and the American Fuel & Petrochemical Manufacturers. Valero Energy Corporation, an energy company that refines transportation fuels and owns multiple ethanol plants, filed a petition for review challenging the RFS rule and also a separation petition seeking review of earlier EPA rulemakings concerning

renewable fuel standard requirements, contending that the D.C. Circuit had jurisdiction to consider the challenges to the older rules because the petition was based on grounds that arose within 60 days after new grounds arose for challenging those rules. *Americans for Clean Energy v. EPA*, No. 16-1005 (D.C. Cir., DuPont motion to intervene Feb. 5, 2016); *Monroe Energy, LLC v. EPA*, No. 16-1044 (D.C. Cir., filed Feb. 9, 2016); *American Fuel & Petrochemical Manufacturers v. EPA*, No. 16-1047 (D.C. Cir., filed Feb. 10, 2016); *American Petroleum Institute v. EPA*, No. 16-1050 (D.C. Cir., filed Feb. 11, 2016); *Alon Refining Krotz Springs, Inc. v. EPA*, No. 16-1049 (D.C. Cir., filed Feb. 11, 2016); *Valero Energy Corp. v. EPA*, Nos. 16-1054, 16-1055 (D.C. Cir., filed Feb. 12, 2016): added to the "Challenges to Federal Action/Clean Air Act" slide.

Environmental Groups Charged That Forest Service and BLM Failed to Protect Greater Sage-Grouse, Cited Climate Impacts on Habitat

Four environmental organizations filed a complaint in the federal district court for the District of Idaho to challenge approvals by the United States Forest Service and the United States Bureau of Land Management (BLM) of revised land use plans for lands located in the range of the greater sage-grouse in Idaho and other states. The plaintiffs alleged that the plans did not implement best available science and government experts' recommendations and would not ensure the greater sage-grouse's survival, which was threatened by the "synergistic impacts of climate change and human activities" on their habitat. The plaintiffs alleged claims under NEPA, the Federal Land Policy and Management Act, and the National Forest Management Act. *Western Watersheds Project v. Schneider*, No. 16-cv-83 (D. Idaho, filed Feb. 25, 2016): added to the "Stop Government Action/Other Statutes" slide.

Public Housing Residents Alleged Albany Oil Terminal Violated Clean Air Act

Public housing tenants in Albany whose homes were adjacent to a petroleum product transloading facility filed a Clean Air Act citizen suit against the facility's operator. The County of Albany and six environmental groups joined the tenants as plaintiffs. The plaintiffs claimed that the operator modified and operated the facility in violation of the Clean Air Act, New York's State Implementation Plan, and the facility's Title V permit. The complaint's allegations focused on traditional air pollutants—particularly volatile organic compounds—but also asserted that the offloading, storage, handling, and transloading of petroleum products at the facility resulted in greenhouse gas emissions. *Benton v. Global Companies, LLC*, No. 1:16-cv-00125 (N.D.N.Y., filed Feb. 3, 2016): added to the "Regulate Private Conduct" slide.

Update #83 (February 3, 2016)

FEATURED CASE

D.C. Circuit Denied Stay in Clean Power Plan Challenge and Set Briefing Schedule; Petitioners Asked Supreme Court for Immediate Stay

On January 21, 2016, the D.C. Circuit Court of Appeals denied motions asking for a stay of EPA's Clean Power Plan. The order stated that the petitioners had not "satisfied the stringent

requirements for a stay pending court review." The court also ordered that consideration of the appeals be expedited. Oral argument was scheduled for June 2, 2016, and the court asked the parties to reserve June 3 in the event that argument did not conclude on the 2nd. The order indicated that the members of the panel that will review the challenge are Judges Judith W. Rogers (appointed by President Bill Clinton), Karen LeCraft Henderson (appointed by President George H.W. Bush) and Sri Srinivasan (appointed by President Barack Obama). On January 28, the court set the briefing schedule, after receiving proposals from the parties. The schedule required submission of petitioners' briefs by February 19, EPA's brief by March 28, and final briefs by April 22. After the D.C. Circuit denied the stay, a group of 29 states and state agencies led by West Virginia and Texas filed an application for an immediate stay with the Supreme Court. That application was joined by applications from business associations, from the coal industry, from utility and allied parties, and from North Dakota. The applications are directed to Chief Justice John Roberts, who is the circuit justice for the D.C. Circuit. Roberts requested EPA's response by February 4. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. order denying stay Jan. 21, 2016): added to the "Challenges to Clean Power Plan" slide. [*Editor's Note:* The numerous petitions, motions, and other documents filed with respect to the Clean Power Plan are available on pages 15–16 of the chart.]

DECISIONS AND SETTLEMENTS

Supreme Court Declined to Review D.C. Circuit's Order That Left in Place EPA Regulation of Greenhouse Gas Emissions from "Anyway" Sources

The United States Supreme Court denied certiorari to the Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation, which sought review of the D.C. Circuit's order governing further proceedings after the Supreme Court's 2014 decision in *Utility Air Regulatory Group v. EPA*. In its April 2015 order, the D.C. Circuit did not vacate EPA's regulations concerning greenhouse gas permitting for stationary sources in their entirety. Instead, the D.C. Circuit ordered EPA to rescind the portions of the regulations that required permits based solely on a source's greenhouse gas emissions, but left in place regulations that required sources subject to Prevention of Significant Deterioration (PSD) requirements due to other types of emissions (often referred to as "anyway" sources) to use best available control technology to control greenhouse gas emissions. *Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation v. EPA*, No. 15-637 (U.S. cert. denied Jan. 19, 2016): added to the "Challenges to Federal Action" slide.

Settlement Agreement Required Analysis of Impacts of Well-Stimulation Practices on Pacific Outer Continental Shelf

Environmental Defense Center (EDC) and the Center for Biological Diversity (CBD) reached settlement agreements pursuant to which the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) will prepare a programmatic environmental assessment (EA) to analyze the potential impacts of certain well-stimulation practices including hydraulic fracturing on the Pacific outer continental shelf. The settlement agreements resolved lawsuits brought by EDC and CBD in 2014 and 2015 in which they alleged that the agencies had failed to comply with the National Environmental Policy Act (NEPA).

EDC had cited greenhouse gas emissions as one environmental risk that should have been considered prior to approving drilling permit applications. The agreements required the programmatic EA to be completed by May 28, 2016. Pursuant to the agreements, BSEE must withhold future approvals of drilling permit applications involving well-stimulation techniques while the programmatic EA is prepared. BSEE must provide notice to EDC and CBD of well-stimulation applications it receives for an interim period while BSEE works to establish a system for making information about submitted applications publicly available. *Environmental Defense Center v. Bureau of Safety & Environmental Enforcement*, No. 2:14-cv-0928 (C.D. Cal. Jan. 29, 2016); *Center for Biological Diversity v. Bureau of Ocean Energy Management*, No. 2:15-cv-01189 (C.D. Cal. Jan. 29, 2016): added to the "Stop Government Action/NEPA" slide.

Montana Federal Court Required New Review of Expansion Plan for Coal Mine

The federal district court for the District of Montana ordered the United States Office of Surface Mining, Reclamation and Enforcement (OSMRE) to prepare an updated environmental assessment that considered the direct and indirect effects of a mining plan amendment for expansion of a surface coal mine in Montana. The court adopted the findings and recommendations issued by a magistrate judge in October 2015. The magistrate judge found that OSMRE's finding of no significant impact (FONSI) was based on a six-year-old environmental assessment that expressly stated that it was not analyzing site-specific plans and contained no explanation of its conclusion that the amendment would have no significant impact on air quality, coal combustion, or reclamation. The court agreed with the magistrate judge that OSMRE had not taken a hard look at environmental impacts and also agreed with the magistrate judge that OSMRE's failure to provide public notice of the FONSI was not harmless error. The district court deferred vacating the mining plan amendment for 240 days to give OSMRE time to complete the review. *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enforcement*, Nos. 14-cv-13, 14-cv-103 (D. Mont. Jan. 21, 2016): added to the "Stop Government Action/NEPA" slide.

Oregon Federal Court Allowed Industry Groups to Intervene in Young People's Climate Lawsuit

The federal district court for the District of Oregon allowed the National Association of Manufacturers (NAM), the American Fuel & Petrochemical Manufacturers (AFPM), and the American Petroleum Institute (API) to intervene as of right in a climate change lawsuit brought by a number of individual plaintiffs aged 19 or younger, an environmental organization, and a plaintiff identified as "Future Generations." The plaintiffs alleged that the federal government's actions—and failures to take action—deprived the plaintiffs of constitutionally protected rights by allowing dangerous levels of carbon dioxide to accumulate in the atmosphere. The court found that NAM, AFPM, and API had a "significantly protectable interest" because the relief sought by the plaintiffs would "change the very nature" of their business. The court also said that there was "no question" that the proposed intervenors' interests would be impaired by any court-mandated regulation to eliminate emissions and that the intervenors' presence was "necessary to fully and fairly put those issues before the court." The court was not persuaded by the plaintiffs' contention that the government was "essentially pro-fossil fuel industry" and would adequately represent the interests of NAM, AFPM, and API. *Juliana v. United States*, No. 6:15-cv-1517 (D.

Or. Jan. 14, 2016): added to the "Common Law Claims" slide.

California Federal Court Found No NEPA Violations in Approval of Introduction of Vehicles to Downtown Fresno's Fulton Mall

The federal district court for the Eastern District of California ruled against plaintiffs who challenged the approval of the reintroduction of vehicular traffic to the Fulton Mall area in downtown Fresno as part of a revitalization plan. The court upheld the finding of no significant impact for the project issued by the California Department of Transportation on behalf of the Federal Highway Administration, finding that the plaintiffs had failed to raise substantial questions as to whether the project would have significant impacts, including on greenhouse gas emissions. The court found that the environmental assessment considered "the potential traffic-generating effects of the project and accounted for expected future land uses." The court also found no violations of Section 4(f) of the Department of Transportation Act. *Bitters v. Federal Highway Administration*, No. 1:14-cv-01646 (E.D. Cal. Jan. 12, 2016): added to the "Stop Government Action/NEPA" slide.

In Citizen Suit Against Oregon Crude Oil Facility Operator, District Court Found No Clean Air Act Violation

The federal district court for the District of Oregon found that citizen suit defendants who constructed a crude oil transloading terminal in Catskanie, Oregon, had not violated the Clean Air Act. Three environmental organizations had alleged that the terminal's operation would result in emissions of air pollutants such as volatile organic compounds, nitrogen oxides, greenhouse gases, and hazardous air pollutants, and that the defendants should have obtained a Prevention of Significant Deterioration (PSD) permit. The court found that the plaintiffs had not proven by a preponderance of the evidence that the defendants miscalculated the terminal's potential to emit and that the terminal's emissions would exceed the threshold for obtaining a PSD permit. *Northwest Environmental Defense Center v. Cascade Kelly Holdings LLC, d/b/a Columbia Pacific Biorefinery*, No. 3:14-cv-01059 (D. Or. Dec. 30, 2015): added to the "Regulate Private Conduct" slide.

Maryland Court Upheld Public Service Commission's Approval of Exelon-Pepco Merger Over Concerns About Impacts on Renewable Energy Market

The Maryland Circuit Court for Queen Anne's County denied petitions by the Maryland Office of People's Counsel, Sierra Club, Chesapeake Climate Action Network, and Public Citizen, Inc. for review of the Maryland Public Service Commission's (PSC's) approval of a merger between the utility and energy generating businesses, Exelon Corporation and Pepco Holdings, Inc. Among other things, the court found that the PSC had not acted arbitrarily or capriciously when it determined that the petitioners' allegations that the merger could cause harm to distributed generation and renewable energy markets were speculative and not a basis for disapproval of the merger. At least two of the petitioners appealed the circuit court's judgment. *In re Maryland Office of People's Counsel*, No. 17-C-15-019974 (Md. Cir. Ct. Jan. 8, 2016): added to the "Stop Government Action/Other Statutes" slide.

FERC Denied Rehearing of Algonquin Natural Gas Pipeline Project Approval

The Federal Energy Regulatory Commission (FERC) denied requests for rehearing of its order approving an application by Algonquin Gas Transmission, LLC to construct and operate a natural gas pipeline project that would expand capacity in New York, Connecticut, Rhode Island, and Massachusetts. FERC found that two other pipeline projects were not cumulative, connected, or similar action and that its environmental review was not improperly segmented. FERC also rejected the contentions that it should have prepared a programmatic environmental impact statement for natural gas infrastructure projects in the Utica and Marcellus shale formations and that it should have considered the pipeline project's indirect effects of induced shale gas production, including increased greenhouse gas emissions. FERC also found that the final environmental impact statement properly excluded the impacts of induced production from the Marcellus and Utica shale formations from its cumulative impact analysis. FERC also rejected arguments regarding inadequacies in its analysis of the impacts of greenhouse gas emissions from the pipeline project. *In re Algonquin Gas Transmission, LLC*, No. CP14-96 (FERC Jan. 28, 2016): added to the "Stop Government Action/NEPA" slide.

NEW CASES, MOTIONS, AND NOTICES

TransCanada Challenged Denial of Keystone Permit as Unlawful Exercise of Executive Power

TransCanada Keystone Pipeline, LP and TC Oil Pipeline Operations Inc. (TransCanada) filed a complaint in the federal district court for the Southern District of Texas alleging that the president could not prohibit the development of the Keystone XL pipeline based on a belief that approval of the pipeline would undermine U.S. influence in international climate change negotiations. The lawsuit stemmed from the announcement on November 6, 2015 that Secretary of State John F. Kerry had denied a presidential permit to enable the construction of cross-border facilities for the proposed Keystone XL pipeline. The complaint said that the prohibition of the pipeline's development was unauthorized by statute, was contrary to express congressional actions, and was an unprecedented exercise of unilateral presidential authority to prohibit domestic and foreign commerce transacted through a cross-border facility. TransCanada also contended that the actions unlawfully exceeded the executive's constitutional powers and encroached on congressional power to regulate foreign and domestic commerce. The complaint alleged that United States' review of the Keystone XL pipeline had concluded that the pipeline would not increase greenhouse gas emissions, but that the Secretary of State's November 2015 determinations had "reasoned that the government must 'prioritize actions that are not perceived as enabling further GHG emissions globally"' and had relied on the "purely symbolic role a permit denial would play abroad" as the basis for denying the permit. *TransCanada Keystone Pipeline, LP v. Kerry*, No. 4:16-cv-00036 (S.D. Tex., filed Jan. 6, 2016): added to the "Challenges to Federal Action" slide.

TransCanada Filed Notice of $15 Billion NAFTA Claim

Canadian affiliates of TransCanada filed a notice of intent to submit a claim to arbitration pursuant to the North American Free Trade Agreement (NAFTA). They said they would seek

damages of more than $15 billion. The notice asserted that environmental activists had succeeded in turning opposition to the Keystone XL Pipeline into a "litmus test" for politicians, and that the delay in considering the presidential permit and the ultimate denial of the permit were "politically-driven, directly contrary to the findings of the [Obama] Administration's own studies, and not based on the merits of Keystone's application." The notice cited core investment protections that the United States government committed to provide under NAFTA, including national treatment (Article 1102), most-favored-nation treatment (Article 1103), treatment in accordance with international law (Article 1105), and protection against uncompensated expropriations (Article 1110). The notice asserted that the Obama administration's actions breached its obligations to provide these protections. *Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, TransCanada Corp. v. Government of the United States of America* (Jan. 6, 2016).

Ethanol Industry Groups Sought Review of EPA Renewable Fuel Standards

Seven petitioners representing the ethanol and biofuel industry asked the D.C. Circuit Court of Appeals to review the final renewable fuel standard rule published in December 2015. The American Fuel & Petrochemical Manufacturers sought leave to intervene as a respondent, citing the rule's direct regulation of its members and asserting that EPA could not adequately represent its membership's interests. In the final rule, EPA established percentage standards for blending cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel into motor vehicle gasoline and diesel produced and imported in 2014, 2015, and 2016. Citing "real-world challenges," the rule set standards that are lower than would be required to meet statutory renewable fuel targets set in the Energy Independence and Security Act of 2007. EPA said it was making use of the statute's waiver provisions, and also noted that, after failing to meet statutory deadlines for issuing the renewable fuel standards for multiple years, it was returning to the statutory timeline. EPA said that the rule's final volume requirements exceeded actual renewable fuel use in 2015 and that the required volumes would not result in stagnation in the growth of renewable fuel use. *Americans for Clean Energy v. EPA*, No. 16-01005 (D.C. Cir., filed Jan. 8, 2016): added to the "Challenges to Federal Action" slide.

Parties Asked for Stay in WildEarth Guardians' Challenge to Mining Plans in Colorado, New Mexico, and Wyoming

On January 29, 2016, WildEarth Guardians and federal defendants filed a joint motion seeking a stay of proceedings in an action where WildEarth Guardians charged that the federal government improperly approved mining plans for the development of federally owned coal in Colorado, New Mexico, and Wyoming. The motion sought a stay until April 1, 2016 so that the parties can conduct settlement negotiations. The motion indicated that the parties would meet in person by March 4, 2016 for settlement discussions after exchanging written term sheets, and then notify the court within two weeks of the meeting regarding whether they had been able to reach a settlement. A motion to sever the action and transfer claims relevant to the New Mexico and Wyoming to the federal courts in those states remained pending, and was opposed by WildEarth Guardians. *WildEarth Guardians v. Jewell*, No. 1:15-cv-02026 (D. Colo. Jan. 29, 2016): added to the "Stop Government Action/NEPA" slide.

Plaintiffs Challenged California Highway Project, Said NEPA Review Should Have Considered Greenhouse Gas Emissions from Building Materials

Four environmental groups filed a complaint in the federal district court for the Central District of California to challenge the Federal Highway Administration's (FHWA's) approval of a highway project in Riverside County in California. The plaintiffs alleged that FHWA failed to disclose and evaluate environmental impacts, including increased greenhouse gas emissions. The plaintiffs said that FHWA should have considered greenhouse gas emissions from "all sources," including building materials, truck hauls, and water trucks. Plaintiffs alleged violations of NEPA, as well as violations of Section 4(f) of the Department of Transportation Act because the project did not avoid certain parks and schools. *Center for Biological Diversity v. Federal Highway Administration*, No. 5:16-cv-00133 (C.D. Cal., filed Jan. 22, 2016): added to the "Stop Government Action/NEPA" slide.

Environmental Groups Challenged Approval of Mining Project in Idaho National Forest

Three Idaho environmental groups filed a complaint in the federal district court for the District of Idaho alleging that the U.S. Forest Service violated NEPA, the National Forest Management Act, and the Forest Service Organic Act when it approved a mine exploration project in the Boise National Forest. The plaintiffs faulted the Forest Service's NEPA review for failing to consider the impacts of the project on Sacajawea's bitterroot. The complaint alleged that the project site was home to the world's largest populations of this flower and that the flower's long-term survival was at risk due to climate change and other threats. *Idaho Conservation League v. U.S. Forest Service*, No. 16-cv-25 (D. Idaho, filed Jan. 15, 2016): added to the "Stop Government Action/NEPA" slide.

Trial Set for July 2016 in Murray Energy's Job Study Case Against EPA; CEO Resolved Republican National Convention Scheduling Conflict

The federal district court for the Northern District of West Virginia set July 19, 2016 as the trial date for the lawsuit brought by Murray Energy Corporation and its affiliates (Murray Energy) in which they charge EPA with failing to comply with its nondiscretionary obligation to conduct evaluations of potential losses or shifts in employment due to the administration and enforcement of the Clean Air Act. On January 22, 2016, Murray Energy moved to modify the trial date to avoid a scheduling conflict with the Republican National Convention. The motion said that Robert E. Murray, Murray Energy Corporation's chief executive officer and board chairman, who is a plaintiffs' witness and client representative, was a member of the convention's host committee and had commitments requiring him to be at the convention. On February 1, 2016, Murray Energy withdrew its motion to modify the trial date, saying that Mr. Murray had been able to resolve the conflict. *Murray Energy Corp. v. EPA*, No. 5:14-CV-00039 (N.D. W. Va. order Dec. 23, 2015; motion to modify trial date Jan. 22, 2016; withdrawal of motion to modify trial date Feb. 1, 2016): added to the "Challenges to Federal Action" slide.

Pointing to Similarities with Dismissed Case, EPA Said Federal Court Should Dismiss Lawsuit Seeking Regulation of Agricultural Sources Under Clean Air Act

After the federal district court for the District of Columbia dismissed a lawsuit that asked the court to compel EPA to respond to a petition asking it to regulate ammonia as a criteria pollutant under the Clean Air Act, EPA filed a notice of decision in a related case, asking that it also be dismissed. In the related case, plaintiffs have asked the court to require EPA to respond to a 2009 petition asking it to regulate concentrated animal feeding operations (CAFOs) as a source of air pollution under the Clean Air Act. The plaintiffs alleged that air pollution from CAFOs endangers public health and welfare, including by contributing to climate change due to their emissions of methane and nitrous oxide. In its notice of decision, EPA said that the court's decision in the first case addressed the same legal issues raised in EPA's motion to dismiss in this case. In particular, EPA said that, as in the other lawsuit, plaintiffs had failed to provide statutorily-required pre-suit notice. *Humane Society of the United States v. McCarthy*, No. 1:15-cv-00141 (D.D.C. Dec. 2, 2015): added to the "Force Government to Act/Clean Air Act" slide.

Air Regulator and California Attorney General Joined City and County of Los Angeles in Public Nuisance Actions Stemming from Leak at Southern California Gas Storage Facility

On January 26, 2016, the South Coast Air Quality Management District (SCAQMD) commenced a public nuisance action against Southern California Gas Company (SoCalGas), the owner and operator of the Aliso Canyon Storage Facility, a natural gas storage facility at which a leak was discovered in October 2015. The complaint alleged that odors and adverse health effects had forced people living in the communities near the facility to leave their homes, and that the leak had also contributed to global warming and increased the risks of harm from global warming by emitting billions of cubic feet of methane into the atmosphere. The lawsuit asserted statutory public nuisance claims, claims of statutory violations that caused actual injury, and claims of negligent and knowing emission of air contaminants in violation of statutes. The complaint sought civil penalties. The SCAQMD action came after the City Attorney for the City of Los Angeles filed an action on behalf of the state in December 2015. The County Counsel joined that action in January 2016, and in February 2016, the California Attorney General sought to join the action both in her independent capacity and on behalf of the California Air Resources Board. The causes of action in this action included public nuisance and violation of California's Unfair Competition Law. The complaint alleged that the release of methane would have detrimental impacts on the state, city, county, environment, and economy due to the exacerbation of climate change impacts. The alleged unfair business practices were also grounded in part in the release of significant quantities of a potent greenhouse gas. The action sought injunctive relief and civil penalties. *California ex rel. South Coast Air Quality Management District v. Southern California Gas Co.*, No. BC608322 (Cal. Super. Ct., filed Jan. 26, 2016); *California v. Southern California Gas Co.*, No. BC602973 (Cal. Super. Ct., filed Dec. 7, 2015; first amended complaint Jan. 8, 2016; stipulation and second amended complaint Feb. 1, 2016): added to the "Regulate Private Conduct" slide.

WildEarth Guardians Asked BLM to Suspend New Oil and Gas Leasing to Prepare Environmental Review of Climate and Non-Climate Impacts

The Environmental Law Clinic at the UC Irvine School of Law filed a petition with the United States Bureau of Land Management (BLM) on behalf of WildEarth Guardians asking BLM to evaluate the direct, indirect, and cumulative impacts on climate change of its oil and gas leasing

program. WildEarth Guardians asked BLM to prepare a programmatic environmental impact statement (PEIS) to look at these climate impacts, and also at non-climate impacts associated with oil and gas development. WildEarth Guardians requested a moratorium on new oil and gas leasing and approvals of applications for permits to drill pending preparation of the PEIS. The organization also asked that the Department of the Interior amend its NEPA regulations to incorporate the Council on Environmental Quality's 2014 revised draft guidance for considering greenhouse gas emissions and climate change in NEPA review. WildEarth Guardians, *Petition Requesting a Programmatic Environmental Impact Statement Addressing the Bureau of Land Management's Oil and Gas Leasing Program and Formal Adoption of the Council on Environmental Quality's Guidance for Greenhouse Gas Emissions and Climate Change Impacts* (Jan. 20, 2016): added to the "Force Government Action/NEPA" slide.

Sierra Club Asked FERC to Reopen Environmental Review of Louisiana LNG Export Project

Sierra Club filed a request for rehearing with the Federal Energy Regulatory Commission (FERC) concerning FERC's authorization of the siting, construction, and operation of natural gas liquefaction equipment, liquefied natural gas (LNG) export facilities, and related pipeline infrastructure at an existing LNG import facility in Louisiana. Sierra Club asked FERC to withdraw the final environmental impact statement (FEIS) for the proposed projects and to conduct additional environmental review, including review of indirect effects related to supply and consumption of natural gas, consideration of the impacts of greenhouse gas emissions, and review of cumulative impacts of the approved projects with other approved and proposed LNG export projects. *In re Trunkline Gas Co.*, Docket Nos. CP14-119, CP14-120, CP14-122, PF12-8 (FERC, filed Jan. 19, 2016): added to the "Stop Government Action/NEPA" slide.

Update #82 (January 7, 2016)

FEATURED CASE

Fourth Circuit Issued Rationale for Barring Deposition of EPA Administrator

On December 8, 2015, the Fourth Circuit Court of Appeals issued an order setting forth its rationale for granting the United States Environmental Protection Agency's (EPA's) petition for writ of mandamus precluding the deposition of EPA Administrator Gina McCarthy in a case pending in district court in West Virginia. The case, brought by Murray Energy Corporation and its affiliates, alleges that EPA has failed to comply with Section 321(a) of the Clean Air Act, which provides that EPA shall conduct evaluation of job loss and employment shifts that may result from administration and enforcement of the Clean Air Act. The Fourth Circuit was not convinced by the district court's finding that alleged conflicts between McCarthy's testimony before Congress and EPA's representations to the court constituted "extraordinary circumstances" warranting deposition of a high-ranking official. The Fourth Circuit saw no contradiction in EPA's position that would support the extraordinary circumstance finding and also was not persuaded that there was no alternative to deposing McCarthy. The Fourth Circuit also disagreed with the district court's finding that EPA's "apparent refusal" to comply with Section 321(a) was prima facie evidence of wrongdoing. The Fourth Circuit said that there was

no clear misconduct. *In re McCarthy*, No. 15-2390 (4th Cir. corrected opinion Dec. 9, 2015): added to the "Challenges to Federal Action" slide.

DECISIONS AND SETTLEMENTS

Supreme Court Declined to Review Decision Upholding Colorado Renewable Energy Standard

The Supreme Court denied a certiorari petition seeking review of the Tenth Circuit Court of Appeals' ruling upholding Colorado's Renewable Energy Standard. The Tenth Circuit ruled in July 2015 that the RES did not violate the dormant Commerce Clause. *Energy & Environment Legal Institute v. Epel*, No. 15-471 (U.S. Dec. 7, 2015): added to the "Challenges to State Action" slide.

Minnesota Federal Court Dismissed Challenges to Cross-Border Pipeline Projects

The federal district court for the District of Minnesota dismissed an action challenging the State Department's approvals of the replacement of a segment of an oil pipeline that crossed the U.S.-Canada border and the expansion of the capacity of another cross-border pipeline. The plaintiffs—who alleged they would be affected by the impacts of increased greenhouse gas emissions from the refining and end-use of tar sands crude oil from Canada—contended that the State Department had failed to comply with the National Environmental Policy Act and the National Historic Preservation Act. The court said that the State Department's actions were not subject to judicial review because they were presidential actions not reviewable under the Administrative Procedure Act. *White Earth Nation v. Kerry*, No. 14-cv-04726 (D. Minn. Dec. 9, 2015): added to the "Stop Government Action/NEPA" slide.

D.C. Federal Court Dismissed Action Seeking EPA Decision on Making Ammonia a Criteria Pollutant

The federal district court for the District of Columbia concluded that it lacked subject matter jurisdiction over an action that sought to compel EPA to respond to a 2011 petition asking the agency to identify ammonia as a criteria pollutant. The plaintiffs had alleged that ammonia contributes to regional haze, which has been associated with climate impacts. The court ruled that it did not have jurisdiction because the plaintiffs had failed to comply with the notice requirement of the Clean Air Act citizen suit provision and could not use the Administrative Procedure Act to circumvent the notice requirement. *Environmental Integrity Project v. EPA*, No. 15-cv-139 (D.D.C. Dec. 1, 2015): added to the "Force Government to Act/Clean Air Act" slide.

California Supreme Court Said CEQA Did Not Generally Mandate Analysis of Effects of Existing Environmental Conditions on Proposed Projects

The California Supreme Court ruled that the California Environmental Quality Act (CEQA) does not generally require consideration of the effects of existing environmental conditions on a proposed project's future users or residents, but that CEQA does mandate analysis of how a

project may exacerbate existing environmental hazards. The court said that portions of the CEQA guidelines that required consideration of the impacts of existing conditions were not valid. This decision was made in a case concerning the California Building Industry Association's (CBIA's) challenge of thresholds of significance for air pollutants, including greenhouse gases (though the particular issue before the Supreme Court did not concern the greenhouse gas thresholds). CBIA had argued that the thresholds for toxic air contaminants and fine particulate matter unlawfully required evaluation of the environment's impacts on a given project, potentially limiting urban infill projects. The California Court of Appeal had said that the receptor thresholds had valid application regardless of whether CEQA required analysis of impacts of existing environmental conditions on project users. The Supreme Court said that the Court of Appeal should address CBIA's arguments in light of this opinion's elaboration of CEQA's requirements with respect to existing conditions. *California Building Industry Association v. Bay Area Air Quality Management District*, No. S213478 (Cal. Dec. 17, 2015): added to the "State NEPAs" slide.

Oregon Supreme Court Required Changes to Ballot Titles for Initiatives That Would Weaken Low Carbon Fuel Standard Requirements

The Oregon Supreme Court weighed in on the wording of ballot titles for two voter initiatives that would modify requirements for the state's low carbon fuel standards (LCFS). Oregon voters could see the oil industry-sponsored initiatives on November 2016 ballots. Both measures would, among other provisions, limit application of the LCFS to blended liquid fuels and would eliminate a fuel credit trading program as an alternative means of compliance. Both initiatives would also restrict the LCFS requirements to blending of liquid fuels that are "available in commercial quantities." The court said that the caption should mention the elimination of the fuel credit trading component. The court also agreed with an LCFS advocate's view that the use of "commercially available" in the "yes" result statement was misleading because voters would think the LCFS would apply if the alternative fuel was available for purchase in the marketplace, while the initiatives would actually establish a more restrictive definition for commercially available. The court did not require the caption or "yes" result statement to mention one initiative's creation of an administrative review action to challenge commercial availability determinations, citing the word limits and the complexity of the initiative's provisions—but did require that the ballot title's 125-word summary refer to the review action. The court rejected some challenges to the ballot title's language made by an oil industry lobbyist, concluding that the concerns raised were more relevant to "ultimate efforts to persuade voters" to vote for the initiatives. The court referred the ballot titles to the Oregon Attorney General for modification. *Blosser/Romain v. Rosenblum*, Nos. S063527, S063531 (Or. Nov. 27, 2015); *Blosser/Romain v. Rosenblum*, Nos. S063528, S063532 (Or. Nov. 27, 2015): added to the "Challenges to State Action" slide.

California Appellate Court Said Analysis of Wildfire Evacuation Risk for Ski Resort Expansion Project Was Insufficient, But Rejected Claims That Energy Impacts Weren't Adequately Considered

In an unpublished opinion, the California Court of Appeal largely upheld Placer County's approval of a plan to expand an existing ski resort at Lake Tahoe, but concluded that the

approval was invalid under CEQA because the County failed to analyze wildfire evacuation risk. The court said that the petitioner had failed to establish CEQA violations related to any of the energy-related issues it raised—which included the energy impacts of increased snowmaking, energy conservation, transportation and equipment energy impacts, and renewable energy resources. The court also found that the petitioner had failed to exhaust administrative remedies regarding a claim that the environmental impact report did not contain substantial evidence to support the determination that carbon credits were not feasible mitigation measures. *California Clean Energy Committee v. County of Placer*, No. C072680 (Cal. Ct. App. Dec. 22, 2015): added to the "State NEPAs" slide.

Maryland Court Upheld Grid Resiliency Charge

The Maryland Court of Special Appeals upheld a grid resiliency charge authorized by the Maryland Public Service Commission. The grid resiliency charge would provide $24 million to accelerate "hardening" projects for 24 "feeders" (low-voltage distribution lines that deliver electricity to end users). Potomac Electric Power Company (Pepco) requested approval for the grid resiliency charge in response to recommendations made by a state task force established to address the potential impact of climate change on regional weather patterns and prolonged power outages brought by extreme weather events. The court said that the issue of whether the Commission exceeded its statutory authority when it approved the grid resiliency charge was not properly before the court because it was not raised before the Commission. The court also concluded that the Commission did not act arbitrarily in approving the charge and that there was substantial evidence that the charge was just and reasonable. *Maryland Office of People's Counsel v. Maryland Public Service Commission*, No. 2173 (Md. Ct. Spec. App. Dec. 15, 2015): added to the "Adaptation" slide.

Arizona Appellate Court Said Trial Court Had to Conduct De Novo Review of Board of Regents' Justification for Withholding Climate Scientist Emails

The Arizona Court of Appeals ruled that a trial court had applied an incorrect standard to its review of a decision by the Arizona Board of Regents to deny requests for records of climate scientists at the University of Arizona. The appellate court said that the Superior Court should have reviewed de novo the Board's justification for withholding emails addressing "prepublication critical analysis, unpublished data, analysis, research, results, drafts and commentary," rather than determining whether the Board had abused its discretion or acted arbitrarily or capriciously. The appellate court remanded to the Superior Court, saying that it should weigh the Board's determination that disclosure would be detrimental to the best interests of the state against the presumption favoring disclosure. The appellate court affirmed the Superior Court's decision with respect to the Board's withholding of emails that contained confidential information or attorney work product. *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. 2 CA-CV 2015-0086 (Ariz. Ct. App. Dec. 3, 2015): added to the "Climate Change Protesters and Scientists" slide.

NEW CASES, MOTIONS, AND NOTICES

Clean Power Plan Challengers Asked D.C. Circuit to Expedite Consideration of EPA

Authority

Petitioners challenging EPA's Clean Power Plan asked the D.C. Circuit to expedite the briefing schedule on "fundamental legal issues" raised by the regulations so that oral argument on these issues would be held by May 2016. The petitioners contended that it was "critical" the Clean Power Plan's lawfulness be adjudicated as soon as possible, "[g]iven the acute importance of this case to the nation's energy system and its customers" and the irreparable harm the regulations were causing. The fundamental legal issues for which the petitioners sought speedy adjudication included EPA's authority to regulate power plants under Section 111(d) when they are already regulated under Section 112, and to use Section 111(d) to "fundamentally restructure the way in which electricity is generated and distributed." The petitioners asked that "state-specific and programmatic" issues be severed and placed in a separate docket. EPA opposed the petitioners' plan. Separately, the petitioner Biogenic CO2 Coalition, which filed its petition for review on December 22, asked the D.C. Circuit not to consolidate its petition with the other proceedings challenging the Clean Power Plan, or that the court sever and hold in abeyance the issues raised in its appeal concerning the regulation of "biogenic carbon dioxide emissions" to permit the petitioner to continue ongoing discussions to achieve an administrative resolution of its concerns. Two other organizations also filed petitions for review on December 22 that made similar requests with respect to issues relating to biogenic emissions. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir., motion filed Dec. 8, 2015): added to the "Challenges to Clean Power Plan" slide. [*Editor's Note:* The numerous petitions and motions filed with respect to the Clean Power Plan are available on pages 15 and 16 of the chart.]

Environmental Groups Contested Decision Not to List Coastal Marten as Endangered or Threatened

The Center for Biological Diversity and the Environmental Protection Information Center filed a lawsuit in the federal district court for the Northern District of California challenging the U.S. Fish & Wildlife Service's (FWS's) determination that listing the coastal marten as endangered or threatened under the Endangered Species Act was not warranted. The plaintiffs contended that the "not warranted" finding was "inexplicable," arbitrary, capricious, and contrary to the best scientific and commercial data available. They cited a report prepared by FWS biologists that allegedly documented substantial threats to coastal martens in Oregon and northern California, including climate change. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. 3:15-cv-05754 (N.D. Cal., filed Dec. 17, 2015): added to the "Stop Government Act/Other Statutes" slide.

Federal Claims Court to Determine Whether to Certify Opinion Holding U.S. Liable for Post-Katrina Flooding for Interlocutory Appeal

The United States asked the Court of Federal Claims to certify for interlocutory appeal the court's May 2015 opinion holding the U.S. liable for a temporary taking caused by flooding during Hurricane Katrina and subsequent storms. The United States said that an immediate appeal was appropriate because the opinion presented "controlling" questions of law about which there were substantial grounds for a difference in opinion. The U.S. also said that certification would advance the ultimate termination of the appeal because it could "obviate the need for

further proceedings" if the U.S. prevailed or, if the liability opinion were affirmed, might "resolve or clarify disputes … concerning just compensation." The plaintiffs opposed certification. The court stayed briefing on the plaintiffs' 2010 motion for class certification pending disposition of an appeal of a final judgment in the case. *St. Bernard Parish Government v. United States*, No. 1:05-cv-01119 (Fed. Cl., U.S. motion for certification of interlocutory appeal Oct. 30, 2015; plaintiff's opposition Nov. 16, 2015; U.S. reply brief Nov. 30, 2015): added to the "Adaptation" slide.

Federal Government Asked Oregon Federal Court to Dismiss Young People's Action to Compel Reductions in Carbon Emissions

The United States moved to dismiss an action brought 21 individuals, all aged 19 or younger, to compel federal government defendants to take action to reduce carbon dioxide emissions so that atmospheric CO_2 concentrations will be no greater than 350 parts per million by 2100. In addition to the individual plaintiffs, the complaint also named "Future Generations" as a plaintiff. The U.S. contended that the plaintiffs lacked standing because they had not alleged a particularized harm that was traceable to defendants' actions. The U.S. also said the alleged injuries were not redressable and that the plaintiffs' claims raised separation of powers issues. The U.S. also argued that Future Generations had alleged no injury in fact. In addition, the U.S. said the plaintiffs had not stated a constitutional claim and that federal courts lacked jurisdiction over public trust doctrine lawsuits because such claims arise under state law. The National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, and American Petroleum Institute have moved to intervene in the action. *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or., motion to dismiss Nov. 17, 2015): added to the "Common Law Claims" slide.

Group Filed FOIA Lawsuit Seeking Production of NOAA Climate Documents

Judicial Watch, a conservative, non-partisan educational foundation, filed a Freedom of Information Act (FOIA) lawsuit against the National Oceanic and Atmospheric Administration (NOAA) in the federal district court for the District of Columbia. Judicial Watch alleged that NOAA had failed to respond to the foundation's request for documents and records of communications concerning certain climate data and related press releases, as well as records related to a subpoena issued by Congressman Lamar Smith for the same categories of records. Judicial Watch asked the court to order NOAA to search for and produce the responsive records. In a December 22 press release, Judicial Watch said that NOAA had submitted the requested documents to Congress after the complaint was filed. *Judicial Watch, Inc. v. United States Department of Commerce*, No. 1:15-cv-02088 (D.D.C., filed Dec. 2, 2015).

Groups Filed Lawsuit Challenging California County Ordinance That Established Permitting Process for Oil and Gas Projects

Environmental and community groups filed a lawsuit in California Superior Court against Kern County challenging amendments to the County zoning ordinance that would purportedly authorize development of up to 3,647 new oil and gas wells annually, as well as related construction and operational activities, without further site-specific assessment. The groups said that the final environmental impact report (EIR) prepared under the California Environmental

Quality Act for the ordinance failed to disclose the extent and severity of impacts. The petitioners' enumeration of the final EIR's shortcomings included an alleged failure to explain how the activities authorized by the ordinance will comply with state-mandated greenhouse gas reduction targets. The petitioners also alleged that the County failed to support the conclusion that mitigation measures would reduce greenhouse gas impacts to insignificant levels. *Committee for a Better Arvin v. County of Kern*, No. BCV-15101679 (Cal. Super. Ct., filed Dec. 10, 2015): added to the "State NEPAs" slide.

Update #81 (December 7, 2015)

FEATURED CASE

California Supreme Court Said Agency Had Not Provided Adequate Rationale for Determination That Development's Greenhouse Gas Impacts Would Be Insignificant

The California Supreme Court ruled that consistency with statewide emission reduction goals was a permissible criterion for determining the significance of a project's greenhouse gas emissions in a California Environmental Quality Act (CEQA) review, but found that the California Department of Fish and Wildlife had not supported its conclusion that a 12,000-acre development's greenhouse gas emissions would not have significant impacts. The court, reversing a decision by the Court of Appeal upholding the agency's review, also ruled against the agency on other aspects of its CEQA review. The court remanded to the Court of Appeal for a determination of the parameters of a writ of mandate to be issued. One justice dissented as to the conclusion that the agency had not supported its determination that there would not be significant greenhouse gas emissions impacts, while another justice dissented from the entire opinion. *Center for Biological Diversity v. California Department of Fish and Wildlife*, No. S217763 (Cal. Nov. 30, 2015): added to the "State NEPAs" slide.

DECISIONS AND SETTLEMENTS

Fourth Circuit Blocked Deposition of EPA Administrator in Coal Companies' Jobs Study Lawsuit

On November 25, 2015, the Fourth Circuit Court of Appeals granted a petition for writ of mandamus by EPA Administrator Gina McCarthy to preclude Murray Energy Corporation (Murray Energy) from deposing her in its lawsuit seeking to compel EPA to undertake an evaluation of the Clean Air Act's impacts on employment pursuant to Section 321(a) of the Clean Air Act. The Fourth Circuit indicated that a "reasoned exposition" of the basis for its order would follow "shortly." Earlier in November, the federal district court for the Northern District of West Virginia denied EPA's motions for a protective order and to stay McCarthy's deposition. The district court found that there were extraordinary circumstances justifying deposition of a high-ranking official because of the "divergent positions" taken by EPA with respect to whether it had undertaken the employment study pursuant to Section 321(a) of the Clean Air Act. The court found that McCarthy had personal knowledge of the facts and that her "apparent refusal" to comply with Section 321(a) provided "sufficient prima facie evidence of wrongdoing such that the plaintiffs will be able to probe her deliberative processes." The district court also found that

there was no viable alternative to the deposition of McCarthy. EPA sought the writ of mandamus prior to the district court's ruling on the motions, and supplemented its arguments in support of granting the writ after the district court denied EPA's motions. *In re McCarthy*, No. 15-2390 (4th Cir. Nov. 25, 2015); *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-00039 (N.D. W. Va. Nov. 12, 2015): added to the "Challenges to Federal Action" slide.

D.C. Circuit Dismissed Challenge to EPA Grant of Waiver for California Tractor Trailer Regulations

The D.C. Circuit Court of Appeals dismissed a petition challenging EPA's granting to California of a waiver of federal preemption related to the State's tractor trailer emissions regulations. The court concluded that it lacked jurisdiction to consider the petition because the petitioner raised only a constitutional claim and did not address whether EPA's action was arbitrary or capricious. The court, which said the issues did not warrant a published opinion, said it was not determining whether it could decide a constitutional claim brought within a broader challenge to an EPA waiver determination. *Owner-Operator Independent Drivers Association, Inc. v. EPA*, No. 14-1192 (D.C. Cir. Nov. 24, 2015): added to the "Challenges to Federal Action" slide.

Colorado Supreme Court Denied Governor's Petition in Dispute with Attorney General over Clean Power Plan Challenge

The Colorado Supreme Court denied Governor John W. Hickenlooper's petition for a ruling requiring Attorney General Cynthia H. Coffman to show cause regarding her authority to sue the federal government on behalf of the State without authorization from the governor. The governor filed the petition after the attorney general joined West Virginia and other states in their D.C. Circuit challenge to the Clean Power Plan. The governor and attorney general are elected separately. Governor Hickenlooper is a Democrat; Attorney General Coffman is a Republican. In its one-page order denying the governor's petition, the court said that the governor had an "adequate alternative remedy." The granting of relief in an original proceeding in the Colorado Supreme Court requires that the case involve an extraordinary matter of public importance and that there be no adequate conventional appellate remedies. The governor had asked the court to declare that the governor has ultimate authority to determine whether the State will sue the federal government and that the attorney general must withdraw the State from the Clean Power Plan lawsuit. The petition also said that the attorney general's challenges of the federal "waters of the United States" rule and federal regulations regarding hydraulic fracturing on federal and tribal lands should be withdrawn. The petition asserted that the attorney general was without statutory, common law, or other authority to sue the federal government, that the lawsuits challenging the federal environmental laws were at odds with the attorney general's statutory obligations to be legal counsel to the State, and that the actions violated the Colorado Constitution, which the petition said grants the governor power to set executive department policy. On November 20, the attorney general responded, arguing that the Colorado Supreme Court should not invoke its "extraordinary" original jurisdiction to resolve "a political disagreement between state officials of different parties." The attorney general contended that the governor was seeking to re-litigate issues that the court resolved 12 years earlier in a case where the attorney general sued to invalidate an act of the Colorado legislature. In that case, the attorney general said, the court ruled that the attorney general could independently seek judicial

review on behalf of the people of the State. *Hickenlooper v. Coffman*, No. 2015 SA 296 (Colo., petition filed Nov. 4, 2015, attorney general's brief Nov. 20, 2015, order Dec. 3, 2015): added to the "Challenges to Federal Action/Clean Power Plan" slide.

Washington Court Said State's Ongoing Greenhouse Gas Rulemaking Was Fulfilling Its Mandate to Protect Air Quality and Public Trust Resources

The Washington Superior Court issued a decision in which it affirmed that climate change affects public trust resources in the state, but ultimately held that the state was fulfilling its public trust obligations because it was engaged in rulemaking to establish more comprehensive greenhouse gas standards. The court said that Washington's current regulatory regime, which requires technological controls for a small number of sources but does not address greenhouse gas emissions from transportation, would not fulfill its statutory mandate under state air laws, a mandate that the court said must be understood in the context of the Washington State Constitution and the public trust doctrine. The court did not expand the definition of "public trust resources" protected under the Washington State Constitution to encompass the atmosphere. Instead, the court explained that climate change poses a threat to the state's navigable waters, a traditional public trust resource that the state has an obligation to protect from harm. The court concluded that the State was not acting arbitrarily and capriciously because it had commenced a rulemaking process, at the direction of the governor, to set a regulatory cap on greenhouse gas emissions. *Foster v. Washington Department of Ecology*, No. 14-2-25295-1 (Wash. Super. Ct. Nov. 19, 2015): added to the "Common Law Claims" slide.

California Court of Appeal Said State Lands Commission Had to Consider Whether Sand Mining in San Francisco Bay Was Appropriate Use of Public Trust Resource, But Upheld CEQA Review

The California Court of Appeal ruled that the California State Lands Commission had complied with the California Environmental Quality Act (CEQA) when it authorized continued dredge mining of sand from sovereign lands under the San Francisco Bay, but remanded to the commission for consideration of whether sand mining leases were a proper use of public trust property. The court's analysis of CEQA compliance did not address the environmental impact report's (EIR's) consideration of greenhouse gas emissions, but the court noted that the final EIR identified the selected alternative as environmentally preferable in part because not continuing the dredging likely would require the Bay Area construction industry to obtain sand from more distant locations, which would lead to increased air emissions, including greenhouse gas emissions. *San Francisco Baykeeper v. California State Lands Commission*, No. A142449 (Cal. Ct. App. Nov. 18, 2015): added to the "State NEPAs" slide.

California Appellate Court Said New Environmental Review Was Required for Affordable Housing Development Due to Deficient Analysis of Greenhouse Gas Emissions

In an unpublished opinion, the California Court of Appeal reversed a trial court decision that upheld a negative declaration prepared pursuant to the California Environmental Quality Act (CEQA) for the Highland Park Transit Village Project in Los Angeles, a residential development composed of 20 condominiums and a 50-unit building for affordable housing. The appellate

court found that the initial study prepared by the City of Los Angeles was inadequate because its discussion of greenhouse gas emissions did not comply with CEQA guidelines. The appellate court said that the study made no attempt to quantify greenhouse gas emissions, did not include qualitative analysis or performance-based standards, and did not support the effectiveness of a mitigation measure that required used of construction materials that contained no, or low levels of, volatile organic compounds. *Friends of Highland Park v. City of Los Angeles*, No. B261866 (Cal. Ct. App. Nov. 4, 2015): added to the "State NEPAs" slide.

New York Attorney General Settled with Peabody Energy After Investigation of Company's Disclosures of Climate Policy Risks

On November 8, Peabody Energy Corporation reached a settlement with the New York State Attorney General's Office (NYAG) in which the company agreed to revise its financial disclosures to reflect the potential impact of climate change regulations on its future business. The settlement followed an investigation by the NYAG concerning Peabody's disclosure of financial risks associated with climate change policies in filings to the Securities and Exchange Commission (SEC). The NYAG found—and Peabody neither admitted nor denied—that Peabody had repeatedly denied its ability to reasonably predict the potential impacts of climate change policies on future operations, financial conditions, and cash flows, while at the same time making market projections about the impact of future climate change policies, some of which concluded that regulatory actions could have a severe negative impact on Peabody's future financial condition. The NYAG also found that Peabody misrepresented findings and projections of the International Energy Agency regarding global coal demand in SEC filings and in communications to the investment community and general public. The NYAG concluded that Peabody had violated New York's Martin Act, which forbids financial fraud. In the assurance of discontinuance of the investigation, Peabody agreed to add specific language on climate policy risks in its next quarterly report and to acknowledge potential effects of climate regulation on demand for Peabody's products and securities. *In re Peabody Energy Corp.*, Assurance No. 15-242 (N.Y. State Att'y Gen. Nov. 8, 2015): added to the "Regulate Private Conduct" slide.

NEW CASES, MOTIONS, AND NOTICES

Additional Parties Joined Clean Power Plan Litigation; EPA Filed Opposition to Stay

As of December 4, additional petitions challenging the final Clean Power Plan rule had been filed, bringing the total number of petitions challenging EPA's carbon dioxide emission standards for existing power plants to 28 and the total number of states challenging the rule to 27. All of the petitions have been consolidated under the caption *West Virginia v. EPA*. On December 3, 2015, EPA filed its brief opposing motions to stay the rule. EPA said that the petitioners were unlikely to succeed on the merits, arguing that its carbon dioxide emissions guidelines were within its authority and that it had not impinged on the regulatory turf of other federal agencies or the states. In addition, EPA said that neither the states nor the industry petitioners had shown a likelihood of irreparable injury, and that a stay would not be in the public interest because climate change was already affecting the national public health, welfare, and environment and because grid reliability and electricity rates were not threatened by the rule. A group of 18 states, joined by the District of Columbia and six municipalities, have moved to

intervene on behalf of EPA, along with a number of other parties, including owners, developers, and operators of power plants; the municipally-owned utilities of Austin and Seattle; and Pacific Gas and Electric Company, a utility that provides electricity and gas to northern and central California. In addition, two former EPA administrators—William D. Ruckelshaus, EPA's first and fifth administrator, and William K. Reilly, who led the agency during President George H.W. Bush's administration—sought to participate on EPA's behalf as amici curiae. Additional parties have also asked to intervene on behalf of the petitioners challenging the Clean Power Plan rule. On November 30, the D.C. Circuit extended the deadline for filing initial submissions and procedural motions from November 30 to December 18. The deadline for dispositive motions was extended to December 28. Additional petitions were also filed seeking review of EPA's carbon dioxide standards for new and modified power plants. The new petitioners, whose proceedings were consolidated with the one filed by North Dakota, included the coal company Murray Energy Corporation, the nonprofit group Energy & Environmental Legal Institute, and 23 states led by West Virginia (but not including Colorado, which had joined the West Virginia coalition in the challenge to the Clean Power Plan rule). Sixteen states and the District of Columbia and New York City moved to intervene on behalf of EPA in the challenge to the New Source Performance Standards. Links to all of these filings are available on the climate litigation chart. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir.); *North Dakota v. EPA*, Nos. 15-1381 et al. (D.C. Cir.): added to the "Challenges to Federal Action/Clean Power Plan" slide.

Group Asked Supreme Court to Require More EPA Rulemaking Post-*UARG v. EPA*

The Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation (Group) filed a petition seeking Supreme Court review of the D.C. Circuit's decision on remand from the Supreme Court's decision in *Utility Air Regulatory Group v. EPA*. In April 2015, the D.C. Circuit issued an order governing further proceedings in which it accepted EPA's view that *UARG v. EPA* did not require EPA to start from scratch to establish a greenhouse gas permitting regime for stationary sources. The D.C. Circuit said that EPA should rescind its regulations requiring Prevention of Significant Deterioration (PSD) or Title V permits solely based on a source's greenhouse gas emissions and that the agency should "consider whether any further revisions to its regulations are appropriate in light of *UARG v. EPA*." In its petition for a writ of certiorari, the Energy-Intensive Manufacturers Working Group argued that EPA should be required to conduct new rulemaking if it wants to regulate greenhouse emissions from "anyway" sources (i.e., sources that meet PSD and Title V emissions thresholds for other air pollutants) and that the D.C. Circuit should have vacated the existing regulations. *Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation v. EPA*, No. 15-637 (U.S., filed Nov. 5, 2015): added to the "Challenges to Federal Action/Clean Air Act" slide.

Group Alleged Los Angeles Failed to Comply with CEQA in Agreement to Open LAX to "Transportation Network Companies"

An organization commenced a lawsuit challenging a licensing agreement approved by the City of Los Angeles that would allow the manager of the Los Angeles International Airport (LAX) to grant "Transportation Network Companies" such as Uber, Sidecar, and Lyft permits to conduct operations at LAX. The organization alleged that the City had violated CEQA by improperly using categorical exemptions to avoid environmental review. The organization said the

categorical exemptions were not appropriate because the action would result in an increase in the use of vehicles not subject to clean fleet vehicle rules. Among the potential impacts alleged by the organization was a substantial increase in carbon monoxide emissions; the petition cited carbon monoxide's health effects, but also its "important indirect effects on global warming" due to its reaction in the atmosphere with hydroxyl radicals that would otherwise reduce the lifetimes of strong greenhouse gases such as methane. *Alliance for a Regional Solution to Airport Congestion v. City of Los Angeles*, No. BS158633 (Cal. Super. Ct. filed Nov. 2, 2015): added to the "State NEPAs" slide.

Ethanol Producer Challenged California's Readopted Low Carbon Fuel Standard

An ethanol producer and a California resident filed a lawsuit in California Superior Court challenging the California Air Resources Board's (CARB's) re-adopted low carbon fuel standard (LCFS) regulation and related alternative diesel fuel regulations. The petitioners alleged that CARB failed to comply with its obligations under CEQA or with the terms of a peremptory writ of mandate issued by the California Superior Court in 2014 that ordered CARB to consider its 2009 LCFS regulation's potential adverse environmental effects of emissions of nitrogen oxides. The petitioners asserted a number of substantive CEQA violations. The petitioners also contended that CARB had failed to respond adequately to numerous environmental comments or to maintain a public rulemaking file, and that CARB had not complied with California's Global Warming Solutions Act of 2006. *POET, LLC v. California Air Resources Board*, No. 15 CECG03380 (Cal. Super. Ct., filed Oct. 30, 2015): added to the "Challenges to State Action" slide.

New York Attorney General Issued Subpoena to Exxon Mobil Regarding Climate Disclosures

On November 5, 2015, Exxon Mobil Corporation (Exxon) confirmed that it had received a subpoena from the New York State Attorney General's Office related to the company's statements to investors and its board of directors regarding climate change risks and their consistency with the company's internal research. The subpoena reportedly seeks extensive financial records, emails, and other documents covering a 40-year period as part of an investigation that began a year earlier. The investigation is being conducted under the State's Martin Act, which forbids financial fraud and gives the State broad investigative powers. The investigation is also reported to be looking into whether Exxon violated state consumer protection laws. The subpoena itself is not publicly available, but reports on the subpoena are available in the *New York Times*, *Bloomberg Business*, and *InsideClimate News*.

Update #80 (November 2, 2015)

FEATURED CASE

Opponents of Clean Power Plan Filed Petitions for Review, Asked D.C. Circuit for Stay

After the United States Environmental Protection Agency (EPA) published its final Clean Power Plan rule in the *Federal Register*, 21 petitions for review were filed in the D.C. Circuit Court of

Appeals to challenge the rule, which regulates carbon dioxide emissions from existing power plants. The petitioners included 26 states; a number of utilities, electric cooperatives, and trade associations representing utilities; two unions representing miners and workers in skilled trades such as welding and fabrication of boilers, ships, pipelines, and other industrial facilities; a coal mining company and other organizations representing the coal industry; the National Association of Home Builders; the U.S. Chamber of Commerce; a trade association for railroads; and other organizations representing manufacturing, industrial, and business interests. The pending petitions, which the D.C. Circuit has consolidated, are as follows:

- *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015)
- *Oklahoma v. EPA*, No. 15-1364 (D.C. Cir. filed Oct. 23, 2015)
- *International Brotherhood of Boilermakers v. EPA*, No. 15-1365 (D.C. Cir. filed Oct. 23, 2015)
- *Murray Energy Corp. v. EPA*, No. 15-1366 (D.C. Cir. filed Oct. 23, 2015)
- *National Mining Association v. EPA*, No. 15-1367 (D.C. Cir. filed Oct. 23, 2015)
- *American Coalition for Clean Coal Electricity v. EPA*, No. 15-1368 (D.C. Cir. filed Oct. 23, 2015)
- *Utility Air Regulatory Group v. EPA*, No. 15-1370 (D.C. Cir. filed Oct. 23, 2015)
- *Alabama Power Co. v. EPA*, No. 15-1371 (D.C. Cir., filed Oct. 23, 2015)
- *CO_2 Task Force of the Florida Electric Power Coordinating Group, Inc. v. EPA*, No. 15-1372 (D.C. Cir. filed Oct. 23, 2015)
- *Montana-Dakota Utilities Co. v. EPA*, No. 15-1373 (D.C. Cir. filed Oct. 23, 2015)
- *Tri-State Generation & Transmission Association, Inc. v. EPA*, No. 15-1374 (D.C. Cir. filed Oct. 23, 2015)
- *United Mine Workers of America v. EPA*, No. 15-1375 (D.C. Cir. filed Oct. 23, 2015)
- *National Rural Electric Cooperative Association v. EPA*, No. 15-1376 (D.C. Cir. filed Oct. 23, 2015)
- *Westar Energy, Inc. v. EPA*, No. 15-1377 (D.C. Cir. filed Oct. 23, 2015)
- *Northwestern Corp. d/b/a NorthWestern Energy v. EPA*, No. 15-1378 (D.C. Cir. filed Oct. 23, 2015)
- *National Association of Home Builders v. EPA*, No. 15-1379 (D.C. Cir. filed Oct. 23, 2015)
- *North Dakota v. EPA*, No. 15-1380 (D.C. Cir. filed Oct. 23, 2015)
- *Chamber of Commerce of the United States of America v. EPA*, No. 15-1382 (D.C. Cir. filed Oct. 23, 2015)
- *Association of American Railroads v. EPA*, No. 15-1383 (D.C. Cir. filed Oct. 23, 2015)
- *Luminant Generation Co. LLC v. EPA*, No. 15-1386 (D.C. Cir. filed Oct. 26, 2015)
- *Basin Electric Power Cooperative v. EPA*, No. 15-1393 (D.C. Cir. filed Oct. 29, 2015)

The states led by West Virginia have asked the D.C. Circuit to stay the rule and to expedite consideration of their petition. In addition, Oklahoma and North Dakota each asked for a stay in their separate proceedings, and three other motions for a stay were filed: one by petitioners representing the coal industry, one by the U.S. Chamber of Commerce and its co-petitioners, and one by utility interests (led by Utility Air Regulatory Group) and the two unions. The American Wind Energy Association, Advanced Energy Economy ("a national organization of businesses dedicated to making the energy we use secure, clean, and affordable"), and nine environmental and public health organizations (led by the American Lung Association) sought to intervene on behalf of EPA, while Peabody Energy Corporation, a coal company, sought to intervene on

behalf of the petitioners. After EPA submitted a motion for a consolidated briefing schedule, the D.C. Circuit issued an order on October 29 that would require any additional motions for a stay to be filed by November 5, though one petitioner, Basic Electric Power Cooperative, has objected to this schedule as unfair and asked for reconsideration. The October 29 order required briefing on the stay motions to be completed on December 23. In addition petitioners were ordered to identify lead or liaison counsel for appropriate groups of petitioners within 10 days. In a separate clerk's order, deadlines were set for other submissions, including statements of issues to be raised (November 30), procedural motions (November 30), and dispositive motions (December 14). In addition to its petition challenging the existing power plants rule, North Dakota filed a petition for review of EPA's new source performance standards for greenhouse gas emissions from new, modified, and reconstructed power plants. *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. filed Oct. 23, 2015): added to the "Challenges to Federal Action" slide.

DECISIONS AND SETTLEMENTS

Sixth Circuit Upheld Kentucky Coal Plant's Switch to Natural Gas

The Sixth Circuit Court of Appeals affirmed the Tennessee Valley Authority's (TVA's) decision to replace coal-fired electric generating units with natural gas-powered units at a Kentucky power plant. The court said that the TVA acted within its discretion when it determined, based on an environmental assessment, that switching to natural gas would not have a significant impact on the environment. The court found that the TVA had taken a hard look at 19 environmental issues, including climate change. The court was not persuaded by arguments made by the plaintiff, Kentucky Coal Association, including a contention that the TVA had not considered the cumulative impacts of building a natural gas pipeline, that the TVA prejudged the switch to natural gas, and that switching to natural gas would have "devastating socioeconomic effects." The court also said that the TVA's actions were not arbitrary and did not violate the Tennessee Valley Authority Act. *Kentucky Coal Association, Inc. v. Tennessee Valley Authority*, No. 15-5163 (6th Cir. Oct. 23, 2015): added to the "Challenges to Federal Action" slide.

Denial of Beluga Whale Import Permit Affirmed by Georgia Federal Court, Decision Mentioned Possible Climate Change Impacts on Whale Population

The Georgia Aquarium lost its appeal of a federal denial of a permit to import 18 beluga whales from Russia for use in a breeding cooperative and for public display. The aquarium applied for the permit under the Marine Mammal Protection Act (MMPA). The National Marine Fisheries Service (NMFS) denied the application on the grounds that the aquarium had not provided sufficient information to demonstrate that MMPA import permit criteria were met, including information to demonstrate that the permit would not have an adverse impact on a beluga whale stock in Russia's Sea of Okhotsk. NMFS's findings included that in considering impacts on the whale stock the aquarium should not discount other sources of "human-caused" removal besides intentional live captures—possibly including climate change, though FWS said that predicting the type and magnitude of climate change impacts was "difficult at this time." The federal district court for the Northern District of Georgia upheld FWS's findings regarding other potential human-caused removals as a reasonable adoption of a precautionary approach. *Georgia Aquarium, Inc. v. Pritzker*, No. 1:13-CV-3241-AT (N.D. Ga. Sept. 28, 2015): added to the

"Challenges to Federal Action" slide.

Federal Court Vacated Listing of Lesser Prairie Chicken as Threatened, Downplayed Climate Change as Factor for Assessing Conservation Plan

The federal district court for the Western District of Texas vacated the listing of the lesser prairie chicken as a threatened species under the Endangered Species Act. The court said that the United States Fish and Wildlife Service (FWS) had not properly followed its own Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) when it considered a rangewide plan (RWP) implemented by five states to protect the lesser prairie chicken's habitat and range. Under the plan voluntary private participants, including oil and gas companies, fund conservation efforts. The court said FWS improperly interpreted and applied the PECE "in a cursory and conclusory manner." One of the numerous findings in which the court grounded its determination that the FWS had acted arbitrarily and capriciously was a finding that FWS made a "critical assumption" that the RWP did not address the threat of drought and climate change, and that this assumption might have tainted FWS's assessment of whether the RWP described threats to the species and how the conservation plan reduced those threats. The court said that FWS's assumption "fail[ed] to adequately account for the main function of the RWP: creating additional habitat and access to that habitat (through connectivity zones) to ameliorate the effects of drought and habitat fragmentation." *Permian Basin Petroleum Association v. Department of the Interior*, No. 14-cv-50 (W.D. Tex. Sept. 1, 2015): added to the "Challenges to Federal Action" slide.

EPA, Environmental Groups, and Utah Power Plant Operator Agreed to Settlement of Air Permit Appeal

EPA Region 8, Sierra Club, WildEarth Guardians, and Deseret Generation & Transmission Cooperative (Deseret) reached an agreement to settle two appeals of a Title V permit issued for the coal-fired Bonanza Power Plant in Uintah County, Utah. The settlement agreement provided that Deseret would apply for a Minor New Source Review (NSR) permit with specified terms restricting emissions of nitrogen oxides and limiting coal consumption for the remainder of the plant's coal-fired unit's operating life to 20 million short tons unless specified pollution control requirements are met. The settlement agreement provided that neither EPA nor the two environmental groups would oppose credit taken by the facility for reductions in carbon dioxide emissions resulting from the reduced coal consumption or from relying on the carbon dioxide reductions to demonstrate compliance with any applicable carbon dioxide standards. In addition to dismissal of the Title V permit appeals, WildEarth Guardians agreed that it would withdraw its lawsuit in the federal district court for the District of Colorado challenging approvals authorizing development of a coal lease for a mine that that was the sole source of fuel for the Deseret power plant (*WildEarth Guardians v. United States Bureau of Land Management*, No. 1:14-cv-01452 (D. Colo.)). The agreement does not, however, prevent WildEarth Guardians or Sierra Club from opposing any application by Deseret to acquire additional sources of fuel. Deseret agreed that it would withdraw an application to construct a waste coal-fired unit at the plant. A pending Prevention of Significant Deterioration (PSD) permit application and a proposed PSD permit would also be withdrawn. EPA published notice of the proposed settlement in the *Federal Register* on October 22, 2015, which opened a 30-day period for public comment. *In re Deseret*

Power Electric Cooperative, Bonanza Power Plant, Nos. 15-01, 15-02 (Envtl. Appeals Bd. settlement agreement signed by EPA Oct. 5, 2015, *Federal Register* notice Oct. 22, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

Murray Energy Agreed to Pay Fine for Pro-Coal, Anti-Obama Signs

Murray Energy Corporation (Murray Energy) paid a $5,000 fine to resolve an enforcement case brought by the Federal Election Commission (FEC) involving the company's campaign spending for yard signs in Ohio and Pennsylvania in 2012 that read "STOP the WAR on COAL—FIRE OBAMA." The conciliation agreement executed by Murray Energy and the FEC said that the FEC had "found reason to believe" that Murray Energy violated disclosure and reporting requirements for public communications that expressly advocate for the election or defeat of a federal candidate. *In re Murray Energy Corp.*, MUR 6659 (FEC Sept. 15, 2015): added to the "Regulate Private Conduct" slide.

NEW CASES, MOTIONS, AND NOTICES

Environmental Organizations Appealed Dismissal of Case That Sought Updated NEPA Review for Coal Management Program

Western Organization of Resource Council and Friends of the Earth filed a notice of appeal in the D.C. Circuit Court of Appeals on October 27, 2015, two months after the district court for the District of Columbia dismissed their lawsuit that sought to compel an updated environmental review for the federal coal management program. The district court concluded that it lacked authority to require supplemental review under the National Environmental Policy Act (NEPA) because there was no ongoing major federal action. *Western Organization of Resource Councils v. Jewell*, No. 15-5294 (D.C. Cir. Oct. 27, 2015): added to the "Stop Government Action/NEPA" slide.

Unsuccessful Challengers of Colorado Renewable Energy Standard Asked for Supreme Court Review

On October 9, 2015, the Energy & Environmental Legal Institute (EELI) filed a certiorari petition in the United States Supreme Court seeking review of the Tenth Circuit Court of Appeals decision upholding Colorado's Renewable Energy Standard (RES). The Tenth Circuit held that the RES did not constitute impermissible extraterritorial regulation and did not violate the Constitution. EELI argued in its petition that the Tenth Circuit too narrowly interpreted Supreme Court precedent regarding the Constitution's bar on state action regulating extraterritorial conduct. EELI said that the Tenth Circuit fell into the "conceptual trap" of pigeon-holing cases concerning extraterritorial conduct into the dormant Commerce Clause, when the jurisprudence on extraterritoriality "stems … from the structure of our system as a whole." EELI also asserted that there was a circuit split on the issue of whether the prohibition of extraterritorial regulation of interstate commerce applied exclusively to price control or price affirmation statutes, and that the risks of states "exporting" their regulatory agendas nationwide warranted the Supreme Court's exercise of supervisory powers. *Energy & Environment Legal Institute v. Epel*, No. 15-471 (U.S., filed Oct. 9, 2015): added to the "Challenges to State Action"

slide.

Environmental Groups Appealed Wyoming Federal Court's Denial of Their Coal Lease NEPA Claims

WildEarth Guardians and Sierra Club filed an appeal in the Tenth Circuit Court of Appeals of the decision of the federal district court for the District of Wyoming that upheld federal approvals for coal leases in the Powder River Basin in Wyoming. Among the claims rejected by the district court was a claim that the NEPA review had not given sufficient consideration to climate change impacts, including the effects of carbon dioxide from coal mining and combustion. *WildEarth Guardians v. United States Bureau of Land Management*, No. 2:13-cv-00042 (D. Wyo. Oct. 7, 2015): added to the "Stop Government Act/NEPA" slide.

Young People Filed Lawsuit in Pennsylvania to Compel Climate Action

Five children and a young adult filed a lawsuit in Pennsylvania Commonwealth Court against Pennsylvania Governor Tom Wolf and six Pennsylvania agencies and the heads of those agencies seeking to compel regulation of carbon dioxide and other greenhouse gas emissions. The plaintiffs claimed that the obligation to regulate arose under the Pennsylvania Constitution's Environmental Rights Amendment (Article I, Section 27). The plaintiffs asked the court to declare the atmosphere a public trust resource protected by the Environmental Rights Amendment and to declare that the defendants had failed to meet their duties as public trustees. They asked the court to require the defendants to take specific actions, including determining the atmospheric concentration of greenhouse gases that must be achieved to satisfy their constitutional obligations as trustees and to prepare and implement regulations to reduce greenhouse gas emissions to achieve those concentrations. *Funk v. Wolf*, No. 467 MD 2015 (Pa. Commw. Ct., filed Sept. 16, 2015): added to the "Common Law Claims" slide.

Environmental Groups Asked EPA to Remove More HFCs from List of Acceptable Substitutes for Ozone-Depleting Substances

The Natural Resources Defense Council (NRDC) and the Institute for Governance & Sustainable Development (IGSD) petitioned EPA to remove additional high global warming potential (GWP) chemicals from its list of acceptable substitutes in its Significant New Alternatives Policy Program (SNAP). The SNAP list identifies alternatives to ozone-depleting substances for specified end uses. NRDC and IGSD noted EPA's delisting of a number of high-GWP chemicals from the SNAP list earlier this year, and urged EPA to continue to remove high-GWP hydrofluorocarbons when lower-GWP alternatives are available. NRDC & IGSD, Petition for Change of Status of HFCs Under Clean Air Act Section 612 (Significant New Alternatives Policy) (Oct. 6, 2015): added to the "Force Government to Act/Clean Air Act" slide.

Update #79 (October 5, 2015)

FEATURED DECISION

D.C. Circuit Denied Stay of Clean Power Plan

The D.C. Circuit Court of Appeals denied emergency petitions for extraordinary writ in which 15 states and Peabody Energy Corporation sought to prevent the United States Environmental Protection Agency (EPA) from moving forward with its Clean Power Plan. In early August, EPA released the prepublication version of the final Clean Power Plan rule, which regulates carbon dioxide emissions from existing power plants. EPA has submitted the final rule for publication in the *Federal Register* and believes that it will be published by the end of October. In denying the petitions, the D.C. Circuit said that the petitioners had not satisfied the "stringent standards" for staying agency action. *In re West Virginia*, No. 15-1277 (D.C. Cir. Sept. 9, 2015): added to the "Challenges to Federal Action" slide.

DECISIONS AND SETTLEMENTS

D.C. Circuit Denied Rehearing of Challenge to Non-Final Clean Power Plan

The D.C. Circuit Court of Appeals denied petitions in which states and other parties opposed to the Clean Power Plan sought rehearing of the court's June 2015 decision dismissing a challenge to the proposed plan on the ground that it was a non-final agency action. The court also denied the alternative relief sought by the petitioners, a stay of the mandate, which the parties argued would allow the court to vacate the June 2015 decision as "academic" after EPA issues the final Clean Power Plan rule. The petitioners said a stay would be consistent with Judge Henderson's opinion concurring with the June 2015 decision, in which she said she believed the court could exercise jurisdiction but that the arguments were "all but academic," given that EPA would soon issue its final rule. *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. petitions for rehearing or rehearing en banc denied Sept. 30, 2015): added to the "Challenges to Federal Action" slide.

Oregon Federal Court Dismissed Challenge to Oregon Low Carbon Fuel Mandate

The federal district court for the District of Oregon dismissed a challenge to an Oregon law and its implementing regulations that establish a low carbon transportation fuel mandate. The law requires a 10% decrease over 10 years in lifecycle greenhouse gas emissions from transportation fuels produced in or imported to Oregon. The court noted that the plaintiffs' dormant Commerce Clause discrimination claims were "largely barred by on-point precedent"—the 2013 decision *Rocky Mountain Farmers Union v. Corey*, in which the Ninth Circuit rejected dormant Commerce Clause claims against California's low carbon fuel standard. The Oregon district court nonetheless addressed the discrimination claims and found that the plaintiffs had not stated claims that the Oregon low carbon fuel mandate would facially discriminate or that it would discriminate in purpose or effect against out-of-state fuels. The court also dismissed the claim that the Oregon law was extraterritorial regulation, rejecting plaintiffs' argument that their claim was different from the unsuccessful extraterritoriality claim in *Rocky Mountain Farmers Union* because it was independently based on principles of interstate federalism, not just on the dormant Commerce Clause. The court also said that neither the Clean Air Act nor EPA's Reformulated Gasoline Rule expressly preempted the Oregon law. The court dismissed a conflict preemption claim as well, finding both that plaintiffs did not have prudential standing since they did not intend to produce or sell the type of fuel they alleged the Oregon law would bar and also that the allegations of conflicts with federal programs were implausible. *American Fuel & Petrochemical*

Manufacturers v. O'Keeffe, No. 3:15-cv-00467 (D. Or. Sept. 23, 2015): added to the "Challenges to State Action" slide.

Parties Agreed to Remedy for NEPA Violations in Approval of Mining Plan Modification

On September 14, 2015, the federal district court for the District of Colorado approved a joint proposed remedy submitted by the parties in a case in which WildEarth Guardians successfully alleged violations of the National Environmental Policy Act (NEPA) in connection with approvals of mining plan modifications. The remedy allowed Trapper Mining Inc. to continue mining activities subject to certain restrictions while the Office of Surface Mining Reclamation and Enforcement (OSMRE) conducted a new NEPA analysis. The analysis "will be prospective and will analyze the reasonably foreseeable environmental impacts of currently proposed and future mining activities …, as well as the past, present, and reasonably foreseeable impacts of any other actions or activities as may be appropriate or required by NEPA." In its May 2015 decision finding that OSMRE had violated NEPA, the court said that the agency was required to consider the impacts of coal combustion. *WildEarth Guardians v. United States Office of Surface Mining Reclamation and Enforcement*, No. 1:13-cv-00518 (D. Colo. joint proposed remedy Sept. 10, 2015): added to the "Stop Government Action/NEPA" slide.

Federal Court Required NMFS to Explain Conclusion of No Short-Term Climate Impacts on Sea Turtles

The federal district court for the District of Columbia declined to vacate a biological opinion in which the National Marine Fisheries Service (NMFS) determined that the operation of seven fisheries would not jeopardize the continued existence of the Northwest Atlantic distinct population segment of loggerhead sea turtles. The court did, however, remand the matter to NMFS to address various concerns, including the short-term impacts of climate change on the loggerheads. The court said the biological opinion had described "clear evidence that climate change is exerting significant environmental impacts right now," but had nevertheless concluded that climate change impacts on sea turtles in the short-term future would be negligible. The court required NMFS to provide an explanation of this conclusion. The court rejected most of plaintiff Oceana, Inc.'s other arguments, including the argument that NMFS had failed to consider the long-term effects of climate change on the loggerheads. *Oceana, Inc. v. Pritzker*, No. 12-cv-0041 (D.D.C. Aug. 31, 2015): added to the "Stop Government Action/Other Statutes" slide.

California Supreme Court to Consider CEQA Claims in Challenge to Los Angeles County Development; Court of Appeal Issued Third Decision Accepting Use of Business-as-Usual Emissions Baseline

In August, the California Supreme Court agreed to hear a challenge to the environmental review and land use approvals for a portion of Newhall Ranch, a major commercial and residential development in Los Angeles County. The court deferred briefing until after it renders a decision in *Center for Biological Diversity v. Department of Fish & Wildlife*, another case concerning Newhall Ranch in which the court is taking up the question of whether an agency conducting a California Environmental Quality Act (CEQA) review may deviate from the existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by

reference to a hypothetical higher "business-as-usual" baseline. In the instant case, the California Court of Appeal upheld Los Angeles County's use of the business-as-usual baseline as well as other aspects of the environmental impact report and approvals in April 2015. In late September, the California Court of Appeal affirmed a trial court's dismissal of claims in connection with environmental approvals for another section of Newhall Ranch known as Mission Village. As in *Center for Biological Diversity v. Department of Fish & Wildlife* and *Friends of the Santa Clara River v. County of Los Angeles*, the court was not persuaded by claims that it was legally impermissible for the environmental review to compare the project's emissions with emissions under a business-as-usual scenario. The petitioners indicated that they would ask the California Supreme Court to hear this case. *California Native Plant Society v. County of Los Angeles*, No. B258090 (Cal. Ct. App. Sept. 29, 2015); *Friends of the Santa Clara River v. County of Los Angeles*, No. S226749 (Cal. Aug. 19, 2015): added to the "State NEPAs" slide.

California Appellate Court Upheld San Diego County's Determination That Wind Energy Program's Benefits Outweighed Its Impacts

The California Court of Appeal upheld a final environmental impact report and amendments to a general plan and zoning ordinance related to wind turbines in San Diego County. One claim rejected by the court was that the County's Board of Supervisors had not provided sufficient support for the conclusion that the wind energy project's benefits would outweigh its significant environmental impacts. The Board identified four categories of benefits in its "statement of overriding considerations," one of which was energy and greenhouse gas reductions. The petitioners' claims were primarily focused on other purported benefits; the court found that petitioners' had failed to show that substantial evidence did not support the Board's findings regarding the benefits. *Backcountry Against Dumps v. San Diego County Board of Supervisors*, No. D066135 (Cal. Ct. App. Sept. 16, 2015): added to the "State NEPAs" slide.

EPA Denied Petition for TSCA Regulation of Carbon Dioxide Emissions

EPA denied a rulemaking petition seeking regulation of carbon dioxide emissions under the Toxic Substances Control Act (TSCA). The Center for Biological Diversity and a retired EPA scientist had sought action by EPA, citing harms posed by carbon dioxide emissions, including ocean acidification. EPA acknowledged the impacts of carbon emissions on ocean acidification and marine ecosystems, but found that the petitioners had not supplied sufficient or specific enough information to make the "unreasonable risk" risk finding necessary to regulate under Section 6 of TSCA. In addition, EPA found that addressing carbon dioxide emissions under authorities other than TSCA would be more efficient and effective. EPA also found that there was insufficient information to require testing under TSCA Section 4 to determine whether anthropogenic carbon dioxide emissions present an unreasonable risk. Letter from EPA to Center for Biological Diversity and Donn J. Viviani (Sept. 25, 2015) and Prepublication Copy of Carbon Dioxide Emissions and Ocean Acidification; TSCA Section 21 Petition; Reasons for Agency Response (signed Sept. 25, 2015): added to the "Force Government Action/Other Statutes" slide.

NEW CASES, MOTIONS, AND NOTICES

Oklahoma Withdrew Tenth Circuit Appeal of Dismissal of Clean Power Plan Lawsuit

Oklahoma filed a consent motion in the Tenth Circuit Court of Appeals for voluntary dismissal of its appeal of a federal district court's dismissal of its challenge to the proposed Clean Power Plan. Oklahoma indicated that because the Tenth Circuit had denied its request for a stay pending appeal, EPA would formally promulgate the final Clean Power Plan in the next several months. Oklahoma said that final promulgation of the rule would deprive the Tenth Circuit of continuing jurisdiction since the Clean Air Act vests exclusive jurisdiction over challenges to final rules in the D.C. Circuit Court of Appeals. *Oklahoma v. McCarthy*, No. 15-5066 (10th Cir. Sept. 18, 2015): added to the "Challenges to Federal Action" slide.

Manufacturers Challenged New EPA Restrictions on Hydrofluorocarbons

Two chemical manufacturers and a manufacturer of composite preform products used in the marine and transportation industries filed petitions in the D.C. Circuit Court of Appeals seeking review of EPA's final rule prohibiting or restricting use of certain hydrofluorocarbons (HFCs) under its Significant New Alternatives Policy program for replacing ozone-depleting substances under Section 612 of the Clean Air Act. The final rule changed the status of certain HFCs and HFC blends for end-uses in the aerosols, foam blowing, and refrigeration and air conditioning sectors based on their high global warming potential. EPA determined that alternatives were available or potentially available that posed a lower overall risk to human health and the environment. On September 23, the D.C. Circuit consolidated the three cases. *Compsys, Inc. v. EPA*, No. 15-1334 (D.C. Cir., filed Sept. 18, 2015); *Arkema Inc. v. EPA*, No. 15-1329 (D.C. Cir., filed Sept. 17, 2015); *Mexichem Fluor, Inc. v. EPA*, No. 15-1328 (D.C. Cir., filed Sept. 17, 2015): added to the "Challenges to Federal Action" slide.

Lawsuit Alleged That Federal Government Should Address Climate Impacts of Coal Mining Plans

WildEarth Guardians filed a lawsuit in the federal district court for the District of Colorado alleging that the federal government improperly approved mining plans for the development of federally owned coal in Colorado, New Mexico, and Wyoming. More generally, WildEarth Guardians accused the Secretary of the Interior, the Department of the Interior, and the Office of Surface Mining, Reclamation and Enforcement of engaging in an "ongoing pattern and practice of uninformed decisionmaking." The complaint included seven claims for relief under NEPA, including failure to consider direct, indirect, and cumulative climate impacts resulting from mining, burning, and transporting coal, and failure to consider the climate impacts of similar and cumulative actions. WildEarth Guardians contended that the defendants should have used the social cost of carbon protocol to address the costs of reasonably foreseeable carbon dioxide emissions. *WildEarth Guardians v. Jewell*, No. 1:15-cv-02026 (D. Colo., filed Sept. 15, 2015): added the "Stop Government Action/NEPA" slide.

WildEarth Guardians Challenged Lease Approval for Utah Coal Mine

WildEarth Guardians filed a petition for review in the federal district court for the District of Colorado, seeking to vacate federal approvals of a lease to expand and extend the life of the

Skyline Mine, an underground coal mine in Utah. WildEarth Guardians alleged that the United States Bureau of Land Management, which issued the lease, and the United States Forest Service, which consented to the lease's issuance, had not complied with NEPA or the Mineral Leasing Act. WildEarth Guardians alleged that the agencies' environmental review relied on an analysis that was 15 years old, and had failed to consider air quality and climate impacts, including climate impacts associated with coal mining, transport, and burning. The organization also alleged that the agencies had failed to consider costs associated with carbon dioxide emissions and had failed to consider cumulative climate impacts of similar mining approvals and proposals. *WildEarth Guardians v. Jewell*, No. 15-cv-1984 (D. Colo., filed Sept. 11, 2015): added to the "Stop Government Action/NEPA" slide.

Environmental Groups Mounted CEQA Challenge to Logistics Center

Five environmental groups commenced a lawsuit against the City of Moreno Valley, California, alleging that it failed to comply with CEQA when it approved the World Logistics Center Project. The groups alleged that the project would cover 2,610 acres and more than 40 million square feet, which would make the warehouse complex larger than Central Park in New York City. The groups alleged numerous procedural and substantive failures in the City's CEQA review, including that the final environmental impact report (EIR) failed to analyze and mitigate mobile source greenhouse gas emissions based on the allegedly faulty premise that such emissions are capped by California law. *Center for Community Action and Environmental Justice v. City of Moreno Valley*, No. RIC1511327 (Cal. Super. Ct., filed Sept. 23, 2015): added to the "State NEPAs" slide.

Plaintiffs Added Climate Change NEPA Claim to Chukchi Sea Lease Sale Challenge

Plaintiffs filed a motion for summary judgment and a supplemental complaint in their challenge in the federal district court for the District of Alaska to the second supplemental environmental impact statement (SEIS) for an oil and gas lease sale in the Chukchi Sea off the Alaskan coast. The plaintiffs, which are environmental groups and Alaskan communities, added a new count alleging that the Bureau of Ocean Energy Management's (BOEM's) failure to analyze the climate change effects of the consumption of oil and gas from the lease sale in the second SEIS violated NEPA. In support of their motion for summary judgment, the plaintiffs contended that advances had been made since preparation of earlier environmental analyses that would allow the agency to assess the impacts of oil and gas extraction on climate change based on "an overall atmospheric 'carbon budget.'" The plaintiffs said that BOEM had improperly concluded that it could not perform an assessment of whether the lease sale would affect energy markets and consumer behavior, and had also improperly concluded that NEPA did not require it to consider climate impacts of burning lease sale fuels. *Alaska Wilderness League v. Jewell*, No. 1:08-cv-00004 (D. Alaska third supplemental complaint and opening brief Aug. 28, 2015): added to the "Stop Government Action/NEPA" slide.

Environmental Groups Threatened Lawsuit Over Corps of Engineers Permits for Virginia Oil Terminal

The Center for Biological Diversity and Sierra Club sent a request for reevaluation and 60-day

notice of intent to sue to the U.S. Army Corps of Engineers (Corps) in connection with permits issued by the Corps for an oil transport facility in Yorktown, Virginia. The letter asked the Corps to reevaluate the granting of permits under the River and Harbors Act and the Clean Water Act. The organizations said that the Corps had failed to consider certain information in its "public interest review," including threats posed by rising sea levels. The organizations also asserted that the Corps violated the Endangered Species Act by failing to consult with the National Marine Fisheries Service regarding potential effects of the agency action on the endangered Atlantic sturgeon and Kemp's ridley and loggerhead sea turtles. Letter from Center for Biological Diversity and Sierra Club to U.S. Army Corps of Engineers (Sept. 24, 2015): added to the "Adaptation" slide.

Update #78 (September 8, 2015)

FEATURED DECISION

Wyoming Federal Court Said Consideration of Coal Leases' Climate Impacts Was Adequate

The federal district court for the District of Wyoming upheld federal approvals for two large coal leases in the Powder River Basin in Wyoming. The court's decision in three consolidated cases rejected a number of claims by environmental groups, including that the review under the National Environmental Policy Act (NEPA) had not given sufficient consideration to the leases' impact on climate change. Citing the "very deferential" stance it was required to take, the court said the disclosure of the effects of greenhouse emissions was adequate, but suggested that "today the analysis likely could have been better given the development and acquisition of new knowledge and continuing scientific study." The court noted that the agencies had not ignored the effects of coal combustion, but that uncertainty regarding such effects was created by the fact that the coal would enter the free marketplace rather than go to a particular power plant. The court also rejected claims under the Federal Land Policy Management Act, the National Forest Management Act, the Surface Mining Control and Reclamation Act, and the Mineral Leasing Act. The court did, however, reject an intervenor's argument that the petitioners did not have standing to make claims that the agencies had failed to adequately consider climate change or greenhouse gas emissions. *WildEarth Guardians v. United States Forest Service*, No. 12-cv-00085; *WildEarth Guardians v. United States Bureau of Land Management*, No. 2:13-cv-00042; *Powder River Basin Resource Council v. United States Bureau of Land Management*, No. 13-cv-90 (D. Wyo. opinion and order affirming agency actions Aug. 17, 2015): added to the "Stop Government Action/NEPA" slide.

DECISIONS AND SETTLEMENTS

Ninth Circuit Revived Environmental Groups' Challenge to Oil and Gas Leases in Montana

The Ninth Circuit Court of Appeals reversed a district court's dismissal on standing grounds of environmental groups' lawsuit challenging federal approvals for oil and gas leasing on federal lands in Montana. The Ninth Circuit's unpublished decision said that the Montana district court

had erred when it failed to consider surface harms caused by the development of the leases and instead focused only on climate change-related effects, which the district court said did not create a concrete and redressable injury. The Ninth Circuit remanded to the district court with instructions to determine which lease sales would harm the areas of land enjoyed by the environmental groups' members. The Ninth Circuit directed that this determination "should include consideration of any actual injury stemming from surface harms fairly traceable to the challenged action." *Montana Environmental Information Center v. United States Bureau of Land Management*, No. 13-35688 (9th Cir. Aug. 31, 2015): added to the "Stop Government Action/NEPA" slide.

Tenth Circuit Denied Oklahoma's Request for Preliminary Injunction for Clean Power Plan

The Tenth Circuit Court of Appeals denied Oklahoma's request for an injunction pending the state's appeal of a district court's dismissal of its challenge to the United States Environmental Protection Agency's (EPA's) Clean Power Plan. Oklahoma filed its lawsuit in the Northern District of Oklahoma before EPA finalized its rule regulating carbon dioxide emissions from existing power plants but after the D.C. Circuit Court of Appeals dismissed other lawsuits that challenged the proposed plan. The district court dismissed Oklahoma's lawsuit less than three weeks after it was filed, noting that there was no exception to the requirement for final agency action and that exclusive jurisdiction for review would lie with the D.C. Circuit. *Oklahoma v. McCarthy*, No. 15-5066 (10th Cir. Aug. 24, 2015): added to the "Challenges to Federal Action" slide.

Ninth Circuit Denied Stay of Shell's Arctic Offshore Oil Exploration, But Put Walrus Case on Expedited Schedule

The Ninth Circuit Court of Appeals declined to stay regulations issued under the Marine Mammal Protection Act authorizing the take of Pacific walruses incidental to offshore oil exploration operations in the Chukchi Sea off the Alaskan coast. The appellants had sought to prevent Shell Gulf of Mexico Inc. from commencing its drilling operations, which the appellants said would introduce "harmful noise and industrial disturbance" into a "key walrus habitat area." The denial of the injunction was without prejudice to renewal before a merits panel. The Ninth Circuit also sua sponte expedited the appeal. The appellants' arguments cited the reduction in summer ice caused by climate change that had left walruses more exposed to the impacts of oil exploration. ***Alaska Wilderness League v. Jewell***, No. 15-35559 (9th Cir. Aug. 10, 2015): added to the "Stop Government Action/Other Statutes" slide. [*Editor's note:* This case summary has been corrected since it was distributed in Update #78.]

D.C. Circuit Rejected Request to Rehear Case on Greenhouse Gas Regulations for Stationary Sources

The D.C. Circuit Court of Appeals issued two orders denying—without comment—a rehearing or rehearing en banc of its judgment remanding but not vacating portions of EPA's permitting regulations for greenhouse gas emissions from stationary sources. In the petition for rehearing, the petitioners had argued that the D.C. Circuit should have vacated EPA's regulations requiring

sources subject to the Prevention of Significant Deterioration permit program solely due to their emissions of other pollutants to use best available control technology (BACT) to reduce greenhouse gas emissions. *Coalition for Responsible Regulation v. EPA*, Nos. 09-1322 et al.; *Coalition for Responsible Regulation v. EPA*, Nos. 10-1073 et al.; *Coalition for Responsible Regulation v. EPA*, Nos. 10-1092 et al.; *American Chemistry Council v. EPA*, Nos. 10-1167 et al. (D.C. Cir., orders denying rehearing & rehearing en banc denied Aug. 7, 2015): added to the "Challenges to Federal Action" slide.

D.C. Circuit Declined to Rehear Challenge to Fuel Standards

The D.C. Circuit Court of Appeals denied rehearing en banc to petitioners who unsuccessfully challenged greenhouse gas and fuel economy standards issued in 2010 and 2011 for new cars and trucks. The D.C. Circuit dismissed the challenges in April 2015 without reaching the merits. The petitioners who sought rehearing en banc argued that the dismissal of their claims on standing grounds was not consistent with Supreme Court precedent. *Delta Construction Co., Inc. v. EPA*, Nos. 11-1428, 11-1441, 12-1427; *California Construction Trucking Association, Inc. v. EPA*, No. 13-1076 (D.C. Cir. petition for rehearing en banc denied Aug. 3, 2015): added to the "Challenges to Federal Action" slide.

Effort to Compel New Review of Federal Coal Leasing Program to Consider Climate Change and Other Impacts Does Not Survive Motion to Dismiss

The federal district court for the District of Columbia dismissed an action in which two environmental organizations asked the court to require the federal government to update the environmental review for the federal coal management program. The United States Bureau of Land Management (BLM) prepared a programmatic environmental impact statement for the program in 1979. In their complaint, the organizations cited new information about greenhouse gas emissions associated with the program and the program's contribution to climate change, as well as new information about climate change's effects, including information developed by the Interagency Working Group on the Social Cost of Carbon. The court determined that it had no authority to compel BLM to supplement its 1979 review because there was no ongoing major federal action that could trigger supplemental review. The court said any coal leasing decisions "are made pursuant to a pre-approved and EIS-supported program." *Western Organization of Resource Councils v. Jewell*, No. 14-cv-1993 (D.D.C. Aug. 27, 2015): added to the "Stop Government Action/NEPA" slide.

Federal Court Put Most Claims Against California's Low Carbon Fuel Standard to Rest

The federal district court for the Eastern District of California issued a ruling that narrowed to one the claims that survive against California's Low Carbon Fuel Standard (LCFS) following the Ninth Circuit's 2013 decision that reversed the district court's earlier determination that the LCFS violated the dormant Commerce Clause. Finding that the Ninth Circuit's mandate was "explicit and unambiguous," the district court granted summary judgment to the defendants on the claim that the original LCFS that went into effect in 2011 was an impermissible extraterritorial regulation. The court further applied the law of the case doctrine to dismiss plaintiffs' extraterritoriality claim regarding the LCFS as amended in 2012. The court noted that

the basis for the extraterritoriality challenge to the amended LCFS was the same as for the unsuccessful challenge to the original LCFS—namely, that the use of a life-cycle analysis to determine a fuel's carbon intensity regulated activities occurring wholly outside California. The court also determined that the plaintiffs could not state a claim that the amended LCFS for crude oil discriminated in purpose and effect. The court found no precedent to support a dormant Commerce Clause claim where a challenged law—like the amended LCFS crude oil provisions—burdened and benefitted in-state and out-of-state interests alike. The district court allowed plaintiffs to proceed with their claim that the original LCFS's ethanol provisions discriminated against interstate and foreign commerce in purpose and effect. The court agreed with plaintiffs that they had not abandoned or disavowed this claim. The court dismissed claims against Governor Jerry Brown on immunity grounds, but granted plaintiffs leave to amend. *American Fuels & Petrochemical Manufacturers Association v. Corey*, Nos. 1:09-cv-2234, 1:10-cv-163 (E.D. Cal. Aug. 13, 2015): added to the "Challenges to State Action" slide.

South Carolina Supreme Court Found That Floodway Restrictions on Development Were Not a Regulatory Taking

The South Carolina Supreme Court affirmed the dismissal of a developer's unconstitutional taking claims against a county that essentially prohibited construction in floodways. The county's restrictions were more stringent than the minimum restrictions required by the Federal Emergency Management Agency (FEMA). A former county planning director said the county standards were more forward-looking than federal flood maps, which he said were retrospective and did not "project the potential of increased flooding in the future from urbanization or from the possibility of more intense storms due to climate change." The court concluded that no regulatory taking occurred based on the developer's lack of reasonable investment-backed expectations and the legitimate and substantial health and safety-related bases for the county's restrictions. These factors outweighed the developer's economic injury. The court noted that at the time the developer purchased the land it knew FEMA's preliminary flood map designated almost all of the property as lying within the regulatory floodway and also knew that the county's stormwater ordinance could be interpreted to preclude commercial development and that the ability to develop was dependent on "a host of factors" not fully explored by or under the control of the developer. *Columbia Venture, LLC v. Richland County*, No. 2013-001067 (S.C. Aug. 12, 2015): added to the "Adaptation" slide.

California State Court Rejected Challenges to Greenhouse Gas Emissions Analysis for San Diego County Water Authority Master Plan Update

A California Superior Court upheld the San Diego County Water Authority's (SDCWA's) approval of an update to a regional master plan for water development and conservation. The petitioner, San Diego Coastkeeper, had also challenged the SDCWA's Climate Action Plan and its supplemental program environmental impact report. The court said that "substantial evidence" supported the SDCWA's actions, including its decision not to include greenhouse emissions from upstream water vendors. The court also upheld the SDCWA's determination not to include an emissions analysis for a potential desalination plant, which was "just one of a list of possible long-term options." The court also rejected claims that the SDCWA had incorrectly calculated baseline emissions and that the SDCWA had not adequately mitigated emissions. *San Diego*

Coastkeeper v. San Diego County Water Authority, No. 37-2014-00013216-CU-JR-CTL (Cal. Super. Ct. July 30, 2015): added to the "State NEPAs" slide.

Washington State Court Upheld Port of Seattle Lease for Shell Arctic Drilling Homeport

A Washington State Superior Court rejected a challenge to the use of a Port of Seattle terminal as a homeport for the Royal Dutch Shell Arctic drilling fleet. Four environmental groups had charged that the Port of Seattle illegally circumvented the environmental review requirements of the State Environmental Policy Act when it entered into a lease with the operator for the homeport. The court said that the Port acted within its jurisdiction and that its actions were not arbitrary and capricious. The environmental groups have appealed the court's order. *Puget Soundkeeper Alliance v. Port of Seattle*, No. 15-2-05143-1 (Wash. Super. Ct. notice of appeal Aug. 27, 2015; order July 31, 2015): added to the "State NEPAs" slide.

Challenge to Connecticut Plan to Expand Natural Gas Pipeline Capacity Dismissed

A Connecticut Superior Court dismissed a lawsuit challenging the state's Comprehensive Energy Strategy (CES), which the Department of Energy and Environmental Protection (DEEP) issued in February 2013 and which provided for a large-scale expansion of the state's natural gas pipeline capacity. A trade association of energy marketers involved in sales of gasoline and heating fuel said the CES required preparation of an environmental impact evaluation (EIE) under the Connecticut Environmental Policy Act (CEPA). The trade group said that the environmental review should have considered methane leakage that would occur as a result of the CES's implementation. The group noted that such leaks "comprise a significant source of [greenhouse gases] that should have been quantified and mitigated by DEEP as part of an EIE to ensure that the Plan is consistent with Connecticut's climate change mandates." The court dismissed the action on sovereign immunity grounds after finding that the group had failed to state a claim under CEPA. The court said that the state agencies (DEEP and the Public Utilities Regulatory Authority) had simply followed legislative duties imposed on them, and that the agencies could not ignore the legislature's prescriptions. The CES therefore was not subject to the requirement for an EIE. As a result, the state's sovereign immunity was intact, and the court did not have subject matter jurisdiction over the action. The trade association appealed the decision. *Connecticut Energy Marketers Association v. Connecticut Department of Energy & Environmental Protection*, No. HHD-CV-14-6054538-S (Conn. Super. Ct. dismissed July 2, 2015; appeal filed July 20, 2015): added to the "State NEPAs" slide.

Attorney Fees Denied in CEQA Case Involving Abandoned Shopping Center Project

In an unpublished opinion, the California Court of Appeal affirmed denial of attorney fees to a group that challenged the City of Yucaipa's approvals for a shopping center. The group had contended that the City failed to fulfill California Environmental Quality Act (CEQA) obligations, including by failing to consider greenhouse gas impacts. The trial court dismissed the group's challenge, and the group's appeal was dismissed as moot after the shopping center's developer abandoned the project and the City revoked its approvals. The group argued that it was entitled to attorney fees because its lawsuit was a catalyst for the City's revocation of the approvals. The Court of Appeal said that evidence indicated the approvals were rescinded

because the developer abandoned the project, not because the environmental review violated CEQA. The Court of Appeal also agreed with the trial court that the group was not a prevailing party. *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa*, No. E057589 (Cal. Ct. App. June 8, 2015): added to the "State NEPAs" slide.

Developer of Mississippi Clean Coal Project Got Authorization for Temporary Rate Increase

The Mississippi Public Service Commission authorized a temporary emergency rate increase by Mississippi Power Company (MPC), the developer and operator of the Kemper Project, a power plant at which MPC expects lignite gasification and the capture of carbon dioxide for enhanced oil recovery will be fully operational in the first half of 2016. The Commission said MPC was "in or nearing financial crisis," noting that MPC has operated the Kemper combined cycle units on natural gas for a year without permanent cost recovery. Earlier in 2015, the Mississippi Supreme Court ordered a refund of charges collected under a previous order related to cost recovery for the Kemper plant. *In re Mississippi Power Co.*, No. 2015-UN-80 (Miss. Pub. Serv. Comm'n Aug. 11, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

NEW CASES, MOTIONS, AND NOTICES

Youth Plaintiffs Asserted Constitutional Claims Against Federal Government for Failure to Reduce Carbon Dioxide Emissions

Twenty-one individual plaintiffs, all age 19 or younger, filed a lawsuit in the federal district court for the District of Oregon against the United States, the president, and various federal officials and agencies. The individuals were joined by the non-profit organization Earth Guardian and a plaintiff identified as "Future Generations," which is represented by Dr. James Hansen, a climate scientist and former director of the NASA Goddard Institute for Space Studies, who also submitted a declaration in support of the complaint. The plaintiffs asked the court to compel the defendants to take action to reduce carbon dioxide emissions so that atmospheric CO_2 concentrations will be no greater than 350 parts per million by 2100. The plaintiffs alleged that the "nation's climate system" was critical to their rights to life, liberty, and property, and that the defendants had violated their substantive due process rights by allowing fossil fuel production, consumption, and combustion at "dangerous levels." The plaintiffs also asserted an equal protection claim based on the government's denial to them of fundamental rights afforded to prior and present generations. They also asserted violations of rights secured by the Ninth Amendment, which the plaintiffs said protects "the right to be sustained by our country's vital natural systems, including our climate system." The plaintiffs also alleged that defendants failed to fulfill their obligations under the public trust doctrine. *Juliana v. United States*, No. 6:15-cv-01517 (D. Or., filed Aug. 12, 2015): added to the "Force Government to Act" slide.

Class Action Complaints Alleged That Arch Coal, Peabody Energy Breached Fiduciary Duties for Employees' Pension Plans

Participants in the employee pension plans of Arch Coal, Inc. (Arch) and Peabody Energy Corporation (Peabody) filed similar class action complaints against their respective companies

alleging breaches of fiduciary duty pursuant to the Employee Retirement Income Security Act (ERISA). The plaintiffs asserted that the defendants retained Arch and Peabody stock as investment options in their respective plans when a reasonable fiduciary would have done otherwise. The complaints alleged that defendants should have known that the pension plans' investments in Arch and Peabody stock were imprudent because of the "sea-change" in the coal industry. Causes of this "sea-change" cited in the complaints included the regulation of carbon dioxide emissions from power plants. *Lynn v. Peabody Energy Corp.*, No. 4:15-cv-00919 (E.D. Mo., filed June 11, 2015); *Roe v. Arch Coal, Inc.*, No. 4:15-cv-00910 (E.D. Mo., filed June 9, 2015): added to the "Regulate Private Conduct" slide.

Office of Surface Mining Withdrew Appeal of District Court Decision That Vacated Permit to Expand Navajo Mine

The U.S. Office of Surface Mining Reclamation and Enforcement (OSM) voluntarily dismissed its appeal of a district court decision that vacated OSM's approval of a permit revision authorizing expansion of the Navajo Mine in New Mexico. The federal district court for the District of New Mexico also vacated the environmental assessment and finding of no significant impact (EA/FONSI) that OSM had prepared for the expansion. The district court said the environmental review should have considered the mine's indirect effects, in particular the impacts of mercury deposition from the power plant for which the mine was the sole source of coal. An appeal by the mine's operator, Navajo Transitional Energy Company, LLC, is still pending in the Tenth Circuit Court of Appeals. The appellees have asked the Tenth Circuit to dismiss the appeal as premature. *Diné Citizens Against Ruining Our Environment v. United States Office of Surface Mining Reclamation and Enforcement*, No. 15-1191 (10th Cir. motion for voluntary dismissal Aug. 18, 2015); *Diné Citizens Against Ruining Our Environment v. United States Office of Surface Mining Reclamation and Enforcement*, No. 15-1126 (10th Cir. motion to dismiss Aug. 20, 2015): added to the "Stop Government Action/NEPA" slide.

States, Coal Company Sought to Stay Clean Power Plan

After EPA released the final Clean Power Plan rule regulating carbon dioxide emissions from existing power plants, 15 states filed an emergency petition for extraordinary writ in the D.C. Circuit. South Carolina intervened on behalf of the states, while a number of environmental organizations have intervened in support of EPA. The 16 states, as well as New Jersey and the National Mining Association, also submitted requests to EPA for an administrative stay of the rule. In the D.C. Circuit, the states argued that a stay is warranted even before formal publication of the rule because EPA had established deadlines for submission of state plans starting in September 2016 that will apply regardless of when the rule is published, and that the states are therefore compelled to continue working to meet those hard deadlines. They argue that the Clean Power Plan is illegal because the Clean Air Act prohibits EPA from regulating source categories under Section 111 where it has regulated them under Section 112 and because the Clean Power Plan exceeds EPA's regulatory authority. The D.C. Circuit has declined to consolidate the petitions challenging the final rule with *In re Murray Energy Corp.*, the challenge to the proposed Clean Power Plan dismissed by the D.C. Circuit in June 2015 because there was no final agency action. The coal company Peabody Energy Corporation filed an emergency renewed petition for extraordinary writ in *In re Murray Energy Corp.*, which the D.C. Circuit instead

opened as a new case and consolidated with the states' proceeding. In September, EPA submitted its opposition to the petitions for extraordinary writ. The agency indicated that it expects to publish the final rule in the *Federal Register* by the end of October. EPA argued that straying from the Clean Air Act's timeframe for judicial review is not warranted, that petitioners will not suffer irreparable harm, and that the statutory issues raised by the petitioners are disputable. *In re West Virginia*, No. 15-1277 (D.C. Cir., filed Aug. 13, 2015, consolidated with No. 15-1284 Aug. 24, 2015): added to the "Challenges to Federal Action" slide.

Pro Se Petition Challenged EPA Determination on Hazardous Air Pollutant Standards, Drew Connection to Aircraft Greenhouse Gas Endangerment Finding

Two individuals filed a pro se petition in the D.C. Circuit Court of Appeals for review of EPA's determination that it had completed the Clean Air Act's requirement that it promulgate emissions standards for source categories accounting for at least 90% of aggregated emissions of seven hazardous air pollutants. The petition asserted that the determination was "intricately-intertwined" with EPA's proposed endangerment finding for greenhouse gases from aircraft. *Lewis v. McCarthy*, No. 15-1254 (D.C. Cir., filed Aug. 3, 2015): added to "Force Government to Act/Clean Air Act" slide.

Plaintiffs Seek Attorney Fees from Corps of Engineers in Alaska Fill Permit Case

Plaintiffs who challenged issuance of a fill permit for a drill site in the National Petroleum Reserve in Alaska filed a petition for costs and fees under the federal Equal Access to Justice Act (EAJA). The federal district court for the District of Alaska upheld the permit in 2015, but only after it first remanded the proceeding to the United States Army Corps of Engineers (Corps) in 2014 for a reasoned explanation for the Corps' decision not to conduct a supplemental environmental analysis. The supplemental analysis subsequently conducted by the Corps included a discussion of whether new information about climate change warranted preparation of a supplemental environmental impact statement and concluded that it did not. In their fees petition, the plaintiffs contended that they were prevailing parties for purposes of EAJA because the court was only satisfied that the Corps had satisfied its NEPA obligations after the Corps completed the supplemental analysis required by the court. *Kunaknana v. United States Army Corps of Engineers*, No. 3:13-cv-00044 (D. Alaska, petition for fees Aug. 27, 2015): added to the "Stop Government Action/NEPA" slide.

NEPA Challenge Filed to Contest Expansion of Montana Underground Coal Mine

Three environmental groups filed a lawsuit in the federal district court for the District of Montana challenging federal approvals for a mining plan modification for the Bull Mountains Mine No. 1 in central Montana. The plaintiffs contended that the modification would permit the mine's expansion by 7,000 acres and allow production of up to 15 million tons of coal annually, making the mine the largest domestic source by annual production of underground coal. The plaintiffs alleged that the mining, transportation, and combustion of coal from the mine would have annual greenhouse gas emissions greater than any single point source in the U.S. They contended that the federal defendants failed to comply with NEPA by, among other things, failing to take a hard look at indirect and cumulative effects of coal transportation, coal exports,

and coal combustion, and failing to consider foreseeable greenhouse gas emission impacts. *Montana Elders for a Livable Tomorrow v. U.S. Office of Surface Mining*, No. 9:15-cv-00106 (D. Mont., filed Aug. 17, 2015): added to the "Stop Government Action/NEPA" slide.

Update #77 (August 4, 2015)

FEATURED DECISION

Tenth Circuit Affirmed Colorado's Renewable Energy Mandate

The Tenth Circuit Court of Appeals ruled that Colorado's renewable energy mandate did not violate the dormant Commerce Clause. The decision affirmed a ruling of the federal district court for the District of Colorado in a lawsuit brought by the Energy and Environment Legal Institute (EELI), whose members include a fossil fuel producer. EELI appealed only one aspect of the district court's decision—that the mandate did not impermissibly control extraterritorial conduct. The Tenth Circuit said that although fossil fuel producers will be hurt by the mandate, EELI "offers no story suggesting how Colorado's mandate disproportionately harms out-of-state businesses," and "it's far from clear how the mandate might hurt out-of-state consumers either." The Tenth Circuit concluded that this case did not fall within the narrow scope of the Supreme Court's extraterritoriality precedent, which was applied only to price control or price affirmation regulation. The Tenth Circuit said that EELI's reading risked "serious problems of overinclusion." *Energy & Environment Legal Institute v. Epel*, No. 14-1216 (10th Cir. July 13, 2015): added to the "Challenges to State Action" slide.

DECISIONS AND SETTLEMENTS

D.C. Circuit Declined to Rehear Case in Which It Struck Down Deferral of Regulation of Biogenic Carbon Dioxide

The D.C. Circuit Court of Appeals denied a petition by industry groups for rehearing of its 2013 decision rejecting the United States Environmental Protection Agency's (EPA's) deferral of regulation of carbon dioxide from biogenic sources. The industry groups included the American Forest & Paper Association, the Utility Air Regulatory Group, and the Renewable Fuels Association. The D.C. Circuit denied their request without comment. The industry groups had argued that the decision needed to be reconsidered in light of the Supreme Court's 2014 decision in *Utility Air Regulatory Group v. EPA*. *Center for Biological Diversity v. EPA*, No. 11-1101, 11-1285, 11-1328, 11-1336 (D.C. Cir. July 24, 2015): added to the "Force Government to Act/Clean Air Act" slide.

Seventh Circuit Affirmed Chicago Area Combined Sewer Overflows Consent Decree

The Seventh Circuit Court of Appeals affirmed a district court's approval of a consent decree between the United States and Illinois and the Metropolitan Water Reclamation District of Greater Chicago (District) pursuant to which the District agreed to complete a project known as the "Deep Tunnel," among other obligations. The Deep Tunnel is a project begun by the District in the 1970s to impound water from the Chicago area's combined stormwater and sewer system

so that the water can be cleaned up and then released. Environmental groups intervened and argued unsuccessfully before both the district court and the Seventh Circuit that the consent decree was inadequate. One argument made by the intervenors before the district court was that reliance on a 2006 precipitation study to determine that the Deep Tunnel's capacity would be adequate was inconsistent with EPA's *National Water Program 2012 Strategy: Response to Climate Change*. The groups argued that EPA should have studied several years of data, more intense storms, and rapidly recurring storms. The district court rejected this and other arguments in its January 2014 decision. The Seventh Circuit agreed with the district court that consent decree was reasonable "in light of the current infrastructure, the costs of doing things differently …, and the limits of knowledge about what will happen when the system is complete." *United States v. Metropolitan Water Reclamation District of Greater Chicago*, Nos. 14-1776, 14-1777 (7th Cir. July 9, 2015): added to the "Adaptation" slide.

Fourth Circuit Denied EPA Request to Require West Virginia District Court to Disallow Discovery in Clean Air Act Jobs Study Case

In a one-sentence judgment, the Fourth Circuit Court of Appeals denied EPA's petition for a writ of mandamus in a lawsuit brought by coal companies seeking to compel EPA to conduct a study of the effects of the Clean Air Act's administration and enforcement on employment. EPA had asked the Fourth Circuit to require the federal district court for the Northern District of West Virginia to vacate a discovery order issued in May 2015. EPA had argued to the Fourth Circuit that discovery was unnecessary in this "nondiscretionary duty" case, given EPA's "willingness to win or lose on the documents" already submitted to the district court. The district court has set a deadline for completion of discovery in February 2016 and a trial date in April 2016. *In re McCarthy*, No. 15-1639 (4th Cir. July 9, 2015): added to the "Challenges to Federal Action" slide.

Alaska Federal Court Ordered Greenpeace to Pay Hourly Penalties While Activists Remained Suspended from Portland Bridge

On July 30, 2015, the federal district court for the District of Alaska found Greenpeace, Inc. (Greenpeace) to be in contempt of its May 2015 order granting a preliminary injunction to Shell Offshore, Inc. The preliminary injunction barred Greenpeace from tortiously or illegally interfering with the movement of certain vessels that Shell is using for its Arctic drilling and exploration efforts this summer. Beginning the morning of July 29, 13 Greenpeace activists dangled from the St. John's Bridge in Portland, Oregon, preventing the vessel *Fennica*, an icebreaker, from traveling from the dry dock location where it was being repaired down the Willamette River. In its July 30 order, the court imposed penalties of $2,500 for each hour that the activists remained suspended. The hourly penalties would have increased to $5,000 and then $10,000 per hour had the protest continued until July 31 and August 1, but by the afternoon of July 30, four of the suspended protesters had been removed, and the *Fennica* traveled under the bridge. The remainder of the protesters came down later that evening. *Shell Offshore, Inc. v. Greenpeace, Inc.*, No. 3:15-cv-00054 (D. Alaska July 30, 2015): added to the "Climate Change Protesters and Scientists" slide.

Utah Federal Court Allowed NEPA Claims Regarding 16 Gas Wells in Uinta Basin to

Proceed

The federal district court for the District of Utah ruled that three environmental groups had standing to challenge a Decision Record and Finding of No Significant Impact (DR/FONSI) for a plan by Gasco Energy, Inc. (Gasco) to drill 16 gas wells in the Uinta Basin. The court also concluded, however, that the groups could not challenge the environmental assessment (EA) for the 16-well project or an environmental impact statement (EIS) and record of decision (ROD) for Gasco's overarching development proposal for more than 200,000 acres in the Uinta Basin, which would allow Gasco to drill up to 1,298 new gas wells. The court said the EA and EIS were not final agency actions, and that the ROD did not inflict an injury-in-fact since additional analysis under the National Environmental Policy Act (NEPA) was required before Gasco could drill wells. The court dismissed the groups' claims under the Federal Land Policy and Management Act relating to the 16-well project without prejudice. The court rejected Gasco's contention that the groups had not alleged injury-in-fact and causation with respect to their NEPA claims relating to the DR/FONSI for the 16-well project. The court said the groups had alleged causation with assertions that the EA inadequately analyzed environmental impacts and ignored the social cost of greenhouse gas emissions. *Southern Utah Wilderness Alliance v. United States Department of the Interior*, No. 13-cv-01060 (D. Utah July 17, 2015): added to the "Stop Government Action/NEPA" slide.

Court Upheld BLM Approval of Mojave Desert Solar Energy Facility

The federal district court for the Central District of California granted summary judgment to the United States Department of the Interior, the United States Bureau of Land Management (BLM), and other federal defendants in a lawsuit challenging approval of a solar energy facility on approximately 4,000 acres in the Mojave Desert. The court incorporated excerpts from its June 2015 decision denying a request for a preliminary injunction, including its conclusion that BLM had satisfied the NEPA requirement that it provide a statement of purpose and need. The court noted that one means by which BLM had fulfilled this obligation was by citing and incorporating by reference directives and policies, including President Obama's Climate Action Plan, which set a goal of approving 20,000 megawatt of renewable energy projects on public lands by 2020. *Colorado River Indian Tribes v. Department of Interior*, No. 14-cv-2504 (C.D. Cal. July 16, 2015): added to the "Stop Government Action/NEPA" slide.

District Court Quickly Dismissed Oklahoma's Challenge to Clean Power Plan

The federal district court for the District of Oklahoma dismissed the State of Oklahoma's challenge to EPA's proposed regulations, known as the Clean Power Plan, to regulate carbon dioxide emissions from existing power plants. The lawsuit was filed on July 1, 2015, and one day later the court issued an order asking the parties to provide briefing on the issue of whether the court had jurisdiction to hear a challenge to a proposed rule and whether the judicial review provision of the Clean Air Act precluded the court from exercising jurisdiction. The court noted in the order that the D.C. Circuit Court of Appeals had recently dismissed a challenge to the Clean Power Plan "based on the clearly-established jurisdictional principle that a proposed rule by a governmental agency is not a final agency action subject to judicial review." On July 17, 2015, after Oklahoma submitted its initial brief, the court dismissed this action, finding that

further briefing was unnecessary. The court said that Oklahoma had not established that the exception to the finality requirement applied, or that the court would be the proper jurisdiction even if judicial review were not premature, given that the Clean Air Act vests exclusive jurisdiction in the D.C. Circuit for such challenges. Oklahoma has appealed the dismissal in the Tenth Circuit Court of Appeals. *Oklahoma ex rel. Pruitt v. EPA*, No. 15-CV-0369 (N.D. Okla. notice of appeal July 21, 2015; opinion & order July 17, 2015; order July 2, 2015): added to the "Challenges to Federal Action" slide.

Proposed Settlement Would Require Retirement or Refueling of Five Coal-Fired Power Plants in Iowa

The federal government lodged a proposed consent decree in the federal district court for the Northern District of Iowa that would resolve allegations that Interstate Power and Light Company (Interstate), which owns and operates seven active coal-fired power plants in Iowa, violated Prevention of Significant Deterioration and Title V permitting requirements as well as Iowa's state implementation plan. The State of Iowa, Linn County, and Sierra Club are also parties to the consent decree. Under the agreement, Interstate would permanently retire coal-fired units at five power plants or convert them to natural gas and would also install pollution controls at two plants. In addition, Interstate would pay a $1.1 million civil penalty to be split among the United States, Iowa, and Linn County, and spend $6 million on environmental mitigation projects. Interstate may choose from five potential mitigation projects. The consent decree would not resolve future claims by the United States or Sierra Club based on modifications that increase greenhouse gas emissions. *United States v. Interstate Power and Light Co.*, No. 15-cv-0061 (N.D. Iowa complaint and proposed consent decree filed July 15, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

Illinois Appellate Court Affirmed NPDES Permit for Coal-Fired Power Plant

The Illinois Appellate Court affirmed the issuance of a national pollution discharge elimination system (NPDES) permit to Dynegy Midwest Generation, Inc. (Dynegy) for its Havana Power Station in Mason County, Illinois. The Havana Power Station is an oil- and coal-fired, six-unit steam-electric generating facility. The court found that the Pollution Control Board (Board) had not erred in finding that the Illinois Environmental Protection Agency (IEPA) was not required to adopt technology-based effluent limits (TBELs) on a case-by-case basis, and also found that the Board had properly deferred to IEPA's determination of whether petitioners' TBEL comments were significant and warranted a response. *Natural Resources Defense Council v. Pollution Control Board*, No. 4-14-0644 (Ill. App. Ct. July 22, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

FERC Rejected Claims of Inadequate Greenhouse Gas Emissions Analysis and Denied Rehearing of LNG Facility Authorization

The Federal Energy Regulatory Commission (FERC) denied rehearing of its authorization of facilities in Cameron Parish, Louisiana, for the liquefaction and export of domestically-produced natural gas. FERC rejected contentions by Sierra Club that its approvals violated NEPA by failing to consider impacts—including increased greenhouse gas emissions—from induced

upstream gas production and from downstream end-use, and also from increased coal use due to natural gas price increases. FERC said that induced production was not an indirect effect of the project that it was required to consider and that there was not a "sufficient causal link" between its approval of the liquefied natural gas (LNG) facilities and impacts related to ultimate consumption. FERC also said that a potential increase in natural gas prices and an accompanying increase in coal consumption were also outside the scope of its NEPA review. Sierra Club also argued unsuccessfully that FERC had failed to consider cumulative impacts in connection with other pending and approved LNG projects and had failed to use accepted methods for evaluating greenhouse gas emissions impacts, such as the social cost of carbon and consistency with federal, state, or local emissions reduction targets. FERC found that the social cost of carbon was not appropriate for determining a specific project's impacts and said that the determination of whether the project's estimated greenhouse gas emissions would be consistent with applicable targets would fall to Louisiana when it determined whether to issue air permits. *In re Sabine Pass Liquefaction Expansion, LLC*, Nos. CP13-552, 13-553 (FERC June 23, 2015): added to the "Stop Government Action/NEPA" slide.

NEW CASES, MOTIONS, AND NOTICES

States Asked D.C. Circuit for Rehearing of Clean Power Plan Challenge

States who unsuccessfully challenged EPA's proposed Clean Power Plan in the D.C. Circuit filed a petition for rehearing or rehearing en banc. The D.C. Circuit ruled in June that it did not have jurisdiction to review a non-final agency action. The states said rehearing was necessary to prevent EPA from evading accountability. The states indicated EPA could do so by requiring regulated parties "to make immediate expenditures to comply with an unlawful but not-yet-final rule." Alternatively, the states asked the court for a stay of the mandate so that the panel could vacate its decision as "academic," consistent with Judge Henderson's concurrence in which she said she believed the court could exercise jurisdiction but that the arguments were "all but academic," given that EPA would soon issue its final rule. The states opined that when EPA does publish the final rule, "the panel could vacate its decision and leave for another time the delineation of this Court's authority to stop extreme agency misconduct during a rulemaking." *In re Murray Energy Corp.*, No. 14-1112; *Murray Energy Corp. v. EPA*, Nos. 14-1151, 14-1146 (D.C. Cir. petition for rehearing or rehearing en banc July 22, 2015): added to the "Challenges to Federal Action" slide.

City of Long Beach Commenced CEQA Challenge to Interstate Widening Project

The City of Long Beach filed a lawsuit in California Superior Court challenging the California Department of Transportation's (Caltrans's) compliance with the California Environmental Quality Act (CEQA) in its "secret approval" of a project to widen an approximately 16-mile-long corridor of Interstate 405. The Orange County Transportation Authority was also named as a respondent in the lawsuit. Among the alleged inadequacies in the CEQA review was a failure to determine and disclose whether greenhouse gas emissions would be significant. The City of Long Beach contended that Caltrans "shirked its duty" by refusing to make a determination of the significance of the greenhouse gas impacts and calling such a determination "too

speculative." The petition alleged that the project would result in a 39% increase in vehicle miles traveled over baseline conditions for the widened freeway segment. *City of Long Beach v. State of California Department of Transportation*, No. BS156931 (Cal. Super. Ct., filed July 16, 2015): added to the "State NEPAs" slide.

Second Mine Owner Appealed in Case Involving Inadequate NEPA Review for Coal Mine Plan Modifications

The owner of a coal mine appealed a decision by the federal district court for the District of Colorado that held that the United States Office of Surface Mining Reclamation and Enforcement had violated NEPA when it approved a mining plan modifications that authorized the mining of additional coal. The court did not vacate the mining plan modification for the mine because it believed all coal extraction authorized by the modification had already occurred. However, the coal mine owner also filed a Notice of Correction of Statement of Law in the district court, stating that the district court's decision relied on the mine owner's misunderstanding that the affirmative defense of mootness applied; the mine owner said that it was withdrawing its mootness defense because it had learned after the court's decision that additional coal was covered by the mining plan modification. The owner of a second coal mine affected by the court's decision has already appealed, but the Tenth Circuit has questioned the finality of the judgment and whether it has appellate jurisdiction. On July 10, 2015, the Tenth Circuit ordered the coal mine owners to submit briefs addressing the basis for appellate jurisdiction. *WildEarth Guardians v. United States Office of Surface Mining Reclamation and Enforcement*, No. 1:13-cv-00518 (D. Colo. notice of appeal July 6, 2015; notice of correction July 1, 2015); No. 15-1186 (10th Cir. order July 10, 2015): added to the "Stop Government Action/NEPA" slide.

Environmental Groups Asked Court to Nullify Port of Seattle Lease for Shell's Arctic Drilling Homeport

Four environmental groups filed a motion for summary judgment in their lawsuit challenging the Port of Seattle's authority to enter into a lease for operation of a terminal in the Port as the homeport for Royal Dutch Shell's Arctic drilling fleet. In their motion, the groups asked the Washington Superior Court for a declaration that the Port violated the State Environmental Policy Act by improperly describing the project and invoking a categorical exemption for leases pursuant to which the property's use will remain "essentially the same." The groups also asked the court to nullify the lease. *Puget Soundkeeper Alliance v. Port of Seattle* (Wash. Super. Ct. plaintiffs' motion for summary judgment July 2, 2015): added to the "State NEPAs" slide.

Update #76 (July 6, 2015)

FEATURED DECISION

Washington Court Ordered Department of Ecology to Reconsider Denial of Greenhouse Gas Rulemaking Petition in Light of December 2014 Report Regarding Costly Climate Change Impacts

The Washington Superior Court ordered the Washington Department of Ecology (Ecology) to reconsider its denial in August 2014 of a rulemaking petition submitted by eight children that asked Ecology to recommend to the state legislature that greenhouse gas emissions be limited "consistent with current scientific assessment of requirements to stem the tide of global warming." The court remanded to Ecology for consideration of a December 2014 report prepared by Ecology at the direction of the governor and an affidavit submitted by the petitioners that reviewed the report. The court noted that the December 2014 report concluded that effects of climate change would be costly unless additional actions were taken to reduce greenhouse gas emissions but recommended no change to the state's greenhouse gas emissions limits. *Foster v. Washington Department of Ecology*, No. 14-2-25295-1 (Wash. Super. Ct. June 23, 2015): added to the "Common Law Claims" slide.

DECISIONS AND SETTLEMENTS

D.C. Circuit Denied Challenges to Proposed Regulation of Carbon Dioxide Emissions from Existing Power Plants

The D.C. Circuit dismissed challenges to EPA's proposed rule regulating carbon dioxide emissions from existing power plants. The challenges were brought by a coal company and 12 states. The D.C. Circuit concluded that it did not have authority to review proposed rules and denied the petitions for review. The court rejected the petitioners' argument that the All Writs Act provided it with authority to "circumvent bedrock finality principles" to review proposed regulations. The court also was not persuaded that EPA's public statements regarding its legal authority to regulate carbon dioxide emissions constituted final agency action, or that the petitioners could challenge a 2011 settlement agreement in which EPA merely agreed to a timeline for determining whether it would regulate carbon dioxide emissions from existing plants. In a concurring opinion, Judge Henderson wrote that she believed the court had jurisdiction to consider the application for a writ of prohibition under the All Writs Act but that a writ was not appropriate because by the time the D.C. Circuit issued its opinion, "or shortly thereafter," EPA would have issued a final rule that could be challenged as a final agency action. *In re Murray Energy Corp.*, Nos. 14-1112, 14-1151; *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. June 9, 2015): added to the "Challenges to Federal Action/Clean Air Act" slide.

D.C. Circuit Dismissed Challenges to Classification of Carbon Dioxide Streams as Solid Waste

The D.C. Circuit Court of Appeals ruled that petitioners did not have standing to challenge EPA's determination that supercritical carbon dioxide streams injected into certain underground wells for purposes of geologic sequestration are "solid waste" under the Resource Conservation and Recovery Act. EPA's determination concerned a new class of wells—Class VI wells—established by EPA under the Safe Drinking Water Act specifically for carbon dioxide injection. The D.C. Circuit said that one petitioner—a company that captured and compressed carbon dioxide for use in enhanced oil recovery or injection in another class of well—had no plans to use the type of well governed by the challenged rule. Therefore, neither the company nor the organization of which it was a member had standing. A second organization that relied on a

member for representational standing also did not have standing because its member company was not directly regulated by the challenged rule but was merely concerned that the rule portended regulation of its enhanced oil recovery operations. *Carbon Sequestration Council v. EPA*, Nos. 14-1046, 14-1048 (D.C. Cir. June 2, 2015): added to the "Challenges to Federal Action/Other Rules" slide.

Clean Air Act Settlement Announced for Coal-Fired Power Plant on Navajo Nation

The United States, three environmental groups, and the operator and owners of the Four Corners Power Plant filed a consent decree with the federal district court for the District of New Mexico. The proposed settlement would resolve allegations by the U.S. and the groups that the operator and owners of the coal-fired power plant, which is located in New Mexico on the Navajo Nation, violated the Clean Air Act by making major modifications to major emitting facilities without obtaining the necessary permits. The settlement would require $160 million in upgrades to pollution controls and would also require payment of a $1.5-million civil penalty and the expenditure of $6.7 million on three health and environmental mitigation projects for members of the Navajo Nation. The projects are a project to replace or retrofit wood- and coal-burning appliances, a home weatherization project, and a health care project to provide funds for medical screenings for Navajo people living in the vicinity of the power plant. The environmental groups filed their lawsuit in 2011. The U.S. filed its complaint concurrently with the consent decree. *United States v. Arizona Public Service Co.*, No. 15-cv-537 (D.N.M., consent decree and complaint filed June 24, 2015); *Diné Citizens Against Ruining Our Environment v. Arizona Public Service Co.*, No. 1:11-cv-00889 (D.N.M. consent decree filed June 24, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

Alaska Federal Court Refused to Dismiss Shell's Lawsuit Against Greenpeace

In June, the federal district court for the District of Alaska denied Greenpeace, Inc.'s motion to dismiss the lawsuit that Shell Offshore, Inc. and Shell Gulf of Mexico Inc. (together, Shell) brought to prevent Greenpeace activists from interfering with its Arctic drilling season. In May, the court had granted Shell a preliminary injunction. In its June decision, the court explained that it had diversity and federal question jurisdiction, as well as admiralty jurisdiction, over the proceeding, and that its jurisdiction extended to claims arising from activities on the high seas. The court also concluded that Shell's claims were ripe, were not displaced or preempted by federal law, and were not barred by the doctrines of primary jurisdiction, *forum non conveniens*, or comity. The court also found that Shell had adequately pled trespass to chattels, interference with navigation, private nuisance, and civil conspiracy claims. *Shell Offshore, Inc. v. Greenpeace, Inc.*, No. 3:15-cv-00054 (D. Alaska June 12, 2015): added to the "Climate Protesters and Scientists" slide.

California Federal Court Denied Injunction in Challenge to Solar Project on Tribal Ancestral Lands

The federal district court for the Central District of California refused to issue a preliminary injunction to stop development of a utility-scale solar power project within the ancestral lands of the Colorado River Indian Tribes. One National Environmental Policy Act argument made by the

plaintiffs was that the statement of purpose and need for the project was too narrow because the Bureau of Land Management (BLM) defined the purpose and need as responding to a request for a variance. The court concluded that BLM had sufficiently included its broader goals, including by citing President Obama's Climate Action Plan, which set a goal of approving 20,000 MW of renewable energy projects on public lands by 2020. *Colorado River Indian Tribes v. Department of Interior*, No. 5:14-cv-02504 (C.D. Cal. June 11, 2015): added to the "Stop Government Action/Project Challenges" slide.

D.C. Circuit Denied Stay in Challenge to Maryland LNG Facilities

The D.C. Circuit declined to place an emergency stay on the Federal Energy Regulatory Commission's approval of the Dominion Cove Point liquefied natural gas (LNG) facilities in Maryland, or to expedite briefing. The court said that the petitioners had not satisfied the stringent requirements for a stay pending court review or articulated strongly compelling reasons for expediting briefing. *EarthReports, Inc. dba Patuxent Riverkeeper v. Federal Energy Regulatory Commission*, No. 15-1127 (D.C. Cir. June 12, 2015): added to the "Stop Government Action/NEPA" slide.

California Appellate Court Upheld Analysis of Climate and Energy Impacts of Pasadena Repowering Project but Remanded for New Consideration of Water Impacts

The California Court of Appeal reversed a trial court's denial of a challenge to the City of Pasadena's approval of the Glenarm Power Plant Repowering Project. In an unpublished decision, the court agreed with the petitioner that the City had failed to conduct an adequate analysis of the impacts of supplying water to the project. The court rejected claims, however, that the analysis of climate and energy impacts was inadequate. *California Clean Energy Committee v. City of Pasadena*, Nos. B254889, B255994 (Cal. Ct. App. June 1, 2015): added to the "State NEPAs" slide.

Fifth Circuit Affirmed Dismissal of Homeowners' Admiralty Suit Against Army Corps of Engineers for Aggravation of Hurricane Katrina Damage

The Fifth Circuit Court of Appeals affirmed the dismissal of claims against the United States Army Corps of Engineers and the United States in which homeowners sought damages under three admiralty statutes for the exacerbation of Hurricane Katrina's effects in the New Orleans area. The court held in an unpublished opinion that the Corps' decision on its method of dredging the Mississippi River Gulf Outlet channel was shielded from liability by the discretionary function exemption. The court rejected the homeowners' contention that the dredging method used by the Corps for decades caused wetland erosion in violation of federal and state statutes and regulations that specifically prescribed that the Corps use methods that would protect wetlands. *In re Katrina Canal Breaches Litigation,* Nos. 14-30060, 14-30136 (5th Cir. May 28, 2015): added to the "Adaptation" slide.

In Denying Summary Judgment on Nuisance, Trespass Claims, Connecticut Court Cited Possibility That Climate Change Caused Damage to Property

A property owner in South Glastonbury, Connecticut, brought an action against the Town of Glastonbury seeking damages and injunctive relief for damages caused to his property over the course of several decades by upstream development approved by the Town, stormwater increase, and water quality degradation. The owner filed a seven-count complaint, that included claims of trespass, nuisance, and intentional infliction of emotional distress against the Town. The Connecticut Superior Court denied the owner summary judgment on these claims, finding that the Town had raised genuine issues of material fact as to what cause the damage to the plaintiff's property. The court noted, for instance, that climate change, "especially an increase in intense precipitation" could be responsible for the erosion and increase stormwater flow on the property. *Emerick v. Town of Glastonbury*, No. HHDCV115035304S (Conn. Super. Ct. May 14, 2015): added to the "Adaptation" slide.

Illinois Court Dismissed Municipal Defendants from Lawsuit Seeking Flood Damages

An Illinois Circuit Court dismissed claims against the Metropolitan Water Reclamation District, Maine Township, and Park Ridge in a lawsuit brought by people whose property sustained damage in floods in 2008. The plaintiffs' charges included that these municipal defendants, which had jurisdiction over a stormwater system, caused the flooding, due in part to their failure to prepare for climate change impacts. The court held that the public duty rule exempted the municipal defendants from liability. *Tzakis v. Berger Excavating Contractors, Inc.*, Nos. 09 CH 6159, 10 CH 38809, 11 CH 29586, 13 CH 10423 (Ill. Cir. Ct. Apr. 3, 2015): added to the "Adaptation" slide.

NEW CASES, MOTIONS, AND NOTICES

Oklahoma Sued EPA Over Clean Power Plan

Oklahoma filed a lawsuit against EPA in the federal district court for the Northern District of Oklahoma seeking declaratory and injunctive relief to prevent EPA from proceeding with its proposal to regulate carbon dioxide emissions from existing power plants under Section 111(d) of the Clean Air Act. The complaint alleged that EPA's proposal was "plainly *ultra vires*" and was already forcing Oklahoma to restructure its energy sector and to make substantial expenditures to maintain electric service in the state. *Oklahoma v. McCarthy*, No. 4:15-cv-00369 (N.D. Okla., filed July 1, 2015): added to the "Challenges to Federal Action" slide.

Center for Biological Diversity and Former EPA Scientist Petitioned EPA to Regulate Carbon Dioxide Under TSCA

The Center for Biological Diversity and a retired EPA scientist submitted a petition to EPA requesting that the agency adopt regulations under Section 6 of the Toxic Substances Control Act (TSCA) to protect public health and the environment from harms associated with anthropogenic emissions of carbon dioxide. The petitioners argue that such emissions meet the standard for regulating under Section 6 because they have the potential to change ocean chemistry, putting marine ecosystems at risk. As an alternative to regulation under Section 6, the petitioners asked that EPA adopt a rule under Section 4 of TSCA requiring manufacturers and processors responsible for the generation of carbon dioxide to conduct testing if the agency determines that

insufficient information is available to determine the effects of carbon dioxide emissions. *Petition for Rulemaking Pursuant to Section 21 of the Toxic Substances Control Act, 15 U.S.C. § 2620, Concerning the Regulation of Carbon Dioxide* (June 30, 2015): added to the "Force Government to Act/Other Statutes" slide.

Coal Mine Owner Asked for Stay of Colorado District Court's NEPA Decision

After a federal district court in Colorado deemed the environmental review for a coal mine expansion insufficient, the coal mine's owner appealed the court's decision in the Tenth Circuit Court of Appeals and asked for a stay pending appeal. On June 29, 2015, the Tenth Circuit issued an order questioning whether the district court's judgment was final and suspending briefing. The order noted that the district court had not vacated agency approval of the expansion, and instead had given the Office of Surface Mining Reclamation and Enforcement 120 days to fulfill its review obligations under the National Environmental Policy Act (NEPA), after which the court indicated it would issue an order of vacatur if the agency had not completed its work. *WildEarth Guardians v. United States Office of Surface Mining Reclamation and Enforcement*, No. 15-1186 (10th Cir. order suspending briefing schedule June 29, 2015); *WildEarth Guardians v. United States Office of Surface Mining Reclamation and Enforcement*, No. 13-cv-00518 (D. Colo. notice of appeal and motion for stay June 1, 2015): added to the "Stop Government Action/NEPA" slide.

New York City Appealed FEMA Flood Maps

New York City submitted an appeal of Preliminary Flood Insurance Rate Maps (FIRMs) that the Federal Emergency Management Agency (FEMA) published in January 2015. The City indicated that it had identified significant technical and scientific errors, including overstatement by more than two feet of base flood elevations and misrepresentation of the special flood hazard area (SFHA) by 35%. The City said the Preliminary FIRMs unnecessarily put 26,000 buildings and 170,000 residents in the SFHA. The City distinguished between "*current* flood risk," for which it said it relied on FIRMs to provide a technically accurate picture, and "*future* flood risk," for which the City said it used the FIRMs in consultation with sea level rise projections. The City stated that "[c]limate change continues to be the challenge of our generation and conveying this risk accurately is paramount. Inaccurate FIRMS would undermine the credibility upon which many other efforts are built and would require unnecessary spending." *Appeal of FEMA's Preliminary Flood Insurance Rate Maps for New York City* (June 26, 2015): added to the "Adaptation" slide.

EPA Asked Fourth Circuit for Writ of Mandamus After Federal Court in West Virginia Ordered EPA to Respond to Discovery Requests in Case Seeking Clean Air Act Jobs Study

The federal district court for the Northern District of West Virginia ordered EPA to comply with discovery requests made by coal companies in their lawsuit seeking to compel EPA to undertake an evaluation of the effects on employment of administration and enforcement of the Clean Air Act. The court noted that "little meaningful discovery" had occurred even though EPA had already filed a motion for summary judgment. After the district court denied reconsideration, EPA filed a petition for writ of mandamus in the Fourth Circuit Court of Appeals, asking the

appellate court to direct the district court to vacate the discovery order and disallow discovery. EPA said that this unusual relief was warranted because "Congress strictly limited the scope of judicial inquiry in nondiscretionary-duty suits like this one, and the extraordinarily broad discovery compelled by the district court has no reasonable prospect of unearthing evidence relevant to the ultimate disposition of this case." *In re McCarthy*, No. 15-1639 (4th Cir., petition for writ of mandamus filed June 12, 2015); *Murray Energy Corp. v. McCarthy*, 5:14-cv-00039 (N.D. W. Va. May 29, 2015): added to the "Challenges to Federal Action" slide.

Environmental Groups Challenged BLM Resource Management Plan for Bakersfield Area in California

Two environmental groups filed a lawsuit in federal court in California challenging the environmental review conducted by the United States Bureau of Land Management (BLM) for the resource management plan for 400,000 acres of public land and 1.2 million acres of subsurface mineral estate "at the epicenter of oil and gas drilling in California" in the area of Bakersfield. The plaintiffs contended that the environmental impact statement (EIS) prepared for the plan did not include an adequate discussion of alternatives, and that the EIS failed to disclose significant environmental impacts, including the climate-related impacts of hydraulic fracturing. The plaintiffs also claimed that BLM should have prepared a supplemental EIS to take into account new information on the impacts of unconventional oil and gas extraction techniques. *Center for Biological Diversity v. United States Bureau of Land Management*, No. 2:15-cv-4378 (C.D. Cal., filed June 10, 2015): added to the "Stop Government Action/NEPA" slide.

Federal Government Appealed Decision That Vacated Navajo Mine Permit Revision

The United States Office of Surface Mining Reclamation and Enforcement (OSM) and other federal defendants joined the owner of the Navajo Mine in New Mexico in appealing March and April decisions by the federal district court for the District of New Mexico that vacated the federal approval of a permit revision. The approval would allow expansion of the coal mine. The court said OSM should have considered the indirect effects of the mine's expansion—in particular, the impacts of mercury deposition in the area of the coal-fired Four Corners Power Plant, which uses all of the coal produced from the mine. *Diné Citizens Against Ruining Our Environment v. Office of Surface Mining Reclamation and Enforcement*, No. 12-cv-01275 (D. Colo. notice of appeal June 5, 2015): added to the "Stop Government Action/NEPA" slide.

Rehearing Sought on D.C. Circuit Ruling That Petitioners Challenging Car and Truck Standards Lacked Standing

Petitioners who unsuccessfully challenged the greenhouse gas and fuel economy standards for new cars and trucks before the D.C. Circuit Court of Appeals asked the court for rehearing en banc. The court had found that these petitioners—who argued that EPA failed to comply with a statutory mandate to submit rules for peer review to the Science Advisory Board (SAB)—lacked standing. The court said the petitioners failed to establish causation or redressability because their alleged injury of increased cost to purchase vehicles would not be redressed since the standards, which were issued by the National Highway Traffic Safety Administration (NHTSA) as well as EPA, would continue to apply because the SAB requirement did not apply to NHTSA.

In their petition for rehearing en banc, the petitioners argued that the standing determination conflicted with Supreme Court precedent on redressability. The petitioners also argued that the case involved a question of exceptional importance. *Delta Construction Co., Inc. v. EPA*, Nos. 11-1428, 11-1441, 12-1427; *California Construction Trucking Association, Inc. v. EPA*, No. 13-1076 (D.C. Cir., petition for reh'g en banc filed June 4, 2015).f

Environmental Groups Challenged Chukchi Sea Exploration Plan

Ten environmental and Alaska Native groups filed a petition in the Ninth Circuit Court of Appeals challenging the Bureau of Ocean Energy Management's approval of an offshore oil exploration plan for the Chukchi Sea in the Arctic Sea off the coast of Alaska. The petitioners claimed that the approval of the plan, which was submitted by Shell Gulf of Mexico Inc., violated the Outer Continental Shelf Lands Act and the National Environmental Policy Act. *Alaska Wilderness League v. Jewell*, No. 15-71656 (9th Cir., filed June 2, 2015): added to the "Stop Government Action/NEPA" slide.

Environmental Groups to Challenge New Approval of Chukchi Sea Lease Sale

After the Bureau of Ocean Energy Management (BOEM) affirmed its approval of an oil and gas lease sale in the Chukchi Sea off the northwest coast of Alaska, the parties notified the federal district court for the District of Alaska that the plaintiffs had decided to challenge BOEM's determination. These developments regarding the Chukchi Sea lease sale follow the Ninth Circuit's ruling in January 2014 that BOEM's earlier environmental review for the lease sale was deficient because it was based on an arbitrary estimate of the amount of economically recoverable oil. In response to the Ninth Circuit's decision, BOEM issued a supplemental environmental impact statement in February 2015 and a record of decision in March. In the challenge to this round of decision-making, the parties are to complete their briefing by October 9, 2015. *Native Village of Point Hope v. Jewell*, No. 1:08-cv-00004 (D. Alaska joint status report June 1, 2015): added to the "Stop Government Action/NEPA" slide.

Challenge to Louisiana LNG Project Was Withdrawn

On March 16, 2015, Sierra Club and Gulf Restoration Network asked the D.C. Circuit Court of Appeals to dismiss their challenge to Federal Energy Regulatory Commission (FERC) approvals of liquefied natural gas (LNG) facilities in Louisiana. The court granted the request on the same day. Earlier in the year, the D.C. Circuit had denied FERC's motion for summary affirmance. *Sierra Club v. Federal Energy Regulatory Commission*, No. 14-1190 (D.C. Cir Mar. 16, 2015): added to the "Stop Government Action/NEPA" slide.

Update #75 (June 2, 2015)

FEATURED DECISION

Colorado Federal Court Held That Environmental Review for Mining Plan Modifications Must Consider Coal Combustion Impacts

The federal district court for the District of Colorado ruled that the environmental review for two mining plan modifications that changed the location and increased the amount of coal to be mined had not complied with the National Environmental Policy Act (NEPA). The court ruled that WildEarth Guardians had organizational standing to bring the action, and that the action was neither moot nor barred by the doctrines of laches or forfeiture. In particular, the court noted that the federal defendants, which included the United States Office of Surface Mining Reclamation and Enforcement (OSM) and the Secretary of the Interior, could not invoke laches when OSM had not complied with "its most basic NEPA duty of providing public notice." On the merits, the court held that OSM's consideration of direct and indirect air quality impacts was insufficient. The court said that a NEPA review should consider coal combustion impacts as indirect effects of the mining plan modifications and that uncertainty about the timing or rate of the coal combustion or the type of emissions controls that would be in place could not justify ignoring the combustion impacts. The court, however, declined to vacate the two mining plan modifications. At one of the mines, all of the federal coal covered by the modification had already been mined. At the other mine, the court found that vacatur was not warranted given potential hardship it could cause to mine employees and the power plant to which the mine supplied coal, and given that mining had occurred in the area since the 1970s, that its impacts had been studied over the years, that state agencies had considered the impacts of the mining plan modifications, and that OSM had changed its NEPA practices. *WildEarth Guardians v. United States Office of Surface Mining Reclamation and Enforcement*, No. 13-cv-00518 (D. Colo. order May 8, 2015): added to the "Stop Government Action/NEPA" slide.

DECISIONS AND SETTLEMENTS

After Corps Prepared New Environmental Report, Alaska Federal Court Upheld Issuance of Fill Permit in National Petroleum Reserve

The federal district court for the District of Alaska upheld the approval by the United States Army Corps of Engineers (Corps) of a permit to fill wetlands in the National Petroleum Reserve in Alaska for development of a drilling site. The Corps prepared a supplemental information report (SIR) after the court held in 2014 that the Corps had not provided a reasoned explanation for its decision not to prepare a supplemental environmental impact statement (SEIS) to update a 2004 EIS. Pursuant to an agreement between the parties and an order of the court, the SIR included a discussion of whether new information about climate change necessitated preparation of an SEIS. The Corps considered both the impact of climate change on the project and the project's impacts on climate change. The court agreed with plaintiffs that the Corps had conducted "only a minimalist review" of the impacts of climate change. Nevertheless, the court found that this assessment was adequate given the absence of detailed instructions from the court regarding the analysis the Corps should have performed and given that the plaintiffs had not identified specific climate change information the Corps should have considered. The court also found that the Corps' determinations that other new information and changes to the project did not require an SEIS were not arbitrary and capricious, and that the Corps had an adequate basis for its determination that the project was the Least Environmentally Damaging Practicable Alternative as required under Section 404 of the Clean Water Act. Judgment was entered for the defendants on May 29, 2015. *Kunaknana v. United States Army Corps of Engineers*, No. 3:13-

cv-00044 (D. Alaska May 26, 2015): added to the "Stop Government Action/NEPA" slide.

Oregon Circuit Court Said Public Trust Doctrine Did Not Compel State to Address Climate Change

In an action in which Oregon children and their families argued that the public trust doctrine compelled the State to take action to reduce carbon dioxide emissions, an Oregon Circuit Court ruled that the State's public trust doctrine applied only to submerged and submersible lands, and not to other resources such as the atmosphere, waters of the State, beaches and shorelands, and fish and wildlife. With respect to the atmosphere, the court questioned "whether the atmosphere is a 'natural resource' at all." The court further declared that the State did not have a fiduciary obligation to protect submerged and submersible lands from the impacts of climate change, concluding that the public trust doctrine merely restricted the ability of the State to entirely alienate such lands. The court also said that granting the relief sought by plaintiffs could violate the separation of powers doctrine, and that the court would not have had sufficient information before it to make a determination as to appropriate concentrations of carbon dioxide in the atmosphere. The plaintiffs have indicated that they will appeal the decision. An Oregon appellate court previously reversed the circuit court's determination that it did not have jurisdiction over the lawsuit. *Chernaik v. Brown*, No. 16-11-09273 (Or. Cir. Ct. opinion and order May 11, 2015): added to the "Common Law Claims" slide.

D.C. Circuit Denied Rehearing in Challenges to EPA Implementation of Greenhouse Gas Requirements

The D.C. Circuit issued orders denying petitions for rehearing of its 2013 decision that dismissed challenges by Texas, Wyoming, and industry groups to EPA rules that imposed federal permitting requirements for greenhouse gases. The petitioners had argued that rehearing was necessary because the Supreme Court's decision in *Utility Air Regulatory Group v. EPA* negated the D.C. Circuit's dismissal of the proceedings on standing grounds. The D.C. Circuit's 2013 ruling was grounded in its interpretation of the Clean Air Act's Prevention of Significant Deterioration (PSD) permitting requirements as "self-executing" for stationary sources that emitted greenhouse gases—the D.C. Circuit therefore reasoned that petitioners' injuries were caused by the statute itself and not by EPA's actions. Petitioners argued in their petitions for rehearing that since the Supreme Court expressly rejected this interpretation, the D.C. Circuit's ruling should be vacated and the petitions for review should be granted or the matter reheard. The denial of the petitions for rehearing came after the D.C. Circuit ordered EPA in April 2015 to rescind regulations that required PSD and Title V permits solely based on a source's greenhouse gas emissions. *Texas v. EPA*, Nos. 10-1425 et al., *Utility Air Regulatory Group v. EPA*, Nos. 11-1037 et al. (D.C. Cir. order denying panel rehearing and order denying rehearing en banc May 4, 2015): added to the "Challenges to Federal Action" slide.

EPA to Respond by July 31 to Sierra Club Request for Objection to Air Permit for New Hampshire Coal-Fired Power Plant

Under the terms of a proposed consent decree filed in the federal district court for the District of Columbia, the United States Environmental Protection Agency (EPA) would have to respond by

July 31, 2015 to a Sierra Club petition submitted in July 2014 that asked the agency to object to an air pollution operating permit issued for a coal-fired power plant in Portsmouth, New Hampshire. Sierra Club filed a lawsuit in December 2014 to compel EPA to respond to the petition. *Sierra Club v. McCarthy*, No. 4:14-cv-02149 (D.D.C., proposed consent decree filed May 1, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

Court of Federal Claims Said Hurricane Katrina Flooding Constituted Temporary Taking

A United States Court of Federal Claims held that the federal government was liable for a temporary taking caused by certain flooding during Hurricane Katrina and subsequent storms. The court found that the plaintiffs, who were property owners in St. Bernard Parish or the Lower Ninth Ward of the City of New Orleans, had established that the flooding of their properties was caused by the U.S. Army Corps of Engineers' construction, expansions, operation, and failure to maintain the Mississippi River-Gulf Outlet (MR-GO), a 76-mile-long navigational channel. One federal government argument rejected by the court was that the flooding was caused, not by MR-GO, but by subsidence, sea level rise, and land loss. With respect to this issue, the court said: "Although subsidence, sea level rise, and land loss took their toll on the region, the evidence in this case demonstrates that the MR-GO had the principal causal role in creating the environmental damage …." Sabin Center Fellow Jennifer Klein wrote about this case in May. *St. Bernard Parish Government v. United States*, No. 1:05-cv-01119 (Fed. Cl. May 1, 2015): added to the "Adaptation" slide.

Author of 2006 Report to Congress on Climate Change Withdraws Lawsuit Against Climate Science Blogger

In March 2014, Edward Wegman, the lead author of a 2006 report to Congress that purported to undermine the scientific basis for climate change, filed a lawsuit against John Mashey, a computer scientist who studies "climate science & anti-science and energy issues" and who has written about these issues in various venues, including DeSmogBlog, Skeptical Inquirer, and Deep Climate. Wegman alleged that Mashey's writings about the 2006 report—in which Mashey asserted numerous problems with the report, including a significant amount of plagiarized text—caused Wegman to be investigated by his university and to lose his position as an editor of a journal. Wegman asserted claims of tortious interference with contract, common law conspiracy, and statutory conspiracy. The action was originally filed in Virginia state court but was removed to the federal district court for the Eastern District of Virginia. On April 30, 2015, Wegman filed a notice of voluntary dismissal. A parallel action asserting the same claims was filed by another author of the 2006 report, Yasmin Said, and was also withdrawn. *Wegman v. Mashey*, No. 1:15-cv-00486 (E.D. Va. notice of voluntary dismissal Apr. 30, 2015): added to the "Climate Protesters and Scientists" slide.

EAB Upheld FutureGen Carbon Sequestration Permits

EPA's Environmental Appeals Board (EAB) denied review of four underground injection control permits for the injection and storage of carbon dioxide. The permits were issued in conjunction with plans for the now-suspended FutureGen carbon capture and storage project in Illinois. The EAB concluded that the petitioners, who owned property in the vicinity of the

project, had identified no clear error of fact or law, abuse of discretion, or matter of policy that warranted EAB review. *In re FutureGen Industrial Alliance, Inc.*, Appeal Nos. UIC 14-68; UIC 14-69; UIC 14-70; UIC 14-71 (EAB Apr. 28, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

NEW CASES, MOTIONS, AND NOTICES

Rehearing Petition Sought Vacatur of EPA's BACT Rules for Greenhouse Gas Emissions from Stationary Sources

After the D.C. Circuit determined in April 2015 that the Supreme Court's decision in *Utility Air Regulatory Group v. EPA* did not require vacating EPA's permitting regulations for greenhouse gas emissions from stationary sources, petitioners asked for panel rehearing and rehearing en banc. The petitioners contended that the D.C. Circuit should have vacated EPA's regulations requiring sources subject to the Prevention of Significant Deterioration permit program solely due to their emissions of other pollutants to use best available control technology (BACT) to reduce greenhouse gas emissions. The petitioners argued that the Supreme Court in *UARG v. EPA* had held that these BACT provisions were defective because, among other reasons, they did not establish a *de minimis* level of greenhouse gas emissions below which BACT would not be required. It therefore was inappropriate, the petitioners said, for the D.C. Circuit to allow EPA "merely to 'consider,' per its own ruminations, whenever it feels so inclined," the extent to which *UARG v. EPA* required revisions to the BACT provisions. The petitioners also contended that the D.C. Circuit's amended judgment was at odds with its own precedent concerning when remand without vacatur is appropriate. *Coalition for Responsible Regulation v. EPA*, Nos. 09-1322 et al.; *Coalition for Responsible Regulation v. EPA*, Nos. 10-1073 et al.; *Coalition for Responsible Regulation v. EPA*, Nos. 10-1092 et al.; *American Chemistry Council v. EPA*, Nos. 10-1167 et al. (D.C. Cir., petition for rehearing May 26, 2015): added to the "Challenges to Federal Action" slide.

Sierra Club Filed Challenge to FERC Approvals of Corpus Christi LNG Facilities

On May 11, 2015, Sierra Club filed a petition for review in the D.C. Circuit Court of Appeals seeking to overturn the Federal Energy Regulatory Commission's (FERC's) approval of liquefied natural gas (LNG) export and import facilities on Corpus Christi Bay in Texas, as well as a 23-mile-long pipeline and two compressor stations. Five days earlier, FERC had denied Sierra Club's request for a rehearing of its order authorizing these projects. Sierra Club has asserted various omissions in FERC's environmental review of the project, including failure to consider both the impacts of induced natural gas production and the potential impacts on U.S. electric sector air emissions due to power generators shifting from gas to coal as result of export-driven rises in natural gas prices. Sierra Club has also argued that FERC failed to take a hard look at the impacts of the project's emissions of greenhouse gases. In its order denying a rehearing, FERC said that the National Environmental Policy Act did not require it to analyze the impacts of additional natural gas production as an indirect effect of the projects or in its analysis of the projects' cumulative effects. FERC also said that Sierra Club had not produced any evidence to support the theory that the project would result in a shift to domestic coal use for electricity production and indicated that reliance on such a theory would require FERC "to

engage in speculation upon speculation." FERC also found that its analysis of impacts on greenhouse gas emissions and climate change was consistent with the Council on Environmental Quality's revised draft guidance and was otherwise adequate. *Sierra Club v. Federal Energy Regulatory Commission*, No. 15-1133 (D.C. Cir., filed May 11, 2015); *In re Corpus Christi Liquefaction, LLC*, Nos. CP12-507-001, CP12-508-001 (FERC, order denying reh'g May 6, 2015): added to the "Stop Government Action/NEPA" slide.

Petition for Rehearing Asked D.C. Circuit to Look Again at EPA Rule That Deferred Regulation of Biogenic Carbon Dioxide

Industry groups filed a petition for rehearing of the D.C. Circuit Court of Appeals decision in 2013 that vacated an EPA rule that deferred regulation of "biogenic" carbon dioxide from non-fossil fuel carbon dioxide sources such as ethanol. This litigation had been on hold while other proceedings challenging EPA's regulatory regime for greenhouse gas emissions made their way to the Supreme Court, culminating in the Supreme Court's decision in *Utility Air Regulatory Group v. EPA* in June 2014 and eventually in the D.C. Circuit's amended judgment in April 2015. The industry groups argued in their petition for rehearing that the D.C. Circuit needed to consider *UARG v. EPA's* impact on the rule deferring regulation of biogenic carbon dioxide, given that the "Deferral Rule" amended the "Tailoring Rule," which was partially invalidated by *UARG v. EPA*. The industry groups also contended that the D.C. Circuit should have considered remand without vacatur as an appropriate remedy and that the D.C. Circuit had erred in finding that the record did not support the Deferral Rule. *Center for Biological Diversity v. EPA*, No. 11-1101 (D.C. Cir., petition for rehearing May 11, 2015): added to the "Force Government to Act/Clean Air Act" slide.

Environmental Groups Challenged FERC Approval of Maryland LNG Project After FERC Denied Rehearing

On May 7, 2015, environmental groups filed a petition for review of FERC's authorization of the construction and operation by Dominion Cove Point LNG, LP, of liquefaction and terminal facilities for the export of liquefied natural gas (LNG) in Cove Point, Maryland, and associated pipeline facilities to transport natural gas to the LNG terminal facilities. On May 4, 2015, FERC had denied several requests for rehearing. In denying the rehearing requests, FERC concluded, among other things, that it was not required to consider the impacts of production activities in the Marcellus Shale region because they were not sufficiently causally related to constitute indirect effects of the Cove Point project. FERC also affirmed its finding "that impacts from additional shale gas development supported by LNG export projects are not reasonably foreseeable." FERC also stood by its consideration of the project's direct greenhouse gas emissions and said that it was not required to consider air emissions and climate change impacts of such emissions from the transportation and ultimate consumption of gas exported from the Cove Point project. FERC rejected the contention that it had not adequately considered potential climate change impacts on the project, including impacts due to severe winds and sea level rise. *EarthReports, Inc. (dba Patuxent Riverkeeper) v. Federal Energy Regulatory Commission*, No. 15-1127 (D.C. Cir., filed May 7, 2015); *In re Dominion Cove Point LNG, LP*, No. CP13-113-000 (FERC, order denying rehearing and stay May 4, 2015): added to the "Stop Government Action/NEPA" slide.

Colorado Federal Court Stays Challenge to Environmental Review for Coal Lease After Parties Indicate They May Settle

In a lawsuit challenging the environmental review for a coal lease where the mine was the sole source of coal for a power plant in Utah, the court granted a joint motion for a stay after the parties indicated that they believed they could reach a settlement. The lawsuit primarily concerns local air impacts. *WildEarth Guardians v. United States Bureau of Land Management*, No. 1:14-cv-01452 (D. Colo. joint motion to stay briefing schedule granted Apr. 6, 2015): added to the "Stop Government Action/NEPA" slide.

Update #74 (May 5, 2015)

FEATURED DECISION

D.C. Circuit Dismissed Challenges to Car and Truck Greenhouse Gas Standards

The D.C. Circuit dismissed challenges to federal greenhouse gas emissions and fuel economy standards for cars and trucks. The regulations were issued by the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA). The car standards were finalized in 2010, and the D.C. Circuit had already upheld them once in 2012. The truck standards were finalized in 2011. The D.C. Circuit said the petitioners who claimed that EPA had violated the Clean Air Act by failing to provide the car and truck regulations to the Science Advisory Board prior to publication had not established standing. The court said the plaintiffs had not demonstrated causation or redressability for the alleged injury—increased cost to purchase vehicles—because even in the absence of the EPA standards, the "substantially identical" NHTSA regulations would continue to apply. The court also dismissed challenges to the truck standards brought by "a business that promotes the use of vegetable oil in place of traditional diesel fuel"; the company alleged that the standards made its products economically infeasible and claimed that the regulations were arbitrary and capricious because, among other reasons, they ignored lifecycle greenhouse gas emissions. The D.C. Circuit said it did not have original jurisdiction over the company's claim against NHTSA because under NHTSA regulations, the company's request for reconsideration of the truck standards had been deemed a petition for rulemaking; jurisdiction for review of denials of petitions for rulemaking is in the district courts. With respect to the claim against EPA, the D.C. Circuit said that the company did not fall within the zone of interests protected by the statute. *Delta Construction Co. v. EPA*, Nos. 11-1428, 11-1441, 12-1427; *California Construction Trucking Association, Inc. v. EPA*, No. 13-1076 (D.C. Cir. Apr. 24, 2015): added to the "Challenges to Federal Action" slide.

DECISIONS AND SETTLEMENTS

Colorado Federal Court Vacated Approval of Navajo Mine Expansion Due to Missing Analysis of Indirect Effects

The federal district court for the District of Colorado vacated the approval of a permit revision that authorized expansion of the Navajo Mine in New Mexico. The court also vacated the environmental assessment and finding of no significant impact (EA/FONSI) that the Office of

Surface Mining Reclamation and Enforcement (OSM) had prepared for the expansion. In March, the court had ruled that OSM's environmental review should have considered the indirect effects of the mine's expansion—in particular, the impacts of mercury deposition in the area of the coal-fired Four Corners Power Plant, for which the Navajo Mine was the sole supplier of coal. In its order vacating the EA/FONSI and permit review approval, the court found that prospective economic harm to the mine's operator did not outweigh "doubts concerning the validity of OSM's actions that are raised by the deficiencies in OSM's EA/FONSI and its approval" of the permit revision. The court also found that the operator and federal respondents had not demonstrated that vacatur was likely to result in closure of the mine or power plant. On April 16, 2015, the Tenth Circuit Court of Appeals rejected the request by the mine's operator for a stay. *Diné Citizens Against Ruining Our Environment v. United States Office of Surface Mining Reclamation & Enforcement*, No. 15-1126 (10th Cir. stay denied Apr. 16, 2015); No. 12-cv-01275 (D. Colo. order Apr. 6, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

California Appellate Court Rejected Challenge to Analysis of Proposed Development's Greenhouse Gas Impacts

A California Court of Appeal upheld the environmental review and land use approvals for a portion of Newhall Ranch, a major commercial and residential development in Los Angeles County. In an unpublished opinion, the court approved the selection of a greenhouse gas emissions significance criterion that was based on the emissions reductions goal in the California Global Warming Solutions Act of 2006, which required adoption of a statewide plan to reduce greenhouse gas emissions to 1990 emissions levels by 2020. The appellate court noted that three other appellate court cases had approved use of significance criteria based on this mandate. The court rejected the argument that this criterion was "illusory" and that the use of a "business-as-usual" emissions baseline was legally impermissible—but noted that the California Supreme Court is currently considering the baseline issue in *Center for Biological Diversity v. Department of Fish and Wildlife*, another case concerning the CEQA review for Newhall Ranch. *Friends of the Santa Clara River v. County of Los Angeles*, No. B256125 (Cal. Ct. App. Apr. 21, 2015): added to the "State NEPAs" slide.

After New EIR, California Superior Court Removed Bar to Expansion of Chevron Refinery

A California Superior Court discharged the writ of mandate that barred Chevron Products Company (Chevron) from proceeding with an expansion project at its oil refinery in the City of Richmond in northern California. The writ was granted in 2009, when the court held that the City's review under the California Environmental Quality Act had been inadequate. Among the shortcomings identified by the court was a failure to mitigate greenhouse gas emissions. After an appellate court affirmed the Superior Court's decision in 2010, the City conducted another review. A final environmental impact report was certified in July 2014. *Communities for a Better Environment v. City of Richmond*, No. MSN08-1429 (Cal. Super. Ct., stipulation and order discharging peremptory writ of mandate filed Apr. 13, 2015): added to the "State NEPAs" slide.

Alaska Federal Court Issued TRO to Prevent Greenpeace from Boarding Arctic-Bound Vessels

The federal district court for the District of Alaska granted a temporary restraining order (TRO) that barred Greenpeace, Inc. (Greenpeace USA) and individuals associated with Greenpeace USA from trespassing and interfering with operations on three vessels that Shell Offshore Inc. and Shell Gulf of Mexico Inc. (together, Shell) plan to use for 2015 oil exploration off the coast of Alaska in the Arctic Ocean. Six individuals had boarded a Shell heavy transport vessel in the Pacific Ocean and scaled the drilling vessel the transport vessel was carrying. The individuals, one of whom was an American employee of Greenpeace, were part of an operation called "The Crossing" that Greenpeace promoted on its website as part of its Save the Arctic campaign. The court concluded that Shell was likely to succeed on the merits of at least one of its claims against Greenpeace USA. The claims included intentional tortious interference with maritime navigation, trespass and trespass to chattels, private nuisance, and civil conspiracy. The court also found that Greenpeace USA's role "in perpetuating the presence of activists" aboard the drilling vessel created a likelihood of immediate irreparable harm with respect to the three vessels. In addition, the court found that the balance of equities and public interest favored granting the TRO, noting that Shell had a "significant and legally valid interest in conducting authorized exploration on its arctic leases without dangerous or tortious interference." The court indicated, however, that it would narrowly tailor the injunctive relief to minimize the impact on Greenpeace USA's legitimate interests in conducting protests and monitoring drilling activities. In addition to barring trespass on the three vessels, the court barred entry into 1,000-meter "safety zones" around the three vessels and set a schedule for determining whether Shell was entitled to preliminary injunctive relief related to other vessels in its fleet. *Shell Offshore Inc. v. Greenpeace, Inc.*, No. 3:15-cv-00054-SLG (D. Alaska, filed Apr. 7, 2015; order granting TRO Apr. 11, 2015): added to the "Climate Protesters and Scientists" slide.

EPA Ordered to Make Limited Changes to PSD and Title V Permitting Regulations After Supreme Court's Decision in *UARG v. EPA*

In an order governing further proceedings after the Supreme Court's 2014 decision in *Utility Air Regulatory Group v. EPA*, the D.C. Circuit accepted EPA's view that *UARG v. EPA* did not require EPA to start from scratch to establish a greenhouse gas permitting regime for stationary sources. Instead, the D.C. Circuit ordered EPA to act "as expeditiously as practicable" to rescind Clean Air Act regulations that required Prevention of Significant Deterioration (PSD) and Title V permits solely based on a source's greenhouse gas emissions. The court also ordered EPA to rescind regulations that would have required EPA to consider lowering the greenhouse gas emissions thresholds for permitting and to "consider whether any further revisions to its regulations are appropriate in light of *UARG v. EPA*." On April 30, the EPA Administrator signed a direct final rule that authorized rescission of PSD permits upon requests from applicants who demonstrate that they would not have been subject to PSD permitting but for their greenhouse gas emissions. The regulation is also to be published as a proposed rule in case adverse comments are received. *Coalition for Responsible Regulation v. EPA*, Nos. 09-1322 et al.; *Coalition for Responsible Regulation v. EPA*, Nos. 10-1073 et al.; *Coalition for Responsible Regulation v. EPA*, Nos. 10-1092 et al.; *American Chemistry Council v. EPA*, Nos. 10-1167 et al. (D.C. Cir. order Apr. 10, 2015): added to the "Challenges to Federal Action" slide.

EPA Agreed to Schedule for Setting Renewable Fuel Obligations for 2014 and 2015

EPA, the American Fuel & Petrochemical Manufacturers (AFPM), and the American Petroleum Institute (API) reached an agreement regarding a schedule for EPA to propose and finalize renewable fuel standards for 2014 and 2015. AFPM and API sued EPA in the federal district court for the District of Columbia in March seeking to compel EPA to fulfill its obligations to promulgate the standards. The proposed consent decree—notice of which was published in the *Federal Register* on April 20—requires EPA to propose renewable fuel obligations for 2015 by June 1, 2015 and to finalize them by November 30, 2015. EPA would also have until November 30, 2015 to finalize the obligations for 2014 and to respond to the plaintiffs' request for a partial waiver of renewable fuel applicable volumes for 2014. EPA also indicated that it was its intention to propose and finalize the renewable fuel volumes for 2016 in the same timeframe as it was addressing the 2015 volumes. *American Fuel & Petrochemical Manufacturers v. EPA*, No. 1:15-cv-394 (D.D.C., proposed consent decree filed Apr. 10, 2015): added to the "Challenges to Federal Action" slide.

Oregon Federal Court Vacated EIS and ROD for Vegetation Management Project in National Forest, But Upheld Climate Analysis

The federal district court for the District of Oregon vacated an environmental impact statement (EIS) and record of decision (ROD) for the Snow Basin Vegetation Management Project in the Wallowa Whitman National Forest in Oregon. In December 2014, the court ruled that the U.S. Forest Service defendants had not complied with the National Environmental Policy Act and the National Forest Management Act (although the court found no fault with the analysis of potential climate change impacts due to short-term reductions in the forest's capacity to store carbon). In its order vacating the EIS and ROD, the court said that it would not void three timber sales contracts that the Forest Service had voluntarily suspended; the court concluded that the determination of what to do regarding the contracts was best left to the agency's discretion. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Peña*, No. 3:12-cv-02271 (D. Or. opinion and order Apr. 6, 2015): added to the "Stop Government Action/NEPA" slide.

NEW CASES, MOTIONS, AND NOTICES

Lawsuit Challenged NMFS Conclusions About Impacts of Shrimp Trawl Fisheries on Sea Turtles

The nonprofit organization Oceana, Inc. (Oceana) filed an Endangered Species Act (ESA) action in the federal district court for the District of Columbia against the Secretary of Commerce, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (NMFS). Oceana challenged a biological opinion issued by NMFS that considered whether the continued operation of Southeast U.S. shrimp trawl fisheries jeopardizes sea turtles protected by the ESA. The complaint included allegations that NMFS disregarded climate change threats to sea turtle habitat and prey. *Oceana, Inc. v. Pritzker*, No. 1:15-cv-00555 (D.D.C., filed Apr. 14, 2015): added to the "Stop Government Action/Other Statutes" slide.

Update #73 (April 8, 2015)

FEATURED DECISION

Massachusetts Court Rebuffed Challenge to Adequacy of State's Greenhouse Gas Reduction Measures

A Massachusetts Superior Court ruled that the Massachusetts Department of Environmental Protection (MassDEP) had substantially satisfied the requirements of the Global Warming Solutions Act, a 2008 law that required MassDEP to "promulgate regulations establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions." MassDEP argued that it had satisfied this mandate by developing three programs: limitations on sulfur hexafluoride leaks, participation in a regional cap-and-trade program for carbon dioxide emissions, and a Low Emission Vehicle program. The court found that each of these programs satisfied the statutory mandate, and said that the plaintiffs' "various quarrels" with the regulatory actions were "hypertechnical and overly exacting." One of the plaintiffs, Conservation Law Foundation, announced on March 25, 2015 that it would appeal the decision. *Kain v. Massachusetts Department of Environmental Protection*, No. SUCV2014-02551 (Mass. Super. Ct. Mar. 23, 2015): added to the "Force Government to Act/Other Statutes" slide.

DECISIONS AND SETTLEMENTS

Federal Court Rejected EPA Defense That Coal Companies Lacked Standing to Bring Jobs Case

The federal district court for the Northern District of West Virginia ruled that coal companies had standing to claim that the U.S. Environmental Protection Agency (EPA) had failed to fulfill its nondiscretionary obligation to conduct evaluations of potential losses or shifts in employment due to the administration and enforcement of the Clean Air Act. The court said that the alleged injuries from the power industry's discontinuance of the use of coal were fairly traceable to EPA actions, including EPA's failure to conduct the employment evaluations. The court further found that such injuries would be redressable because conducting the evaluations could result in reversal of prior EPA actions. The court also found that the coal companies fell within the zone of interests protected by the Clean Air Act provision requiring the evaluations. In addition, the court held that the companies had procedural and informational standing. *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39 (N.D. W. Va. Mar. 27, 2015): added to the "Challenges to Federal Action" slide.

Arizona Court Upheld Decision to Withhold Emails of University of Arizona Climate Scientists

The Arizona Superior Court in Pima County ruled that the Arizona Board of Regents did not act arbitrarily and capriciously when it denied access to more than 1,700 emails of two University of Arizona climate scientists. The emails were among documents requested by the Energy & Environmental Legal Institute pursuant to Arizona's public records law. Based on a

representative set of 90 emails, the court concluded that the Board of Regents did not act arbitrarily or capriciously or abuse its discretion when it withheld emails concerning prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary on the ground that production of these emails "would have a chilling effect on the ability and likelihood of professors and scientists engaging in frank exchanges of ideas and information." The court noted that the Board of Regents had provided "compelling" support of this position through the affidavits of scholars, academic administrators, and professors. *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. C20134963 (Ariz. Super. Ct. Mar. 24, 2015): added to the "Climate Change Protesters and Scientists" slide.

Court Granted Request for Extradition of Man Allegedly Involved in Fraudulent Trading of Greenhouse Gas Emissions Allowances in Germany

A magistrate judge in the federal district court for the Northern District of California granted the U.S. government's request for a certificate of extraditability in the case of a man charged in Germany with 89 counts of tax evasion. The charges in Germany include allegations of fraud in connection with the trade of greenhouse gas emissions allowances. *In re Azizi*, No. 5:14-XR-90282 (N.D. Cal. Mar. 20, 2015): added to the "Regulate Private Conduct" slide.

Federal Court Denied New Hampshire Power Plant Operator's Request to Intervene in Citizen Suit

The federal district court for the District of Columbia denied a power plant operator's motion to intervene in a citizen suit in which Sierra Club sued EPA for failing to respond to its petition concerning the operator's plant. Sierra Club asked EPA to object to a proposed permit for the plant, which is located in Portsmouth, New Hampshire, and sued when EPA did not respond to the petition. EPA and Sierra Club had reached a tentative agreement to settle the lawsuit; the power plant operator sought to intervene, arguing that otherwise its interests would not be adequately represented. The court concluded that the operator was not entitled to intervene as of right because Sierra Club's lawsuit involved only the timing of EPA's response and not the validity or terms of the operator's permit. The court also declined to grant permissive intervention because the parties had already reached a tentative settlement with which the operator's intervention could interfere. *Sierra Club v. McCarthy*, No. 1:14-cv-2149 (D.D.C. Mar. 17, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

Massachusetts Court Dismissed Harvard Students' Divestment Lawsuit

The Massachusetts Superior Court dismissed an action in which Harvard students asked the court to compel Harvard University to divest from fossil fuel companies. The court ruled that the individual students did not have standing to claim mismanagement of charitable assets based on their status as students because their rights as students were "widely shared" with thousands of other Harvard students and were not "specific" and "personal" enough to endow them with standing. The court also rejected the students' argument that Harvard's investment in fossil fuels interfered with personal rights because it diminished their education in fields such as environmental law and because Harvard's funding of "climate change denial" chilled academic freedom and impeded the students' association with "like-minded colleagues." The court noted

that these impacts were not "personal" to the plaintiffs since numerous other students would be affected. The court also found that the allegations were too speculative and conclusory. The court also dismissed the claim of "intentional investment in abnormally dangerous activities." The court said that it was not its place either to recognize this proposed new tort action or to extend existing law on standing to permit the plaintiffs to litigate on behalf of "Future Generations," as they sought to do. The court also said that an "overarching" problem with the action was the absence of limitations on the subject matter and scope of this type of lawsuit. The court noted that while the student plaintiffs "fervently believe" that climate change poses the most serious threat to the world, other students would just as fervently believe that some other cause posed a serious threat. *Harvard Climate Justice Coalition v. President and Fellows of Harvard College ("Harvard Corporation")*, No. 2014-3620-H (Mass. Super. Ct. Mar. 17, 2015): added to the "Regulate Private Conduct" slide.

New Mexico Appellate Court Said Judiciary Could Not Rely on Public Trust Doctrine to Compel Regulation of Greenhouse Gases

The New Mexico Court of Appeals ruled that courts could not require the state to regulate greenhouse gas emissions based on a common law duty arising from the public trust doctrine. The ruling affirmed a 2013 trial court decision granting summary judgment to the state in a case brought by WildEarth Guardians and parents on behalf of their minor child. The appellate court concluded that although the New Mexico constitution recognized a public trust obligation to protect natural resources, including the atmosphere, the obligation had been incorporated into and implemented by state constitutional and statutory provisions, including New Mexico's Air Quality Control Act. Therefore, the plaintiffs could not use a separate common law cause of action to make their arguments regarding the state's duty to protect the atmosphere. The appellate court noted that the plaintiffs had not appealed the New Mexico Environmental Improvement Board's repeal of restrictions on greenhouse gas emissions; nor had the plaintiffs proposed other greenhouse gas regulations pursuant to Air Quality Control Act. *Sanders-Reed v. Martinez*, No. 33,110 (N.M. Ct. App. Mar. 12, 2015): added to the "Common Law Claims" slide.

California Supreme Court Agreed to Consider Whether CEQA Required Review of Consistency with 2005 Executive Order's Greenhouse Gas Emissions Targets

The California Supreme Court granted the San Diego Association of Governments' (SANDAG's) petition for review of an appellate court decision that found that SANDAG's environmental review for its regional transportation plan was inadequate. In November 2014, the California Court of Appeal said that the review should have considered the plan's consistency with greenhouse gas emissions targets set in a 2005 executive order signed by Governor Arnold Schwarzenegger. The Supreme Court granted review only on the issue of whether compliance with the California Environmental Quality Act (CEQA) required an analysis of the regional transportation plan's consistency with the executive order's goals. *Cleveland National Forest Foundation v. San Diego Association of Governments*, No. S223603 (Cal. Mar. 11, 2015): added to the "State NEPAs" slide.

California Supreme Court Denied Review of Decision Setting Aside San Diego County's Climate Action Plan

The California Supreme Court denied a petition for review of a lower appellate court decision that set aside San Diego County's approval of a climate action plan. The lower appellate court said that the climate action plan required preparation of a supplemental environmental impact report, and that the plan should have included enforceable mitigation measures. *Sierra Club v. County of San Diego*, No. S223591 (Cal. Mar. 11, 2015): added to the "State NEPAs" slide.

Though Critical of EPA FOIA Practices, Federal Court Declined to Impose Punitive Sanctions

The federal district court for the District of Columbia denied the request of the Landmark Legal Foundation (LLF) for punitive spoliation sanctions against EPA in a lawsuit brought to compel production of documents under the Freedom of Information Act (FOIA). LLF believed records it requested in August 2012 would reveal that EPA improperly delayed controversial environmental regulations prior to that year's presidential election. In 2013, the court allowed limited discovery after finding that LLF had raised questions of fact regarding whether certain records, including potentially relevant personal emails for certain EPA officials, had been excluded from EPA's records search. A year later, LLF sought sanctions, arguing that EPA had failed to search and recover relevant personal emails and text messages. In denying the sanctions motion, the court found that LLF had not presented sufficient evidence that EPA failed to preserve responsive documents in bad faith. The court, however, criticized EPA's response to the FOIA request, finding that some of the document searches could only have been done with "abject carelessness" and that an EPA employee had exhibited "utter indifference" to the agency's FOIA obligations. The court was also critical of EPA's "baffling" refusal to take responsibility for its mistakes during the course of the litigation. Nonetheless, the court said that spoliation could not be inferred from EPA's delayed response, and that negligent failure to preserve records was not sufficient to warrant punitive sanctions. The court said, however, that it "would implore" the executive branch to take steps to ensure that all EPA FOIA requests are "treated with equal respect and conscientiousness" regardless of the requester's political affiliation. *Landmark Legal Foundation v. Environmental Protection Agency*, No. 1:12-cv-01726 (D.D.C. Mar. 2, 2015): added to the "Force Government to Act/Other Statutes" slide.

Federal Court Dismissed Steel Company's Clean Air Act Citizen Suit Against Rival Company

The federal district court for the Eastern District of Arkansas dismissed a Clean Air Act citizen suit brought against a steel company by a rival steel company concerning a Prevention of Significant Deterioration permit issued by the Arkansas Department of Environmental Quality. The plaintiff's allegations included that the defendant had failed to satisfy Best Available Control Technology (BACT) requirements, including by conducting an improper greenhouse gas BACT analysis and by improperly eliminating carbon capture and sequestration as a control technology. The court dismissed the action as an impermissible collateral attack on a state-issued air permit. *Nucor Steel-Arkansas v. Big River Steel, LLC*, No. 3:14-CV-00193 (E.D. Ark. Feb. 25, 2015): added to the "Regulate Private Conduct" slide.

NEW CASES, MOTIONS, AND NOTICES

Competitive Enterprise Institute Sought EPA Correspondence Regarding Congressional Inquiries into Climate Research Funding

The Competitive Enterprise Institute (CEI) filed a lawsuit against EPA to compel production of correspondence between EPA and four federal legislators concerning inquiries that the legislators had made regarding funding for climate research. CEI submitted its Freedom of Information Act requests to EPA in late February and early March 2015. The legislators whose correspondence is the subject of the requests are three senators who had sent letters to fossil fuel companies and trade associations seeking information about their funding of climate research and advocacy and a congressman who asked universities to provide information about climate researchers they employed. *Competitive Enterprise Institute v. United States Environmental Protection Agency*, No. 1:15-cv-00466 (D.D.C., filed Apr. 1, 2015): added to the "Climate Protesters and Scientists" slide.

Challenge to Renewal Fuel Standard Delays Was Filed in District of Columbia Federal Court

American Fuel & Petrochemical Manufacturers (AFPM) and American Petroleum Institute (API) filed an action in the federal district court for the District of Columbia to compel EPA to establish renewable fuel volume requirements for the 2014 and 2015 compliance years. The trade associations asserted that EPA had ignored its nondiscretionary duty to publish annual renewable fuel volumes and renewable fuel obligations by November 30 of the year preceding each compliance year. The trade associations also alleged that EPA had failed to respond to the organizations' 2013 request for a partial waiver of the applicable renewable fuel volumes for 2014, which are established by the Clean Air Act. AFPM and API filed notices of their intent to file the lawsuit in November and December 2014. EPA announced in the *Federal Register* on December 9, 2014 that it would not finalize the 2014 standards until sometime in 2015; EPA has not yet proposed 2015 standards. *American Fuel & Petrochemical Manufacturers v. McCarthy*, No. 1:15-cv-00394 (D.D.C., filed Mar. 18, 2015): added to the "Challenges to Federal Action" slide.

Trade Associations Challenged Constitutionality of Oregon Clean Fuels Program

Three trade associations—American Fuel & Petrochemical Manufacturers, American Trucking Association, and Consumer Energy Alliance—filed a lawsuit in federal court in Oregon to enjoin the state's Clean Fuels Program. The plaintiffs claimed that the program, which requires reductions in the carbon intensity of fuels produced in or imported into the state, violates the U.S. Constitution's Commerce Clause because it discriminates against transportation fuels imported into Oregon and attempts to regulate economic activities such as extraction, production, and distribution of transportation fuels that occur outside Oregon's borders. The plaintiffs contended that the regulation of economic conduct outside the state also violates "principles of interstate federalism embodied in the federal structure of the United States Constitution." The three organizations also claimed that the Clean Fuels Program violates the Supremacy Clause because it is preempted by federal laws, including the Clean Air Act, the Energy Policy Act of

2005, the Energy Independence and Security Act of 2007, and the federal Renewable Fuels Standard. *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, No. 3:15-cv-00467 (D. Or., filed Mar. 23, 2015): added to the "Challenges to State Action" slide.

Trade Association Challenged Oregon Regulations for Clean Fuels Program

The Western States Petroleum Association (WSPA) filed a petition for judicial review in the Oregon Court of Appeals to challenge regulations adopted in January 2015 to implement Oregon's Clean Fuels Program. WSPA indicated in a press release that sufficient alternative fuels would not be available to meet the regulations' requirements. *Western States Petroleum Association v. Oregon Commission on Environmental Quality*, No. A158944 (Or. Ct. App., filed Mar. 6, 2015): added to the "Challenges to State Action" slide.

CEQA Lawsuit Challenged Refining Facility Project and Alleged Undisclosed Impacts from Increased Transportation and Refining of Low-Quality Oil Feedstocks

Communities for a Better Environment (CBE) filed a lawsuit in California Superior Court alleging that Contra Costa County failed to comply with the California Environmental Quality Act when it approved a project to allow Phillips 66 to modify and augment an existing facility to recover additional butane and propane. CBE contended that the environmental impact report (EIR) prepared for the project obscured the increase in refining of lower-quality oil feedstocks that would occur as a result of the project. CBE alleged that the EIR therefore did not adequately disclose impacts that would occur as a result of the transportation and refining of the lower-quality feedstocks, including, among other impacts, increased emissions of greenhouse gases. *Communities for a Better Environment v. Contra Costa County*, No. N15-0301 (Cal. Super. Ct., filed Mar. 4, 2015): added to the "State NEPAs" slide.

Environmental Organizations Challenged Port of Seattle Lease for Shell Arctic Drilling Fleet

Four environmental organizations filed a lawsuit against the Port of Seattle alleging that it had improperly entered into a lease pursuant to which it would serve as a homeport for Royal Dutch Shell's Arctic drilling fleet. The organizations claimed that the Port had illegally circumvented the State Environmental Policy Act and had therefore avoided a full assessment of the project's environmental impacts. The organizations also contended that the Port was required to obtain a revision of its substantial shoreline development permit prior to entering into the lease. *Puget Soundkeeper Alliance v. Port of Seattle*, No. 15-2-05143-1 SEA (Wash. Super. Ct., filed Mar. 2, 2015): added to the "State NEPAs" slide.

Update #72 (March 3, 2015)

FEATURED DECISION

California Appellate Court Upheld AB 32's Offset Program

The California Court of Appeal ruled that the offset component of California's cap-and-trade

program for greenhouse gas emissions did not violate the California Global Warming Solutions Act of 2006 (AB 32). Two environmental groups had charged that the offset program did not satisfy AB 32's additionality requirements, and in particular that the California Air Resources Board (CARB) had not ensured that offset projects' emission reductions would be "in addition to … any other greenhouse gas emission reduction that otherwise would occur." The court was not persuaded by "the rather pedantic position" that AB 32 required "unequivocal proof" that an offset project's emission reduction would not otherwise occur. The court called this interpretation "unworkable" and said that such a requirement would not account "for the fact that is virtually impossible to *know* what otherwise would have occurred in most cases." The appellate court instead concluded that AB 32 delegated rulemaking authority to CARB to establish a "workable method of ensuring additionality" and that CARB had not acted arbitrarily or capriciously in formulating the offset protocols. The court also ruled that AB 32 authorized CARB to grant early action credits for offset projects previously undertaken pursuant to Carbon Reserve protocols. *Our Children's Earth Foundation v. California Air Resources Board*, No. A138830 (Cal. Ct. App. Feb. 23, 2015): added to the "Stop Government Action/Other Statutes" slide.

DECISIONS AND SETTLEMENTS

Court Said Ex-Im Bank's Action Plausibly Included Activities on the High Seas, Not Just in Australia—So Endangered Species Act Claim Regarding LNG Facility Financing Survived

After initially dismissing an Endangered Species Act (ESA) challenge to Export-Import Bank of the United States (Ex-Im Bank) financing for the development and construction of two liquefied natural gas (LNG) projects located partially in Australia's Great Barrier Reef World Heritage Area, the federal district court for the Northern District of California denied a motion to dismiss an amended complaint. The court ruled in August 2014 that the action failed to state an ESA claim because the ESA's consultation requirements did not apply to "agency action" taken in foreign countries. After plaintiffs amended their complaint, however, the court concluded that they had alleged facts that plausibly showed that the Ex-Im Bank's actions included post-construction shipping activities occurring on the high seas, bringing the actions within the ESA's scope. The court noted that the Ex-Im Bank had funded the "downstream" portions of the projects, including financing for construction of the LNG facilities and related infrastructure, including two marine jetties and loading berths to transfer LNG to tankers for shipping. Even though the Ex-Im Bank did not specifically provide funding for the shipping activities, the court said that it was "reasonable to infer" that a primary objective of the projects was to ship LNG. Because the term "agency action" in the ESA is construed broadly, the court concluded plaintiffs had stated a plausible ESA claim. *Center for Biological Diversity v. Export-Import Bank of the United States*, No. 12-cv-6325 (N.D. Cal. Feb. 20, 2015): added to the "Stop Government Action/Other Statutes" slide.

After EPA Declined to Object to Permits for Three Texas Power Plants, Environmental Group Withdrew Lawsuit Seeking to Compel EPA Response

Environmental Integrity Project (EIP) and the U.S. Environmental Protection Agency (EPA)

executed a settlement agreement on January 22, 2015, in which they resolved EIP's lawsuit asking a court to compel EPA to respond to EIP's petitions requesting that EPA object to Title V permits issued to three power plants by the Texas Commission on Environmental Quality. EPA issued an order on January 23, 2015 denying the three petitions. EPA's denial addressed three concerns that remained pending after EIP and former party Sierra Club withdrew other issues. The remaining claims rejected by EPA related to the adequacy of monitoring requirements to ensure compliance with particulate matter limits during startup, shutdown, and maintenance at all three plants (an issue EPA said had not been raised during the public comment period), as well as deficiencies in the record supporting the indicator ranges to be monitored for one of the plants. EIP also argued that the permit for one of the plants—the Big Brown plant—should be modified to include a provision explicitly allowing use of "any credible evidence" to demonstrate noncompliance; EIP said this provision was made necessary by a federal court decision regarding the Big Brown plant that held that credible evidence could not be used in citizen suits to enforce emissions limits. EPA said that this issue had not been raised with reasonable specificity during the comment period and, moreover, that a petition would have to identify particular permit terms that excluded use of credible evidence. On February 20, 2015, EIP moved for voluntary dismissal of its lawsuit. EPA published notice of its denial of the petitions in the February 23, 2015 issue of the *Federal Register*, and indicated that any petition for review of the denial must be filed within 60 days of the notice. *Environmental Integrity Project v. McCarthy*, No. 1:14-cv-01196 (D.D.C., notice of voluntary withdrawal Feb. 20, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

Federal Court Dismissed Challenge to EPA Approval of Washington and Oregon Impaired Waters Lists

The federal district court for the Western District of Washington granted summary judgment to EPA in the Center for Biological Diversity's challenge to EPA's approval in 2012 of Washington's and Oregon's lists of impaired waters under Section 303(d) of the Clean Water Act. Although both states' water quality standards implicate ocean acidification, which results from seawater's absorption of carbon dioxide from the atmosphere, neither Washington nor Oregon listed any waters as impaired based on ocean acidification. The Center for Biological Diversity charged that the absence of any such waters from the lists was arbitrary and capricious. As an initial matter, the court concluded that the Center for Biological Diversity had standing to bring the action, rejecting arguments raised by the Western States Petroleum Association and the American Petroleum Institute in an amicus curiae brief. The court concluded that the Center for Biological Diversity had established causation and redressability. The court reasoned that even though global atmospheric carbon dioxide—which the amicus brief argued could not be addressed through a Clean Water Act mechanism—was the primary driver of acidification, the Center for Biological Diversity had alleged that local activities also had a significant impact on ocean acidity and that local mitigation measures could address "hot spots" of ocean acidification. Ultimately, however, the court found that EPA's approval of the impaired waters lists was neither implausible nor contrary to the evidence. The court also determined that EPA had reasonably concluded that Washington and Oregon assembled and evaluated all existing and readily available water quality data. *Center for Biological Diversity v. EPA*, No. 13-cv-1866 (W.D. Wash. Feb. 19, 2015): added to the "Stop Government Action/Other Statutes" slide.

Biofuel Company Withdrew Challenge to Delay in 2014 Renewable Fuel Standards

Plant Oil Powered Diesel Fuel Systems, Inc. filed a motion for voluntary dismissal of its petition challenging EPA's announcement that it would not finalize the 2014 applicable percentage standards for the Renewable Fuel Standard (RFS) program until 2015. The petition, filed just a month earlier, had asserted that EPA's notification constituted agency action adopting the 2014 RFS standards proposed in November 2013. *Plant Oil Powered Diesel Fuel Systems, Inc. v. EPA*, No. 15-1011 (D.C. Cir., motion for voluntary dismissal Feb. 17, 2015): added to the "Challenges to Federal Action/Clean Air Act" slide.

Mississippi Supreme Court Ordered Refunds to Ratepayers for Illegal Rate Increase for Kemper Project

The Mississippi Supreme Court held that Mississippi law did not empower the Mississippi Public Service Commission (MPSC) to authorize 2013 rate increases for the Kemper Project, which includes a carbon capture system cited by EPA as an example of a viable technology in its proposed new source performance standards for coal-fired power plants. The court ruled that the Base Load Act (a 2008 law that made it possible for utilities to recover costs prior to a facility becoming operational) did not provide a basis for the rate increases. The court's judgment requires that Mississippi Power Co. (MPC) refund ratepayers for payments attributable to the rate increases. The court further ruled that the increased rates were confiscatory takings and that ratepayers had been denied due process because of the lack of proper notice. The court also invalidated a 2013 settlement agreement that preceded the rate increase. The court said that the 2013 rate increase resulted from the settlement agreement, in which MPC agreed to abandon its appeal of an earlier denial of a rate increase, and that MPSC lacked authority to enter into a settlement agreement reached during private meetings. *Mississippi Power Co. v. Mississippi Public Service Commission*, No. 2012-UR-01108-SCT, and *Blanton v. Mississippi Power Co.*, No. 2013-UR-00477-SCT (Miss. Feb. 12, 2015): added to the "Challenges to Coal-Fired Power Plants" slide.

FTC Found No Violation of Law by Green Mountain Power But Advised Clear and Consistent Communications Regarding Renewable Energy

On February 5, 2015, the Federal Trade Commission (FTC) sent a letter to counsel for Green Mountain Power Corporation (GMP) expressing concern that GMP might have created confusion for its customers about the renewable attributes of the power they purchased because GMP might not have "clearly and consistently communicated" that GMP sells renewable energy certificates (RECs) for most of its renewable energy-generating facilities to entities outside Vermont. FTC sent the letter after receiving a petition from the Environmental and Natural Resources Law Clinic at Vermont Law School on behalf of several Vermont citizens. In the February 5 letter, the FTC said that no findings had been made that any GMP statements violated the Federal Trade Commission Act, but urged that GMP prevent future confusion by clearly communicating the implications of its REC sales—namely, that when GMP sells RECs tied to a particular renewable energy facility, it may no longer characterize the power delivered from that facility as renewable. Letter from Federal Trade Commission to Counsel for Green Mountain Power Corp. (Feb. 5, 2015): added to the "Regulate Private Conduct" slide.

Natural Gas Industry Groups Dropped Challenges to Greenhouse Gas Reporting Rule

The American Gas Association and the Interstate Natural Gas Association of America moved to voluntarily withdraw their challenges to EPA's greenhouse gas reporting rule. The groups filed challenges in 2011 and 2012. *American Gas Association v. EPA*, Nos. 11-1020, 12-1108 (D.C. Cir., motion for voluntary dismissal Feb. 4, 2015); *Interstate Natural Gas Association of America*, No. 11-1027 (D.C. Cir., motion for voluntary dismissal Feb. 20, 2015): added to the "Challenges to Federal Action/Clean Air Act" slide.

Federal Court Upheld Tennessee Valley Authority Decision to Switch to Natural Gas at Kentucky Facility

The federal district court for the Western District of Kentucky granted summary judgment to the Tennessee Valley Authority (TVA) in an action challenging TVA's plan to retire coal-fired electric generating units and replace them with a new natural gas plant at a facility in Muhlenberg County, Kentucky. TVA's National Environmental Policy Act procedures provide that a new power generating facility usually requires an environmental impact statement (EIS), but the court agreed with TVA that it had discretion to determine whether an EIS was warranted in a particular case. In this case, TVA determined there would be no major environmental impacts, and that there would in fact be environmental benefits, including significant benefits to regional air quality, a significant reduction in carbon dioxide emissions, reductions in water withdrawals and heated discharges into the Green River, and reduction of the production of coal combustion waste. The court upheld all the challenged aspects of TVA's review. It rejected claims that TVA failed to consider the importance of the availability of an adequate supply of electricity at a reasonable price and that it did not consider the significant employment impacts if the facility stopped burning coal. The court also concluded that the assessment of impacts did not improperly segment the decommissioning of the coal-fired units (which the court characterized as a "too speculative" possibility) or the construction and operation of a natural gas pipeline (the impacts of which the court determined TVA had assessed to the extent possible). Nor was the court persuaded by plaintiffs' contentions that TVA had understated emissions of greenhouse gases from natural gas, that it arrived at a predetermined outcome, or that it had used an improper no action alternative. The court also determined that TVA's decisionmaking regarding least-cost planning under the Tennessee Valley Authority Act of 1933 was not arbitrary and capricious. Plaintiffs have appealed the court's judgment to the Sixth Circuit. *Kentucky Coal Association v. Tennessee Valley Authority*, No. 4:14CV-00073 (W.D. Ky. Feb. 2, 2015, amended Feb. 3, 2015): added to the "Challenges to Federal Action" slide.

Massachusetts Land Court Found Intent to Abandon Nonconforming Cottage Destroyed by Hurricane

After a hurricane damaged a cottage in Wareham, Massachusetts in 1991, its owners demolished the cottage, which did not conform to zoning requirements. The couple sold the property in 1993 for $5,000. In 2001, the new owner made his first attempt to obtain a permit to build a new residence on the property. In 2011, he received a special permit allowing him to build a house. The permit was challenged on the grounds that the owner had abandoned the residential structure

and was not entitled to rebuild. The Massachusetts Land Court found an intent to abandon the residential structure. The court noted the low price the owner paid for the property and the unexplained eight-year gap between the time he purchased the property and the time when he first sought approval to rebuild. *Chiaraluce v. Ferreira*, Nos. 11 MISC 451014, 11 MISC 451165 (Mass. Land Ct. Dec. 31, 2014): added to the "Adaptation" slide.

NEW CASES, MOTIONS, AND NOTICES

Groups Sought Disclosure of SEC Communications with Ceres and New York Attorney General on Climate Change

The Energy & Environment Legal Institute and the Free Market Environmental Law Clinic filed a Freedom of Information Act lawsuit (FOIA) against the Security and Exchange Commission (SEC). The lawsuit, filed in the federal district court for the District of Columbia, seeks to compel production of documents relating to the SEC's interactions with the investor-activist group Ceres and New York Attorney General Eric Schneiderman. The FOIA request asked for text messages and emails containing specified climate change-related terms. *Energy & Environment Legal Institute v. United States Security & Exchange Commission*, No. 1:15-cv-00217 (D.D.C., filed Feb. 12, 2015): added to the "Force Government to Act/Other Statutes" slide.

Los Angeles and Other Parties Challenged Restrictive Kern County Ordinance on Biosolids Recycling

The City of Los Angeles, two sanitation districts, two businesses involved in the recycling of biosolids, and the California Association of Sanitation Agencies commenced a lawsuit against Kern County and its board of supervisors and planning commission to challenge the "surreptitious adoption" of a zoning ordinance that would impose burdensome requirements on biosolids recycling. The plaintiffs-petitioners alleged violations of the California Environmental Quality Act and failures to provide required notices. They also alleged that the ordinance violated a writ issued in another proceeding that required preparation of an environmental impact report in connection with a zoning ordinance concerning land application of biosolids. Their petition-complaint alleged that land application of biosolids can replace use of chemical fertilizers, which accelerate climate change both because of the use of fossil fuels in their manufacture and because of their removal of organic carbon from the soil. *City of Los Angeles v. County of Kern*, No. S-1500-CV-284100 (Cal. Super. Ct., filed Feb. 10, 2015): added to the "State NEPAs" slide.

Organizations Sought Decisions from EPA on Regulating Concentrated Animal Feeding Operations Under the Clean Air Act

The Humane Society of the United States and four environmental organizations filed a lawsuit in the federal district court for the District of Columbia. They asked the court to require EPA to respond to their 2009 petition asking that concentrated animal feeding operations (CAFOs) be regulated as a source of air pollution under the Clean Air Act. The complaint alleged that air pollution from CAFOs endangers public health and welfare, including by contributing to climate

change due to their emissions of methane and nitrous oxide. In a related action, six organizations sought a response from EPA to a 2011 petition asking the agency to identify ammonia as a criteria pollutant. Large livestock operations are the leading source of ammonia pollution. The complaint alleged that ammonia contributes to regional haze, which has been associated with climate impacts. *Humane Society of the United States v. McCarthy*, No. 15-cv-0141 (D.D.C., filed Jan. 28, 2015); *Environmental Integrity Project v. EPA*, No. 15-cv-139 (D.D.C., filed Jan. 28, 2015): added to the "Force Government to Act/Clean Air Act" slide.

WildEarth Guardians Objected to Oil and Gas Leasing Analysis for Pawnee National Grassland

WildEarth Guardians submitted an objection to the Rocky Mountain Region of the United States Forest Service concerning the Draft Record of Decision and Final Environmental Impact Statement for the Pawnee National Grassland Oil and Gas Leasing Analysis. WildEarth Guardians alleged that the Forest Service had violated the National Environmental Policy Act, the Clean Air Act, the Endangered Species Act, and the Arapaho-Roosevelt National Forest and Pawnee National Grassland Land and Resource Management Plan. Among the issues that WildEarth Guardians asserted had received insufficient attention were the climate impacts of post-leasing development of the oil and gas resources underlying the grasslands. WildEarth Guardians said that the Forest Service should have used the social cost of carbon protocol to account for carbon costs. *WildEarth Guardians v. Casamassa* (U.S. Forest Service, filed Jan. 20, 2015): added to the "Stop Government Action/NEPA" slide.

Sierra Club Sued EPA over New Hampshire Power Plant

Sierra Club filed a Clean Air Act citizen suit against the EPA Administrator asking the federal district court for the District of Columbia to compel EPA to grant or deny Sierra Club's petition asking the agency to object to an air pollution operating permit issued for coal-fired power plant in Portsmouth, New Hampshire. Sierra Club submitted the petition on July 28, 2014. The organization's objections to the permit concern allegedly inadequate controls for sulfur dioxide and particular matter. *Sierra Club v. McCarthy*, No. 1:14-cv-02149 (D.D.C., filed Dec. 18, 2014): added to the "Challenges to Coal-Fired Power Plants" slide.

Update #71 (February 2, 2015)

FEATURED DECISION

Federal Court Rejected Plaintiffs' Standing Arguments in Challenge to Ex-Im Bank Loan Guarantee for Coal Company

The federal district court for the District of Columbia ruled that environmental groups did not have associational or organizational standing to challenge a loan guarantee by the Export-Import Bank of the United States (Ex-Im Bank) to Xcoal Energy & Resources, LLC (Xcoal). The environmental groups contended that the $90-million loan guarantee facilitated export of $1 billion in U.S. coal, and that Ex-Im Bank had failed to comply with the requirements of the

National Environmental Policy Act. The court ruled that the environmental groups asserting associational standing had failed to establish the redressability component of standing because they had not established a likelihood that a change in Ex-Im Bank's authorization of the loan guarantee would affect Xcoal's export of coal. Noting that, in a case like this one, the agency's action is "only one piece of the redressability puzzle," the court found that a declaration submitted by Xcoal's vice president of finance supported the defendants' assertion that Xcoal had obtained enough alternative sources of credit so that rescission of the loan guarantee would not impede coal exports; the court further found that the environmental groups had not brought forward any facts to rebut this testimony. The court also held that two other environmental groups—Pacific Environment (PE) and the Center for International Environmental Law (CIEL)—failed to establish organizational standing. The two groups had asserted that Ex-Im Bank's actions caused injuries to their missions, activities, and resources. The court found that neither group had established injury-in-fact. The court found that PE had not established either a conflict between approval of the loan guarantee and PE's mission, an impediment to the PE's activities, or a drain on PE's resources. With respect to CIEL, the court was not persuaded by arguments that CIEL's policy work had been undermined because CIEL was forced to direct time and resources towards monitoring Ex-Im Bank's policies, or that CIEL's public education efforts had been injured by its inability to provide input during the course of Ex-Im Bank's decision-making process. *Chesapeake Climate Action Network v. Export-Import Bank of the United States*, No. 13-cv-1820 (D.D.C. Jan. 21, 2015): added to the "Stop Government Action/NEPA" slide.

DECISIONS AND SETTLEMENTS

Federal Court Criticized NJDEP's Condemnation Practices for Dune Project, But Denied Injunction

The federal district court for the District of New Jersey denied without prejudice a New Jersey city's motion for a preliminary injunction to stop the U.S. Army Corps of Engineers (Corps) and the New Jersey Department of Environmental Protection (NJDEP) from constructing a dune system designed to protect the coastline during future storms. The court found that plaintiffs had shown a likelihood of success on the merits on the issue of whether NJDEP deprived them of procedural due process rights. The court described NJDEP's decision to proceed with condemnation for the dune project through administrative orders rather than through the Eminent Domain Act's procedures as "baffling." The court determined, however, that the awarding of a contract by the Corps would not cause irreparable harm because actual construction would not begin until after NJDEP commenced a condemnation proceeding, which it had agreed to do by April 2015. Nor did the balance of harms or the public interest weigh in favor of an injunction. However, in the event the Corps is prepared to begin construction before the condemnation proceeding is filed, the court said plaintiffs could seek reconsideration. *Margate City, New Jersey v. United States Army Corps of Engineers*, No. 1:14-cv-07303 (D.N.J. Jan. 15, 2015): added to the "Adaptation" slide.

Federal Court Ruled for NSA in Action That Sought EPA Officials' Phone, Text Message, and E-Mail Records

The federal district court for the District of Columbia rejected the Competitive Enterprise Institute's (CEI's) "novel and inventive gambit" to obtain information about EPA officials' phone calls, e-mails, and text messages from the National Security Agency (NSA). CEI sought this information under the Freedom of Information Act (FOIA) as part of its broader effort to show that EPA officials had improperly been using private accounts to conduct their work. In response to CEI's request, the NSA issued a *Glomar* response refusing to confirm or deny that it possessed relevant records. The court disagreed with CEI's contention that NSA had waived its right to issue a *Glomar* response because it had publicly admitted (after the release of the Edward Snowden documents) that NSA collected this type of information. The court agreed with the NSA that there had been no official acknowledgment that the NSA had the specific records sought by CEI. Nor did public knowledge of the "general contours" of the NSA's data collecting "vitiate" the *Glomar* response in this case. *Competitive Enterprise Institute v. National Security Agency*, No. 14-975 (D.D.C. Jan. 13, 2015): added to the "Force Government to Act/Other Statutes" slide.

Federal Court Approved Settlement of Alleged Greenhouse Gas Emissions Violations by Car Makers

The federal district court for the District of Columbia approved the record-setting Clean Air Act settlement negotiated by EPA, the California Air Resources Board (CARB), and Hyundai Motor Company, Kia Motors Corporation, and two other entities affiliated with the car manufacturers. The U.S. and CARB had alleged that the manufacturers falsified fuel economy and greenhouse gas emissions claims for more than one million vehicles for model years 2012 and 2013. The consent decree requires the companies to pay a $100-million fine, to forfeit 4.75 million tradeable greenhouse gas credits, and to take actions to ensure future conformance with the Clean Air Act's requirements. The court called the settlement fair and said that the size of the fine—the largest in Clean Air Act history—and other provisions were adequate and appropriate. The court noted that five commenters (two environmental groups and three state environmental agencies or state attorneys general) had submitted comments supporting the settlement but asking that it be renegotiated to include $25 million for Supplemental Environmental Projects (SEPs) to support the promotion of electric vehicles in certain states. The court called the SEP proposal "laudable," but it agreed with the U.S. that the public interest would not be served by reopening negotiations to create "a different and more complex settlement arrangement." *United States v. Hyundai Motor Co.*, No. 14-cv-1837 (D.D.C. Jan. 9, 2015): added to the "Regulate Private Conduct" slide.

California Appellate Court Upheld Environmental Review for Santa Clarita Development, Reversing Trial Court

The California Court of Appeal reversed a trial court decision that concluded that certain aspects of the environmental review for a 185-acre real estate development in the City of Santa Clarita were inadequate. The appellate court's option did not substantively address the consideration of climate change in the environmental impact report (EIR) for the project, but, as a procedural matter, the court found that an alternative fuels plan had been properly incorporated by reference into the EIR section on global climate change. *Santa Clarita Organization for Planning and the*

Environment v. City of Santa Clarita, No. B250487 (Cal. Ct. App. Dec. 18, 2014): added to the "State NEPAs" slide.

Federal Court Found That Agency Adequately Assessed Impacts of Climate Change on Loggerhead Sea Turtles

The federal district court for the District of Columbia largely rejected a challenge to the National Marine Fisheries Service's (NMFS's) issuance of a Biological Opinion determining that the Atlantic Sea Scallop Fishery would not jeopardize the survival of the Northwest Atlantic distinct population segment of loggerhead sea turtles. The court was not persuaded by the plaintiff's claims that the no-jeopardy determination was arbitrary and capricious. The court rejected the argument that NMFS had not sufficiently considered the effects of climate change, finding that the plaintiff had failed to refute NMFS's determination that current scientific data were too inconclusive to accurately predict impacts on loggerheads. The court distinguished earlier successful challenges of Biological Opinions where there were "wholesale failures to even address the issue" of climate change. The court did identify some deficiencies in the incidental take statement and therefore remanded to NMFS for the limited purpose of addressing those issues. *Oceana, Inc. v. Pritzker*, No. 08-cv-1881 (D.D.C. Dec. 17, 2014): added to the "Stop Government Action/Other Statutes" slide. [*Editor's note:* This case summary has been corrected since it was distributed in Update #71.]

NEW CASES, MOTIONS, AND NOTICES

Oil and Gas Industry Challenged EPA's 2014 Revisions to Greenhouse Gas Reporting Rule

The American Petroleum Institute and the Gas Processors Association each filed a petition in the D.C. Circuit Court of Appeals seeking review of EPA's 2014 revisions to the greenhouse gas reporting rule. The revisions made changes to the reporting requirements and confidentiality determinations for the petroleum and natural gas systems source category. Among criticisms leveled at the revised rule during the public comment period were (1) that the removal of the best available monitoring methods (BAMM) option would make compliance difficult for some reporters and could have adverse impacts in other areas, such as the development of new technologies, and (2) that the revised rule increased the reporting burden for gas well completions and workovers by requiring reporters to differentiate between well type combinations. ("Well type combination" takes into account the following factors: vertical or horizontal, with flaring or without flaring, and reduced emissions completion (REC)/workover or no REC/workover.) Commenters also asserted that in general EPA had "significantly oversimplified the impacts and underestimated the burden" of the rule. *American Petroleum Institute v. EPA*, No. 15-1020 (D.C. Cir., filed Jan. 23, 2015); *Gas Processors Association v. EPA*, No. 15-1021 (D.C. Cir., filed Jan. 23, 2015): added to "Challenges to Federal Action" slide.

Biodiesel Company Challenged Delay of 2014 Renewable Fuel Standards in D.C. Circuit

A company that supplies a 100%-jatropha-plant-oil fuel for certain diesel engines filed a petition in the D.C. Circuit Court of Appeals to challenge EPA's announcement that it would not finalize

the 2014 applicable percentage standards for the Renewable Fuel Standard (RFS) program until 2015. EPA published notification of its decision to delay issuance of the standards in the December 9, 2014 issue of the *Federal Register*. The petitioner—Plant Oil Powered Diesel Fuel Systems, Inc.—said that EPA's notification constituted agency action adopting the 2014 RFS standards proposed in November 2013. *Plant Oil Powered Diesel Fuel Systems, Inc. v. EPA*, No. 15-1011 (D.C. Cir., filed Jan. 15, 2015): added to the "Challenges to Federal Action" slide.

Environmental Groups and Others Asked FERC to Rescind Approvals for Pennsylvania-to-New York Gas Pipeline

Five requests for rehearing were filed with the Federal Energy Regulatory Commission (FERC) seeking rescission of its approval of a 124-mile gas pipeline between Pennsylvania and New York. The requests for rehearing charged that FERC committed a number of errors in its review of the pipeline, including failures to fully consider the project's environmental impacts. For example, Catskill Mountainkeeper and other organizations charged that the environmental review should have considered the indirect impacts of additional gas production and that it had not fully considered the project's greenhouse gas emissions. Among the alleged insufficiencies related to the project's greenhouse gas emissions were failure to consider cumulative impacts, failure to consider the impact of the elimination of carbon sinks such as forests and wetlands, and failure to properly incorporate the social cost of carbon into the impact analysis. Catskill Mountainkeeper also accused FERC of improperly minimizing the significance of the project's greenhouse gas emissions by comparing them to global emissions. Concern regarding the assessment of greenhouse gas emissions was echoed in other requests for rehearing, including it the request submitted by Stop the Pipeline, which took issue with the project sponsor's assertion that natural gas would reduce greenhouse gas emissions. *In re Constitution Pipeline Co., LLC*, Docket Nos. CP13-499, CP13-502 (FERC, requests for reh'g (Catskill Mountainkeeper et al., Henry S. Kernan Trust, Stop the Pipeline, Allegheny Defense Project & Damascus Citizens for Sustainability, Capital Region Board of Cooperative Educational Services) filed Jan. 2, 2015): added to the "Stop Government Action/NEPA" slide.

Update #70 (January 13, 2015)

FEATURED DECISION

California Appellate Court Ruled That Environmental Review of Landfill Expansion Was Adequate. The California Court of Appeal reversed a trial court and ruled that an environmental impact report (EIR) for a proposed landfill expansion was adequate, including the EIR's consideration of climate change-related impacts. The case concerned the 420-acre Redwood Landfill in Marin County, which accepts most of the county's solid waste. The appellate court found that the EIR did not improperly defer mitigation of projected sea-level rise. The court said that, given uncertainty regarding the timing and extent of sea-level rise, the measures required by the EIR were "specific enough" to address potential future impacts. The appellate court also concluded that the EIR sufficiently analyzed cumulative greenhouse gas emissions. The court said that the California Environmental Quality Act did not mandate that the EIR analyze all methane-producing landfills or the cumulative impacts of all "related projects" on greenhouse gas emissions. In addition, the appellate court found that substantial evidence supported methods

used to estimate landfill gas emissions and that the EIR properly offset an increase in greenhouse gas emissions with a reduction of greenhouse gas emissions due to the use of engines fired by landfill gas. *No Wetlands Landfill Expansion v. County of Marin*, No. A137459 (Cal. Ct. App. Dec. 12, 2014): added to the "State NEPAs" slide.

DECISIONS AND SETTLEMENTS

Sierra Club and Energy Company Reached Agreement Regarding Attorney Fees Award. The District of Delaware bankruptcy court approved a settlement agreement between Sierra Club and Energy Future Holdings Corporation (EFHC) and related entities. The agreement resolved a number of pending litigation proceedings, including a $6.45-million attorney fees award against Sierra Club. The fee award was ordered by a Texas federal district court after Sierra Club unsuccessfully pursued a Clean Air Act citizen suit related to a coal-fired power plant located in Texas. In return for EFHC's abandonment of its claim to the fee award, Sierra Club agreed to withdraw and release certain pending and threatened litigation concerning coal-fired plants run by EFHC and its affiliates and to withdraw certain Freedom of Information Act requests. EFHC agreed not to oppose Sierra Club's motion to intervene in a pending New Source Review case brought by the United States concerning two Texas power plants, but Sierra Club agreed to restrictions on the scope of its intervention. *In re Energy Future Holdings Corp.*, No. 14-10979 (Bankr. D. Del. order approving settlement Dec. 17, 2014; EFHC motion regarding settlement agreement Nov. 24, 2014): added to the "Challenges to Coal-Fired Plants" slide.

District Court Ruled on Motion to Amend in Remanded Challenge to California's Low Carbon Fuel Standard. The district court for the Eastern District of California granted in part and denied in part a motion by plaintiffs to amend their complaint in their constitutional challenge to California's Low Carbon Fuel Standard (LCFS). The court will be addressing the remaining pieces of this challenge after the Ninth Circuit Court of Appeals largely rejected the contention that the LCFS violated the dormant Commerce Clause. The court rejected the request to amend claims of extraterritorial regulation in violation of the Commerce Clause as well as a claim of a violation of principles of interstate federalism embodied in the Constitution (plaintiffs called this latter theory their "horizontal federalism claim"). The court said the Ninth Circuit resolved any claim premised on extraterritorial regulation when it explicitly held that the LCFS did not regulate conduct outside California. The district court also found that the law of the case barred plaintiffs' claim that the LCFS's ethanol provisions facially discriminated. The court found, however, that law of the case did not bar the claim of discrimination in purpose and effect since the Ninth Circuit did not reach that issue. The court also held as a matter of law that the LCFS did not implicate the Import-Export Clause because it did not provide for anything that reasonably could be construed as a tax; the court therefore denied plaintiffs' request to add a claim of impermissible discrimination in violation of the Import-Export Clause. The court granted leave to amend to challenge 2012 amendments to the LCFS crude oil provisions and to drop federal preemption and "*Pike* balancing" claims under the dormant Commerce Clause. *Rocky Mountain Farmers Union v. Goldstene*, No. 1:09-cv-02234 (E.D. Cal. Dec. 10, 2014): added to the "Challenges to State Action" slide.

Federal Court Ruled That Qualitative Analysis of Logging Plan's Carbon Storage Impacts Was Sufficient. The federal district court for the District of Oregon issued a mixed ruling in a

challenge to the Snow Basin Vegetation Management Project, which would authorize a certain amount of commercial logging of large trees and old forests in the Wallowa Whitman National Forest in northeastern Oregon. Although the court ruled for the plaintiffs on several claims under the National Environmental Policy Act (NEPA), the court ruled for the federal defendants on the climate change-related NEPA claim. In particular, the court rejected the plaintiffs' argument that the United States Forest Service had failed to disclose the short-term negative impact that the project would have on the forest's capacity to store carbon. The court found that the agency's qualitative analysis of the project's long-term benefits with respect to climate change was sufficient. The analysis had noted there was uncertainty regarding carbon sequestration's relationship to climate change and that the project was consistent with the Intergovernmental Panel on Climate Change's recommendations for forest management. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, No. 3:12-cv-02271 (D. Or. Dec. 9, 2014): added to the "Stop Government Action/NEPA" slide.

Supreme Court Declined to Hear Federal Public Trust Doctrine Case. The U.S. Supreme Court denied certiorari to petitioners who sought review of the D.C. Circuit's holding that the public trust doctrine is a matter of state law. The petitioners had argued that the public trust doctrine compelled the federal government to take actions to reduce greenhouse gas emissions. *Alec L. v. McCarthy*, No. 14-405 (U.S. cert. denied Dec. 8, 2014): added to the "Common Law Claims" slide.

California Appellate Court Upheld CEQA Review of Mine in Fresno County. The California Court of Appeal affirmed the denial of a challenge to Fresno County's approval of an aggregate mine. The mine, along with associated processing facilities, is planned for a 1,500-acre site in the Sierra Nevada foothills. The court rejected claims that the project's environmental impact report (EIR) prepared under the California Environmental Quality Act (CEQA) was inadequate. Among the rejected contentions was the petitioner's argument against the EIR's assertion that the project would supply construction materials to satisfy "tremendous unmet need for aggregate in Fresno County." The EIR said the project would result in a reduction of vehicle miles traveled and reduce greenhouse gas emissions because the project's customers would otherwise have to travel approximately 120 miles to obtain the materials. The court found that substantial evidence supported the EIR's conclusions. *Friends of the Kings River v. County of Fresno*, No. F068818 (Cal. Ct. App. Dec. 8, 2014): added to the "State NEPAs" slide.

Appeals Board Dismissed Challenge to Underground Injection Control Permit for Carbon Capture and Sequestration Project. The EPA Environmental Appeals Board (EAB) dismissed a challenge to an underground injection control permit issued for carbon capture and sequestration. The petitioner had filed a voluntary notice of dismissal after EPA sought to dismiss the petition on the ground that it was not timely. The petition argued that EPA had violated the Endangered Species Act by failing to consult with the U.S. Fish and Wildlife Service and that EPA failed to include provisions in the permit that would properly compensate Illinois property owners to whose "pore space" the carbon dioxide migrates. The petition also contended that EPA should have provided the public with access to proprietary software to verify modeling results, that EPA did not address air quality impacts, and that the permit's rock sampling requirements would not provide a high degree of confidence in predictions of the

carbon dioxide plume's behavior. *In re Archer Daniels Midland Co.*, UIC Appeal No. 14-72 (EAB Nov. 26, 2014): added to the "Stop Government Action/Project Challenges" slide.

New York Court Ruled Against Homeowners in Negligence Action Arising from 2011 Flooding. A New York Supreme Court in Staten Island awarded summary judgment to the City of New York and the New York City Department of Environmental Protection in an action by Staten Island homeowners who alleged that the City's negligence resulted in flooding that damaged their car and their residence in August 2011. The court took judicial notice of climatological reports from the National Climatic Center and found that these reports proved that New York City had been "subjected to inordinate rainfall" during two storms in August 2011 (one of which was Hurricane Irene). The court found that the evidence demonstrated that the Staten Island sewer system had not been designed to accommodate the volume of rain that fell during the storms, and that the City met its burden of demonstrating prima facie that the sole proximate cause of the flooding was the volume of precipitation, not the City's inspection and maintenance failures. *Wohl v. City of New York*, No. 103095/2012 (N.Y. Sup. Ct. Oct. 22, 2014): added to the "Adaptation" slide.

NEW CASES, MOTIONS, AND NOTICES

San Diego Association of Governments Sought California Supreme Court Review of Decision on Regional Transportation Plan. The San Diego Association of Governments (SANDAG) filed a petition for review in the California Supreme Court of an appellate court decision that held that SANDAG violated the California Environmental Quality Act (CEQA) when it approved a regional transportation plan. The appellate court said that SANDAG's CEQA review should have included an analysis of the plan's consistency with the greenhouse gas emissions reduction targets set forth in Governor Arnold Schwarzenegger's Executive Order S-3-05. *Cleveland National Forest Foundation v. San Diego Association of Governments*, No. S223603 (Cal., petition for review filed Jan. 6, 2015): added to the "State NEPAs" slide.

FOIA Lawsuit Filed to Obtain Records About Availability of Data for Carbon Capture and Storage Facility. The Energy & Environment Legal Institute and the Free Market Environmental Law Clinic filed a lawsuit in the federal district court for the District of Columbia seeking documents from the U.S. Department of Energy (DOE) concerning a carbon capture and storage (CCS) facility in Mississippi. The plaintiffs submitted their Freedom of Information Act (FOIA) request for documents to DOE in November 2014. They requested a "cooperative research and development agreement" for the Kemper County Energy Facility, a flagship demonstration project for CCS that the U.S. Environmental Protection Agency cited in its existing power plants greenhouse gas rulemaking as an example of a facility where CCS has been "adequately demonstrated." The plaintiffs said that the agreement reveals when the U.S. government will receive technical and cost data for the project, which the complaint says "is still not fully operational and presently $4 billion over budget." *Energy & Environment Legal Institute v. U.S. Department of Energy*, No. 15-cv-007 (D.D.C., filed Jan. 5, 2015): added to the "Force Government to Act/FOIA" slide.

D.C. Circuit Allowed EPA Additional Time to Consider Air Standards for Oil and Gas Sector. EPA requested, and received, a continued stay of the proceeding challenging its 2012

new source performance standards (NSPS) for the oil and gas sector. EPA asked for the additional time so that it could further consider comments it received on technical white papers regarding control of methane emissions from the oil and gas sector. The white papers were released in April 2014 as a component of President Obama's March 2014 strategy to address methane emissions. EPA also said it was working to finalize time-sensitive implementation measures for the NSPS. The parties to the proceeding must file motions to govern further proceedings by January 30, 2015. *American Petroleum Institute v. EPA*, No. 13-1108 (D.C. Cir., clerk order granting mot. to continue stay Dec. 17, 2014): added to the "Challenges to Federal Action" slide.

New Jersey City Sought to Enjoin Construction of Dune System on Its Beaches. The City of Margate, New Jersey commenced a lawsuit against the U.S. Army Corps of Engineers and the New Jersey Department of Environmental Protection (NJDEP) to prevent the agencies from commencing a sand dune construction project on the City's beaches. The City claimed that implementation of the project would violate the U.S. and New Jersey constitutions, would constitute a trespass, and would violate New Jersey law. The complaint also alleged that NJDEP had failed to comply with the requirements of New Jersey's Eminent Domain Act of 1971. *Margate City, New Jersey v. United States Army Corps of Engineers*, No. 1:14-cv-07303 (D.N.J., filed Nov. 24, 2014): added to the "Adaptation" slide.

Organizations Filed Notices of Intent to Sue EPA About Delays in Renewable Fuel Standards. In November and December 2014, EPA received four letters from two organizations notifying the agency of intent to file lawsuits to compel EPA to issue biomass-based diesel and renewable fuel requirements for 2014 and 2015. One organization, the American Fuel & Petrochemical Manufacturers (AFPM), said that "EPA's track record has become an egregious pattern of statutory non-compliance." The American Petroleum Institute (API) included a table in its letter that listed EPA's delays since 2010 in determining annual renewable fuel requirements. API also indicated that it also planned to sue to require EPA to respond to a 2013 waiver application. API, Notice of Intent To File Citizen Suit (Dec. 15, 2014); AFPM, Notice of Intent to File Suit for Failure to Issue the 2015 Renewable Fuel Standard Regulations (Dec. 1, 2014); API, Notice of Intent to File Citizen Suit (Dec. 1, 2014); AFPM, Notice of Intent to File Suit for Failure to Issue the 2014 Renewable Fuel Standard Regulations (Nov. 21, 2014): added to the "Challenges to Federal Action" slide.

Lawsuit Alleged NEPA Violations in Approvals of Offshore Drilling Permits Off California Coast. The Environmental Defense Center (EDC) filed a lawsuit in the federal district court for the Central District of California alleging that federal agencies and officials failed to comply with NEPA when they approved 51 Applications for Permits to Drill and Applications for Permits to Modify for offshore drilling. EDC alleged that the permits would facilitate oil and gas development and production in federal waters off California's coast and would authorize well stimulation such as acid well stimulation and hydraulic fracturing. EDC said that the Bureau of Safety and Environmental Enforcement improperly relied on categorical exclusions or no written NEPA documentation at all in making its determinations on these permits. Among the environmental risks enumerated in the complaint are increased greenhouse gas emissions. *Environmental Defense Center v. Bureau of Safety and Environmental Enforcement*, No. 2:14-cv-09281 (C.D. Cal., filed Dec. 3, 2014): added to the "Stop Government Action/NEPA" slide.

Lawsuit Filed to Challenge Natural Gas-Fired Power Plant in Massachusetts. On November 28, 2014, four individuals filed a petition in the First Circuit Court of Appeals seeking review of air permits issued by the Massachusetts Department of Environmental Protection for a natural gas-fired power plant. The facility is located in Salem, Massachusetts. The EPA Environmental Appeals Board previously denied review of the permits. *Brooks v. EPA*, No. 14-2252 (1st Cir., filed Nov. 28, 2014): added to the "Stop Government Action/Project Challenges" slide.

Update #69 (December 2, 2014)

FEATURED DECISION

Appellate Court Said CEQA Required Consideration of Regional Transportation Plan's "Consistency" with Executive Order Emissions Targets. The California Court of Appeal agreed with a trial court that the approval of a transportation plan for the San Diego region violated the California Environmental Quality Act (CEQA). The appellate court rejected the contention of the San Diego Association of Governments (SANDAG) that CEQA did not require it to analyze the transportation plan's consistency with greenhouse gas emissions reduction targets through 2050 that were set forth in Executive Order S-3-05, which was signed by Governor Arnold Schwarzenegger in 2005 and which the appellate court said "underpins all of the state's current efforts to reduce greenhouse gas emissions." The court said the decision not to conduct such an analysis "did not reflect a reasonable, good faith effort at full disclosure and is not supported by substantial evidence because [it] ignored the Executive Order's role in shaping state climate policy." The court said that omission of the analysis gave the false impression that the regional transportation plan furthered climate policy goals when "the trajectory of the transportation plan's post-2020 emissions directly contravenes it." The appellate court also said that because the environmental impact report (EIR) had not considered feasible mitigation alternatives that would substantially lessen the plan's greenhouse gas emissions, substantial evidence did not support SANDAG's determination that it had adequately considered mitigation for greenhouse gas impacts. In addition, the court found the EIR's assessment of alternatives, air quality impacts, and agricultural impacts to be insufficient. One justice issued a dissenting opinion in which she said the majority's opinion elevated the Executive Order to a "threshold of significance" and in doing so stepped overstepped the court's authority. *Cleveland National Forest Foundation v. San Diego Association of Governments*, No. D063288 (Cal. Ct. App. Nov. 24, 2014): added to the "State NEPAs" slide.

DECISIONS AND SETTLEMENTS

CARB Invalidated Offset Credits Issued to Operator of Arkansas Facility That Received Notice from EPA That Its Activities Violated RCRA. The California Air Resources Board (CARB) issued a final determination invalidating 88,955 offset credits issued under its greenhouse gas cap-and-trade program to the operator of a facility in Arkansas that destroyed ozone-depleting substances. The facility incinerated and treated the substances to create a calcium chloride brine that was sold as a recycled product for use in oil and gas well drilling, completion, and remediation applications. CARB concluded that that the invalidated credits were generated while the facility was not in compliance with the federal Resource Recovery and

Conservation Act (RCRA). The invalidated credits represented credits associated with destruction of ozone-depleting substances between the time the facility received a report on February 2, 2012, from the U.S. Environmental Protection Agency indicating that sale of the brine violated RCRA and the time of the last shipment of the brine to a customer a day later. CARB had been investigating approximately 4.3 million credits issued for activities at the Arkansas facility; the credits not invalidated by the final determination were to be returned to their respective accounts in the cap-and-trade program. California Air Resources Board, Final Determination, Air Resources Board Compliance Offset Investigation, Destruction of Ozone Depleting Substances (Nov. 14, 2014): added to the "Regulate Private Conduct" slide.

Ninth Circuit Rejected Shell's Preemptive Litigation Against Environmental Groups over Federal Approvals for Alaska Off-Shore Operations. The Ninth Circuit Court of Appeals ruled that it lacked jurisdiction over a declaratory judgment action brought by Shell Gulf of Mexico Inc. and Shell Offshore Inc. (Shell) against environmental organizations in connection with federal approvals of oil spill response plans for Shell operations in the Beaufort and Chukchi Seas on Alaska's coast. Shell anticipated the organizations would challenge the approvals, and sought to expedite the litigation by bringing its own suit. The Ninth Circuit rejected this "novel litigation strategy," finding that Shell and the environmental groups did not have "adverse legal interests." A related appeal that raised similar issues was dismissed as moot. Shell's declaratory judgment action had been consolidated with an action brought by environmental groups to challenge the federal approvals; the environmental groups' appeal of a summary judgment decision against them is still pending in the Ninth Circuit. *Shell Gulf of Mexico Inc. v. Center for Biological Diversity, Inc.*, No. 13-35835 (9th Cir. Nov. 12, 2014); *Shell Gulf of Mexico Inc. v. Center for Biological Diversity, Inc.*, No. 12-36034 (9th Cir. Nov. 12, 2014): added to the "Climate Change Protestors and Scientists" slide.

EPA Negotiated Settlement in Texas Power Plant Citizen Suit. The Environmental Integrity Project and Sierra Club negotiated a settlement with the U.S. Environmental Protection Agency (EPA) that would resolve their citizen suit concerning three coal-fired power plants in Texas. Plaintiffs sought to compel EPA to respond to their petitions asking the agency to object to Title V permits issued for the three plants by the Texas Commission on Environmental Quality. Under the settlement agreement's terms, EPA would respond by May 2015 to two sets of issues raised in the petitions. Both sets of issues concern compliance assurance monitoring and reporting obligations for deviations from permit emissions limits during startup, shutdown, and maintenance. The federal district court granted the parties' consent motion to stay on November 12, 2014. A notice of the proposed settlement agreement was published in the *Federal Register* on November 13, 2014. *Environmental Integrity Project v. McCarthy*, No. 1:14-cv-01196 (D.D.C., order granting consent motion for stay Nov. 12, 2014): added to the "Challenges to Coal-Fired Plants" slide.

Federal Court Upheld Decision Not to List Sonoran Desert Bald Eagles as Threatened or Endangered. The federal district court for the District of Arizona rejected a challenge to the U.S. Fish and Wildlife Service's (FWS's) determination that the Sonoran Desert population of bald eagles did not constitute a distinct population segment (DPS) under the Endangered Species Act and was therefore not eligible for listing as threatened or endangered. One of plaintiffs' arguments was that FWS's determination had failed to consider climate change as a relevant

factor for establishing a DPS. The court found that FWS had considered whether the Sonoran Desert bald eagles had unique characteristics that would help bald eagles as a whole under conditions caused by climate change, even though it had not done so under the heading of climate change. *Center for Biological Diversity v. Jewell*, No. 12-cv-02296 (D. Ariz. Nov. 4, 2014): added to the "Endangered Species Act" slide.

Sierra Club Lost Administrative Challenge to FutureGen Project. The Illinois Pollution Control Board (Board) granted summary judgment to the developers of the FutureGen project in Sierra Club's administrative action alleging violation of the Illinois Environmental Protection Act (Act). The FutureGen project is a coal-fired oxy-combustion power plant that would enable use carbon capture and sequestration technology. Sierra Club alleged that the developers were required to obtain a Prevention of Significant Deterioration preconstruction permit for the project. The Board ruled that because the Illinois Environmental Protection Agency (IEPA) had issued a minor source air permit, the developers had not violated the Act. The Board said it could not review the validity of the permit in this proceeding, to which IEPA was not a party. *Sierra Club v. Ameren Energy Medina Valley Cogen, LLC*, No. PCB 14-134 (Ill. Pollution Control Bd. Nov. 4, 2014): added to the "Challenges to Coal-Fired Plants" slide.

California Appellate Court Agreed with Trial Court That San Diego Climate Action Plan Required Supplemental Environmental Review. The California Court of Appeal affirmed a trial court decision that set aside the County of San Diego's 2012 approval of a Climate Action Plan (CAP). The appellate court agreed with the trial court that the County had erred in assuming that the CAP was within the scope of the County's 2011 General Plan Update (GPU), for which a program environmental impact report had been prepared. The 2011 GPU included mitigation measures, including one that committed the County to preparing a CAP that included detailed greenhouse gas emissions reduction targets and deadlines and enforceable emissions reductions measures. The appellate court ruled that the CAP did not comply with these requirements. Moreover, because the CAP itself was a "plan-level document" that would facilitate additional development that would not be required to undergo additional review, a supplemental EIR should have been prepared for the CAP and the CAP should have included enforceable mitigation measures. *Sierra Club v. San Diego County*, No. 37–2012–00101054 (Cal. Ct. App. Oct. 29, 2014): added to the "State NEPAs" slide.

NEW CASES, MOTIONS, AND NOTICES

Organizations Filed NEPA Challenge to Federal Coal Management Program in D.C. District Court. Two organizations brought a lawsuit against the Secretary of the Interior and the U.S. Bureau of Land Management (BLM) challenging the failure to update the environmental review of the federal coal management program to consider the climate change impact of greenhouse gas emissions resulting from the program. The organizations—Western Organization of Resource Councils and Friends of the Earth—alleged that BLM had not comprehensively analyzed the environmental impacts of the program since 1979, and that the 1979 analysis "only briefly discussed the then-nascent science of the effects of greenhouse gas emissions and the federal coal management program's emissions." The organizations asked the federal district court for the District of Columbia to declare defendants in violation of the National Environmental Policy Act (NEPA); to order an analysis of the impacts of coal leasing under the

federal coal management program on climate change and analyze alternative policies to reduce such impacts, and to enjoin defendants from considering applications for or issuing new coal leases or modifications of existing leases until defendants comply with NEPA. *Western Organization of Resource Councils v. Jewell*, No. 14-cv-1993 (D.D.C., filed Nov. 25, 2014): added to the "Stop Government Action/NEPA" slide.

Environmental Organizations Submitted Notice of Intent to Sue Over Gunnison Sage-Grouse Listing. The Center for Biological Diversity (CBD) sent a 60-day notice of its intent to file a lawsuit challenging the decision of the U.S. Fish and Wildlife Service (FWS) to list the Gunnison sage-grouse as a threatened—rather than endangered—species under the Endangered Species Act (ESA). The notice, which CBD sent on behalf of itself and the Western Watersheds Project, said the FWS's decision was based on political pressure and that it violated both the substantive and procedural requirements of the ESA. Among other things, the notice said that FWS "arbitrarily decided" that climate change was not a real threat to the species. Center for Biological Diversity & Western Watersheds Project, Notice of Intent to Sue: Violations of the Endangered Species Act ("ESA") in Listing the Gunnison Sage-Grouse As Threatened (Nov. 20, 2014): added to the "Endangered Species Act" slide.

Harvard Students Brought Divestment Lawsuit Against University. Harvard Climate Justice Coalition and individual Harvard students filed a lawsuit against the President & Fellows of Harvard College (Harvard Corporation) and Harvard Management Company, Inc., which oversees investment of Harvard Corporation's endowment. Plaintiffs sought to compel the university to divest from fossil fuel companies. The complaint alleged counts of mismanagement of charitable funds and intentional investment in abnormally dangerous activities. In particular, plaintiffs alleged that the university's investment in fossil fuel companies was a breach of its fiduciary and charitable duties as a public charity and nonprofit corporation because such investment contributed to climate change and other harms to "the public's prospects for a secure and healthy future." The complaint also alleged that climate change would cause damage to the university's physical campus. Harvard Climate Justice Coalition brought the lawsuit on its own behalf and as next friend to "Plaintiffs Future Generations, individuals not yet born or too young to assert their rights but whose future health, safety, and welfare depends on current efforts to slow the pace of climate change." *Harvard Climate Justice Coalition v. President & Fellows of Harvard College ("Harvard Corporation")*, No. ___ (Mass. Super. Ct., filed Nov. 19, 2014): added to the "Regulate Private Conduct" slide.

FERC Sought to Dismiss Challenges to Louisiana LNG Projects as 25 Seconds Too Late. The Federal Energy Regulatory Commission (FERC) moved for summary affirmance and dismissal of challenges by Sierra Club and the Gulf Restoration Network (together, Sierra Club) to approvals of liquefaction facilities and pipeline and compression facilities at an existing liquefied natural gas (LNG) import terminal in Louisiana. FERC argued that its determination to reject Sierra Club's rehearing petition as untimely should be summarily affirmed, and that since timely rehearing was not sought, the D.C. Circuit was without jurisdiction to hear the challenge to FERC's approvals of the projects at the LNG facility. Sierra Club filed the rehearing petition 25 seconds after close of business on the last day of the 30-day period during which it could seek rehearing after FERC issued its orders approving the projects. *Sierra Club v. Federal Energy*

Regulatory Commission, No. 14-1190 (D.C. Cir, motion for summary affirmance and dismissal Nov. 14, 2014): added to the "Stop Government Action/NEPA" slide.

Environmental Organizations Charged That California Drilling Permits Required Environmental Review. Environmental organizations filed a lawsuit in California Superior Court challenging drilling permits issued by the Division of Oil, Gas, and Geothermal Resources (DOGGR) of the California Department of Conservation. Petitioners alleged that DOGGR had issued at least 214 individual permits for drilling in the South Belridge Oil Field since July 29, 2014, without completing the review required under the California Environmental Quality Act. Petitioners contended that DOGGR had failed to consider the cumulative impacts of the permits, including the release of greenhouse gases. *Association of Irritated Residents v. California Department of Conservation, Division of Oil, Gas, and Geothermal Resources*, No. S-1500-CV-283418 (Cal. Super. Ct., filed Nov. 12, 2014): added to the "State NEPAs" slide.

Indian Tribe and Environmental Groups Commenced NEPA Challenge to Tar Sands Crude Oil Pipeline Project. An Indian tribe and seven environmental, conservation, and community organizations brought a lawsuit under the National Environmental Policy Act (NEPA) challenging the U.S. Department of State's approval of a new pipeline for importing heavy tar sands crude oil from Alberta, Canada, to a terminal facility in Wisconsin. The lawsuit, filed in the federal district court for the District of Minnesota, also challenged the State Department's authorization of the diversion of 800,000 barrels per day to a pipeline segment purportedly constructed as part of an existing pipeline. Plaintiffs argued that approval of this diversion undermined the NEPA review of a request to increase the volume of oil imported on a pipeline known as the "Alberta Clipper." Plaintiffs alleged that they brought the lawsuit on their own behalf as well as on behalf of their members who use areas that will be affected by air and water pollution from the pipeline projects and by the impacts of increased greenhouse gas emissions from the refining and end-use of tar sands crude oil. *White Earth Nation v. Kerry*, No. 0:14-cv-04726 (D. Minn., filed Nov. 11, 2014): added to the "Stop Government Act/NEPA" slide.

New Jersey Oceanfront Property Owners Challenged Easements for Dune Project. A group of oceanfront property owners in the Township of Long Beach, New Jersey, filed a lawsuit against the Township and the State of New Jersey challenging the Township's taking of permanent easements for the construction of flood hazard risk reduction measures. Such measures are to include expansion of a dune structure. The property owners contended that the Township illegally bypassed New Jersey's Eminent Domain Act and instead purported to take the easements in favor of itself and the State pursuant to the State's Disaster Control Act. *Carolan v. Township of Long Beach*, No. PWL 3379-14 (N.J. Super. Ct., filed Nov. 5, 2014): added to the "Adaptation" slide.

FOIA Action Filed Regarding Polar Vortex Video. The Competitive Enterprise Institute (CEI) filed an action under the federal Freedom of Information Act (FOIA) to compel the Office of Science and Technology Policy (OSTP) to produce documents related to a video posted on the White House website in January 2014 called "The Polar Vortex Explained in 2 Minutes." The video, according to CEI, was "about global warming supposedly causing severe winter cold." CEI alleged that OSTP improperly relied on FOIA's deliberative process privilege to withhold

documents. *Competitive Enterprise Institute v. Office of Science and Technology Policy*, No. 1:14-cv-01806 (D.D.C., filed Oct. 30, 2014): added to "Climate Change Protestors and Scientists" slide.

CEQA Challenge to Merced County Sustainable Communities Strategy Was Filed. Sierra Club and the Center for Biological Diversity filed a lawsuit challenging the approval by the Merced County Association of Governments and its Governing Board of the 2014-2040 Regional Transportation Plan/Sustainable Communities Strategy and the environmental impact report (EIR) prepared for this project. The organizations alleged that the environmental review did not comply with the California Environmental Quality Act. Among the alleged inadequacies were failure to disclose the project's greenhouse gas emissions in light of California's long-term targets for emissions reductions and inclusion in the EIR of greenhouse gas mitigation that was "unlawfully deferred, unenforceable, vague, and not certain to occur." *Sierra Club v. Merced County Association of Governments*, No. CVM019664 (Cal. Super. Ct., filed Oct. 23, 2014): added to the "State NEPAs" slide.

Update #68 (November 3, 2014)

FEATURED DECISION

Federal Court Dismissed Nebraska's Challenge to Proposed Greenhouse Gas Standards for New Power Plants. The federal district court for the District of Nebraska dismissed the State of Nebraska's lawsuit against the U.S. Environmental Protection Agency (EPA) in which Nebraska sought to force EPA to withdraw its proposed rule for reducing greenhouse gas emissions from new power plants. The court agreed with EPA that Nebraska's "attempt to short-circuit the administrative rulemaking process runs contrary to basic, well-understood administrative law." The district court said that there had been no final agency action and that the Clean Air Act provided an adequate remedy—review of any final rule by the D.C. Circuit Court of Appeals. *Nebraska v. EPA*, No. 4:14-CV-3006 (D. Neb. Oct. 6, 2014): added to the "Challenges to Federal Action" slide.

DECISIONS AND SETTLEMENTS

EPA and Department of Justice Announced Record Clean Air Act Penalty for Understating Vehicle Greenhouse Gas Emissions. On November 3, 2014, EPA and the Department of Justice announced that they had reached an agreement with the automakers Hyundai and Kia to resolve claims that the companies violated the Clean Air Act and California law by overstating fuel efficiency and understating greenhouse gas emissions for new motor vehicles from model years 2012 and 2013. Pursuant to the consent decree filed in the federal district court for the District of Columbia, the companies agreed to pay a $94-million civil penalty to the United States and a $6-million civil penalty to the California Air Resources Board. The consent decree also provided that the companies would forfeit greenhouse gas emissions credits that EPA said were worth more than $200 million. The credits could have been used to offset emissions from less fuel-efficient vehicle models or sold or traded to other companies for use as offsets. In addition, the companies agreed to undertake a number of corrective measures to prevent future

miscalculations of greenhouse gas emissions, including audits of model year 2015 and 2016 vehicles and formation of an independent certification group to oversee new certification training and testing programs as well as enhanced data management and review for "coast down data" from testing of the companies' vehicles. *United States v. Hyundai Motor Co.*, No. 1:14-cv-1837 (D.D.C., complaint and consent decree filed Nov. 3, 2014): added to the "Regulate Private Conduct" slide.

West Virginia Federal Court Denied EPA Motion for Clarification in Clean Air Act Employment Impacts Case. The federal district court denied EPA's motion to clarify its September decision denying EPA's motion to dismiss a lawsuit brought under Section 321(a) of the Clean Air Act. Section 321(a) provides that EPA "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the Clean Air Act. In the September decision, the court found that the absence of a "date-certain deadline" for conducting the Section 321(a) evaluations did not make EPA's obligation to conduct them discretionary. The court therefore concluded that it had jurisdiction to hear the case. In the motion to clarify, EPA said that it was "unable to discern … whether the Court was asserting jurisdiction for the failure to perform of a nondiscretionary duty under Section 304(a)(2) or for unreasonable delay under Section 304(a)" of the Clean Air Act. EPA said these were two separate and distinct causes of action subject to different standards of evaluation. The court said it believed that its September order "clearly set forth the bases for the ruling and that no further explanation is necessary." *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-39 (N.D. W. Va. Oct. 24, 2014): added to the "Challenges to Federal Action" slide.

InterState Oil Agreed to Surrender Permit for Rail-to-Truck Crude Oil Transfers at California Facility. On October 22, 2014, Earthjustice announced that the Sacramento Metropolitan Air Quality Management District (SMAQMD) had withdrawn the permit issued to InterState Oil Co. (InterState) for transloading crude oil at a McClellan Park, California facility. In September, Earthjustice filed a lawsuit on behalf of Sierra Club claiming that issuance of the permit violated the California Environmental Quality Act. Sierra Club alleged, among other things, that the project would result in significant increases in greenhouse gas emissions. In a letter to InterState dated October 21, SMAQMD said the permit should not have been issued because it failed to meet best available control technology requirements. The letter indicated that InterState had agreed to surrender the permit. *Sierra Club v. Sacramento Metropolitan Air Quality Management District*, No. 32-2014-80001945 (Cal. Super. Ct. Oct. 22, 2014): added to the "State NEPAs" slide.

D.C. Circuit Said Challengers of Gasoline Labeling Requirements Lacked Standing. In an unpublished opinion, the D.C. Circuit Court of Appeals denied a petition for review of an EPA rule requiring gas stations to label pumps that dispense gasoline that contains more than 10% ethanol. Citing its 2012 decision in *Grocery Manufacturers Association v. EPA*, the court said the petitioners—the American Petroleum Institute (API) and the Engine Products Group (EPG)—once again lacked standing. The court said that API had not provided evidence that any of its members sold or planned to sell gasoline containing 15% ethanol (E15) and that API therefore failed to show risk of injury adequate for standing. The court said EPG—which argued that E15 would damage products sold by its members for which E10 (gasoline containing 10% ethanol) was suitable—had failed to provide evidence connecting sales of E15 under the

challenged regulation to injuries that EPG members were likely to suffer. The court also said that EPG had alleged only a conjectural or hypothetical injury when it argued that EPA's denial of its rulemaking petition asking EPA to mandate the continued sale of E10 would force consumers to use the product-damaging E15 "for want of adequate E10 supplies." *Alliance of Automobile Manufacturers v. EPA*, Nos. 11-1334, 11-1344 (D.C. Cir. Oct. 21, 2014): added to the "Challenges to Federal Action" slide.

Environmental Group Settled with Bay Area Air Quality Management District in Richmond Refinery Lawsuit. Communities for a Better Environment (CBE) announced on October 16, 2014, that it had settled its lawsuit against the Bay Area Air Quality Management District (BAAQMD) over the alleged issuance of a permit to Chevron USA Inc. for a modernization project at its refinery in Richmond, California. CBE had claimed that BAAQMD failed to comply with the California Environmental Quality Act and in particular claimed that BAAQMD had failed to review the "additional and massive GHG emissions" expected from the project. CBE indicated that the settlement required BAAQMD to base its decision on the permit on an environmental impact report approved by the Richmond City Council in July 2014. *Communities for a Better Environment v. Bay Area Air Quality Management District*, No. CPF-14-513557 (Cal. Super. Ct., settlement announced Oct. 16, 2014): added to the "State NEPAs" slide.

Court Declined to Dismiss Lawsuit Challenging Delaware's Implementation of New RGGI Emissions Cap. The Delaware Superior Court denied a motion by the Delaware Department of Natural Resources and Environmental Control (DNREC) to dismiss an action challenging DNREC's implementation of the reduced carbon dioxide emissions cap instituted under the Regional Greenhouse Gas Initiative (RGGI) in 2013. Plaintiffs asserted that DNREC's regulations were inconsistent with Delaware's RGGI Act and violated the Delaware constitution's requirement that increases in environmental permit fees be approved by a three-fifths majority of the legislature. The court ruled that plaintiffs—Delaware residents and customers of Delaware utilities—had standing and rejected the contention that the challenge should have been made before the Public Service Commission. The court also found that plaintiffs' allegations were sufficient for their claims to survive a motion to dismiss. *Stevenson v. Delaware Department of Natural Resources and Environmental Control*, No. S13C-12-025 (Del Super. Ct. Sept. 22, 2014): added to the "Industry Lawsuits/Challenges to State Action" slide.

Federal Court Denied Broad Injunctive Relief After Finding NEPA Shortcoming in Review of Los Angeles Subway Project, Cited Project's Greenhouse Gas Reductions. The federal district court for the Central District of California ruled in May 2014 that the review under the National Environmental Policy Act (NEPA) for a subway project in Los Angeles was adequate except for the analysis of alternative construction methods for one segment of the project. In September 2014, the court partially vacated the record of decision, but declined to issue an injunction that would bar utility relocation, purchase of tunnel boring equipment, and certain tunneling activities. The court found that plaintiffs had not shown that the balance of hardships weighed in favor of enjoining these activities, citing, among other factors, the reduction in greenhouse gas emissions that would result from the finished project. The court also found that plaintiffs had not shown that the public interest would not be disserved by broad injunctive relief, given the project's social and environmental benefits and the potential jeopardy in which broad injunctive

relief could place the project. *Today's IV, Inc. v. Federal Transit Administration*, No. 2:13-cv-00378 (C.D. Cal. Sept. 12, 2014).

NEW CASES, MOTIONS, AND NOTICES

EPA Asked D.C. Circuit to Dismiss Challenge to Proposal for Regulating Existing Power Plants' Greenhouse Gas Emissions. EPA filed a motion to dismiss Murray Energy Corporation's petition seeking review of EPA's proposed rule for regulating greenhouse gases from existing power plants. EPA said there was no subject matter jurisdiction because a proposed rule is not a reviewable action under the Clean Air Act. EPA argued that Murray Energy's claim that EPA "altogether lacks authority" to regulate greenhouse gas emissions from existing power plants could not render the proposed rule a "final action" subject to judicial review. *Murray Energy Corp. v. EPA*, No. 14-1151 (D.C. Cir., motion to dismiss Oct. 23, 2014): added to the "Challenges to Federal Action" slide.

Group Filed FOIA Action Against EPA Seeking Records Showing Outside Influence on Renewable Fuel Standards Decisionmaking. The non-profit corporation Citizens for Responsibility and Ethics in Washington (CREW) filed a lawsuit under the Freedom of Information Act (FOIA) against EPA seeking disclosure of records related to EPA's 2014 proposed Renewable Fuel Standards (RFS), which would decrease the amount of renewable fuel required to be blended into transportation fuel. CREW alleged that companies affected by the regulation had influenced EPA's decisionmaking. The complaint also alleged that delays in issuing the RFS suggested that the process was "politicized and tainted by outside influence." *Citizens for Responsibility and Ethics in Washington v. EPA*, No. 1:14-cv-01763 (D.D.C., filed Oct. 22, 2014): added to the "Force Government to Act/Other Statutes" slide.

Parties Submitted Motions to Govern Further Proceedings After Supreme Court Greenhouse Gas Permitting Decision. On October 21, 2014, parties weighed in on how the D.C. Circuit should proceed after the Supreme Court's decision on greenhouse gas regulation in *Utility Air Regulatory Group v. EPA*. Industry groups, along with states and public interest groups aligned with industry, argued that greenhouse gas emissions were not and could not be subject to Prevention of Significant Deterioration (PSD) or Title V requirements without further EPA rulemaking. EPA asked that its PSD and Title V regulations be vacated only to the extent that they required permits where greenhouse gases were the only pollutant that exceeded applicable major source thresholds or required EPA to consider phasing sources into the permitting programs that met lower greenhouse gas emission thresholds. EPA (and also environmental organization respondent-intervenors) said that best available control technology requirements for greenhouse gases should continue to apply—without need for further rulemaking—to sources whose emissions of other pollutants met the applicable thresholds. *Coalition for Responsible Regulation v. EPA*, Nos. 09-1322 et al. (D.C. Cir., industry/states/public interest groups' motion, EPA motion, environmental respondent-intervenors' motion Oct. 21, 2014).

BLM Said Environmental Review Process for California Oil and Gas Leases Would Take Two Years. The U.S. Bureau of Land Management (BLM) and the Center for Biological Diversity and Sierra Club filed a joint status report in the environmental organizations' lawsuit challenging BLM's leasing of federal lands in California for oil and gas development. In March 2013, the

federal district court for the Northern District of California said that BLM had unreasonably refused to consider drilling projections that included hydraulic fracturing. In its October 2014 status report, BLM indicated that it had completed the public scoping process for its environmental impact review, published a Scoping Summary Report, funded a review of scientific and technical information on well stimulation technologies by the California Council on Science and Technology, and awarded a contract for preparation of the Resource Management Plan Amendment and environmental impact statement. BLM said that it anticipated that it will take two years to complete the review process and tentatively scheduled issuance of the record of decision for October 2016. *Center for Biological Diversity v. Bureau of Land Management*, No. 11-cv-06174 (N.D. Cal., joint status report Oct. 16, 2014): added to the "Stop Government Action/NEPA" slide.

Rehearing and Stay Sought for Dominion Cove Point LNG Project. On October 15, 2014, environmental groups requested that the Federal Energy Regulatory Commission (FERC) rehear and rescind its September 29 order authorizing construction and operation by Dominion Cove Point LNG, LP, of liquefaction and terminal facilities for the export of liquefied natural gas (LNG) in Cove Point, Maryland, and associated pipeline facilities to transport natural gas to the LNG terminal facilities. The environmental groups also asked for a stay of FERC's order to prevent construction or land disturbance associated with the authorized actions. The groups claimed that FERC's order failed to comply with the National Environmental Policy Act and the Endangered Species Act. The request for rehearing enumerated a number of alleged shortcomings in the environmental review, including that FERC had "improperly discounted the significance of the project's direct greenhouse gas emissions" and had "ignored the reasonably foreseeable upstream and downstream greenhouse gas emissions" that the project would cause. *In re Dominion Cove Point LNG, LP*, No. CP13-113-000 (FERC, request for rehearing and motion for stay Oct. 15, 2014): added to the "Stop Government Action/NEPA" slide.

Environmental Groups Challenged Decision to Withdraw Proposed Listing of Wolverine as Threatened Species in Contiguous United States. A group of environmental organizations challenged the withdrawal of a proposal to list the distinct population segment of the North American wolverine in the contiguous United States as a threatened species under the Endangered Species Act. The complaint said that the wolverine resided in "high-altitude and high-latitude ecosystems characterized by deep snow and cold temperatures" and that its survival in the contiguous U.S. was threatened by climate change, as well as by other threats such as highly isolated and fragmented habitat, extremely low population numbers, intentional and incidental trapping, and disturbance by winter recreation activities. Plaintiffs alleged that the Fish and Wildlife Service (FWS) based the withdrawal of the proposed listing on "manufactured uncertainty as to climate modeling and wolverine habitat needs and reached speculative conclusions about the wolverine's future prospects that run directly counter to all of the evidence in the record." Plaintiffs also alleged that the FWS "arbitrarily dismissed" the non-climate factors that compounded the threat to the wolverine. *Center for Biological Diversity v. Jewell*, No. 9:14-cv-00247-DLC (D. Mont., filed Oct. 13, 2014): added to the "Endangered Species Act" slide.

Environmental Groups Challenged Approval of Project That Would Reopen Bakersfield Refinery. Three environmental groups commenced a lawsuit in California Superior Court challenging the approval by the Kern County Board of Supervisors of an environmental impact

report (EIR) for a project that the groups alleged would result in a "five-fold increase" in the Alon Bakersfield Refinery's capacity to import crude oil and allow the "shuttered" facility to reopen and operate at full capacity. The groups alleged a number of substantive California Environmental Quality Act (CEQA) violations, including improper use of a 2007 baseline for the assessment of impacts that measured impacts from a point when the refinery was still operating when the baseline should have been current non-operational conditions. With respect to the project's greenhouse gas emissions, petitioners alleged that the EIR failed to disclose the higher greenhouse emissions that result from refining tar sands; that the EIR had improperly failed to analyze greenhouse gas emissions associated with rail transportation on the grounds that federal law preempted CEQA; that the EIR had improperly assumed that the refinery's required participation in the California cap-and-trade program would reduce its emissions to zero; and that the EIR ignored emissions from combustion of end products. *Association of Irritated Residents v. Kern County Board of Supervisors*, No. S-1500-CV-283166 (Cal. Super. Ct., filed Oct. 9, 2014): added to the "State NEPAs" slide.

Property Owners Challenged Underground Injection Control Permits for FutureGen Project. The Environmental Appeals Board consolidated the appeals of four Class VI Underground Injection Control (UIC) permits issued to FutureGen Industrial Alliance, Inc. for the injection of a carbon dioxide stream generated by an oxy-combustion power plant in Illinois. The petitioners own property in the Area of Review for the project. They challenged certain permit conditions, including the Area of Review, which they contended was based on an undersized plume and inaccurate identification of wells and insufficient investigation of well impacts. Petitioners also argued that the site monitoring network was not explained or justified, especially in light of the undersized plume, and that financial assurance requirements were inadequate for an untested project. *In re FutureGen Industrial Alliance, Inc.*, Appeal Nos. UIC 14-68; UIC 14-69; UIC 14-70; UIC 14-71 (EAB, filed Oct. 1, 2014 (UIC 14-68, UIC 14-69, UIC 14-70, UIC 14-71); consolidated Oct. 9, 2014): added to the "Stop Government Action/Project Challenges" slide.

Trade Association for Gasoline and Heating Fuel Marketers Alleged Connecticut Failed to Evaluate Methane Leakage Impacts of Natural Gas Infrastructure Expansion Plan. A trade association of energy marketers involved in sales of gasoline and heating fuel filed a lawsuit in Connecticut Superior Court challenging the failure of the Connecticut Department of Energy and Environmental Protection (CTDEEP) and the Connecticut Public Utilities Regulatory Authority (PURA) to prepare an environmental impact evaluation (EIE) pursuant to the Environmental Protection Act in conjunction with the plan to expand Connecticut's natural gas infrastructure. The plan included expansion of natural gas pipeline capacity into the state, 900 miles of new gas mains inside the state, incentives for gas companies to begin construction quickly, and conversion of 300,000 residential and commercial customers to natural gas. Plaintiff alleged that CTDEEP had failed to consider the direct, indirect, and cumulative impacts of methane leakage from Connecticut's natural gas distribution system. *Connecticut Energy Marketers Association v. Connecticut Department of Energy and Environmental Protection*, No. HHD-CV-14-6054538-S (Conn. Super. Ct., filed Oct. 7, 2014): added to the "State NEPAs" slide.

Public Trust Doctrine Plaintiffs Sought Supreme Court Review. The parties who unsuccessfully sought to use the public trust doctrine to compel climate-mitigating action by the federal government filed a petition for certiorari in the U.S. Supreme Court. They asked the

Court to review the D.C. Circuit's opinion affirming the dismissal of their action for lack of subject matter jurisdiction. The D.C. Circuit said in June 2014 that there was no federal question jurisdiction because the public trust doctrine was a matter of state law. Petitioners said their certiorari petition raised the questions of whether the public trust doctrine applies to the federal government and whether federal courts have jurisdiction to enforce the public trust against the federal government. *Alec L. v. McCarthy*, No. 14-405 (U.S., pet. for cert. filed Oct. 3, 2014): added to the "Common Law Claims" slide.

Truck Drivers Challenged EPA Waiver for California Greenhouse Gas Regulation of Heavy-Duty Trucks. The Owner-Operator Independent Drivers Association, Inc. petitioned the D.C. Circuit Court of Appeals to review EPA's granting of a request by the California Air Resources Board for a waiver of Clean Air Act preemption of certain provisions of California's greenhouse gas regulations for heavy-duty tractor-trailer trucks. The waiver encompasses sleeper-cab tractors for model years 2011 through 2013 and dry-van and refrigerated-van trailers encompassed by such tractors starting with the 2011 model year. *Owner-Operator Independent Drivers Association, Inc. v. EPA*, No. 14-1192 (D.C. Cir., filed Oct. 3, 2014): added to the "Challenges to Federal Action" slide.

Environmental Groups Appealed FERC Approvals of LNG Facilities in Louisiana. Sierra Club and the Gulf Restoration Network filed a petition in the D.C. Circuit Court of Appeals seeking review of Federal Energy Regulatory Commission (FERC) actions authorizing construction and operation of liquefaction facilities and pipeline and compression facilities in Louisiana. The liquefaction facilities are to be constructed at the site of an existing liquefied natural gas (LNG) import terminal, and the actions approved by FERC will facilitate the export of LNG. FERC rejected Sierra Club's contentions that the facilities would result in increased domestic natural gas production and cause environmental harms, including increased greenhouse gas emissions. The FERC actions for which petitioners seek review are its Order Granting Authorization Under Section 3 of the Natural Gas Action and Issuing Certificates (June 19, 2014); Notice Rejecting Request for Rehearing and Dismissing Request for Stay (July 29, 2014); and Order Denying Rehearing (September 26, 2014). *Sierra Club v. Federal Energy Regulatory Commission*, No. 14-1190 (D.C. Cir., filed Sept. 29, 2014): added to the "Stop Government Action/NEPA" slide.

Update #67 (October 7, 2014)

FEATURED DECISION

Alaska Supreme Court Rejected Minors' Public Trust Doctrine Claims. The Supreme Court of Alaska affirmed the dismissal of an action brought by six children under the Alaska constitution and the public trust doctrine against the State of Alaska seeking to impose obligations on the State to address climate change. As initial matters, the court concluded that plaintiffs had interest-injury standing to make these claims and that sovereign immunity did not shield the State. The court ruled, however, that three of plaintiffs' claims for relief that asked the court to set carbon dioxide emissions standards and order the state to take actions to meet the standards were nonjusticiable political questions because they required "a science- and policy-based inquiry" better left to the executive or legislative branches of government. While four

other claims sought justiciable relief—namely a declaratory judgment interpreting the state constitution to impose a duty on the State to protect the atmosphere—these claims did not present an actual controversy. The court indicated that a declaration of the scope of the public trust doctrine would neither compel the State to take any particular action nor advance the plaintiffs' interests. The court therefore dismissed these claims on "prudential grounds." Plaintiffs filed a petition for rehearing on September 25, 2014. *Kanuk v. Alaska*, No. S-14776 (Alaska Sept. 12, 2014): added to the "Common Law Claims" slide.

DECISIONS AND SETTLEMENTS

D.C. Circuit Ordered EPA to Respond to Petition Challenging Greenhouse Gas Rulemaking for Existing Power Plants. On September 18, 2014, the D.C. Circuit ordered the U.S. Environmental Protection Agency (EPA) to respond to the petition for extraordinary writ filed in June by Murray Energy Corporation challenging EPA's authority to conduct rulemaking to regulate greenhouse gas emissions from existing power plants. EPA's response is due on October 20, but EPA asked for an additional two weeks to allow for Department of Justice and EPA management review of its brief. In its unopposed motion seeking the additional time, EPA noted that the Federal Rules of Appellate Procedure permit the court to deny a petition for a writ of prohibition without requiring an answer and that respondents are not permitted to submit a responsive pleading unless requested to do so by the court. *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. Sept. 18, 2014): added to the "Challenges to Federal Action" slide.

Federal Court in West Virginia Allowed Coal Company's Lawsuit Against EPA to Proceed. The federal district court for the Northern District of West Virginia denied EPA's motion to dismiss a lawsuit seeking to compel the agency to fulfill its obligation under Section 321(a) of the Clean Air Act to evaluate the impacts of administration and enforcement of the Clean Air Act on employment. The court found that the absence of a "date-certain deadline" for conducting the evaluations required by Section 321(a) did not make EPA's obligation to conduct them discretionary. The court therefore concluded that it had jurisdiction to hear the case. The court also rejected EPA's request that it strike plaintiffs' prayer for injunctive relief. The court noted that while there might be questions as to the scope of injunctive relief the court could grant, arguments regarding this issue were premature. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-39 (N.D. W. Va. Sept. 16, 2014): added to the "Challenges to Federal Action" slide.

Colorado Federal Court Vacated Agency Actions That Authorized Expanded Coal Mining, Saying That Review of Greenhouse Gas Impacts Should Start with "Clean Slate." The federal court for the District of Colorado issued a final order vacating three actions of the United States Forest Service and Bureau of Land Management that permitted expansion of coal mining in a part of Colorado's North Fork Valley called the Sunset Roadless Area. In a June 2014 opinion, the court asked the parties to confer regarding an appropriate remedy after ruling that the agencies had violated the National Environmental Policy Act (NEPA) by failing to take hard look at potential impacts of increased greenhouse gas emissions associated with their actions. The parties were unable to agree, so the court stepped in. In vacating the federal actions, the court noted that vacatur was the "normal remedy" for NEPA violations and that equitable considerations did not weigh in favor of a more limited remedy such as the tailored temporary injunctions requested by defendants. The court said that the agencies' decision on remand was

not a foregone conclusion and that "NEPA's goals of deliberative, non-arbitrary decision-making would seem best served by the agencies approaching these actions with a clean slate." *High Country Conservation Advocates v. United States Forest Service*, No. 13-cv-01723-RBJ (D. Colo. Sept. 11, 2014): added to the "Stop Government Action/NEPA" slide.

California Court Ruled That Subdivision Was Subject to CEQA and That Environmental Review Was Mostly Sufficient. The California Court of Appeal reversed a trial court's determination that a proposed subdivision approved by the County of Colusa was not subject to the California Environmental Quality Act, but proceeded to uphold the environmental review supporting the mitigated negative declaration that the County had issued. (The only shortcoming identified by the appellate court related to potential traffic impacts at a single intersection.) With respect to climate change impacts, the County had concluded that the project would achieve a 35% reduction in greenhouse gas emissions below business-as-usual levels through compliance with regulatory measures. The court found that plaintiffs had not pointed to any evidence that suggested it would be unreasonable to expect the applicant and ultimate land users to comply with the regulatory measures, and that plaintiffs had not pointed to any other substantial evidence in the record that supported a fair argument of significant impact. *Rominger v. County of Colusa*, No. C073815 (Cal. Ct. App. Sept. 9, 2014): added to the "State NEPAs" slide.

Federal Court in Nevada Dismissed NEPA Challenge to Oil and Gas Lease Sale as Premature. The federal district court for the District of Nevada rejected a request for a preliminary injunction and also *sua sponte* dismissed a lawsuit brought by a group of owners of farming and ranching land, water rights, and grazing rights in Nevada who challenged the U.S. Bureau of Land Management's (BLM's) issuance of oil and gas leases in Nevada. The group had challenged BLM's compliance with the National Environmental Policy Act (NEPA), including its failure to consider its actions' impacts on methane releases and increased emissions of greenhouse gasses from fossil fuel combustion. The court concluded that it had no subject matter jurisdiction because there had been no final agency action since although BLM had conducted the lease sale, it had not yet decided whether to issue the leases. *Reese River Basin Citizens Against Fracking, LLC v. Bureau of Land Management*, No. 3:14-cv-00338 (D. Nev. Sept. 8, 2014): added to the "Stop Government Action/NEPA" slide.

District Attorney in Massachusetts Dropped Conspiracy Charges Against Climate Protestors Who Blocked Coal Shipment. On September 8, 2014, Bristol County (Massachusetts) District Attorney Samuel Sutter dropped criminal conspiracy charges against two climate activists who in 2013 used a lobster boat to block a shipping channel to stop a coal shipment to the Brayton Point Power Station in Somerset, Massachusetts. to plea guilty to reduced charges of disturbing the peace and motor vessel violations. The activists had indicated that they would pursue a necessity defense that would require them to establish that climate change presented a clear and imminent danger, not one that was debatable or speculative; that they reasonably expected that their actions would be effective in directly reducing or eliminating the danger; and that there was no legal alternative which would have been effective to reduce or eliminate the danger. In dropping the charges, the district attorney called climate change "one of the gravest crises our planet has ever faced" and said that "[i]n my humble opinion, the political leadership on this issue has been sorely lacking." *Commonwealth v. Ward, Commonwealth v.*

O'Hara (Mass. Dist. Ct. Sept. 8, 2014): added to the "Climate Change Protestors and Scientists" slide.

California State Court Said CEQA Suit Challenging Permits for Crude-by-Rail Operation Was Time-Barred. A judge in the California Superior Court ruled from the bench on September 5, 2014, that a lawsuit challenging the Bay Area Air Quality Management District's issuance of a permit for a crude-by-rail operation in Richmond, California, was barred by the statute of limitations. Petitioners had alleged that BAAQMD's action violated the California Environmental Quality Act (CEQA). *Communities for a Better Environment v. Bay Area Air Quality Management District*, No. CPF-14-513557 (Cal. Super. Ct. Sept. 5, 2014): added to the "State NEPAs" slide.

U.S. and Costco Entered into Consent Decree to Resolve Refrigerant Violations. The United States and Costco Wholesale Corp. (Costco) filed a consent decree in the federal district court for the Northern District of California to resolve the U.S.'s allegations that Costco violated the Clean Air Act and its regulations by failing to repair leaks of the refrigerant R-22—an ozone-depleting hydrochlorofluorocarbon and potent greenhouse gas—from commercial refrigeration appliances. Costco agreed to pay a $335,000 civil penalty and also agreed to implement a refrigerant compliance management plan, to reduce its leak rate, to retrofit appliances at 30 warehouses to use non-ozone-depleting refrigerants with global warming potentials no greater than that of the refrigerant R-407F, and to install environmentally friendly glycol secondary loop refrigeration systems and centrally monitored refrigerant leak detection systems at all new stores. *United States v. Costco Wholesale Corp.*, No. 3:14-cv-03989 (N.D. Cal. Sept. 3, 2014): added to the "Regulate Private Conduct" slide.

California Court Ruled That City's Analysis of Shopping Center's Greenhouse Gas Emissions Was Insufficient and Misleading. The California Court of Appeal reversed a trial court's decision and held that the City of Porterville's analysis of the greenhouse gas impacts of a large shopping center had not complied with the California Environmental Quality Act. The environmental impact report (EIR) for the project had concluded that there would not be a significant impact because the project's greenhouse gas emissions would be reduced at least 29% below business-as-usual emissions, in large part because the shopping center would be developed on an infill site. After receiving comments critical of the basis for this conclusion, the City released—on the day of the project's approval and without opportunity for public review—a memorandum prepared by its consultants that employed a "new and different" analysis to support the conclusion that greenhouse gas emissions would be insignificant. In an unpublished opinion, the court said that the EIR's analysis of greenhouse gas emissions misled the public because it "interlaced" its qualitative and quantitative assessments and made the quantitative analysis seem essential when, in fact, the EIR presented "a qualitative analysis decorated with baseless numbers." The court further held that the City's memorandum presented on the day of the project's approval was procedurally improper and could not cure the EIR's insufficiencies. *California Healthy Communities Network v. City of Porterville*, No. F067685 (Cal. Ct. App. Sept. 3, 2014): added to the "State NEPAs" slide.

Texas Federal Court Awarded Defendants in Coal Plant Citizen Suit $6.4 Million in Attorney and Expert Witness Fees. The federal district court for the Western District of Texas

ordered Sierra Club to pay $6.4 million in attorney fees, expert witness fees and costs to the owners of a coal-fired power plant in Texas. The court found that Sierra Club's claims in the citizen suit, which alleged particulate matter and opacity violations of the Clean Air Act, were frivolous, unreasonable, or groundless. The court noted that Sierra Club knew prior to filing its suit that the power plant was exempted from particulate matter deviations during maintenance, startup, and shutdown; that Sierra Club at trial failed to prove injury or causation for its lone standing witness; that Sierra Club persisted in keeping the parent company of the owner of the plant as a defendant even though Sierra Club knew it had no role in the ownership or operations of the plant; and that Sierra Club failed to analyze Texas Commission on Environmental Quality investigation reports that documented that there were no particulate matter or opacity violations. The court also rejected Sierra Club's argument that defendants' fees were unreasonable. Sierra Club has filed notices of appeal of the granting of the motion for fees and also of the judgment itself. *Sierra Club v. Energy Future Holdings Corp.*, No. 6:12-cv-00108-WSS (W.D. Tex. Aug. 29, 2014): added to the "Challenges to Coal-Fired Plants" slide.

NEW CASES, MOTIONS, AND NOTICES

Sierra Club and Citizen Groups Challenged Approval of Plan to Repower New York Power Plant. Sierra Club and a group called Ratepayer and Community Intervenors commenced a proceeding challenging an order issued by the New York Public Service Commission that approved the addition of natural gas firing capability to a coal-burning power plant in Dunkirk, New York. Petitioners alleged that the agency violated the New York Public Service Law and the State Environmental Quality Review Act. Petitioners argued that the environmental review measured impacts against an improper baseline by comparing impacts to the operation of four coal-fired units rather than to the current operation of a single coal-fired unit at the plant. Petitioners also said that the environmental review incorrectly assumed that natural gas would replace coal as the sole fuel source. In their memorandum of law, petitioners contended that, as a result of these incorrect assumptions, the review failed to assess, among other things, the climate change impacts of the agency's actions. *Sierra Club v. Public Service Commission of State of New York*, No. 4996/2014 (N.Y. Sup. Ct., filed Sept. 26, 2014): added to the "Challenges to Coal-Fired Power Plants" slide.

States and Industry Sought Rehearing on EPA's Federal Greenhouse Gas Permitting Authority. Two states, along with trade associations and other organizations representing various industrial sectors, filed petitions for rehearing in the D.C. Circuit in their proceedings challenging the U.S. Environmental Protection Agency's (EPA's) imposition of federal greenhouse gas permitting requirements. The petitions argued that rehearing was necessary because the Supreme Court's decision in *Utility Air Regulatory Group v. EPA* negated the D.C. Circuit's dismissal of the proceedings on standing grounds. The D.C. Circuit's ruling was grounded in its interpretation of the Clean Air Act's Prevention of Significant Deterioration (PSD) permitting requirements were "self-executing" for stationary sources that emitted greenhouse gases—the D.C. Circuit therefore reasoned that petitioners' injuries were caused by the statute itself and not by EPA's actions. Petitioners argued in their petitions for rehearing that since the Supreme Court expressly rejected this interpretation, the D.C. Circuit's ruling should be vacated and the petitions for review should be granted or the matter reheard. *Texas v. EPA*, No. 10-1425, *Utility Air Regulatory Group v. EPA*, No. 11-1037 (D.C. Cir., SIP/FIP Advocacy

Group petition for panel rehearing or rehearing en banc Sept. 22, 2014; State of Wyoming et al. petition for panel rehearing Sept. 22, 2014): added to the "Challenges to Federal Action" slide.

Sierra Club Challenged Air Permits for Crude Oil Terminal in California. Sierra Club filed a lawsuit in California Superior Court challenged the issuance by the Sacramento Metropolitan Air Quality Management District (SMAQMD) of construction and operating permits for a crude oil rail-to-truck operation that Sierra Club said would bring "highly volatile and explosive North Dakotan Bakken crude oil" to California. Sierra Club alleged that SMAQMD had issued the permits "without any notice or public process whatsoever" and that the terminal project could result in a number of significant adverse environmental impacts, including significant increases in greenhouse gas emissions. Sierra Club asked the court to require SMAQMD to set aside and withdrawal its approval of the permits and to refrain from granting other approvals until it has complied fully with the California Environmental Quality Act. *Sierra Club v. Sacramento Metropolitan Air Quality Management District*, No. 2014-80001945 (Cal Super. Ct., filed Sept. 22, 2014): added to the "State NEPAs" slide.

Petition to FTC Called Green Mountain Power's "Double Counting" of Renewable Energy Credits a Deceptive Practice. Four Vermont residents filed a petition with the Federal Trade Commission asking for a determination that Green Mountain Power Corporation (GMP) had engaged in deceptive practices by representing to Vermont electricity customers that GMP was providing them with electricity from renewable sources when, in fact, GMP was selling the Renewable Energy Credits generated by renewable sources to out-of-state utilities. Citing the FTC's 2012 *Guides for the Use of Environmental Marketing Claims* (known as the *Green Guides*), the petitioners contended that GMP had misled Vermont residents concerned about their carbon footprint, the segment of consumers at which GMP targets its marketing efforts. Petition to Investigate Deceptive Trade Practices of Green Mountain Power Company in the Marketing of Renewable Energy to Vermont Consumers (Sept. 15, 2014): added to the "Regulate Private Conduct" slide.

Organization Sought Sanctions Against EPA in FOIA Dispute. Landmark Legal Foundation (LLF) asked the federal district court for the District of Columbia to impose sanctions on the U.S. Environmental Protection Agency (EPA) for spoliation. The sanctions motion was made in an action LLF filed before the 2012 presidential election to force EPA to produce documents under the Freedom of Information Act (FOIA) relevant to LLF's request for records the group believed would show that EPA improperly delayed controversial environmental regulations for political reasons prior to the election. The sanctions motion was filed almost a year after the court's August 2013 decision permitting LLF to conduct limited discovery because the court found that questions of fact had been raised as to (1) whether EPA deliberately and in bad faith sought to exclude the EPA administrator's records from the scope of the FOIA request and (2) whether possibly relevant personal e-mails had been excluded from EPA's records search. LLF contends that EPA failed to recover—and, in fact, erased—text messages and failed to cooperate in investigation the loss of text messages, and to search and recover relevant e-mails from personal accounts. LLF seeks attorney fees, costs, and a fine; the appointment of an independent monitor; and orders directing EPA's Inspector General to investigate and report on all spoliation issues involving senior officials covered by the FOIA request and directing EPA to notify plaintiffs and petitioners in proceedings against the agency since 2009 of the possibility that EPA

engaged in spoliation in their proceedings. *Landmark Legal Foundation v. EPA*, No. 1:12-cv-01726-RCL (D.D.C., sanctions motion July 24, 2014; reply Sept. 24, 2014): added to the "Force Government to Act/Other Statutes" slide.

Update #66 (September 8, 2014)

FEATURED DECISION

Ninth Circuit Ruled That EPA Could Not Waive Compliance with New Air Standards in Permit for Natural Gas Power Plant. Despite agreeing that equities favored an applicant who waited more than three years for EPA to issue an air permit for a natural gas-fired power plant, the Ninth Circuit Court of Appeals concluded that the Clean Air Act's plain language required vacating the permit, which did not require compliance with regulatory standards in effect at the time the permit was issued. The case involved an application for a plant in Avenal, California, for which a permit application was submitted in 2008. Although the Clean Air Act requires permit determinations to be made within one year of an application, EPA did not issue its final determination until 2011, after a federal district court ordered it to do so. In the course of its deliberations on the permit application, EPA at first contended that it was required to apply new standards promulgated after the application was submitted, including the best available control technology standard for greenhouse gases, but the agency later reversed course and said that it could waive standards that became effective after the statutory one-year deadline for permit determinations. The Ninth Circuit ruled that the Clean Air Act clearly required EPA to apply the regulations in effect at the time of its permit determination and that the Clean Air Act did not allow EPA discretion to grandfather a permit application in under old air standards. The Ninth Circuit noted that this case involved an "ad hoc waiver" of applicable regulations and that its decision did not affect EPA's ability to grandfather permits through rulemaking (for example, by setting an operative date for new regulations so that a waiver for pending applications was built into the regulation itself). ***Sierra Club v. EPA***, Nos. 11-73342, 11-73356 (9th Cir. Aug. 12, 2014): added to the "Stop Government Action/Project Challenges" slide.

DECISIONS AND SETTLEMENTS

Federal Court Found Fish and Wildlife Service's Assessment of Climate Change Impacts on Threatened Bull Trout Was Adequate. The federal district court for the District of Montana upheld an incidental take permit for grizzly bears and bull trout (both are threatened species under the Endangered Species Act) for logging and road building activities on land in western Montana, except to the extent of finding that the Fish and Wildlife Service (FWS) had failed to justify the conclusion that mitigation measures for the take of grizzly bears were sufficient. The court concluded that the FWS's review under the National Environmental Policy Act (NEPA) was adequate, including the review of climate change-related cumulative impacts. The FWS included a chapter on climate change in the final environmental impact statement in response to public comment; the chapter discussed "the causes of climate change, its effects on forest management, projections for future temperatures, the environmental impacts of increased temperatures, current approaches to the issue, and a comparison of the effects of climate change across the alternatives." In particular, the chapter addressed the effects of climate change on bull trout, including loss of bull trout habitat. Plaintiffs criticized the "disconnect" between the

assessment of climate change's adverse impacts and the FWS's conclusions regarding the environmental consequences of the permit, but the court concluded that the FWS adequately addressed and mitigated climate change's potential effects. ***Friends of the Wild Swan v. Jewell***, No. 9:13-cv-00061-DWM (D. Mont. Aug. 21, 2014): added to the "Stop Government Action/NEPA" slide.

After Council on Environmental Quality Denies Climate Change Rulemaking Petition, Lawsuit Seeking Response to Petition Is Voluntarily Withdrawn. On August 7, 2014, the Council on Environmental Quality (CEQ) denied a 2008 rulemaking petition to amend its NEPA regulations to require analysis of climate change impacts. The rulemaking petition had been submitted by the International Center for Technology Assessment (ICTA), the Natural Resources Defense Council, and the Sierra Club. CEQ denied the petition on the grounds that NEPA regulations already required assessment of climate impacts. CEQ also indicated that it was considering how to proceed with its 2010 draft guidance on incorporating consideration of climate change into environmental reviews in light of comments it received. On August 20, ICTA and its sister organization, the Center for Food Safety, filed a notice of voluntary dismissal without prejudice of the federal action they filed earlier in 2014 seeking to compel a response to the 2008 petition; the notice indicated that the organizations were preserving their right to challenge the denial on its merits. ***International Center for Technology Assessment v. Council on Environmental Quality***, No. 1:14-cv-00549 (D.D.C. Aug. 20, 2014): added to the "Force Government to Act/Other Statutes" slide.

Challenge to 2013 Cellulosic Biofuel Standard Is Voluntarily Dismissed After EPA Issues Response to Request for Reconsideration. The D.C. Circuit Court of Appeals granted a joint motion for voluntary dismissal of a challenge to the 2013 cellulosic biofuel standard. (The challenge to the cellulosic standard previously had been severed from the challenge to the rest of the 2013 renewable fuel standard (RFS); the D.C. Circuit upheld the rest of the 2013 RFS in May 2014.) EPA finalized its response to a request for administrative reconsideration of the cellulosic biofuel standard in May 2014 when it issued a direct final rule in which it based the 2013 standard on actual 2013 production and provided for a refund of excess waiver credits obtained by obligated parties. ***Monroe Energy, LLC v. EPA***, No. 14-1033 (D.C. Cir. Aug. 19, 2014): added to the "Challenges to Federal Action" slide.

Long Beach City Council Agreed That New Agreements for Coal Export Facility Did Not Require New Environmental Review. The Long Beach City Council unanimously denied an appeal filed by environmental groups who argued that the Port of Long Beach Board of Harbor Commissioners should have undertaken a new review under the California Environmental Quality Act (CEQA) for a new operating agreement and 15-year lease for a coal export facility at the port. The City Council agreed with the recommendation of Harbor Department staff that CEQA review was not required because the actions were categorically exempt from CEQA under exemptions for the use and repair of existing facilities and because a negative declaration had been issued for the coal shed facility in 1992 and no changes to the coal shed had been proposed. The City Council was not persuaded by the argument that information regarding the adverse impacts of greenhouse gases required a new review. **Recommendation and Draft Resolution (No. RES-14-0069) from Managing Director and Chief Executive of Harbor**

Department (Aug. 19, 2014); **City Council Finished Agenda and Draft Minutes** (Aug. 19, 2014): added to the "State NEPAs" slide.

California Appellate Court Rejected Claims That Large-Scale Residential Redevelopment in San Francisco Would Have Significant Greenhouse Gas Impact. The California Court of Appeal affirmed the denial of a challenge to the approvals by the City and County of San Francisco of the Parkmerced project, a redevelopment of a large-scale residential development originally built in the 1940s to provide middle-income housing. The redevelopment would increase the number of residential units from 3,221 to 8,900 over the course of 20 to 30 years. Among the arguments rejected by the appellate court was the claim that the final environmental impact report (FEIR) prepared under CEQA should have identified significant greenhouse gas production impacts because the project would result in increased greenhouse gas emissions before 2020, inhibiting achievement of California's statutory goal of reducing greenhouse gas emissions to 1990 levels by 2020. The court said the FEIR had disclosed the anticipated increase in greenhouse gas emissions from construction activities and had adequately supported its conclusion that the increased emissions would not result in a significant impact. ***San Francisco Tomorrow v. City and County of San Francisco***, No. A137753 (Cal. Ct. App. Aug. 14, 2014): added to the "State NEPAs" slide.

Massachusetts Land Court Removed Barriers to Construction of Biomass Plant. The Massachusetts Land Court ruled that the developer for a proposed biomass energy plant in Springfield was not required to obtain a special permit from the City. The court reinstated building permits for the project. The court noted that the developer had performed an analysis of the project's potential greenhouse gas emissions and concluded that the burning of its fuel source, green wood chips, was carbon neutral because there was no difference in emissions between green wood chips that decayed naturally and chips that were burned. ***Palmer Renewable Energy, LLC v. Zoning Board of Appeals of City of Springfield***, Nos. 12 PS 461494 AHS, 12 PS 468569 AHS (Mass. Land Ct. Aug. 14, 2014): added to the "Challenges to Local Action" slide.

Federal Court Ruled That Endangered Species Act's Federal Agency Consultation Requirements Did Not Apply to Projects in Other Countries. The federal district court for the District of Northern California dismissed Endangered Species Act (ESA) claims in a challenge to the decision by the Export-Import Bank of the United States to provide financing for liquefied natural gas projects in Australia. The court said that the ESA's consultation requirements did not apply to projects located in foreign countries and that any challenge to the ESA regulations was time-barred. The court dismissed with leave to amend. Plaintiffs have also alleged a claim under the National Historic Preservation Act; that claim was not a subject of this motion to dismiss. ***Center for Biological Diversity v. Export-Import Bank of the United States***, No. C 12-6325 SBA (N.D. Cal. Aug. 12, 2014): added to the "Stop Government Action/Other Statutes" slide.

Sixth Circuit Upheld NEPA Review of Greenhouse Gas Emissions from Ohio River Bridges Project. The Sixth Circuit Court of Appeals affirmed the rejection of a challenge to a $2.6-billion construction and transportation management program designed to improve mobility across the Ohio River between Kentucky and Southern Indiana. Plaintiff challenged the project under NEPA and Title VI of the Civil Rights Act of 1964. Like the district court, the Sixth

Circuit was not persuaded that the reviewing agencies' consideration of greenhouse gas emissions was inadequate. The Sixth Circuit said that defendants' position that they could not "usefully evaluate" such emissions on a project-specific basis because of "the non-localized, global nature" of climate impacts was not arbitrary and capricious. ***Coalition for Advancement of Regional Transportation v. Federal Highway Administration***, No. 13-6214 (6th Cir. Aug. 7, 2014): added to the "Stop Government Action/NEPA" slide.

Sierra Club Agreed to End Litigation Against Coal-Fired Plants in Mississippi. The Sierra Club and Mississippi Power Company (MPC) (a subsidiary of Southern Co.) entered into a global settlement regarding Sierra Club's pending litigation related to the Victor J. Daniel Electric Generating Plant in Jackson County, Mississippi, and the Kemper County IGCC Project. Sierra Club agreed to dismiss seven pending judicial actions and proceedings before the Mississippi Public Service Commission (MPSC) and to refrain for three years from initiating, intervening, or participating in lawsuits and regulatory proceedings regarding certain enumerated activities at the Kemper and Daniel projects. For its part, MPC agreed to cease burning coal and other solid fuel at units at two other power plants, one in Mississippi and one in Alabama, and to retire, repower with natural gas, or convert to a non-fossil fuel alternative energy source another plant in Mississippi. MPC also said it would use commercially reasonable efforts to pursue a wind or solar power purchase agreement and agreed to certain environmental commitments, including compliance with U.S. Environmental Protection Agency (EPA) mercury and air toxic standards at the Kemper project. MPC also agreed to contribute $15 million over 15 years to a new energy efficiency and renewable energy program to provide energy efficiency services to low-income households and to provide grants to public educational institutions for the installation of renewable energy equipment. The agreement also limited the scope of both parties' participation in net-metering rulemaking in Mississippi. Two other actions involving the Kemper project remain active in the Mississippi Supreme Court (*Blanton v. Mississippi Power Co.*, No. 2013-UR-00477-SCT, and *Mississippi Power Co. v. Mississippi Public Service Commission*, No. 2012-UR-01108-SCT). After the Sierra Club and Mississippi Power Co. sought jointly to dismiss a pending case before the Mississippi Supreme Court, plaintiff Blanton in one of the other pending cases moved to stay the dismissal. His motion was opposed separately by each of the other parties to the litigations (see Sierra Club, MPC, MPSC). **Settlement Agreement Between Sierra Club and Mississippi Power Co.** (Aug. 1, 2014): added to the "Challenges to Coal-Fired Plants" slide.

New Jersey Jury Awarded Homeowners $300 for Loss of Beachfront View. A jury awarded homeowners $300 in compensation for the loss of their ocean view resulting from an easement required for public construction of a dune system designed to protect properties from extreme weather. The homeowners had sought $800,000, but received far less as a result of a New Jersey Supreme Court case involving other homeowners who sought compensation for loss of beachfront rules in which the court said that compensation awards should take into account the "quantifiable benefits" of a public project on the value of the remaining property. ***Borough of Harvey Cedars v. Groisser***, No. L-001429-09 (N.J. Super. Ct. July 1, 2014): added to the "Adaptation" slide.

NEW CASES, MOTIONS, AND NOTICES

Challengers of EPA's Designation of Carbon Dioxide as Solid Waste Lay Out Legal Arguments. The Carbon Sequestration Council, Southern Company Services, Inc., and the American Petroleum Institute filed their opening brief in their challenge to EPA's rule that categorized carbon dioxide in the form of gas or supercritical fluid as a "solid waste" under the Resource Conservation and Recovery Act (RCRA). They argue that Congress did not intend for EPA to assert authority over supercritical fluids or, in the alternative, that EPA's assertion that supercritical fluids and uncontained gases were subject to RCRA was not reasonable or deserving of deference. The petitioners do not challenge the conditional exclusion of carbon dioxide as a hazardous waste under RCRA. ***Carbon Sequestration Council v. EPA***, No. 14-1046 (D.C. Cir. Aug. 28, 2014): added to the "Challenges to Federal Action" slide.

Murray Energy Corp. Filed Second Challenge to EPA's Clean Power Plan. After EPA published its proposal to regulate greenhouse gas emissions from existing power plants in the *Federal Register* on June 18, 2014, Murray Energy Corp. filed a second petition in the D.C. Circuit challenging the agency's Clean Power Plan. (Murray Energy also filed a petition for extraordinary writ in June.) In the second petition, Murray Energy contended that EPA's proposal was an illegal final action because it violated an express statutory prohibition on regulating sources under both Section 112 and Section 111(d) of the Clean Air Act. Attempting to differentiate its petition from a challenge to proposed greenhouse gas new source performance standards for power plants that the D.C. Circuit rejected in 2012, Murray Energy noted that it was not challenging the substance of the Clean Power Plan rule, but whether EPA had any authority to initiate a rulemaking at all. ***Murray Energy Corp. v. EPA***, No. 14-1151 (D.C. Cir., filed Aug. 15, 2014): added to the "Challenges to Federal Action" slide.

Both Sides Seek Summary Judgment in Center for Biological Diversity's Challenge to EPA's Approvals of Impaired Waters Lists. Both EPA and the Center for Biological Diversity (CBD) moved for summary judgment in CBD's challenge to EPA's approvals of Oregon's and Washington's lists of impaired waters under the Clean Water Act. CBD argued that EPA's approvals were at odds with evidence in the administrative record of the harmful effects of ocean acidification caused by increasing levels of carbon dioxide in the atmosphere, and also that data EPA was required to consider was missing from the record. EPA said it recognized the seriousness of ocean acidification and that more information and data were available now than were available in 2010, when the reporting period for the challenged listings ended, and more even than in 2012, when EPA approved the lists. EPA argued, however, that viewed in terms of the information available at the time of EPA's approvals, those approvals were fully supported and deserved deference. ***Center for Biological Diversity v. EPA***, No. 2:13-cv-01866-JLR (W.D. Wash., EPA cross-motion for summ. j. Aug. 15, 2014; CBD motion for summ. j. June 20, 2014): added to the "Stop Government Act/Other Statutes" slide.

After Environmental Organizations Notified EPA of Intent to Sue over Failures to Regulate Aircraft Greenhouse Gas Emissions, EPA Announced Plan to Make Endangerment Finding. On August 5, 2014, the Center for Biological Diversity and Friends of the Earth submitted a notice of intent to file suit to EPA. The notice indicated that the organizations would challenge EPA's "unreasonable delay" in fulfilling its obligations under Section 231(a)(2)(A) of the Clean Air Act to determine whether emissions of greenhouse gases from aircraft engines cause or contribute to air pollution that may reasonably be anticipated to

endanger public health or welfare. The two organizations, along with several others, filed a petition in 2007 asking EPA to take these actions, and in 2011, the federal district court for the District of Columbia held that the Clean Air Act imposed a mandatory duty on EPA to make the endangerment finding. The court dismissed the claim in 2012, however, finding that plaintiffs had not shown that EPA had unreasonably delayed in making the determination. On September 3, 2014, EPA issued a document outlining its plan to make a proposed endangerment finding in late April 2015. The plan indicated that EPA's rulemaking process would take place in parallel with the development of international standards for greenhouse gases from aviation. **EPA, U.S. Aircraft Greenhouse Gas Rulemaking Process** (Sept. 3, 2014); **Center for Biological Diversity & Friends of the Earth, Notice of Intent to File Suit Under Section 304 of the Clean Air Act with Respect to Endangerment Finding and Rulemaking to Reduce Greenhouse Gas Emissions from Aircraft** (Aug. 5, 2014): added to the "Force Government to Act/Clean Air Act" slide.

States Filed Challenge to Settlement Agreement that Required EPA to Regulate Greenhouse Gases from Existing Power Plants; Other States Intervene on EPA's Side Twelve states filed a petition for review in the D.C. Circuit asking the court to review a settlement agreement between EPA and other states, governmental entities, and nonprofit organizations in which EPA agreed to propose and finalize a rule regulating greenhouse gas emissions from existing coal-fired power plants. EPA approved the settlement in 2011. The twelve states contended that the agreement was illegal to the extent that it compelled EPA to propose and finalize regulations under Section 111(d) of the Clean Air Act to regulate greenhouse gas emissions from existing power plants after EPA finalized regulation of hazardous air pollutants from power plants under Section 112 in 2012. EPA published its proposal to regulate greenhouse gases from existing power plants in the June 18, 2014 edition of the *Federal Register*. It is the states' position that regulation of sources under Section 112 bars regulation under Section 111(d). On September 2, 2014, 11 other states, Washington, D.C., and New York City filed a motion to intervene in support of EPA, saying that they had an interest in the rulemaking moving forward to address climate change-related harms. ***West Virginia v. EPA***, No. 14-1146 (D.C. Cir., filed Aug. 4, 2014): added to the "Challenges to Federal Action" slide.

Environmental Organizations Commenced Clean Air Act Citizen Suit Against Operator of Oil Terminal in Oregon. Three environmental organizations commenced a citizen suit under the Clean Air Act against the operators of an oil terminal on the Columbia River in Oregon. Plaintiffs alleged that operation of the terminal resulted in emissions of air pollutants such as volatile organic compounds, nitrogen oxides, greenhouse gases, and hazardous air pollutants. They claimed that the operators should have obtained a Prevention of Significant Deterioration for the project. They sought declaratory and injunctive relief, and also penalties. ***Northwest Environmental Defense Center v. Cascade Kelly Holdings LLC***, No. 3:14-cv-01059 (D. Or., filed July 2, 2014): added to the "Regulate Private Conduct" slide.

Update #65 (August 4, 2014)

FEATURED DECISION

Federal Court in Alaska Vacated Listing of Bearded Seals as Threatened Species. The federal district court for the District of Alaska ruled in three actions that the listing of the Beringia distinct population segment (DPS) of bearded seals as threatened under the Endangered Species Act (ESA) was arbitrary, capricious, and an abuse of discretion. The actions were brought by (1) the Alaska Oil and Gas Association and the American Petroleum Institute, (2) the State of Alaska, and (3) parties representing inhabitants and local government in northern Alaska. Procedurally, the court said that the National Marine Fisheries Service (NMFS) had not responded adequately to the State of Alaska's comments because NMFS had responded to some of the comments only in the preamble to the final rule, rather than in a letter directed to the State, as required by the ESA. Substantively, the court said that NMFS's forecasting of possible impacts of loss of sea-ice on the bearded seal population more than 50 years into the future was too speculative and too remote. The court also said that its finding that the listing was arbitrary and capricious was bolstered by NMFS's explicit finding that no protective regulations were required. The court also found that plaintiffs did not have standing to challenge the listing of the Okhotsk DPS of bearded seals, which is located in the Sea of Okhotsk off the coast of Japan and the Russian Federation. ***Alaska Oil and Gas Association v. Pritzker***, No. 4:13-cv-00021-RRB (D. Alaska July 25, 2014): added to the "Endangered Species Act" slide.

DECISIONS AND SETTLEMENTS

In Atmospheric Trust Case, Texas Court of Appeals Said District Court Lacked Jurisdiction. The Texas Court of Appeals ruled that a district court erred in concluding that it had subject matter jurisdiction over an action seeking review of the Texas Commission on Environmental Quality's (TCEQ's) denial of a rulemaking petition. The rulemaking petition was part of a legal campaign by the organization Our Children's Trust to use the public trust doctrine to compel regulation of greenhouse gas emissions. The district court had denied TCEQ's plea to the jurisdiction, but had ruled that TCEQ had reasonably exercised its discretion in denying the petition. The appellate court concluded that neither the Texas Administrative Procedure Act nor the Texas Water Code waived sovereign immunity for judicial review of denials of rulemaking petitions. ***Texas Commission on Environmental Quality v. Bonser-Lain***, No. 03-12-00555-CV (Tex. Ct. App. July 23, 2014): added to the "Common Law Claims" slide.

Federal Court Declined to Vacate Permit to Fill Wetlands in National Petroleum Reserve While Corps of Engineers Rectifies NEPA Violations. The federal district court for the District of Alaska ruled in May that the U.S. Army Corps of Engineers had not provided a reasoned explanation for its decision not to supplement its 2004 environmental review prior to issuing a permit to fill wetlands for development of a drilling site in Alaska's National Petroleum Reserve. In July, the court issued an order regarding further proceedings in the case. The court opted not to vacate the permit because stopping ongoing construction would have disruptive consequences. On remand, the court directed the Corps to consider post-2004 information on how climate change could affect the project. The court denied the challengers' request for a public hearing, noting that the National Environmental Policy Act did not require a public hearing for a determination of whether to prepare a supplemental environmental impact statement. The Corps must submit its determination on remand by August 27. ***Kunaknana v. United States Army Corps of Engineers***, No. 3:13-cv-00044-SLG (D. Alaska July 22, 2014): added to the "Stop Government Action/NEPA" slide.

D.C. Circuit Denied Rehearing on Request for Regulation of Methane from Coal Mines. The D.C. Circuit Court of Appeals denied WildEarth Guardians' petition for rehearing en banc of its May 2014 decision upholding the U.S. Environmental Protection Agency's denial of a request to add coal mines to the list of regulated stationary sources under the Clean Air Act. ***WildEarth Guardians v. EPA***, No. 13-1212 (D.C. Cir. July 18, 2014): added to the "Force Government to Act/Clean Air Act" slide.

California Supreme Court Will Hear Appeal of CEQA Case Raising Question of Appropriate Baseline for Greenhouse Gas Analysis. The California Supreme Court granted a petition to review a decision upholding the environmental review for a 12,000-acre commercial-residential development known as Newhall Ranch in northwestern Los Angeles County. One of the three issues the court will consider is whether an agency may "deviate from [the California Environmental Quality Act's] existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by reference to a hypothetical higher 'business as usual' baseline." ***Center for Biological Diversity v. Department of Fish and Wildlife***, No. S217763 (Cal. July 9, 2014): added to the "State NEPAs" slide.

New York Federal Court Said Agencies Had Adequately Considered Sea Level Rise at Solid Waste Marine Transfer Station. The federal district court for the Southern District of New York upheld the issuance by the United States Army Corps of Engineers of a Clean Water Act Section 404 permit for a solid waste marine transfer station on the East River on the Upper East Side of Manhattan. Among the arguments rejected by the court was that New York City should have prepared a supplemental environmental impact statement to address both flooding after Superstorm Sandy and also the issuance of new advisory flood maps by the Federal Emergency Management Agency (FEMA). The court said the City's actions, which included preparation of a technical memorandum after issuance of the FEMA maps and incorporation of additional floodproofing measures, satisfied "hard look" requirements under New York's State Environmental Quality Review Act. The court also rejected the claim that the Corps should have supplemented its own environmental review after Sandy. ***Residents for Sane Trash Solutions, Inc. v. United States Army Corps of Engineers***, No. 12 Civ. 8456 (PAC) (S.D.N.Y. July 10, 2014): added to the "Adaptation" slide.

Fifth Circuit Dismissed Challenges to EPA Notices of Violation at Coal-Fired Plants. The Fifth Circuit Court of Appeals ruled that it did not have subject matter jurisdiction over petitions for review of notices of violation issued by the U.S. Environmental Protection Agency (EPA) to the operator of coal-fired power plants in Texas. The Fifth Circuit said that issuance of the notice did not commit EPA to any particular course of action, that the notice imposed no new legal obligations on the operator, that under the Clean Air Act a "notice" was distinct from an "order" (which could be a reviewable final action), and that the operator could challenge the adequacy of the notice as a defense in the pending enforcement action in federal district court. ***Luminant Generation Co. v. EPA***, No. 12-60694 (5th Cir. July 3, 2014): added to the "Challenges to Coal-Fired Power Plants" slide.

NEW CASES, MOTIONS, AND NOTICES

Environmental Groups Asked Federal Court to Require EPA to Respond to Requests for Objections to Texas Coal Plant Permits. The Environmental Integrity Project and Sierra Club filed an action in the federal district court for the District of Columbia to compel the U.S. Environmental Protection Agency (EPA) to respond to petitions asking the agency to object to Clean Air Act Title V permits issued to three coal-fired power plants in Texas by the Texas Commission on Environmental Quality. The environmental groups contended that EPA had a nondiscretionary obligation to respond to the petitions within 60 days. ***Environmental Integrity Project v. McCarthy***, No. 14-1196 (D.D.C., filed July 16, 2014): added to the "Challenges to Coal-Fired Power Plants" slide.

Environmental and Citizen Groups Appealed Michigan Steel Plant Air Permit. Four nonprofit organizations appealed the issuance by the Michigan Department of Environmental Quality (MDEQ) of a Clean Air Act permit for a steel plant operated by Severstal Dearborn, LLC. Among the counts alleged by the appellants is that MDEQ failed to apply post-2005 Clean Air Act regulations, including greenhouse gas regulations. ***South Dearborn Environmental Improvement Association, Inc. v. Michigan Department of Environmental Quality***, No. 14-008887-AA (Mich. Cir. Ct., filed July 10, 2014): added to the "Stop Government Action/Project Challenges" slide.

Coal Mining Organization and Kentucky Landowners Challenged TVA Decision to Retire Coal-Fired Units and Build Natural Gas Plant. A group of plaintiffs that included Kentucky landowners and a nonprofit organization representing eastern and western Kentucky coal mining operations commenced a lawsuit in the federal district court for the Western District of Kentucky alleging that the Tennessee Valley Authority (TVA) did not comply with the National Environmental Policy Act when it decided to retire coal-fired electric generating units and replace them with a new combustion turbine/combined cycle natural gas plant at a facility in Muhlenberg County in Kentucky. Plaintiffs alleged that TVA was required to prepare an environmental impact statement for its action, rather than relying on an environmental assessment. They contended that "viewed holistically" the switch to natural gas would have more significant adverse environmental impacts than upgrading emission controls on the existing coal units, including impacts associated with building new facilities and natural gas pipelines. Plaintiffs alleged that TVA had inappropriately elevated consideration of carbon dioxide emissions and related air quality issues above other environmental impacts "in an attempt to 'comply' with President Obama's Climate Action Plan, which lacks force of law." Plaintiffs further alleged that TVA's evaluation of greenhouse gas emissions was deficient because it did not consider emissions from the entire life cycle of natural gas production. The suit also alleged that TVA failed to adhere to its obligation under the Tennessee Valley Authority Act of 1933 to conduct least-cost planning. ***Kentucky Coal Association, Inc. v. Tennessee Valley Authority***, No. 4:14-CV-73-M (W.D. Ky., filed July 10, 2014): added to the "Challenges to Federal Action" slide.

Challenge to Oil and Gas Lease Sale in Nevada Raises Issue of Greenhouse Gas Emissions. A group of owners of farming and ranching land, water rights, and grazing rights in Nevada filed an action in the federal district court for the District of Nevada challenging the U.S. Bureau of Land Management's (BLM's) decision to lease 230,989 acres of public lands for oil and gas development. The group alleged that BLM had not fulfilled its obligations under the National

Environmental Policy Act. Among the allegations of shortcomings in the environmental review was BLM's alleged failure to consider greenhouse gas emissions associated with the lease sale and the sale's impact on climate change. In particular, plaintiff said BLM should have considered the impact of methane releases from exploration and production activities and greenhouse gas emissions from the addition of more fossil fuels. ***Reese River Citizens Against Fracking v. Bureau of Land Management***, No. 3:14-cv-00338-MMD-WGC (D. Nev., filed June 27, 2014): added to the "Stop Government Action/NEPA" slide.

Update #64 (July 7, 2014)

FEATURED DECISION

Utility Air Regulatory Group v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, and 12–1272 (U.S. June 23, 2014): added to the "Challenges to Federal Action" slide. The United States Supreme Court ruled that the United States Environmental Protection Agency (EPA) had impermissibly interpreted the Clean Air Act as compelling or permitting a facility's potential greenhouse gas emissions to trigger Prevention of Significant Deterioration (PSD) and Title V permitting requirements. The Court upheld, however, EPA's determination that "anyway" sources (facilities subject to PSD permitting due to their conventional pollutant emissions) could be required to employ "best available control technology" (BACT) for greenhouse gases. The majority opinion, written by Justice Scalia, concluded that subjecting sources to the PSD and Title V programs solely based on their greenhouse gas emissions "would place plainly excessive demands on limited governmental resources" and "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." The Court rejected EPA's attempt to fix these problems by "rewriting" statutory emissions thresholds, which the Court said "would deal a severe blow to the Constitution's separation of powers." The Court went on to hold, however, that the Clean Air Act's text clearly supported an interpretation that required BACT for "anyway" sources and that applying BACT to greenhouse gases "is not so disastrously unworkable" and "need not result in such a dramatic expansion of agency authority" as to make the interpretation unreasonable. Justice Breyer wrote an opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, concurring with the BACT portion of the majority opinion but dissenting from the conclusion that EPA could not interpret the PSD and Title V programs to be triggered solely by a source's greenhouse gas emissions. Justice Breyer said that a more sensible way to avoid the absurdity of sweeping an unworkable number of sources into the permitting programs was to imply an exception to the numeric statutory thresholds, rather than to imply a greenhouse gas exception to the phrase "any air pollutant." Justice Alito, in an opinion joined by Justice Thomas, concurred with the ruling on the triggers for the permitting programs, but dissented from the BACT holding. Justice Alito found it "curious" that the Court departed from a literal interpretation of "pollutant" in striking down greenhouse gas triggers for PSD and Title V permitting, but embraced literalism in upholding the application of BACT for "anyway" sources.

DECISIONS AND SETTLEMENTS

Rocky Mountain Farmers Union v. Corey, No. 13-1148; ***American Fuel & Petrochemical Manufacturers Association***, No. 13-1149; ***Corey v. Rocky Mountain Farmers Union***, No. 13-

1308 (U.S. cert. denied June 30, 2014): added to the "Challenges to State Action" slide. The U.S. Supreme Court denied three petitions seeking review of the Ninth Circuit decision that reversed district court rulings that California's Low Carbon Fuel Standard (LCFS) violated the dormant Commerce Clause. Two of the petitions (Rocky Mountain Farmers Union, American Fuel & Petrochemical Manufacturers Association) had been filed by the parties who had challenged the LCFS; their petitions sought review of the Ninth Circuit's conclusions that the LCFS did not facially discriminate against interstate commerce and did not constitute extraterritorial regulation. The third was a conditional cross-petition filed by the State of California defendants, who sought review on the issues of whether Section 211(c)(4)(B) of the Clean Air Act (authorizing California to set emissions requirements) barred petitioners' challenges and whether changes to the LCFS regulations' treatment of 2011 California crude oil sales rendered some aspects of petitioners' challenges moot.

High Country Conservation Advocates v. United States Forest Service, No. 1:13-cv-01723-RBJ (D. Colo. June 27, 2014): added to the "Stop Government Action/NEPA" slide. The federal district court for the District of Colorado ruled that the United States Forest Service and the United States Bureau of Land Management did not take the required "hard look" under the National Environmental Policy Act at the impacts of increased greenhouse gas emissions associated with actions that expanded mining in a part of Colorado's North Fork Valley called the Sunset Roadless Area. The three actions challenged in the lawsuit were the 2012 Colorado Roadless Rule, which included an exemption for temporary road construction or reconstruction associated with coal mining in the North Fork Valley; lease modifications that added new land to preexisting mineral leases; and approval of Arch Coal's exploration plan for the additional land. As an initial matter, the court concluded that plaintiffs—three environmental and conservation groups—had standing to bring all of their claims. Citing the D.C. Circuit's decision in *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013), the court rejected defendants' argument that the alleged failure to adequately analyze greenhouse gas emissions resulting from the Colorado Roadless Rule was unrelated to plaintiffs' alleged concrete injury of harm to their recreational interests in the Sunset Roadless Area. The court went on to find that the agencies had not adequately disclosed and considered the impacts of greenhouse gas emissions in several respects. First, the court faulted the agencies for failing to use the "social cost of carbon protocol" developed by a federal interagency working group in the analysis of the lease modification's impacts. The draft environmental review documents had included an assessment of social costs of carbon related to disturbance of forested areas and methane emissions from mining, but the discussions were removed in the final environmental impact statement (FEIS), apparently because use of the protocol was deemed controversial. The court found the explanation for omitting the social cost of carbon protocol from the FEIS to be arbitrary and capricious. The court also rejected the agencies' justifications for not quantifying methane emissions from mining associated with the Colorado Roadless Rule and for not estimating greenhouse gas emissions associated with combustion of the mined coal. Among other things, the court said that the detailed economic analysis of the benefits of expanded mining was at odds with defendants' arguments that future emissions associated with the mining were too speculative to support a quantitative analysis. The court enjoined implementation of the exploration plan, and asked the parties to confer and attempt to reach agreement on an appropriate remedy.

Communities for a Better Environment v. Metropolitan Transportation Commission, No. RG13692189 (Cal. Super. Ct. June 18, 2014): added to the "State NEPAs" slide. Communities for a Better Environment and Sierra Club reached an agreement with the Metropolitan Transportation Commission and the Association of Bay Area Governments to resolve a California Environmental Quality Act (CEQA) challenge to Plan Bay Area, a regional land use and transportation plan intended to achieve the greenhouse gas emissions reduction goals of AB 32. Respondents agreed to undertake certain analyses in the next update to the plan, including disclosing total greenhouse gas emissions both with and without the implementation of state-wide emissions reduction programs, studying the effects of the creation of express lanes on greenhouse gas emissions and vehicle miles traveled, and preparing a Freight Emissions Reduction Action Plan that will study options for zero-emissions rail and truck technologies.

Reyes v. EPA, No. 1:10-cv-02030-EGS (D.D.C. June 13, 2014): added to the "Climate Change Protestors and Scientists" slide. The federal district court for the District of Columbia granted EPA's renewed motion for summary judgment in this Freedom of Information Action (FOIA) action seeking disclosure of documents related to EPA's endangerment finding for greenhouse gases. EPA renewed its motion after completing the tasks required by the court in its September 2013 decision partially granting and partially denying summary judgment. The court found that EPA's "detailed, non-conclusory" affidavits established that EPA's search satisfied the reasonableness standard. Plaintiff's arguments that the search was not adequate because of lack of detail, unexplained methodology, and failure to search all relevant locations and the files of all relevant individuals were not persuasive. The court also found that EPA's justification for withholding documents on the basis of attorney-client privilege was adequate.

Chernaik v. Kitzhaber, No. A151856 (Or. Ct. App. June 11, 2014): added to the "Common Law Claims" slide. The Oregon Court of Appeals reversed a trial court's dismissal of plaintiffs' public trust doctrine lawsuit. The trial court had concluded that it lacked subject matter jurisdiction over the action, in which plaintiffs sought declaratory and equitable relief for the State of Oregon's failures to meet its fiduciary obligations to protect natural resources such as the atmosphere from the impacts of climate change. The trial court grounded its conclusion in separation of powers and political question concerns. The appellate court ruled that the trial court had authority under the Uniform Declaratory Judgments Act to issue a declaration of whether the atmosphere and other natural resources are "trust resources" that the State of Oregon has a fiduciary obligation to protect from climate change impacts. The court rejected defendants' contention that such declarations would not amount to the sort of "meaningful relief" required to make plaintiffs' claims justiciable. The appellate court declined to address the merits of plaintiffs' claims, indicating that such a determination would only be possible after the parties had litigated the merits and a court had declared "the scope of the public trust doctrine and defendants' obligations, if any, under it."

Citizens Against Airport Pollution v. City of San Jose, No. H038781 (Cal. Super. Ct. June 6, 2014; request for publication granted July 2, 2014): added to the "State NEPAs" slide. Petitioner challenged an addendum to the 1997 environmental impact report (EIR) for the City of San Jose's International Airport Master Plan. The addendum assessed the impacts of amendments to the Plan, including changes to the size and location of future air cargo facilities, the replacement of air cargo facilities with 44 acres of general aviation facilities, and the modification of two

taxiways to provide better access for corporate jets. The California Court of Appeal affirmed the trial court's rejection of the challenge. The appellate court was not persuaded that the changes to the Plan constituted a new project requiring a new EIR under CEQA. The court found that substantial evidence in the record showed that the changes to the Plan would not result in new significant impacts to noise levels, air quality, or burrowing owl habitat. The appellate court held that the City did not violate the 2010 CEQA guidelines for greenhouse gas emissions by failing to analyze greenhouse gas emissions in the addendum. The court concluded that the potential impact of greenhouse gas emissions did not constitute new information because information about greenhouse gas impacts was known or could have been known when the 1997 EIR and a 2003 supplemental EIR were prepared.

Alec L. v. McCarthy, No. 13-5192 (D.C. Cir. June 5, 2014): added to the "Common Law Claims" slide. In an unpublished opinion, the D.C. Circuit Court of Appeals affirmed the district court's 2012 and 2013 orders that dismissed plaintiffs' lawsuit for lack of subject matter jurisdiction because it failed to raise a federal question. Plaintiffs argued that the federal defendants violated their obligation to protect the atmosphere under the public trust doctrine. The D.C. Circuit, like the district court, ruled that the public trust doctrine is a matter of state law.

Petrozzi v. City of Ocean City, No. 073596 (N.J. June 5, 2014): added to the "Adaptation" slide. The New Jersey Supreme Court denied without comment the City of Ocean City's request that it review the appellate court decision that obligated the City to make restitutionary payments to property owners whose ocean views were affected after the height of a dune system created by the City increased beyond height limitations established in easements granted to the City.

Native Village of Point Hope v. Jewell, No. 1:08-cv-00004-RRB (D. Alaska Apr. 24, 2014; BOEM status report, May 23, 2014; BOEM notice of intent to prepare SEIS, June 20, 2014): added to the "Stop Government Action/NEPA" slide. In January 2014, the Ninth Circuit Court of Appeals ruled that the Bureau of Ocean Energy Management (BOEM) had based its environmental review of an oil and gas lease sale in the Chukchi Sea on inadequate information due to BOEM's reliance on an estimate of economically recoverable oil that many parties had said might significantly underestimate production. In April 2014, the federal district court for the District of Alaska remanded the matter to BOEM for further analysis in keeping with the Ninth Circuit's opinion. The court ordered BOEM to provide bimonthly updates, and barred BOEM from removing suspensions on drilling in the lease area and from approving or "deeming submitted" any exploration plans submitted by lessee. In May 2014, BOEM submitted its first status report, indicating that it had begun drafting a supplemental environmental impact statement (SEIS) and collecting and analyzing information to create a expanded exploration and development scenario to study on remand. BOEM estimated that it would issue its record of decision in March 2015. In June 2014, BOEM published a notice of intent to prepare an SEIS in the *Federal Register*.

NEW CASES, MOTIONS, AND NOTICES

Sierra Club v. Moser, No. 14-112008 (Kan. Ct. App., filed June 27, 2014): added to "Challenges to Coal-Fired Plants" slide. Sierra Club filed a challenge in the Kansas Court of Appeals to an air

permit issued to Sunflower Electric Power Corporation authorizing construction of a coal-fired power plant in Holcomb, Kansas. The Kansas Department of Health and Environment reissued the permit in May after the Kansas Supreme Court ruled in October 2013 that a permit issued in 2010 did not properly apply EPA standards. In its petition challenging the new permit, Sierra Club alleged substantive and procedural violations of the Clean Air Act, the Kansas Air Quality Act, and implementing regulations. The claimed violations included failure to incorporate greenhouse gas emissions standards in the permit.

Transportation Solutions Defense and Education Fund v. California Air Resources Board, No. 14CECG01788 (Cal. Super. Ct., filed June 23, 2014): added to the "State NEPAs" slide. Petitioner challenged the California Air Resources Board's (CARB's) approval of the First Update to the Climate Change Scoping Plan (Update) and CARB's certification of a program-level environmental assessment for the Update. Petitioner claimed that CARB violated both the California Environmental Quality Act (CEQA) and the Global Warming Solutions Act of 2006 (AB 32). In particular, petitioner alleged that CARB had failed to take into account the greenhouse gas emissions associated with the high-speed rail project included in the Update, that CARB violated CEQA procedures, and that inclusion of the high-speed rail project violated AB 32.

Communities for a Better Environment et al., Appeal of Long Beach Board of Harbor Commissioners' Ordinance Approving a New Operating Agreement with Metropolitan Stevedore Company and New Lease with Oxbow Energy Solutions, LLC (June 23, 2014): added to the "State NEPAs" slide. Communities for a Better Environment, Natural Resources Defense Council, and Sierra Club (represented by Earthjustice) filed an appeal with the City of Long Beach challenging the Port of Long Beach Board of Harbor Commissioners decision not to undertake a CEQA review in its consideration of a new operating agreement and lease, which the environmental groups contended would expand the export of coal from the port. Among the arguments advanced by the environmental groups was that a 1992 negative declaration was not sufficient to cover the approvals, in part because greenhouse gas emissions were not evaluated at that time. The groups also argued that the impacts of the export of coal on climate change must be considered, including emissions from transporting coal and burning it overseas.

Monroe Energy, LLC v. EPA, No. 13-1265 (D.C. Cir. June 20, 2014): added to the "Challenges to Federal Action" slide. Respondent-intervenor National Biodiesel Board (NBB) filed a petition for rehearing of a portion of the D.C. Circuit's decision upholding the 2013 Renewable Fuel Standards (RFS). NBB sought reconsideration of the holding that Monroe Energy, LLC had Article III standing to challenge the RFS. NBB argued that Monroe Energy's claimed energy was higher compliance costs resulting from third-party actions, and that Monroe Energy had produced no evidence that a decision in its favor would have redressed such an injury. NBB urged a rehearing to prevent the use of annual challenges to the RFS to raise questions about "fundamental precepts" of the program.

In re Murray Energy Corp., No. 14-1112 (D.C. Cir., filed June 18, 2014; states' *amici curiae* brief June 25, 2014): added to the "Challenges to Federal Action" slide. Murray Energy Corporation (Murray), the largest privately owned coal company in the United States, filed a petition for extraordinary writ in the D.C. Circuit Court of Appeals, seeking to enjoin EPA from

conducting its rulemaking to create greenhouse gas emission standards for existing power plants. Murray argued that the D.C. Circuit could bar EPA from continuing the rulemaking process because EPA had proposed to take actions beyond its power. Murray contended that because EPA imposed national standards on power plants under a rule issued under Section 112 of the Clean Air Act, which addresses hazardous air pollutants, it could not mandate state-by-state greenhouse gas emission standards under Section 111(d). Nine states filed a brief in support of the petition.

Center for Biological Diversity v. Jewell, No. 14-1021 (D.D.C., filed June 17, 2014): added to the "Endangered Species Act" slide. The Center for Biological Diversity filed a lawsuit in the federal district court for the District of Columbia seeking to require the U.S. Fish and Wildlife Service to making required findings regarding the listing of nine species under the Endangered Species Act. The nine species include the San Bernardino flying squirrel, which the Center for Biological Diversity alleged was threatened by climate change's adverse impacts to its mixed-conifer, black-oak forest habitat.

Kunaknana v. United States Army Corps of Engineers, No. 3:13-cv-00044-SLG (D. Alaska, materials in support of motions regarding further proceedings (ConocoPhillips motion and memorandum, Corps motion, plaintiffs' submission) June 17, 2014): added to the "Stop Government Action/NEPA" slide. The parties to the lawsuit challenging the granting of a wetlands permit to ConocoPhillips Alaska, Inc. by the United States Army Corps of Engineers could not agree on a course for further proceedings after the federal district court for the District of Alaska ruled that the Corps had not provided an adequate explanation for its decision not to prepare an SEIS. ConocoPhillips requested a remand without vacatur, asking that the remand period be limited to 90 days and that the scope of the remand only include remedying the errors identified by the court in the Corps' rationale and addressing post-2004 climate change information. The Corps also requested a 90-day limited remand. Plaintiffs, on the other hand, argued that vacatur of the permit was warranted.

Center for Biological Diversity v. Jewell, No. 1:14-cv-00991-EGS (D.D.C., filed June 10, 2014): added to the "Endangered Species Act" slide. Three environmental organizations filed a complaint in the federal district court for the District of Columbia seeking to compel the U.S. Fish and Wildlife Service to issue findings in response to their 2011 petition to list the Alexander Archipelago wolf as an endangered or threatened species under the Endangered Species Act. The Alexander Archipelago wolf is a subspecies of gray wolf that inhabits the islands and coastal mainland of Southeast Alaska. Plaintiffs alleged that the species faces a number of threats, including threats from climate change. The climate change threats include more severe winter storm events and above-normal snowfalls that adversely affect the wolf's primary prey species.

Competitive Enterprise Institute v. United States National Security Agency, No. 14-cv-975 (D.D.C., filed June 9, 2014): added to the "Climate Change Protestors and Scientists" slide. The Competitive Enterprise Institute (CEI) and two other organizations commenced a FOIA lawsuit against the National Security Agency (NSA) in the federal district court for the District of Columbia. CEI and other entities had requested "metadata" for text messaging, e-mail, and phone accounts used by EPA administrators. Plaintiffs alleged that the EPA officials had used personal email and phones to circumvent FOIA and the Federal Records Act, and that the

metadata are therefore records under FOIA. The NSA refused to confirm or deny the existence of the records sought by CEI. CEI contended that there had been "clear public admissions" that the NSA had collected the type of metadata it sought, and that the agency was therefore precluded from responding in this fashion (known as a "*Glomar*" response) to FOIA requests. Plaintiffs seek declaratory and injunctive relief, as well as attorney fees and other costs.

Communities for a Better Environment v. Bay Area Air Quality Management District, No. CPF-14-513704 (Cal. Super. Ct., filed June 5, 2014): added to the "State NEPAs" slide. Petitioner commenced a lawsuit in California Superior Court challenging the issuance of a permit to Chevron USA Inc. for a modernization project at its refinery in Richmond, California. Petitioner alleged that the agency had not complied with CEQA requirements prior to issuing the permit. In particular, petitioners claimed that the Bay Area Air Quality Management District had failed to review the "additional and massive GHG emissions" expected from the project (almost 1 million metric tonnes annually).

County of Kings v. California High-Speed Rail Authority, No. 2014-80001861 (Cal. Super. Ct., filed June 5, 2014): added to the "State NEPAs" slide. Petitioners challenged the California High-Speed Rail Authority's approval of the 114-mile Fresno-to-Bakersfield section of California's high-speed train project. The lawsuit, filed in California Superior Court, alleged violations of CEQA; California's anti-discrimination law; the Williamson Act, which protects agricultural lands; and Proposition 1A, which authorized funding for the high-speed rail project. Petitioners contest the adequacy of the CEQA review in a number of impact areas. Their climate change-related claims included that the environmental impact report (EIR) should have been recirculated because the final EIR substantially reduced the anticipated greenhouse gas reduction benefits (a response to comments suggesting that the agency had failed to take improved fuel economy into account). Petitioners also alleged that emissions associated with the production of materials—concrete, in particular—used for construction of the section would offset twenty to thirty years of the section's purported greenhouse gas reduction benefits. Other lawsuits have been filed challenging the project: ***Coffee-Brimhall LLC v. California High-Speed Rail Authority***, No. 2014-80001859 (Cal. Super. Ct., filed June 5, 2014), and ***City of Bakersfield v. California High-Speed Rail Authority***, No. 2014-80001866 (Cal. Super. Ct., filed June 5, 2014); ***County of Kern vs. California High Speed Rail Authority***, No. 2014-80001863. (Cal. Super. Ct., filed June 6, 2014); ***First Free Baptist Church of Bakersfield vs. California High Speed Rail Authority***, No. 2014-80001864 (Cal. Super. Ct., filed June 6, 2014), and ***Dignity Health vs. California High-Speed Rail Authority***, No. 2014-80001865 (Cal. Super. Ct., filed June 6, 2014).

Update #63 (June 11, 2014)

FEATURED DECISION

WildEarth Guardians v. United States Environmental Protection Agency, No. 13-1212 (D.C. Cir. May 13, 2014): added to the "Force Government to Act/Clean Air Act" slide. The D.C. Circuit Court of Appeals upheld the United States Environmental Protection Agency's (EPA's) denial of a request to add coal mines to the list of regulated stationary sources under the Clean Air Act. Earthjustice, on behalf of other environmental groups, had asked EPA to create the new

source category and to create standards to address methane emissions from the new category. In April 2013, EPA denied the request, citing its need to "prioritize its actions in light of limited resources and ongoing budget uncertainties." The D.C. Circuit said that EPA's determination "easily passes muster" under the deferential standard applied to review of agency denials of rulemaking petitions. The court distinguished this case from ***Massachusetts v. EPA***, 549 U.S. 497 (2007), where EPA had responded to a rulemaking petition seeking regulation of carbon dioxide under the Clean Air Act by disclaiming authority to regulate.

DECISIONS AND SETTLEMENTS

Illinois Farmers Insurance Co. & Farmers Insurance Exchange v. Metropolitan Water Reclamation District of Greater Chicago, No. 14-CV-03251 (N.D. Ill. June 3, 2014): added to the "Adaptation" slide. Illinois Farmers Insurance Co. & Farmers Insurance Exchange and its subsidiaries and related entities (Farmers Insurance) filed notices of dismissal withdrawing their putative class action lawsuits that sought damages from municipal entities in Illinois for failing to implement adequate stormwater management plans to prevent flooding that occurred in 2013. Farmers Insurance had filed nine of the lawsuits (see complaints for Cook, DuPage, Lake, McHenry, and Will Counties), at least two of which (Cook and McHenry) had been removed to federal court. A Farmers Insurance spokesperson said "[w]e believe our lawsuit brought important issues to the attention of the respective cities and counties, and that our policyholders' interests will be protected by the local governments going forward."

United States v. Landfill Technologies of Arecibo Corp., No. 3:14-cv-01438 (D.P.R. May 29, 2014): added to the "Regulate Private Conduct" slide. On May 30, 2014, EPA announced that it had reached an agreement with Landfill Technologies of Arecibo Corp., the municipality of Arecibo and the Puerto Rico Land Authority to settle alleged violations of the Clean Air Act involving defendants' failures to install a gas collection and control system at a Puerto Rico landfill by a 2005 deadline. Installation of the system was completed in 2012, but EPA alleged that in the intervening six-and-a-half years, the landfill emitted substantial amounts of non-methane organic compounds and other landfill gases, including methane. In the consent decree filed in the federal district court for the District of Puerto Rico on May 29, 2014, defendants agreed to pay a total of $350,000 in civil penalties and to implement a comprehensive recycling and composting plan, the details of which were specified in an appendix to the consent decree. A notice in the *Federal Register* on June 5, 2014 announced that the comment period on the consent decree would remain open for 30 days (until July 7, 2014).

Clean Energy Fuels Corp. v. California Public Utilities Commission, No. G048820 (Cal. Ct. App. May 29, 2014): added to the "Stop Government Action/Project Challenges" slide. The California Court of Appeal affirmed the California Public Utilities Commission's (CPUC's) approval of Southern California Gas Company's (SoCalGas) application for a "Compression Services Tariff" under which SoCalGas would construct and operate equipment on nonresidential customers' property to compress, store, and dispense natural gas above standard line pressure for customer end-use applications, including natural gas vehicle refueling, combined heat and power facilities, and peaking power plants. The court said that CPUC had incorporated adequate restrictions in its approval to prevent SoCalGas from unfairly competing with nonutility enterprises. The court also ruled that substantial evidence supported CPUC's

conclusion that the tariff would increase natural gas use in the Los Angeles area and thereby reduce air pollution and greenhouse gas emissions.

Southern California Edison Co. v. California Public Utilities Commission, Nos. B246782, B246786 (Cal. Ct. App. May 28, 2014): added to the "Challenge to State Action" slide. The California Court of Appeal rejected SoCalGas's challenge to CPUC's authority to implement the Electric Program Investment Charge (EPIC), which required electric utilities to collect a surcharge from ratepayers to fund renewable energy research, development, and demonstration projects. The court ruled that CPUC had the constitutional and statutory authority to implement EPIC, that EPIC was not an unlawful delegation of CPUC's authority, and that the surcharge was a regulatory fee, not a tax requiring legislative enactment.

Kunaknana v. United States Army Corps of Engineers, No. 3:13-cv-00044-SLG; ***Center for Biological Diversity v. United States Army Corps of Engineers***, No. 3:13-cv-00095-SLG (D. Alaska May 27, 2014): added to the "Stop Government Action/NEPA" slide. Plaintiffs commenced two actions in the federal district court for the District of Alaska alleging that the United States Army Corps of Engineers (Corps) did not comply with NEPA and Section 404 of the Clean Water Act in issuing a permit to fill wetlands in the National Petroleum Reserve in Alaska. The permit was required for ConocoPhillips Alaska, Inc. to develop a drill site. The court ruled that the Center for Biological Diversity did not have standing to bring the action. In the other action, the court granted partial summary judgment to the plaintiffs to the extent of finding that the Corps had not provided a reasoned explanation for its decision not to conduct a supplemental environmental analysis. The court did not resolve the Clean Water Act claim and asked the parties to conduct briefing on how the action should proceed. Among the issues the court will consider after further briefing is the extent to which the Corps should consider new information about the potential impacts of climate change on the project.

Klein v. United States Department of Energy, No. 13-1165 (6th Cir. May 21, 2014): added to the "Stop Government Action/NEPA" slide. The Sixth Circuit Court of Appeals reversed a district court ruling that plaintiffs lacked standing to challenge the U.S. Department of Energy (DOE) approval of a $100-million grant for a lumber-based ethanol plant in the Upper Peninsula of Michigan. The grant represented approximately 34% of the total cost of constructing the plant. The Sixth Circuit ruled that, contrary to the finding of the district court for the Western District of Michigan, plaintiffs had provided sufficient facts to support a reasonable inference that the plant would not be built without the DOE grant. They had therefore adequately established the redressability element of standing. On the merits, however, the Sixth Circuit affirmed the judgment in favor of the defendants, finding that DOE had complied with the requirements of the National Environmental Policy Act (NEPA). Among other impacts that DOE had adequately considered were the proposed plant's greenhouse gas emissions. The environmental assessment concluded that the plant's reductions in life-cycle greenhouse gas emissions would result in a decrease in net greenhouse gas emissions.

In re ExxonMobil Chemical Company (Baytown Olefins Plant), PSD Appeal No. 13-11 (EAB May 14, 2014): added to the "Stop Government Action/Project Challenges" slide. EPA's Environmental Appeals Board (EAB) rejected a challenge by Sierra Club to EPA Region 6's issuance of a permit for a new natural gas-fired ethylene production unit at ExxonMobil

Chemical Company's Baytown Olefins Plant in Harris County, Texas. Sierra Club contended that EPA had clearly erred or abused its discretion in its assessment of the viability of using carbon capture and sequestration (CCS) to reduce carbon dioxide emissions from the unit. EAB upheld Region 6's best available control technology (BACT) analysis. EAB concluded that Region 6 had appropriately determined that the total cost of the CCS technology, which would have increased the project's capital costs by 25%, made CCS economically unachievable, and that implementing CCS would have secondary environmental impacts such as increased emissions of nitrogen oxides and volatile organic compounds. EAB also said that the absence of comparable facilities justified the Region's reliance on total cost information instead of on data showing the project's cost-effectiveness per ton of carbon dioxide avoided. EAB also rejected Sierra Club's arguments that Region 6 had not followed the methodology required in EPA's *Cost Control Manual* and that Region 6 should have considered emissions streams from the project's steam cracking furnaces (which produce a cleaner stream that would be less costly to capture) separately from emissions from the CCS system's utility plant.

WildEarth Guardians v. McCarthy, No. 1:13-cv-03457 (D. Colo., consent decree filed Apr. 29, 2014; *Federal Register* notice May 13, 2014): added to the "Challenges to Coal-Fired Plants" slide. In a federal lawsuit challenging its failures to take action on the application for a Title V permit by a coal-fired power plant on the Uintah and Ouray reservation in northeastern Utah, EPA agreed to issue a final decision by August 29, 2014. A comment period on the draft permit opened on May 1, 2014 with the publication of a notice. EPA announced the filing of the consent decree settling the lawsuit on May 13. See also the discussion below of WildEarth Guardians' lawsuit against the United States Bureau of Land Management (BLM) and other federal defendants in connection with the impacts of this power plants operations.

Energy and Environment Legal Institute v. Epel, No. 11-cv-00859-WJM-BNB (D. Colo. May 9, 2014, standing order May 1, 2014): added to the "Challenges to State Action" slide. The federal district court for the District of Colorado ruled on May 9 that the "Renewables Quota" of Colorado's Renewable Energy Standard (RES) did not violate the dormant Commerce Clause. The Renewables Quota required that utilities obtain 30% of their energy from renewable sources by 2020. The judgment in favor of the defendants came eight days after the court ruled that the Energy and Environment Legal Institute—"a non-profit organization dedicated to the advancement of rational, free-market solutions to land, energy, and environmental challenges in the United States"—had standing to challenge the Renewables Quota, based on the lost sales and lost ability to compete of one of its members, a mining company that operated two coal mines in Wyoming. (The court concluded, however, that neither the organization nor one of its individual members had standing to challenge two ancillary provisions of the RES.) In its May 9 opinion, the court found that plaintiffs had not made any effort to show that the Renewables Quota discriminated against out-of-state interests on its face or in purpose or effect. Moreover, the court rejected plaintiffs' contentions that the Renewables Quota improperly regulated wholly out-of-state commerce. The court noted that the RES only affected commerce when an out-of-state electricity generator "freely chooses to do business with a Colorado utility" and that the RES did not impose conditions on the importation of electricity. The court also found that plaintiffs had failed to establish that the RES burdened interstate commerce for the purpose of the *Pike* balancing test. Plaintiffs announced they would appeal the district court's judgment to the Tenth Circuit Court of Appeals.

U.S. v. Miami-Dade County, Fla., No. 1:12-cv-24400-FAM (S.D. Fla., order denying motion to reopen May 8, 2014; order granting motion to enter consent decree Apr. 9, 2014): added to the "Adaptation" slide. The federal district court for the Southern District of Florida denied intervenor Biscayne Bay Waterkeeper's motion to reopen the case, which was resolved by a consent decree between the federal and state governments and Miami-Dade County. The court agreed with the U.S. that the consent decree had resolved the Clean Water Act violations at issue in the case. Intervenors originally had charged that the improvements to the County's water treatment plants and sewer system required by the consent decree did not adequately address future sea level rise. The final consent decree included higher stipulated penalties for failures to submit timely deliverables and for occurrences of sanitary sewer overflows (SSOs). The court required the County to submit semiannual status reports on SSOs and on its progress in implementing the improvements required by the consent decree.

Monroe Energy, LLC v. Environmental Protection Agency, No. 13-1265 (D.C. Cir. May 6, 2014): added to the "Challenges to Federal Action" slide. The D.C. Circuit upheld EPA's rule establishing the 2013 renewable fuel standards. In the final rule, which was issued months past the statutory deadline, EPA maintained the volumes for total renewable fuels and advanced biofuels established by the Energy Policy Act of 2005 as amended by the Energy Independence and Security Act of 2007. EPA reduced the statutory volume for cellulosic biofuel from 1.0 billion gallons to 6 million gallons. The D.C. Circuit rejected petitioner's contentions that EPA had acted arbitrarily or unreasonably by not reducing the total renewable fuel quota despite having substantially reduced the volume for cellulosic biofuel and despite the constraints posed by the "E10 blendwall" created by the inability of U.S. vehicle engines to use gasoline consisting of more than 10% ethanol. The court also said that EPA's failure to meet the statutory deadline for setting the RFS was not a basis for vacating the rule since obligated parties had been put on notice by the volumes set in the statute and EPA's assertion in the proposed rule that it would not waive statutory volumes other than for cellulosic biofuel and because EPA had extended the compliance deadline by four months.

NEW CASES, MOTIONS, AND NOTICES

WildEarth Guardians v. United States Bureau of Land Management, No. 14-cv-01452 (D. Colo., filed May 23, 2014): added to the "Stop Government Action/NEPA" slide. WildEarth Guardians filed a lawsuit in the federal district court for the District of Colorado challenging BLM's approval of the Blue Mountain Coal Lease and the U.S. Office of Surface Mining's and the Secretary of the Interior's approval of a "mining plan" modification that authorized development of the coal lease. WildEarth Guardians alleged that the agencies' issuance of a Finding of No Significant Impact violated NEPA because they failed to adequately address the air quality impacts of expanded mining and the air quality impacts of extending the life of operations at a coal-fired plant in Uintah County, Utah for which the mine was the sole source of fuel. (See above for a discussion of a settlement related to this power plant in *WildEarth Guardians v. McCarthy*.) The allegations focused on local air pollution impacts, not the impacts of greenhouse gas emissions.

Center for Biological Diversity, **Protest of BLM's July 17, 2014 Oil and Gas Competitive Lease Sale and Environmental Assessment DOI-BLM-NV-B000-2014-0001-EA** (May 12, 2014): added to the "Stop Government Action/NEPA" slide. The Center for Biological Diversity (CBD) submitted a formal protest to BLM's Nevada office objecting to BLM's plan to conduct an oil and gas lease sale in July 2014 for 102 parcels covering 174,021.36 acres. CBD asked BLM to cancel the lease sale and prepare a full environmental impact statement. CBD said BLM must reopen the decision-making process to address methane waste, water quality, air quality, sage grouse and other biological resources, and climate change impacts.

Letter to Securities and Exchange Commission from the Chesapeake Climate Action Network and Ruth McElroy Amundsen regarding Dominion Midstream Partners LP registration statement (May 6, 2014): added to the "Regulate Private Conduct" slide. The Chesapeake Climate Action Network and an individual shareholder in Dominion Resources, Inc. sent a letter to the U.S. Securities and Exchange Commission (SEC) asserting their belief that Dominion Midstream Partners LP, might have omitted or inadequately disclosed material information in a registration statement submitted to the SEC on March 28, 2014. The letter and the accompanying analysis identify the following areas as "potentially … characterized by lack of disclosure": permitting and litigation delay risks for the company's proposed liquefaction facility at its liquefied natural gas terminal on the Chesapeake Bay in Maryland; environmental risks and impacts associated with the LNG facility, including water drawdown, air and greenhouse gas mitigation risks, and climate change impacts to the facility; and risks related to the company's ability to generate stable and consistent cash flow such as permitting delays, the financial health of the parent company, and project cost overruns.

American Petroleum Institute v. EPA, No. 14-1048 (D.C. Cir., filed Apr. 3, 2014; statement of issues, May 5, 2014; ***Carbon Sequestration Council v. EPA***, No. 14-1046 (D.C. Cir., filed Apr. 2, 2014; statement of issues, May 8, 2014) (consolidation order, May 6, 2014): added to the "Challenges to Federal Action" slide. Two petitions were filed in the D.C. Circuit Court of Appeals seeking review of EPA's final regulation under the Resource Conservation and Recovery Act (RCRA) that created a conditional exclusion for hazardous carbon dioxide streams from the definition of "hazardous waste," provided that the streams meet certain conditions, including that they be captured from emission streams and be injected into Underground Injection Control Class VI wells for purposes of geologic sequestration. Petitioners argued that EPA improperly interpreted "solid waste" to include carbon dioxide as a supercritical fluid. API believed that this interpretation could be used to draw other supercritical fluids such as methane or propane into RCRA's jurisdiction. The proceedings were consolidated on May 6, 2014.

Update #62 (May 6, 2014)

FEATURED DECISION

American Tradition Institute v. Rector and Visitors of the University of Virginia, Record No. 130934 (Va. Apr. 17, 2014): added to the "Climate Change Protestors and Scientists" slide. The Supreme Court of Virginia affirmed a lower court ruling that shielded certain documents

produced or received by climate scientist Michael Mann while he was a professor at the University of Virginia (UVA) from disclosure under Virginia's Freedom of Information Act (VFOIA). The case turned on the meaning of "proprietary" in VFOIA's exemption for "[d]ata, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education … in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues." The Virginia Supreme Court rejected the American Tradition Institute's (ATI's) "narrow construction" of "proprietary," which ATI said required financial competitive advantage. The court said this interpretation was not consistent with legislative intent to protect public educational institutions from being placed at a competitive disadvantage compared to private universities and colleges. The court concluded that the legislative concern was motivated by a "broader notion" of competitive disadvantage that extended beyond financial injury to "harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression." The court cited at length the affidavit of a UVA administrator who had also served as an administrator at a private university, who said that "[i]f U.S. scientists at public institutions lose the ability to protect their communications with faculty at other institutions, their ability to collaborate will be gravely harmed."

DECISIONS AND SETTLEMENTS

North Dakota v. Heydinger, Case No. No. 11-cv-3232 (SRN/SER) (D. Minn. Apr. 18, 2014): added to the "Challenges to State Action" slide. The federal district court for the District of Minnesota enjoined the State of Minnesota from enforcing provisions of the Next Generation Energy Act (NGEA) that barred both importing energy from a "new large energy facility" outside Minnesota and entering into new long-term power purchase agreements, where such activities would contribute to statewide carbon dioxide emissions. The court ruled that these prohibitions were a "classic example" of extraterritorial regulation in violation of the dormant Commerce Clause. The court said that due to how the electricity industry operates, the law could require out-of-state entities to comply with Minnesota requirements and even seek regulatory approval from Minnesota before engaging in power transactions outside Minnesota. The court noted that "[u]nlike … tangible products, electricity cannot be shipped directly from Point A to Point B. MISO [the Midcontinent Independent System Operator, the regional transmission organization of which Minnesota is a member] does not match buyers to sellers, and once electricity enters the grid, it is indistinguishable from the rest of the electricity in the grid. Therefore, a North Dakota generation-and-transmission cooperative cannot ensure that the coal-generated electricity that it injects into the MISO grid is used only to serve its North Dakota members and not its Minnesota members. Consequentially, in order to ensure compliance with [the NGEA provisions], out-of-state parties must conduct their out-of-state business according to Minnesota's terms—i.e., engaging in no transactions involving power or capacity that would contribute to or increase Minnesota's statewide power sector carbon dioxide emissions.".

Communities for a Better Environment v. Environmental Protection Agency, No. 11-1423 (D.C. Cir. Apr. 11, 2014): added to the "Force Government to Act/Clean Air Act" slide. The D.C. Circuit upheld the U.S. Environmental Protection Agency's (EPA's) determination not to establish a secondary standard for carbon monoxide, finding that petitioners did not have standing to challenge the determination because they had not presented sufficient evidence of a

link between carbon monoxide at the levels permitted by EPA and a worsening of global warming. In its review of the standards for carbon monoxide, EPA had conducted an evaluation of the causal connection between carbon monoxide and climate change and concluded that it could not determine whether a secondary standard for carbon monoxide would affect climate.

Mississippi Power Co. v. Mississippi Public Service Commission, No. 2013-CC-00682-SCT (Miss. Apr. 10, 2014): added to the "Force Government to Act/Other Statutes" slide. The Supreme Court of Mississippi ruled that certain documents concerning "the long term natural gas price forecast and a forecast of the economic impact of pending federal legislation of greenhouse gas emissions" that Mississippi Power Co. (Mississippi Power) had filed in January 2009 with the Mississippi Public Service Commission (MPSC) should be disclosed. Mississippi Power had filed the documents in connection with a certificate of public convenience and necessity proceeding for a proposed power plant in Kemper County, Mississippi. Bigger Pie Forum, a media outlet covering (and opposed to) the project, had sought the documents pursuant to the Mississippi Public Records Act. Mississippi Power had marked the documents at issue as confidential, but it came to light that it had shared information responsive to the records request with the *Wall Street Journal*. Mississippi Power, however, continued to assert that since the information provided to the *Wall Street Journal* was from a December 2009 filing with MPSC, an earlier filing in January 2009 that contained similar information remained confidential. The Mississippi Supreme Court disagreed, stating that "Mississippi Power's revelation of natural gas price forecasts and CO2 cost assumptions provided to the Commission in December 2009 militates against the argument that a similar forecast submitted in January 2009 would be entitled to confidential, secret status."

Thrun v. Cuomo, Mo. No. 2014-138 (N.Y. Apr. 3, 2014): added to the "Challenges to State Action" slide. The New York Court of Appeals denied a motion for leave to appeal an Appellate Division decision dismissing a challenge to New York's participation in the Regional Greenhouse Gas Initiative (RGGI). The Appellate Division ruled in December 2013 that challenges to the validity of New York's RGGI regulations were time-barred and that the challenge to then-Governor Pataki's signing of the RGGI memorandum of understanding was moot.

WildEarth Guardians v. Bureau of Land Management, No. 1:11-cv-01481-RJL (D.D.C. Mar. 30, 2014): added to the "Stop Government Action/NEPA" slide. The federal district court for the District of Columbia granted the U.S. Bureau of Land Management's (BLM's) motion for summary judgment in this challenge to BLM's decision to authorize competitive lease sales in two coal tracts in the Wyoming Powder River Basin. As a threshold matter, the court concluded that plaintiffs had standing to bring all of their claims, including those related to climate change. After concluding that plaintiffs had standing stemming from injuries to aesthetic and recreational interests from local pollution to challenge BLM's consideration of local pollution impacts, the court expressed relief that it "need not navigate the troubled waters of the 'derivative' standing issue, nor … decide whether plaintiffs have established a separate injury in fact caused by climate change" because the D.C. Circuit had made clear in a similar case—*WildEarth Guardians v. Jewell*, No. 12-5300—that plaintiffs had standing to challenge BLM's consideration of climate change impacts on a procedural injury theory. On the merits, however, the court rejected plaintiffs' claims under both the National Environmental Policy Act (NEPA)

and the Federal Land Policy Management Act. Under NEPA, the court was not persuaded that BLM had not sufficiently considered the impacts of greenhouse gas emissions from mining operations and from the subsequent combustion of the coal. The court concluded that "the level of specificity plaintiffs would prefer in BLM's analysis is neither possible based on current science, nor required by law." The court said that BLM's evaluation of greenhouse gas emissions associated with its actions as a percentage of statewide and nationwide emissions was "a permissible and adequate approach," given that current climate science did not allow for "specific linkage between particular [greenhouse gas] emissions and particular climate change impacts." The court also rejected plaintiffs' contention that BLM was obligated to consider alternatives that would reduce greenhouse gas emissions such as emissions capture and sequestration, more efficient mine hauling trucks, and carbon offsets.

Protect Our Communities Foundation v. Jewell, No. 3:13-cv-00575-JLS-JMA (S.D. Cal. Mar. 25, 2014): added to the "Stop Government Action/NEPA" slide. The federal district court for the Southern District of California rejected a challenge to BLM actions authorizing the Tule Wind Project, a utility-scale wind energy facility on public lands in San Diego County. The court was not persuaded that BLM violated NEPA, the Migratory Bird Treaty Act, or the Bald and Golden Eagles Protection Act. Among other things, the court rejected plaintiffs' claims that BLM had failed to take a hard look at climate change impacts, finding that BLM did not have to indicate the number of megawatt-hours of energy the project would generate each year to support its conclusion that the project would "potentially" decrease overall emissions associated with electrical generation in California. Nor did BLM have to assess the project's "life-cycle" emissions impacts by taking into account emissions from off-site equipment manufacture and transportation—the court deemed such an assessment "largely speculative." The court also agreed with the defendants that BLM had sufficiently addressed a distributed generation alternative favored by plaintiffs that would have relied on widespread development of "rooftop solar" systems on residential and commercial structures in San Diego County, as well as development of other small-scale renewable energy sources.

In re Energy Answers Arecibo LLC, (EAB Mar. 25, 2014): added to the "Stop Government Action/Project Challenges" slide. In response to EPA Region 2's Motion for Limited Voluntary Remand, the Environmental Appeals Board (EAB) remanded a Clean Air Act Prevention of Significant Deterioration (PSD) permit issued for a resource recovery facility in Puerto Rico. EAB indicated that Region 2 should incorporate regulation of biogenic greenhouse gas emissions in the permit in a manner consistent with the revisions proposed in Region 2's motion. Region 2 had issued the permit prior to the D.C. Circuit's decision in *Center for Biological Diversity v. EPA*, No. 11-1101 (July 12, 2013), which vacated EPA's rule deferring regulation of biogenic greenhouse gases under the PSD program. EAB concluded that the amendments to the permit would not result in any change to the control technology or the total carbon dioxide emissions. EAB also concluded that the permit need not be reopened for public comment on remand, noting, among other factors, that EPA Region 2 already had taken biogenic carbon dioxide emissions into account in its best available control technology analysis.

NEW CASES, MOTIONS, AND NOTICES

San Diego Coastkeeper v. San Diego County Water Authority, No. 37-2014-00013216-CU-JR-CTL (Cal. Super. Ct., filed Apr. 25, 2014): added to the "State NEPAs" slide. An environmental organization filed a lawsuit alleging that the San Diego County Water Authority (SDCWA) failed to comply with the California Environmental Quality Act (CEQA) when it approved updates to its long-term plan for water development and conservation. The two elements of the plan, which SDCWA called "a road map through 2035 for future capital projects," were an update to the 2003 Regional Water Facilities Master Plan and a Climate Action Plan (CAP). Petitioner alleged a number of shortcomings related to climate change, including that the CAP "did not accurately account for current or projected future emissions" or "adequately provide for emission reduction goals and energy conservation opportunities." Petitioner also alleged that the Supplemental Program Environmental Impact Report (SPEIR) did not comply with AB 32 (California's greenhouse gas emissions reductions law) and that it failed to ensure consistency with Executive Order S-3-05 (a precursor to AB 32 that set greenhouse gas emissions reductions targets). Petitioner also asserted that the SPEIR did not use proper criteria to assess climate change impacts, that it failed to consider health impacts related to climate change, and that the CAP was not a qualified greenhouse gas reduction plan under CEQA guidelines.

Illinois Farmers Insurance Co. v. Metropolitan Water Reclamation District of Greater Chicago, No. 2014CH06608 (Ill. Cir. Ct., filed Apr. 16, 2014): added to the "Adaptation" slide. Insurance companies sued the water reclamation district for greater Chicago, Cook County, the City of Chicago and numerous other cities, towns, and villages in Illinois in a class action alleging that the municipalities' failures to implement reasonable stormwater management practices and increase stormwater capacity resulted in increased payouts to the plaintiffs' insureds after heavy rains in April 2013. The rains resulted in sewer water flooding the insureds' properties. Plaintiffs alleged that the rainfall was within the anticipated 100-year rainfall return frequency—or, alternatively, that it was within the climate change-adjusted 100-year rainfall return frequency predicted by the 2008 Chicago Climate Action Plan. They asserted claims of negligent maintenance liability, failure to remedy known dangerous conditions, and takings without just compensation.

Mississippi Insurance Department v. United States Department of Homeland Security, No. 1:13-cv-379-LG-JMR (S.D. Miss. Apr. 14, 2014): added to the "Adaptation" slide. After President Obama signed legislation—The Homeowner Flood Insurance Affordability Act of 2014, Pub. L. No. 113-89—in March 2014 rolling back flood insurance reform measures enacted in the Biggert-Waters Flood Insurance Reform and Modernization Act of 2012, the Mississippi Insurance Department filed a notice of voluntary dismissal to withdraw its lawsuit challenging flood insurance rate increases. The dismissal is without prejudice, and the Mississippi Insurance Commissioner said that the agency would refile the lawsuit if implementation of the new legislation does not address affordability concerns.

Communities for a Better Environment v. Bay Area Air Quality Management District, No. CPF-14-513557 (Cal. Super. Ct., filed Mar. 27, 2014): added to the "State NEPAs" slide. Environmental organizations filed a lawsuit in California Superior Court challenging the granting by the Bay Area Air Quality Management District (BAAQMD) of a permit to Kinder Morgan to conduct crude-by-rail operations. The organizations allege that the Kinder Morgan operations will bring North Dakotan Bakken crude oil to Bay Area refineries in the same types of

rail cars that were involved in the explosive train derailment in Québec in July 2013. They allege that the BAAQMD permit was issued in a "clandestine" manner "without any notice or public process whatsoever." They claim that BAAQMD "eschewed" its CEQA obligations by designating the project as "ministerial" and thereby failed to consider a number of impacts, including significant increases in greenhouse gas emissions.

International Center for Technology Assessment v. Council on Environmental Quality, No. 1:14-cv-00549 (D.D.C., filed Apr. 2, 2014): added to the "Force Government to Act/Other Statutes" slide. Two non-profit organizations filed an action in the federal district court for the District of Columbia seeking to compel the Council on Environmental Quality (CEQ) to respond to a 2008 petition in which plaintiff International Center for Technology Assessment asked CEQ to require consideration of climate change impacts in environmental review documents prepared to comply with NEPA. The complaint alleged that while CEQ published draft guidance in 2010 that would affirm that agencies must consider climate change impacts in their NEPA reviews, CEQ never finalized the guidance or otherwise "formally responded" or took "meaningful action" in response to the 2008 petition. Plaintiffs claim that this lack of response violated the Administrative Procedure Act.

Update #61 (April 1, 2014)

FEATURED DECISION

In re La Paloma Energy Center, LLC, PSD Appeal No. 13-10 (EAB Mar. 14, 2014): added to the "Stop Government Action/Project Challenges" slide. The U.S. Environmental Protection Agency (EPA) Environmental Appeals Board (EAB) rejected Sierra Club's challenge to a Prevention of Significant Deterioration permit issued by EPA Region 6 for a natural gas-fired power plant in Texas. EAB was not persuaded by Sierra Club's argument that Region 6 was required to consider each of three combined cycle natural gas-fired combustion turbine models as a separate technology in its BACT analysis. EAB deferred to Region 6's determination that the differences in the greenhouse gas (GHG) emissions from each of the three proposed turbine models were "marginal," and concluded that Region 6 "did not clearly err or abuse its discretion in determining that the GHG emission limits for all three turbine models represent BACT for highly efficient combined cycle combustion turbines." EAB also ruled that Region 6 had not abused its discretion in determining that a solar thermal energy component would "redefine the source" and therefore could be excluded as a potential emissions control alternative.

DECISIONS AND SETTLEMENTS

In re Regional Greenhouse Gas Initiative (RGGI), No. A-4878-11T4 (N.J. Super. Ct. App. Div. Mar. 25, 2014): added to the "Challenges to State Action" slide. The New Jersey Superior Court, Appellate Division, agreed with Environment New Jersey and the Natural Resources Defense Council that the New Jersey Department of Environmental Protection (NJDEP) should have followed formal rulemaking procedures to repeal or amend regulations implementing the State's participation in the Regional Greenhouse Gas Initiative (RGGI). After Governor Chris Christie announced in 2011 that the State would withdraw from RGGI's carbon dioxide cap-and-trade

program, NJDEP did not initiate formal repeal procedures for its RGGI regulations but instead posted a notice on its website that power plants would no longer be required to comply with the regulations' requirements as of January 2012. The appellate court rejected NJDEP's contention that it was not necessary to repeal the regulations because their only purpose was to implement New Jersey's participation in RGGI. The court determined that formal rulemaking was required because the regulations "are worded quite broadly and can be read to require action by [NJDEP] absent participation in a regional greenhouse program."

Center for Biological Diversity v. Department of Fish and Wildlife, No. B245131 (Cal. Ct. App. Mar. 20, 2014): added to the "State NEPAs" slide. The California Court of Appeal reversed a trial court judgment that had overturned California Department of Fish and Wildlife (DFW) actions in connection with a 12,000-acre commercial-residential development known as Newhall Ranch in northwestern Los Angeles County. The trial court had held that the environmental impact report (EIR) prepared pursuant to the California Environmental Quality Act (CEQA) used a baseline for assessing cumulative impacts of the project's GHG emissions that was inappropriate as a matter of law. In an unpublished portion of the appellate court's decision, the court ruled that a substantial evidence standard applied to judicial review of the selection of a baseline, and that substantial evidence supported DFW's baseline determination as well as its determination regarding the significance of the impacts of the project's GHG emissions.

Citizens Actions Coalition of Indiana, Inc. v. Duke Energy Indiana, Inc., No. 93A02-1301-EX-76 (Ind. Ct. App. Mar. 19, 2014): added to the "Challenges to Coal-Fired Power Plants" slide. The Indiana Court of Appeals rejected challenges to a regulatory settlement involving the construction of an integrated coal gasification combined cycle generating facility in Edwardsport, Indiana. The settlement agreement was adopted in 2012 by the Indiana Utility Regulatory Commission, which had issued the Certificates of Public Convenience and Necessity (CPCNs) for the facility in 2007. Intervenors had requested that the CPCNs be modified to require mitigation of carbon emissions, citing concerns about the risk of future costs to ratepayers. On appeal, the intervenors accused the Commission of adopting an "'ostrich approach' to global climate change and the role of carbon emissions, leaving ratepayers at financial risk in the future." In its nonprecedential decision, the court noted that there currently was no federal mandate requiring carbon mitigation, and said that it was not persuaded "that the Commission was derelict in its statutory duties when it declined to revisit the issue of potential future costs of carbon emissions at the Edwardsport plant. Nor can the settlement be considered contrary to law because it does not incorporate anticipated changes in the law."

Monroe Energy, LLC v. Environmental Protection Agency, No. 13-1265 (D.C. Cir. Mar. 11, 2014): added to the "Challenges to Federal Action/Other Rules" slide. In this challenge to the 2013 renewable fuel standard, the D.C. Circuit Court of Appeals granted an unopposed motion by EPA to sever and hold in abeyance issues pertaining to the cellulosic biofuel standard, which EPA agreed to reconsider after learning that producers had lowered their production estimates. The D.C. Circuit established a new case (No. 14-1033) and required status reports on EPA's reconsideration of the cellulosic biofuel standard every 60 days, starting on March 28. Oral argument on the challenge to other aspects of the 2013 renewable fuel standard will be heard on April 7, 2014.

California Clean Energy Committee v. City of Woodland, No. C072033 (Cal. Ct. App. Feb. 28, 2014): added to the "State NEPAs" slide. In an unpublished decision, the California Court of Appeal ruled that the City of Woodland had not complied with CEQA in approving the development of a regional shopping center on undeveloped agricultural land. In doing so, the appellate court reversed a trial court decision in favor of the City. Among the inadequacies in the CEQA review was the City's failure to assess the project's transportation, construction, and operation energy impacts. The appellate court said that the City was required to investigate renewable energy options that might be available or appropriate for the project.

Sierra Club v. Energy Future Holdings Corp., No. 12-cv-108 (W.D. Tex. Feb. 26, 2014): added to the "Challenges to Coal-Fired Power Plants" slide. After a three-day bench trial in this citizen suit alleging that the Big Brown Steam Electric Station in Freestone County, Texas violated the Clean Air Act, the judge ruled from the bench for the defendants on February 26, 2014. The court found that plaintiff had not established that a penalty should apply and denied all requested relief. Defendants submitted proposed findings of fact and conclusions of law on March 10, 2014.

In re Consolidated Environmental Management, Inc. – Nucor Steel, Saint James Parish, Louisiana, Pet. Nos. VI-2010-05, VI-2011-06, and VI-2012-07 (EPA Jan. 30, 2014): added to the "Stop Government Action/Project Challenges" slide. The EPA administrator issued an order rejecting requests by the Louisiana Environmental Action Network (LEAN) and Sierra Club that EPA object to GHG provisions in a Title V permit issued by the Louisiana Department of Environmental Quality for a facility that produced feedstock for steelmaking. LEAN and Sierra Club had contended that the permit was not in compliance with Clean Air Act requirements because it did not require best available control technology (BACT) for GHG emissions and did not specify procedures for estimating GHG emissions. The order was signed on January 30, 2014, and notice was published in the Federal Register on March 21, 2014.

NEW CASES, MOTIONS, AND NOTICES

Murray Energy Corp. v. McCarthy, No. 5:14-cv-39 (N.D. W. Va., filed Mar. 24, 2014): added to the "Challenges to Federal Action/Other Rules" slide. Coal companies commenced a federal lawsuit seeking to compel EPA to undertake an evaluation pursuant to section 321 of the Clean Air Act of the effects of administration and enforcement of the Clean Air Act on employment. Plaintiffs contend that EPA "has continued to administer and enforce the Clean Air Act in a manner that is causing coal mines to close, costing hard-working Americans their jobs, and shifting employment away from areas rich in coal resources to areas with energy resources preferred by [EPA]." Plaintiffs seek an injunction barring EPA from promulgating new Clean Air Act regulations that affect the coal industry until the employment evaluation is completed.

Rocky Mountain Farmers Union v. Corey, No. 13-1148 (U.S. Mar. 20, 2014); ***American Fuel & Petrochemical Manufacturers Association v. Corey***, No. 13-1149 (U.S. Mar. 20, 2014): added to the "Challenges to State Actions" slide. Two petitions for writs of certiorari were filed in the U.S. Supreme Court seeking review of the Ninth Circuit decision that revived California's Low Carbon Fuel Standard (LCFS) after a district court had ruled that it violated the dormant Commerce Clause. The petition filed by the Rocky Mountain Farmers Union and other parties

associated with the ethanol industry presents two questions: (1) whether the Ninth Circuit erred "in concluding that the [LCFS] does not facially discriminate against interstate commerce" and (2) whether the Ninth Circuit erred "in concluding that the [LCFS] is not an extraterritorial regulation." The petition filed by the American Fuel & Petrochemical Manufacturers Association, American Trucking Associations, and Consumer Energy Alliance presents one question: "Whether [the LCFS] is unconstitutional because it discriminates against out-of-state fuels and regulates interstate and foreign commerce that occurs wholly outside of California."

United States v. Miami-Dade County, Florida, No. 1:12-cv-24400-FAM (S.D. Fla. Mar. 6, 2014): added to the "Adaptation" slide. The federal district court for the Southern District of Florida declined to approve the consent decree proposed by the United States, Florida, and Miami-Dade County to resolve alleged violations of the Clean Water Act by the County in connection with its ownership and operation of a publicly owned treatment works. The court suggested that the parties submit further pleadings and further suggested that the appointment of a special master to oversee and monitor the County's progress in implementing the repairs required by the consent decree, as well as increased penalties for failures to make the repairs, might assuage the court's concerns regarding implementation. The court indicated, however, that "remaining objections"—presumably including objections raised by intervenors as to the consent decree's failure to take climate change-related sea level rise into consideration—were not sufficient to overcome the presumption in favor of approval of the consent decree. On March 21, 2014, the federal and state plaintiffs submitted supplemental comments on the consent decree in which they reported that they had reached agreement with the County to double the penalties that would apply for sanitary sewer overflows and failures to meet deadlines and "submit timely deliverables." The parties urged the court to accept the option of "heightened reporting requirements" in lieu of the appointment of a special master, which they said would cause unnecessary expense and delay.

Office of Management and Budget, Response to Petition for Correction of the "Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866" Technical Support Documents (Jan. 24, 2014); **Request for Reconsideration** (Feb. 24, 2014): added to the "Challenges to Federal Action/Other Rules" slide. On February 24, 2014, a coalition of organizations representing various industry and business sectors submitted a Request for Reconsideration (RFR) to the Office of Management and Budget (OMB) regarding OMB's January 2014 response to the organizations' September 2013 Petition for Correction (PFC) of Technical Support Documents (TSDs) prepared as the basis for Social Cost of Carbon (SCC) estimates used by federal agencies in their decision making. In the January 2014 response, OMB addressed the five concerns enumerated in the PFC but concluded that the SCC estimates "provide valuable and critical insight" for regulatory decision making. The January 2014 response also referred the organizations to the ongoing public comment process on the SCC TSDs, which sought comments "on topics that are consistent with those raised" in the PFC. The RFR called OMB's January 2014 response "unsatisfactory," contending that OMB "supported its terse conclusion with little more than a 'cut-and-paste' reiteration of the precise TSD language that concerned the [organizations]." The RFR catalogs the January 2014 response's alleged shortcomings, including that it had not remedied the "opacity" that characterized the development of the SCC estimates. The organizations also contend that OMB did not comply

with its own Information Quality Act guidelines in the development of either the TSDs or the 2014 response.

Update #60 (March 5, 2014)

FEATURED DECISION

Washington Environmental Council v. Bellon, No. 12-35323 (9th Cir. Feb. 3, 2014): added to the "Force Government to Act/Clean Air Act" slide. The Ninth Circuit denied rehearing en banc of its October 2013 ruling that plaintiffs seeking to compel the State of Washington to regulate greenhouse gas emissions from oil refineries did not have standing. Judge Ronald M. Gould, joined by two other judges, wrote a dissent from the denial calling the October ruling "overbroad" and warning that it would foreclose climate change-related citizen suits under the Clean Air Act and harm the public. Judge Gould wrote that the Supreme Court's 2007 opinion in *Massachusetts v. EPA*, in his view, did not limit standing in environmental lawsuits related to climate change to states. Instead, he wrote: "The Supreme Court's reasoning endorsed the principle that causation and redressability exist, independent of sovereign status, when some incremental damage is sought to be avoided. Accordingly, *Massachusetts v. EPA* also confers standing upon individuals seeking to induce state action to protect the environment." In a concurring opinion, Judge Milan D. Smith, Jr. (author of the October opinion) wrote that the conclusion that plaintiffs lacked standing was compelled by the Supreme Court's stringent requirements for standing in *Lujan v. Defenders of Wildlife*, as well as by *Massachusetts v. EPA*. Judge Smith reiterated the distinction between the instant case, in which private plaintiffs sought to compel promulgation of specific regulations, from *Massachusetts v. EPA*, in which sovereign states asserted a procedural right. Judge Smith rejected the dissent's suggestion that the court had erected "new and inappropriate barriers to environmental litigation." "Not so," wrote Judge Smith. Rather, "[o]ur decision rests on a straightforward application of *Lujan* and *Mass. v. EPA*."

DECISIONS AND SETTLEMENTS

PT Air Watchers v. Washington, No. 88208-8 (Wash. Feb. 27, 2014): added to the "State NEPAs" slide. The Washington Supreme Court affirmed determinations of the Department of Ecology (WDOE) authorizing the construction of a cogeneration facility at an existing kraft pulp and paper mill in Port Townsend, Washington. In its review under the State Environmental Policy Act (SEPA), WDOE issued a determination of nonsignificance for the project, which would increase the burning of woody biomass and add an electrical turbine to one of the mill's steam boilers. In determining that greenhouse gas emissions from the project would not have significant adverse impacts, WDOE invoked the preference in state law (RCW 70.235.020(3)) for use of biomass fuel, combustion of which is part of the earth's carbon cycle. WDOE also projected that by increasing the use of woody biomass, the project would reduce fossil fuel use by 1.8 million gallons each year. The court said that the invocation of the state statute was "a legitimate reference point" for WDOE to consider, and that SEPA did not require a statement regarding the exact amount of carbon dioxide that would be emitted by the project. The court also said that WDOE did not need to calculate the specific greenhouse gas emissions associated with transportation of the biomass to the facility since its estimates of additional truck routes

needed to transport the fuel were "sufficient to evaluate the general change in greenhouse gas emissions."

In re Petition of Footprint Power Salem Harbor Development LP for Approval to Construct a Bulk Generating Facility in the City of Salem, Massachusetts, EFSB 13-1 (Mass. Energy Facilities Siting Bd. final decision Feb. 25, 2014; settlement filed Feb. 18, 2014): added to the "Stop Government Action/Project Challenges" slide. In November 2013, the Conservation Law Foundation initiated several administrative and judicial appeals of approvals granted by the Massachusetts Energy Facilities Siting Board (EFSB) and the Massachusetts Department of Environmental Protection for a 630-MW natural gas-fired electric generation facility, the first generating facility proposal made to the EFSB since enactment of the Massachusetts Global Warming Solutions Act (GWSA) in 2008. After the EFSB issued a tentative decision granting additional approvals necessary for the project on February 4, 2014, the Conservation Law Foundation and the facility's developer reached a settlement that the parties agreed would establish conditions ensuring compliance with the GWSA's mandate to reduce greenhouse gas emissions in the state by 80% below 1990 levels by 2050. The conditions include declining annual carbon dioxide emissions limits and a limitation on the useful life of the facility (the facility must cease operations by 2050). In the absence of regulations implementing the GWSA, the settlement's conditions are intended to serve as parameters for future applications for fossil fuel-fired generation. The EFSB issued a final decision incorporating these conditions on February 25, 2014.

WildEarth Guardians v. U.S. Office of Surface Mining Reclamation and Enforcement, No. 1:13-cv-00518 (D. Colo. Feb. 7, 2014): added to the "Stop Government Action/NEPA" slide. An environmental group commenced this lawsuit in the federal district court for the District of Colorado seeking to invalidate coal mining permits in Colorado, Montana, Wyoming, and New Mexico. Plaintiff alleged violations of the National Environmental Policy Act, including failure to involve the public in the review process and failure to take a hard look at impacts associated with coal transport and combustion. The court—in an opinion by a judge who admitted that he had "a history of granting transfer in environmental administrative cases"—ordered the action to be severed, and transferred the claims involving mining permits in other states to the district courts in those jurisdictions, saying that "[t]he value in having environmental claims litigated where their impacts resonate most deeply eclipses any alleged judicial economy in lumping together in one suit and one venue various locally charged claims." The court was not swayed by the environmental group's arguments that their claims protested a "practice or pattern" of not involving the public that should be heard in one action, or that judicial economy, the risk of inconsistent judgments, or prejudice to the plaintiff in the form of inconvenience and increased costs and delay otherwise weighed against severance and transfer.

U.S. v. Alabama Power Co., No. 2:01-CV-152-VEH (N.D. Ala. Feb. 5, 2014): added to the "Challenges to Coal-Fired Power Plants" slide. In 2001, the federal government sued Alabama Power Co. in the federal district court for the Northern District of Alabama for failure to comply with new source review (NSR) permitting requirements at existing coal-fired power plants in Alabama. In 2011, the court granted summary judgment to Alabama Power Co. after finding that expert testimony crucial to the federal government's ability to establish that the projects undertaken by Alabama Power Co. were major modifications subject to the NSR permitting

program was inadmissible. After the Eleventh Circuit ruled that the exclusion of the expert testimony was an abuse of discretion and remanded the action, the district court judge denied a motion by the federal government to recuse herself based on her mother's ownership of shares in the parent company of the defendant and her own ownership of shares in a utility sector mutual fund that had holdings in the defendant's parent company.

Utility Reform Network v. Public Utilities Commission, No. A138701; ***Independent Energy Producers Association v. Public Utilities Commission***, No. A139020 (Cal. Ct. App. Feb. 5, 2014): added to the "Stop Government Action/Project Challenges" slide. In 2012, the California Public Utilities Commission (CPUC) approved an application by Pacific Gas and Electric Company (PG&E) to purchase a natural gas-fired power plant in Oakley, California. The administrative law judge in the proceeding had recommended denying the application because she found there was insufficient evidence of "a specific, unique reliability need" for the project. In doing so, she rejected PG&E's reliance on hearsay evidence, including statements made by the California Independent System Operator (CAISO) regarding the need for flexible generating capacity to meet the state's renewable energy targets. (CAISO had elected not to become a party to the proceeding, so the statements could not be cross examined.) CPUC instead adopted a proposed decision that relied on such statements as evidence of the potential for a reliability risk as the state moved towards meeting the 33% renewable portfolio standard by 2020. On appeal of CPUC's decision, the California Court of Appeal annulled the approval, finding a lack of substantial evidence that the project was needed "to meet a specific, unique reliability risk." The court said that uncorroborated hearsay evidence, while admissible, could not be the sole support for a finding of disputed fact.

Sierra Club v. Tahoe Regional Planning Agency, No. 12-CV-00044 (E.D. Cal. Jan. 31, 2014): added to the "State NEPAs" slide. In January 2013, the federal district court for the Eastern District of California ruled that the Tahoe Regional Planning Agency's approval of a plan to expand a ski resort failed to adequately assess the economic feasibility of a smaller proposal. Although the court rejected other claims, including allegations of shortcomings in the agency's analysis of the project's greenhouse gas emissions, the court stayed construction and remanded for the required economic analysis. In late January 2014, Sierra Club and the developers announced that they had entered into a settlement in which they agreed to a scaled-down version of the project.

Competitive Enterprise Institute v. United States Environmental Protection Agency, Civil Action No. 12-1617 (D.D.C. Jan. 29, 2014): added to the "Force Government to Act/Other Statutes" slide. The Competitive Enterprise Institute (CEI) sought disclosure of e-mails to and from a secondary e-mail account used by the administrator of the United States Environmental Protection Agency (EPA). CEI sought e-mails that included the words "climate," "endanger" (including, for example, "endangerment"), "coal," or "MACT." In late January 2014, the district court for the District of Columbia ruled that EPA—having produced more than 10,000 documents and complied with the court's orders to prepare sample *Vaughn* indices detailing the basis for withholding all or portions of documents—had in large part complied with Freedom of Information Act (FOIA), stating: "For the most part, … CEI speaks loudly and carries a small stick. Despite the group's bold claims, the law and the record show that EPA has almost entirely complied with its obligations under FOIA and that it is entitled to summary judgment on nearly

every count. Still, CEI scores a few stray hits, and the Court will require EPA to polish off these last details before it terminates the case." The "last details" involved providing additional information in two instances regarding e-mail addresses used by former EPA administrator and White House advisor Carol Browner in communications with EPA and providing a justification for withholding one of 25 documents that EPA apparently excluded inadvertently in the preparation of the sample *Vaughn* indices.

Conservation Law Foundation v. McCarthy, No. 1:11-cv-11657 (D. Mass. stay ordered Jan. 28, 2014; motion to dismiss denied in part Aug. 23, 2013): added to the "Adaptation" slide. Plaintiffs commenced this lawsuit in 2011 (amended complaint filed in 2012) to compel EPA to take steps pursuant to its authorities under the Clean Water Act to address the increasing nitrogen pollution in the embayments of Cape Cod. Plaintiffs' allegations include that climate change will cause additional strain to coastal ecosystems that has not been considered in water quality management planning. In August 2013, the federal district court for the District of Massachusetts dismissed three of plaintiffs' four claims, but declined to dismiss plaintiffs' claim that EPA's annual reviews of Massachusetts's use of its State Revolving Fund (SRF) monies—which fund certain types of waste water management projects—were arbitrary, capricious, and contrary to Clean Water Act. Plaintiffs alleged that because Massachusetts had not updated its areawide waste treatment management plan for Cape Cod since 1978 and had therefore not evaluated the impact of climate change on water quality conditions in connection with the state's water quality management planning, EPA could not lawfully approve the state's use of SRF funds, which must be consistent with the areawide plan. In September 2013, EPA submitted a proposed plan of action to the court, asking that the action be stayed since the Cape Cod Commission had initiated the preparation of an update to the areawide plan, which, EPA said, was essentially the relief sought by plaintiffs. EPA's proposed plan indicates that the work plan for the update includes consideration of climate change, sea level rise, and storm surge. In January 2014, the court ordered that the case be stayed until June 1, 2015 while work proceeds on the update; the stay is contingent on plaintiffs' ongoing satisfaction with adherence to representations made in the September 2013 plan of action. The court also required the parties to report by March 31, 2014 as to whether they had decided to settle the case.

NEW CASES, MOTIONS, AND NOTICES

Utility Air Regulatory Group v. Environmental Protection Agency, No. 121146 (U.S., oral argument Feb. 24, 2014): added to the "Challenges to Federal Action" slide. The Supreme Court held oral argument in the challenge to EPA's authority to regulate greenhouse gases under the Clean Air Act's Prevention of Significant Deterioration program. The transcript of the oral argument is available here. A sampling of reporting on the oral argument: *New York Times*, SCOTUSblog, *Washington Post*, *Los Angeles Times*, AP.

Monroe Energy, LLC v. U.S. Environmental Protection Agency, No. 13-1265 (D.C. Cir., unopposed motion to sever Feb. 4, 2014): added to the "Challenges to Federal Action" slide. In this proceeding seeking review of EPA's final rule setting the 2013 renewable fuel standard (RFS), EPA filed a motion to sever and establish a new docket number for issues pertaining to the cellulosic biofuel standard. In the motion to sever, EPA reported that it had agreed to reconsider the 2013 cellulosic biofuel standard based on information received after the rule was

finalized from a producer of cellulosic biofuel that it had reduced its 2013 production estimate. EPA indicated that to provide regulatory certainty to parties subject to the RFS it would issue a new direct final rule concerning the cellulosic biofuel standard; to address concerns regarding the timing of the rulemaking process, EPA also proposed to make regular reports on its progress, starting on March 21, 2014. The court has not ruled on this motion. Oral argument is set for April 7, 2014.

Monroe Energy, LLC v. U.S. Environmental Protection Agency, No. 14-1014 (D.C. Cir., filed Jan. 28, 2014): added to the "Challenges to Federal Action" slide. After EPA proposed its 2014 renewable fuel standard, Monroe Energy, LLC petitioned the D.C. Circuit for review of EPA's 2010 amendment to rules governing the RFS program, and in particular the provision that imposes compliance obligations on refiners and importers of diesel and gasoline fuels rather than on the blenders who produce the finished transportation fuels. Monroe Energy contends that its challenge to the 2010 rule is timely because, due to changed circumstances, EPA in the 2014 RFS proposes to waive the statutory standards for the required quantities of renewable fuels and to establish a new methodology for determining the standards that will increase the regulatory burden created by the 2010 rule for certain refiners and importers.

Update #59 (February 4, 2014)

FEATURED DECISION

Native Village of Point Hope v. Jewell, No. 12-35287 (9th Cir. Jan. 22, 2014): added to the "Stop Government Action/NEPA" slide. The Ninth Circuit reversed a district court's grant of summary judgment to the federal government in a case challenging the Bureau of Ocean Energy Management's (BOEM's) approval of an oil and gas lease sale in the Chukchi Sea off the northwest coast of Alaska. The Ninth Circuit "largely" agreed with the district court that BOEM had not abused its discretion in its handling of missing information in the environmental review under the National Environmental Policy Act. The Ninth Circuit agreed, however, with the plaintiffs-appellants that BOEM had acted arbitrarily in choosing a one billion barrel estimate for the amount of economically recoverable oil from the lease sale, and that BOEM's environmental review and ultimate decision were therefore based on inadequate information. Evidence in the record showed that BOEM employees, other agencies, and public commentators had expressed concerns about the rationale for the one billion barrel estimate and whether it significantly underestimated the likely amount of recoverable oil. The Ninth Circuit was not persuaded by the government's argument that any errors in the estimate could be corrected for in site-specific environmental reviews later in the development process because "[i]t is only at the lease sale stage that the agency can adequately consider cumulative effects of the lease sale on the environment, including the overall risk of oil spills and the effects of the sale on climate change." The Ninth Circuit therefore held that since BOEM had decided oil production was reasonably foreseeable, it should have based its analysis on "the full range of likely production if oil production were to occur." Judge Rawlinson dissented in part, indicating that he would have deferred to the agency on the issue of the one billion gallon estimate.

DECISIONS AND SETTLEMENTS

Penalties for Violations of California's Mandatory Greenhouse Gas Emissions Reporting Regulation (Jan. 27, 2014): added to the "Regulate Private Conduct" slide. The California Air Resources Board (CARB) announced that it had fined three companies a total of almost $1 million for violations of California's greenhouse gas emissions reporting requirements. All of the violations concern 2011 emissions. Chevron U.S.A. Inc. must pay $364,500 for incorrectly reporting emissions from its El Segundo refinery and leaving the data uncorrected for 243 days. Chevron North America Exploration & Production Company must pay $328,500 for reporting emissions associated with the company's San Joaquin Valley oil fields 219 days late. Southwest Gas Corporation must pay $300,000 for reporting emissions from gas supplied to California 320 days late. This is the second time California has imposed penalties for violations of the reporting requirements, and these penalties are the largest assessed so far. CARB indicated that the three companies had brought the missing reports to CARB's attention, and that the violations were the companies' first and had been determined to be inadvertent.

Rocky Mountain Farmers Union v. Corey, Nos. 12-15131, 12-15135 (9th Cir. Jan. 22, 2014). The Ninth Circuit denied the petitions for rehearing en banc of its September 2013 decision reversing the portions of a 2011 district court decision that found California's low carbon fuel standard (LCFS) to be in violation of the dormant Commerce Clause. The Ninth Circuit denied the petitions over the dissent of seven judges, including the partial dissent of Judge Mary H. Murguia. She joined the portion of the dissent from the denial of rehearing that addressed facial discrimination. The dissent, authored by Judge Milan D. Smith, Jr., pointed to at least three ways in which the court had erred. One, the majority had found "at least facially constitutional a protectionist regulatory scheme that threatens to Balkanize our national economy." Two, the majority "compound[ed] its error" by finding that the legitimate local concern of combating climate change justified the LCFS ethanol provisions when the state had admitted that they would have little to no effect on climate change. Three, the LCFS ethanol provisions clearly impermissibly sought to control conduct in other states. Although the court denied the petition for rehearing without an opinion, Judge Ronald M. Gould, who wrote the court's September 2013 majority opinion, wrote a concurrence supporting the September opinion and countering the "overstatements" of the dissent. Of particular note to those who may be wondering what will happen next in this case, Judge Gould stated: "the tone and substance of the dissent is perhaps aimed at encouraging Supreme Court review. A petition for writ of certiorari from the parties who sought rehearing is likely forthcoming, but our court properly declines to give its judicial imprimatur to the dissent's position. Because Supreme Court review is possible, however, I set forth my own views on that prospect. On the one hand, the Supreme Court's considered judgment could be helpful to clarify as soon as practical what states may do of their own accord to deter or slow global warming.…On the other hand, the record in this case is incomplete and thus unsuitable for understanding the full scope of the issues presented.… The issues raised by the dissent … may be rendered moot by the district court's decision [on remand], and in any event there will be a more complete record, including findings on purpose and effect, on which to make a ruling about the controlling legal principles."

Mann v. National Review (D.C. Super. Ct. Jan. 22, 2014; D.C. Ct. App. Dec. 19, 2013). A District of Columbia Superior Court has again denied motions to dismiss a defamation lawsuit filed by the climatologist Michael Mann against *National Review*, the Competitive Enterprise

Institute (CEI), and individual writers. The motions were directed at an amended complaint filed before the July 2013 decisions that denied motions by ***National Review*** and CEI to dismiss the original complaint. The "substantive" difference between the original complaint and the amended complaint was Mann's assertion of one additional count, libel *per se*. In denying the motions, the new judge in the case (who replaced the retired Judge Combs Greene) ruled that, "regardless of whether the rulings embodied in the non-final orders of July 19, 2013, should be treated as 'law of the case,'" he agreed with Judge Combs Greene's conclusion that Mann had shown sufficient likelihood of success to defeat the special motion to dismiss the six counts in the original complaint under D.C.'s Anti-SLAPP (Strategic Lawsuit Against Public Participation) Act. With respect to the new libel *per se* count, the court said that while some of defendants' statements about Mann and his research were protected as "opinions and rhetorical hyperbole," other statements—such as statements that Mann "molested and tortured data" or statements calling Mann's work "fraudulent"—were "assertions of fact" that would be defamatory if proven false and would be actionable if made with actual malice. The court found that "[v]iewing the facts in the light most favorable to plaintiff, a reasonable jury is likely to find in favor of the plaintiff." This Superior Court decision comes a month after the District of Columbia Court of Appeals dismissed the appeals of the court's earlier decisions as moot, given that Mann had filed the amended complaint and defendants had filed new motions to dismiss. *National Review*, CEI, and individual defendant Rand Simberg have filed notices of appeal for the January 22 decision.

Svitak v. Washington (Wash. Ct. App. Dec. 16, 2013): added to the "Common Law Claims" slide. The Washington Court of Appeals affirmed the dismissal of a public trust doctrine case brought by minor children and their guardians to force Washington to accelerate its greenhouse gas reductions. The appellate court ruled that the claims presented a political question that must be left to the legislature to address (particularly where, as in this case, the legislature had already addressed greenhouse gas emissions), and that the issue of the state's alleged inaction was not justiciable because there were no specific alleged constitutional or statutory violations.

Delta Construction Co. v. EPA (D.C. Cir. Dec. 12, 2013): added to the "Challenges to Federal Action" slide. The D.C. Circuit granted petitioner Clean Energy Fuels Corp.'s unopposed motion to dismiss it from consolidated proceedings challenging the U.S. Environmental Protection Agency's (EPA's) September 2011 rule establishing greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles. Clean Energy Fuels, which was described in the proceedings as "the leading provider of natural gas for transportation in North America," had objected to the use of a higher global warming potential (GWP) for methane from mobile sources than for methane from stationary sources. This discrepancy was rectified in EPA's November 2013 amendment to the Greenhouse Gas Reporting Rule (see discussion of ***Waste Management, Inc. v. EPA***, below). Other parties continue to challenge the medium- and heavy-duty vehicle standards on other grounds. In November 2013, the parties submitted a joint motion seeking to sever the challenges that are dependent on the Supreme Court's determination in *Utility Air Regulatory Group v. EPA* regarding stationary source greenhouse gas permitting and to proceed with a briefing schedule for the remainder of the challenges to the rule and related cases.

NEW CASES, MOTIONS, AND NOTICES

Waste Management, Inc. v. EPA (D.C. Cir., filed Jan. 28, 2014): added to the "Challenges to Federal Action/GHG Reporting Rule" slide. Waste Management, Inc. and three affiliates filed a petition in the D.C. Circuit seeking review of EPA's November 2013 amendment of the Greenhouse Gas Reporting Rule (40 C.F.R. part 98). The November 2013 amendment revised the global warming potentials (GWPs) of certain greenhouse gases to make them consistent with the GWPs used in the UN Intergovernmental Panel on Climate Change's Fourth Assessment Report. The GWP for methane was increased to 25 from 21. In comments on the proposed rule, Waste Management expressed a number of concerns, including concerns about the rule's retroactive application, concerns regarding the increased number of landfills that would be subject to the reporting requirements due to the increase in methane's GWP, and concerns over the effect of the GWP revisions on the applicability of Title V and prevention of significant deterioration (PSD) permitting programs.

Murray Energy Corp., 60-Day Notice of Intent to File Clean Air Act Citizen Suit (Jan. 21, 2014): added to the "Challenges to Federal Action/Other Rules" slide. Characterizing EPA's administration and enforcement of the Clean Air Act (CAA) over the past five years as a "war on coal," Murray Energy Corporation and certain subsidiaries and affiliates sent a letter to EPA on January 21, 2014 notifying the agency of its intent to file a citizen suit challenging EPA's failure to fulfill a nondiscretionary duty under section 321 of the CAA to conduct continuing evaluations of potential loss or shifts of employment that may result from administration or enforcement of the CAA. The letter described EPA actions, including the development of proposed regulations for greenhouse gas emissions from power plants, that place "immense pressure" on the electric generating sector and other industries that traditionally burn coal, and said that "EPA has taken these actions to discourage the use and production of coal without adequate evaluation and consideration of their implications for the jobs of many thousands of employees in the coal sector and many other dependent industries. This is the very reason why Congress enacted CAA § 321(a), which expressly requires EPA to continuously evaluate the employment effects of these Agency actions." The letter cited the EPA Administrator's responses to questions from members of Congress as indicating that EPA has never conducted the evaluation required by section 321 and that it is not likely to do so in the future without judicial intervention.

Nebraska v. EPA (D. Neb., filed Jan. 15, 2014): added to the "Challenges to Federal Action/Other Rules" slide. A week after EPA proposed new source performance standards for greenhouse gas emissions from power plants, the State of Nebraska commenced a lawsuit seeking an order enjoining EPA's work on the rulemaking and requiring withdrawal of the proposed rule. Nebraska alleges that the proposed rule violates the Energy Policy Act of 2005, which provides that EPA may not base required technologies or emissions reductions levels under section 111 of the CAA solely on the use of technologies by facilities receiving assistance under the Energy Policy Act. Nebraska's complaint seeks a declaration that the proposed rule's consideration of the federally financed deployment of carbon capture and sequestration (CCS) to support the finding that CCS is "adequately demonstrated" for section 111 purposes is unlawful.

Stevenson v. Delaware Department of Natural Resources and Environmental Control (Del. Super. Ct., filed Dec. 30, 2013): added to the "Challenges to State Action" slide. Individuals commenced a challenge in Delaware Superior Court to regulations published in December 2013 implementing changes to the Regional Greenhouse Gas Initiative (RGGI), including a reduction in the carbon dioxide emissions cap. Plaintiffs allege that the December 2013 regulations illegally decrease the cap below the level provided for in the original RGGI memorandum of understanding (MOU) that Delaware's governor signed in 2005. They contend that Delaware statutory law expressly constrains the Secretary of the Department of Natural Resources and Environmental Control to regulate within the parameters of the 2005 MOU. Plaintiffs also contend that the regulations increase RGGI program fees in contravention of the Delaware constitution, which would require fee increases to be approved by a three-fifths majority of the Delaware General Assembly. A former Delaware state deputy attorney general is pursuing a parallel challenge to the regulations at the Delaware Environmental Appeals Board (***In re 7 Del. Admin. Code 1147, CO2 Budget Trading Program***).

In re ExxonMobil Chemical Company Baytown Olefins Plant, No. 13-11 (EAB, filed Dec. 26, 2013): added to the "Stop Government Action/Project Challenges" slide. The Sierra Club petitioned the Environmental Appeals Board (EAB) for review of the conditions in the prevention of significant deterioration (PSD) permit issued by EPA Region 6 for the addition of an ethylene production unit at an existing major source at the Baytown Olefins Plant in Harris County, Texas. Sierra Club said that facilities in Texas such as the Baytown Olefins Plant have a "unique opportunity" to consider deployment of CCS and development of carbon storage resources to reduce greenhouse gas emissions. (The petition notes a U.S. Geological Survey study that concluded that the Gulf Coast has 65% of the country's estimated accessible carbon storage resources.) Sierra Club said that the Baytown facility's PSD permit "exemplified the Region's inadequate implementation of the PSD permitting program in general for [greenhouse gases]" and asked the EAB to remand the permit to Region 6 and require a "full and appropriate analysis" of CCS in the best available control technology analysis.

Conservation Law Foundation v. Broadrock Gas Services, LLC, No. 13-777 (D.R.I., filed Dec. 16, 2013): added to the "Regulate Private Conduct" slide. The Conservation Law Foundation (CLF) filed a CAA citizen suit against the owners and operators of the Central Landfill in Johnston, Rhode Island "for releasing polluted landfill gas into Rhode Island's air." All municipal solid waste generated in the state of Rhode Island is disposed of at the Central Landfill. In the complaint, which alleged violations of the new source performance standards, PSD, and Title V programs, CLF contended that pollutants emitted from the landfill "pose risks to human health, cause foul odors in areas surrounding the Landfill, and contribute to climate change." CLF seeks penalties and declaratory and injunctive relief.

Cleveland National Forest Foundation v. California Department of Transportation (Cal. Super. Ct., filed Dec. 4, 2013): added to the "State NEPAs" slide. The Cleveland National Forest Foundation commenced a CEQA challenge to the approval of a project that would widen a 27-mile stretch of Interstate 5 in southern California, citing an "enormous surge in greenhouse gas emissions as compared to existing conditions" as one of the project's potential adverse impacts. The petition for a writ of mandamus alleged that the conclusion in the environmental impact report (EIR) that the highway project "will actually help reduce greenhouse gas emissions

… is wholly without foundation," and that the EIR "not only fails to measure all types of greenhouse gases, but it also uses legally improper metrics to analyze the significance of the Project's climate impacts."

Mississippi Insurance Department v. U.S. Department of Homeland Security (S.D. Miss. Nov. 18, 2013): added to the "Adaptation" slide. The United States filed a motion to dismiss for lack of subject matter jurisdiction the Mississippi Insurance Department's (MID's) lawsuit seeking to enjoin or stay rate increases for the National Flood Insurance Program and to compel the completion of certain studies, including an affordability study, required by the Biggert-Waters Flood Insurance Reform and Modernization Act of 2012 (BW-12). The U.S. argued that MID had no standing as a state agency and that it could not bring claims on behalf of Mississippi citizens. The U.S. also said that an order from the court would not redress the alleged injuries because the relief sought was only available from Congress; that the actions MID sought to require did not constitute reviewable "agency action"; and that claims as to portions of BW-12 that the government did not intend to implement for at least a year were not ripe.

Update #58 (January 7, 2014)

FEATURED DECISION

WildEarth Guardians v. Jewell (D.C. Cir. Dec. 24, 2013): added to the "Stop Government Action/NEPA" slide. Environmental groups achieved a standing victory but ultimately lost the battle when they appealed a district court ruling that they did not have standing to pursue their claims that a final environmental impact statement (FEIS) prepared by the Bureau of Land Management (BLM) inadequately addressed climate change. BLM had prepared the FEIS prior to its approval of tracts of federal land in Wyoming for leasing for coal mining. The groups also appealed the district court's determination that BLM's consideration of other types of environmental impacts had been adequate. The D.C. Circuit reversed the holding on standing, finding that the district court "sliced the salami too thin" when it required that the specific type of pollution causing the environmental groups' injury be the same type that was considered inadequately in the FEIS. The D.C. Circuit concluded that the harm to the groups' members' recreational and aesthetic interests caused by local pollution was a sufficient injury in fact to challenge all of the alleged deficiencies in the FEIS, including those related to global climate change. On the merits, however, the D.C. Circuit called the alleged climate change-related inadequacies "of the flyspecking variety" and concluded that BLM had satisfied its obligations to consider climate change under the National Environmental Policy Act.

DECISIONS AND SETTLEMENTS

Sierra Club v. BNSF Railway Co. (E.D. Wash. Jan. 2, 2014): added to the "Challenges to Coal-Fired Power Plants" slide. Seven environmental groups commenced a lawsuit in the federal district court for the Eastern District of Washington against BNSF Railway Co. (BNSF) alleging that BNSF's operation of rail lines to carry coal violated the Clean Water Act (CWA). In the facts section of their complaint, the environmental groups alleged that BNSF's trains and rail cars discharged coal and coal dust "to waters of the United States when traveling adjacent to,

over, and in proximity to waters of the United States" and that the trains and rail cars were point sources. The district court denied BNSF's motion to dismiss, which was grounded in BNSF's contention that coal from rail cars that falls on land and not directly into waters does not violate the CWA. The court found that since plaintiffs' claim alleged that coal pollutants were discharged "into" waterways, it was necessary to permit plaintiffs to develop facts to support their claim.

Fix the City v. City of Los Angeles; ***La Mirada Avenue Neighborhood Association of Hollywood v. City of Los Angeles***; ***Save Hollywood.org v. City of Los Angeles*** (Cal. Super. Ct. Dec. 10, 2013): added to the "State NEPAs" slide. A California Superior Court issued a tentative decision in three related cases challenging the Hollywood Community Plan Update (HCPU), which would, among other things, increase density near public transit stops. If issued as a final decision, the court's ruling would invalidate the HCPU. The court found that the environmental impact report prepared under the California Environmental Quality Act was flawed, including its outdated assumptions regarding population and its inadequate consideration of alternatives. The City issued a letter on December 20 acknowledging the uncertainty created by the tentative decision and indicating that it remained committed to the principles of the HCPU.

Thrun v. Cuomo (N.Y. App. Div. Dec. 5, 2013): added to the "Industry Lawsuits/Challenges to State Action" slide. The New York Appellate Division affirmed the dismissal of a challenge to New York's participation in the Regional Greenhouse Gas Initiative (RGGI), a nine-state cap-and-trade program restricting carbon dioxide emissions from the power sector. The court below had dismissed the challenge on standing and laches grounds. The appellate court assumed without deciding that plaintiffs had standing, but ruled that the causes of action challenging the validity of RGGI regulations issued by the New York State Department of Environmental Conservation and the New York State Energy Research and Development Authority were time barred because, as challenges to "quasi-legislative" acts, they could have been brought in an Article 78 proceeding despite their constitutional underpinnings, and were thus governed by the four-month statute of limitations for Article 78 proceedings. The claims therefore were made two and a half years too late. The appellate court further ruled that the challenges to then-Governor George Pataki's signing of the RGGI memorandum of understanding (MOU) were moot because the MOU did not effectuate the RGGI program or New York's participation in it, and undoing the MOU would not redress the claimed injuries.

Alliance for the Wild Rockies v. Brazell (D. Idaho, Nov. 27, 2013): added to the "Stop Government Action/NEPA" slide. The federal district court for the District of Idaho granted federal defendants' motion to dismiss a challenge to the Little Slate Project, a set of actions including aquatic habitat restoration, timber harvest, fuel treatments, and changes to the roads and trails intended to improve conditions in the Little Slate Creek watershed in Idaho. Plaintiffs challenged federal decisions under the National Environmental Policy Act, the Endangered Species Act, and the National Forest Management Act. The court found that the defendants had not acted arbitrarily or capriciously. Although climate change impacts were not central to the federal defendants' or the court's analysis, the court noted that a biological opinion for bull trout prepared by the Fish and Wildlife Service identified global climate change as a cumulative effect

and "determined the 'quite certain' warming of the global climate would have negative effects on bull trout habitat."

POET, LLC v. California Air Resources Board (Cal. Nov. 20, 2013): added to the "Industry Lawsuits/Challenges to State Action" slide. The California Supreme Court denied the California Air Resource Board's (CARB's) petition for review of the appellate court decision requiring CARB to set aside its approval of California's low carbon fuel standard (LCFS) and to take steps to rectify errors in its approval process, including the improper deferral of the formulation of mitigation measures for potential increases in nitrogen oxide emissions from biodiesel without committing to specific performance criteria for judging the efficacy of the future mitigation measures. The LCFS will remain in effect while CARB undertakes the required actions. The California Supreme Court also denied CARB's depublication request for the appellate court's decision.

NEW CASES, MOTIONS, AND NOTICES

Energy Conservation Program for Consumer Products, Notice of Denial of Petition for Reconsideration by Landmark Legal Foundation (78 Fed. Reg. 79,643, Dec. 31, 2013): added to the "Challenges to Federal Action" slide. On December 31, 2013, the Office of Energy Efficiency and Renewable Energy of the U.S. Department of Energy (DOE) denied an August 2013 petition from the Landmark Legal Foundation (LLF) for reconsideration of the final rule for Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens. LLF had requested reconsideration because the final rule used a different "social cost of carbon" (SCC) than the supplementary notice of proposed rulemaking. In denying the petition, DOE indicated that the SCC values used in the proposed rule and in the final rule had not affected DOE's decision because the estimated benefits of the proposed and final standard exceeded the standard's costs even without considering SCC values. In fact, the proposed and final standard were the same. DOE also said that the use of an updated SCC value in the final rule did not violate the Administrative Procedure Act's notice and comment requirements because, among other reasons, DOE had indicated in its notice of proposed rulemaking that the SCC values were subject to change based on improved scientific and economic understanding of climate change and because the change in the SCC values reflected refinements to underlying models, not to methodology or federal government inputs such as discount rates, population growth, climate sensitivity distribution, or socio-economic trajectories.

In re La Paloma Energy Center, LLC (EAB, filed Dec. 6, 2013): added to the "Stop Government Action/Project Challenges" slide. On December 6, 2013, the Sierra Club petitioned the Environmental Appeals Board for review of a Prevention of Significant Deterioration (PSD) permit issued by EPA Region VI for a natural gas-fired combined cycle electric generating plant in Harlingen, Texas. Sierra Club contended that Region VI erred by setting three different greenhouse gas best available control technology (BACT) limits and allowing the applicant to determine which limit would apply based on which of three turbine designs the applicant ultimately selected for the power plant. Sierra Club also argued that Region VI "clearly erred by refusing to consider solar thermal hybrid addition to the proposed natural gas combined cycle power plant, despite being a demonstrated method to reduce greenhouse gas emissions without

changing the fundamental business purpose of producing electricity through a combined cycle power plant."

Sierra Club v. U.S. Environmental Protection Agency (9th Cir., filed Sept. 6, 2013): added to the "Stop Government Action/Project Challenges" slide. Sierra Club and three other environmental organizations petitioned the Ninth Circuit for review of EPA's decision to extend the deadline for commencing construction of the 600-MW natural gas-fired Avenal Energy Project in the San Joaquin Valley in California pursuant to a PSD permit issued in 2011. A challenge to the 2011 permit—which did not require implementation of greenhouse gas controls because the permit application was submitted before GHG requirements became effective and because EPA failed to act in a timely manner on the application—is also pending in the Ninth Circuit. The Ninth Circuit held oral argument in that action on October 8, 2013. In announcing the challenge to the construction deadline extension, the Center for Biological Diversity, one of the environmental organizations bringing the lawsuit, said that the exemption from the deadline was "contrary to decades of EPA precedent" and was based on Avenal's "specious claim that it could not obtain financing for the project due to the existing litigation."

Update #57 (December 2, 2013)

FEATURED DECISION

California Chamber of Commerce v. California Air Resources Board*; *Morning Star Packing Co. v. California Air Resources Board (Cal. Super. Ct. Nov. 12, 2013). The California Superior Court issued a ruling denying two petitions that challenged the sale and auction provisions of California's greenhouse gas (GHG) cap-and-trade regulations. The court was not persuaded by the petitioners' argument that the text, structure, and legislative history of AB 32—the statute creating California's GHG reduction program—showed that the California Legislature did not intend to authorize the sale of allowances. The court instead found that AB 32 broadly delegated to the California Air Resources Board the authority to design a system for distributing emissions allowances. The court also rejected the contention that the sale of allowances constituted an unconstitutional tax because AB 32 was not passed by a supermajority of the legislature. The court held that "[o]n balance" the charges for emissions allowances "are more like traditional regulatory fees than taxes, but it is a close question." Having found that the charges were more like a fee than a tax, the court held that the charges were valid fees because their primary purpose was regulation (i.e., GHG emissions reduction), not revenue generation; the total fees would not exceed the costs of the regulatory programs they supported because AB 32 required the proceeds to be spent in furtherance of AB 32's regulatory purposes; and there was a "reasonable relationship" between the charges for the allowances and the regulated entities' collective responsibility for the harmful impacts of GHG emissions. The Pacific Legal Foundation, which represents the Morning Star Packing Co. petitioners, announced that it would appeal the ruling.

DECISIONS AND SETTLEMENTS

Southern Utah Wilderness Alliance v. Burke (D. Utah Nov. 4, 2013): added to the "Stop Government Action/NEPA" slide. Ten environmental and historic preservation organizations

challenged the Richfield Resource Management Plan and Travel Plan for 2.1 million acres of federal land in south-central Utah. Although the federal district court for the District of Utah found that the Bureau of Land Management (BLM) had failed to comply with the National Historic Preservation Act and with its own off-highway vehicle (OHV) minimization criteria, the court rejected plaintiffs' claim that BLM failed to take into account the impacts of OHV damage in the context of climate change as required by the National Environmental Policy Act (NEPA) and Secretarial Order 3226, which requires agencies within the Department of the Interior to "consider and analyze potential climate change impacts when undertaking long-range planning exercises . . . [and] when developing multi-year management plans." The court found that BLM's evaluation of OHV impacts and climate change was sufficient to comply with the Secretarial Order and NEPA. The court noted that "[t]he EIS in this case identifies the climate changing pollutants at issue, the studies regarding the environmental impacts of those pollutants, and the activities in the Richfield Planning Area that may generate emissions of such climate changing pollutants," and that the EIS had "established the existing baseline climate of the Richfield Planning Area" and determined the "potential long-term emissions impacts associated with OHV use … to be minimal." The court also pointed to portions of the EIS that indicated that certain activities in the plan such as management of vegetation to favor perennial grasses could actually sequester carbon.

Competitive Enterprise Institute v. National Aeronautics and Space Administration (D.D.C. Oct. 29, 2013): added to the "Climate Change Protestors and Scientists" slide. The Competitive Enterprise Institute (CEI) commenced a federal lawsuit in 2010 to compel the National Aeronautics and Space Administration (NASA) to produce documents in response to CEI's requests under the Freedom of Information Act (FOIA) for information related to NASA's correction in 2007 of its global temperature data sets. The Goddard Institute of Space Studies (GISS), a component of NASA, had revised the data sets after a statistician brought to NASA's attention an error that he alleged caused the agency to overstate U.S. temperatures from 2000 onward. The district court for the District of Columbia granted in part and denied in part NASA's motion for summary judgment. The court directed NASA to produce responsive documents from a certain directory on GISS's computer system, including computer programs and data files that would require a computer program or commercial visualization tool in order to be intelligible. The court also ruled that a GISS scientist's e-mails relating to the blog RealClimate, to which he contributed, constituted agency records to the extent that they "traveled" on the NASA e-mail domain and related to agency business, regardless of whether the scientist used his RealClimate or NASA e-mail account. The court otherwise found that the NASA/GISS search for responsive records had been adequate, determining, among other things, that the scientist's e-mails located only on an "@columbia.edu" domain were not in the agency's control and therefore not susceptible to a FOIA request.

In re WildEarth Guardians, IBLA No. 2013-172 (Interior Bd. of Land Appeals Oct. 29, 2013): added to the "Stop Government Action/NEPA" slide. The Interior Board of Land Appeals (IBLA) granted the BLM's request that it remand to BLM the agency's decision to authorize the sale and issuance of the El Segundo Mine Coal Lease in northwestern New Mexico. WildEarth Guardians had appealed BLM's decision, arguing that BLM had authorized the lease in violation of NEPA, which required BLM to take a hard look at the indirect and cumulative impacts on air

quality and climate caused by coal mining and combustion. In remanding the matter, the IBLA set aside BLM's decision.

Monroe Energy, L.L.C. v. Environmental Protection Agency, No. 13-1265 (D.C. Cir. Oct. 29, 2013) (consolidated with ***American Fuel & Petrochemical Manufacturers v. EPA***, No. 13-1268, and ***American Petroleum Institute v. EPA***, No. 13-1267): added to the "Challenges to Federal Action" slide. The D.C. Circuit granted the motion by petitioner Monroe Energy, L.L.C. (Monroe) to expedite the review of challenges to the United States Environmental Protection Agency's (EPA's) final rule setting the 2013 renewable fuel standards. Monroe had argued that expedited review was needed so that the court's decision would be rendered well in advance of the June 30, 2014 deadline for submitting Renewable Identification Numbers to EPA. Monroe noted that EPA had issued its final rule eight and a half months after the statutory deadline. The briefing schedule set by the D.C. Circuit provides for the final set of briefs to be submitted by February 20, 2014 (Monroe had requested that briefing be completed in mid-December 2013).

Petrozzi v. City of Ocean City (N.J. App. Div. Oct. 28, 2013): added to the "Adaptation" slide. Property owners sued the City of Ocean City after the dune system created by the City in the early 1990s increased in height due to natural accretion and exceeded height limitations agreed to in easements granted by the property owners. The City was barred from reducing the dunes' height because the New Jersey Department of Environmental Protection denied it a dune maintenance permit, which was required pursuant to 1994 amendments to New Jersey's Coastal Area Facility Review Act (CAFRA). A trial judge ruled that most of the property owners were not entitled to breach of contract damages because the City's performance was made impossible or impracticable by the CAFRA amendments; the judge ruled that the City was liable only to two sets of property owners who granted easements after the passage of the CAFRA amendments. The New Jersey Appellate Division ruled, however, that the property owners who granted easements prior to the amendments were entitled to restitution. The court noted that in calculating the restitutionary payments or breach of contract damages due to the property owners, the court should take into account the New Jersey Supreme Court's decision in *Borough of Harvey Cedars v. Karan*, in which the court indicated that any reduction in value due to loss of views should be offset by value added due to the dunes' storm-protection benefits.

NEW CASES, MOTIONS, AND NOTICES

Utility Air Regulatory Group v. EPA, No. 12-1146; ***American Chemistry Council v. EPA***, No. 12-1248; ***Energy-Intensive Manufacturers v. EPA***, No. 12-1254; ***Southeastern Legal Foundation v. EPA***, No. 12-1268; ***Texas v. EPA***, No. 12-1269; ***Chamber of Commerce v. EPA***, No. 12-1272 (U.S. Nov. 25, 2013). The U.S. Supreme Court has scheduled oral argument for Monday, February 24, 2014, in the cases challenging EPA's determination that its regulation of GHG emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit GHGs . In 2012, the D.C. Circuit upheld EPA's determination in *Coalition for Responsible Regulation v. EPA*. The Court has allotted one hour for the oral argument.

Office of Management and Budget, **Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866, Notice of Availability and Request for Comments** (78 Fed. Reg. 70,586, Nov. 26, 2013): added to the "Challenges to Federal Action" slide. The Office of Management and Budget (OMB) announced the availability of, and requested public comments on, an updated Technical Support Document (TSD) for agencies to use to estimate the social cost of carbon (SCC) in their rulemakings. OMB indicated that it was particularly interested in comments on the selection of the models used and the synthesis of the resulting SCC estimates; how the distribution of SCC estimates should be represented in regulatory impact analyses; and the strengths and limitations of the overall approach. The publication of the updated TSD comes after OMB received a "petition for correction" in September 2013 from seven industry and business groups seeking withdrawal of the TSDs issued in 2010 and May 2013. The deadline for comments is January 27, 2014.

Washington Environmental Council v. Bellon (9th Cir. Oct. 31, 2013): added to the "Force Government to Act/Clean Air Act" slide. On October 17, 2013, the Ninth Circuit dismissed on standing grounds a citizen suit brought by two environmental groups to compel the Washington Department of Ecology (WDOE) and two regional clean air agencies to regulate oil refineries under the Clean Air Act. After a judge of the Ninth Circuit called for a vote to determine whether the case would be reheard en banc, the court issued an order on October 31, 2013 requiring the parties to submit briefs on whether the case should be reheard. Briefs were filed by the environmental groups, WDOE, and the Western States Petroleum Association on November 21.

Sierra Club v. Oklahoma Gas and Electric Co. (E.D. Okla., filed Aug. 12, 2013; motion to dismiss Nov. 4, 2013). In August 2013, Sierra Club filed a lawsuit against the owner and operator of a coal-fired power plant in Muskogee, Oklahoma. Sierra Club alleged that the defendant had failed to comply with the Clean Air Act in connection with a major modification to the plant in 2008. Sierra Club sought declaratory and injunctive relief and penalties and claimed that the defendant had not obtained the required Prevention of Significant Deterioration (PSD) permit and that the plant's emissions violated opacity and particulate matter limits. The claims for relief focus on traditional pollutants—sulfur dioxide, nitrogen oxides, and particulate matter—but Sierra Club alleges injuries that include the power plant's emissions of carbon dioxide contributing to global warming. On November 4, 2013, defendant moved to dismiss the action on the grounds that the PSD claim was untimely and that the opacity and particular matter claim was insufficiently pled.

Mississippi Insurance Department v. United States Department of Homeland Security (S.D. Miss., filed Sept. 26, 2013; first am. compl. Oct. 7, 2013): added to the "Adaptation" slide. The Mississippi Insurance Department (MID) filed a lawsuit in the federal district court for the Southern District of Mississippi seeking to enjoin or stay rate increases for the National Flood Insurance Program (NFIP). The increased rates became effective on October 1, 2013. MID alleged that the Federal Emergency Management Agency (FEMA) acted arbitrarily and capriciously by imposing substantial rate increases prior to completing studies, including an affordability study, mandated by the Biggert-Waters Flood Insurance Reform and Modernization Act of 2012 (BW-12). BW-12, which President Obama signed in July 2012, "requires changes to all major components of the [NFIP], including flood insurance, flood hazard mapping, grants,

and the management of flood plains." MID noted that "[m]any of the changes are designed to make the NFIP more financially stable, and ensure that flood insurance rates more accurately reflect the real risk of flooding," but that BW-12 "is perceived as an oncoming economic disaster to Mississippi citizens and other persons having homes or businesses located in a flood zone." In addition to injunctive relief, MID also seeks a declaration that FEMA must undertake the studies required by BW-12 prior to making its rate determinations. Other states and state insurance departments have filed amicus curiae papers in support of MID's claims, including Florida, the Louisiana Department of Insurance, Massachusetts, and the South Carolina Department of Insurance.

Update #56 (November 4, 2013)

FEATURED DECISION

Coalition for Responsible Regulation v. EPA (U.S., cert. granted Oct. 15, 2013): added to the "Challenges to Federal Action" slide. On October 15, 2013, the U.S. Supreme Court granted certiorari with respect to six petitions seeking review of *Coalition for Responsible Regulation v. Environmental Protection Agency*, in which the D.C. Circuit upheld the authority of the United States Environmental Protection Agency (EPA) to regulate greenhouse gases under the Clean Air Act. The Supreme Court's grant of certiorari is limited to one question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." Certiorari was denied with respect to other questions raised in petitions challenging the D.C. Circuit's decision, including issues relating to EPA's endangerment finding and tailpipe emissions standards.

DECISIONS AND SETTLEMENTS

Washington Environmental Council v. Bellon (9th Cir. Oct. 17, 2013): added to the "Force Government to Act/Clean Air Act" slide. The Ninth Circuit dismissed on standing grounds a citizen suit brought by two environmental groups to compel the Washington Department of Ecology and two regional clean air agencies to regulate oil refineries under the Clean Air Act. The environmental groups alleged that the agencies' failure to define "reasonably available control technology" (RACT) greenhouse gas emissions limits violated Washington's State Implementation Plan. The district court for the Western District of Washington in 2011 ordered the agencies to complete the RACT process for refineries. On appeal, defendant-intervenor Western States Petroleum Association argued for the first time that plaintiffs lacked Article III standing, and in a decision issued on October 17, 2013, the Ninth Circuit agreed. The Ninth Circuit held that even assuming that plaintiffs established injury in fact resulting from climate changes, they had not provided evidence sufficient to establish the causality or redressability elements of standing at the summary judgment stage. The court assumed without deciding that "that man-made sources of [greenhouse gas] emissions are causally linked to global warming and detrimental climate change" but held that plaintiffs' "vague, conclusory statements" connecting the failure to set RACT standards to their injuries failed to satisfy their evidentiary burden. The Ninth Circuit further noted that establishing "a causal nexus" might be "a particularly challenging task" because "there is limited scientific capability in assessing,

detecting, or measuring the relationship between a certain [greenhouse gas] emission source and localized climate impacts in a given region." The court rejected plaintiffs' argument that the causal link should be inferred because they were seeking to enforce a regulatory obligation; the court noted that plaintiffs could not benefit from the relaxed standing rule for sovereign states carved out by the Supreme Court in *Massachusetts v. EPA*. In concluding that plaintiffs had also failed to establishing the redressability element of standing, the Ninth Circuit pointed to the absence of evidence in the record that RACT standards would reduce the pollution causing plaintiffs' injuries.

Latinos Unidos de Napa v. City of Napa (Cal. Ct. App. Oct. 10, 2013): added to the "State NEPAs" slide. An affordable housing advocacy organization challenged the City of Napa's failure to prepare an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) for revisions to housing elements of the City's general plan and related actions. The City determined that the actions would not result in any new significant environmental effects not identified and mitigated in the EIR for the 1998 general plan. The California Court of Appeal affirmed the trial court's denial of the challenge. Citing substantial evidence in the administrative record that the actions would not have any new significant impacts, the Court of Appeal rejected petitioner's contention that the City had failed to disclose the actions' impacts and cumulative impacts on greenhouse gas emissions.

Safari Club International v. Jewell (U.S. cert. denied Oct. 7, 2013): added to the "Endangered Species Act" slide. On October 7, 2013, the Supreme Court denied Safari Club International's petition for writ of certiorari in the case challenging the designation of polar bears as a threatened species under the Endangered Species Act.

Sierra Club v. Moser (Kan. Oct. 4, 2013): added to the "Challenges to Coal-Fired Power Plants" slide. The Kansas Supreme Court granted in part the Sierra Club's petition for judicial review of the issuance of an air emissions source construction permit for an 895-megawatt coal-fired power plant in Holcomb, Kansas. The court remanded the proceeding on the ground that the Kansas Department of Health and Environment should have applied EPA regulations regarding one-hour emission limits for nitrogen dioxide and sulfur dioxide that became effective before the permit was issued.

Save the Plastic Bag Coalition v. County of Marin (Cal. review denied Oct. 2, 2013): added to the "State NEPAs" slide. On October 2, 2013, the California Supreme Court declined to review the California Court of Appeals decision upholding Marin County's ordinance banning plastic bags. Plaintiff had alleged that increased paper bag use might increase greenhouse gas emissions.

Shurtleff v. EPA (D.D.C. Sept. 30, 2013): added to the "Climate Protesters and Scientists" slide. The Attorney General of Utah commenced a lawsuit against EPA pursuant to the Freedom of Information Act (FOIA) seeking documents concerning the "endangerment" finding that provided a basis for regulating greenhouse gases under the Clean Air Act. In September 2012, a magistrate judge recommended that the motion be granted in part, holding that the agency adequately conducted a search of relevant documents concerning the FOIA request, but that certain documents withheld pursuant to the attorney-client privilege should be disclosed. In

September 2013, the district court accepted in large part the recommendations of the magistrate judge but rejected the conclusion that EPA's search of relevant documents had been adequate for all portions of the FOIA request. The court found that EPA had not included some portions of the request in one of the three "phases" into which it had divided most of the request, and that for those undesignated portions it had not provided detail about the types of searches, search terms, methods or processes used. The court ordered EPA to perform new searches for responsive documents or to provide proof that its earlier search had met the adequacy standard. The court otherwise rejected plaintiff's arguments that any delay in response constituted a basis for denying EPA summary judgment and that EPA should have searched files of additional employees and offices where EPA explained its basis for limiting its search. The court also denied plaintiff's motion to supplement the record with correspondence between EPA and Congress regarding the EPA administrator's use of "alias email accounts," citing EPA's statement that the FOIA search had encompassed documents in both the administrator's official and internal e-mail accounts. The court also declined to order the disclosure of the internal e-mail address or the e-mail addresses of employees in the Executive Office of the President. The court accepted the recommendation that for 17 documents withheld under the claim of attorney-client privilege, EPA must either disclose such documents or submit supplemental materials explaining in sufficient detail why such documents are subject to the privilege. On the other hand, the court found that EPA had adequately supported the withholding of attorney comments and edits on EPA's response to comments under the work product doctrine where EPA had received "a flood of comments" attacking its proposed endangerment finding, indicating the likelihood of litigation. The court also agreed with the magistrate judge that EPA fulfilled its FOIA obligations by directing plaintiff to publicly available documents and was not required to identify specific responsive documents.

California Clean Energy Committee v. City of San Jose (Cal. Ct. App. Sept. 30, 2013): added to the "State NEPAs" slide. In an unpublished opinion, the California Court of Appeal reversed the decision of the trial court dismissing plaintiff's challenge to the City of San Jose's compliance with CEQA in conjunction with its approval of an update to the City's general plan entitled "Envision San Jose 2040 General Plan." The appellate court disagreed with the trial court's conclusion that plaintiff had failed to exhaust its administrative remedies, noting that plaintiff had submitted comments critical of the draft EIR (including comments critical of the draft EIR's analysis of greenhouse gas emissions). The appellate court held that because the City Council had improperly delegated the duty to certify the EIR as complete to the planning commission, no administrative appeal was available to plaintiff, and plaintiff's comment letter on the draft EIR sufficed to exhaust its administrative remedies.

SSHI LLC dba DR Horton v. City of Olympia (Wash. Ct. App. Sept. 24, 2013): added to the "Stop Government Action/Other Statutes" slide. Developer DR Horton challenged the City of Olympia's denial of its master plan application for an 80-acre "neighborhood village." In its challenge under the Washington Land Use Petition Act, DR Horton claimed, among other things, that the City Council erred in denying the application for failure to satisfy public transit requirements. In an unpublished opinion, the Washington Court of Appeals affirmed the trial court's orders dismissing the petition. With respect to the public transit requirements, the appellate court held that the Council had not erred in concluding that the proposed master plan failed to satisfy transit requirements. The court also concluded that the public transit

requirement did not violate the developer's substantive due process rights because it was grounded in the legitimate public purpose of reducing greenhouse gases.

NEW CASES, MOTIONS, AND NOTICES

Conservation Law Foundation, Inc. v. Dominion Energy Brayton Point, LLC (D. Mass., voluntary motion to dismiss filed Oct. 22, 2013): added to the "Challenges to Coal-Fired Power Plants" slide. Three environmental groups filed a voluntary motion to dismiss with prejudice their citizen suit against the owner and operator of the Brayton Point Station, a coal-, natural gas-, and oil-fired electricity generating station in Somerset, Massachusetts. The groups indicated that they had reached a settlement with the defendant. The terms of the settlement were not filed with the court, but news reports indicated that the owners had agreed to remediate emissions violations and report on their efforts, install soot monitoring equipment, and pay $76,000 in civil penalties, $65,000 of which would fund projects in Somerset. Earlier in October a new owner of the power plant announced its intent to close the plant as of June 2017.

American Petroleum Institute, Notice of Intent to File Citizen Suit (Oct. 17, 2013): added to the "Challenges to Federal Action" slide. On October 17, 2013, the American Petroleum Institute submitted a 60-day notice of intent to sue to EPA Administrator Gina McCarthy. The notice letter asserted EPA failures, and anticipated failures, to comply with statutory deadlines for setting biomass-based diesel and renewable fuel requirements for 2014. The notice letter cataloged EPA's "habitual, historical delays" in promulgating the annual renewable fuel standards and asserted that "EPA's continual tardiness has real, adverse effects on industry."

Center for Biological Diversity v. United States Environmental Protection Agency (W.D. Wash, filed Oct. 16, 2013): added to the "Stop Government Action/Other Statutes" slide. On October 16, 2013, the Center for Biological Diversity (CBD) commenced a lawsuit in the district court for the Western District of Washington challenging EPA's approvals of Oregon's and Washington's lists of impaired waters. CBD alleged that the approvals were arbitrary and capricious and in violation of the Clean Water Act because of EPA's longstanding acknowledgment that "as a result of absorbing large quantities of human-made carbon dioxide emissions, ocean chemistry is changing, and this is likely to negatively affect marine ecosystems and species including coral reefs, shellfish, and fisheries." CBD further alleged that EPA had before it "substantial evidence" that oyster production problems in Oregon and Washington stemmed from acidification. CBD submitted a letter to EPA in July 2013 asking it to reconsider the approvals.

American Fuel & Petrochemical Manufacturers v. EPA, No. 13-1268 (D.C. Cir., filed Oct. 10, 2013); ***American Petroleum Institute v. EPA***, No. 13-1267 (D.C. Cir., filed Oct. 8, 2013): added to the "Challenges to Federal Action" slide. The American Petroleum Institute and American Fuel & Petrochemical Manufacturers filed petitions in the D.C. Circuit for review of EPA's final rule setting the 2013 renewable fuel standards. In the final rule, EPA concluded that available fuels would be available to meet the statutory volumes of 2.75 billion gallons for advanced biofuels and 16.55 billion gallons for total renewable fuels. EPA reduced the cellulosic biofuel volume for 2013 from the statutory volume of 1.0 billion gallons to 6 million gallons.

Rocky Mountain Farmers Union v. Corey (9th Cir., petitions for rehearing *en banc* (RMFU, AFPM) filed Oct. 2, 2013): added to the "Challenges to State Action" slide. On October 2, 2013, two separate petitions for rehearing *en banc* were filed in the case challenging California's low carbon fuel standard (LCFS). The Rocky Mountain Farmers Union plaintiffs—representing farming and ethanol interests—filed one petition, in which they argued that the Ninth Circuit had contravened Supreme Court precedent by "invok[ing] the state's purported nondiscriminatory purposes to avoid strict scrutiny of a facially discriminatory regulatory regime" and that the court "also failed to recognize that the LCFS by design impermissibly regulates conduct occurring in other states." Similarly, the American Fuels & Petrochemical Manufacturers Association (AFPM) plaintiffs—representing petrochemical, energy, and trucking industry groups—argued in their petition that the Ninth Circuit had impermissibly abandoned the strict scrutiny framework for assessing "regulations that, on their face, impose discriminatory burdens on imported products based on 'state boundaries'" and that the LCFS's lifecycle analysis regulated "interstate and foreign commerce—the production and transportation of fuels—occurring wholly outside of California." The AFPM plaintiffs also argued that the Ninth Circuit's conclusion that the LCFS's crude oil provisions did not violate the dormant Commerce Clause was in conflict with Supreme Court and other federal circuit court precedents. The AFPM plaintiffs contended that the crude oil provisions, which benefited a certain California crude oil while burdening imported and Alaskan crude oils, were not immune from challenge merely because they also burdened other California crude oils.

American Tradition Institute v. University of Arizona (Ariz. Super. Ct., filed Sept. 6, 2013): added to the "Climate Protestors and Scientists" slide. The American Tradition Institute, now known as the Energy and Environment Legal Institute, announced on September 10, 2013 that it had filed a lawsuit challenging the University of Arizona's compliance with Arizona's Public Records Act. The plaintiff contends that the University failed either to produce responsive records or to provide adequate detail about certain records it withheld regarding "the notorious global warming 'Hockey Stick', and the group that made it famous, the Intergovernmental Panel on Climate Change."

Communities for a Better Environment v. EPA (D.C. Cir., filed Oct. 31, 2011; oral argument Sept. 26, 2013): added to the "Force Government to Act" slide. In October 2011, petitioners challenged EPA's final rule entitled "Review of National Ambient Air Quality Standards for Carbon Monoxide." Among other things, petitioners challenged EPA's decision not to set a secondary standard for carbon monoxide (CO) based on its climate-related effects. EPA had concluded that there was "insufficient information at this time to support the consideration of a secondary standard based on CO effects on climate processes." The oral argument on September 26, 2013 addressed the issue of EPA's obligation under *Massachusetts v. EPA* to regulate pollutants that cause climate change.

Update #55 (October 3, 2013)

FEATURED DECISION

Rocky Mountain Farmers Union v. Corey (9th Cir. Sept. 18, 2013): added to the "Challenges to State Action" slide. The Ninth Circuit reversed the portions of a 2011 district court decision that found California's low carbon fuel standard (LCFS) to be in violation of the dormant Commerce Clause. The Ninth Circuit ruled that the LCFS's ethanol regulation did not facially discriminate against out-of-state commerce, that its initial crude oil provisions did not discriminate against out-of-state crude oil in purpose or practical effect, and that the LCFS did not violate the dormant Commerce Clause prohibition on extraterritorial regulation. The Ninth Circuit vacated the preliminary injunction imposed by the district court and remanded for consideration of whether the LCFS's ethanol provisions discriminate in purpose or practical effect and for application of the *Pike v. Bruce Church, Inc.* balancing test to determine whether the crude oil provisions impose a burden on interstate commerce that is "clearly excessive" in relation to their local benefits. The Ninth Circuit instructed that if the district court finds the ethanol provisions to be discriminatory in purpose or practical effect, it should apply strict scrutiny to those provisions, but that it must otherwise apply the *Pike* balancing test to the ethanol provisions. The Ninth Circuit affirmed the district court's ruling that section 211(c)(4)(b) of the Clean Air Act does not foreclose Commerce Clause scrutiny of the LCFS. The Ninth Circuit did not express an opinion regarding whether the federal Renewable Fuel Standard preempts the LCFS.

DECISIONS AND SETTLEMENTS

Center for Biological Diversity v. Export-Import Bank of the United States (N.D. Cal. Sept. 17, 2013): added to the "Stop Government Action/Other Statutes" slide. Plaintiffs challenge the decision of the Export-Import Bank of the United States (Ex-Im Bank) to provide financing for a natural gas project in Australia. Plaintiffs claim that the Ex-Im Bank's failure to consider the project's effects on the Great Barrier Reef World Heritage Area violated the National Historic Preservation Act. Plaintiffs also express concerns regarding the project's impact on climate and allege that the project would emit 11 million tons of carbon dioxide equivalents annually. In a decision issued on September 17, 2013, the district court for the Northern District of California denied defendants' motion to transfer the action to the district court for the District of Columbia, finding that defendants had failed to sustain their burden of showing that transfer was warranted.

Mann v. National Review, Inc. (D.C. Super. Ct. Sept. 12, 2013): added to the "Climate Change Protestors and Scientists" slide. In this defamation lawsuit brought by the climatologist Michael Mann against defendants associated with *National Review* and the Competitive Enterprise Institute (CEI), the District of Columbia Superior Court denied the defendants' joint motion to certify for appeal the court's July 2013 orders denying their motions to dismiss. In an order signed by the new judge assigned to the case after Judge Natalia M. Combs Greene's retirement, the court ruled that the order denying the motions to dismiss did not meet the criteria for interlocutory review. The court noted that while the case "undoubtedly involves complex and important issues at the intersection of the First Amendment and the common law of defamation as applied to public figures," the controlling questions of law were "relatively settled." The court further noted that D.C.'s Anti-SLAPP (Strategic Lawsuit Against Public Participation) Act did not provide for interlocutory appeal. While noting that certification for appeal followed by reversal of the July 2013 decision could hasten the termination of the lawsuit, the court stated that "in the court's view, reversal is unlikely, and it is more likely that an interlocutory appeal would unnecessarily prolong the litigation."

Texas v. EPA; ***Utility Air Regulatory Group v. EPA*** (D.C. Cir. Sept. 4, 2013): added to the "Challenges to Federal Action" slide. The D.C. Circuit granted petitioners' unopposed motions seeking to extend their deadline to file petitions for rehearing of the D.C. Circuit's rejection of their challenge to U.S. Environmental Protection Agency (EPA) rules imposing federal permitting requirements for greenhouse gas emissions. The D.C. Circuit extended the deadline for filing petitions for rehearing and for issuing the mandate until 30 days after the Supreme Court's disposition of pending petitions for a writ of certiorari that seek review of *Coalition for Responsible Regulation v. EPA*, in which the D.C. Circuit upheld EPA's regulation of greenhouse gas emissions under the Clean Air Act. The petitions for certiorari were distributed for the Supreme Court's September 30 conference.

Mann v. National Review, Inc. (D.C. Super. Ct. Aug. 30, 2013): added to the "Climate Change Protestors and Scientists" slide. On August 30, 2013, the District of Columbia Superior Court denied the National Review defendants' motion for reconsideration of the court's July 2013 decision denying their motion to dismiss. The court rejected the National Review defendants' contention that the denial of the motion to dismiss was grounded in the court's "mistaken belief" that the National Review defendants, as opposed to the CEI defendants, had induced EPA to investigate Mann's work and had criticized Mann for many years. The court concluded that any confusion over whether it was the CEI defendants or the National Review defendants who criticized Mann and who induced the EPA investigation was not a "material mistake" because those facts were not the basis for the court's July 2013 decision. The court reiterated its view that at this stage the evidence demonstrated "something more than mere rhetorical hyperbole" on the part of the National Review defendants in their criticisms of Mann. The court also rejected the argument that it should dismiss Mann's claim for intentional infliction of emotional distress (IIED). The court found the absence of analysis of this claim in the earlier decision (which focused on the defamation claim) to be inconsequential, given the similarities between IIED and defamation.

Turtle Island Restoration Network v. U.S. Department of Commerce (D. Haw. Aug. 23, 2013): added to the "Stop Government Action/Other Statutes" slide. Plaintiffs challenged federal agency decisions that allowed shallow-set longline fishing for swordfish. They alleged, among other things, violations of the Endangered Species Act (ESA). The federal district court for the District of Hawaii affirmed the agencies' decisions. In doing so, the court rejected the claim that the National Marine Fisheries Service (NMFS) had violated the ESA by taking action that "deepened the jeopardy" to sea turtles posed by climate change. The court stated that "when climate conditions jeopardize a species, the ESA does not automatically prohibit the 'taking' of a single member of the species. This is not to say, of course, that dangerous climate conditions give rise to an 'open season' on a threatened or endangered species. Instead, the ESA is violated only when agency action results in a 'take' that appreciably reduces the likelihood of survival and recovery of a species in the wild." The court also rejected claims that the ESA's requirement to use "best available data" required NMFS to conduct more comprehensive studies of the effects of climate change on sea turtles.

Cascade Bicycle Club v. Puget Sound Regional Council (Wash. Ct. App. July 22, 2013): added to the "State NEPAs" slide. The Washington Court of Appeals affirmed the dismissal of a

challenge to the regional transportation plan adopted by the Puget Sound Regional Council (PSRC). The Court of Appeals concluded that a state statute that established statewide greenhouse gas emissions reductions requirements did not require PSRC to approve a plan that achieved the region's proportional share of the statewide emissions reduction requirement, and that PSRC had not voluntarily committed itself to achieving the emissions reductions. The Court of Appeals also found that the assessment of alternative actions and potential mitigation measures to reduce greenhouse gas emissions in the plan's environmental impact statement satisfied State Environmental Policy Act requirements.

Funk v. Commonwealth of Pennsylvania (Pa. Commw. Ct. July 3, 2013): added to the "Common Law Claims" slide. In October 2012, petitioner Ashley Funk submitted a petition for rulemaking to the Pennsylvania Department of Environmental Protection (PADEP) requesting that the Environmental Quality Board (EQB) promulgate regulations requiring reduction of fossil fuel carbon dioxide emissions by six percent annually to achieve an atmospheric concentration of 350 parts per million or less of carbon dioxide by 2100. In November 2012, PADEP notified Funk that the petition failed to meet the requirements for submission to the EQB because (1) EQB was barred by statute from adopting an ambient air quality standard more stringent than the standard adopted by EPA and there was no EPA standard for carbon dioxide; (2) the requested rule was contrary to the Pennsylvania Climate Change Act's inventory and reporting requirements; and (3) the petition did not identify persons, businesses, and organizations likely to be affected. Funk filed a petition for review in the Pennsylvania Commonwealth Court seeking to compel PADEP to submit the rulemaking petition to the EQB. Funk also filed an appeal with the Environmental Hearing Board (EHB). The Pennsylvania Commonwealth Court sustained PADEP's preliminary objections on the ground that Funk had not exhausted her administrative remedy of appeal to the EHB. Although there is an exception to the doctrine of exhaustion of administrative remedies where the constitutionality of a statutory scheme is challenged, the court found that the constitutional issues raised by Funk were not facial challenges to the statute, but challenges of the application of statutes to her case. The court dismissed the petition without prejudice to Funk's right to raise the issues before the EHB or on appeal from any EHB decision.

NEW CASES, MOTIONS, AND NOTICES

Office of Management and Budget, Petition for Correction, Social Cost of Carbon for Regulatory Impact Analysis (Sept. 3, 2013): added to the "Challenges to Federal Action" slide. Seven organizations—America's Natural Gas Alliance, the American Chemistry Council, the American Petroleum Institute, the National Association of Home Builders, the National Association of Manufacturers, the Portland Cement Association, and the U.S. Chamber of Commerce—submitted a "Petition for Correction" to the Office of Management and Budget (OMB) seeking withdrawal of two Technical Support Documents issued in 2010 and 2013 that provide estimates of the social cost of carbon (SCC). Federal agencies, including EPA and the Department of Energy, use SCC estimates in their development of regulations. The petitioners contend that the SCC estimates "fail in terms of process and transparency" because, among other reasons, the development of the estimates did not comply with OMB guidance under the Information Quality Act. The petition also asserts that the modeling for the estimates did not

provide "a reasonably acceptable range of accuracy for use in policy-making" and that the estimates will skew agency decision-making by focusing on the global, rather than domestic, benefits of reducing carbon emissions. The petitioners also argued that using the estimates would cause agencies to violate the Administrative Procedure Act (APA) and that the estimates themselves violated the APA.

Update #54 (September 4, 2013)

FEATURED DECISION

California Chamber of Commerce v. California Air Resources Board*; *Morning Star Packing Co. v. California Air Resources Board (Cal. Super. Ct. Aug. 27, 2013; July 23, 2013): added to the "Challenges to State Action" slide. On August 27, 2013, the California Superior Court issued a joint tentative decision and order for appearances in two related cases challenging California's use of an auction to distribute a portion of greenhouse gas allowances as part of its cap-and-trade program created under AB 32. The court tentatively held that the auction provisions of the cap-and-trade regulations were within the scope of authority that AB 32 delegated to the California Air Resources Board (CARB). The court heard oral argument on August 28 on the question of whether the sale of allowances constitutes a tax requiring approval by a two-thirds supermajority of the California State Legislature under Proposition 13. In its August 27 tentative ruling, the court identified six sets of questions to be addressed at oral argument, including whether auction of allowances regulates greenhouse gas emissions in ways that free distribution of allowances would not, and whether the planned or actual use of the auction proceeds matters for purposes of determining whether the sale of allowances is a tax. On July 23, 2013, the court denied the National Federation of Independent Business's motion to intervene in the case on the grounds that its application was too late, that it lacked a direct interest in the case, and that its interests in the litigation were adequately represented by other parties.

DECISIONS AND SETTLEMENTS

Center for Biological Diversity v. EPA (D.C. Cir. Aug. 26, 2013): added to the "Force Government to Act/Clean Air Act" slide. The D.C. Circuit Court of Appeals granted the motion of industry group intervenors to extend the deadline to petition for rehearing en banc with respect to the D.C. Circuit's decision vacating the U.S. Environmental Protection Agency's (EPA's) rule that delayed regulation of "biogenic" carbon dioxide from non-fossil fuel carbon dioxide sources such as ethanol for three years. Petitioners opposed granting the motion to extend the deadline. Respondent-intervenors must file any petition no later than 30 days after the Supreme Court's decision whether to grant the pending petitions for a writ of certiorari seeking review of the D.C. Circuit's decision in *Coalition for Responsible Regulation v. EPA*, which upheld EPA's regulation of greenhouse gas emissions under the Clean Air Act.

Friends of Oroville v. City of Oroville (Cal. Ct. App. Aug. 19, 2013): added to the "State NEPAs" slide. In a case challenging the approval of an expanded and relocated Wal-Mart store in Oroville, California, the California Court of Appeal held that the City had failed to adequately assess the impact of a project's greenhouse gas emissions. The court ruled that in the review of

the project under the California Environmental Quality Act (CEQA), the City had improperly applied the threshold for determining the significance of project greenhouse gas emissions. The court found that the City had made a "meaningless" comparison of the proposed store's emissions to statewide emissions and had failed both to calculate the existing Wal-Mart store's emissions and to "quantitatively or qualitatively ascertain or estimate" the effect of mitigation measures on the proposed store's emissions.

North Sonoma County Healthcare District v. County of Sonoma (Cal. Ct. App. Aug. 14, 2013): added to the "State NEPAs" slide. In an unpublished decision, an appellate court in California upheld an award of attorney fees in a case in which the trial court had ruled that the environmental impact report (EIR) prepared by the County did not support the County's imposition of reduced mitigation measures for greenhouse gas emissions. The County had imposed the reduced measures based on post-EIR calculations. The appellate court rejected the County's contention that attorney fees were not warranted, concluding that the trial court had not abused its discretion in finding that petitioners were successful parties who had achieved a significant public benefit for purposes of the attorney fee statute. The appellate court stated that "the additional public process with more accurate information on the mitigation of the Project's greenhouse gas emissions, standing alone, conferred a substantial public benefit" and that "this litigation conferred an additional substantial benefit to the general public because the County may be less inclined, in the consideration and preparation of EIR's for future projects, to 'acknowledge a significant impact and approve the project after imposing a mitigation measure not shown to be adequate by substantial evidence.'"

California Building Industry Association v. Bay Area Air Quality Management District (Cal. Ct. App. Aug. 13, 2013): added to the "State NEPAs" slide. Petitioner challenged significance thresholds for emissions of air pollutants, including greenhouse gases, that the Bay Area Air Quality Management District adopted in 2010. A California trial court determined that the promulgation of thresholds of significance for use in CEQA reviews was itself a "project" subject to CEQA review. The California Court of Appeal reversed. The Court of Appeal concluded that the state's CEQA guidelines, which dictated the procedure for enacting "generally applicable thresholds of significance," did not require CEQA review of the thresholds, and that the environmental changes that petitioner contended would result from adoption of the thresholds were "speculative and not reasonably foreseeable" and did not provide a basis for requiring CEQA review.

POET, LLC v. California Air Resources Board (Cal. Ct. App. Aug. 8, 2013): added to the "Challenges to State Action" slide. On August 8, 2013, the California Court of Appeal denied CARB's petition for rehearing of the court's July 15 decision that found procedural and substantive defects in CARB's approval of the state's low carbon fuel standard. The court also certified the entire opinion filed on July 15 for publication.

In re Pio Pico Energy Center (EAB Aug. 2, 2013): added to the "Stop Government Action/Project Challenges" slide. Petitioners sought Environmental Appeals Board (EAB) review of EPA Region 9's issuance of a prevention of significant deterioration (PSD) permit for a 300-megawatt natural gas-fired peaking and/or intermediate load-shaping power plant in California. EAB denied review of almost all of the petitioners' challenges, including the

challenges to Region 9's elimination of combined-cycle gas turbines as a control technology in its best available control technology (BACT) analysis for greenhouse gases and to the adequacy of the BACT emission limits Region 9 selected for greenhouse gases. In rejecting petitioners' argument that Region 9 should not have eliminated combined-cycle gas turbines in its BACT analysis, the EAB noted that Region 9 had emphasized that the purpose of the project was to support renewable power generation, that the capacity of the single-cycle turbine plant for "frequent and fast turbine startups" would do so by providing power "to compensate for the intermittent nature of wind and solar generation," and that the longer start-up times for combined-cycle turbines were incompatible with the project's purpose.

NEW CASES, MOTIONS AND NOTICES

Texas v. EPA*; *Utility Air Regulatory Group v. EPA (D.C. Cir., motion to extend deadline for petition for rehearing filed Aug. 21, 2013): added to the "Challenges to Federal Action" slide. Petitioners filed a motion seeking to extend their deadline to file a petition for rehearing of the D.C. Circuit's rejection of their challenge to EPA rules imposing federal permitting requirements for greenhouse gas emissions. Petitioners asked that the deadline for filing the petition and for issuing the mandate be extended until 30 days after the Supreme Court's disposition of pending petitions for a writ of certiorari that seek review of *Coalition for Responsible Regulation v. EPA*, in which the D.C. Circuit upheld EPA's regulation of greenhouse gas emissions under the Clean Air Act. The motion papers assert that deferral of the deadline would not significantly delay issuance of the mandate because the petitions for writ of certiorari have been distributed for conference on September 30, only two weeks after the mandate is currently scheduled to issue. The motion is unopposed.

Communities for a Better Environment v. Metropolitan Transportation Commission (Cal. Super. Ct., filed Aug. 19, 2013): added to the "State NEPAs" slide. Communities for a Better Environment and the Sierra Club commenced a challenge to the adoption of Plan Bay Area by the Bay Area's regional transportation and land use planning agencies (the Association of Bay Area Governments (ABAG) and the Metropolitan Transportation Commission (MTC)). Plan Bay Area is a regional land use and transportation plan intended to meet state-mandated goals for greenhouse gas emissions reductions. A primary allegation of the lawsuit is that Plan Bay Area does not do enough to reduce reliance on cars and trucks and therefore fails to make the required greenhouse gas reductions. The verified petition alleges, among other things, that the EIR for the Plan misleadingly indicates that reductions in greenhouse gas emissions result from the Plan when the reductions are in fact attributable to state-level programs. The verified petition also alleges that the EIR for the Plan fails to provide adequate information about the feasibility and implementation of mitigation measures to combat the effects of development in areas vulnerable to rising sea levels.

Building Industry Association Bay Area v. Association of Bay Area Governments (Cal Super. Ct., filed Aug. 16, 2013): added to the "State NEPAs" slide. A building industry group also challenged Play Bay Area's compliance with CEQA and with SB 375, the state law mandating that regional land use and transportation plans meet greenhouse gas reduction requirements. The group alleged that the plan failed to provide adequate housing to support projected future populations and that its environmental review was inadequate.

Bay Area Citizens v. Association of Bay Area Governments (Cal. Super. Ct., filed Aug. 6, 2013): added to the "State NEPAs" slide. Bay Area Citizens (BAC), a non-profit organization represented by the Pacific Legal Foundation, also challenged the adoption by ABAG and MTC of Plan Bay Area. BAC alleges that the adoption of the plan violated CEQA because the agencies' analysis gave "the false impression" that the high-density development strategy set forth in the Plan was necessary to achieve the required greenhouse gas emissions reductions—BAC's petition asserts that projected improvements in fuel efficiency and fuel composition would independently allow the Bay Area to "handily exceed" the required emissions reductions.

Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Petition for Reconsideration (78 Fed. Reg. 49,975 (Aug. 16, 2013)): added to the "Challenges to Federal Action" slide. On August 16, 2013, the Office of Energy Efficiency and Renewable Energy of the U.S. Department of Energy published a notice in the Federal Register that it had received a petition from the Landmark Legal Foundation (LLF) for reconsideration of the final rule of Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens. The notice indicated that LLF requested reconsideration because the final rule used a different "social cost of carbon" than the supplementary notice of proposed rulemaking. The August 16 notice sought comment on whether to undertake the requested reconsideration. The comment deadline is September 16, 2013.

Chesapeake Climate Action Network v. Export-Import Bank of the United States (N.D. Cal., filed July 31, 2013): added to the "Stop Government Action/NEPA" slide. Petitioners challenged the Export-Import (Ex-Im) Bank of the United States' approval of a $90 million loan guarantee, which they alleged would facilitate a commercial loan to Xcoal Energy & Resources, LLC (Xcoal) and enable Xcoal to broker $1 billion in sales of coal for export from Appalachian coal mines. Petitioners allege that the Ex-Im Bank failed to consider environmental and health impacts prior to approving the loan in violation of the National Environmental Policy Act.

Safari Club International v. Jewell (U.S., cert. petition filed July 29, 2013): added to the "Endangered Species Act" slide. A number of hunting groups and individuals filed a petition for writ of certiorari seeking Supreme Court review of the D.C. Circuit's decision upholding the U.S. Fish and Wildlife Service's designation of polar bears as a threatened species under the Endangered Species Act (ESA).

Rocky Mountain Wild v. Kornze (D. Colo., filed July 25, 2013): added to the "Stop Government Action/Other Statutes" slide. A coalition of environmental organizations filed a lawsuit alleging that the U.S. Bureau of Land Management failed to comply with the ESA when it approved amendments to nine resource management plans to permit oil shale or tar sands leasing on 810,000 acres of public land in Colorado, Utah, and Wyoming. Among other things, plaintiffs contend that oil shale and tar sands development will increase greenhouse gas emissions, exacerbating the effects of climate change and adversely affecting the lands and waters of Colorado, Utah, and Wyoming.

Update #53 (July 31, 2013)

FEATURED DECISION

Texas v. EPA (D.C. Cir. July 26, 2013): added to the "Challenges to Federal Action" slide. The federal Court of Appeals for the District of Columbia Circuit dismissed, on standing grounds, challenges by Texas, Wyoming, and industry groups to United States Environmental Protection Agency (EPA) rules that imposed federal permitting requirements for greenhouse gases. The D.C. Circuit concluded that section 165(a) of the Clean Air Act (CAA) was "self-executing," finding that the provision requires that major emitting facilities obtain Prevention of Significant Deterioration (PSD) preconstruction permits with best available control technology for every pollutant regulated under the CAA regardless of whether a pollutant is included in a given state's implementation plan. The D.C. Circuit therefore held that industry petitioners lacked standing because their purported injury—that they would be subject to PSD permitting requirements for greenhouse gases—was caused not by the challenged EPA rules, but by "automatic operation" of the CAA. With respect to the state petitioners, the court ruled that a successful challenge to the EPA rules would result in a "construction moratorium," not restoration of the states' permitting powers. The states therefore lacked standing because their challenge would not redress the alleged harm to their "quasi-sovereign interests in regulating air quality within their borders." Judge Kavanaugh dissented.

DECISIONS AND SETTLEMENTS

Mann v. National Review, Inc. (D.C. Super. Ct., July 19, 2013): added to the "Climate Change Protestors and Scientists" slide. The court denied defendants' motions to dismiss the defamation lawsuit brought by the climatologist and Pennsylvania State University professor Michael Mann against *National Review*, the Competitive Enterprise Institute, and individual writers in connection with pieces published about Mann and his work that, among other things, called his work "intellectually bogus," referred to Mann as the "ringmaster of the tree-ring circus," and compared Penn State's investigation of Mann's work to the university's handling of the Jerry Sandusky scandal. In orders denying motions to dismiss by the *National Review* defendants and the Competitive Enterprise Institute defendants, the court—though calling it a "very close case"—found that the defendants' statements were "not pure opinion but statements based on provably false facts" and that the evidence demonstrated "something more and different tha[n] honest or even brutally honest commentary." The court found that further discovery was warranted because there was "sufficient evidence to demonstrate some malice or the knowledge that the statements were false or made with reckless disregard as to whether the statements were false."

Coalition for the Advancement of Regional Transportation v. Federal Highway Administration (W.D. Ky. July 17, 2013): added to the "Stop Government Action/NEPA" slide. A federal district court dismissed a challenge to a $2.6-billion construction and transportation management program designed to improve mobility across the Ohio River between Kentucky and Southern Indiana. Among other things, plaintiff claimed that defendants "purposely withheld" information about greenhouse gas emissions during the project's review under the National Environmental Policy Act (NEPA), that defendants ignored EPA comments regarding greenhouse gas emissions and that defendants misled the public about the extent of the project's

greenhouse gas emissions. The court ruled that plaintiff had failed to proffer any regulatory mandate or national environmental standards requiring analysis of greenhouse gas emissions in the NEPA process. Although the court called consideration of greenhouse gas emissions "patently important," the court agreed with defendants that "Project-specific quantification of greenhouse gas emissions, and their effect on climate change, would be largely uninformative and speculative." The court noted that defendants had committed to working with the DOT Center for Climate Change to develop strategies to reduce transportation's contribution to greenhouse gas emissions and to assess the risks posed by climate change to transportation systems.

League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton (D. Or. July 17, 2013): added to the "Stop Government Action/NEPA" slide. A federal district court denied plaintiffs' motion for a preliminary injunction to stop the commencement of logging that was part of the Snow Basin Vegetation Management Project in the Wallowa Whitman National Forest in Oregon. Among other claims, plaintiffs contended that the environmental impact statement (EIS) for the project failed to discuss the impacts of logging on carbon storage. The court concluded that the United States Forest Service's qualitative analysis had adequately addressed the project's impacts on carbon sequestration and climate change, and that the agency had sufficiently supported "its determination that the Project would positively affect carbon sequestration and that carbon sequestration was insignificant because the Project would retain and thin trees rather than clear-cut tre[e]s."

POET, LLC v. California Air Resources Board (Cal. Ct. App. July 15, 2013): added to the "Challenges to State Action" slide. The California Court of Appeal reversed a trial court's denial of a challenge to the low carbon fuel standard (LCFS) promulgated by the California Air Resources Board (CARB). While stating that CARB "satisfied a vast majority of the applicable legal requirements," the court concluded that CARB had committed procedural errors in its consideration of the LCFS by, among other things, prematurely approving the LCFS prior to completion of the environmental review. The court also ruled that CARB had improperly deferred the formulation of mitigation measures for potential increases in nitrogen oxide emissions from biodiesel without committing to specific performance criteria for judging the efficacy of the future mitigation measures. The appellate court directed the trial court to issue a writ of mandate directing CARB to set aside its approval of the LCFS but permitting the LCFS to remain in effect while CARB takes action to rectify the errors identified in the appellate court's decision.

Center for Biological Diversity v. EPA (D.C. Cir. July 12, 2013): added to the "Force Government to Act/Clean Air Act" slide. The D.C. Circuit vacated EPA's rule that deferred regulation of "biogenic" carbon dioxide from non-fossil fuel carbon dioxide sources such as ethanol for three years. The court ruled that EPA could not rely on the *de minimis*, one-step-at-a-time, administrative necessity, or absurd results doctrines of administrative law to justify this "Deferral Rule." Judge Kavanaugh wrote a concurring opinion that asserted that in his view none of the above doctrines could apply because EPA had no statutory authority to distinguish between types of carbon dioxide. Judge Henderson dissented, voicing her view that EPA could defer regulation until it had taken the time it needed to study and resolve the issue or, alternatively, that the matter was not ripe for adjudication.

WildEarth Guardians v. Lamar Utilities Board (D. Colo. July 11, 2013): added to the "Challenges to Coal-Fired Power Plants" slide. On July 11, 2013, a federal district court granted a motion to stay proceedings in this challenge under the CAA to a coal-fired plant in Colorado until September 2013 to allow EPA and the U.S. Attorney General the statutorily-mandated 45 days to review a proposed consent decree lodged with the court on July 2, 2013. The proposed consent decree provides that the plant will be shut down until 2022 and requires defendants to pay $325,000 for attorneys' fees as well as $125,000 for a supplemental environmental project intended to improve air quality, enhance energy efficiency, or develop clean energy.

Borough of Harvey Cedars v. Karan (N.J. July 8, 2013): added to the "Adaptation" slide. The Borough of Harvey Cedars exercised its power of eminent domain to acquire a portion of the Karans' property to construct a dune that connected to a dune running the length of Long Beach Island in New Jersey. The trial court permitted the Karans to present evidence regarding the diminution in their property's value due to the obstruction of the ocean view from their home, but did not permit the Borough to introduce evidence that the dune enhanced the value of the property by protecting it from damage from storms and ocean surges. The trial court determined, and the Appellate Division affirmed, that such protection was a "general benefit" that protected all property owners in the Borough and should not be factor in determining just compensation. The New Jersey Supreme Court reversed, stating that just compensation "must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property.… A formula—as used by the trial court and Appellate Division—that does not permit consideration of the quantifiable benefits of a public project that increase the value of the remaining property in a partial-takings case will lead to a compensation award that does not reflect the owner's true loss." The Supreme Court ordered a new trial to determine the fair market value of just compensation.

Sanders-Reed v. Martinez (N.M. Dist. Ct. July 4, 2013): added to the "Common Law Claims" slide. In this action asserting the public trust doctrine as a basis for forcing the State of New Mexico to address greenhouse gas emissions, the court ruled from the bench on June 26, 2013 that the public trust doctrine did not apply because the New Mexico Environmental Improvement Board had made findings that there was no need to regulate the state's greenhouse gas emissions because such regulation would have no impact on global warming or climate change. On July 4, 2013, summary judgment was filed in favor of defendants. Plaintiffs have filed a notice of appeal.

Save Panoche Valley v. San Benito County (Cal. Ct. App. June 25, 2013): added to the "Stop Government Action/Project Challenges" slide. The California Court of Appeal affirmed a trial court's rejection of a challenge to San Benito County's cancellation of Williamson Act contracts to permit the construction of a solar power development. The Williamson Act contracts obligate landowners to maintain land as agricultural for 10 or more years, and cancellation of a contract requires, among other things, a finding that "other public concerns substantially outweigh the objectives of [the Williamson Act]." The Court of Appeal found substantial evidence in the record to support the conclusion that public concerns such as furthering the state's progress toward achieving goals for increased renewable energy and reduced greenhouse emissions outweighed the purposes of the Williamson Act.

Save the Plastic Bag Coalition v. County of Marin (Cal. Ct. App. June 25, 2013): added to the "State NEPAs" slide. The California Court of Appeal affirmed the dismissal of a California Environmental Quality Act challenge to a county ordinance that bans plastic bags. While plaintiff had alleged that increased paper bag use might increase greenhouse gas emissions, the Court of Appeal concluded that "it is plain that any increased greenhouse gas emissions or similar, broader environmental consequences resulting from the ordinance would be comparatively trivial."

NEW CASES, MOTIONS AND NOTICES

Center for Biological Diversity, Request for reconsideration of approval of Washington and Oregon's impaired waters lists and courtesy notice of intent to sue (July 23, 2013): added to the "Force Government to Act/Other Statutes" slide. On July 23, 2013, the Center for Biological Diversity (CBD) sent a "courtesy letter" to inform EPA of CBD's intent to sue to challenge EPA's December 2012 approvals of Washington's and Oregon's lists of impaired waters under section 303(d) of the Clean Water Act. CBD asserted that EPA's approval of lists without any waterbodies identified as threatened or impaired by ocean acidification was arbitrary and capricious and urged EPA to reconsider its determinations.

U.S. v. Miami-Dade County (S.D. Fla., intervenor complaint filed June 25, 2013; comment period on proposed consent decree extended July 15, 2013): added to the "Adaptation" slide. On June 25, 2013, the intervenors filed a complaint in intervention opposing the entry of the proposed consent decree between the United States and Miami-Dade County. The proposed consent decree provides for $1.5 billion in capital improvements over 15 years to Miami-Dade County's wastewater collection and transmission system, and would also require payment of almost $1 million in penalties and completion of a $2-million Supplemental Environmental Project. Among other things, the intervenors request that the court order the County to address sea level rise and climate impacts when developing the necessary capital improvements to the sewage collection and treatment system to provide assurance that sanitary sewer overflows and violations of National Pollutant Discharge Elimination System permit violations will not occur in the future. In support of their allegations regarding the inadequacies of the proposed consent decree's consideration of sea level rise and climate change, the intervenors submitted two expert affidavits concerning climate change impacts and the County's wastewater system. On July 15, 2013, the Department of Justice published a notice in the *Federal Register* advising that it had extended the comment period on the proposed consent decree with Miami-Dade County for 30 days through August 11, 2013.

WildEarth Guardians v. U.S. Environmental Protection Agency (D.C. Cir., filed July 9, 2013): added to the "Force Government to Act/Clean Air Act" slide. WildEarth Guardians petitioned the D.C. Circuit for review of EPA's denial of the petition asking that EPA list coal mines as a new stationary source category under Section 111 of the CAA. EPA had cited limited resources and ongoing budget uncertainties to justify its denial.

High Country Citizens' Alliance v. United States Forest Service (D. Colo., filed July 2, 2013): added to the "Challenges to Federal Action/NEPA" slide. Plaintiffs charge that certain actions

by the United States Forest Service and the Bureau of Land Management in furtherance of the expansion of a coal mine in Colorado violated NEPA. Among the impacts that plaintiffs allege were overlooked are "the societal costs of mining and burning the coal" in the expanded lease area for the mine as well as the impacts of mining and burning "half a billion tons of coal … that … would stay in the ground" were it not for a loophole contained in the Forest Service's Colorado Roadless Rule. The complaint alleged that the social cost of the mine's carbon dioxide and methane pollution will be between $1.2 billion and $2.2 billion.

Alec L. v. Perciasepe (D.D.C., notice of appeal filed June 27, 2013): added to the "Common Law Claims" slide. After decisions by the district court for the District of Columbia dismissing their action and denying their motion for reconsideration, plaintiffs in this public trust doctrine lawsuit filed a notice of appeal to the D.C. Circuit. Plaintiffs have unsuccessfully sought to force the federal government to take action to reduce greenhouse gas emissions based on a federal public trust doctrine.

Center for Biological Diversity v. Jewell (D.D.C., filed June 27, 2013): added to the "Petitions Under the Endangered Species Act and Related Litigation" slide. Plaintiff commenced an action against the Secretary of the Interior and the U.S. Fish and Wildlife Service alleging that they failed to make statutorily-required findings on whether to list nine species as endangered or threatened under the Endangered Species Act. Climate change and sea level rise are among the alleged threats to the species.

Clean Air Task Force et al., Petition for Rulemaking and Interpretive Guidance Ensuring Comprehensive Coverage of Methane Sources Under Subpart W of the Greenhouse Gas Reporting Rule – Petroleum and Natural Gas Systems (Mar. 19, 2013): added to the "Force Government to Act/Clean Air Act" slide. On March 19, 2013, the Clean Air Task Force, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club submitted a rulemaking petition to EPA requesting that it collect greenhouse gas emissions data from methane sources in the petroleum and natural gas sectors that are currently not subject to the mandatory reporting rule. The petition asserts that methane emissions data reported under the rule were 51 percent lower than national estimates in 2011 due to missing source categories and to sources that do not meet the reporting threshold.

Institute for Policy Integrity, New York University School of Law, Petition for Rulemakings and Call for Information under Section 115, Title VI, Section 111, and Title II of the Clean Air Act to Regulate Greenhouse Gas Emissions (Feb. 19, 2013): added to the "Force Government to Act/Clean Air Act" slide. On February 19, 2013, the Institute for Policy Integrity at the New York University School of Law submitted a rulemaking petition to EPA requesting that it address climate change through one or more of its authorities under the CAA. In particular, the Institute petitioned EPA to take action to control greenhouse gas emissions under Section 115, which creates a mandatory duty to respond to United States emissions that endanger public health and welfare in foreign countries. Alternatively, the Institute petitioned EPA to take action under Title VI/Section 615 (concerning pollutants in the stratosphere) or to continue and enhance its efforts to control greenhouse gases pursuant to Section 111 and Title II.

Update #52 (June 28, 2013)

FEATURED DECISION

Montana Environmental Information Center v. United States Bureau of Land Management (D. Mont. June 14, 2013): added to the "Stop Government Action/NEPA" slide. In this challenge to the Bureau of Land Management's (BLM's) decisions approving oil and gas leases on public lands, plaintiffs asserted that BLM had failed to comply with the National Environmental Policy Act (NEPA) because BLM allegedly failed to adequately consider climate change impacts. The court granted defendants' motion for summary judgment and dismissed the lawsuit on standing grounds, finding that plaintiffs had failed to establish injury-in-fact. Noting that plaintiffs' recreational and aesthetic interests were "uniformly local" and the effects of greenhouse gas emissions "diffuse and unpredictable," the court found that plaintiffs had presented "no scientific evidence or recorded scientific observations to support their assertions that BLM's leasing decisions will present a threat of climate change impacts on lands near the lease sites." The court further held that plaintiffs had made no effort to show that methane emissions from the lease sites would make a "meaningful contribution" to global warming and had thus failed to show that potential climate change impacts to the local environment were "fairly traceable" to greenhouse gas emissions associated with the challenged leases.

DECISIONS AND SETTLEMENTS

Grocery Manufacturers Association v. EPA (U.S., petition for writ of certiorari denied June 24, 2013); ***American Fuel & Petrochemical Manufacturers v. EPA*** (U.S., petition for writ of certiorari denied June 24, 2013); ***Alliance of Automobile Manufacturers v. EPA*** (U.S., petition for writ of certiorari denied June 24, 2013): added to the "Challenges to Federal Action" slide. The U.S. Supreme Court denied petitions for writs of certiorari from food producer and other industry groups seeking review of the D.C. Circuit decision that dismissed on standing grounds their challenges to EPA waivers allowing more ethanol in fuel.

In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litigation (D.C. Cir. June 14, 2013): added to the "Petitions Under the Endangered Species Act and Related Litigation" slide. The D.C. Circuit affirmed the 2011 decision of the district court for the District of Columbia upholding the Fish and Wildlife Service's (FWS's) barring of the importation of polar bear trophies. In its 2008 rule listing the polar bear as a threatened species under the Endangered Species Act (ESA), FWS had also determined that the listing had the effect of designating the species as "depleted" under the Marine Mammal Protection Act (MMPA), and that the MMPA thus barred continued importation of sport-hunted polar bear trophies. The D.C. Circuit agreed with the district court's conclusions that the ESA listing for the polar bear had the effect of designating the species as "depleted" for MMPA purposes; that once the MMPA import prohibitions were triggered, polar bears could no longer be imported under the MMPA's trophy import authorization; and that the import prohibitions applied even to bears taken before the species was designated as depleted. The D.C. Circuit also rejected claims that FWS's determination to bar importation of trophies was procedurally defective.

Association of Taxicab Operators USA v. City of Dallas (5th Cir. June 13, 2013): added to the "Challenges to State and Municipal Vehicle Standards" slide. The Fifth Circuit affirmed the

district court decision that dismissed a challenge to the City of Dallas ordinance that allowed taxicabs certified to run on compressed natural gas (CNG) "head of line" privileges at Love Field, a municipally owned airport. Plaintiff had claimed that the ordinance was preempted by section 209(a) of the Clean Air Act, which prohibits states and the political subdivisions of states from adopting emission standards for vehicles. The Fifth Circuit concluded that the ordinance did not on its face impose an emissions standard—the ordinance was "a compelling offer, not a compelled restraint." The court also agreed with the district court that plaintiff had not offered evidence to show that the law indirectly compelled a particular course of action (i.e., the purchase of CNG vehicles).

Sierra Club, Iowa Chapter v. LaHood (S.D. Iowa June 10, 2013): added to the "Stop Government Action/NEPA" slide. The court granted defendants' motion for summary judgment, finding that the agencies had not acted arbitrarily and capriciously in approving an 8.5-mile highway extension southwest of Cedar Rapids, Iowa. The court was not persuaded by plaintiffs' arguments that under the Eighth Circuit's decision in *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), climate change must be considered in an environmental review under NEPA. Finding that *Mid States Coalition for Progress* required consideration of impacts on air quality more generally— not climate change specifically—the district court ruled that "there is no requirement that climate change be analyzed, particularly given the speculative nature of such an effect."

POET, LLC v. California Air Resources Board (Cal. App. Ct. tentative disposition issued June 3, 2013): added to the "Challenges to State Action" slide. In this state court challenge to California's low carbon fuel standard (LCFS), the appellate court on June 3, 2013 issued a tentative disposition reversing the superior court's granting of judgment in favor of the defendants. With respect to the procedural challenges, the appellate court's tentative disposition found that the LCFS was approved for California Environmental Quality Act (CEQA) purposes on April 25, 2010 and that the decision-making function had been improperly split between the California Air Resources Board (CARB) and its executive officer. With respect to the substantive challenge, the tentative disposition determined that CARB violated CEQA by deferring the formulation of mitigation measures to address potential increases in NO_x emissions from the increased use of biodiesel fuels caused by the LCFS. The appellate court noted that its tentative disposition would not suspend operation of the LCFS and requested input from the parties as to the terms of its disposition of the proceeding, including as to deadlines for CARB actions, whether the LCFS should remain in effect pending CARB's actions in response to the disposition, whether the court should dictate that public comment be permitted on the issue of carbon intensity values attributed to land use changes, the proper framework for considering NO_x emissions, and whether CARB should be required to file an initial return setting forth how it will comply with the writ to be issued by the superior court. The parties were required to respond by June 11, 2013.

South Bronx Unite! v. New York City Industrial Development Agency (N.Y. Sup. Ct. May 31, 2013): added to the "State NEPAs" slide. Local residents and community organizations challenged various governmental actions that facilitated the relocation of a grocery delivery service's operations from Queens to the Bronx in New York City. Among other claims, the petitioners-plaintiffs alleged that environmental review under the State Environmental Quality

Review Act (SEQRA) had been inadequate, including with respect to consideration of climate change. The court was not persuaded by the challengers' assertions of inadequacies in the methodologies employed in the environmental review, which found that the project would result in fewer vehicle trips per day than a fully built-out land use plan that had been studied in a 1993 environmental impact statement. With respect to the challengers' allegations regarding the lack of consideration of greenhouse gas emissions, the court concluded without discussion that the respondents had established that SEQRA did not require consideration of greenhouse gas emissions in the circumstances presented by this project.

Pietrangelo v. S & E Customize It Auto Corp. (N.Y. Civ. Ct. May 22, 2013): added to the "Common Law Claims" slide. In this small claims action, claimant alleged that as a result of the defendant's negligent failure to have flood insurance, she was not fully compensated for damage to her vehicle caused by Hurricane/Superstorm Sandy while the vehicle was at the defendant's vehicle repair shop in Staten Island, New York. The court ruled against claimant, noting that where, as here, a bailment was created, the law in New York is clear that there is no bailee liability for failure to obtain insurance for the bailor's goods. The court further ruled that claimant's negligence cause of action was barred by the "act of nature" defense and by the claimant's failure to establish that defendant was negligent in storing the vehicle. In the course of its decision, the court engaged in what it called "merely intellectual speculation" as to whether global warming or climate change caused Sandy to become a superstorm, stating, "[i]f this is true then the possibility exists that Sandy is not a pure 'act of nature' but is the result of human activity." The court, though leaving this issue for future resolution, indicated that in its view the act of nature defense would still be available because "locating a source of the altered weather pattern might be impossible" and "the proper party or parties could not be identified with any certainty so as to bring them into the court's jurisdiction."

NEW CASES, MOTIONS AND NOTICES

East Yard Communities for Environmental Justice v. City of Los Angeles (Cal. Super. Ct., filed June 7, 2013); ***City of Long Beach v. City of Los Angeles*** (Cal. Super. Ct., filed June 5, 2013); ***South Coast Air Quality Management District v. City of Los Angeles*** (Cal. Super. Ct., filed June 7, 2013): added to the "State NEPAs" slide. These three lawsuits assert CEQA challenges to City of Los Angeles approvals for an approximately 185-acre intermodal railyard facility located in the cities of Los Angeles, Carson, and Long Beach. The petitions assert a number of failings in the environmental review of the project, including climate change-related shortcomings. In particular, the City of Long Beach petition alleges that the review failed to provide an adequate analysis of, and mitigation for, the project's individual and cumulative greenhouse gas and climate change impacts, and that the environmental impact report (EIR) failed to discuss how the project would affect attainment of greenhouse gas reduction goals under AB 32. The East Yard Communities for Environmental Justice petition charges that despite concluding that the project would have significant impacts on greenhouse gas emissions, the EIR did not discuss any mitigation measures for the project, and that the EIR made "patently false" claims regarding the project's consistency with state and local plans and policies for the reduction of greenhouse gas emissions.

U.S. v. Miami-Dade County (S.D. Fla., proposed consent decree lodged June 6, 2013): added to the "Force Government to Act/Other Statutes" slide. The U.S. Department of Justice (USDOJ) lodged a proposed consent decree with the court on June 6, 2013. On June 12, 2013, USDOJ published in the *Federal Register* a Notice of Lodging of Proposed Consent Decree Under the Clean Water Act, which commenced a 30-day public notice period. The proposed consent decree would provide for $1.5 billion in capital improvements over 15 years to Miami-Dade County's wastewater collection and transmission system, and would also require payment of almost $1 million in penalties and completion of a $2-million Supplemental Environmental Project. In May 2013, the court granted the motion of Biscayne Bay Waterkeeper and a resident of Key Biscayne to intervene in the proceeding. Among other things, the intervenors claim that the proposed decree should take into account climate change impacts including sea level rise.

WildEarth Guardians v. United States Environmental Protection Agency (D.D.C., motion to dismiss filed June 4, 2013): added to the "Force Government to Act/Clean Air Act" slide. Plaintiffs filed this action in November 2011 asking the court to compel EPA to respond to its petition requesting that EPA list coal mines as a new stationary source category under the Clean Air Act. On April 30, 2013 EPA denied the petition, and on May 8, 2013 published notice of the denial in the *Federal Register*. In its June 4, 2013 motion to dismiss, EPA argued that the action should be dismissed on mootness grounds because there is no further relief that the court can grant. EPA noted that to challenge the substance of the denial, plaintiffs must seek review in the United States Court of Appeals for the District of Columbia Circuit.

Alliance for a Regional Solution to Airport Congestion v. City of Los Angeles (Cal. Super. Ct., filed May 30, 2013); ***City of Inglewood v. City of Los Angeles*** (Cal. Super. Ct., filed May 30, 2013); ***SEIU United Service Workers West v. City of Los Angeles*** (Cal. Super. Ct., filed May 30, 2013): added to the "State NEPAs" slide. These three lawsuits assert challenges under CEQA to the approval of a $4.5-billion set of redevelopment and expansion projects at the Los Angeles International Airport. Among other alleged shortcomings in the environmental review, two of the lawsuits charge that respondents failed to adequately analyze and mitigate the project's impacts on greenhouse gas emissions and/or that respondents should have approved an alternative that would have resulted in lower greenhouse gas emissions.

Alaska Oil and Gas Association v. Blank (D. Alaska, filed May 21, 2013): added to the "Petitions Under the Endangered Species Act and Related Litigation" slide. Plaintiff challenges the National Marine Fisheries Service's (NMFS's) listing of two distinct population segments (DPSs) of bearded seals as threatened under the ESA. Plaintiff alleges that the listing is unlawful because the bearded seal populations are presently "abundant, wide-ranging and entirely healthy" and the basis for the listing was "unknown and unspecified adverse effects that may occur at an unknown time and at an unknown rate in the future as a consequence of climate change in the Arctic occurring over the next century." Among other things, plaintiff asserts that NMFS irrationally relied upon climate predictions extending to 2100 when prior ESA listing determinations relied on mid-century projections, and that neither best available scientific data and information nor the administrative record supported a listing of the bearded seal DPSs as threatened.

EPA Response to Petition for Additional Water Quality Criteria and Guidance Under Section 304 of the Clean Water Act, 33 U.S.C. §1314, to Address Ocean Acidification (May 17, 2013): added to the "Force Government to Act/Other Statutes" slide. In a letter dated May 17, 2013, EPA responded to the Center for Biological Diversity's petition dated April 17, 2013 that requested that EPA develop additional water quality criteria and guidance under the Clean Water Act to address ocean acidification. In the May 17 letter, EPA indicated that it intended to establish a technical workgroup within the next six months that would study ocean acidification and its causes.

Update #51 (May 31, 2013)

FEATURED DECISION

Comer v. Murphy Oil USA, Inc. (5th Cir. May 14, 2013): added to the "Common Law Claims" slide. On May 14, 2013, the Fifth Circuit affirmed on res judicata grounds the district court's 2012 dismissal of plaintiffs' claims. Plaintiffs had alleged claims of nuisance, trespass, and negligence on the theory that the defendant energy companies' greenhouse gas (GHG) emissions contributed to global climate change and exacerbated the effects of Hurricane Katrina. In 2007, the district court had dismissed similar claims by the same plaintiffs against some of the same defendants on the grounds that plaintiffs lacked standing and that the claims were non-justiciable political questions, a judgment that remained untouched after a series of procedural twists during the appeals process. In its May 2013 decision, the Fifth Circuit rejected plaintiffs' arguments that the district court's 2007 judgment was not final or on the merits, noting that at no point in the appeals process had the district court's 2007 judgment been disturbed. The Fifth Circuit also refused plaintiffs' request for an equitable exception to res judicata, invoking the "well-known rule that a federal court may not abrogate principles of res judicata out of equitable concerns." The Fifth Circuit also held that the 2007 judgment was on the merits since res judicata principles apply to jurisdictional determinations.

DECISIONS AND SETTLEMENTS

Sierra Club v. United States Department of Agriculture Rural Utilities Service (D.C. Cir. May 28, 2013): added to the "Challenges to Coal-Fired Power Plants" slide. The D.C. Circuit dismissed the appeal by intervenor Sunflower Electric Power Corporation of the district court's order granting summary judgment to the Sierra Club. The district court had held that the Rural Utilities Service unlawfully failed to prepare an environmental impact statement (EIS) prior to granting approvals and financial assistance to Sunflower for expansion of a coal-fired power plant. The district court remanded the proceeding to the Service for a determination of what further action was needed. The D.C. Circuit determined that the district court's order was a non-final remand order that was not immediately appealable by a private party and therefore dismissed Sunflower's appeal for lack of jurisdiction.

Alec L. v. Perciasepe (D.D.C. May 22, 2013): added to the "Common Law Claims" slide. On May 22, 2013, the federal district court for the District of Columbia denied reconsideration of its May 2012 dismissal of plaintiffs' claims. Plaintiffs had alleged that the federal defendants

violated the "federal public trust doctrine" by failing to protect the atmosphere. Relying on a 2012 Supreme Court decision, the court ruled in its 2012 decision that it lacked subject matter jurisdiction because the public trust doctrine was a creature of state—not federal—law. In denying reconsideration, the court's May 2013 decision rejected plaintiffs' arguments that they had not been given an adequate opportunity to address the 2012 Supreme Court decision. The district court further found that plaintiffs' arguments in the motion for reconsideration merely "repackage[d]" arguments that the court had already rejected, or attempted to make new arguments that could and should have been raised previously.

North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors (Cal. Ct. App. May 21, 2013): added to the "State NEPAs" slide. In 2009, the Marin Municipal Water District Board of Directors (Board) certified a final environmental impact report (EIR) for and subsequently approved the construction of a desalination plant that would extract raw seawater from San Rafael Bay, remove solids from the raw water by using reverse osmosis, and discharge a saline brine back into the bay. Plaintiffs challenged the project, and the trial court set aside the Board's decisions. Among other faults, the trial court found that the EIR failed to adequately discuss the alternative of using green energy credits to mitigate the project's energy impacts and that the EIR's conclusion that the project's GHG emissions would not be cumulatively considerable was not supported by substantial evidence. The appellate court reversed the trial court's decision. The appellate court determined that because the EIR concluded that the project's energy impacts would be insignificant, there was no need to discuss green energy credits as an alternative mitigation measure. The appellate court also determined that facts and analysis in the EIR were sufficient to support the conclusion that the impact on GHG emissions would not be cumulatively considerable. The appellate court noted, among other things, that the EIR's analysis concluded that the project would not interfere with the county goal of reducing GHG emissions to 15 percent below 1990 levels by 2020 and that the Board had adopted a policy requiring offsets for all project-related GHG emissions.

Native Village of Kivalina v. Exxon Mobil Corp. (U.S. May 20, 2013): added to the "Common Law Claims" slide. The U.S. Supreme Court denied the Native Village of Kivalina's petition for a writ of certiorari. The Village had sought to recover money damages from a number of energy companies for GHG emissions from the companies' operations that plaintiffs alleged contributed to the erosion of sea ice where the Village is located. The Ninth Circuit had held that the Village could not sue under a theory of public nuisance because the common law claims had been displaced by the Clean Air Act.

Alaska Oil & Gas Association v. Jewell (D. Alaska May 15, 2013): added to the "Petitions Under the Endangered Species Act and Related Litigation" slide. The district court denied motions to alter or amend its January 2013 judgment vacating the Fish and Wildlife Service (FWS) designation of critical habitat for the polar bear. In denying the motions, the court rejected arguments that there were errors in its judgment and noted that defendants and defendants-intervenors could not raise new arguments or previously known and available evidence or rehash arguments previously made. The court also ruled that vacating and remanding FWS's final rule was a proper remedy even though the court found nothing wrong with 96 percent of the designated area. The decision noted that polar bears "are presently abundant" and "face no immediate or precipitous decline" and cited plaintiffs' showing that they

would be harmed if the critical habitat designation were left in place. The court also indicated that vacating and remanding was appropriate because it would give FWS another opportunity to involve Alaska Native villages, corporations and the State of Alaska in the designation process.

U.S. v. Miami-Dade County, Fla. (S.D. Fla. May 14, 2013): added to the "Force Government to Act/Other Statutes" slide. The court granted the motion by Biscayne Bay Waterkeeper and a resident of Key Biscayne to intervene in a government action against Miami-Dade County to enforce the Clean Water Act and the Florida Air and Water Pollution Control Act. The intervenors had previously submitted a notice of their intent to sue under the Clean Water Act's citizen suit provision. The governments' complaint allege unpermitted discharges of untreated sewage, failures to comply with permit conditions, and the creation of conditions that present an imminent and substantial endangerment. The lawsuit was commenced after months of negotiations among the federal, state, and county governments over a proposed consent decree, which the Miami-Dade Board of County Commissioners approved on May 21, 2013. In their motion, which was filed in January 2013, the intervenors contended that the proposed consent decree "if not significantly altered, is not reasonably calculated to ensure Clean Water Act compliance and is contrary to the public's interest." Among other things, the intervenors argued that the proposed decree needed to consider climate change impacts including sea level rise.

American Petroleum Institute v. EPA (D.C. Cir. May 10, 2013): added to the "Challenges to Federal Action" slide. The D.C. Circuit granted a motion requesting that this action challenging the third step of EPA's tailoring rule be held in abeyance pending the U.S. Supreme Court's disposition of *Utility Air Regulatory Group v. EPA* and related petitions. The Utility Air Regulatory Group and numerous other parties have filed petitions for writs of certiorari for review of the D.C. Circuit's June 2012 decision in *Coalition for Responsible Regulation, Inc. v. EPA* that upheld EPA's GHG permitting program for stationary sources and other EPA regulation of GHG emissions (*see infra*).

In re Polar Bear Endangered Species Act Listing (D.C. Cir. April 29, 2013): added to the "Petitions Under the Endangered Species Act and Related Litigation" slide. The D.C. Circuit issued orders denying requests for a panel rehearing and for panel rehearing on the Fish and Wildlife Service decision to list the polar bear as threatened under the Endangered Species Act (ESA). The D.C. Circuit upheld the listing determination on March 1, 2013.

Alliance of Automobile Manufacturers v. EPA (D.C. Cir. April 25, 2013): added to the "Challenges to Federal Action" slide. Petitioners in this proceeding challenge EPA's rule requiring gas stations to label pumps that dispense gasoline that contains more than 10 percent ethanol. The D.C. Circuit granted a motion to hold the proceedings in abeyance pending the disposition of *Grocery Manufacturers Assn. v. EPA, Alliance of Automobile Manufacturers v. EPA*, and *American Fuel & Petrochemical Manufacturers v. EPA* by the U.S. Supreme Court. Parties in those three proceedings challenged EPA's decision to allow vehicles from model years 2001 forward to use gasoline with up to 15-percent ethanol content; the D.C. Circuit dismissed the challenges for lack of standing. The parties have petitioned the Supreme Court to overturn the D.C. Circuit's decision.

Southwest Energy Efficiency Project v. New Mexico Construction Industries Commission (N.M. Ct. App. April 23, 2013): added to the "Stop Government Action/Other Statutes" slide. On April 23, 2013, the New Mexico Court of Appeals issued an order for a rehearing. A few weeks earlier, the court had set aside the Commission's adoption of revised energy codes that repealed energy efficiency requirements. The New Mexico Construction Industries Commission issued a press release on April 25, 2013 to announce the rehearing order, which the Commission indicated "has the effect of suspending the opinion of the court until its final determination." The press release stated that it would continue to enforce the revised codes while a final decision by the Court of Appeals is pending.

Sierra Club v. San Diego County (Cal. Super. Ct. April 19, 2013): added to the "State NEPAs" slide. In July 2012, the Sierra Club filed a lawsuit challenging San Diego County's climate action plan (CAP). In April 2013, the court set aside the County's approval of the CAP. The court held that the CAP was not properly approved because it should have been subject to a supplemental EIR. (The county had concluded in an addendum to the program EIR for the County's 2011 General Plan Update (GPU) that the CAP fell within the program EIR's scope.) The court further held that even if the CAP had been properly approved, it failed to meet the mitigation obligations in the program EIR for the GPU, which required the County to set detailed GHG emissions reduction targets and deadlines and to implement enforceable GHG emissions reduction measures. Noting that the CAP describes itself as a "living document" and as a "a platform for the County to build strategies to meet its emission-reduction targets," the court stated: "There is no time for 'building strategies' or 'living documents;' as the PEIR quite rightly found, enforceable mitigation measures are necessary now."

NEW CASES, MOTIONS AND NOTICES

Petition to Undertake Area-Wide Environmental Impact Statement on All Proposed Coal Export Terminals in Washington and Oregon (May 22, 2013): added to the "Force Government to Act/Other Statutes" slide. Earthjustice, on behalf of 11 groups, submitted a petition to the U.S. Army Corps of Engineers pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), requesting that the Corps evaluate the cumulative and related impacts of all proposed coal export terminals in Oregon and Washington in a "single, comprehensive, area-wide" environmental impact statement. Among the issues that the petition said should be considered in an area-wide EIS were "effects on global consumption of coal … and resulting increased greenhouse gas emissions." The petition requested a response from the Corps prior to completion of the scoping process for the proposed Millennium Terminal in Longview, Washington. The petition cited two other pending applications for coal export facilities, the Gateway Pacific Terminal site in Cherry Point, Washington, and the Morrow Pacific project in Oregon, as projects that should be considered in the EIS.

Notice of Intent to Sue for Failure to Issue Polar Bear Status Review and Recovery Plan (May 15, 2013): added to the "Petitions Under the Endangered Species Act and Related Litigation" slide. The Center for Biological Diversity sent a 60-day notice of intent to sue to the Secretary of the Interior and the U.S. Fish and Wildlife Service for failing to conduct a five-year status review and complete a recovery plan for the polar bear. The polar bear was listed as a threatened species under the ESA in 2008 because of declining Arctic sea ice habitat. The notice

states that new evidence shows sea ice habitat is declining more rapidly than predicted and that the polar bear's status now warrants an endangered listing under the ESA.

Notice of Final Action on Petition From Earthjustice To List Coal Mines as a Source Category and To Regulate Air Emissions From Coal Mines (EPA, 78 Fed. Reg. 26,739, May 8, 2013): added to the "Force Government to Act/Clean Air Act" slide. On May 8, 2013, EPA published a notice of final action in the Federal Register to provide notice that on April 30, 2013 Acting Administrator Bob Perciasepe had signed a letter denying a petition submitted by Earthjustice in 2010 to add coal mines to the Clean Air Act section 111 list of stationary source categories. The notice stated that "limited resources" and "ongoing budget uncertainties" forced EPA to prioritize its actions and that it could not commit to undertake the process required for determining whether coal mines should be listed as a stationary source category.

Tennessee Environmental Council v. Tennessee Valley Authority (M.D. Tenn., filed April 25, 2013): added to the "Challenges to Coal-Fired Power Plants" slide. Plaintiffs challenge the Tennessee Valley Authority's (TVA's) alleged failure to comply with the National Environmental Policy Act (NEPA) in connection with TVA's decision in August 2011 to spend more than $1 billion to construct retrofits and associated facilities at its Gallatin plant (the Life Extension Project) to allow TVA to continue to use the plant past a 2017 deadline established in a settlement agreement with EPA and a consent decree between TVA and a number of states and environmental organizations. Petitioners contend that while the Life Extension Project will substantially reduce air emissions from the Gallatin plant, it will still cause a number of significant impacts that could be avoided by shutting the plant down, including significant ongoing emissions of sulfur dioxide, carbon dioxide, nitrogen oxides, and mercury; two "massive" new landfills; and a number of new wastewater streams. Plaintiffs allege, among other things, that TVA committed resources to the project prior to complying with NEPA, that TVA should have prepared an EIS, that TVA failed to consider a legitimate no-action alternative, and that TVA failed to allow for public comment.

Notice of Intent to Sue for Failure to Timely Promulgate New Source Standards of Performance and Regulations Providing Emission Guidelines for Certain Greenhouse Gas Emissions from Fossil Fuel-Fired Electric Utility Generating Units (Power Plants) (April 25, 2013): added to the "Force Government to Act/Clean Air Act" slide. On April 25, 2013, the Conservation Law Foundation sent a 60-day notice of intent to sue to EPA. The notice cites EPA's failure to promulgate final standards of performance for GHG emissions from new power plants as required by 42 U.S.C. § 7411(b) and to propose and finalize regulations that provide for a plan and emission guidelines for the control of carbon dioxide emissions from existing power plants as required by 42 U.S.C. § 7411(d). This notice follows two similar notices submitted by states and cities and by three other environmental organizations (see *infra*).

Notice of Intent to Sue for Failure to Promulgate Standards of Performance and Emissions Guidelines for Greenhouse Gas Emissions from Electric Utility Generating Units (April 17, 2013): added to the "Force Government to Act/Clean Air Act" slide. On April 17, 2013, ten state attorneys general as well as the attorney general for the District of Columbia and the New York City Corporation Counsel sent a 60-day notice of intent to sue to EPA. The notice requests that EPA remedy its failure to publish performance standards for GHG emissions from power

plants. The entities represented are petitioners in *New York v. EPA* (D.C. Cir., No. 06-1322), in which they challenged the Bush administration EPA's decision declining to regulate GHG emissions from power plants and steam generating units. The April 2013 notice contends that EPA's failures to finalize GHG emissions standards for new power plants and to issue standards for existing power plants are in violation of the Clean Air Act because EPA has failed to perform non-discretionary duties and has unreasonably delayed in taking action to promulgate such standards. This notice comes two days after three environmental organizations sent a 60-day notice asserting the same failures on the part of EPA (see *infra*).

Notice of Intent to Sue for Failure to Timely Promulgate New Source Performance Standards (NSPS) and Emission Guidelines for Greenhouse Gas Emissions from Electric Utility Generating Units (EGUs) (April 15, 2013): added to the "Force Government to Act/Clean Air Act" slide. On April 15, 2013, Environmental Defense Fund, the Sierra Club, and the Natural Resources Defense Council sent a 60-day notice of intent to sue to EPA for (1) failure to perform its nondiscretionary duty under the Clean Air Act to issue final new source performance standards regulating GHG emissions of greenhouse gases from new power plants within one year of proposing these standards, and for unreasonable delay in carrying out that duty, and (2) failure to carry out its nondiscretionary duty to issue proposed and final emission guidelines for GHG emissions from existing power plants, a duty it is required to execute under section 111(d) of the Act and EPA regulations, and for its unreasonable delay in failing to take such action. Two days later, on April 17, ten states and the District of Columbia and New York City sent a 60-day notice asserting the same failures, and 10 days later, the Conservation Law Foundation sent a similar notice (see *supra*).

Petition for Additional Water Quality Criteria and Guidance Under Section 304 of the Clean Water Act, 33 U.S.C. § 1314, to Address Ocean Acidification (April 17, 2013): added to the "Force Government to Act/Other Statutes" slide. On April 17, 2013, the Center for Biological Diversity petitioned EPA to promulgate additional water quality criteria under Section 304 of the Clean Water Act to address ocean acidification and to request that that EPA publish information on water quality in order to guide states addressing ocean acidification. The petition provided an overview of the scientific background for ocean acidification, asserting that as the oceans absorb carbon dioxide emitted from the burning of fossil fuels, seawater becomes increasingly acidic, and that the current rate of acidification is faster than anything experienced in the last 300 million years. The petition asserts that EPA has a non-discretionary duty to promulgate standards because the current criteria and guidelines "do not reflect the latest scientific knowledge and fail to protect marine water quality, as required by the Clean Water Act."

Morning Star Packing Co. v. CARB (Cal. Super. Ct., filed April 16, 2013): added to the "Industry Lawsuits/Challenge to State Action" slide. Petitioners-plaintiffs, which are California residents, businesses, trade associations, and advocacy groups, seek an order enjoining and requiring California to rescind the "revenue-generating auction provisions" of its GHG emissions cap and trade program and a declaration that the cap and trade program's auction provisions are not authorized by statute or, alternatively, that they constitute illegal taxes under the California Constitution.

Numerous petitions for writs of certiorari have been filed in the U.S. Supreme Court seeking review of the D.C. Circuit's June 2012 decision in *Coalition for Responsible Regulation, Inc. v. EPA*, which upheld several aspects of EPA's regulation of GHG emissions under the Clean Air Act:

- ***U.S. Chamber of Commerce v. EPA*** (U.S., petition for writ of certiorari filed April 19, 2013): added to the "Challenges to Federal Action" slide. The U.S. Chamber of Commerce, the American Farm Bureau Federation, and Alaska filed a petition for writ of certiorari seeking to reverse the D.C. Circuit's upholding of EPA's 2009 endangerment finding, which serves as the basis for EPA's regulation of GHG emissions under the Clean Air Act, and EPA's GHG permitting program for large stationary sources. More broadly, the petition seeks review of the question of whether EPA, having identified "absurd" consequences posed by regulation of GHG under the Clean Air Act, may deem the absurdity "irrelevant" to construction of some statutory provisions and a "justification for rewriting others."

- ***Coalition for Responsible Regulation, Inc. v. EPA*** (U.S., petition for writ of certiorari filed April 19, 2013): added to the "Challenges to Federal Action" slide. A coalition that included the Coalition for Responsible Regulation, Alpha Natural Resources, Inc., and the National Cattlemen's Beef Association raised the broad question of whether the Clean Air Act and *Massachusetts v. EPA* prohibit EPA from considering whether regulations addressing GHG emissions under Section 202 of the Clean Air Act "would meaningfully mitigate the risks identified as the basis for their adoption."

- ***Southeastern Legal Foundation, Inc. v. EPA*** (U.S., petition for writ of certiorari filed April 19, 2013): added to the "Challenges to Federal Action" slide. A coalition that included members of Congress, a number of businesses, and various policy and advocacy groups filed a petition for a writ of certiorari asking the U.S. Supreme Court to reverse the D.C. Circuit's June 2012 decision in *Coalition for Responsible Regulation, Inc. v. EPA*. The petition presents several questions challenging EPA's authority to regulate GHG emissions under the Clean Air Act in general and its tailoring rule, in particular.

- ***The Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation v. EPA*** (U.S., petition for writ of certiorari filed on April 19, 2013): added to the "Challenges to Federal Action" slide. This petition raises the question of whether EPA was statutorily required to regulate GHG emissions under the Clean Air Act's Prevention of Significant Deterioration (PSD) and Title V programs, as well as related questions in connection with EPA's obligation to consider alternative regulatory programs for GHG emissions from stationary sources and with the timeliness of challenges to the application of the PSD program to GHG emissions.

- ***Texas v. EPA*** (U.S., petition for writ of certiorari filed April 19, 2013): added to the "Challenges to Federal Action" slide. Citing the regulatory burden imposed on state regulators, a group of states seeks review of EPA's GHG permitting program for large stationary sources.

- ***American Chemistry Council v. EPA*** (U.S., petition for writ of certiorari file April 18, 2013): added to the "Challenges to Federal Action" slide. A group of industry-affiliated organizations seeks review of EPA's GHG permitting program for large stationary sources.

- ***Utility Air Regulatory Group v. EPA*** (U.S., petition for writ of certiorari filed March 20, 2013): added to the "Challenges to Federal Action" slide. The Utility Air Regulatory Group filed a petition for writ of certiorari seeking review of the D.C. Circuit's upholding of EPA's GHG permitting program for large stationary sources.

- ***Pacific Legal Foundation v. EPA*** (U.S., petition for writ of certiorari filed March 20, 2013): added to the "Challenges to Federal Action" slide. This petition seeks reversal of the D.C. Circuit's upholding of EPA's 2009 endangerment finding.

- ***Virginia v. EPA*** (U.S., petition for writ of certiorari filed March 20, 2013): added to the "Challenges to Federal Action" slide. This petition also seeks reversal of the D.C. Circuit's upholding of EPA's 2009 endangerment finding.

American Fuel & Petrochemical Manufacturers v. EPA (U.S., petition for writ of certiorari filed April 10, 2013); ***Alliance of Automobile Manufacturers v. EPA*** (U.S., petition for writ of certiorari filed March 26, 2013): added to the "Challenges to Federal Action" slide. Additional industry groups filed petitions for writs certiorari with the U.S. Supreme Court to review a decision by the D.C. Circuit that the groups lacked standing to challenge EPA waivers allowing more ethanol in fuel for model year 2001 and newer vehicles. (A group of food producer organizations was the first to file a petition for certiorari in February 2013.) The waiver raises from 10 percent to 15 percent the maximum ethanol level in gasoline used in these vehicles. In August 2012, the D.C. Circuit dismissed the lawsuit on standing grounds, holding that none of the industry groups that challenged the decision could show that they were harmed by the rule given that the waivers did not directly impose regulatory restrictions, costs, or other burdens on any of the groups.

Update #50 (Apr. 17, 2013)

DECISIONS AND SETTLEMENTS

Friends of the Earth v. EPA (D.D.C. March 27, 2013): added to the "Force Government to Act/Clean Air Act" slide. Plaintiffs sought to compel EPA to issue a determination under Section 231 of the Clean Air Act regarding whether lead emissions from aircraft engines using aviation gasoline (avgas) cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. The district court granted EPA's motion for summary judgment, holding that it lacked subject matter jurisdiction because an endangerment determination under Section 231 is not the type of nondiscretionary act or duty that the Clean Air Act's citizen suit provision (42 U.S.C. § 7604) grants district courts the jurisdiction to compel.

County of Sonoma v. Federal Housing Finance Agency (9th Cir. March 19, 2013): added to the "Stop Government Action/Other Statutes" slide. The Federal Housing Finance Agency (FHFA), the regulator and conservator of Freddie Mac and Fannie Mae, issued a directive preventing Freddie Mac and Fannie Mae from purchasing mortgages for properties encumbered by liens created by property-assessed clean energy (PACE) programs. FHFA indicated, among other things, that the first liens of the PACE programs could disrupt the housing market and that there was a lack of underwriting standards to protect homeowners and an absence of energy-saving standards to allow for the valuation of home improvements. Plaintiffs alleged that FHFA must issue a regulation to implement this directive. The district court ruled against FHFA and required completion of notice-and-comment rulemaking. On appeal, the Ninth Circuit dismissed the action, ruling that FHFA's directive was a lawful exercise of its statutory authority as conservator, and that the courts therefore lacked jurisdiction.

Sierra Club v. U.S. Fish & Wildlife Serv. (D.D.C. March 19, 2013): added to the "Petitions Under the Endangered Species Act and Related Litigation" slide. The Sierra Club challenged the determination of the Fish and Wildlife Service (FWS) in response to its petition to revise the critical habitat for the leatherback sea turtle, claiming that the FWS's decision to delay any revision was arbitrary and capricious. It also alleged that the defendants had unlawfully delayed in designating additional critical habitat for the turtles. One of the claims in the Sierra Club's petition was that "threats on the nesting beach are substantial and that global climate change is exacerbating the situation." The court held that the FWS's determination was unreviewable because the applicable statutes (the Endangered Species Act and the Administrative Procedure Act) provided no manageable standard to evaluate the FWS's exercise of discretion.

NRDC v. Mich. Dept. of Env. Quality (Mich. Ct. App. March 21, 2013): added to the "Challenges to Coal-Fired Power Plants" slide. In 2011, Natural Resources Defense Council and Sierra Club filed a lawsuit seeking review of the Michigan Department of Environmental Quality's (MDEQ) issuance of an air permit for the expansion of a coal-fired power plant in Holland, Michigan. The lawsuit alleged that the permit did not comply with federal regulations requiring that modification permits address greenhouse gas emissions. The state agency had issued the permit in February 2011 following a court decision finding that the agency had overstepped its authority in denying the permit. The circuit court affirmed MDEQ's issuance of the permit, and plaintiffs appealed, contending that the circuit court applied the wrong standard of review and that the permit was not authorized by law because the "best achievable controls technology" (BACT) analysis in support of the permit did not adequately consider clean fuels and therefore did not comply with the Clean Air Act (CAA). The court of appeals ruled that the circuit court had reviewed the permit's compliance with the CAA de novo and had not improperly deferred to MDEQ. The court of appeals stated that although the circuit court may have improperly reviewed the record evidence in a situation where there was no contested case hearing, such an error was harmless. In its own de novo review of CAA compliance, the court of appeals held that MDEQ's BACT analysis was adequate because it provided a reasoned analysis of each type of fuel that the facility could utilize without major modifications. The court stated that the CAA does not generally require a facility to be redesigned to use the *cleanest* fuel.

Butler v. Brewer (Ariz. Ct. App. March 14, 2013): added to the "Common Law Claims" slide. Plaintiffs filed a complaint for declaratory and injunctive relief on the basis of the public trust

doctrine. Among other things, they sought a declaration that the atmosphere was a public trust asset and that the defendants had a fiduciary obligation as trustees to take affirmative action to preserve the atmosphere and other trust assets from the impacts of climate change. They asked the court to mandate that the state institute reductions in CO_2 emissions of at least six percent annually. The superior court dismissed the action, stating that plaintiffs' remedies were with the legislature or Congress. On appeal, the court of appeals in a memorandum decision rejected the defendants' argument that determinations of what resources are protected by the public trust doctrine and whether the state has violated the doctrine are non-justiciable. The court assumed without deciding that the atmosphere was part of the public trust subject to the doctrine. Nonetheless, the court of appeals affirmed dismissal of the complaint, holding that the complaint failed to make the requisite showing of a specific constitutional provision or other law that had been violated by state action or inaction. Furthermore, the court agreed in part with defendants that a state statute precluded defendants from redressing Butler's grievances. Butler had not challenged the constitutionality of the statute or identified a basis upon which it could be found unconstitutional. The court determined that it was without power to order the state to take action in violation of the statute and that it therefore could not grant relief.

Filippone v. Iowa DNR (Iowa Ct. App. March 13, 2013): added to the "Common Law Claims" slide. In 2011, Glori Dei Filippone and others filed an administrative petition with the Iowa Department of Natural Resources (DNR) requesting adoption of rules to reduce statewide greenhouse gas (GHG) emissions from fossil fuels. Filippone cited the Public Trust Doctrine as one of the rationales for requiring such regulation. DNR denied the petition, stating that it had already adopted state regulations regarding an inventory of statewide GHG emissions and also citing existing and impending federal regulation of GHG emissions from certain sources in the state. Filippone filed a petition for judicial review of DNR's denial of the petition, and the district court affirmed DNR's determination. Filippone again appealed, and the court of appeals upheld the denial. The court of appeals declined to expand Iowa's public trust doctrine to include the atmosphere, noting that the doctrine has a "narrow scope." The court of appeals also held that DNR had given fair consideration to the petition and that denial of the petition was not unreasonable, arbitrary, capricious or an abuse of discretion, and that Filippone had failed to preserve error on her Inalienable Rights Clause claim. One judge on the panel issued a concurring opinion stating that he felt that there was a "sound public policy basis" for extending the public trust doctrine to air but that the court was constrained by Iowa Supreme Court precedent limiting the doctrine's scope. Filippone has filed an appeal in the Iowa Supreme Court.

Merced Alliance for Responsible Growth v. City of Merced (Cal. Ct. App. Nov. 29, 2012) (petition for review denied March 13, 2013): added to the "State NEPAs" slide. On March 13, 2013, the California Supreme Court denied a community group's petition for review in a case in which the community group had unsuccessfully challenged the City of Merced's approval of a regional distribution center in the City boundaries. The community group had alleged that the environmental impact report (EIR) prepared for the proposed project did not address the project's impact on greenhouse gases and climate change. The intermediate appellate court held that the EIR adequately addressed these issues.

NEW CASES, MOTIONS AND NOTICES

Southwest Energy Efficiency Project v. New Mexico Construction Industries Commission (N.M. Ct. App. Apr. 4, 2013) (motion for contempt order filed, Apr. 11, 2013): added to the "Stop Government Action/Other Statutes" slide. In 2011, the New Mexico Construction Industries Commission adopted revisions to four building codes. The purpose of the revisions was to remove energy efficiency requirements that went beyond the 2009 International Energy Conservation Code. There was no discussion or deliberation about the revised codes at the meeting at which the revisions were adopted, and the Commission did not make any separate findings or orders. A number of organizations and individuals challenged the adoption of the revised codes. The New Mexico Court of Appeals set aside the revisions, ruling that the Commission had failed to state any reason for its adoption of the revised codes. The court directed the Commission to reconsider and revote on the revisions and to make a statement as to the rationale for its actions, preferably in written form. On April 11, 2013, plaintiffs filed a motion seeking an order holding the Commission and the Governor of New Mexico in contempt for failing to comply with the court's April 4, 2013 order. The motion alleged that since the court issued its order, the Commission and the Governor had twice announced that they intended to continue to enforce the building codes that the court had set aside.

Competitive Enterprise Institute v. EPA (D.D.C., filed March 28, 2013): added to the "Force Government to Act/Other Statutes" slide. Plaintiffs filed a lawsuit against EPA pursuant to the Freedom of Information Act seeking disclosure of EPA instant message transcripts for communications sent from or to three senior EPA officials, including EPA Administrator Lisa Jackson. The complaint seeks communications related to climate change and the regulation of coal-fired generators.

California Construction Trucking Ass'n Inc. v. EPA (D.C. Cir., filed March 25, 2013): added to the "Industry Lawsuits/Challenges to Federal Action" slide. In April 2011, parties petitioned EPA to reconsider aspects of the greenhouse gas emissions standards issued in May 2010 for model year 2012-2016 light duty vehicles. Petitioners argued that EPA had failed to make the standards available to the Science Advisory Board for review and comment prior to promulgating the standards. In January 2013, EPA denied the petition for reconsideration, finding that the issues raised by the petition could have been made during the public comment period for the rulemaking and that the petition "failed to demonstrate that its objection is of central relevance to the outcome of the rulemaking." On March 25, 2013, petitioners filed a Petition for Review in the D.C. Circuit seeking review of EPA's denial.

Update #49 (Mar. 13, 2013)

FEATURED DECISION

In re Polar Bear Endangered Species Act Litigation (D.C. Cir. March 1, 2013): added to the "Endangered Species Act" slide. The D.C. Circuit upheld the U.S. Fish and Wildlife's "threatened" designation given to polar bears under the Endangered Species Act as a result of climate change, holding that the FWS engaged in reasonable decision-making and adequately explained the scientific basis for its decision. In May 2008, the FWS listed the polar bear as threatened under the ESA. In June 2011, a federal district court in the District of Columbia

dismissed challenges to the listing of the polar bear as a threatened species under the Endangered Species Act. Environmental groups had sued to have the bear classified as endangered, a more protective classification, while Alaska, hunting groups, and others had asked the court to block any listing. The court, deferring to the U.S. Fish and Wildlife Service, which made the determination, held that plaintiffs failed to demonstrate that the agency acted irrationally in making its listing decision, noting that the agency considered more than 160,000 pages of documents and over 670,000 comment submissions before making its final decision.

DECISIONS AND SETTLEMENTS

Concerned Dublin Citizens v. City of Dublin (Cal. Ct. App. March 7, 2013): added to the "state NEPAs" slide. A citizen's group challenged the City of Dublin's determination that a proposed development within a larger transit center development was exempt from the preparation of an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA) because a previous EIR had been prepared and certified in 2002. The plaintiff alleged that supplemental environmental review was necessary because new information concerning GHG emissions has come to light since the EIR was certified in 2002. The trial court disagreed, holding that GHG emissions thresholds adopted by the Bay Area Air Quality Management District in 2010 constituted new information requiring additional environmental review given that the potential environmental effects of GHG emissions were known at the time the 2002 EIR was certified. On appeal, the appellate court affirmed on similar grounds.

Creed-21 v. City of Glendora (Cal. Ct. App. Feb. 19, 2013): added to the "state NEPAs" slide. A community group filed a lawsuit challenging the City of Glendora's approval of an expansion of an existing Wal-Mart store. Among other things, the lawsuit alleged that the city violated CEQA by preparing an EIR that did not adequately analyze the project's greenhouse gas emissions and climate change impacts. The trial court denied the petition, holding that the EIR did properly evaluate the project's GHG emissions and climate change impacts. On appeal, the appellate court affirmed, holding that proposed mitigation measures concerning the use of alternative modes of transportations to reduce GHG emissions were too speculative and did not have to be considered.

North Dakota v. Heydinger (D. Minn. Feb. 15, 2013): added to the "challenges to state action" slide. A federal district court affirmed a magistrate judge's order denying several environmental groups' motion to intervene in an action concerning a Minnesota law designed to reduce GHG emissions, holding that the groups could not intervene given that they could not demonstrate a sufficient interest in the outcome of the case and that generalized interests in the reduction of carbon dioxide emissions were not enough to confer standing. In the underlying lawsuit, North Dakota alleges that Minnesota's Next Generation Energy Act, which took effect in 2009 and prohibits the importation of power from any new large energy facility that would contribute to state-wide carbon dioxide emissions, violates the Commerce Clause and the Supremacy Clause. According to the lawsuit, the law defines power sector carbon dioxide emissions to include carbon dioxide emitted from the generation of electricity generated outside of Minnesota but consumed in the state.

WildEarth Guardians v. BLM (D.D.C. Feb. 13, 2013): added to the "NEPA" slide. A federal district court in the District of Columbia granted the Bureau of Land Management's motion to transfer a case involving challenging coal leases to Wyoming, holding that the case could have been brought in Wyoming and public interests weighed decisively in favor of transfer. The plaintiffs, several environmental groups, filed a lawsuit against BLM alleging that the agency's authorization of four large coal leases in the Power River Basin without fully analyzing the climate change impacts of increased carbon dioxide emissions in violation of NEPA. According to the complaint, collectively, the four leases have the potential to produce more than 1.8 billion tons of coal, resulting in over three billion metric tons of carbon dioxide emissions.

NEW CASES, MOTIONS AND NOTICES

WildEarth Guardians v. Klein (D. Colo., filed Feb. 27, 2013): added to the "NEPA" slide. An environmental group commenced a lawsuit seeking to halt coal mining operations in four Western states because of alleged violations by the Department of Interior (DOI) in approving the mines. In particular, the lawsuit alleges that DOI's Office of Surface Mining Reclamation and Enforcement approved plans for mining on federally owned lands without providing an opportunity for public comment and without fully analyzing their direct and indirect environmental impacts, including impacts associated with coal transport and combustion, pursuant to NEPA. Several of the mines included in the complaint are located in the Powder River Basin, which contains some of the largest deposits in the world of low-sulfur subbituminous coal, which is used for electric power generation. Developers of several planned terminals in the Pacific Northwest are currently seeking federal regulatory approval to export to Asia coal mined from federal land in the basin.

Native Village of Kivalina v. ExxonMobil Corp. (U.S., filed Feb. 25, 2013): added to the "common law claims" slide. An Alaskan Village whose village is threatened by climate change filed a petition for certiorari with the U.S. Supreme Court seeking a review of a Ninth Circuit's decision finding that its lawsuit seeking damages under state common law was displaced by the Clean Air Act. The lawsuit alleged that as a result of climate change, the Arctic sea ice that protects the Kivalina coast from storms has been diminished and that resulting erosion will require relocation of the residents at a cost of between $95 and $400 million. In 2009, a federal district court in California dismissed the village's lawsuit against 24 oil, energy and utility companies, holding that the question of how best to address climate change is a political question not appropriate for a federal trial court to decide. The court also held that the plaintiffs could not demonstrate that the companies had caused them injury. In September 2012, the Ninth Circuit affirmed the dismissal, holding that plaintiffs could not sue under a theory of public nuisance given that it had been displaced by the Clean Air Act.

Conservation Law Foundation v. Dominion Energy (D. Mass., filed Feb. 22, 2013): added to the "coal-fired power plants challenges" slide. Several environmental groups filed a citizen suit alleging that the owner of a coal-fired power plant violated the Clean Air Act, including monitoring requirements for carbon dioxide. According to the complaint, the alleged violations are based on the company's filings with the Massachusetts Department of Environmental Protection, including quarterly excess emissions reports, permit deviation reports, and semiannual and annual compliance reports.

Grocery Manufacturers Association v. EPA (U.S., filed Feb. 21, 2013): added to the "challenges to federal action" slide. Several industry groups filed a motion for certiorari with the U.S. Supreme Court concerning a decision by the D.C. Circuit that the groups lacked standing to challenge EPA waivers that increases the amount of ethanol allowed in gasoline for newer automobiles. In the lawsuit, the groups challenged EPA's decision to grant a waiver allowing more ethanol in fuel for 2007 and newer vehicles, alleging that the agency exceeded its authority under the Clean Air Act. The decision raises from 10 percent to 15 percent the maximum ethanol level in gasoline used in these vehicles. In August 2012, the D.C. Circuit dismissed the lawsuit on standing grounds, holding that none of the industry groups that challenged the decision could show that they were harmed by the rule given that the waivers did not directly impose regulatory restrictions, costs, or other burdens on any of the groups.

Center for Biological Diversity v. California Department of Conservation (Cal. Super. Ct., filed Jan. 24, 2013): added to the "challenges to state action" slide. Several environmental groups commenced a lawsuit against the California Department of Conservation (CDEC) alleging that the state has failed to properly oversee hydraulic fracturing operations. According to the complaint, the state's Underground Injection Control program requires a division of CDEC to regulate oil and natural gas fracking operations. The lawsuit seeks to prohibit hydraulic fracturing of oil and natural gas wells until CDEC takes steps to regulate the wells and ensure that the operations pose no risks to public health or the environment.

Update #48 (Feb. 13, 2013)

FEATURED DECISION

Coalition for Responsible Regulation v. EPA (D.C. Cir. Dec. 20, 2012): added to the "challenges to federal action" slide. The D.C. Circuit denied a motion to rehear lawsuits challenging EPA's greenhouse gas regulations, voting 6-2 against hearing the case en banc. The court held that there was no basis for such review. At issue in the case is EPA's December 2009 finding that GHG emissions pose a danger to the public and should be regulated, the agency's 2010 emissions standards for vehicles, its June 2010 tailoring rule which limited GHG permitting to the largest stationary sources, and the agency's historical application of its prevention of significant deterioration (PSD) permitting program. In June 2012, the court dismissed all challenges to the agency's GHG regulations, concluding that the endangerment finding and the tailpipe rule were not arbitrary or capricious, EPA's interpretation of the governing CAA provisions was unambiguously correct, and no petitioner had standing to challenging the timing and tailoring rules.

DECISIONS AND SETTLEMENTS

American Petroleum Institute .v EPA (D.C. Cir. Jan. 25, 2013): added to the "challenges to federal action" slide. The D.C. Circuit vacated a decision by EPA that petroleum refiners blend 8.65 million gallons of cellulosic biofuel into the gasoline supply in 2012 as part of its renewable fuel standard, holding that the agency must set blending mandates that reflect actual production estimates and not ones that are merely aspirational. According to EPA, the industry produced

only 20,069 gallons of such oil in 2012. According to petroleum refiners, the lack of such fuel would require them to purchase $8 million worth of renewable fuel credits from EPA because no such fuel was available. The court held that that Congress intended the Energy Independence and Security Act to drive the development of the cellulosic ethanol industry and that the statute required EPA to product a projection that aims at accuracy. The law originally required that the 500 million gallons be produced in 2012. This was lowered by the agency to 8.65 million gallons.

Citizens Climate Lobby v. California Air Resources Board (Cal. Super. Ct. Jan. 25, 2013): added to the "state NEPAs" slide. A California state court upheld state regulators' authority to use carbon offset projects as a compliance tool under the state's economy-wide GHG cap-and-trade program. The lawsuit alleged, among other things, that the offset projects do not ensure that the emission reductions would be "additional" to those otherwise achieved under the law. The court rejected the petition, holding that the statute gave CARB vast discretion to develop regulations to curb GHG emissions and that the evidence demonstrated that the agency's use of the standards-based approach in developing the carbon offset protocol was consistent with the law.

Honeywell International Inc. v. EPA (D.C. Cir. Jan. 22, 2013): added to the "challenges to federal action" slide. The D.C. Circuit rejected a challenge from two manufacturing companies concerning EPA's approval of transfers of allowances for production and use of hydrochlorofluorocarbons (HCFCs) by competitor companies under a federal cap-and-trade program. HCFCs are ozone depleting gases that also contribute to climate change. EPA's allowance system caps overall production and consumption of HCFCs and establishes company-by-company baselines for two HCFCs (HCFC-22 and HCFC-142b) based on their historical usage. Allowances can be transferred between pollutants within the same company or between companies for the same pollutant. In 2008, EPA approved the transfers of allowances by competitors of Honeywell and DuPont, which served to increase the competitor companies' baseline allowances under the trading program and to reduce the market share and allowances for Honeywell and DuPont. In August 2010, the D.C. Circuit held that EPA must honor the transactions when setting new baseline allowances of HCFCs for companies participating in the program. The court denied the challenge, holding that it must abide by its August 2010 decision.

Grocery Manufacturers Association v. EPA (D.C. Cir. Jan. 15, 2013): added to the "challenges to federal action" slide. The D.C. Circuit denied a motion from grocery producers to rehear lawsuits challenging EPA's decision allowing gasoline containing up to 15 percent ethanol (E15) allowed in gasoline for 2001 and newer automobiles. In August 2012, the court dismissed lawsuits challenging the decision for lack of standing, holding that none of the groups challenging the rule could show that they were injured by it given that it did not impose any regulatory restrictions, costs, or other burdens on them.

Anderson v. City and County of San Francisco (Cal. Ct. App. Jan. 14, 2013): added to the "state NEPAs" slide. An individual challenged an environmental impact report (EIR) prepared in conjunction with an update of San Francisco's bike plan on numerous grounds, including that the report failed to properly analyze the increased amounts of GHG emissions caused by several

aspects of the plan, including allegedly degraded intersections that would increase car idling. This court affirmed the dismissal of this and other issues, holding that the lower court properly concluded that the EIR properly addressed these. However, the court did remand the case given that the EIR failed to make a finding of infeasibility with respect to certain mitigation measures.

Alaska Oil and Gas Association v. Salazar (D. Alaska Jan. 11, 2013): added to the "Endangered Species Act" slide. A federal district court in Alaska overturned the U.S. Fish and Wildlife Service's designation in 2011 of 187,157 square miles of coastal lands, barrier islands, and ice-dotted marine waters as critical habitat for the polar bear, concluding that the area in question was too big to be justified. The court further held that the agency failed to show sufficient evidence that much of the land and barrier islands included in the designation held polar bear dens, included features suitable for dens, or had areas suitable for maternal bears rearing newly emerged cubs. The court held that the agency could not speculate as to the existence of such features. The court remanded the designation to the agency for further studies.

Sierra Club v. Tahoe Regional Planning Agency (E.D. Cal. Jan. 4, 2013): added to the "state NEPAs" slide. A federal district court in California blocked expansion of a ski resort in Lake Tahoe after finding that the environmental analysis for the project failed to adequately assess the economic feasibility of a smaller proposal. Among other things, the lawsuit alleged that the environmental impact report failed to adequately address the project's GHG emissions. The court rejected this and other environmental concerns, but held that the report failed to make a meaningful comparison between a smaller and larger project. The court therefore remanded the matter to the county planning agency to redo the economic feasibility analysis.

North Dakota v. Heydinger (D. Minn. Dec. 21, 2012): added to the "challenges to state action" slide. North Dakota sued Minnesota over a Minnesota law designed to reduce GHG emissions, alleging that the law violated the Commerce Clause because it would prohibit North Dakota from selling electricity to Minnesota. The lawsuit alleged that Minnesota's Next Generation Energy Act, which took effect in 2009 and prohibits the importation of power from any new large energy facility that would contribute to state-wide carbon dioxide emissions, violates the Commerce Clause and the Supremacy Clause. According to the lawsuit, the law defines power sector carbon dioxide emissions to include carbon dioxide emitted from the generation of electricity generated outside of Minnesota but consumed in the state. In November 2012, several environmental groups moved to intervene in the case. The district court denied the motion, holding that the groups could not intervene given that they could not demonstrate a sufficient interest in the outcome of the case and that generalized interests in the reduction of carbon dioxide emissions were not enough to confer standing.

American Petroleum Institute v. EPA (D.C. Cir. Dec. 17, 2012): added to the "challenges to federal action" slide. The D.C. Circuit partially dismissed a lawsuit challenging EPA's renewable fuel standard for 2011, holding that the industry group that filed the lawsuit did not file it within 60 days as required. However, a portion of the lawsuit challenging the agency's decision to deny industry petitions to waive the cellulosic ethanol component of the renewable fuel standard for 2011 will be allowed to proceed. EPA required 6.6 million gallons of cellulosic biofuel to be blended into the nation's gasoline supply in 2011. The petroleum industry argued that the requirement should be waived because cellulosic biofuel is not being produced

commercially. Refiners must pay penalties to EPA if they are unable to meet the renewable fuel standard requirements.

Las Brisas Energy Center LLC v. EPA (D.C. Cir. Dec. 13, 2012): added to the "challenges to federal action" slide. The D.C. Circuit dismissed as premature power industry challenges to EPA's proposed carbon dioxide emissions limits for new fossil fuel-fired power plants. The court held that given that these proposed standards are not final actions subject to judicial review. The proposed standards issued pursuant to CAA Section 111 would limit new fossil fuel-fired power plants to 1,0000 pounds of carbon dioxide emissions per megawatt hour. The proposal would not apply to existing or modified sources.

NEW CASES, MOTIONS AND NOTICES

In re Pio Pico Energy Center LLC (EPA Env. Appeals Board, filed Dec. 19, 2012): added to the "coal-fired power plants challenges" slide. The Sierra Club filed an appeal with the EPA Environmental Appeals Board alleging that the agency improperly excluded cleaner generation technologies when it issued a GHG emissions permits to a California power plant. The group asked the board to overturn the prevention of significant determination (PSD) permit issued to the plant. In particular, the Sierra Club alleged that the agency did not give adequate consideration to requiring the plant to install cleaner combined-cycle turbines rather than the less efficient single-cycle turbines. According to the plant, the combined-cycle units do not power up quickly enough to provide the sort of peak power the plant is intended to generate.

Center for Biological Diversity v. Export-Import Bank of the United States (N.D. Cal., filed Dec. 12, 2012): added to the "Endangered Species Act" slide. Three environmental groups filed a lawsuit against the Export Import Bank alleging that it failed to perform rigorous environmental assessments before approving $2.95 billion in financing for an Australian liquefied natural gas project. The $20 billion project will drill up to 10,000 coal-seam gas wells and install nearly 300 miles of pipeline to transport the gas to the coast. The complaint alleges that the bank violated the Endangered Species Act, NEPA, and other environmental laws when issuing the financing. The case will test the unresolved legal issue of whether the ESA applies to federal agency actions take outside of U.S. borders.

Utility Air Regulatory Group v. EPA (D.C. Cir., filed Dec. 13, 2012): added to the "challenges to federal action" slide. A power industry group filed a lawsuit against the EPA challenging the fuel economy and GHG emissions standards issued in October 2012 for cars and light trucks. The final rule requires light-duty vehicles to achieve an average of 54.5 mpg by 2025.

Notice of Intent to Sue (EPA, Dec. 11, 2012): added to the "Clean Air Act" slide. Seven states issued a notice of intent to sue EPA unless the agency takes action to curb methane emissions from hydraulic fracturing. The states, led by New York, said EPA violated the Clean Air Act because its new source performance standards for hydraulic fracturing do not directly regulate methane emissions. According to the states, cost-effective controls are available to the natural gas industry that could control methane. The states are asking EPA to determine whether setting a methane performance standard would be appropriate. If the agency determines that methane

should be regulated, the states are asking that it issue emissions guidelines for existing natural gas wells under CAA Section 111(d).

Update #47 (Dec. 11, 2012)

FEATURED DECISION

Native Village of Kivalina v. ExxonMobil Corporation (9th Cir. Nov. 11, 2012): added to the "common law claims" slide. The Ninth Circuit denied a motion for a rehearing en banc concerning its decision affirming the dismissal of a lawsuit by Inupiat Native Alaskans seeking to recover money damages from a number of energy companies for GHG emissions from the companies' operations that plaintiffs alleged eroded sea ice where the village is located. The appeals court held that plaintiffs could not sue under a theory of public nuisance given that this theory had been displaced by the Clean Air Act. The lawsuit alleged that as a result of climate change, the Arctic sea ice that protects the Kivalina coast from storms has been diminished and that resulting erosion will require relocation of the residents at a cost of between $95 and $400 million.

DECISIONS AND SETTLEMENTS

Cleveland National Forest Foundation v. San Diego Ass'n of Government (Cal. Super. Ct. Dec. 3, 2012): Several environmental groups filed a lawsuit challenging a regional transportation plan developed by the San Diego Association of Governments on the grounds that it failed to address, among other things, GHG emissions and climate change impacts. Specifically, the lawsuit alleges that the defendant violated the California Environmental Quality Act (CEQA) by failing to address these issues in its draft environmental impact report (EIR). The trial court agreed, holding that the EIR did not sufficiently analyze the GHG impacts of the plan through 2050.

Sierra Club v. County of Tehama (Cal. Ct. App. Nov. 30, 2012): added to the "state NEPAs" slide. An environmental group filed a lawsuit alleging that Tehama County's general plan update violated CEQA by, among other things, misrepresenting greenhouse gas emissions in its EIR. The trial court denied the petition. On appeal, the appellate court affirmed, holding that the methodology for quantifying such emissions in the EIR was supported by substantial evidence.

Merced Alliance for Responsible Growth v. City of Merced (Cal. Ct. App. Nov. 29, 2012): added to the "state NEPAs" slide. A community group challenged the City of Merced's approval of a regional distribution center in the city boundaries. The petition alleged that the EIR prepared for the proposed project did not address the project's impact on greenhouse gases and climate change. The state trial court dismissed the petition. On appeal, the appellate court affirmed, holding that that EIR adequately addressed these issues.

Habitat and Watershed Caretakers v. City of Santa Cruz (Cal. Ct. App. Nov. 27, 2012): added to the "state NEPAs" slide. A community group filed a lawsuit alleging that the City of Santa Cruz failed to comply with CEQA when it certified an EIR to amend the city's "sphere of

influence" to include an undeveloped portion of the University of California at Santa Cruz campus to provide water and sewer services to a new development. Among other things, the petition alleged that the EIR did not adequately address the impacts of the project on the environment, including climate change. The trial court dismissed the petition. On appeal, the appellate court reversed, holding that the EIR inadequately addressed feasible alternatives to the project.

NEW CASES, MOTIONS AND NOTICES

American Petroleum Institute v. EPA (D.C. Cir., filed Nov. 26, 2012); ***American Fuel & Petroleum Manufacturers v. EPA*** (D.C. Cir., filed Nov. 21, 2012): added to the "challenges to federal action" slide. Two industry associations filed lawsuits against EPA challenging the agency's 2013 volume requirements for biomass-based diesel fuel. The final rule mandates the use of 1.28 billion gallons of biodiesel in 2013, a 28% increase from the 2012 requirement. According to the lawsuits, the costs for producing the fuel greatly outweigh the benefits and fraudulent biofuel credits undermine the program.

Notice of Intent to Sue (EPA, filed Nov. 27, 2012): added to the "Clean Air Act" slide. New York University's Institute for Policy Integrity served a notice of intent to sue EPA for its failure to propose and adopt regulations for a cap-and-trade system limiting emissions from motor vehicle and aircraft fuels. In 2009, the group served a petition on the agency asking EPA to making a finding under Section 211 of the CAA that emissions from motor fuels could endanger public welfare and then propose a cap-and-trade system to control emissions from fuels used in mobile sources. It also asked that the agency make a finding under Section 231 that aircraft emissions endanger public welfare and then propose a joint rulemaking with the Federal Aviation Administration to incorporate aircraft fuels into the cap-and-trade system. EPA failed to act on the petition, prompting the notice of intent to sue.

American Forest & Paper Association v. EPA (D.C. Cir., filed Nov. 16, 2012): added to the "challenges to federal action" slide. An industry group filed a lawsuit alleging that the emissions factors developed by EPA as part of its GHG reporting requirements for paper mills and biomass-fired boilers exceed actual measured emissions and should be revised. According to the lawsuit, emissions factors the agency requires paper mills and boilers to use when calculating their methane and nitrous oxide emissions greatly overstate actual emissions. EPA's greenhouse gas reporting rule requires facilities such as power plants, petroleum refineries, and manufacturing plants with emissions greater than 25,000 tons per year to submit annual reports.

California Chamber of Commerce v. California Air Resources Board (Cal. Super. Ct., filed Nov. 13, 2012): added to the "challenges to state action" slide. The California Chamber of Commerce filed a lawsuit seeking to invalidate the state's auction of GHG emissions allowances, alleging that the California Air Resources Board (CARB), which runs the auctions, lacks authority to do so under A.B. 32. The lawsuit alleges that the allowances are illegal taxes and that, in adopting A.B. 32, state lawmakers did not intend for CARB to raise revenue through an auction mechanism. The suit was filed the day before the auction took place, and no injunctive relief was sought.

Competitive Enterprise Institute v. U.S. Treasury Dept. (D.D.C., filed Nov. 13, 2012): added to the "other statutes" slide under the "Freedom of Information Act" subsection. A conservative legal foundation filed a lawsuit against the Treasury Department seeking agency emails concerning a possible federal carbon tax. According to the agency, the Obama Administration has no plans to propose a carbon tax and any such legislation would need Republican support. The lawsuit seeks emails from the agency's Office of Energy and Environment that contain the word "carbon."

Public Service Co. of Oklahoma v. EPA (10th Cir. Nov. 13, 2012): added to the "challenges to coal-fired power plants" slide. EPA solicited public comment on a proposed settlement agreement in which the Public Service Company of Oklahoma would take one coal-burning unit out of commission and install better pollution control equipment on another. The proposed agreement would settle a lawsuit brought by a company that owns the power plant against EPA that challenges a final rule partially disapproving Oklahoma's state implementation plan.

Environmental Integrity Project v. Jackson (D.D.C., proposed consent decree filed Oct. 18, 2012): added to the "coal-fired power plant challenges" slide. EPA agreed to respond by January 15, 2013 to a petition asking the agency to object to a Clean Air Act permit issued by Texas regulators for a coal-fired power plant. In their petition, plaintiffs asked EPA to object to the permit because it incorporated by reference a Texas pollution control standard permit. EPA disapproved Texas's proposed clean air plan revision incorporating the standard permit for pollution control projects into the Texas plan in September 2010.

Petition to EPA (EPA, filed October 18, 2012): added to the "other statutes" slide under "Clean Water Act." The Center for Biological Diversity filed a petition with EPA requesting that the agency revise state water quality standards for marine pH under the Clean Water Act to address ocean acidification. The petition alleges that ocean acidification is occurring as a result of anthropogenic carbon dioxide emissions. The petition alleges that the marine pH water quality standards of 15 coastal states and territories exceed EPA's recommended water quality criterion, and that these standards are inadequate to product aquatic life from the harmful effects of ocean acidification.

Update #46 (Nov. 8, 2012)

FEATURED DECISION

Town of Babylon v. Federal Housing Finance Agency (2d Cir. Oct. 24, 2012): added to the "NEPA" slide. A town commenced a lawsuit against the Federal Housing Finance Agency and several other related government agencies seeking a declaration that defendants' actions with respect to the town's Property Assessed Clean Energy (PACE) program on properties that had PACE liens violated several federal statutes, including NEPA. The town's PACE program allowed residential building owners to take out a low-interest loan for energy efficiency upgrades and then repay these loans over time via an annual property tax assessment. Defendants moved to dismiss. The district court granted the motion, holding that it was without jurisdiction to review FHFA's actions in its role as a conservator and that the town lacked Article III standing

since it could not demonstrate redressibility. On appeal, the Second Circuit affirmed on identical grounds.

DECISIONS AND SETTLEMENTS

Sierra Club v. 22nd District Agricultural Association (Cal. Super. Ct. Oct. 2, 2012): added to the "state NEPAs" slide. A California state court held that an environmental impact report performed on a renovation project at a fairgrounds failed to describe all GHG emissions resulting from its operations. The lawsuit challenged the impact report, prepared pursuant to the California Environmental Quality Act (CEQA), which excluded the fairgrounds' baseline GHG emissions from its traffic assessment on the grounds that the portion of the roadway traffic attributable to the facility was unknown and thus could not be estimated. The court rejected this, holding that a good-faith effort, supported by factual data, was required.

Agriculture, Business & Labor Educational Coalition of San Luis Obispo County v. County of San Luis Obispo (Cal. Ct. App. Oct. 30, 2012): added to the "state NEPAs" slide. A coalition of community groups commenced an action concerning San Luis Obispo County's negative declaration pursuant to CEQA concerning a series of amendments to the county's land use regulations concerning "smart growth" principles. The coalition alleged that an environmental impact statement was required given that the amendments would have a significant impact on the environment. Among other things, the coalition alleged that the amendments would lead to an increase in GHG emissions. After a trial, the trial court entered judgment in favor of the county. On appeal, the appellate court affirmed, holding that the coalition failed to cite to any evidence that would demonstrate that the amendments would have a significant environmental impact.

Chung v. City of Monterey Park (Cal. Ct. App. Oct. 23, 2012): added to the "state NEPAs" slide. An individual commenced a lawsuit challenging Monterey Park City Council's decision to place a measure on the ballot that would require the city to seek competitive bids for trash service without first performing an environmental review pursuant to CEQA. The trial court dismissed the suit, determining that the measure was not a "project" within the meaning of CEQA and therefore the measure did not require environmental review before being placed on the ballot. On appeal, the appellate court affirmed on identical grounds.

Northern Plains Resource Council v. Montana Board of Land Commissioners (Montana Sup. Ct. Oct. 23, 2012): added to the "state NEPAs" slide. The Montana Supreme Court affirmed the dismissal of a challenge to the Montana State Land Board's decision to lease access to 1.2 billion tons of coal without first complying with the Montana Environmental Policy Act (MEPA). Plaintiffs argued that a state law exempting coal leases from environmental review under MEPA violated the Montana Constitution. The trial court disagreed, holding that the exemption only delayed the environmental review until a more detailed mining plan was presented at the permitting stage. On appeal, the Supreme Court affirmed, holding that the state's lease of mineral interests to a coal company was not a major government action affecting the quality of the human environment as would trigger the requirement for the preparation of an environmental impact statement under MEPA. In addition, the court held that a rational basis existed for the deferral of the EIS until there was a specific proposal to consider.

San Diego Navy Broadway Complex Coalition v. Dept. of Defense (S.D. Cal. Oct. 17, 2012): added to the "NEPA" slide. A community group commenced a lawsuit against the Department of Defense concerning its revocation of Naval administrative facilities in downtown San Diego that included the development of 3.25 million square feet of space. Among other things, the coalition alleged that a 2009 environmental assessment prepared pursuant to NEPA failed to address climate change impacts related to the development, alleging that the project will emit approximately 69,000 metric tons of GHGs and that the assessment failed to quantify any proposed reduction in GHG emissions. The court granted defendant's motion for summary judgment, holding that the assessment set forth an 11-page discussion of climate change issues which included a discussion of actions to be taken to reduce the number of vehicle trips, building energy efficiency, vehicle fuel efficiency, and renewable energy.

Colorado River Cutthroat Trout v. Salazar (D.D.C. Oct. 16, 2012): added to the "Endangered Species Act" slide. Several environmental groups commenced an against the Fish and Wildlife Service (FWS) concerning its finding that listing the Colorado River Cutthroat Trout as endangered or threatened under the Endangered Species Act was not warranted at this time. Among other things, plaintiffs alleged that the FWS did not consider the impact of climate change in assessing threats to the species. Both sides moved for summary judgment. The district court granted the FWS' motion, holding that the agency's finding was not contrary to the Endangered Species Act nor was it arbitrary and capricious. In particular, the court held that there was no requirement that the agency discuss climate change in its listing decisions and that it was reluctant to impose such a requirement where the issue was not raised in the plaintiffs' comments to the agency.

Bell v. Cheswick Generating Station (W.D. Penn. Oct. 12, 2012): added to the "coal-fired power plant challenges" slide. A federal district court in Pennsylvania held that neighboring landowners of a coal-fired power plant are not entitled to monetary damages and injunctive relief for damage the plant allegedly caused to their property under common law tort theories because the Clean Air Act preempted their claims. Two individuals filed suit against the power plant on behalf of a putative class of at least 1,500 neighbors, alleging that emissions from the plant damaged their property and those living within a 1-mile radius of it. Specifically, the plaintiffs complained of odors and coal dust which allegedly required them to clean their properties constantly. The court granted the plaint's motion to dismiss, holding that to grant the plaintiffs' relief would require the court to alter the emissions standards for the plant under the Clean Air Act, something that would impermissibly encroach on and interfere with the CAA's regulatory scheme.

North Dakota v. Swanson (D. Minn. Sept. 30, 2012): added to the "state NEPAs" slide. North Dakota sued Minnesota over a Minnesota law designed to reduce GHG emissions, alleging that the law violated the Commerce Clause because it would prohibit North Dakota from selling electricity to Minnesota. The lawsuit alleged that Minnesota's Next Generation Energy Act, which took effect in 2009 and prohibits the importation of power from any new large energy facility that would contribute to state-wide carbon dioxide emissions, violates the Commerce Clause and the Supremacy Clause. According to the lawsuit, the law defines power sector carbon dioxide emissions to include carbon dioxide emitted from the generation of electricity generated outside of Minnesota but consumed in the state. Minnesota moved to dismiss certain

claims on various grounds. The district court granted the motion in part, holding that North Dakota had stated a *prima facie* claim that the Next Generation Energy Act was preempted by federal law. However, it dismissed claims alleging violations of the Privileges and Immunities Clause, holding that the law did not discriminate against North Dakota residents in obtaining employment in Minnesota. In addition, the court dismissed claims alleging violations of the Due Process Clause, holding that North Dakota failed to establish a constitutionally protected property interest.

WildEarth Guardians v. Lamar Utilities Board (D. Col. Sept. 28, 2012): added to the "challenges to coal-fired power plants" slide. A federal district court in Colorado held that a coal-fired power plant violated the Clean Air Act by not meeting the maximum achievable control technology (MACT) standard. In 2004, the authority that owned the plant decided to upgrade the plant and change it from a natural gas-fired plant to a coal-fired one, which would have the effect of increasing its generating capacity. Subsequently, EPA directed the authority to obtain a new source MACT determination. The authority argued that it did not have to obtain such a determination because it was not a major source of hazardous air pollutants. The court disagreed, finding that the plant was a major source of hazardous air pollutants and thus violated the MACT standard.

Shurtleff v. EPA (D.D.C. Sept. 26, 2012): added to the "other statutes" slide under the "FOIA" subsection. The Attorney General of Utah commenced a lawsuit against EPA pursuant to the Freedom of Information Act (FOIA) seeking documents concerning the agency's so-called "endangerment" finding that concluded that greenhouse gases could be regulated under the Clean Air Act. EPA withheld certain documents, claiming that such documents were except from disclosure. After the lawsuit was filed, EPA moved for summary judgment. A magistrate judge recommended that the motion be granted in part, holding that the agency adequately conducted a search of relevant documents concerning the FOIA request, but that certain documents withheld pursuant to the attorney-client privilege should be disclosed.

Californians for Renewable Energy v. Dept. of Energy (D.D.C. May 17, 2012): added to the "other statutes" slide under the "Energy Policy Act" subsection. A nonprofit renewable energy group filed a lawsuit against the Department of Energy (DOE), alleging that the agency had failed to promulgate regulations concerning the American Recovery and Reinvestment Act's modification to the Energy Policy Act as to the selection of applicants for loan guarantees and implementation of the renewable energy program. The program permits the Secretary of Energy to guarantee loans for energy projects that reduce or otherwise eliminate GHG emissions. The district court granted DOE's motion to dismiss, holding that generalized allegations that the group would suffer environmental harms were insufficient to demonstrate an injury.

NEW CASES, MOTIONS AND NOTICES

Petition to Massachusetts DEP (Mass. DEP, filed Nov. 1, 2012): added to the "common law claims" under the "Public Trust Doctrine" subsection. Massachusetts students filed a petition calling for Massachusetts to ensure that carbon dioxide emissions from fossil fuel are reduced by 6 percent per year beginning in 2013 and to consider ways to reduce GHG emissions by more than 25 percent by 2020. The petition calls on Massachusetts Department of Environmental

Protection to expand its existing GHG reporting program to include every substantial source of GHGs in Massachusetts, and to adopt implementing regulations.

Mann v. The National Review (D.C. Super. Ct., filed Oct. 24, 2012): added to the "climate change protestors and scientists" slide. Michael Mann, an influential climatologist who was accused of manipulating climate change data, filed a defamation lawsuit against the National Review and Competitive Enterprise Institute for accusing him of academic fraud and for comparing him to convicted child molester Jerry Sandusky.

Plant Oil Powered Diesel Fuel Systems, Inc. v. Dept. of Transportation (D.C. Cir. Oct. 23, 2012): added to the "challenges to federal regulation" slide. A clean diesel company filed a lawsuit challenging EPA's and the Department of Transportation's joint fuel economy greenhouse gas emissions standards for passenger vehicles and heavy-duty truck. In particular, the lawsuit alleges that the regulations only measure greenhouse gases from the tailpipe and do not account for producing the fuels.

Peabody Western Coal Co. v. EPA (D.C. Cir., filed Oct. 19, 2012): added to the "challenges to coal-fired power plants" slide. A coal company sought review of EPA's approval of its Title V operating permit for a surface coal mining operation on a Navajo tribal reservation in Arizona and the agency's Environmental Appeals Board's subsequent denial of the company's petition for review. The company objected to the permit issued by the Navajo Nation Environmental Protection Agency under authority delegated to it by EPA. The company objected to the permit on the ground that the tribal agency should have cited only federal regulations rather than tribal regulations. The EAB rejected this argument, stating that state agencies with delegated authority may cite both state and federal laws.

Farb v. Kansas (Kansas Dist. Ct., filed Oct. 18, 2012): added to the "common law claims" slide under the "Public Trust Doctrine" subsection. Our Children's Trust, an environmental group, filed a lawsuit in Kansas claiming that the state has an obligation to help prevent climate change and to reduce carbon dioxide emissions under the Public Trust Doctrine. The group has filed a series of lawsuits and petitions in several states, requesting that the environmental agencies in these states adopt rules to reduce statewide GHG emissions from fossil fuels pursuant to the Public Trust Doctrine.

Competitive Enterprise Institute v. EPA (D.D.C. Sept. 28, 2012): added to the "other statutes" slide under the "FOIA" subsection. A conservative think tank filed a lawsuit against EPA pursuant to FOIA seeking disclosure of records relating to its top administrators' nonpublic email accounts concerning climate change. The complaint seeks documents related to the agency's alleged "campaign against coal-fired power" which the complaint alleged was exhibited through EPA limits on air toxics emissions generated by coal-fired power plants and EPA's so-called "endangerment" finding that GHG emissions pose a danger to public health.

Petition to BLM to Require Reductions of Emissions of Methane Gas (BLM, filed Sept. 11, 2012): added to the "other statutes" slide under the "Mineral Leasing Act" subsection. Three environmental groups filed a petition with the Bureau of Land Management calling on the agency to require oil and gas companies operating on public lands to reduce their methane

emissions. The petition urges the agency to require such companies to install readily available pollution control measures that would reduce methane gas leaked into the atmosphere during the drilling process. According to the petition, approximately 126 billion cubic feet of gas are vented and flared from federal oil and gas leases every year.

Update #45 (Oct. 3, 2012)

FEATURED DECISION

Native Village of Kivalina v. ExxonMobil Corp. (9th Cir. Sept. 21, 2012): added to the "common law claims" slide. The Ninth Circuit affirmed the dismissal of a lawsuit by Inupiat Native Alaskans seeking to recover money damages from a number of energy companies for GHG emissions from the companies' products that plaintiffs alleged eroded sea ice where the village is located. The appeals court held that plaintiffs could not sue under a theory of public nuisance given that it had been displaced by the Clean Air Act. The district court dismissed the case for lack of subject matter jurisdiction, holding that the question of how best to address climate change is a political question not appropriate for a federal trial court to decide. The court also held that the plaintiffs could not demonstrate that the companies had caused them injury. The lawsuit alleged that as a result of climate change, the Arctic sea ice that protects the Kivalina coast from storms has been diminished and that resulting erosion will require relocation of the residents at a cost of between $95 and $400 million.

DECISIONS AND SETTLEMENTS

Aranow v. State of Minnesota (Minn. Ct. of Appeals Oct. 1, 2012): added to the "common law claims" under the "public trust doctrine" subsection. Our Children's Trust, an environmental group, filed dozens of lawsuits in federal court and all 50 states asserting that the federal government and state governments have an obligation under the public trust doctrine to regulate GHG emissions. In Minnesota, the group commenced a lawsuit against the Governor and the Minnesota Pollution Control Agency, which moved to dismiss. A state trial court granted the motion, holding first that the Governor was not a proper party because he had no legislative authority to implement the policies sought by the plaintiff. Turning to the merits, the court held that that the public trust doctrine only applies to navigable waters, not the atmosphere. In addition, the court held that the plaintiff had no viable claim under the Minnesota Environmental Rights Act given that he had not given the requisite notice and had not sued on behalf of the state, as the statute required. On appeal, a state appellate court affirmed the decision, holding that the doctrine only applied to navigable waters and did not apply to the atmosphere.

American Tradition Institute v. Rector and Visitors of the University of Virginia (Va. Cir. Ct. Sept. 17, 2012): added to the "climate change protestors and scientists" slide. A conservative legal foundation filed a lawsuit under the Virginia Freedom of Information Act seeking documents related to the work of former professor Michael Mann, who was involved in the so-called "climategate" email controversy. In an decision from the bench, the court held that the email correspondence was exempt from disclosure under the Virginia Freedom of Information Act. In particular, the court held that although the emails qualified as public records, they were

exempt from disclosure under an exclusion concerning information produced by facility or staff of public institutions of higher education as a result of study or research on medical, scientific, technical or scholarly issues where such data has not been publicly released.

United States v. DeChristopher (10th Cir. Sept. 14, 2012): added to the "climate change protestors and scientists" slide. An individual was indicted for submitting several bids for oil and gas drilling leases on federal land that he did not intend to pay for. He argued that he did so to prevent the leases from being used in a way that would worsen the effects of climate change. After determining that the individual was not allowed to present the "necessity defense" in explaining his actions, he was sentenced to 24 months in prison and three years of supervised release. On appeal, the 10th Circuit upheld the conviction, holding that the evidence was sufficient to sustain the conviction and that the district court did not err in disallowing the individual from presenting the necessity defense, holding that the first prong, that there was no legal alternative to violating the law, was not present in this case given that the individual could have taken other steps, such as filing a lawsuit to stop the issuance of the leases.

NEW CASES, MOTIONS AND NOTICES

American Petroleum Institute v. EPA (D.C. Cir. Sept. 18, 2012): added to the "challenges to federal action" slide. A coalition of industry groups filed a lawsuit challenging EPA's 2012 cellulosic ethanol requirements set under the renewable fuel program. The petitioners allege that the agency's projections for cellulosic biofuels are unrealistic, as they require refiners to blend 8.65 million gallons of such fuel into the national gasoline supply this year even though only a little over 20,000 gallons have thus far been produced. Refiners will be required to pay penalties for not purchasing the biofuel even if it is not commercially viable.

Luminant Generation Co. LLC v. EPA (5th Cir., filed Sept. 11, 2012): added to the "challenges to coal-fired power plants" slide. The owner of two power plants in Texas filed a petition with the Fifth Circuit seeking a review of an EPA finding that violated Texas's clean air plan. EPA's review alleged that the company modified the two plants without obtaining appropriate permits under the Texas Title V permit process. EPA also alleged that the company failed to use best available control technology at the plants and that its actions resulted in significant emissions of sulfur dioxide and nitrogen oxides at the two facilities.

American Petroleum Institute v. EPA (D.C. Cir. Sept. 10, 2012): added to the "challenges to federal action" slide. A coalition of industry groups filed a lawsuit challenging an EPA rule that maintains the existing GHG emissions permitting thresholds concerning the agency's tailoring rule, which limits GHG permitting to the largest industrial sources. On July 12, EPA issued the third step of the tailoring rule, retaining the existing permitting thresholds of Title V and prevention of significant deterioration emissions permits. New facilities that emit 100,000 tons per year of carbon dioxide-equivalent and existing facilities that increase their emissions by 75,000 tons per year of carbon-dioxide equivalent will be required to obtain prevention of significant deterioration and Clean Air Act Title V operating permits. According to EPA, it is retaining those existing permitting thresholds because state permitting authorities need more time to develop the infrastructure necessary to issue GHG permits.

Update #44 (September 6, 2012)

FEATURED DECISION

Bonser-Lain v. Texas Commission on Env. Quality (Travis Co. Dist. Ct. August, 2012): added to the "common law claims" slide under the "Public Trust Doctrine Lawsuits" subheading. In a case brought by Our Children's Trust, the group filed an administrative petition in Texas requesting that the Texas Commission on Environmental Quality adopt rules to reduce statewide GHG emissions from fossil fuels pursuant to the Public Trust Doctrine. The Commission denied the petition, stating that Texas was currently in litigation with EPA concerning the regulation of GHGs, and that the use of the Public Trust Doctrine in the state had been limited to waters and did not extend to GHGs. In July 2011, the group filed a lawsuit in state court challenging the denial. In July 2012, the judge hearing the case issued a letter order holding that the Commission's conclusion that the Public Trust Doctrine is limited to waters was legally invalid, and that the doctrine includes all natural resources of the state. The judge also held that the Commission's conclusion that it is prohibited from regulating air quality pursuant to Section 109 of the Clean Air Act was also legally erroneous, holding that the CAA was a floor, not a ceiling. In a subsequent judgment, the court repeated its earlier conclusions, but held that "in light of other state and federal litigation, the Court finds that it is a reasonable exercise of [the Commission's] rulemaking discretion not to proceed with the requested petition for rulemaking at this time," effectively dismissing the case.

DECISIONS AND SETTLEMENTS

Grocery Manufacturers Association v. EPA (D.C. Cir. August 17, 2012): added to the "challenges to federal regulations" slide. The D.C. Circuit dismissed lawsuits challenging EPA's decision to increase the allowable ethanol content in gasoline on standing grounds, holding that none of the industry groups that challenged the decision could show that they were harmed by the rule. The agency issued waivers allowing more ethanol in fuel for 2001-06 vehicles and for 2007 and newer vehicles. The waivers raised from 10 percent to 15 percent the maximum ethanol level in gasoline used in these vehicles. The waivers were challenged by trade groups for petroleum producers, engine manufacturers, and food producers, who argued that increasing the ethanol content of gasoline would drive up the price of corn and could damage engines. In a 2-1 decision, the court held that, on its face, the waivers did not directly impose regulatory restrictions, costs, or other burdens on any of the groups.

WildEarth Guardians v. Public Service Company of Colorado (10th Cir. August 10, 2012): added to the "coal-fired power plant challenges" slide. The Tenth Circuit dismissed as moot a lawsuit brought by an environmental group that alleged that Colorado's largest utility violated the Clean Air Act by failing to obtain a valid construction permit for a new coal-fired power plant in Pueblo, Colorado. Specifically, the court held that the company has come into compliance with the existing regulatory scheme, and thus the CAA allegations were moot. The group alleged that the construction of the plant violated the CAA because the company's construction permit lacked required provisions on mercury emissions. In 2008, the D.C. Circuit in *New Jersey v. EPA* rejected the agency's scheme for controlling mercury emissions from

power plants and required regulators to impose additional CAA requirements for new plant construction. After this decision was issued, the company worked with the relevant agencies to come into compliance with the modified regulatory regime during the construction of the plant. As a result, the violations alleged by the environmental group were found to be not reasonably likely to recur, thus rendering the lawsuit moot.

NEW CASES, MOTIONS AND NOTICES

Coalition for Responsible Regulation v. EPA (D.C. Cir., filed August 10, 2012): added to the "challenges to federal regulation" slide. Several states and industry groups filed a motion seeking a rehearing before the D.C. Circuit concerning a series of lawsuit challenging EPA's GHG regulations. In June 2012, the court dismissed all challenges to EPA's greenhouse gas regulations. The ruling upheld four aspects of the rules, including the endangerment finding rule, the tailpipe rule, the tailoring rule and the timing rule. In particular, the court concluded that the endangerment finding and tailpipe rule were neither arbitrary nor capricious; EPA's interpretation of the governing CAA provisions was unambiguously correct; and no petitioner had standing to challenge the timing and tailoring rules. The court dismissed for lack of jurisdiction all petitions for review of the timing and tailoring rules, and denied the remainder of the petitions. The motions allege that the court erred on matters of legal standing, application of the Clean Air Act, and scientific review of EPA's regulations.

Notice of Intent to Sue U.S. Export-Import Bank (notice issued August 2, 2012): added to the "NEPA" slide. Three conservation groups filed a notice of intent to sue the U.S. Export-Import Bank concerning its decision to provide nearly $3 billion in financing for two Australian liquefied natural gas projects. The groups contend that the loans violate NEPA, the Endangered Species Act, and the National Historic Preservation Act. Specifically, the groups contend that the bank never issued environmental impact statements that are required under NEPA. The case raises the issue of whether U.S. environmental laws extend beyond its borders. The notice is a prerequisite before a case ban be brought. The bank has 60 days to respond. In 2009, the bank settled a lawsuit brought by Friends of the Earth, which alleged that the bank contributed to climate change by making $32 billion in loans to fossil-fuel projects. As part of a settlement of the case, the bank agreed to consider GHG emissions as part of its decision-making progress on whether to finance a project.

Louisiana Dept. of Env. Quality v. EPA (5th Cir., filed June 22, 2012): added to the "Clean Air Act" slide. The Louisiana Department of Environmental Quality filed a lawsuit alleging that EPA erroneously rejected state-issued CAA permits that for the first time include GHG limits. The lawsuit contests EPA's March 23, 2012 order disapproving Title V operating permits for a steel plant in St. James Parrish, Louisiana. The agency rejected the permits because it stated that the plant's cumulative emissions impacts were underestimated by dividing the plant's operations into two permits instead of aggregating them. Among other things, the lawsuit alleges that the permits meet the minimum requirements of the CAA and that EPA's objection was untimely.

Update #43 (August 2, 2012)

FEATURED DECISIONS

Sanders-Reed v. Martinez (N.M. Dist. Ct. July 14, 2012): added to the "common law claims" slide, under the "Public Trust Doctrine Lawsuits" subheading. In May 2011, Our Children's Trust, an environmental group, filed lawsuits and administrative petitions in several states, including New Mexico, requesting that the environmental agencies in these states adopt rules to reduce statewide GHG emissions from fossil fuels pursuant to the Public Trust Doctrine. After the lawsuit was filed, New Mexico moved to dismiss. In a brief order, a state court denied the motion, holding that plaintiffs had made a substantive allegation that the state is ignoring the atmosphere with respect to GHG emissions.

Bonser-Lain v. Texas Commission on Env. Quality (Travis Co. Dist. Ct. July 9, 2012): added to the "common law claims" slide, under the "Public Trust Doctrine Lawsuits" subheading. In another case brought by Our Children's Trust, the group filed an administrative petition in Texas requesting that the Texas Commission on Environmental Quality adopt rules to reduce statewide GHG emissions from fossil fuels pursuant to the Public Trust Doctrine. The Commission denied the petition, stating that Texas was currently in litigation with EPA concerning the regulation of GHGs, and that the use of the Public Trust Doctrine in the state had been limited to waters and did not extend to GHGs. In July 2011, the group filed a lawsuit in state court challenging the denial. In July 2012, the judge hearing the case issued a letter order holding that the Commission's conclusion that the Public Trust Doctrine is limited to waters was legally invalid, and that the doctrine includes all natural resources of the state. The judge also held that the Commission's conclusion that it is prohibited from regulating air quality pursuant to Section 109 of the Clean Air Act was also legally erroneous, holding that the CAA was a floor, not a ceiling,

DECISIONS AND SETTLEMENTS

Rialto Citizens for Responsible Growth v. City of Rialto (Cal. Ct. App. July 31, 2012): added to the "state NEPAs" slide. A citizens group commenced a lawsuit challenging the City of Rialto's approval of a 230,000 square foot Wal-Mart "Supercenter." The lawsuit alleged that the city violated the California Environmental Quality Act (CEQA) by issuing a final Environmental Impact Report (EIR) that inadequately analyzed the project's cumulative impacts on, among other things, GHG emissions. The trial court granted the petition and issued a decision invalidating the approval. On appeal, the appellate court reversed, holding that the city did not abuse its discretion in issuing the EIR. With respect to GHG emissions, the court held that the EIR adequately addressed the project's cumulative impacts on such emissions and properly concluded that the impacts were too speculative to determine.

WildEarth Guardians v. Salazar (D.D.C. July 30, 2012): added to the "NEPA" slide. Several environmental groups filed an action concerning the Bureau of Land Management's (BLM) decision to auction off several leases in the Powder River Basin, a region in northeastern Wyoming and southeastern Montana that includes all ten of the highest-producing coal mines in the United States. The lawsuit alleged that the agency violated NEPA by failing to adequately analyze the impacts of increased GHG emissions resulting from the sale of the leases. After the suit was filed, both sides moved for summary judgment. The district court granted BLM's motion, holding that the plaintiffs did not have standing to maintain the action because they

could not show that leasing of the lands in question will lead to climate change impacts resulting in specific adverse consequences to their articulated recreational, aesthetic, or economic interests in the discrete areas where they have concrete plans to work or pursue recreational activities.

Coalition for a Sustainable 520 v. U.S. Dept. of Transportation (W.D. Wash. July 25, 2012): added to the "NEPA" slide. A community organization filed a lawsuit challenging a Final Environmental Impact Statement (FEIS) concerning a bridge to be constructed to replace an existing floating bridge across Lake Washington. Among other things, the organization alleged that the FEIS violated NEPA and Washington state law concerning GHG emissions by not rigorously exploring and evaluating all reasonable alternatives. The court disagreed, holding that the FEIS adequately discussed such alternatives. With respect to state law claims concerning GHG emissions, Washington State Department of Transportation, which was named as a defendant, claimed that it was immune from suit pursuant to the Eleventh Amendment. The court agreed and dismissed the agency.

National Chicken Council v. EPA (D.C. Cir. July 20, 2012): added to the "challenges to federal action" slide. A coalition of meat industry groups filed a lawsuit challenging EPA criteria for determining which biofuels meet the U.S. renewable fuels standard. The meat industry lawsuit objected to provisions in the rule that deem some ethanol facilities at which construction commenced in 2008 and 2009 to be compliant with the standard. The final rule exempted ethanol produced from corn at facilities in or at which construction commenced before December 17, 2007 from the requirement that a renewable fuel must reduce lifecycle GHG emissions by at least 20 percent compared with gasoline. In the final rule, EPA extended the exemption to ethanol produced at facilities that use natural gas or biofuels as an energy source at which construction began before December 31, 2009. In July 2012, the D.C. Circuit dismissed the lawsuit, holding that plaintiffs did not have standing to maintain the lawsuit given that that even if the rule was overturned, there was no evidence that ethanol producers would reduce their production and thus they could not show substantial probably of injury redress.

Black Mesa Water Coalition v. Salazar (D. Ariz. July 11, 2012): added to the "NEPA" slide. A coalition of Navajo and non-Native American community and conservation organizations challenged the approval of a mining permit by the Federal Office of Surface Mining Control and Enforcement. The matter was assigned to an administrative law judge. The coalition moved for a summary decision, alleging that the permit violated NEPA because, among other things, it failed to adequately analyze impacts related to climate change. The judge granted another party's motion for summary decision and held that he need not address the merits of the coalition's motion because the relief it sought had already been granted. The coalition subsequently moved for an award of attorneys' fees, which was denied. The coalition appealed the decision to the Interior Board of Land Appeals, which upheld it. The coalition then filed an action in federal court challenging the Board's decision. The district court upheld the Board's decision, holding that its conclusion that the coalition had not made a substantial contribution to the determination of the issues was not arbitrary and capricious.

In re Tongue River Railroad Co. (Surface Transportation Board June 18, 2012): added to the "NEPA" slide. Several environmental groups moved to reopen a proceeding before the Surface Transportation Board concerning a proposed railroad that would access coal in the Powder River

Basin in Montana and Wyoming. Among other things, the petition alleged that the final Environmental Impact Statement prepared in October 2006 pursuant to NEPA did not consider the emergence of new scientific evidence concerning accelerating effects of climate change and the need to reduce greenhouse gas emissions from the burning of coal and other fossil fuels. In December 2011, the Ninth Circuit reversed in part the Board's decision, holding that the agency failed to take the requisite "hard look" at several environmental issues raised by the project. Specifically, the court held that the EIS ignored the combined impacts of future well development and coal mining projects in the area, improperly relying on a five-year timeline which resulted in a faulty analysis. In a June 2012 decision, the Board agreed to reopen the record and require the company building the railroad to submit a new EIS.

NEW CASES

American Petroleum Institute v. EPA (D.C. Cir., filed July 24, 2012): added to the "challenges to federal action" slide. A petroleum industry group filed a lawsuit concerning EPA's denial of petitions to waive requirements for refiners to blend cellulosic biofuel into their fuels in 2011. Previously, the group had asked EPA to waive the requirement under the renewable fuel standard to blend 6.6 million gallons of cellulosic biofuels into their fuels in 2011 because not enough fuel was available. In May 2012, EPA denied petitions seeking such relief, holding that petitioners should have raised this concern when the 2011 fuel standards were proposed.

Sierra Club v. San Diego County (Cal. Super. Ct., filed July 20, 2012): added to the "state NEPAs" slide. The Sierra Club filed a lawsuit challenging San Diego County's greenhouse gas review standards and a climate action plan. The lawsuit alleges that the county violated CEQA by approving a standard of review for future development concerning GHGs and a climate action plan that fail to support achieving minimum climate stabilization requirements, approving such documents without substantial supporting evidence, and doing so without properly involving or notifying the public in.

Update #42 (July 3, 2012)

FEATURED DECISION

Coalition for Responsible Regulation v. EPA (D.C. Cir. June 26, 2012): added to the "challenges to federal action" slide. The D.C. Circuit issued a highly-anticipated decision dismissing all challenges to EPA's greenhouse gas regulations and reaffirming the rules in their entirety. The ruling upheld four aspects of the rules, including the endangerment finding rule, the tailpipe rule, the tailoring rule and the timing rule. In particular, the court concluded that the endangerment finding and tailpipe rule were neither arbitrary nor capricious; EPA's interpretation of the governing CAA provisions was unambiguously correct; and no petitioner had standing to challenge the timing and tailoring rules. The court dismissed for lack of jurisdiction all petitions for review of the timing and tailoring rules, and denied the remainder of the petitions. Fourteen states and several industry groups had challenged EPA's rulemaking, alleging that the agency overstepped its authority when it declared that greenhouse gas emissions

endangered human health and that it intended to regulate these emissions under the Clean Air Act. A blog entry analyzing the decision is available here.

DECISIONS AND SETTLEMENTS

EPA Response to Petitions Seeking Regulation of Greenhouse Gas Emissions From Aircraft, Marine Engines, and Nonroad Vehicles (EPA, undated): added to the "Clean Air Act" slide. EPA formally responded to three petitions requesting that the agency regulate greenhouse gas emissions from aircraft, marine engines, and other nonroad vehicles and engines under the Clean Air Act. With respect to the petition for aircraft regulations, which was filed in December 2007, EPA stated that it intends to initiate a rulemaking after the D.C. Circuit rules in *Center for Responsible Regulation v. EPA* (see above), and projected that a proposed rule for aircraft would take approximately 22 months to develop. In a separate decision, EPA denied petitions filed in October 2007 and January 2008 seeking regulation of GHG emissions from marine engines and nonroad vehicles and engines on the ground that undertaking such a rulemaking would require significant resources and detract from more pressing issues in the mobile sources area.

Building Industry Association of Washington v. Washington State Building Code Council (9th Cir. June 25, 2012): added to the "challenges to state action" slide. The Ninth Circuit affirmed a district court decision that found that an energy efficient building energy code adopted by the Washington Building Code Council in 2009 met the requirements for obtaining an exemption under the Energy Policy and Conservation Act (EPCA). Specifically, the court held that the 2009 Code met all seven requirements for obtaining a building code exemption under the statute. EPCA sets federal energy efficiency guidelines for residential appliances used in buildings, including heating, ventilation and air conditioning equipment. EPCA also requires that states adopt and periodically revise their building energy codes to comply with the International Energy Conservation Code (IECC). While EPCA prohibits imposing state regulations that are stricter than those set by the IECC, it does allow for exceptions for state energy codes as long as they meet seven enumerated requirements. In February 2011, the district court held that the Council did not violate EPCA when it enacted the 2009 Code. Specifically, the court held that the 2009 Code met all seven of EPCA's requirements to obtain a building code exception under the statute. The Ninth Circuit affirmed, holding that the Code met all seven requirement to obtain an exception. A blog post analyzing the decision is available here.

Association of Irritated Residents v. California Air Resources Board (Cal. Ct. App. June 19, 2012): added to the "state NEPAs" slide. A California appellate court held that the California Air Resources Board (CARB) did not violate the statutory requirements of the Global Warming Solutions Act, otherwise known as AB 32, in approving a strategy to implement the statute. In particular, the court held that CARB did not disregard the law or act arbitrarily or capriciously in adopting the scoping plan. In June 2009, environmental justice groups filed suit objecting to the cap-and-trade program, alleging that it would harm low-income and minority populations because the program allows industrial sources of emissions to purchase credits rather than reduce carbon emissions, which would in turn curb emissions of other pollutants. (see below for related filing with EPA on similar grounds).

Thrun v. Cuomo (N.Y. Sup. Ct. Albany Co. June 13, 2012): added to the "challenges to state action" slide. A New York state court dismissed a lawsuit that sought to block the state's participation in the Regional Greenhouse Gas Initiative (RGGI) on standing grounds. The plaintiffs, three taxpayers, filed the lawsuit alleging that the state had no authority to enter into RGGI without authorizing legislation from the State legislature. Specifically, the lawsuit alleged that New York's participation in the program constituted a tax that can only be approved by the State legislature and that it is unconstitutional because it infringes on federal authority to regulate air pollution and transmission of electric power across state lines. The plaintiffs further alleged that they suffered economic damages in the form of higher electricity rates due to the program. The court disagreed and dismissed the lawsuit, holding that plaintiffs could not show standing because their alleged harm was no different than that of the general public. Because plaintiffs failed to establish that as ratepayers they suffered an injury distinct from that of the general public, they could not assert standing on the basis of that alleged harm. The court further held that even if the plaintiffs could assert standing, the case would be dismissed on laches grounds given that the state implemented its regulations in 2008 and the lawsuit was not filed until 2011.

Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg (Cal. Ct. App. June 4, 2012): added to the "state NEPAs" slide. A California state court awarded attorneys fees to a citizens group after the court granted in part its petition for a writ of mandate challenging an environmental impact report (EIR) under the California Environmental Quality Act of a resort development. In particular, the court found that the EIR was defective for failing to study the water demand associated with vegetation to be planted as part of the mitigation measures, failing to consider the project's aesthetic effects on local vista points and trails, and failing to consider a sufficient range of viable alternatives. However, the court rejected the group's challenge to the EIR's analysis of greenhouse gas emissions, among other things. The group moved for attorneys' fees under state law, which the trial court partially granted on the grounds that the action had enforced an important right affecting the public, had conferred benefits on a large group, and the necessity of the action and the financial burden made the award appropriate. On appeal, the California Court of Appeals affirmed, holding that the award of $382,189.73 was appropriate.

NEW CASES

American Fuel & Petrochemical Manufacturers v. EPA (D.C. Circuit, filed June 12, 2012): added to the "challenges to federal action" slide. Two energy industry groups filed a lawsuit challenging EPA's renewable fuel standards, specifically the agency's decision to require refiners to blend fuel with ethanol or pay the agency for waiver credits. The lawsuit was filed after EPA denied a petition from the groups seeking a waiver of the 2011 cellulosic fuel requirements under the standard. According to the petition, EPA's data revealed that no cellulosic fuel was available during 2011. The lawsuit alleges that the waiver denial amounts to a hidden fuel tax to consumers because it forced refiners to purchase credits representing a fuel that was inaccessible. In denying the petition, EPA said that the organizations had ample opportunity to raise their arguments in response to the two notices of proposed rulemaking but failed to do so.

Las Brisas Energy Center LLC v. EPA (D.C. Cir., filed June 11, 2012); ***White Stallion Energy Center LLC v. EPA*** (D.C. Cir., filed June 12, 2012); ***Sunflower Electric Power Co. v. EPA*** (D.C. Cir., filed June 12, 2012); ***Utility Air Regulatory Group v. EPA*** (D.C. Cir., filed June 12, 2012); ***Tri-State Generation and Transmission Association v. EPA*** (D.C. Cir., filed June 12, 2012); ***CTS Corp. v. EPA*** (D.C. Cir., filed June 13, 2012); ***Power4Georgians v. EPA*** (D.C. Cir., filed June 12, 2012): added to the "challenges to federal action" slide (all cases are listed under "Las Brisas Energy Center LLC v. EPA"). Several power plants and industry groups filed challenges to EPA's proposed carbon dioxide emissions standards for new power plants. Although EPA has not finalized the rule, the petitioners alleged that the rule constitutes final agency action because new plants that begin construction after April 13, 2012, the date the rule was proposed, would be subject to the carbon dioxide limit. The proposed rule would set a carbon dioxide emissions limit of 1,000 pounds per megawatt hour for all new power plants.

Coalition for a Safe Environment v. California Air Resources Board (EPA, filed June 8, 2012): added to the "challenges to state action" slide. Environmental justice advocates filed a complaint with EPA alleging that California's economy-wide greenhouse gas emissions cap-and-trade program violates Title VI of the Civil Rights Act of 1964 because it adversely impacts low-income and minority neighborhoods. Specifically, the groups contend that CARB discriminated against communities of color when it adopted the cap-and-trade program because the residents of those neighborhoods will not benefit from the reduction in emissions the program is designed to achieve. At issue is the basic design of the trading program, which allow emitters to reduce emissions or purchase credits. Petitioners allege that allowing emitters to purchase credits does not result in emission reductions in neighborhoods in and around industrial facilities to reduce harmful air toxics that are emitted along with carbon dioxide.

In re Regional Greenhouse Gas Initiative (N.J. Super. Ct., filed June 6, 2012): added to the "challenges to state action" slide. Two environmental advocacy groups filed a lawsuit in New Jersey state court, alleging that the state's withdrawal from RGGI violated state procedural requirements for regulatory actions. In particular, the plaintiffs alleged that the state's action ignored the public notice-and-comment requirements of the New Jersey Administrative Procedure Act. In May 2011, New Jersey Governor Chris Christie announced that the state would terminate its participation in RGGI at the end of 2011, stating that the program was not effective in cutting emissions of carbon dioxide and had contributed to higher energy prices.

Update #41 (June 4, 2012)

FEATURED DECISION

Alec L. v. Jackson (D.D.C. May 31, 2012): added to the "Common Law Claims" slide. Five children, along with the groups Kids vs. Global Warming and WildEarth Guardians, sued the heads of several federal agencies for failing to adequately address global warming. The plaintiffs proceeded on the theory that the atmosphere is a commonly shared public resource that defendants, as agency heads, have a duty to protect under the public trust doctrine. As relief, plaintiffs asked for an injunction directing the named federal agencies to "take all necessary actions to enable carbon dioxide emissions to peak by 2012 and decline by at least six percent

per year beginning in 2013." Defendants and intervenors argued in a motion to dismiss that plaintiffs failed to state a valid claim for relief. The district court agreed and dismissed the suit. Relying on the recent Supreme Court decision *PPL Montana, LLC v. Montana*, 132 S. Ct. 1213 (2012), the court held that the public trust doctrine is a matter of state, not federal, law. It further held that even if the public trust doctrine were a federal common law claim, such a claim has been displaced in this case by the Clean Air Act (as was similarly held in the 2011 Supreme Court case *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527).

DECISIONS AND SETTLEMENTS

Shell Gulf of Mexico, Inc. v. Greenpeace (D. Alaska May 30, 2012): added to the "climate change protestors" slide. Shell Oil filed a lawsuit in Alaska federal court seeking to block environmental activists from barricading or occupying its drilling ship bound for the Arctic. The company alleged that Greenpeace members unlawfully boarded its ship in New Zealand and chained themselves to drilling equipment meant to stop the ship from reaching the Chukchi Sea. The company alleged causes for action for, among other things, nuisance, piracy, malicious mischief on the high seas, tortious interference with contractual relations, trespass, false imprisonment, and reckless endangerment. Greenpeace moved to dismiss. The court granted the motion in part, dismissing the public nuisance and tortious interference claims, but declined to dismiss the other causes of action. It also expanded a previously granted restraining order blocking activists from barricading or occupying the company's ships bound for the Arctic.

Sierra Club v. Texas Commission on Environmental Quality (Texas Dist. Ct., Travis Co. May 14, 2012): added to the "coal-fired power plant challenges" slide. Two environmental nonprofits filed a lawsuit challenging a Texas state agency's approval of a $3 billion, 1,300 MW coal-fired power plant in Corpus Christi, alleging that the state incorrectly evaluated possible air pollution from the facility in violation of CAA regulations. On May 14, 2012, in a letter to the parties, the judge assigned to the case indicated that he would reverse the agency's approval given that it had made several significant errors when issuing the permit, including not specifying the location, control, and method of material handling. In addition, the permit did not require compliance with several EPA rules, including the NAAQS for 1-hour sulfur dioxide and nitrogen oxide, as well as the mercury and air toxics standards.

WildEarth Guardians v. Salazar (D.D.C. May 10, 2012): added to the "NEPA" slide. Several environmental groups filed an action concerning the Bureau of Land Management's (BLM) decision to auction off several leases in the Powder River Basin, a region in northeastern Wyoming and southeastern Montana that includes all ten of the highest-producing coal mines in the United States. The lawsuit alleged that the agency violated NEPA by failing to adequately analyze the impacts of increased GHG emissions resulting from the sale of the leases. The district court dismissed the action, holding that the groups lacked standing to maintain the action

Stein v. Kyocera Mita America, Inc. (Cal. Super. Ct. May 9, 2012): added to the "climate change protestors" slide. A California state court partially dismissed a lawsuit brought by the actor Ben Stein, who alleged that a Japanese company breached a contract concerning a series of commercials Stein had contracted to do because of his belief that human activity plays no role in climate change. The court dismissed the breach of contract and related claims, holding that there

was insufficient evidence that Stein had conclusively entered into an agreement with the company. However, the court allowed his claim for publicity rights misappropriation to go forward. The actor claims that after withdrawing his offer, the company hired an actor that looks like him to appear in the commercial in question.

Chabot-Las Positas Community College District v. EPA (9th Cir. May 4, 2012): added to the "challenges to coal-fired power plants" slide. The Ninth Circuit issued a ruling upholding the first power plant permit that includes a greenhouse gas emission limit, although the decision does not discuss the GHG requirement. A community group challenged the air permit for the Russell City Energy Center, a 600 MW natural gas facility in Hayward, California. In upholding the permit, the court found that EPA's decision not to require a 24-hour particulate matter standard in an area re-designated as a non-attainment area during the permitting process was supported by precedent.

Consolidated Irrigation District v. City of Selma (Cal. Ct App. April 26, 2012): added to the "state NEPAs" slide. An irrigation district in California petitioned for a writ of mandate challenging the City of Selma's use of a negative declaration under CEQA in approving a 160-unit, 44-acre residential development. The trial court granted the petition, holding that the negative declaration did not adequately address greenhouse gas emissions from the project. The appellate court affirmed, holding that the district had standing to maintain the action and that the evidence in the record should not have been discounted by the city absent a credibility determination. Subsequently, the district moved for leave to conduct limited discovery and to augment the administrative record. The trial court denied the motion. On appeal, the appellate court reversed, holding that the record should have been augmented to include, among other things, the 2007 Intergovernmental Panel on Climate Change, Fourth Assessment Report.

NEW CASES

Dominion Cove Point LLC v. Sierra Club (Md. Cir. Ct., filed May 18, 2012): added to the "climate change protestors" slide. An energy company sought a declaratory judgment that an agreement between it and the Sierra Club pertaining to a liquefied natural gas (LNG) terminal allows it to convert the terminal into a LNG export facility. Specifically, the lawsuit seeks a declaratory judgment that the Sierra Club's effort to block the conversion has no basis under the agreement. Under a series of agreements between the two parties, major changes to the terminal and adjacent areas cannot be made without the environmental group's approval.

Dine Citizens Against Ruining Our Environment v. OSMRE (D. Col., filed May 15, 2012): added to the "NEPA" slide. Several environmental groups filed a lawsuit in Colorado federal court alleging that the federal government did not analyze the overall environmental impact in approving a coal mine expansion permit in New Mexico. The mine at issue is the sole source of coal for the Four Corners Power Plant on the Navajo tribal reservation. The plant is the largest source of nitrogen oxide emissions nationwide.

Shell Gulf of Mexico, Inc. v. Center for Biological Diversity (D. Alaska, filed May 2, 2012): added to the "climate change protestors" slide. Shell Oil filed a lawsuit in Alaska federal court seeking a declaration that the National Oceanic and Atmospheric Administration (NOAA) and

the National Marine Fisheries Service (NMFS) properly issued it an "incidental harassment authorization" in connection with its oil exploration activities in the Chukchi and Beaufort Seas. The complaint alleges that the Center for Biological Diversity and seven other environmental organization have sought to prevent the company from drilling on the Alaska Outer Continental Shelf "by any means necessary" and that it is a "virtual certainty" that these groups will litigate the approvals of this authorization.

WildEarth Guardians v. Bureau of Land Management (D.D.C., filed May 2, 2012): added to the "NEPA" slide. An environmental nonprofit group filed a lawsuit against BLM alleging that the agency's authorization of four large coal leases in the Power River Basin without fully analyzing the climate change impacts of increased carbon dioxide emissions in violation of NEPA. According to the complaint, collectively, the four leases have the potential to produce more than 1.8 billion tons of coal, resulting in over three billion metric tons of carbon dioxide emissions.

Sierra Club v. Energy Future Holdings Corp. (W.D. Texas, filed May 1, 2012): added to the "coal-fired power plant challenges" slide. The Sierra Club filed a lawsuit against a coal-fired power plant near Waco, Texas, alleging that the plant violated particulate standards thousands of times over a four-year period in violation of Texas state law. The lawsuit alleges that the plant violated the opacity limit in the Texas State Implementation Plan and the emissions limit in its operating permit. The Sierra Club alleges that between July 2007 and December 2010, the plant's two units violated the opacity limit more than 6,500 times.

Update #40 (May 4, 2012)

FEATURED DECISION

Rocky Mountain Farmers Union v. Goldstene (9th Cir. April 23, 2012): added to the "challenges to state action" slide. The 9th Circuit held that California could continue to enforce its low-carbon fuel standard pending the state's appeal of a December 2011 district court **decision** holding that the standard was unconstitutional. The decision in effect lifted an injunction issued by the district court pending appeal. In the December 2011 decision, the district court held that because the standard assigns more favorable carbon intensity values to corn-derived ethanol in California than to ethanol derived outside California, it impermissibly discriminates against out-of-state entities. In addition, the district court held that the standard impermissibly regulates channels of interstate commerce. The district court further held that although the standard serves a legitimate local purpose, that purpose could be accomplished through other nondiscriminatory means. The standard aims to reduce the carbon intensity of transportation fuels in California by at least 10 percent by 2020.

DECISIONS AND SETTLEMENTS

AES Corp. v. Steadfast Insurance Co. (Vir. Sup. Ct. April 20, 2012): added to the "common law claims" slide under "money damages." The Virginia Supreme Court reaffirmed its **previous holding** that an insurance company has no obligation to defend or indemnify an energy company

against a lawsuit alleging that its greenhouse gas emissions were contributing to the destruction of an Alaskan village. AES was sued by the Alaskan coastal village of Kivalina, a case that is now before the 9th Circuit. The insurance company refused to defend or indemnify AES in the litigation, declaring that the damage allegedly caused by AES's emissions was not the result of an accident or occurrence covered by its policy. AES sued the insurance company in Virginia state court, contending that the damages alleged by its emissions were the result of a covered occurrence. The trial court dismissed the case. AES appealed the case to the Virginia Supreme Court, which affirmed. AES requested a rehearing, which the court granted. Upon rehearing, the court reaffirmed its prior holding, stating that the allegations by the village were that its damages were the result of AES's intentional actions and not an accident or other occurrence covered by the policy.

Conservancy of Southwest Florida v. U.S. Fish and Wildlife Service (11th Cir. April 18, 2012): added to the "Endangered Species Act" slide. The 11th Circuit affirmed a district court decision dismissing a lawsuit challenging the U.S. Fish and Wildlife Service's denial of petitions to designate critical habitat for the Florida panther. In 2009, several environmental advocacy groups petitioned the FWS to initiate such rulemaking, contending that the species was suffering a decline in population due to fragmentation and degradation of its habitat caused, in part, by climate change. The FWS denied the petitions on the grounds that the measures it was already taking were sufficient. The groups subsequently filed suit in federal court alleged that the denial violated the Administrative Procedure Act and the Endangered Species Act. The district court granted the FWS' motion to dismiss, holding that the FWS' decision was committed to agency discretion by law and thus it could not be reviewed. On appeal, the 11th Circuit affirmed on identical grounds.

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (Cal. Ct. App. April 17, 2012): added to the "state NEPAs" slide. A California appellate court affirmed a ruling that held that a public authority responsible for constructing a light rail line connecting downtown Los Angeles with Santa Monica did not violate the California Environmental Quality Act (CEQA) when it analyzed the impact of the project on, among other things, greenhouse gas emissions using as baseline conditions projected for 2030. The court rejected the notion that CEQA forbids, as a matter of law, the use of projected conditions as a baseline. The petitioners had argued that CEQA required the authority to use baseline conditions that existed sometime between when the notice of preparation of the construction phase was filed in 2007 and when the authority certified the final environmental impact report (EIR) in 2010. The appellate court disagreed, holding that the project would not begin operating until 2015 at the earliest and thus its impact would yield no practical information to decision makers or the public until that time.

Loorz v. Jackson (D.D.C. April 2, 2012): added to the "common law claims" slide under "Public Trust Doctrine." A federal district court in Washington D.C. issued a decision allowing business groups to intervene in a lawsuit that seeks to require the federal government to establish a plan for an immediate cap on greenhouse gas emissions and start lowering these emissions by 6 percent a year beginning in 2013. Several advocacy groups, including Our Children's Trust, filed the federal lawsuit in May 2011 along with similar actions in many states. The lawsuit alleges that the federal government has a duty under the Public Trust Doctrine to reduce

greenhouse gas emissions in the atmosphere. Thus far, none of the state actions have been successful.

Sierra Club v. Mississippi Public Service Commission (Miss. Sup. Ct. March 15, 2012): added to the "coal-fired power plant challenges" slide. In a unanimous decision, the Mississippi Supreme Court reversed a 2010 decision by the Mississippi Public Service Commission that permitted a company to construct a $2.4 billion coal-fired power plant in Kemper County. The plant was to burn locally mined lignite coal and employ a novel type of Integrated Gasification Combined Cycle Gasification technology called "TRIG," which has never before been used on a commercial scale. The company proposed to capture the carbon dioxide associated with burning the gasified lignite and sell it to oil companies who would then sequester it in unidentified geologic formations. The Sierra Club challenged the approval on a number of grounds, including that the carbon sequestration plan had no buyer for the carbon dioxide and that the electricity that would be produced was not in fact needed. The Supreme Court, in a short opinion, held that the Commission's approval was not supported by substantial evidence and thus remanded the case for further proceedings. A CCCL blog post examining this ruling is available **here**.

California Building Industry Association v. Bay Area Air Quality Management District (Cal. Super. Ct. March 5, 2012): added to the "state NEPAs" slide. A California state court issued a decision ordering the Bay Area Air Quality Management District to set aside, depublish, and stop the circulation of thresholds of significance for greenhouse gas emissions when conducting CEQA analyses. The thresholds were intended to be used by the District and other local agencies in the San Francisco Bay Area to determine whether a local land use project would have significant air quality impacts under CEQA. In 2010, the District adopted a resolution which included numeric air quality thresholds, including greenhouse gas emissions, for analyses by lead agencies under CEQA. If a project's emissions exceeded the thresholds, it would result in a finding of significant impact necessitating preparation of an EIR and adoption of mitigation measures. A building industry association filed suit, alleging that the District did not analyze the thresholds as a project under CEQA and failed to study their impact on future development patterns. The court agreed, holding that the thresholds should be set aside pending full CEQA compliance.

New Energy Economy v. Vanzi (N.M. Sup. Ct. Feb. 16, 2012): added to the "challenges to state action" slide. In a procedurally complex action, several nonprofit groups sought to participate in a proceeding challenging rules adopted by the New Mexico Environmental Improvement Board (EIB). Previously, New Energy Economy (NEE) petitioned the EIB to adopt a new rule, known as Rule 100, which cap greenhouse gas emissions from large power producers in the state. After the EIB adopted Rule 100 in December 2010, seven groups, including the New Mexico Public Service Commission (PSC) appealed EIB's adoption of the rule. None of the parties who appealed the rule named NEE or any of the nonprofit groups as a party. In April 2011, NEE and the other nonprofits sought to intervene as a party in the appeal. The appellate court ordered mediation between EIB and PSC but denied the motions to intervene. Thus, the mediation included the seven groups opposing Rule 100 and the newly appointed members of EIB, now composed of members appointed by New Mexico Governor Susana Martinez, who publically opposed the rule. After the mediation began, PSC and EIB requested that the proceeding be

remanded to EIB for further proceedings. On remand, the seven groups opposing the rule filed a new petition with EIB, essentially taking the role of petitioners to rescind or amend Rule 100. The nonprofit groups filed an appeal with the New Mexico Supreme Court seeking a writ of superintending control to overturn the appellate court's decision denying their motions to intervene. The court granted the motions, holding that the appellate court did not have discretion to deny the motions given that the groups were proper parties to the proceeding and participated in a legally sufficient manner.

Consolidated Irrigation District v. City of Selma (Cal. Ct. App. Feb. 8, 2012): added to the "state NEPAs" slide. An irrigation district in California petitioned for a writ of mandate challenging the City of Selma's use of a negative declaration under CEQA in approving a 160-unit, 44-acre residential development. The trial court granted the petition, holding among other things that the evidence presented supported a fair argument that the proposed development may have a significant effect on the environment. In particular, the court held that the negative declaration did not adequately address greenhouse gas emissions from the project. On appeal, the appellate court affirmed, holding that the irrigation district had standing to maintain the action and that the evidence in the record should not have been discounted by the city absent a credibility determination.

Update #39 (April 4, 2012)

FEATURED DECISION

Comer v. Murphy Oil USA (S.D. Miss. March 20, 2012): added to the "common law claims" slide under the "money damages" subsection. A federal district court in Mississippi dismissed the case, holding that the doctrines of res judicata and collateral estoppel bar claims for trespass, nuisance, and negligence against numerous oil, coal, electric, and chemical companies for damages allegedly stemming from Hurricane Katrina. The lawsuit alleged that the companies' activities amount to the largest sources of greenhouse gas emissions and that climate change led to high sea temperatures and sea level rise that fueled the hurricane, which in turn damaged their property. The court held that the lawsuit was nearly identical to the individuals' 2005 lawsuit. The court also found that the plaintiffs lacked standing because their claims were not fairly traceable to the companies' conduct, that the lawsuit presented a non-justiciable political question, that all of the claims were preempted by the Clean Air Act (CAA), that the claims were barred by the applicable statute of limitations, and that the plaintiffs could not demonstrate that their injuries were proximately caused by the companies' conduct. In the 2005 lawsuit, the district court granted defendants' motion to dismiss. On appeal, a panel of the Fifth Circuit partially reversed, holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims presented non-justiciable political questions. The Fifth Circuit subsequently granted a motion for en banc review, but then because of a loss of quorum, the court dismissed the en banc review, which had the effect of reinstating the district court decision dismissing the case. The plaintiffs appealed for a writ of mandamus to the U.S. Supreme Court, which was denied.

DECISIONS AND SETTLEMENTS

Citizens for Open Government v. City of Lodi (Cal. Ct. App. March 28, 2012): added to the "state NEPAs" slide. Two citizen groups challenged the re-approval by the City of Lodi of a conditional use permit for a proposed shopping center project after the original environmental impact report (EIR) issued pursuant to the California Environmental Quality Act (CEQA) was revised and recertified. Among other things, the plaintiffs alleged that a stipulation entered into between them, the City, and the developer allowed them to litigate what would otherwise be barred by res judicata, including the alleged failure to adequately address the impacts of greenhouse gas emissions and climate change. The trial court dismissed the petition. On appeal, the appellate court affirmed. Although it held that the plaintiffs were not barred from raising the issue with respect to climate change and that the EIR failed to analyze this issue, it did not require recirculation of the EIR because this deficiency did not make it fatally flawed.

Center for Biological Diversity v. EPA (D.D.C. March 20, 2012): added to the "Clean Air Act" slide. Several environmental groups filed an action seeking to force EPA to regulate greenhouse gas emissions from aircraft, ships and non-road engines used in heavy industrial equipment. According to the complaint, these sources produce about a quarter of the greenhouse gas emissions from mobile sources in the U.S. but have not yet been regulated by EPA. In a July 2011 decision, the district court held that EPA is not required to issue endangerment findings under the Clean Air Act for greenhouse gas emissions from marine vessels and nonroad vehicles and engines, but held that it is required to issue such findings for aircraft engines. EPA moved to dismiss several additional causes of action in the complaint concerning greenhouse gas emissions and black carbon from non-road vehicles and engines. The district court denied the motion as moot given that EPA agreed to respond to three outstanding petitions by plaintiffs within 90 days.

Public Service Co. of New Mexico v. EPA (10th Cir. March 1, 2012): added to the "coal-fired power plant challenges" slide. The 10th Circuit denied without comment a request from the Public Service Company of New Mexico and Governor Susana Martinez to delay implementing pollution control technology at the San Juan Generating Station in the state. EPA ordered the PSC, the state's largest utility and operator of the plant, to retrofit it with selective catalytic reduction technology to bring the plant into compliance with the CAA within five years. The PSC appealed EPA's order, calling its estimated $750 million price tag unnecessary and expensive. The 10th Circuit denied the request.

NEW CASES AND COURT FILINGS

Citizens Climate Lobby v. California Air Resources Board (Cal. Super. Ct., filed March 28, 2012): added to the "challenges to state action" slide. Several citizens' groups filed a lawsuit against the California Air Resources Board (CARB), alleging that its carbon dioxide offset regulations violate AB 32, otherwise known as the California Global Warming Solutions Act. The lawsuit alleges that the offset protocols allow non-additional credits to qualify as offsets, that CARB's definitions for "conservative" and "business-as-usual" have the potential to be interpreted in more than one way, that the regulations themselves are not enforceable, and that the provisions violate AB 32's integrity standards.

Dine CARE v. EPA (D.D.C., filed March 19, 2012): added to the "coal-fired power plant challenges" slide. The National Parks Conservation Association and a Navajo tribal environmental group filed a lawsuit alleging that EPA failed to require modern pollution controls for two power plants in Arizona. The complaint alleges that EPA should have issued federal implementation plans establishing best available retrofit technology (BART) for the plants. The complaint alleges that the agency issued a proposed BART determination for one of the plants in 2010 but never issued a final determination, and that it never issued a proposed or final determination for the other plant.

Utility Air Regulatory Group v. EPA (D.C. Cir., filed March 16, 2012): added to the "challenges to federal action" slide. An industry group challenged EPA's mercury and air toxics standards for power plants. In addition to challenging the standards, the petition challenges EPA's denial of a petition to remove electric utility steam generating units from the list of source categories that are regulated under Section 112 of the CAA.

American Petroleum Institute v. EPA (D.C. Cir., filed March 9, 2012): added to the "challenges to federal action" slide. The American Petroleum Institute filed a lawsuit in the D.C. Circuit challenging EPA's renewable fuel standards for 2012, alleging that the requirements are unachievable. EPA's renewable energy standards for 2012 require 8.865 million gallons of cellulosic biofuel. The lawsuit alleges that these requirements are a "regulatory absurdity" because the fuel is not widely available, and that the agency should set the requirement by looking at the previous year's actual production volume.

Sierra Club v. County of Riverside (Cal. Super. Ct., filed March 7, 2012): added to the "state NEPAs" slide. Sierra Club and the Center for Biological Diversity filed a lawsuit challenging a large, mixed-use development planned for the shores of the Salton Sea in California. The lawsuit alleges that Riverside County's Board of Supervisors failed to adequately analyze the project's greenhouse gas emissions, among other things. According to the complaint, the project, if completed, would involve 16,665 residential units and more than 5 million square feet of commercial space on 4,918 acres. It would take 35 years to complete all five phases. Among other things, the complaint alleges that residents of the project will be forced to drive long distances for jobs and basic services, which will result in increased air pollution and greenhouse gas emissions.

Koch v. Cato Institute (Johnson Co. Dist. Ct., filed March 2, 2012): added to the "climate change scientists and protestors" slide. The Koch brothers, billionaires who have funded a variety of groups that oppose efforts to regulate greenhouse gas emissions, filed a lawsuit concerning the ownership of the Cato Institute, a libertarian think tank founded by the brothers. The Koch brothers own 50 percent of the shares of the Institute. The lawsuit contends that 25 percent of the remaining shares of the Institute were owned by William Niskanen, who died in 2011, and that these shares should have been sold back to the Institute upon his death pursuant to shareholders' agreements.

Barnett v. Chicago Climate Futures Exchange LLC (Cook Co. Cir. Ct., filed Dec. 16, 2011): added to the "regulate private conduct" slide. The founder of the Chicago Climate Futures Exchange, which is scheduled to close in 2012, was sued in Illinois state court for alleged fraud

in luring two dozen individuals and companies into buying privileges with the environmental derivatives market. The plaintiffs allege that founder Richard Sandor and other agents with the Exchange falsely represented that only 250 trading privileges on the Exchange would be sold, after which their holders would be able to transfer or lease them. According to the complaint, the plaintiffs paid between $5,000 and $120,000 for trading privileges.

Update #38 (March 6, 2012)

FEATURED DECISION

University of Virginia v. Virginia Attorney General (Vir. Sup. Ct. March 2, 2012): added to the "climate change protestors and scientists" slide. The Virginia Supreme Court set aside subpoenas issued by the Virginia Attorney General, holding that he did not have authority to demand records related to a former University of Virginia climate researcher's work. In 2010, the Attorney General issued a civil investigative demand for documents, seeking information on five grant applications prepared by former professor Michael Mann and all emails between Mann and his research assistants, secretaries, and 39 other scientists from across the country. A Virginia trial court judge set aside the demand, holding that four of the five grants were issued by the federal government and thus the Attorney General could not question the professor about them. In addition, the court held that the document requests were not specific enough because they did not show sufficient reason to believe incriminating documents existed. With regard to the state grant, the court held that the Attorney General could question the professor about it. The Supreme Court agreed to hear arguments related to the state grant, concluding that the University was not a "person" under the Virginia Fraud Against Taxpayers Act (FATA) and thus the subpoenas, which were predicated on enforcement of FATA, were invalid.

DECISIONS AND SETTLEMENTS

Williamson v. Montana Public Service Commission (Montana Sup. Ct. Feb. 14, 2012): added to the "challenges to state action" slide. A group of individuals filed an administrative action with the Montana Public Service Commission concerning an electric utility company's provision of street lighting services. Specifically, the plaintiffs sought to have the Commission require the utility company to replace existing street lights with light emitting diode (LED) street lights, contending that adoption of LEDs would, among other things, reduce greenhouse gas emissions. The Commission denied the petition, stating that while LED technology was promising, it did not warrant a mandatory street and outdoor lighting conversion program. The individuals subsequently filed an action in state court, which dismissed on standing grounds. On appeal, the Montana Supreme Court reversed in part, holding that although the individuals named in the original complaint lacked standing because they failed to establish that they were directly affected by the Commission's decision not to require LED lights, an amended complaint naming individuals who were directly affected established standing. Thus, the court remanded the case to the Commission to determine whether to allow the amended complaint.

Northern Plains Resource Council v. Montana Board of Land Commissioners (Montana Dist. Ct. Feb. 3, 2012): added to the "state NEPAs" slide. A Montana state court dismissed a

challenge to the Montana State Land Board's decision to lease access to 1.2 billion tons of coal without first complying with the Montana Environmental Policy Act (MEPA). The plaintiffs argued that a state law exempting coal leases from environmental review under MEPA violated the Montana Constitution. The court disagreed, holding that the exemption only delayed the environmental review until a more detailed mining plan was presented at the permitting stage.

Conservation Law Foundation v. Dominion Energy New England (D. Mass, consent decree filed Feb. 3, 2012): added to the "challenges to coal-fired power plants" slide. The owner of the Salem Harbor Power Station, one of the oldest and most heavily polluting power plants in Massachusetts, agreed not to use coal at any new generating units at the plant after the current facility shuts down in 2014. The consent decree also requires the company to provide $275,000 for supplemental environmental projects designed to reduce air pollution in communities close to the plant and reduce demand for electricity in the region. Several environmental groups filed the lawsuit in 2010, alleging that the company had violated the Clean Air Act more than 300 times in a five-year period.

Peters v. Honda (Cal. Small Claims Ct. Feb. 1, 2012): added to the "regulate private conduct" slide. A small claims court in California awarded the owner of a 2006 Honda Civic Hybrid $9,867 in damages concerning claims that the company had negligently misled the owner concerning claims that the car could achieve as much as 50 miles per gallon. The plaintiff contended that her vehicle never achieved the fuel economy of 51 mpg on highways and 46 mpg in cities that Honda promoted, claiming that her car only achieved around 28 mpg. Under a fuel-economy testing procedure no longer used by the EPA, the Civic Hybrid scored as high as 51 mpg on highways. highway. The agency, after revising its testing methods, rated the current Civic Hybrid at 44 mpg city and highway. Although several class action lawsuits have been filed on behalf of disgruntled owners of the 2003-9 Civic Hybrid, the plaintiff opted out of the settlement class.

Sierra Club v. U.S. Dept. of Agriculture (D.D.C. Jan. 31, 2012): added to the "challenges to coal-fired power plants" slide. A federal district court in the District of Columbia held that USDA's Rural Utilities Service violated NEPA by failing to prepare an environmental impact statement (EIS) in connection with its involvement in the expansion of a coal-fired power plant in Kansas. The court held that because the Service provided approvals and financial support to the project, its involvement amounted to a "major federal action" within the meaning of NEPA. The court held that the Service cannot issue any approvals or arrangements directly related to the project until an EIS is complete.

Aronow v. Minnesota (Minn. Dist. Ct. Jan. 30, 2012): added to the "climate change protestors and scientists" slide. Our Children's Trust, an environmental group based in Oregon, filed dozens of lawsuits in federal court and all 50 states asserting that the federal government and state governments had an obligation under the public trust doctrine to regulate greenhouse gas emissions. In Minnesota, the group commenced a lawsuit against the Governor and the Minnesota Pollution Control Agency, which moved to dismiss. A state trial court granted the motion, holding first that the Governor was not a proper party because he had no legislative authority to implement the policies sought by the plaintiff. Turning to the merits, the court held that that the public trust doctrine only applies to navigable waters, not the atmosphere. In

addition, the court held that the plaintiff had no viable claim under the Minnesota Environmental Rights Act given that he had not given the requisite notice and had not sued on behalf of the state, as the statute required.

AES Corp. v. Steadfast Insurance Co. (Va. Supreme Ct. Jan. 17, 2012): added to the "common law claims" slide. The Virginia Supreme Court granted a motion for a new hearing in a lawsuit in which the court previously held that an insurance company did not have a duty to defendant an energy company being sued for its alleged contribution to climate change. In the motion, AES argued that the court's decision was overly broad and could impair the administration of insurance claims for negligence in Virginia.

United States v. Ameren Missouri (E.D. Mo. Jan. 27, 2012): added to the "challenges to coal-fired power plants" slide. A federal district court in Missouri dismissed an action filed by EPA seeking civil penalties from the owner of two coal-fired power plants concerning two modifications in 2002 and 2004, holding that the five-year statute of limitations had run. The complaint alleged that the company modified the plants in violation of significant deterioration requirements under the Clean Air Act, the Missouri state implementation plan, and the company's Title V operating permit. The court rejected EPA's arguments that the plants have continued to be in violation since 2002 and 2004, holding that these projects were finished in those years, and that the Title V permits, while prohibiting construction and beginning operation without a permit, do not prohibit ongoing operation without a permit into perpetuity.

Rocky Mountain Farmers Union v. Goldstene (E.D. Cal. Jan. 23, 2011): added to the "challenges to state action" slide. A federal district court in California denied a motion by the California Air Resources Board (CARB) to lift an injunction blocking enforcement of the state's low-carbon fuel standard, concluding that it lacked authority to do so because CARB appealed the orders and thus it was without jurisdiction to do so. Previously, on December 29, 2011, the court granted a preliminary injunction, holding that because the standard assigns more favorable carbon intensity values to corn-derived ethanol in California than to ethanol derived in California, it impermissibly discriminates against out-of-state entities.

American Petroleum Institute v. Cooper (E.D.N.C. Dec. 16, 2011): added to the "challenges to state action" slide. A federal district court in North Carolina granted a summary judgment motion dismissing a challenge by an industry group that a North Carolina law requiring oil refiners and producers to sell wholesalers gasoline unblended with ethanol is preempted by federal law. The dispute arose because a federal excise tax credit allows a party who blends ethanol with gasoline to claim a credit against its gasoline excise tax obligations to the IRS. The state statute has the effect of preventing suppliers from receiving the tax credit. The court held that the state law does not interfere with federal law and only requires that suppliers that import gasoline into North Carolina to give distributors and retailers the option to buy gasoline that is not pre-blended.

NEW CASES AND COURT FILINGS

Shell Gulf of Mexico, Inc. v. Greenpeace (D. Alaska, filed Feb. 27, 2011): added to the "climate change protestors and scientists" slide. Shell filed a lawsuit in Alaska federal court

seeking to block environmental activists from barricading or occupying its drilling ship bound for the Arctic. The company alleged that Greenpeace members unlawfully boarded its ship in New Zealand and chained themselves to drilling equipment meant to stop the ship from reaching the Chukchi Sea. The company alleged causes for action for , among other things, nuisance, piracy, malicious mischief on the high seas, tortious interference with contractual relations, trespass, false imprisonment, and reckless endangerment.

American Petroleum Institute v. EPA (D.C. Cir., filed Feb. 21, 2012); ***American Gas Association v. EPA*** (D.C. Cir., filed Feb. 21, 2012): added to the "challenges to federal action" slide. Several oil and natural gas industry groups filed a lawsuit in the D.C. Circuit challenging an EPA rule issued in December 2011 requiring petroleum and gas drilling operations to report 2011 greenhouse gas emissions from wells and storage tanks on a county level and by geologic formation. Among other things, the groups allege that the revisions to EPA's mandatory emissions reporting rule were not subject to a notice-and-comment period before they were finalized. The reporting rule requires old and natural gas systems that emit at least 25,000 metric tons per year of carbon dioxide-equivalent to collect data on their emissions, with 2011 emissions due to EPA by March 31, 2012.

Resisting Environmental Destruction on Indigenous Lands v. EPA (9th Cir., filed Feb. 17, 2012): added to the "Clean Air Act" slide. Several environmental and Alaska Native groups filed an action in the Ninth Circuit seeking to overturn two air quality permits issued by EPA to Shell for offshore Arctic drilling operations. The permits allow a ship owned by Shell and several support vessels to operate in both the Chukchi Sea and the Beaufort Sea. The authorizations are "major source" permits, which allow Shell to emit more than 250 tons of pollutants annually and to adhere to the Clean Air Act's prevention of significant deterioration requirements. Among other things, the plaintiffs contend that greenhouse gases and back carbon from the ships will accelerate the loss of snow and sea ice in the Arctic, to the detriment of members of the Alaska Native communities.

Independent Energy Producers Association v. County of Riverside (Cal. Superior Ct., filed Feb. 3, 2012): added to the "challenges to state action" slide. Several groups representing solar power plant developers filed a lawsuit challenging a $450 per acre annual fee on utility-scale solar projects by Riverside County. The county says that the fee is necessary to defray the costs of impacts and services related to the development of the facilities. The plaintiffs allege that the fee is an illegal tax and also violates the California Mitigation Fee Act.

Update # 37 (Jan. 25, 2012)

FEATURED DECISION

Rocky Mountain Farmers Union v. Goldstene (E.D. Cal. Dec. 29, 2011): added to the "challenges to state action" slide. A federal district court in California temporarily enjoined California from enforcing its low carbon fuel standard. The California Air Resources Board (CARB) adopted the standard in April 2009. It measures the level of greenhouse gas emissions associated with the production, distribution, and consumption of gasoline and diesel fuels and

their alternatives. It is designed to cut the average carbon intensity of fuels by 10 percent over 11 years. Ethanol producers filed suit, alleging that the standard violates the dormant Commerce Clause because it discriminates against out-of-state ethanol producers on its face. The court agreed and granted the preliminary injunction, holding that because the standard assigns more favorable carbon intensity values to corn-derived ethanol in California than to ethanol derived in California, it impermissibly discriminates against out-of-state entities. In addition, the court held that the standard impermissibly regulates channels of interstate commerce. The court further held that although the standard serves a legitimate local purpose, that purpose could be accomplished through other nondiscriminatory means. In addition, the court held that the plaintiffs' preemption claim raises a serious question as to whether the standard is preempted by the Clean Air Act.

DECISIONS AND SETTLEMENTS

West Virginia Highlands Conservancy v. Monongahela Power Co. (N.D. W. Vir. Jan. 3, 2012): added to the "coal-fired power plant challenges" slide. A district court denied a coal-fired power plant's motion to dismiss or stay an environmental group's Clean Water Act citizen suit against it for allegedly discharging impermissible amounts of arsenic into waters of the United States in violation of its state and federal permits. The plant sought to dismiss the lawsuit on the theory that it was an impermissible collateral attack on a permitting decision by the state. The court disagreed, finding that the case was an ordinary citizen suit under the CWA seeking to enforce state and federal permits.

Northern Plains Resources Council, Inc. v. Surface Transportation Board (9th Cir. Dec. 29, 2011): added to the "NEPA" slide. The Ninth Circuit reversed in part a decision by the Surface Transportation Board approving an application from a railroad company to build a 130-mile railroad line in southwestern Montana to haul coal, holding that the agency failed to take the requisite "hard look" at several environmental issues raised by the project. Specifically, the court held that the agency's environmental impact statement (EIS) concerning the proposed line adequately considered the cumulative effect of the coal bed methane wells and the railroad on air quality and wildlife. However, the court held that the EIS ignored the combined impacts of future well development and coal mining projects in the area, improperly relying on a five-year timeline which resulted in a faulty analysis. The court also held that the EIS did not provide baseline data for many wildlife and sensitive plant species.

Sierra Club v. U.S. Army Corps of Engineers (W.D. Ark., consent decree filed Dec. 22, 2011): added to the "coal-fired power plant challenges" slide. A power company and environmental groups reached a settlement that resolves a lawsuit challenging the construction of a 600-megawatt coal-fired power plant in Arkansas. Among other things, the company agreed to build no other generating units at the site and no other power plants within 30 miles of the facility. The company also agreed to construct or secure 400 megawatts of renewable energy resources by the end of 2014, use low-sulfur coal at the plant, and conduct additional stack testing at the plant to determine whether it could comply with more stringent emissions limits for coarse particulate matter. The groups filed the lawsuit in 2010, alleging that the preconstruction review of the proposed facility failed to comply with NEPA, the Clean Water Act, and the Endangered Species Act.

Portland Cement Association v. EPA (D.C. Cir. Dec. 9, 2011): added to the "challenges to federal action" slide. The D.C. Circuit held that EPA issued emissions standards for cement kilns without considering the effects of a related ongoing rulemaking to define solid waste incinerators. In particular, the court held that the rulemaking could have led to some kilns being classified as incinerators, which would mean that they would have different emissions limits. The court also dismissed arguments raised by environmental groups that the standards should include limits on greenhouse gases, holding that EPA is continuing to collect this information and thus the court did not have jurisdiction until the agency issues a final rule.

Sierra Club v. Sandy Creek Energy Associates LP (W.D. Texas, settled Dec. 9, 2011): added to the "coal-fired power plant challenges" slide. The owner of a coal-fired power plant in Texas agreed to reduce mercury and particulate matter emissions in return for environmental groups dropping their challenge to its air permit. In a November 2010 decision, the Fifth Circuit held that the plant violated the Clean Air Act because, as a major source of a hazardous air pollutant, it lacked a determination by a regulatory authority on required emissions control technology. According to the court, because the plant will emit more than 10 tons of mercury per year, it falls under the construction requirements of Section 112(g) of the CAA, which governs hazardous air pollutants. This section prohibits construction of any major source of hazardous air pollutants unless a state or federal authority has determined that the source will meet maximum achievable control technology (MACT) emissions limits for new sources.

Loorz v. Jackson (N.D. Cal. Dec. 6, 2011): added to the "common law claims" slide under the "Public Trust Doctrine" subsection. A federal district court in California transferred a lawsuit alleging that the Public Trust Doctrine requires the federal government to reduce GHG emissions to a federal court in Washington, DC. Federal officials named as defendants in the lawsuit sought a change of venue on grounds that the lawsuit challenged broad, nationwide policies that are prepared by federal agencies in the nation's capital. The lawsuit, which was filed in May 2011, is among dozens of lawsuits and petitions filed in 50 states by Our Children's Trust and other advocacy groups to compel federal and state governments to regulate GHG emissions.

Association of Irritated Residents v. California Air Resources Board (Cal. Super. Ct. Dec. 6, 2011): added to the "state NEPAs" slide. A California state court approved an expanded environmental analysis of alternatives to a cap-and-trade program for implementing the California Global Warming Solutions Act, otherwise known as AB 32. In their lawsuit, plaintiffs alleged that the program fails to minimize GHG emissions and protect vulnerable communities as required by AB 32. Plaintiffs also alleged that the agency violated the California Environmental Quality Act (CEQA) in approving the program. In March 2011, the court issued an order enjoining the state from implementing the program, holding that CARB had not adequately weighed alternatives to the cap-and-trade system. In June 2011, a state appellate court lifted the stay pending appeal. This stay was affirmed by the California Supreme Court in September 2011.

NEW CASES AND COURT FILINGS

Center for Biological Diversity v. Bureau of Land Management (N.D. Cal., filed Dec. 8, 2011): added to the "NEPA" slide. Several environmental groups filed a lawsuit challenging the federal government's leasing of nearly 2,600 acres of public land in California to oil and gas developers, alleging that BLM failed to fully analyze the environmental impacts of high-pressure hydraulic fracturing, otherwise known as "fracking." In June 2011, BLM issued a final environmental assessment finding no significant environmental impact for the lease sale. The lawsuit alleges that the agency ignored or downplayed the impacts of the lease sale on endangered or sensitive species in the area and failed to address the impacts of fracking on water quality and other resources.

WildEarth Guardians v. U.S. Forest Service (D. Col., filed Dec. 6, 2011): added to the "NEPA" slide. Three environmental groups sued the U.S. Forest Service concerning the agency's consent to lease nearly 2,000 acres in the Thunder Basin National Grassland in Wyoming for coal mining, alleging violations of NEPA, the Administrative Procedure Act, the Surface Mining Control and Reclamation Act, and the National Forest Management Act. Under federal law, coal mining is prohibited on national grasslands without permission from USFS. The complaint alleges that the Bureau of Land Management's environmental impact statement concerning the coal leases was legally inadequate.

Poet, LLC v. California Air Resources Board (Cal. Super. Ct., filed Jan. 22, 2010): added to the "challenges to state action" slide. In a companion case to several lawsuits filed in federal court alleging that the state's low carbon fuel standard (see above), a corn ethanol producer filed a lawsuit in California state court challenging the state's low carbon fuel standard. Among other things, the lawsuit alleges that CARB violated CEQA and the California Health and Safety Code in establishing the standard.

Update #36 (Dec. 8, 2011)

FEATURED DECISIONS

Greater Yellowstone Coalition v. Servheen (9th Cir. Nov. 22, 2011): added to the "Endangered Species Act" slide. The 9th Circuit held that the U.S. Fish and Wildlife Service failed to justify its Endangered Species Act (ESA) delisting of the grizzly bears in the Yellowstone region because it did not consider the impact of climate change on a key source of the bear's food supply. The court reversed the agency's 2007 ruling to remove the bear's "threatened" status under the ESA. The decision affirms a lower court ruling that the FWS did not adequately consider the impacts of climate change on whitebark pine nuts, a major source of food for the bears. The decision stated that FWS's delisting decision did not articulate a rational connection between the data before it and its conclusion that whitebark pine declines were not likely to threaten the Yellowstone grizzly bear.

Washington Environmental Council v. Sturdevant (W.D. Wash. Dec. 1, 2011): added to the "Clean Air Act" slide. Two environmental nonprofit groups filed a lawsuit alleging that the Washington State Department of Ecology, Northwest Clean Air Agency, and the Puget Sound Clean Air Agency violated the CAA by failing to implement mandatory provisions of

Washington's State Implementation Plan relating to the control of GHGs from oil refineries. The complaint alleged that four of the five companies that operate oil refineries in the state are operating under expired Title V permits, and none of the permits contain requirements for controlling GHG emissions. Both sides moved for summary judgment. The district court granted the plaintiffs' motion, holding that the law was clear that the state agencies were required to establish reasonably available control technologies (RACT) for GHGs and to apply the RACT standards to oil refineries.

DECISIONS AND SETTLEMENTS

Texas v. EPA (D.C. Cir. Dec. 1, 2011): added to the "challenges to federal action" slide. Texas filed suit against the EPA, challenging a final rule issued by the agency extending its takeover of the state's GHG permitting authority under the Clean Air Act (CAA). The lawsuit challenges an EPA final rule under Section 110 of the CAA that removed the agency's prior approval of Texas' state implementation plan for the prevention of significant deterioration after the state said that it would not implement a GHG permitting program. The lawsuit alleges that EPA's rule is arbitrary and capricious, an abuse of discretion, and contrary to the CAA. The final rule allows the state to continue issuing permits for other pollutants such as sulfur dioxide and nitrogen oxides. After asking the parties to brief whether the case should be held in abeyance while challenges to EPA's endangerment finding, emissions standards for cars and trucks, and a ruling limiting GHG permitting to the largest industrial sources were resolved, the court held that this case could proceed.

NRDC v. California Dept. of Transportation (Cal. Ct. App. Nov. 22, 2011): added to the "state NEPAs" slide. Several environmental groups filed a lawsuit challenging California Department of Transportation's approval of a new diesel truck expressway serving the Ports of Long Beach and Los Angeles, alleging that the final environmental impact review (EIR) pursuant to the California Environmental Quality Act (CEQA) did not, among other things, sufficiently address GHG emissions and associated climate change. The trial court denied the petition. On appeal, the appellate court affirmed, holding that the EIR adequately investigated and discussed the GHG impacts from the project, that the agency's conclusions that the impacts would be "less than significant" was supported by substantial evidence, and that the agency was not required to make a quantitative analysis of GHG emissions in the EIR.

Drewry v. Town Council for the Town of Dendron, Virginia (Vir. Cir. Ct. Nov. 21, 2011): added to the "coal-fired power plant challenges" slide. A Virginia state court held that a Virginia town council unlawfully rezoned land to make way for a proposed coal-fired power plant. The lawsuit alleged that the Dendron Town Council failed to properly notify the public before it voted to approve four land use applications from the owner of the plant and amend the Town's zoning plan in February 2010. The court held that the rezoning was unlawful because the notice circulated by the Town before the meeting said it would receive public comments, but made no mention of a vote.

Sierra Club v. U.S. Dept. of Energy (D.D.C. Nov. 18, 2011): added to the "coal-fired power plant challenges" slide. A district court denied the Sierra Club's motion to preliminarily enjoin the Department of Energy (DOE) from providing funding assistance for the construction and

operation of a coal-fired power plant in Mississippi on the grounds that the agency's EIS was legally insufficient. The court held that alleged harm is not from DOE's disbursement of funds, but from the power company's construction and operation of the plant. In addition, the court held that although the Sierra Club produced evidence that the project was unlikely to have commenced without federal funding, it did not make such a showing regarding the continued viability of the project without federal funding. Moreover, the company provided a sworn affidavit indicating that it will proceed with the project with or without federal assistance or a loan guarantee. Hence, the group failed to meet its burden of showing that it will likely succeed on the merits of its claims.

Sierra Club v. U.S. Army Corps of Engineers (W.D. Ark. Nov. 16, 2011): added to the "coal-fired power plant challenges" slide. The Sierra Club and three chapters of the Audubon Society filed suit against the U.S. Army Corps of Engineers and related parties, seeking an injunction to halt construction of a planned 600 megawatt power plant in Hempstead County, Arkansas. The plaintiffs allege that the Corps violated NEPA and the Clean Water Act when it issued the permit allowing the company to take water from the Little River and fill wetlands during project construction. After the plaintiffs settled with several defendants, the owner of the power plant moved to dismiss on standing and mootness grounds. The district court denied the motion, holding that the plaintiffs had standing to proceed with their case and that the case was not moot even though the construction of the plant was nearly complete.

Save Strawberry Canyon v. U.S. Department of Energy (N.D. Cal. Nov. 14, 2011): added to the "NEPA" slide. A district court held that DOE complied with NEPA when it determined that the construction of a "supercomputer" project on a college campus would have no significant environmental impact and did not require an environmental impact statement (EIS). Specifically, the court held that the environmental assessment (EA) took a hard look at direct and indirect GHG emissions, adequately analyzed the impacts of the projects GHG emissions, and made a reasonable determination that the GHG emissions did not significantly impact the environment. The court also held that the EA adequately described the methodology DOE used to reach its GHG emissions conclusions.

WildEarth Guardians v. Jackson (D. N.M., settlement order dated Nov. 9, 2011): added to the "coal-fired power plant challenges" slide. A federal court approved a settlement between EPA and WildEarth, requiring the agency to act on the group's petition to block an air pollution permit for a 1,800 MW coal plant in New Mexico. The New Mexico Environmental Department issued the permit in August 2010. Subsequently, WildEarth filed a petition with EPA urging the agency to reject the permit on the grounds that it did not comply with the Clean Air Act. The group then sued EPA after the agency missed the Clean Air Act's 60 day deadline to take final action on the petition.

Ballona Wetlands Land Trust v. City of Los Angeles (Cal. Ct. App. Nov. 9, 2011): added to the "state NEPAs" slide. A land trust and several other parties challenged the certification of a revised EIR under CEQA concerning a proposed mixed-use real estate development. Among other things, the lawsuit challenged the EIR's analysis of sea level rise from climate change. A state trial court dismissed the challenge. On appeal, the state appellate court affirmed, holding that the EIR adequately discussed the impacts of sea level rise from climate change.

National Petrochemical and Refiners Association v. EPA (U.S. Sup. Ct. Nov. 7, 2011): added to the "challenges to federal action" slide. The Supreme Court rejected a petition for certiorari concerning a **decision** by the D.C. Circuit which upheld a final rule requiring motor fuel producers to include certain percentages of renewable fuels in their products. EPA published the final rule on March 25, 2010, which changes EPA regulations to include renewable fuel requirements for motor fuels established by Energy Independence and Security Act (EISA) in 2007.

American Tradition Institute v. Rector and Visitors of the University of Virginia (Va. Cir. Ct. Nov. 1, 2011): added to the "climate change protestors and scientists" slide. A Virginia state court ruled that climate scientist Michael Mann can intervene in a lawsuit seeking emails and other documents he authored while a professor at the University of Virginia. In May 2011, a conservative legal organization filed a lawsuit under the Virginia Freedom of Information Act seeking documents related to the work of Professor Mann, who was involved in the so-called "climategate" email controversy.

WildEarth Guardians v. U.S. Forest Service (D. Col. Oct. 31, 2011): added to the "NEPA" slide. Environmental groups sued the U.S. Forest Service, alleging that in a final EIS concerning a coal mine, it failed to identify a reasonable range of alternatives to methane venting, as well as failing to identify measures such as flaring that would mitigate the effects of the release of the methane and failing to analyze the climate change impacts of methane venting. The district court, after finding that WildEarth had standing to maintain the action, upheld the FEIS, holding that the agency's decision not to flare or otherwise capture the methane gas was not arbitrary or capricious. In addition, the court held that the FEIS adequately addressed the climate change-related impacts of this decision.

Town of Babylon v. Fed. Housing Finance Agency (E.D.N.Y. June 13, 2011): added to the "NEPA" slide. A town commenced a lawsuit against the Federal Housing Finance Agency and several other related government agencies, seeking a declaration that the defendants' actions with respect to the town's Property Assessed Clean Energy (PACE) program on properties that had PACE liens violated several federal statutes, including NEPA. The town's PACE program allowed residential building owners to take out a low interest loan for energy efficiency upgrades and then repay these loans over time via an annual property tax assessment. Defendants moved to dismiss. The district court granted the motion, holding that it was without jurisdiction to review FHFA's actions in its role as a conservator and that the town lacked Article III standing since it could not demonstrate redressibility.

NEW CASES AND COURT FILINGS

Cleveland National Forest Foundation v. San Diego Association of Governments (Cal. Sup. Ct., filed Nov. 28, 2011): added to the "state NEPAs" slide. Several environmental groups filed a lawsuit challenging a regional transportation plan developed by the San Diego Association of Governments on the grounds that it failed to address, among other things, GHG emissions and climate change impacts. Specifically, the lawsuit alleges that the defendant violated CEQA by failing to address these issues in its draft EIR.

Delta Construction v. EPA (D.C. Cir., filed Nov. 4, 2011): added to the "challenges to federal action" slide under the "other rules" tab. Several trucking and construction companies filed a lawsuit challenging EPA's rules regarding GHG emissions requirements for heavy-duty trucks. In September 2011, EPA and the National Highway Traffic Safety Administration established GHG emissions limits and fuel economy standards for model years 2014-18 on medium- and heavy-duty pickup trucks, delivery vehicles, and tractor trailers. The lawsuit alleges that EPA failed to send the proposed standards to the agency's Science Advisory Board for review as required under federal law.

Sierra Club v. EPA (9th Cir., filed Nov. 3, 2011): added to the "coal-fired power plant challenges" slide. Several environmental groups filed a lawsuit challenging EPA's decision to grant an air permit to a planned 600-MW power plant in California. The permit exempts the facility from complying with permitting requirements for, among other things, GHG emissions because EPA received the permit application before GHG standards were proposed.

North Dakota v. Swanson (D. Minn., filed Nov. 2, 2011): added to the "challenges to state action" slide. North Dakota sued Minnesota over a Minnesota law designed to reduce GHG emissions, alleging that the law violated the Commerce Clause because it would prohibit North Dakota from selling electricity to Minnesota. The lawsuit alleges that Minnesota's Next Generation Energy Act, which took effect in 2009 and prohibits the importation of power from any new large energy facility that would contribute to state-wide carbon dioxide emissions, violates the Commerce Clause and the Supremacy Clause. According to the lawsuit, the law defines power sector carbon dioxide emissions to include carbon dioxide emitted from the generation of electricity generated outside of Minnesota but consumed in the state.

Sierra Club v. Michigan Dept. of Env. Quality (Mich. Cir. Ct., filed Sept. 26, 2011): added to the "coal-fired power plant challenges" slide. The Sierra Club and NRDC filed a lawsuit in Michigan state court, alleging that an air permit issued by the Michigan Department of Environmental Quality in June 2011 to a company for a proposed coal-fired power plant in Rogers City, Michigan violated the Clean Air Act because it failed to, among other things, establish emission limits that represent best available control technology (BACT) and establish emission limits that reflect maximum achievable control technology (MACT) for hazardous air pollutants.

Update #35 (Oct. 27, 2011)

Featured decision:
Association of Irritated Residents v. California Air Resources Board (Cal. Sup. Ct. Sept. 28, 2011): added to the "state NEPAs" slide. Environmental justice advocates filed a lawsuit challenging the plan of the California Air Resources Board (CARB) to implement the Global Warming Solutions Act of 2006 (also known as AB 32). The complaint alleged that the plan fails to minimize greenhouse gas (GHG) emissions and protect vulnerable communities as required by the Act. Plaintiffs also alleged that CARB violated the California Environmental Quality Act (CEQA) in approving the plan. The complaint sought an injunction preventing

implementation of the plan until CARB brings it into compliance with AB 32. In January 2011, a California state court issued a ruling setting aside CARB's certification of the scoping plan for implementing AB 32. In its ruling, the court held that CARB failed to adequately consider alternatives to cap-and-trade and other climate programs under the law. In May 2011, the court issued an injunction, ordering CARB not to take any additional steps to implement its greenhouse gas cap-and-trade program until it completes an adequate environmental analysis of the program. In June 2011, a state appellate court granted CARB's request for a stay of the injunction. On September 28, 2011, the California Supreme Court rejected the petition by plaintiffs to grant a temporary stay of CARB's implementation of AB 32 pending the plaintiffs' appeal of the June 2011 decision. Thus the program may go into effect.

DECISIONS

In re Polar Bear Endangered Species Act Litigation (D. D.C. Oct. 17, 2011): added to the "Endangered Species Act" slide. A district court in Washington, DC held that the Fish and Wildlife Service (FWS) violated NEPA but not the Endangered Species Act (ESA) when it issued a special rule that specifies the protective mechanisms that apply to the polar bear as a result of its threatened status. In May 2008, the FWS listed the polar bear as threatened under the ESA and then issued a special rule that, among other things, addressed the threat of direct impacts to individual bears and their habitat from oil and gas exploration and development activities within the species' current range. Environmental groups filed suit, arguing that the FWS purposely and unlawfully crafted the rule in such a way as to avoid addressing the threat of climate change and that the FWS cannot effectively provide for the conservation of the polar bear without addressing global GHG emissions. The court held that climate change poses unprecedented challenges of science and policy on a global scale that entitles the agency to great deference, and that, based on the evidence before it, the FWS reasonably concluded that the ESA is not a useful or appropriate tool to alleviate the particular threat to the polar bear from climate change caused by global GHG emissions. However, the court agreed with the environmental groups that the FWS violated NEPA by failing to analyze the potential environmental impacts of its special rule. The FWS was required to conduct at least an initial assessment to determine whether the rule warranted a full EIS. Because the FWS conducted no analysis whatsoever, the court held that the rule violates NEPA and must be vacated.

United States v. EME Homer City Generation LP (W.D. Pa. Oct. 12, 2011): added to the "coal-fired power plant challenges" slide. The U.S. Justice Department filed a lawsuit in federal court alleging that current and former owners and operators of a coal-fired power plant in western Pennsylvania violated the Clean Air Act by making major modifications to two electric generating units without obtaining required permits or installing proper emissions controls. According to the complaint, the defendants made major modifications to one boiler unit in 1991 and to another unit in 1994, which resulted in significantly increased pollutant emissions. The complaint alleged that sulfur dioxide emissions at the plant total 100,000 tons a year, making it one of the largest air pollution sources in the nation. In October 2011, the court granted the defendant's motion to dismiss, holding that the five year statute of limitations had passed for the government to seek civil penalties, and that the government cannot hold the current owners liable for alleged Clean Air Act violations by the former owners.

AES Corp. v. Steadfast Insurance Co. (Va. Sup. Ct. Sept. 16, 2011): added to the "common law claims" slide. An insurance company filed a lawsuit seeking a declaratory judgment that it was not liable for any damages an energy company may be obligated to pay in the *Native Village of Kivalina v. ExxonMobil Corp*. lawsuit filed in federal court. Plaintiffs in *Kivalina* seek to recover damages from the energy company and other parties allegedly caused by climate change that threatens their village in Alaska. The complaint alleges several bases for non-coverage, including that the policies only apply to claims arising from an "accident" or "occurrence" which is not alleged by the *Kivalina* plaintiffs, that the damages occurred prior to September 2003 when the policies were issued, and because GHGs are considered a pollutant which is subject to the pollution exclusion clauses in the policies. The trial court held that the insurance company had no duty to defend or indemnify the energy company. On appeal, the Virginia Supreme Court affirmed, holding that the relevant policies only provide coverage against claims for damages caused by an accident or occurrence, and the release of GHGs did not qualify as either. [Editor's note: The Ninth Circuit has scheduled oral argument on the appeal of the District Court's dismissal of *Kivalina* for November 28, 2011.]

Burton v. Dominion Nuclear Connecticut, Inc. (Conn. Sup. Ct. April 19, 2011): added to the "state NEPAs" slide. An individual commenced an action against the operator of a nuclear power plant, seeking injunctive relief to prohibit the operator from increasing the plant's generating capacity. The complaint alleged violations of the Connecticut Environmental Protection Act (CEPA) and contained other common law causes of action. Specifically, the complaint alleged that increasing the capacity of the plant, combined with warming seawater caused by climate change, would impact marine species. The trial court dismissed the action on standing grounds. On appeal, the Supreme Court affirmed, holding that the Atomic Energy Act preempted the plaintiff's CEPA and state law claims. In addition, the court held that the plaintiff lacked standing to bring a claim under common law nuisance because she did not allege that she would suffer harm different from the general public.

NEW CASES AND COURT FILINGS

Center for Biological Diversity v. U.S. State Department (D. Neb., filed Oct. 5, 2011): added to the "NEPA" slide. Several environmental groups filed a lawsuit seeking to halt the construction of the Keystone XL oil sands pipeline. The lawsuit alleges that the pipeline construction violates NEPA because it allows for the clearing of rare, native grasses and the trapping and relocating of the endangered American burying beetle without carrying out a required environmental review.

NRDC v. EPA (D.C. Cir., filed Sept. 19, 2011): added to the "challenges to federal action" slide. NRDC filed an action in the D.C. Circuit challenging EPA's decision to defer for three years the requirement that facilities burning biomass fuels obtain GHG permits under the Clean Air Act. The rule, which was adopted July 20, exempts facilities that burn wood, various crop residues, grass, and other biomass from the requirements to obtain prevention of significant deterioration permits and Title V operating permits for their GHG emissions. EPA granted the deferral in response to a petition by the National Alliance of Forest Owners. According to the agency, the three years will allow it to conduct further studies of GHG emissions from biomass.

Washington Environmental Council v. Sturdevant (W.D. Wash., filed March 10, 2011): added to the "Clean Air Act" slide. Two environmental nonprofit groups filed a lawsuit alleging that the Washington State Department of Ecology, Northwest Clean Air Agency, and the Puget Sound Clean Air Agency are in violation of the Clean Air Act because they have failed to implement mandatory provisions of Washington's State Implementation Plan relating to the control of GHGs from oil refineries. The complaint alleges that four of the five companies that operate oil refineries in the state are operating under expired Title V permits, and none of the permits contain requirements for controlling GHG emissions.

Update #34 (Sept. 7, 2011)

Featured decision:
Amigos Bravos v. BLM (D.N.M. August 3, 2011): added to the "NEPA" slide. Six environmental groups filed a lawsuit against the Bureau of Land Management (BLM), alleging that a 2008 grant by the agency of 92 oil and gas leases in New Mexico violated federal law by failing to address greenhouse gas (GHG) emissions. Plaintiffs alleged that BLM's grants of the leases were improper under the Federal Land Policy and Management Act, the Mineral Leasing Act, and NEPA. BLM moved to dismiss on standing grounds. The district court granted the motion, holding that plaintiffs failed to demonstrate that their members suffered any injury in fact given that they produced no scientific evidence concerning statements in members' declarations that climate change will lead to less water, decreased biodiversity, siltier rivers, and more forest fires. Thus, these statements were excluded as inadmissible hearsay. The court further held that even it were to accept such statements, none of the alleged effects of climate change created a risk of imminent environmental harm. In addition, the court held that none of the plaintiffs demonstrated that their members used the lands that would be subject to the leases. Finally, the court held that plaintiffs also failed to demonstrate causation concerning these alleged effects and the granting of the leases.

DECISIONS

Barnes v. U.S. Dept. of Transportation (9th Cir. Aug. 25, 2011): added to the "NEPA" slide. Several individuals challenged an order of the Federal Aviation Administration (FAA), relieving the Department of Transportation (DOT) from preparing an environmental impact statement (EIS) concerning the proposed construction of an airport runway. After preparing an Environmental Assessment (EA), the FAA determined that an EIS was not necessary because, among other things, there would not be a significant increase in air emissions. Among other things, the plaintiffs alleged that the EA was deficient because its analysis of GHG emissions was not specific to the locale. The court disagreed, finding that given that GHG emissions are a global problem, it was adequate for the agency to discuss the GHG emissions from the construction of this runway by using percentages and comparing this percentage to all U.S. emissions.

Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa (Cal. Ct. App. Aug. 25, 2011): added to the "state NEPAs" slide. An environmental group filed a lawsuit challenging the City of Yucaipa's approval of a shopping center on land owned by the City. Among other

things, the petition alleged that the project failed to properly consider GHG emissions as required under the California Environmental Quality Act (CEQA). The trial court denied the petition and dismissed the proceeding. On appeal, the appellate court dismissed the case on mootness grounds given that the project had been abandoned and the City had rescinded its approval for it.

Wyoming v. EPA (10th Cir. August 17, 2011): added to the "challenges to federal action" slide. Several related cases challenging EPA's GHG permitting program were transferred from the 10th Circuit to the District of Columbia Circuit. The lawsuits challenge EPA rules that allow the agency to assume permitting responsibilities from states unwilling or unable to establish their own permitting responsibilities concerning the CAA's PSD requirements for GHG emissions.

NRDC v. Wright-Patterson Air Force Base (S.D.N.Y. Aug. 3, 2011): added to the "other statutes" slide under the "FOIA" subsection. A district court granted a motion for summary judgment in a case brought by NRDC, which alleged that the Air Force failed to conduct an adequate search for records responsive to a Freedom of Information Act (FOIA) request concerning a $6 billion coal-to-liquid facility to be built in Ohio by a private company. NRDC alleged that the facility would emit more than 26 million tons of GHGs and sought records concerning the federal government's agreement to purchase any fuel generated by the facility. After receiving the FOIA request, the Air Force sent the NRDC a response stating that no records had been found. After no records were produced in response to subsequent FOIA requests, NRDC filed an action in federal court. The Air Force moved for summary judgment on the ground that it had conducted an adequate search for responsive documents. The district court granted the motion, holding that the agency had conducted an adequate search.

Sierra Club v. U.S. Defense Energy Support Center (E.D. Va. July 29, 2011): added to the "other statutes" slide under the "Energy Policy Act/EISA" subsection. A federal district court dismissed a lawsuit brought by the Sierra Club against a government agency on standing grounds. Sierra Club alleged in its lawsuit that the Department of Defense's procurement of oil from Canadian oil sands violated a Congressional ban on procurement of carbon-intensive fuels pursuant to the 2007 Energy Independence and Security Act and that purchasing the fuel posed a threat to its members by exacerbating the effects of climate change. In its dismissal, the district court held that the Sierra Club failed to establish a causal connection between the alleged injuries and continued procurement of crude from the Canadian oil sands given that climate change is a global problem.

New Energy Economy v. Vanzi (N.M. Sup. Ct. July 27, 2011): added to the "challenges to state action" slide. The New Mexico Supreme Court upheld an appellate court decision concerning a rule adopted by the state Environmental Improvement Board (EIB) concerning GHG emissions. The appellate court had remanded the case to the EIB for resolution. The court also held that an environmental group, New Energy Economy, had the right to intervene in the proceeding before the EIB to defend a the rule, which was adopted by the agency in December 2010 and required large producers of GHGs in the state to reduce their emissions by 3 percent annually from 2010 levels. Several utilities appealed the rule. New Energy Economy had filed the appeal to the Supreme Court, asking that the court not remand the case back to the EIB because it claimed that the agency was allegedly colluding with the utilities to repeal the rule.

Santa Clarita Organization for Planning the Environment v. City of Santa Clarita (Cal. Ct. App. June 30, 2011): added to the "state NEPAs" slide. An environmental organization commenced an action seeking to set aside the City of Santa Clarita's approval of a master plan to allow an existing hospital to expand to approximately double its size. Among other things, the environmental organization alleged that the City violated CEQA by failing to sufficiently analyze and explain the project's impact on climate change in the environmental impact report (EIR). The trial court denied the petition and dismissed the proceeding. On appeal, the appellate court affirmed, holding that the City's analysis was adequate and that its findings were supported by substantial evidence.

***In re* Kids v. Global Warming** (Iowa Dept. of Nat. Resources June 22, 2011); ***In re* Bonser-Lain** (Texas Comm. on Env. Quality June 27, 2011): added to the "common law claims" slide. In May 2011, an environmental group, Our Children's Trust, filed administrative petitions in Iowa and Texas requesting that the environmental agencies in these states adopt rules to reduce statewide GHG emissions from fossil fuels pursuant to the Public Trust Doctrine. The petitions are part of a nationwide campaign by Our Children's Trust and iMatter, groups that seek to combat climate change on behalf of future generations. The Iowa Department of Natural Resources denied the petition, stating that it had already adopted state regulations regarding a GHG inventory of statewide emissions and because of existing and impending federal regulation of GHG emissions from certain sources in the state. The Texas Commission on Environmental Quality also denied the petition, stating that Texas was currently in litigation with EPA concerning the regulation of GHGs, and that the use of the Public Trust Doctrine in the state had been limited to waters and did not extend to GHGs.

SETTLEMENTS

Sierra Club v. U.S. Army Corps of Engineers (W.D. Arkansas July 25, 2011); ***Hempstead County Hunting Club, Inc. v. Southwestern Electric Power Co.*** (8th Cir. July 25, 2011): added to the "challenges to coal-fired power plants" slide. The owner of a coal-fired power plant in Arkansas agreed to partially settle two cases concerning the construction of a new plant. The plant was approved by the U.S. Army Corps of Engineers, but was later challenged by the Sierra Club and other groups who alleged that the Corps failed to comply with the National Environmental Policy Act, the Clean Water Act, and other federal and state laws. As part of the settlement, the owner agreed not to construct any additional generation units at the plant, and not to propose any new coal-fired plants within 30 miles of the facility. The owner will also provide funding to preserve the local environment, to complete a baseline mercury study of the area, and to install new liners at its landfill. However, the Sierra Club and the National Audubon Society are continuing to challenge the air permit and the Corps permit in state and federal court.

Sierra Club v. Portland General Electric (D. Oregon, settlement dated July 14, 2011): added to the "challenges to coal-fired power plants" slide. In 2006, several environmental organizations filed a citizen suit against the only coal-fired power plant in Oregon, alleging multiple violations of the Clean Air Act. After several years of litigation, the parties agreed to settle the case. As part of the settlement decree, the plan agreed to shut down by 2020, and to reduce sulfur dioxide emissions beginning in 2015 by 3,000 tons beyond what is called for under federal law. The

plant also agreed to establish a $2.5 million fund at the Oregon Community Foundation, which provides for land acquisition and habitat restoration as well as renewable energy projects.

NEW CASES AND COURT FILINGS

WildEarth Guardians v. BLM (D.D.C., filed August 18, 2011): added to the "NEPA" slide. Several environmental groups filed an action concerning the Bureau of Land Management's (BLM) decision to auction off several leases in the Powder River Basin, a region in northeastern Wyoming and southeastern Montana that includes all ten of the highest-producing coal mines in the United States. The lawsuit alleges that the agency violated NEPA by failing to adequately analyze the impacts of increased GHG emissions resulting from the sale of the leases.

Center for Biological Diversity v. EPA (D.C. Cir., filed August 15, 2011): added to the "challenges to federal action" slide. Several environmental groups filed a lawsuit against EPA, challenging an agency rule that exempts facilities burning biomass from the requirement to obtain GHG emissions permits for three years. The lawsuit alleges that the exemption will encourage development of more facilities burning wood and grasses without having to control GHG emissions. The rule exempts facilities that burn wood, various crop residues, grass, and other biomass from the requirement to obtain PSD permits and Title V operating permits under the Clean Air Act. EPA granted the deferral in response to a petition by the National Alliance of Forest Owners (NAFO). According to the agency, the additional three years will allow it to conduct further studies of GHG emissions from biomass. A similar lawsuit was filed in April 2011 challenging the agency's decision to grant the petition from NAFO.

California Air Resources Board v. Association of Irritated Residents (Cal. Sup. Ct., filed July 26, 2011): added to the "state NEPAs" slide. Environmental justice advocates filed a petition with the California Supreme Court seeking to prevent the California Air Resources Board (CARB) from continuing to implement its GHG cap-and-trade program. The petitioners are requesting that the court review an appellate court decision that allowed the program to proceed after a trial court injunction had blocked its implementation, and claim that the appellate court erred when it stayed enforcement of the injunction pending the state's appeal of the trial court's decision. In granting the injunction, the trial court held that CARB had failed to adequately analyze alternatives to the cap-and-trade program when it adopted a strategy to implement AB 32 (the Global Warming Solutions Act) and, as a result, it violated CEQA. The injunction halted further implementation of the trading program until CARB complied with CEQA. CARB prepared and released a new alternatives analysis in June 2011, finding for the second time that the cap-and-trade program would be the best strategy for achieving the reductions required by AB 32.

Update #33 (July 22, 2011)

Featured decision:
Connecticut v. American Electric Power (U.S. Supreme Court June 20, 2011): In an 8-0 opinion, the U.S. Supreme Court held that federal common law nuisance claims cannot be brought against utilities for their greenhouse gas emissions given that the Clean Air Act and EPA

regulations displace federal common law in this area. The lawsuit alleged that under common law, the companies' greenhouse gas emissions constitute a public nuisance in contributing to climate change. The plaintiffs sought injunctive relief requiring each power company to cap their greenhouse gas emissions and reduce them by a specified percentage each year. The district court dismissed the lawsuit in 2005, holding that the claims represented a political question not under the jurisdiction of the courts. In 2009, the Second Circuit reversed, holding that the plaintiffs could proceed with their lawsuit. An article analyzing the Supreme Court's decision is available **here**.

DECISIONS

Sierra Club v. U.S. Army Corps of Engineers (8th Cir. July 14, 2011): added to the "challenges to coal-fired power plants" slide. The Eighth Circuit affirmed the grant of an injunction imposed by a district court which halted work at the site of a new coal-fired power plant in Arkansas. In granting the injunction, the district court held that plaintiffs made a sufficient showing that environmental damage was likely to occur. The permit would have allowed the company to fill in eight acres of wetlands, divert large amounts of water from the Little River, and build three new power lines.

Save the Plastic Bag Coalition v. Manhattan Beach (Cal. Sup. Ct. July 14, 2011): added to the "state NEPAs" slide. The California Supreme Court reversed two lower courts in holding that the City of Manhattan Beach did not violate the California Environmental Quality Act (CEQA) by failing to conduct a full-scale environmental impact analysis before adopting an ordinance prohibiting certain retailers from providing plastic bags to customers, concluding that the ordinance would have no significant environmental effect. The city issued a negative declaration under the CEQA. A coalition of retail groups commenced an action seeking to invalidate the ordinance. A state trial court vacated the ordinance pending an environmental impact report (EIR). On appeal, the appellate court affirmed, holding that the city should have prepared an EIR given that the ordinance could have a significant environmental impact.

Earth Island Institute v. Gibson (E.D. Cal. July 13, 2011): added to the "NEPA" slide. Two environmental nonprofits filed a lawsuit challenging the Forest Service's fire restoration project in a national forest, alleging that the agency violated NEPA by failing to take a hard look at the project's impact on climate change. Specifically, the plaintiffs alleged that the agency failed to describe the methodology it used to calculate greenhouse gas emissions and failed to evaluate all direct and indirect emissions from the project. The district court upheld the agency's analysis, finding that an environmental assessment (EA) issued as part of the project sufficiently addressed this issue and was entitled to deference.

Center for Biological Diversity v. EPA (D.D.C. July 5, 2011): added to the "Clean Air Act" slide. A district court held that EPA is not required to issue endangerment findings under the Clean Air Act for greenhouse gas emissions for marine vessels and nonroad vehicles and engines, but held that it is required to issue such findings for aircraft engines. EPA argued that the provisions upon which the plaintiffs relied cannot support undue delay claims because they give the agency discretion to conduct the endangerment findings but do not require the agency to do so. The court agreed with respect to Section 213, which governs marine vessels and nonroad

engines. However, Section 231, which governs aircraft engines, contains mandatory language that creates a mandatory duty to regulate.

Sierra Club v. Jackson (D.C. Cir. July 1, 2011): added to the "challenges to coal-fired power plants" slide. The D.C. Circuit affirmed the dismissal of a lawsuit brought by the Sierra Club seeking to compel EPA to halt construction of two power plants in Kentucky. The lawsuit alleged that because Kentucky's State Implementation Plan (SIP) was out of date, EPA was required to stop the construction of new sources of air pollution. EPA claimed that its ability to intervene was discretionary and that federal courts lacked jurisdiction to force it to act in such cases. The district court agreed and dismissed the case. The D.C. Circuit affirmed the decision, holding that the Administrative Procedure Act does not provide a cause of action to review the EPA Administrator's failure to act under Sec. 167 of the Clean Air Act.

In re Polar Bear Endangered Species Act Litigation (D.D.C. June 30, 2011): added to the "Endangered Species Act" slide. A federal district court dismissed challenges to the listing of the polar bear as a threatened species under the Endangered Species Act. Environmental groups had sued to have the bear classified as endangered, a more protective classification, while Alaska, hunting groups, and others had asked the court to block any listing. The court, deferring to the U.S. Fish and Wildlife Service, which made the determination, held that plaintiffs failed to demonstrate that the agency acted irrationally in making its listing decision, noting that the agency considered more than 160,000 pages of documents and over 670,000 comment submissions before making its final decision.

Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers (D. Kansas June 28, 2011): added to the "NEPA" slide. Several environmental groups filed an action challenging the U.S. Army Corps of Engineers' decision to issue a permit under the Clean Water Act in connection with the construction and development of an intermodal facility consisting of a rail yard and logistics park in Kansas. Among other things, plaintiffs alleged that the Corps violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement (EIS) concerning project-related greenhouse gas emissions. The district court upheld the Corps' decision not to prepare an EIS, holding that the agency made a reasoned determination that such a quantification was unnecessary given that EPA has not yet determined whether such GHGs should be regulated and given that there was no certain method to quantify estimates of GHG emissions.

Association of Irritated Residents v. California Air Resources Board (Cal. Ct. App. June 24, 2011): added to the "state NEPAs" slide. A California state appellate court granted the California Air Resources Board's (CARB) request for a stay of a **May 2011 injunction** that had stopped its work implementing the state's cap-and-trade program. The court lifted the injunction imposed by the trial court following that court's holding that CARB had not adequately weighed alternatives to the cap-and-trade system and other measures when it adopted a strategy to implement AB 32, the California Global Warming Solutions Act. The injunction had halted all rulemaking activities related to the program until CARB fulfilled its duty under the CEQA by analyzing the alternatives. [Editor's note: Shortly after this decision was issued, CARB announced that it was nonetheless postponing the start of the cap-and-trade program by one year.]

League of Wilderness Defenders v. Martin (D. Oregon June 23, 2011): added to the "NEPA" slide. An environmental group challenged a timber sale in a national forest under NEPA, alleging that the Forest Service should have prepared an EIS instead of an environmental assessment (EA) before deciding whether the timber sale would significantly impact the forest. Among other things, the plaintiffs alleged that the EA inadequately addressed the timber sale's impact on climate change. The district court upheld the EA, holding that the Forest Service adequately addressed the impact of the sale on carbon sequestration and climate change.

GenOn Mid-Atlantic, LLC v. Montgomery County, Maryland (4th Cir. June 20, 2011): added to the "challenges to state action" slide. The Fourth Circuit held that the federal Tax Injunction Act does not prevent the owner of a power plant from challenging a county excise tax on carbon dioxide emissions which is only levied on the plant. The court, overturning a district court decision which held that the county fee was a tax and the power plant was thus barred from challenging it in federal court by the Tax Injunction Act, held that the fee was actually a "punitive regulatory matter" and that single entities subject to such punitive financial strikes should be able to challenge them in federal court. At issue is an excise tax which the county adopted in April 2010 which imposed a tax on facilities that emit more than 1 million tons of carbon dioxide a year at a rate of $5 per ton emitted. The power plant is the only facility in the county that exceeds this threshold. The company filed the lawsuit seeking to bar enforcement of the tax on the ground that it violates the Maryland and U.S. Constitution.

Barhaugh v. Montana (Montana Sup. Ct. June 15, 2011): added to the "common law claims" slide. The Montana Supreme Court denied a petition asking it to find that the state was constitutionally required to prevent climate change by regulating greenhouse gas emissions. The petition sought a declaration that the state holds the atmosphere in trust for the present and future citizens of Montana and that it must take steps to protect and preserve the atmosphere by enforcing limits on greenhouse gas emissions. The petition is part of a nationwide campaign by Our Children's Trust and iMatter, groups that seek to combat climate change on behalf of future generations. The petition alleged that the Supreme Court had original jurisdiction because it concerns constitutional issues of major statewide importance, the case involves purely legal questions of constitutional construction, and emergency factors make the normal litigation process inadequate. The court disagreed, holding that the petition did not meet the standards to be heard directly by the court given that the claim required factual inquiry, that emergency circumstances were not present, and that it was not constitutionally based.

Citizens for Responsible Equitable Environmental Development v. City of Chula Vista (Cal. Ct. App. June 10, 2011): added to the "state NEPAs" slide. A citizens group commenced a lawsuit in California state court challenging a project to replace an existing Target store with a larger Target store. In particular, the group alleged that the City of Chula Vista violated CEQA by adopting a negative declaration with respect to the project by not taking into account its greenhouse gas emissions and its effect on climate change. The trial court denied the petition. On appeal, the state appellate court partially reversed, holding that the plaintiffs had made a "fair argument" that the project may have a significant impact due to contaminated soil and thus the trial court was required to determine whether the corrective action plan addressed this issue. However, with respect to greenhouse gas emissions, the court held that there was no fair

argument that the project will have a significant greenhouse gas emissions or climate change impact.

SETTLEMENTS

Alabama v. Tennessee Valley Authority (E.D. Tenn., settlement approved June 30, 2011): added to the "challenges to coal-fired power plants" slide. A settlement of a lawsuit brought by a number of states and EPA against the Tennessee Valley Authority (TVA) was judicially approved on June 30. Pursuant to the settlement's terms, TVA agreed to invest between $3-5 billion in new air pollution controls and retire almost one-third of its coal-fired generating units. The agreement resolves allegations by EPA that TVA violated Clean Air Act rules at 11 coal-fired power plants in Alabama, Kentucky, and Tennessee. Under the agreement, TVA will be required to reduce emissions of nitrogen oxides by 69 percent and sulfur dioxide by 67 percent from 2008 emissions levels. As part of the agreement, TVA will invest $350 million over the next five years in clean energy projects. The agreement also requires TVA to pay a civil penalty of $10 million.

Commonwealth of Massachusetts v. Mount Tom Generating Co. (Mass. Super. Ct., settlement filed June 28, 2011): added to the "challenges to coal-fired power plants" slide. The owners of a power plant in Massachusetts agreed to install a system to provide continuous monitoring of the facility's emissions, settling a lawsuit brought by Massachusetts that the plant repeatedly exceeded emissions limits pursuant to the Clean Air Act over the past several years. The agreement requires the plant to meet substantially stricter emissions limits for particulate matter and install a continuous emissions monitoring system to ensure compliance with those limits.

WildEarth Guardians v. EPA (D. Colo., consent decree announced June 15, 2011): added to the "coal-fired power plant challenges" slide. Pursuant to a proposed consent decree, EPA has agreed to meet deadlines to act on plans to address power plant emissions and regional haze in several Western states. The decree settles two lawsuits that alleged that EPA failed to act on state and federal implementation plans as required by the Clean Air Act. Under the agreement, EPA will finalize either a State Implementation Plan (SIP) or a federal regional haze plan by September 2012 for Colorado, by June 2012 for Montana, by January 2012 for North Dakota, and by October 2012 for Wyoming.

NEW CASES AND COURT FILINGS

Utility Air Regulatory Group v. EPA (D.C. Cir., filed July 5, 2011); ***Chase Power Development LLC v. EPA*** (D.C. Cir., filed July 5, 2011); ***SIP/FIP Advocacy Group v. EPA*** (D.C. Cir., filed July 5, 2011): added to the "challenges to federal action" slide. Several industry groups filed petitions challenging EPA's takeover of the Texas greenhouse gas permitting authority for industrial facilities. The lawsuit challenges a May 3, 2011 final rule that revises EPA's approval of Texas's SIP for the prevention of significant deterioration (PSD) program. The plan did not include provisions addressing greenhouse gases. The final rule, in effect, granted only partial approval of the Texas plan, allowing the state to continue issuing PSD permits for other pollutants, but requiring that EPA remain the greenhouse gas permitting authority for the state. Texas filed a petition challenging the rule on May 4, 2011.

Thrun v. Cuomo (N.Y. Supreme Court, filed June 27, 2011): added to the "challenges to state action" slide. Three taxpayers in New York filed a lawsuit alleging that the state had no authority to enter into the Regional Greenhouse Gas Initiative (RGGI) without authorizing legislation from the State legislature. The plaintiffs allege that they have suffered economic damages in the form of higher electricity rates due to the program. The lawsuit alleges that New York's participation in the program constitutes a tax that can only be approved by the State legislature and that it is unconstitutional because it infringes on federal authority to regulate air pollution and transmission of electric power across state lines.

American Tradition Institute v. NASA (D. D.C., filed June 2011): added to the "climate change protestors and scientists" slide. A conservative nonprofit organization filed a lawsuit under the Freedom of Information Act (FOIA) seeking to force NASA to release ethics records for Dr. James Hansen, specifically records that pertain to his outside employment, revenue generation, and advocacy activities. In January 2011, the organization filed a FOIA request with NASA, which refused to release the records on the grounds that it would constitute an unwarranted violation of Dr. Hansen's privacy rights.

Notice of Intent to Sue for Failure to Regulate Black Carbon Under Clean Water Act (June 22, 2011): added to the "other statutes" slide under the "Clean Water Act" column. The Center for Biological Diversity announced that it plans to sue EPA over its failure to regulate black carbon in sea ice and glaciers under the Clean Water Act, stating that the agency did not respond to its February 2011 petition asking it to develop water quality criteria for black carbon. Black carbon, more commonly known as soot, is formed by incomplete combustion of fossil fuels, biofuels, and biomass. Although it has a short atmospheric life, it is a potent contributor to climate change. According to the notice, the Clean Water Act regulates atmospheric deposition of pollutants like mercury and thus atmospheric depositions of black carbon onto the nation's waters are subject to the statute's authority.

Civil Society Institute, Inc. v. U.S. Dept. of Energy (D. Mass., filed June 10, 2011): added to the "other statues" slide under the "FOIA" column. A nonprofit organization that supports renewable energy sued the Department of Energy pursuant to FOIA for allegedly blocking the release of a report on energy and water supplies, which was drafted by individuals at Sandia National Laboratories and sent to the agency in 2006 but has never been made publically available. According to the complaint, the report shows that U.S. energy policy has not given adequate consideration to the nation's limited water resources. According to plaintiffs, the U.S. electric sectors use more than 200 billion gallons of water a day, and water withdrawals from thermoelectric power sources accounted for almost half of total water withdrawals.

Comer v. Murphy Oil USA, Inc. (S.D. Miss., filed May 27, 2011): added to the "common law claims" slide. Plaintiffs refiled their climate change tort action alleging public and private nuisance, trespass, and negligence causes of action under Mississippi law. The complaint alleges that plaintiffs suffered injuries in Hurricane Katrina as a result of greenhouse gas emissions by several coal, oil and chemical companies, which made the hurricane more ferocious and damaging. The case had been previously dismissed on political question and standing grounds. The 5th Circuit reversed, but then granted a motion to consider the case *en banc*. However, due

to the loss of a quorum because of recusal of an additional judge, the Fifth Circuit dismissed the *en banc* review and reinstated the district court's decision dismissing the case, and the Supreme Court rejected the plaintiffs' request for a writ of mandamus.

NON-U.S. COURT DECISIONS

Australia

Australian Competition and Consumer Commission v. Global Green Plan Ltd. (Federal Court of Australia (2010), [2010] FCA 1057): Global Green Plan Ltd was paid by customers to purchase renewable energy certificates (RECs). In December 2009, Global Green Plan acknowledged that it had not been using the money provided to it to purchase RECs, and pledged that it would make up the 4,137 missing RECs by March 2010. When it failed to do so, the Australian Competition and Consumer Commission instituted proceedings in the Federal Court. On September 29, 2010, the Federal Court declared that Global Green Plan had failed to meet its pledge and that it had breached the Trade Practices Act 1974.

Australian Competition and Consumer Commission v. Prime Carbon Pty Ltd. (Federal Court of Australia (2010)): The Australian Competition and Consumer Commission challenged Prime Carbon Pty Ltd, a company that sells carbon credits, for falsely claiming that it was certified by the National Stock Exchange of Australia and that the National Environment Registry, a company through which Prime Carbon supplied some of its credits, was regulated by the Australian Government. The Federal Court ruled that Prime Carbon had misrepresented its services and affiliations, violating section 53 of the Trade Practices Act 1974. Prime Carbon was ordered to publicize the court's orders to its customers and Kenneth Bellamy, the sole director of the company, was ordered to undergo compliance training.

Director of Public Prosecutions v. Fraser and O'Donnell (Supreme Court of New South Wales, Common Law Division (2008), [2008] NSWSC 244): On September 24, 2007, two environmental activists associated with Greenpeace trespassed into a coal loader owned by Port Waratah Coal Services and halted the operation of the conveyor belt for almost two hours at a cost of approximately $27,000. Police arrested and charged the activists for "maliciously damaging property" under section 195 (1) of the Crimes Act 1900. The prosecutor and counsel for the defendants questioned the meaning of "damages" as it appeared in section 195 and whether the defendants' actions applied. The magistrate ruled that there were two sorts of damages (physical and monetary) and that the defendants could only be charged for monetary damage, which would constitute a civil crime, not a criminal one. He proceeded to dismiss the charge.

Australian Competition and Consumer Commission v. GM Holden Ltd (Federal Court of Australia (2008), [2008] FCA 1428): The Australian Competition and Consumer Commission (ACCC) filed a suit against GM Holden Ltd for wrongly advertising that Saab vehicles provided "carbon neutral motoring." GM Holden had claimed that Saab would plant 17 native trees for every Saab vehicle purchased to offset the carbon emissions. ACCC filed its claim on the basis that GM Holden had not shown any change in the way it manufactured Saab vehicles subsequent to its carbon neutral campaign and that GM Holden's claim that 17 native trees would offset the

carbon emissions was not proven and was misleading. The Federal Court declared that GM Holden had breached sections 52 and 53(c) of the Trade Practices Act 1974. GM Holden agreed to advise its marketing staff to avoid "misleading and deceptive" marketing tactics and to plant 12,500 native trees to offset all the carbon emissions that would occur by Saab vehicles sold during the marketing campaign.

Anvil Hill Project Watch Association v. Minister for the Environment and Water Resources (Federal Court of Australia, New South Wales District (2008), [2008] FCAFC 3): Under section 75(1) of the Environmental Protection and Biodiversity Conservation Act, the Commonwealth Minister is to assess if a proposed action is a "controlled action." The Anvil Hill Project Watch Association challenged the decision by the Minister that the proposed construction of an open coal mine was not a controlled action. The court ruled that section 75(1) did not require an objective factual determination by the Minister of whether an action is considered a controlled action or not.

Update #32 (June 14, 2011)

Featured decision:
Barhaugh v. State (Montana Sup. Ct. May 17, 2011): added to the "common law claims" slide. In a petition seeking a court declaration that the state holds the atmosphere in trust for the present and future citizens of Montana and that it must take steps to protect and preserve the atmosphere by enforcing limits on greenhouse gas emissions, the Montana Supreme Court ordered state officials to respond to the petition. The petition is part of a nationwide campaign by Our Children's Trust and iMatter, groups that seek to combat climate change on behalf of future generations. The groups filed lawsuits in multiple states on May 4, 2011. The petition at issue was filed in the Montana Supreme Court and alleges that the court had original jurisdiction because it concerns constitutional issues of major statewide importance, the case involves purely legal questions of constitutional construction, and emergency factors make the normal litigation process inadequate. According to the petition, the Montana Constitution recognizes a right to a "clean and healthful environment."

DECISIONS AND SETTLEMENTS

Sierra Club v. Two Elk Generation Partners (10th Cir. May 31, 2011): added to the "challenges to coal-fired power plants" slide. The 10th Circuit upheld the dismissal of a lawsuit filed by the Sierra Club against a Wyoming power company on the grounds of issue preclusion. The Sierra Club filed the lawsuit in 2009 under the citizen suit provision of the Clean Air Act, alleging that the company's prevention of significant deterioration permit for a proposed power plant was invalid. The district court dismissed the lawsuit, holding that the Wyoming Department of Environmental Quality had already ruled on the matter and thus the issue had already been decided. The 10th Circuit affirmed on the same grounds. At issue in the lawsuit was whether the company had begun construction at the site as required by May 2005, and whether the permit had become invalid because construction was discontinued for two years.

The American Tradition Institute v. Rector and Visitors of the University of Virginia (Virginia Co. Cir. Ct May 24, 2011): added to the "climate change protestors and scientists" slide. A non-profit organization filed a lawsuit under the Virginia Freedom of Information Act seeking documents related to the work of former professor Michael Mann, who was involved in the so-called "climategate" email controversy. The university stated that it had turned over approximately 20% of the 9,000 pages of documents it says are responsive to the request. After the organization filed the petition in state court seeking the remaining documents, the court issued an order granting the request and giving the university until August 22, 2011 to supply the remaining documents under seal; the parties' counsel will review them under a confidentiality order.

Association of Irritated Residents v. California Air Resources Board (Cal. Super. Ct. May 20, 2011): added to the "state NEPAs" slide. On May 20, 2011, a California state court issued an order holding that the California Air Resources Board (CARB) must not take any additional steps to implement its greenhouse gas cap-and-trade program until it completes an adequate environmental analysis of the program. In an **earlier decision** in March 2011, the court held that CARB had improperly begun implementing the scoping plan before it completed an environmental review under the California Environmental Quality Act (CEQA), and that it failed to weigh alternative measures to the cap-and-trade program required by law. On May 23, 2011, CARB appealed the order. On June 3, 2011, a state appellate court temporary lifted the May 20 order until opposition briefs could be filed; they are due on June 20.

Citizens for Responsible Equitable Environmental Development v. City of San Diego (Cal. Ct. App. May 19, 2011): added to the "state NEPAs" slide. A citizens' group filed a lawsuit challenging San Diego's certification of an addendum to a 1994 final environmental impact report for a proposed residential development. Among other things, the group alleged that the city did not take into account new information concerning the effect of greenhouse gases on the climate, and that a supplemental environmental impact report under the California Environmental Quality Act (CEQA) was required. The trial court dismissed the lawsuit for failure to exhaust administrative remedies. On appeal, a state appellate court affirmed, holding that the group failed to raise this issue to the city and thus it was not preserved for appeal.

NEW CASES AND COURT FILINGS

Coalition for Responsible Regulation v. EPA (Index No. 10-1092, D.C. Cir., petitioner briefs filed June 3, 2011): added to the "challenges to federal action" slide. In petitions challenging EPA's May 2010 rule that increases the fuel economy standard for cars and light trucks to 35.5 mpg by model year 2016 and limits greenhouse gas emissions from cars and light trucks to an average of 250 grams per mile, lawyers for 53 industry groups filed briefs arguing that the rule should be vacated because it does little to address climate change, and challenging EPA's assertion that regulating such emissions from vehicles necessarily triggers similar control requirements from stationary sources. The petitioners also argued that EPA failed to consider the regulatory costs and burdens imposed on stationary sources.

Coalition for Responsible Regulation v. EPA (Index No. 09-1322, D.C. Cir., petitioner briefs filed May 20, 2011): added to the "challenges to federal action" slide. In a lawsuit challenging

EPA's 2009 finding that greenhouse gas emissions endanger public health and the environment, the petitioners filed briefs arguing that the finding should be vacated because the agency did not specify at what atmospheric concentrations harm would occur and how the agency's subsequent regulations would mitigate the effects of climate change. The petitions also argued that EPA failed to consider whether humans could adapt to climate change, to acknowledge emissions reductions as a result of the Energy Independence and Security Act, and to perform its own climate change review. Texas filed a separate brief alleging that EPA's finding failed to identify any criteria by which to judge endangerment. In a related proceeding challenging EPA's denial of a petition to reconsider its endangerment finding (the lawsuits have since been consolidated under Index No. 09-1322), the petitioners argued that EPA improperly relied on scientific data in a 360-page supplement to the endangerment finding that had never been subjected to public review when it denied the petition to reconsider. In amicus briefs that were filed on behalf of the petitioners on May 27, several groups argued that EPA violated the Clean Air Act by not considering the costs associated with subsequent regulations when it issued its endangerment finding.

Friends of the Earth v. Dept. of State (N.D. Cal., filed May 18, 2011): added to the "other statutes" slide under "FOIA". Several environmental groups filed a lawsuit under the Freedom of Information Act (FOIA) seeking to force the Department of State to release documents and information detailing communications with a lobbyist for TransCanada Pipelines. The lawsuit involves the company's application for a permit to build and operate a proposed 1,700 mile pipeline to transport oil extracted from Canadian oil sands in Alaska to refineries in Texas. The lawsuit alleges that the lobbyist worked as national deputy director on Secretary of State Hilary Clinton's presidential campaign and that plaintiffs need the records so they can submit comments on the supplemental environmental impact statement that was released on April 15, 2011.

Arctic Slope Regional Corp. v. Salazar (D. Alaska, filed May 13, 2011): added to the "Endangered Species Act" slide. Eleven Alaska Native organizations and the local government for the Inupiat Eskimo district of northernmost Alaska filed a lawsuit against the Department of Interior challenging the designation of critical habitat for threatened polar bears. The lawsuit alleges that the designation will unfairly restrict Alaska Natives' traditional cultural activities and important economic development--primarily oil development--while doing nothing to counter climate change that has threatened the species. In November 2010, the U.S. Fish and Wildlife Service designated 187,157 square miles as critical habitat for polar bears.

NRDC v. Michigan Dept. of Env. Quality (Mich. Cir. Ct., filed May 11, 2011): added to the "coal-fired power plant challenges" slide. The NRDC and the Sierra Club filed a lawsuit seeking a review of the Michigan Department of Environmental Quality's issuance of an air permit for the expansion of a coal-fired power plant in Holland, Michigan. The lawsuit alleges that the permit does not comply with federal regulations requiring that modification permits address greenhouse gas emissions. The state agency issued the permit in February 2011 following a court decision finding that the agency had overstepped its authority in denying the permit.

Update #31 (May 13, 2011)

Featured decision:
U.S. Chamber of Commerce v. EPA (D.C. Cir. April 29, 2011): added to the "challenges to federal action" slide. The D.C. Circuit dismissed a lawsuit filed by the U.S. Chamber of Commerce and a trade group representing car dealers on standing grounds, upholding an EPA waiver allowing California to set standards for greenhouse gas (GHG) emissions from cars and light trucks. The petitioners argued that the California standards would make it harder for manufacturers to make light trucks and other high-emitting but popular vehicles, and that the standards would cause sales to drop by making cars more expensive. In a unanimous decision, the court rejected this argument as too speculative and found that, in any event, the claim was moot because California has agreed to synchronize its own rules with federal fuel economy standards for model year 2012 and beyond. Because the petitioners could not show how their members would be injured, they lacked standing to maintain the action.

DECISIONS AND SETTLEMENTS

Koch Industries, Inc. v. John Does 1-25 (D. Utah May 9, 2011): added to the "climate change protestors and scientists" slide. A federal court in Utah dismissed a lawsuit that sought to uncover the identities of individuals behind a fake news release that said that Koch Industries had reversed its stance on climate change. Among other things, the lawsuit alleged federal trademark infringement and unfair competition. The company had earlier served subpoenas on the companies that had hosted the fake website, seeking names of the individuals who had registered it. In its decision granting the motion to dismiss and for a protective order, the court held that the company's trademarks had not been violated because there was no commercial competition between it and Youth for Climate Truth, the organization that had put out the fake news release. It also dismissed the company's claim that the copying of its website violated anti-computer hacking laws. Because the complaint stated no claims upon which relief could be granted, the court held that the company could not disclose the identities of any of the members of Youth for Climate Truth.

WildEarth Guardians v. Salazar (D.D.C. May 8, 2011): added to the "NEPA" slide. A federal district court in Washington D.C. dismissed part of a suit brought by several environmental nonprofits concerning the federal government's decision to put coal mining leases in Wyoming's Powder River Basin up for sale. The court dismissed the portion of the lawsuit that alleged that the decision by the Bureau of Land Management (BLM) in March 2010 to issue two coal leases was inappropriate because the agency never recertified the area as a "coal production region," holding that this was a challenge to BLM's decision to decertify the Powder River Basin in 1990, and that the six-year statute of limitations had passed. The court held that the plaintiffs could petition BLM to recertify the basin as a coal production region (the plaintiffs have done this, and BLM rejected their suit; they filed a separate action on April 18, mentioned below, challenging this). The remaining claims, which allege that BLM violated NEPA by, among other things, failing to address climate change impacts once the coal is burned, remain.

National Petrochemical & Refiners Association v. EPA (D.C. Cir. April 22, 2011): added to the "challenges to federal action" slide. The D.C. Circuit rejected a petition by two petroleum industry groups for a hearing by the full court of a lawsuit challenging EPA's blending requirements for renewable fuels. The two groups sued EPA in 2010, arguing that a rule

implementing a renewable fuels standard under the Energy Independence and Security Act was illegal because it was applied retroactively. The rule, which required that the industry supply 12.95 billion gallons of renewable fuel in 2010, took effect on July 1, 2010, but it applied to the entire year. In December 2010, the D.C. Circuit **dismissed** the lawsuit.

Friends of the Chattahoochee v. Georgia Dept. of Natural Resources (Georgia Office of State Adm. Hearings April 19, 2011): added to the "challenges to coal-fired power plants" slide. A state administrative judge in Georgia ruled that the Georgia Department of Natural Resources improperly issued a permit to operate a coal-fired power plant, concluding that some of the permit's pollution limits were not enforceable. The judge remanded the case to the state agency, requiring it to re-examine the permit after finding that gaps in its monitoring and reporting requirements could leave some hazardous air pollutants unaccounted for. Specifically, the judge found that the methods approved by the agency for measuring certain pollutants were unlikely to produce reliable data, and the permit lacked any monitoring provisions for emissions from storage tanks, boilers, and other equipment at the plant. However, the judge upheld a majority of the other provisions in the permit over the objections of two environmental nonprofits.

Alabama v. TVA (E.D. Tenn., settled April 14, 2011): added to the "challenges to coal-fired power plants" slide. The Tennessee Valley Authority (TVA) agreed to invest between $3-5 billion in new air pollution controls and retire almost one-third of its coal-fired generating units as part of a settlement reached with EPA, several states, and a number of public interest groups. The agreement resolves allegations by EPA that TVA violated Clean Air Act (CAA) rules at 11 coal-fired power plants in Alabama, Kentucky, and Tennessee. Under the agreement, TVA will be required to reduce emissions of nitrogen oxides by 69 percent and sulfur dioxide by 67 percent from 2008 emissions levels. As part of the agreement, TVA will invest $350 million over the next five years in clean energy projects. The agreement also requires TVA to pay a civil penalty of $10 million.

Southern Alliance for Clean Energy v. Duke Energy Carolinas LLC (4th Cir. April 14, 2011): added to the "challenges to coal-fired power plants" slide. The Fourth Circuit affirmed a decision awarding nearly $500,000 in attorneys' fees to environmental groups that challenged approval of a coal-fired power plant in North Carolina. The groups **filed suit** in July 2008, alleging that state regulators had not checked whether the plant would meet the CAA's requirement that it use Maximum Achievable Control Technology. In December 2008, the district court **granted** the groups' motion for summary judgment. However, the district court **dismissed** the case in July 2009 because regulators had taken over handling the file. Nonetheless, the district court held that defendant company was required to pay some of the attorneys' fees that plaintiffs had incurred to that point. The Fourth Circuit **affirmed**, holding that the plaintiffs need only achieve some success to qualify for an award under the CAA.

Center for Biological Diversity v. California Fish and Game Commission (Cal. Ct. App. April 8, 2011): added to the "Endangered Species Act" slide. A state appellate court in California reversed a lower court ruling that awarded attorneys fees in the amount of $258,000 to the plaintiffs. The underlying lawsuit concerned designation of the American pika under California's Endangered Species Act. In May 2009, a state court ordered the California Fish and Game Commission to reconsider its denial of protection for the species under the Act because it

might have applied an incorrect standard of review. The appellate court held that the Center for Biological Diversity (CBD) did not meet the definition of "a successful party" under state law given that the remand was for a perceived procedural defect and resulted in no demonstrable substantive change in the agency's position.

Center for Biological Diversity v. EPA (D.D.C. April 11, 2011): added to the "Clean Air Act" slide. A federal district court in Washington, D.C. denied motions by two aviation associations to intervene in a lawsuit seeking an order requiring EPA to use its authority under the CAA to regulate GHGs from marine vessels, aircraft, and other nonroad vehicles, holding that the associations failed to establish Article III standing. The court determined that implementation and enforcement of new emission standards were too hypothetical and too far removed to constitute an impending causally connected injury for standing purposes, given that the plaintiffs are asking EPA to make an endangerment finding. The associations' alleged economic injury was based on the outcome of this determination, which was an issue not before the court.

Sierra Club v. U.S. Dept. of Agriculture (D.D.C. March 29, 2011): added to the "challenges to coal-fired power plants" slide. A federal district court in Washington D.C. granted a summary judgment motion by the Sierra Club, holding that the U.S. Department of Agriculture (USDA) should have prepared an environmental impact statement (EIS) concerning the USDA's Rural Utilities Service's use of low-interest loans to finance the construction of new generating units at a coal-fired power plant in western Kansas. In 2007, the Sierra Club filed suit, alleging that the agency did not prepare an EIS for the plant and failed to analyze impacts of climate change and renewable energy alternatives.

Western Watersheds Project v. Bureau of Land Management (D. Nevada March 28, 2011): added to the "NEPA" slide. A federal district court in Nevada denied a motion filed by several environmental nonprofits to preliminarily enjoin the BLM from authorizing the site clearing and construction of a wind energy facility in the state, holding that the groups were not likely to succeed on their claim that an EIS was required under NEPA. The court held that BLM's decision to forego issuing an EIS was justified by the adoption of significant mitigation measures to offset potential environmental impacts. In addition, BLM sufficiently considered the cumulative impacts of the project and took the requisite "hard look" as required. Further, the court held that denial of the motion would not result in irreparable harm to several species and that a delay of the program would harm federal renewable energy goals.

United States v. Pacific Gas & Electric (N.D. Cal. March 3, 2011): added to the "challenges to coal-fired power plants" slide. An environmental nonprofit sought to intervene for purposes of objecting to a proposed consent decree concerning a power plant located near Antioch, California. In 2009, EPA filed a complaint alleging that Pacific Gas & Electric constructed and operated the plant in violation of the New Source Review program under the CAA. The parties entered into settlement negotiations and requested that the court approve a consent decree. The nonprofit group moved to intervene, alleging that the decree is a federal agency action that requires EPA to consult with the Fish and Wildlife Service regarding the possible effect of the decree on the endangered Lange Metalmark butterfly. The district court denied the motion, holding that it was not timely given that the group waited for 15 months after public notice of the settlement, and that the decree was not an "agency action" under the Endangered Species Act.

NEW CASES

Sierra Club v. Texas Commission on Environmental Equality (Texas Dist. Ct. Travis Co., filed May 9, 2011): added to the "coal-fired power plant challenges" slide. Two environmental nonprofits filed a lawsuit challenging a Texas state agency's approval of a coal-fired power plant in Corpus Christi, alleging that the state incorrectly evaluated possible air pollution from the facility and is in violation of CAA regulations.

Texas v. EPA (D.C. Cir., filed May 4, 2011): added to the "challenges to federal action" slide. Texas filed suit against EPA, challenging a final rule issued by the agency extending its takeover of the state's GHG permitting authority under the CAA. The lawsuit challenges an EPA final rule under Section 110 of the CAA that removed the agency's prior approval of Texas' state implementation plan for the prevention of significant deterioration after the state said that it would not implement a GHG permitting program. The lawsuit alleges that EPA's rule is arbitrary and capricious, an abuse of discretion, and contrary to the CAA. The final rule allows the state to continue issuing permits for other pollutants such as sulfur dioxide and nitrogen oxides. In 2010, Texas sued EPA challenging the interim final rule (Texas v. EPA, Index No. 10-1425 (D.C. Cir.)).

Alec L. v. Jackson (N.D. Cal., filed May 4, 2011): added to the "common law claims" slide. A nonprofit group filed lawsuits in California federal court and 10 states against the federal government, alleging that the public trust doctrine required them to reduce GHG emissions and implement reforestation programs to fight climate change. The lawsuits are seeking a 6 percent reduction in global GHG emissions every year, along with widespread global reforestation.

National Wildlife Federation v. EPA (D.C. Cir., filed April 18, 2011): added to the "other states" slide under the "Energy Policy Act/EISA" subheading. An environmental nonprofit sued EPA following the agency's denial of its petition to reconsider a rule that sets criteria for renewable fuels. The lawsuit alleges that the rule violates a provision of the Energy Independence and Security Act (EISA) that is meant to protect native grasslands from being converted into feedstocks for biofuel production. The nonprofit and other environmental groups petitioned EPA's March 2010 rule that sets criteria for determining which biofuels meet the renewable fuels standard, arguing that the rule failed to require producers to verify that crops and crop residues used to produce renewable fuel complied with applicable land-use restrictions under the statute.

Center for Biological Diversity v. EPA (D.C. Cir., filed April 7, 2011): added to the "challenges to federal action" slide. Several environmental advocacy groups filed a lawsuit challenging EPA's decision to grant an industry petition to reconsider portions of its GHG tailoring rule by deferring for three years permitting requirements for industries that burn biomass. On March 21, 2011, EPA **proposed** delaying for three years GHG permitting requirements for new and modified industrial facilities that use wood, crop residues, grass, and other biomass for energy under its GHG tailoring rule. According to EPA, it will use the time to seek further independent scientific analysis of biomass emissions and develop a rule that lays out whether they should be considered emissions that trigger CAA GHG permitting requirements.

WildEarth Guardians v. Salazar (D.D.C., filed April 4, 2011): added to the "NEPA" slide. Three environmental groups filed suit against the Department of the Interior, alleging that it failed to properly plan leasing in the Powder River Basin in Wyoming. The lawsuit alleges that that DoI and BLM violated the Administrative Procedure Act by refusing the manage the area as a "coal producing region." Such a designation would put more regulatory requirements on BLM to plan the management of leases instead of managing them under the current competitive leasing process. According to the complaint, the basin produces about 42 percent of the country's coal. The complaint was filed two weeks after DoI announced four further lease sales for 758 million tons of coal, as well as four records of decision offering for development coal tracts in the basin estimated to produce 1.6 million tons of coal.

Update #30 (April 6, 2011)

Featured decision:
Association of Irritated Residents v. California Air Resources Board (Cal. Super. Ct. March 18, 2011): added to the "state NEPAs" slide. A California state court issued an order enjoining the state from implementing its recently adopted GHG emissions cap-and-trade program pursuant to the state's Global Warming Solutions Act, more commonly referred to as A.B. 32. In an earlier decision, the court issued a tentative ruling setting aside the California Air Resources Board's (CARB) certification of the scoping plan for implementing A.B. 32, concluding that CARB failed to adequately consider alternatives to cap-and-trade and other climate programs under the law. In December 2008, environmental justice advocates filed the lawsuit, alleging that CARB's proposal for a cap-and-trade program would adversely affect minority and low income communities. The court rejected plaintiffs' claims that the scoping plan failed to comply with the statutory requirements of A.B. 32 and that under the California Environmental Quality Act (CEQA), CARB was required to provide a detailed environmental analysis of each of the measures and programs prescribed by the scoping plan. However, the court accepted plaintiffs' claims that the analysis CARB provided was lacking facts and data to support the agency's conclusions in its environmental document. A blog entry describing the decision and its effect is available **here**.

COURT AND AGENCY DECISIONS AND SETTLEMENTS

Pacific Merchant Shipping Association v. Goldstene (9th Cir. March 28, 2011): added to the "Clean Air Act" slide. The Ninth Circuit upheld California rules requiring oceangoing vessels traveling within 24 miles of the state's coastline to switch to low-sulfur fuels, rejecting the shipping industry's argument that the state lacked legal authority to impose the rules on vessels outside of its three-mile coastal jurisdiction. Affirming the district court, the circuit court held that the plaintiff failed to establish that the Submerged Lands Act preempts the state rules. In a previous decision in 2008 (Pacific Merchant Shipping Association v. Goldstene (9th Cir. 2008)), the Ninth Circuit held that the state could not enforce a rule that established emissions standards for auxiliary engines that oceangoing vessels use for producing steam and heating water and heavy fuel oil without a waiver under the Clean Air Act.

Valley Advocates v. City of Atwater (Cal. Ct. App. March 23, 2011): added to the "state NEPAs" slide. A nonprofit group that advocates for responsible development filed a lawsuit challenging the adequacy of an environmental review under the California Environmental Quality Act (CEQA) of a project to construct and operate a wastewater treatment plant. The nonprofit alleged, among other things, that the final environmental impact statement (FEIS) failed to analyze the project's GHG emissions. The trial court dismissed the lawsuit on the grounds that the nonprofit did not exhaust its administrative remedies. The appellate court affirmed on the same grounds.

United States v. Midwest Generation LLC (N.D. Ill. March 16, 2011): added to the "challenges to coal-fired power plants" slide. A federal court for the second time dismissed claims that a power company is responsible for Clean Air Act (CAA) violations at five plants it owns in Illinois in 1999, holding that the government had not offered any new facts to support its arguments. The government alleged that the company should be liable for prevention of significant deterioration (PSD) requirements at the five plants that occurred before the company purchased them. The court dismissed these claims in March 2010 but allowed the government to file an amended complaint offering new evidence of the company's liability.

Power Inn Alliance v. County of Sacramento Env. Management Dept. (Cal. Ct. App. March 15, 2011): added to the "state NEPAs" slide. A coalition of businesses and property owners brought suit against Sacramento County alleging that the county violated CEQA when it issued a negative declaration concerning a permit to reopen a solid waste facility. Among other things, the coalition alleged that a study prepared by the county did not sufficiently discuss the project's GHG emissions. The trial court dismissed the challenge. On appeal, the appellate court affirmed, holding that the project was small enough such that it was unnecessary to engage in further discussion of its GHG emissions.

United States v. Alabama Power Co. (N.D. Alabama March 14, 2011): added to the "challenges to coal-fired power plants" slide. A federal court granted a power company's motion for summary judgment, holding that the United States had relied on inadequate export reports when it reclassified the state's repaired coal-fired power plants as new sources of pollution subject to more stringent standards under the CAA. The court rejected the methodology used by the experts in calculating emissions resulting from the modifications, and drew a distinction between equipment that operates continuously and cycling equipment used by the power company, which operates on a regular basis but not continuously.

Rector and Visitors of the University of Virginia v. Cuccinelli (Virginia March 11, 2011): added to the "climate change protestors and scientists" slide. The Virginia Supreme Court agreed to consider the Virginia Attorney General's request for documents concerning the so-called "climategate" controversy concerning grant applications of a former University of Virginia climate change scientist. In May 2010, the University filed a lawsuit objecting to a subpoena served by the Attorney General on the University concerning five grants received by a professor previously employed by the University who was involved in the so-called "climategate" controversy. In August 2010, the presiding judge held that four of the five grants were federal grants and thus the Attorney General could not question the professor about them.

In addition, the court held that the document requests were not specific enough because they did not show sufficient reason to believe incriminating documents existed.

Sierra Club v. Wyoming Dept. of Environmental Quality (Wyoming March 9, 2011): added to the "challenges to coal-fired power plants" slide. The Wyoming Supreme Court upheld a state-issued air quality permit authorizing a power plant's construction of a proposed coal-to-liquid facility and an associated underground coal mine, rejecting the Sierra Club's claims that the permit failed to consider sulfur dioxide emissions from flares in determining the potential to emit.

Sierra Club v. Texas Commission on Environmental Quality (Texas Dist. Ct. March 7, 2011): added to the "challenges to coal-fired power plants" slide. A Texas trial court rejected the Sierra Club's claim that the Texas Commission on Environmental Quality violated state law when it granted air quality permits for a coal-fired power plant in Limestone County without considering any evidence concerning GHG emissions. The Sierra Club argued that the agency violated state air quality laws because it refused to consider carbon dioxide as a contaminant, as it was required to do under state law. The court did not explain its reasoning in upholding the agency's decision.

Wyoming v. EPA (10th Cir., filed Feb. 10, 2011): added to the "challenges to federal action" slide. Wyoming challenged EPA rules that allow the agency to assume permitting responsibilities from states unwilling or unable to establish their own permitting responsibilities concerning the CAA's PSD requirements for GHG emissions. After EPA required states to amend their state PSD programs to incorporate GHG emissions, 13 states failed to do so by the required deadline. EPA then found that the states' state implementation plans (SIPs) were inadequate and directed these states to submit corrective SIP revisions. Seven states, including Wyoming, did not do so. EPA then assumed GHG permitting authority for these states through a federal implementation plan. Wyoming alleges that EPA has exceeded its authority and required the state to meet an unreasonable deadline. Texas has also filed suit against EPA on similar grounds. A blog entry analyzing these legal challenges is available **here**.

Woodward Park Homeowners' Association v. City of Fresno (Cal. Ct. App. Feb. 9, 2011): added to the "state NEPAs" slide. A California state appellate court affirmed a lower court decision which denied a petition by a homeowners' association concerning the environmental review of a commercial development under CEQA. Among other things, the association alleged that the city should have required solar panels as a way to reduce the project's greenhouse gas emissions. The lower court held that the city properly analyzed the project's impacts and did not have to consider solar panels.

COMPLAINTS/PETITIONS/MOTIONS/SUBPOENAS

American Electric Power v. Connecticut (U.S. Sup. Ct., briefs filed March 11, 2011): added to the "common law claims" slide. Several states and New York City filed a brief with the U.S. Supreme Court urging it to uphold the rights of states to sue power companies as a major contributor to climate change. The parties, who are respondents in the lawsuit, argued that the power companies are major contributors to climate change and are collectively responsible for

ten percent of the nation's GHG emissions. A blog entry describing these arguments in more detail is available **here**.

Grocery Manufacturers Association v. EPA (D.C. Cir., filed March 11, 2011); ***National Petrochemical & Refiners Association v. EPA*** (D.C. Cir., filed March 21, 2011): added to the "challenges to federal action" slide. Industry groups and various related organizations filed petitions for review of EPA's Clean Air Act waiver authorizing the use of gasoline containing 15 percent ethanol for use in model year 2001-06 cars and light trucks. The petitions supplement filings that challenged EPA's original waiver to allow so-called E15 in gasoline for model year 2007 and newer cars and light trucks.

Sierra Club v. U.S. Dept. of Energy (D. D.C., filed March 10, 2011): added to the "coal-fired power plant challenges" slide. The Sierra Club filed a lawsuit against the Department of Energy, alleging that the agency violated NEPA when it awarded federal funding to a coal-fired power plant in Mississippi. The complaint alleges that DOE failed to properly weigh reasonable alternatives, fully disclose the plant's environmental impacts, or consider the cumulative impact of GHG emissions from the plant. The complaint alleges that the plant, along with a nearby strip mine which would supply the coal, would emit 5.7 million tons of carbon dioxide annually.

Alaska v. Salazar (D. Alaska, filed March 9, 2011): added to the "Endangered Species Act" slide. Alaska filed a lawsuit seeking to overturn the Department of Interior's establishment of critical habitat for polar bears. The lawsuit alleges that the designation of 187,157 square miles of habitat is unnecessary and will not provide any new protections for the species. In 2008, DOI found that polar bears are "threatened" because of a loss of sea ice habitat caused by climate change.

California Dump Truck Owners Association v. California Air Resources Board (E.D. Cal., filed March 1, 2011): added to the "challenges to state and municipal vehicle standards" slide. An industry group filed suit against CARB, alleging that the agency's truck and bus regulation, which is part of a number of regulations under AB 32 to address greenhouse gas regulations, is preempted by the Federal Aviation Administration Authorization Act of 1994. The regulation at issue sets stricter emissions standards for dump trucks and other diesel-fuel vehicles beginning in 2012, and will require replacement of older vehicles beginning in 2015.

Update #29 (March 8, 2011)

COURT AND AGENCY DECISIONS AND SETTLEMENTS

Sierra Club v. Mississippi Public Service Commission (Harrison Co. Chancery Ct. Feb. 28, 2011): added to the "coal-fired power plant challenges" slide. A state court in Mississippi rejected a challenge from the Sierra Club seeking to block the construction of a coal-fired power plant in eastern Mississippi, holding that state regulators committed no error in approving the project. The court rejected the group's argument that the Mississippi Public Service Commission's orders lacked specific findings concerning the balancing of the environmental and

economic risks of the facility, holding that the decision could not be reversed on that ground alone.

City of New York v. Metropolitan Taxicab Board of Trade (U.S. Supreme Court, cert. petition denied Feb. 28, 2011): added to the "challenges to state and municipal vehicle standards" slide. The Supreme Court denied a request by New York City to review a Second Circuit decision that blocked enforcement of city regulations requiring taxicab owners to convert to an all-hybrid fleet. The Second Circuit previously held that a district court did not abuse its discretion in finding that city regulations concerning increased lease rates for hybrid taxes were related to fuel economy standards and were thus preempted by the Energy Policy and Conservatoin Act.

Texas v. EPA (5th Cir. Feb. 24, 2011): added to the "challenges to federal actions" slide. The Fifth Circuit transferred a case brought by Texas challenging a final rule by EPA, referred to as the "SIP Call," requiring states to adopt laws and regulations allowing them to issue permits to new and modified stationary sources for GHG emissions. In deciding the transfer the case to the D.C. Circuit, the court held that centralized review of national issues was preferable and that Texas did not convincingly argue that the Fifth Circuit should hear the case because the state was challenging a local aspect of the rule.

Building Industry Association of Washington v. Washington State Building Code Council (W.D Wash., Feb. 7, 2011): added to the "challenges to state action" slide. A federal district court in Washington state granted summary judgment in favor of the Washington State Building Code Council and several intervenors concerning claims that proposed amendments to the Washington State Energy Code are preempted by various federal regulations on the basis that they would require homes to have HVAC, plumbing, or water heating equipment whose efficiency exceeds controlling federal standards. Specifically, the court found that the Energy Policy and Conservation Act's "building code exception" applies to the disputed amendments. This exception allows state and local governments to set energy efficiency targets for new residential construction which can be reached with equipment or products whose efficiencies exceed federal standards, provided the enabling legislation also includes other means to achieve the targets with products that do not exceed the federal standards.

Coalition for Responsible Regulation v. EPA (D.C. Cir., motion to withdraw granted Jan. 28, 2011): added to the "challenges to federal actions" slide. The D.C. Circuit granted Arizona's motion to withdraw from a case challenging EPA's authority to regulate GHG emissions from large new and modified stationary sources. Arizona had initially defended EPA's authority to do so. However, Arizona's new Attorney General, citing a need to protect states' rights, filed a motion to withdraw from the case.

Alaska Community Action on Toxics v. Aurora Energy Services LLC (D. Alaska Jan. 10, 2011): added to the "coal-fired power plant challenges" slide. A district court denied an energy company's motion to dismiss, holding that several environmental groups may maintain their action alleging that coal-contaminated dust, slurry, water and snow is being discharged from a coal loading facility into a bay in violation of the CWA. Although the facility has a NPDES permit, the plaintiffs alleged that the permit applies to storm water discharges and that it fails to cover discharges stemming from the facility's conveyor system as well as from wind and snow.

In denying the motion to dismiss, the court held that the fact that the pollutants travel for some distance through the air did not defeat liability under the CWA.

COMPLAINTS/PETITIONS/MOTIONS/SUBPOENAS

Environmental Integrity Project v. Lower Colorado River Authority (S.D. Texas, filed March 7, 2011): added to the "coal-fired power plant challenges' slide. Three environmental groups filed a lawsuit against a public utility, alleging that it emitted excessive levels of particulate matter from its coal-fired electricity generating plant without making pollution control upgrades as required by the Clean Air Act. The complaint alleges that the facility is violating the CAA's prevention of significant deterioration requirements under new source review by making major modifications to the power plant's main units and failing to obtain necessary permits, install best available control technology, reduce emissions, and comply with requirements for monitoring, recordkeeping, and reporting.

Alaska Oil and Gas Association v. Salazar (D. Alaska, filed March 1, 2011): added to the "Endangered Species Act" slide. An oil and gas association filed a lawsuit against the Interior Department seeking to overturn its December 2010 decision designating 187,157 square miles of area as critical habitat for polar bears, alleging that it will impede oil company operations without providing meaningful benefits to polar bears. The complaint alleged that the designation of so much habitat was not supported by science and violated the ESA and the Administrative Procedure Act.

Utility Air Regulatory Group v. EPA (D.C. Cir., filed Feb. 28, 2011): added to the "challenges to federal action" slide. An electric power company trade group challenged two EPA rules to facilitate GHG emissions permitting in seven states. The rules allow EPA to impose a federal implementation plan on seven states whose on laws and regulations would have prevented them from initiating GHG emissions permitting on January 2, 2011, the date on which GHG emissions permitting took effect. The seven states are Arizona, Arkansas, Florida, Idaho, Kansas, Oregon, and Wyoming.

Chase Power Development, LLC v. EPA (D.C. Cir., filed Feb. 28, 2011): added to the "challenges to federal action" slide. A company in Texas filed a lawsuit challenging EPA's takeover of GHG emissions permitting in Texas. The lawsuit challenges a rule known as the "greenhouse gas SIP Call," which requires states to change their air quality state implementation plans to allow them to issue permits for GHG emissions from large new and modified stationary sources such as power plants. The rule allows EPA to issue federal implementation plans in states that either would not or were unable to change their own laws and regulations and their state implementation plans by January 2, 2011 to allow PSD permitting for GHG emissions. The lawsuit is similar to the lawsuits (described below) filed on February 11, 2011.

Sierra Club v. EPA (N.D. Cal., filed Feb. 23, 2011): added to the "coal-fired power plant challenges" slide. The Sierra Club sued EPA seeking to recover 350,000 pages of documents that allegedly demonstrate Clean Air Act violations by five coal-fired power plants in Texas, contending that EPA failed to respond to its Freedom of Information Act (FOIA) request in a timely manner. The complaint alleges that the documents demonstrate the power company's

knowing violation of the CAA and, as such, release of the documents is in the public interest, and a balance of the equities demonstrates that the organization should have access to the documents.

Alliance of Automobile Manufacturers v. EPA (D.C. Cir., filed Feb. 16, 2011): added to the "challenges to federal action" slide. Four industry groups sued EPA after it granted a waiver under the Clean Air Act allowing gasoline containing 15% ethanol (referred to as "E15") to be used in model year 2011-06 cars and light trucks. EPA approved E15 for use in model year 2001-06 cars and light trucks on January 26, 2011. The previous limit on ethanol in gasoline had been 10%. That limit still applies to vehicles older than model year 2001 due to concerns that the corrosive nature of ethanol would damage engines and emissions controls. However, testing by the Department of Energy has found that newer vehicles can use the fuel blend safely. In January 2011, industry groups challenged a rule allowing E15 for model year 2007 and newer vehicles.

Texas v. EPA (D.C. Cir., filed Feb. 11, 2011); ***Utility Air Regulatory Group v. EPA*** (D.C. Cir., filed Feb. 11, 2011); ***SIP/FIP Advocacy Group v. EPA*** (D.C. Cir., filed Feb. 11, 2011): added to the "challenges to federal action" slide. Texas and two industry groups filed lawsuits challenging an EPA rule that requires states to adopt laws and regulation allowing them to issue permits for large new and modified stationary sources for GHG emissions. The lawsuits challenge a rule known as the "greenhouse gas SIP Call," which requires states to change their air quality state implementation plans to allow them to issue permits for GHG emissions from large new and modified stationary sources such as power plants. The rule allows EPA to issue federal implementation plans in states that either would not or were unable to change their own laws and regulations and their state implementation plans by January 2, 2011 to allow PSD permitting for GHG emissions. Texas has refused to implement PSD permitting requirements for GHG emissions, and EPA has assumed PSD permitting for GHG emissions in the state.

Montana Environmental Information Center v. Bureau of Land Management (D. Montana, filed Feb. 7, 2011): added to the "NEPA" slide. A coalition of environmental groups sued the Bureau of Land Management (BLM) for allegedly failing to concerning the climate change impacts of oil and gas leasing on public lands in Montana and the Dakotas. The groups alleged that the Interior Department failed to control the release of methane from oil and gas development on nearly 60,000 acres of leases sold in 2008 and December 2010 in violation of NEPA. The environmental groups settled an earlier action under which BLM agreed to suspend the 2008 leases and conduct a supplement EIS of their climate change impacts. In August 2010, BLM said that emissions from developing these leases could not be tied to specific climate change impacts and decided to move forward with issuing the 2008 leases and a new round of 2010 leases.

Notice of Intent to sue over failure to protect 82 coral species under ESA (Notice filed Jan. 25, 2011): added to the "Endangered Species Act" slide. The Center for Biological Diversity (CBD) filed a notice of its intent to sue the National Marine Fisheries Service for the agency's failure to protect 82 imperiled coral species under the Endangered Species Act. According to the notice, these corals, all of which occur in U.S. waters ranging from Florida and Hawaii to U.S. territories in the Caribbean and Pacific, face numerous dangers, including climate change and

ocean acidification. According to the notice, in 2009, CBD petitioned to protect 83 corals under the ESA. In response, the government found that listing might be warranted for all except one species. However, the government failed to meet its deadline to determine whether listing is warranted and propose rules to protect these beleaguered corals.

Semiconductor Industry Association v. EPA (D.C. Cir., filed Jan. 31, 2011): added to the "challenges to federal action" slide. An industry association filed a petition in the D.C. Circuit seeking a review of the EPA greenhouse gas reporting rule for sources of fluorinated GHGs. The final rule, which was published on December 1, 2010, applies to electronics production, fluorinated gas production, imports, and exports of pre-charged equipment or closed-cell foams containing fluorinated GHGs, and the use and manufacture of electricity transmission and distribution equipment. Facilities in these categories that emit at least 25,000 tons of CO2e of fluorinated GHGs are required to report these emissions. Data collection was required to begin January 1, 2011 and the first reports are due by March 31, 2012. According to the association, the rule in its current form requires semiconductor companies to measure emissions in a technically infeasible manner and also gives EPA access to highly valuable proprietary data which could compromise critical trade secrets and other sensitive information.

American Electric Power Co. v. Connecticut (U.S. Supreme Court, TVA brief filed Jan. 31, 2011): added to the "common law claims" slide. The federal government, on behalf of the Tennessee Valley Authority, asked the U.S. Supreme Court to overturn the Second Circuit decision allowing several states to continue with their public nuisance lawsuit against several utility companies for their GHG emissions. In their brief, the government said that the plaintiffs lacked "prudential standing" and that their lawsuits should be dismissed. According to the government, courts should not adjudicate such general grievances absent statutory authority, particularly since EPA has begun regulating GHGs under the Clean Air Act. On February 7, 2011, the Supreme Court scheduled oral arguments in the case for April 19, 2011. A blog entry analyzing the claims raised by TVA and AEP in their briefs is available **here**.

American Gas Association v. EPA (D.C. Cir., filed Jan. 28, 2011); ***Gas Processors Association v. EPA*** (D.C. Cir., filed Jan. 28, 2011); ***Interstate Natural Gas Association v. EPA*** (D.C. Cir., filed Jan. 31, 2011): added to the "challenges to federal action" slide. Three industry groups filed petitions seeking to change elements of an EPA rule that will require oil and natural gas companies to report their GHG emissions. The final rule, announced by EPA November 9, 2010, requires oil and natural gas systems that emit at least 25,000 metric tons per year of CO2e to collect data on their emissions. Data collection was required beginning on January 1, 2011 and the first reports are due to EPA by March 31, 2012.

NON-U.S. COURT DECISIONS

European Union

Gas Natural Fenosa SDG v. Commission of the European Communities (Court of First Instance, Jan. 27, 2011), Case T-484/10; **Iberdola SA v. Commission of the European Communities** (Court of First Instance, Jan. 27, 2011), Case T-486/10; **Endesa and Endesa Generación v. Commission of the European Communities** (Court of First Instance, Jan. 27,

2011), Case T-490/10: These cases are three applications for leave to intervene by ClientEarth, Greenpeace Spain, Greenpeace International and World Wide Fund for Nature European Policy Programme to the General Court of the European Union in three separate actions that were brought against the European Commission by three Spanish electricity companies (Gas Natural Fenosa SDG, Iberdola SA, and Endenesa). The companies seek annulment of Commission Decision C(2010) 4499 of 29 September 2010 in State aid Case No N178/2010 - Spain, approving as permissible state aid a Spanish program under which coal-fired power plants are given preferential access to the market through a price fixing mechanism and subsidies, in exchange for the use of indigenous coal. The scheme is challenged as incompatible with the environmental laws of the European Union.

France

Decision No. 2010-622 DC of December 28, 2010 (French Constitutional Council, 2010): Article 64 of the finance law of 2011 provides that companies will have to purchase their greenhouse gas emissions quotas for 2011 whereas quotas were distributed free of charge in 2010. Some of the companies have still not received their quotas, even though they carried out activities in 2010, and as a result challenged the validity of the law as violating the principle of equality between companies. However the Constitutional Council upholds the validity of the article as the quota purchase will only apply for 2011 and 2012.

Decision No. 287110 of February 8, 2007 (French Council of State, 2007): Companies from the steel industry claimed that decree n°2004-832, which transposes the EU directive of October 13, 2003 establishing a system of exchange of greenhouse gas emission quotas in the European Union, was illegal. The companies claimed that the directive violated the principle of equality since it provided for a difference of treatment between certain industries. It included the companies from the steel industry but excluded companies from the plastic and aluminum industries. The French Conseil d'Etat referred the question to the European Court of Justice for a preliminary ruling. The European Court of Justice held that the directive did not violate the principle of equality as the difference of treatment between the industries was justified by objective criteria, such as the very low carbon dioxide emissions from the non-steel industries.

Spain

Judgment No. 5087/2009 of July 17, 2009 (Supreme Court of Spain, Administrative Litigation Division, Section 5) Appeal No. 103/2005: Arcelor España, S.A. (previously known as Arcelaria Corporación Siderúrgica, S.A.) challenged the decision of the Council of Ministers of Spain of January 21, 2005, declaring the individual assignment of emissions credits for the 2005-2007 term. Arcelor argued the decision was void because (1) the European norm on which it was based violated the principles of equality, freedom of enterprise, the right to property, and rule of law; and (2) Spanish Law 1/2005 of March 9th, which transposed the EU's Directive 2003/87/EC, was also invalid as to its applicability to the iron and steel industry and not to others that compete with the same (e.g. the chemical sector and the sector for non-ferrous metals). The Court rejected Arcelor's arguments and dismissed its request for a remedy.

Judgment No. 6846/2009 of July 15, 2009 (Supreme Court of Spain, Administrative Litigation Division, Section 5) Appeal No. 119/2004: Electra de Viesgo Distribución S.L. and Viesgo Generación S.L. (also known as E.On Distribución S.L. and E. On Generación S.L.) brought suit challenging the individual assignment of emissions credits contained in Royal Decree 1866/2004 of September 6, 2004, which approved the National Plan for Assignment of emissions credits 2005-2007. The decree, argued the plaintiffs, did not contain a savings clause applicable to the electricity sector (as it did for the industrial sector) to allow the adjustment of the credits assigned to facilities for which the reference period for the overall calculation of credits (the years 2002-2000) was not representative of historic emissions. Electra argued that not allowing otherwise eligible facilities to apply for adjustment of credits in accordance with their truly representative emissions periods resulted in a violation of the principle of equality. The Court found in favor of plaintiffs, inasmuch as the Administration did not provide a justification for not providing a savings clause to the electricity sector, and declared null and void section 4.A.a. of the National Plan.

Judgment No. 3421/2009 of May 29, 2009 (Supreme Court of Spain, Administrative Litigation Division, Section 5) Appeal No. 303/2005: Cerámica Dolores García Bazataqui S.L. brought suit challenging the decision of the Council of Ministers of Spain of January 21, 2005 that declared the individual assignment of emissions credits for the 2005-2007 term. Cerámica was assigned 18,051 annual credits, instead of the 29,023.76 it had requested. It argued that the assignment of credits was done in violation of provisions in Royal Decree 1866/2004 of September 6, 2004, which required consideration of increased production capacity prior to a certain date in order to determine acceptable emissions levels and the corresponding assignment of credits. The Court rejected this argument and dismissed the petition, as the record reflected that the Administration had adequately taken these factors into account.

Judgment No. 7168/2008 of December 3, 2008 (Supreme Court of Spain, Administrative Litigation Division, Section 5) Appeal No. 322/2005: Cerámica General Castaños, S.A., brought suit against the decision of the Council of Ministers of Spain of January 21, 2005 approving the assignment of emission credits to its facility in Bailen for the 2005-2007 term at 6,666 annual tons of CO2. The Court found in favor of Cerámica, inasmuch as the Administration had not taken into account the proven increase in production capacity that was expected from the facility's new wing. According to the Court, Royal Decree 1866/2004 of September 6, 2004 required consideration of increased production capacity prior to a certain date in order to determine acceptable emissions levels and the corresponding assignment of credits. However, the Court found there was insufficient proof in the record to sustain Cerámica's argument for an increase to 7,725 annual tons of CO2. Accordingly, the Court annulled the individual assignment of emissions credits and ordered that a new calculation take place in harmony with its findings.

Judgment No. 6947/2008 of December 3, 2008 (Supreme Court of Spain, Administrative Litigation Division, Section 5), Appeal No. 315/2005: Cerámica Hermanos Fernández S.L. brought suit against the General Government Administration of Spain challenging the decision of the Council of Ministers of Spain of January 21, 2005 approving an individual assignment of emissions credits to its facility. The court denied Cerámica's petition. It rejected petitioner's argument that the Council's decision had violated its right of free enterprise because individual

assignments were not being based on objective criteria, and that its particular assignment should have been based on the facility's production capacity, as opposed to its actual production.

Judgment No. 7167/2008 of December 2, 2008 (Supreme Court of Spain, Administrative Litigation Division, Section 5), Appeal No. 259/2005: Cales de Llierca, S.A., brought suit against the Council of Ministers of Spain challenging their decision of January 21, 2005 approving the individual assignment of emissions credits to its lime processing facility for the 2005-2007 period. Cales de Llierca argued the assignment of credits was done in violation of provisions in Royal Decree 1866/2004 which required consideration of increased production capacity prior to a certain date in order to determine acceptable emissions levels and the corresponding assignment of credits. The court found in favor of Cales de Llierca and ordered the Council to conduct a new assignment of credits, holding that the administrative record did not sustain the Council's conclusion regarding the facility's production capacity and that it had misapplied the methodologies required by applicable laws in reaching its conclusion.

Judgment No. 6895/2008 of November 19, 2008 (Supreme Court of Spain, Administrative Litigation Division), Appeal No. 318/2005: A brick manufacturer, Ladri Bailén, S.L., brought suit against a decision of the Council of Ministers of Spain of January 21, 2005 approving the assignment of emission allowances to its factory in Bailén at a total of 57,033 tons of CO2 for the 2005-2007 period, or 19,011 tons per year. The Court declared the decision of the Council of Ministers null and void as a matter of both Spanish administrative and constitutional law, as well as the laws of the European Union. The administrative record did not adduce sufficient reasons for the decision to assign to the facility an amount substantially less than requested (27,346 tons of CO2 annually, or a total of 83,038 tons for the 2005-2007 period) , though the request had been substantiated by adequate evidence indicating that the factory had increased its production capacity. The Ministry of the Environment was ordered to conduct a new assignment of credits.

Judgment No. 7449/2008 of November 18, 2008 (Supreme Court of Spain, Administrative Litigation Division, Section 5), Appeal No. 332/2006: Minera Catalana Aragonesa, S.A. brought suit against the General Government Administration of Spain (Ministry of the Environment) challenging the decision of the Council of Ministers of Spain of July 14, 2006, approving the individual assignment of emissions credits to its ceramics facility in the region of Onda. Minera Catalana had requested the exclusion of the types of processes employed at its facility (the drying of barbotine, a mixture of clay and water, by atomization) in the definition of "combustion facilities" under Law 1/2005 of March 9th, as modified by Royal Decree 5/2005 of March 11th, which regulates the market for GHG emissions trading in Spain. The court found in Minera Catalana's favor, adopting its argument that because its combustion processes were not used for energy production they could not be included in the scope of Law 1/2005, and declared the decision of the Council of Ministers in this respect null and void.

Judgment No. 5347/2008 of October 6, 2008 (Supreme Court of Spain, Administrative Litigation Division, Section 5), Appeal No. 100/2005: Foraneto, S.L. brought suit against the Council of Ministers of Spain challenging their decision to approve the individual assignment of emissions credits to its energy plant in Tarragona at a total of 140,250 tons of CO2 for 2005-2007 period, or 46.750 tons per year, under the provisions of Royal Decree 5/2004 of August

27th. Foraneto sought partial annulment of the Council's decision in order to increase its credit allowance by a total of 35,318 tons, or 11,772 additional tons per year (the amount originally requested); in the alternative, they sought compensation at the average market rate. The court found in Foraneto's favor, holding that the assignment of credits was made by applying formalistic factors that did not take into account the real volume of production at the Tarragona facility. Based on an expert's testimony, the court changed the assignment to a total of 174,508 tons for the 2005-2007 period, or 58.136 tons per year.

Judgment No. 6888/2008 of October 1, 2008 (Supreme Court of Spain, Administrative Litigation Division), Appeal No. 309/2005**:** A brick manufacturer, Macerba de Bailén, S.L., brought suit against a decision of the Council of Ministers of Spain of January 21, 2005 approving the assignment of emission allowances to its factory in Bailén at a total of 43.746 tons of CO2 over the course of three years (2005-2007), or 14.582 tons per year. The Court declared the decision of the Council of Ministers null and void as a matter of both Spanish administrative and constitutional law, as well as the laws of the European Union. The administrative record did not adduce any reasons for the Council's decision to assign to the facility an amount substantially less than requested (27,825 tons of CO2 annually, or a total of 83,475 tons for the 2005-2007 term) though the request was substantiated by technical evidence indicating that the factory was in the process of expanding its production capacity. The Ministry of the Environment was ordered to conduct a new assignment of credits.

Update #28 (Feb. 3, 2011)

COURT AND AGENCY DECISIONS AND SETTLEMENTS

Association of Irritated Residents v. California Air Resources Board (Cal. Sup. Ct. Jan. 21, 2011): added to the "state NEPAs" slide. A California Superior Court issued a tentative ruling that, if finalized, could set aside the California Air Resources Board's (CARB) certification of the scoping plan for implementing California's Global Warming Solutions Act, more commonly referred to as A.B. 32. In its ruling, the court concluded that CARB failed to adequately consider alternatives to cap-and-trade and other climate programs under the law. In December 2008, environmental justice advocates filed the lawsuit, alleging that CARB's proposal for a cap-and-trade program would adversely affect minority and low income communities. The court rejected plaintiffs' claims that the scoping plan failed to comply with the statutory requirements of A.B. 32 and that under the California Environmental Quality Act (CEQA), CARB was required to provide a detailed environmental analysis of each of the measures and programs prescribed by the scoping plan. However, the court accepted plaintiffs' claims that the analysis CARB provided was lacking facts and data to support the agency's conclusions in its environmental document.

New Energy Economy v. Martinez (listed in chart as *Leavell v. New Mexico Env. Improvement Board*) (N.M. Sup. Ct. Jan. 26, 2011): added to the "challenges to state action" slide. The New Mexico Supreme Court held that Governor Susana Martinez's administration violated the state Constitution by blocking regulations designed to reduce the state's GHG emissions from being published as codified in the New Mexico State Register. The court issued a writ of mandamus

against the state records administrator for failing to publish finalized regulations concerning a state cap on GHG emissions. Governor Martinez had imposed a 90-day delay in the implementation of the regulations to allow for a review to determine whether they were business friendly. This decision is discussed in more detail on CCCL's climate blog **here**.

Rocky Mountain Farmers Union v. Goldstene (E.D. Cal. Jan. 14, 2011): added to the "challenges to state action" slide. In 2009, Industry and business groups filed a lawsuit challenging California's low-carbon fuel standard promulgated by the California Air Resources Board, alleging that it violates the Commerce Clause of the U.S. Constitution because it interferes with interstate commerce, specifically because it discriminates against products made in other states such as corn-based ethanol. The plaintiffs subsequently moved for summary judgment. The defendants moved to deny or continue the motions pursuant to Federal Rule of Civil Procedure 56(d), seeking additional time to serve additional documents and interrogatories and to depose one additional individual. The district court granted the motion except as to one plaintiff and set a new discovery schedule.

U.S. v. Northern Indiana Public Service Co. (N.D. Cal., settlement dated Jan. 13, 2011): added to the "coal-fired power plant challenges" slide. A power company in northern Indiana agreed to spend approximately $600 million over the next eight years to improve pollution controls as part of a settlement of a case alleging that the company violated the Clean Air Act. The settlement requires that the company spend $9.5 million on environmental mitigation projects and pay a $3.5 million fine. Under the agreement, the company will make improvements at three of its four coal-fired power plants to meet emission rates and annual tonnage limitations. The company is also required to permanently retire its fourth plant, which is currently out of service.

Texas v. EPA (D.C. Cir. Jan. 12, 2011): added to the "challenges to federal action" slide. The D.C. Circuit lifted an emergency stay that had blocked EPA from taking over Texas's GHG permitting program, holding that the state did not satisfy the standards required for a stay pending review. The decision allows EPA to issue permits for large stationary sources of GHG emissions in Texas pending a review of the merits of the lawsuit. In December 2010, EPA announced the publication of rules that would allow it to issue permits for new and modified sources of GHG emissions in Texas and stated that it was taking this action because Texas refused to implement GHG emissions permits as it was required to do under prevention of significant deterioration (PSD) provisions of the Clean Air Act starting January 2, 2011. Texas then sought an emergency stay in the D.C. Circuit, which granted an "administrative stay" on December 30, 2010. In that order, the court stated that it did not rule on the merits and granted the stay only so it had an adequate opportunity to consider the motion and so EPA had an adequate opportunity to respond.

Sierra Club v. U.S. Defense Energy Support Center (N.D. Cal. Jan. 11, 2011): added to the "other statutes" slide under "Energy Policy Act/EISA." The district court granted a motion to transfer venue to the Eastern District of Virginia, holding that the plaintiffs had met their burden in meeting the elements required to transfer the case. The Sierra Club filed the lawsuit seeking to stop the U.S. military from buying fuels derived from Canadian oil sands, alleging that the fuels violate Section 526 of the Energy Independence and Security Act (EISA), which states that for federal agency purchases of fuels produced from nonconventional sources like oil sands, "the

lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources." Sierra Club contends that given the higher GHG emissions associated with oil sands production, the Defense Department is violating the EISA as well as the Administrative Procedure Act and NEPA.

Comer v. Murphy Oil (U.S. Sup. Ct. Jan. 10, 2011): added to the "common law claims" slide. The U.S. Supreme Court rejected without comment the plaintiffs' request for a writ of mandamus concerning a lawsuit that alleged that defendants, including a number of companies that produce fossil fuels, caused the emission of GHGs that contributed to climate change and thereby added to the ferocity of Hurricane Katrina, ultimately causing damages to plaintiffs' property. Defendants moved to dismiss, which was granted by the district court. On appeal, the Fifth Circuit partially reversed, holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims presented nonjusticiable political questions. The Fifth Circuit subsequently granted a motion to reconsider its decision *en banc*. In May 2010, due to the loss of a quorum because of recusal of an additional judge, the Fifth Circuit dismissed the *en banc* review, and determined that the district court's dismissal of the lawsuit should stand. In August 2010, the plaintiffs filed a petition for a writ of mandamus with the U.S. Supreme Court, seeking an order that would, in effect, overturn the Fifth Circuit's dismissal of the appeal. The denial of the writ means that that the suit's dismissal by the district court stands.

WildEarth Guardians v. EPA (D. Col., settlement dated Jan. 10, 2011): added to the "coal-fired power plant challenges" slide. EPA has agreed to respond to three administrative petitions submitted by WildEarth Guardians requesting that EPA object to Colorado's issuance of Clean Air Act permits to three coal-fired power plants. The consent decree settles a lawsuit filed by the group in July 2010 alleging that EPA failed to perform a duty mandated by the CAA to grant or deny the three petitions within 60 days. Pursuant to the terms of the settlement, EPA has agreed to respond to one petition by June 30, 2011, the second petition by September 30, 2011, and the third petition by October 31, 2011.

Northern Plains Resource Council v. Montana Board of Land Commissioners (Montana Dist. Ct. Jan. 7, 2011); ***Montana Environmental Information Center v. Montana Board of Land Commissioners*** (Montana Dist. Ct. Jan. 7, 2011): added to the "state NEPAs" slide. A state court in Montana held that two lawsuits may proceed against Montana's land board for leasing 8,300 acres of state-owned land for surface coal mining without an environmental review. The plaintiffs are seeking a declaratory judgment that the Montana Board of Land Commissioners violated the state constitution by failing to conduct an environmental review when it leased the land in southeastern Montana to a coal company in 2010. In 2003, an exemption from a provision of the Montana Environmental Policy Act was passed by the state legislature specifically to facilitate the lease. The exemption defers environmental review from the leasing stage to the later mine permitting stage. The plaintiffs allege that the exemption is unconstitutional and denies the land board its right to place mitigating conditions on the lease.

Holland v. Michigan Dept. of Natural Resources & Env. (Ottawa Co. Mich. Cir. Ct. Dec. 15, 2010): added to the "coal-fired power plant challenges" slide. A state trial court in Michigan held that the Michigan Department of Natural Resources and Environment acted outside its constitutional and statutory authority in denying a company's expansion of its coal-fired power plant. The court found that the agency's decision was based on an executive order by former Governor Jennifer Granholm which required regulators to deny permits for coal-fired plants unless the utilities can show no alternatives are available. Because the decision was based on the Governor's "capricious" policy change and not on compliance with air quality standards as outlined under state law, the agency's decision was arbitrary.

COMPLAINTS/PETITIONS/MOTIONS/SUBPOENAS

Sierra Club v. Moser (Kansas Ct. App., filed Jan. 14, 2011): added to the "coal-fired power plant challenges" slide. The Sierra Club petitioned a Kansas appellate court seeking to overturn a permit allowing Sunflower Electric Power Corporation to build a coal-fired power plant. The petition alleges that the Kansas Department of Health and Environmental violated the Clean Air Act and accepted bogus data when it approved the plant's permit in December 2010.

Notices of Intent to sue under the Endangered Species Act (Jan. 13, 2011; Jan. 17, 2011): added to the "Endangered Species Act" slide. On January 13, 2011, the Center for Biological Diversity formally **notified** the Department of the Interior (DOI) that it intends to file suit concerning the agency's decision to allow new oil and gas development in area that was declared critical habitat for polar bears by the U.S. Fish and Wildlife Service in November 2010. On January 17, 2011, a coalition of groups representing Inupiat Eskimo residents of the North Slope notified DOI that it intends to sue the agency on the grounds that the designation of critical habitat penalizes them for pollution created elsewhere and that the designation will do nothing to mitigate the rapid decline of the polar bear.

United States v. EME Homer City Generation LP (W.D. Penn., filed Jan. 6, 2011): added to the "coal-fired power plant challenges" slide. The U.S. Justice Department filed a lawsuit in federal court alleging that current and former owners and operators of a coal-fired power plant in western Pennsylvania violated the Clean Air Act by making major modifications to two electric generating units without obtaining required permits or installing proper emissions controls. According to the complaint, the defendants made major modifications to one boiler unit in 1991 and to another unit in 1994, which resulted in significantly increased pollutant emissions. The complaint alleges that sulfur dioxide emissions at the plant total 100,000 tons a year, making it one of the largest air pollution sources in the nation.

Koch Industries, Inc. v. John Does 1-25 (D. Utah, filed Dec. 28, 2010): added to the "climate change protestors and scientists" slide. Koch Industries filed a lawsuit seeking to punish anonymous pranksters who claimed in a fake press release posted on the internet that it was discontinuing funding to climate denial groups. The lawsuit alleges that defendants issued the fake press release and set up a fake website with the intent to deceive and confuse the public, to disrupt and harm Koch Industries' business and reputation, and that as a result the company's business and reputation were harmed.

Update #27 (Jan. 6, 2011)

COURT AND AGENCY DECISIONS AND SETTLEMENTS

Texas v. EPA (5th Cir. Dec. 29, 2010) and ***Texas v. EPA*** (D.C. Cir. Dec. 30, 2010): added to the "challenges to federal action" slide. On December 23, 2010, EPA announced the publication of rules that would allow it to issue permits for new and modified sources of GHG emissions in Texas. The agency stated that it was taking this action because Texas refused to implement GHG emissions permits as it was required to do under prevention of significant deterioration (PSD) provisions of the Clean Air Act starting January 2, 2011. Earlier, on December 15, 2010, Texas filed a motion to challenging the PSD provisions with respect to GHGs and requesting a stay of their implementation. On December 29, 2010, the Fifth Circuit denied the motion, holding that the state had not met its burden in satisfying the legal requirements for a stay. Texas then sought an emergency stay in the D.C. Circuit, which granted an "administrative stay" on December 30, 2010. In its order, the court stated that it did not rule on the merits and granted the stay only so it had an adequate opportunity to consider the motion and so EPA had an adequate opportunity to respond.

New York v. EPA (D.C. Cir., settlement reached Dec. 23, 2010) and ***American Petroleum Institute v. EPA*** (D.C. Cir., settlement reached Dec. 23, 2010): added to the "Clean Air Act" slide. EPA announced that it had reached agreements in two lawsuits to propose sector-wide GHG emissions controls for electric utilities and petroleum refineries. The agreements call for EPA to propose revisions to new source performance standards and emissions guidelines for the industries, which include limits on GHGs. The new source performance standards will apply to new and modified facilities, while the emissions guidelines will apply to existing facilities. Under the **agreement** concerning electric power plants (*New York v. EPA*), EPA must propose the new standards by July 26, 2011 and finalize them by May 26, 2012. Under the **agreement** with refineries (*American Petroleum Institute v. EPA*), EPA must propose the new standards by December 15, 2011 and finalize them by November 15, 2012.

Center for Biological Diversity v. Lubchenco (N.D. Cal. Dec. 21, 2010): added to the "Endangered Species Act" slide. The Center for Biological Diversity, along with Greenpeace, filed suit against the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS), alleging that the agencies violated the Endangered Species Act by failing to list the ribbon seal as threatened or endangered. NMFS concluded that ribbon seals are not in current danger of extinction and that the abundance of the ribbon seal population is likely to decline gradually in the foreseeable future, but that this decline is unlikely to make them an endangered species. After discovery, both sides moved for summary judgment. The district court granted the government's motion, holding that the agencies' decision was supported by the evidence and was not arbitrary or capricious.

Hempstead County Hunting Club v. Southwestern Electric Power Co. (8th Cir. Dec. 21, 2010): The Eighth Circuit upheld an injunction blocking a power company from continuing construction on a coal-fired power plant in Arkansas, vacating its November 24, 2010 interim

judgment staying a preliminary injunction granted by a federal district court judge. The court held that the district court's issuance of the preliminary injunction was not plainly contrary to law concerning the requirement that plaintiffs must show irreparable harm in the absence of a preliminary injunction.

National Petrochemical and Refiners Association v. EPA (D.C. Cir. Dec. 21, 2010): added to the "challenges to federal action" slide. The D.C. Circuit rejected a challenge by two petroleum industry associations to EPA requirements for blending renewable fuels, such as ethanol, in transportation fuels. The court denied petitions by the National Petroleum and Refiners Association and the American Petroleum Institute to overturn an EPA rule implementing the renewable fuel standard that took effect July 1, 2010 but covered the entire year, agreeing with EPA that the Energy Independence and Security Act authorized the agency to establish mandates for fuel producers to blend renewable fuel into their products for the entire year. The court also agreed with EPA that the agency acted within the law when it set the requirement for biodiesel in 2010 by combining the requirements contained in the law for 2009 and 2010. The law required 500 million gallons of biodiesel in 2009 and 650 million gallons in 2010. The EPA rule combines the annual amounts, requiring 1.15 billion gallons in 2010.

Fall-Line Alliance for a Clean Environment v. Barnes (Georgia Office of State Administrative Hearings Dec. 16, 2010): added to the "coal-fired power plant challenges" slide. A Georgia administrative law judge rejected a state air quality permit for a proposed coal-fired power plant, ruling that the state's Environmental Protection Division (EPD) set pollutant limits for the facility based on the limits in other facilities' permits rather than on the amount of pollution actually reduced at those plants. The judge held that the EPD erred by basing the maximum achievable control technology (MACT) emissions floor for non-mercury hazardous metals and hazardous organic pollutants on the permitted levels of the best controlled similar sources, rather than on the emission reductions actually achieved by those sources. In doing so, EPD failed to determine whether the permitted emissions limitations reasonably reflected the level of control achieved at the facilities.

Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission (Minn. Ct. App. Dec. 14, 2010): added to the "state NEPAs" slide. An environmental nonprofit filed a lawsuit challenging a 313-mile long crude oil pipeline in Minnesota, alleging that the Minnesota Public Utilities Commission (MPUC) violated the Minnesota Environmental Protection Act (MEPA) by, among other things, not considering the GHG emissions from refining the tar sands from which the petroleum would be extracted. A state district court granted summary judgment in favor of MPUC. The appellate court affirmed, holding that the state regulations did not require that MPUC take into account emissions from the tar sands.

Decision finding that wolverines warrant protection under the Endangered Species Act (Fish and Wildlife Service Dec. 13, 2010): added to the "Endangered Species Act" slide. The Fish and Wildlife Service (FWS) announced that wolverines warrant protection under the ESA, but would have to wait until other higher priority species are addressed. The species will be placed on a list of candidates for ESA protection and its status will be reviewed annually. FWS' determination concluded that a study on the wolverine found that the primary threat to the species is climate change.

Coalition for Responsible Regulation v. EPA (D.C. Cir., Dec. 10, 2010): added to the "challenges to federal action" slide. The D.C. Circuit denied all the pending motions to stay EPA's regulations of greenhouse gases, some of which took effect on January 2, 2011. The order declared that the petitioners (several industry groups and states opposed to climate regulation) "have not shown that the harms they allege are 'certain,' rather than speculative, or that the 'alleged harm[s] will directly result from the action[s] which the movant[s] seeks to enjoin.'" The court also directed that (as the petitioners had requested) the cases be scheduled for oral argument on the same day before the same panel.

Olmstead County Concerned Citizens v. Minnesota Pollution Control Agency (Minn. Ct. App. Dec. 7, 2010): added to the "state NEPAs" slide. A company sought to construct and operate a 75-million-gallon-per-year ethanol plant which would rely on process water from two production wells for its water needs. The process water would be recycled on-site and reused. A citizens' group challenged the Minnesota Pollution Control Agency's decision not to require an environmental impact statement (EIS) for the project. Among other things, the citizens' group alleged that the environmental assessment did not adequately address increased greenhouse gas emissions from indirect impacts like corn production used for ethanol. The state district court granted summary judgment on behalf of the agency. The appellate court affirmed, holding that it was not arbitrary or capricious not to include such an analysis given that the long-term effects of ethanol production were relatively unknown.

Proposal to list ringed and bearded seals as threatened under the Endangered Species Act: (NOAA Dec. 3, 2011): added to the "Endangered Species Act" slide. The National Oceanic and Atmospheric Administration proposed listing the ringed seal and the bearded seal as threatened under the Endangered Species Act due to climate change impacts.

COMPLAINTS/PETITIONS/MOTIONS/SUBPOENAS

National Petrochemical & Refiners Association v. EPA (D.C. Cir., filed Jan. 3, 2011) and ***Alliance of Automobile Manufacturers v. EPA*** (D.C. Cir., filed Dec. 20, 2010): added to the "challenges to federal action" slide. A coalition of automobile manufacturers and engine makers sued EPA over a rule that would allow the use of gasoline with up to 15% ethanol in vehicles from model years 2007 and newer, alleging that it violates the Clean Air Act. Ethanol content in gasoline is currently limited to 10%. On October 13, 2010, EPA announced that it would grant a partial waiver allowing vehicles from model years 2007 and newer to use gasoline with up to 15% ethanol. The petitioners allege that the CAA does not allow such a partial waiver.

Notice of intent to sue over polar bear critical habitat designation: (State of Alaska, Dec. 21, 2010): added to the "Endangered Species Act" slide. The State of Alaska noticed the Fish and Wildlife Service that it intends to sue the agency to overturn the designation of 187,157 square miles of critical habitat for polar bears, which were designated as threatened under the ESA. Alaska contends that the designation of such a large habitat is not justified by available science

and was established without adequate consideration of the state's comments and interests or an analysis of the designation's economic impact.

Climate Solutions v. Cowlitz County (Washington State Shorelines Hearings Board, filed Dec. 13, 2010): added to the "state NEPAs" slide. Several environmental groups filed an appeal to the Washington State Shorelines Hearings Board, seeking to delay the opening of a major coal export facility. The petition alleges that county commissioners erred in determining that the project would not have a significant enough effect on the environment to require an environmental impact statement under the State Environmental Policy Act (SEPA). The petition alleges that the county should have examined, among other things, the GHG emissions that would be emitted by the coal. The facility is expected to export 5.7 million tons of coal annually.

Update #26 (Dec. 9, 2010)

COURT AND AGENCY DECISIONS

American Electric Power v. Connecticut (U.S. Sup. Ct., cert. granted Dec. 6, 2010): added to the "common law claims" slide. The U.S. Supreme Court granted certiorari in a case brought by eight states and New York City against six large electric power generators that sought to limit the generators' GHG emissions by claiming that these emissions contributed to the public nuisance of climate change. In 2005, the district court dismissed the lawsuit, holding that the claims represented "non-judiciable political questions." In 2009, the Second Circuit reversed, holding that although Congress had enacted laws affecting air pollution, none of those laws displaced federal common law. In August 2010, four of the defendants filed a petition for certiorari. That same month, the federal government, appearing on behalf of one of the named defendants (Tennessee Valley Authority), also filed a cert petition seeking to overturn the Second Circuit's decision. The brief questioned whether the plaintiffs had standing to bring the lawsuit and whether recent actions by EPA to regulate GHG emissions displace the federal common law of nuisance. Justice Sotomayor recused herself; she had been on the Second Circuit panel that heard the argument below, though she had been promoted to the Supreme Court before the Second Circuit issued its ruling allowing the case to proceed.

In re Application of Middletown Coke Co. (Sup. Ct. Ohio Dec. 1, 2010): added to the "challenges to coal-fired power plants" slide. The Ohio Supreme Court held that the Ohio Power Siting Board has jurisdiction to review a proposed power plant's environmental impact, regardless of its declaration to the contrary. In approving the power plant's application, the Board claimed that it had no jurisdiction to review construction permits requiring environmental impact assessments. The Supreme Court disagreed, holding that state law required it to assess whether the plant would have minimal adverse environmental impacts.

WildEarth Guardians v. Jackson (D. Col. Nov. 30, 2010): added to the "challenges to coal-fired power plants" slide. The EPA agreed to respond to petitions objecting to Colorado's issuance of operating permits to three coal-fired power plants in Colorado. The proposed

agreement would settle a lawsuit filed by WildEarth Guardians alleging that EPA failed to fulfill a Clean Air Act (CAA) mandate to respond within 60 days to the organization's objections to the permits.

Critical Habitat Designation for Polar Bear (U.S. Fish and Wildlife Service, Nov. 24, 2010): added to the "Endangered Species Act" slide. The U.S. Fish and Wildlife Service designated 187,157 square miles of Alaska land and floating sea ice as critical habitat for the polar bear, which is listed as **threatened** under the Endangered Species Act. The proposed designation of the critical habitat in 2009 covered 200,541 square miles. The USFWS stated that the smaller area in the final designation was primarily because of corrections to accurately reflect the U.S. boundary for proposed sea ice habitat, which extends 200 miles off the U.S. coast.

Sierra Club v. Sandy Creek Energy Associates (5th Cir. Nov. 23, 2010): added to the "challenges to coal-fired power plants" slide. The Fifth Circuit reversed a district court decision, holding that construction of a coal-fired power plant in Waco, Texas violated the CAA because, as a major source of a hazardous air pollutant, it lacked a determination by a regulatory authority on required emissions control technology. According to the court, because the plant will emit more than 10 tons of mercury per year, it falls under the construction requirements of Section 112(g) of the CAA, which governs hazardous air pollutants. This section prohibits construction of any major source of hazardous air pollutants unless a state or federal authority has determined that the source will meet maximum achievable control technology (MACT) emissions limits for new sources.

***In re* Russell City Energy Center LLC** (EPA Env. App. Board Nov. 18, 2010): added to the "Clean Air Act" slide. The EPA Environmental Appeals Board denied petitions to review a CAA permit issued by San Francisco Bay area regulators for a natural gas-fired power plant that includes a cap on greenhouse gas emissions. The challenges rejected by the Appeals Board addressed non-greenhouse gas-related provisions in the permit for the facility. None of the petitions objected to the greenhouse emissions cap. The order gives the go-ahead for the first ever CAA pre-construction permit issued with limits on greenhouse gas emissions.

EPA Ocean Acidification Memo (EPA Nov. 15, 2010): added to the "Other States" slide under "Clean Water Act." EPA issued a memorandum stating that states should include waters affected by ocean acidification in their lists of impaired waters and develop plans to address the problem. EPA said in the memo that states should include marine pH water quality when compiling 2012 Section 303(d) lists for waters not meeting water quality standards. This section requires states to develop lists of waters that do not meet quality standards they have set. The memo is part of a settlement agreement EPA announced in March 2010 to resolve a lawsuit filed by the Center for Biological Diversity. One condition of the settlement was that EPA issue a memorandum by November 15 describing how the agency will proceed on addressing ocean acidification.

New Energy Economy v. Shoobridge (listed in chart as *Leavell v. New Mexico Env. Improvement Board*) (Sup. Ct. N.M. Nov. 10, 2010): added to the "challenges to state action" slide. The New Mexico Supreme Court, reversing a lower court, held that a court may not intervene when the state legislature delegates authority to a state agency to promulgate rules and

regulations before that agency has adopted such rules and regulations. In April 2009, the New Mexico Environmental Improvement Board voted to classify greenhouse gas emissions as air pollutants under the New Mexico Air Quality Control Act and make them subject to rulemaking by the Board. In January 2010, a group of state legislators, businesses, agricultural interests and others filed an action in state court seeking to stop the Board from adopting a statewide cap on greenhouse gas emissions, alleging that it lacked statutory authority to consider or adopt an emissions cap. In April 2010, a lower court issued a preliminary injunction halting the Board's adoption of such regulations.

Sierra Club v. U.S. Army Corps of Engineers (W.D. Arkansas Nov. 2, 2010): added to the "challenges to coal-fired power plants" slide. A federal court refused to grant a company constructing a power plant a stay of an October 2010 preliminary injunction blocking construction of the plant. In July 2010, the Sierra Club and other environmental groups filed the lawsuit alleging that the Army Corps of Engineers granted a permit to the company to build the plant without carrying out the necessary environmental impact studies. In the October 2010 decision, the court held that the Sierra Club made a sufficient showing that environmental damage was likely to occur. The permit would have allowed the company to fill in eight acres of wetlands, divert large amounts of water from the Little River, and build three new power lines.

***In re* WildEarth Guardians** (Interior Dept. Board of Land Appeals Oct. 28, 2010): added to the "NEPA" slide. The Interior Department's Board of Land Appeals denied a request for a stay of a previous decision allowing the sale of 2,695 acres adjoining coal mines in northwestern Wyoming, effectively allowing the Bureau of Land Management (BLM) to complete the sales. In August 2010, the BLM agreed to offer the land at issue for leasing purposes. WildEarth Guardians, along with several other environmental groups, appealed the decision, alleging that BLM failed to adequately analyze and assess the climate change impacts of the leases under NEPA.

COMPLAINTS/PETITIONS/MOTIONS/SUBPOENAS

Sierra Club v. EPA (W.D. Wash., filed Nov. 17, 2010): added to the "challenges to coal-fired power plants" slide. The Sierra Club, along with several other environmental organizations, filed a lawsuit alleging that EPA violated the CAA by failing to respond to objections concerning an operating permit issued by the agency for an existing coal-fired power plant in Washington state. The Southwest Clean Air Agency, which is responsible for administering the state's Title V permit program, published a draft Title V operating permit for the plant in May 2009. The plaintiffs lodged complaints in July 2009 and requested that EPA object to the draft permit. However, the complaint alleges that EPA provided no response to the comments within the required 45 days. The lawsuit alleges that EPA should have objected to the permit because it failed to require reasonably available control technology for the control of, among other things, carbon dioxide.

Southern Utah Wilderness Alliance v. Interior Dept. (D.D.C., filed Nov. 9, 2010): added to the "NEPA" slide. Several environmental groups filed a lawsuit against the Interior Department, challenging three Bureau of Land Management approvals authorizing oil and gas development

on 4.5 million acres of public lands in southeast Utah. The lawsuit alleges that BLM's 2008 approval of resource management plans for this land violated NEPA because the agency failed to consider the environmental impacts of oil and gas development, off-road vehicle use, and other motor vehicle use on the lands, including their contribution to climate change.

Grocery Manufacturers Association v. EPA (D.C. Cir., filed Nov. 9, 2010): added to the "challenges to federal action" slide. An industry association and several other representatives of the meat and pork industry filed an action challenging EPA's decision to grant a waiver allowing more ethanol in fuel for 2007 and newer vehicles, alleging that the agency exceeded its authority under the CAA. The decision raises from 10 percent to 15 percent the maximum ethanol level in gasoline used in these vehicles.

Defenders of Wildlife v. Jackson (D.D.C, filed Nov. 8, 2010): added to the "other statutes" slide under "Clean Water Act." The Sierra Club filed a lawsuit against the EPA, alleging that it has failed to revise wastewater limits for coal-fired power plants in violation of the Clean Water Act. The lawsuit alleges that despite EPA data showing high concentrations of toxic metals in power plant wastewater, there are no national standards regarding coal-combustion effluent.

Sierra Club v. EPA (D.C. Cir., filed Nov. 8, 2010): added to the "challenges to federal action" slide. The Sierra Club filed a lawsuit seeking restrictions on greenhouse gas emissions from Portland cement plants. The lawsuit challenges new source performance standards for Portland cement plants announced by EPA. In September 2010, EPA published a final rule regarding standards for the plant which did not include limits on greenhouse gas emissions.

United States v. DTE Energy Co. (E.D. Mich., filed Aug. 5, 2010): added to the "challenges to coal-fired power plants" slide. The federal government filed a lawsuit against DTE Energy Co., alleging that it modified a coal-fired power plant in Michigan without a permit and failed to install proper pollution controls. Specifically, the government claims that the company modified a unit without installing the equipment needed to limit nitrogen oxide and sulfur dioxide emissions in violation of the New Source Review provisions of the CAA. In November 2010, the court granted a motion to intervene filed by the Natural Resources Defense Council and the Sierra Club.

Sierra Club v. Vilsack (D.D.C., filed June 15, 2010): added to the "challenges to coal-fired power plants" slide. The Sierra Club filed a lawsuit challenging a regulation pursuant to which the federal Rural Utilities Service (RUS) granted approval for a company to construct a new coal-fired power plant without requiring environmental review under the National Environmental Policy Act. In July 2009, the RUS granted the company a lien accommodation to allow it to obtain private financing for the construction of a new unit. In November 2010, the court granted the company's motion to intervene.

NON-U.S. COURT DECISIONS

SPAIN

Judgment No. 6903/2008 of September 30, 2008, Supreme Court of Spain, Administrative Litigation Division (Section 5). An energy company, Unión Fenosa Generación, S.A., brought suit against a decision of the Council of Ministers of Spain dated January 21, 2005, whereby it approved the assignment of emissions allowances to two of the company's power plants for the 2005-2007 term under the provisions of Royal Decree 5/2004 of August 27th, which regulated the market for GHG emissions trading. The Court granted plaintiff's request for an increase in the emission allowances for its combined cycle power plant in Huelva, which had been incorrectly considered a "new entrant" to the emissions market under the regulation's timetable. Plaintiff's request for an increase in its emission allowances as to its coal-fired power plant in La Coruña, one of the five worst emitters in the country¸ was denied. The Court found that the government was justified in applying the maximum penalty of 55% over the total 2000-2002 historical emissions for that category of emitter, despite the fact that plaintiff was thus allowed a lower emission factor than other emitters of the same generation of technologies.

Judgment No. 4745/2009 of July 6, 2009, Supreme Court of Spain, Administrative Litigation Division (Section 5). A mineral extraction company, Segura, S.L., brought suit against a decision of the Council of Ministers of Spain of January 21, 2005, which approved the assignment of emission credits to the company's limestone processing facility in Seville for the 2005-2007 term under the provisions of Royal Decree 5/2004 of August 27th, which regulated the market for GHG emissions trading. The Court found that the decision of the Council was invalid because it did not adduce adequate foundation as to the criteria that were applied to quantify the emission credits assigned to Segura, S.L., and ordered the Council to conduct the assignment of credits anew. Adequate foundation deemed important to avoid arbitrary application of rules, to promote transparency in the market for emissions trading, and avoid impinging on principles of sound competition.

Judgment No. 1205/2010 of March 4, 2010, Supreme Court of Spain, Administrative Litigation Division (Section 5). An energy retailing company brought suit against the General Government Administration of Spain, challenging Royal Decree 1370/2006 of November 24th (Official Bulletin of the State No. 282 of November 25, 2006), which implemented amendments to Spain's National Allocation Plan for greenhouse gas allowances for 2008-2012. The Court found that rules setting standards for SO2 emissions, and which took into account investments to reduce SO2 emissions by coal-fired power plants in assigning emission allowances under the Plan, were null and void on their face because they were not specifically authorized by Spain's implementing statute for the EU's Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, Law 1/2005 of March 9th. Rules relating to the provisional assignment of credits for new installations also found to be contrary to the implementing statute because they effectively altered the definition of "new entrants" in the statute. However, the Court rejected plaintiff's argument that the Plan's methodology for the assignment of credits to coal-fired power plants was invalid because it placed undue burdens on certain facilities, as well as its argument that the allowance reserves for new entrants were inadequately low.

Update #25 (Nov. 5, 2010)

NEW COURT AND AGENCY DECISIONS

Sierra Club v. U.S. Army Corps of Engineers (W.D. Ark. Oct. 24, 2010): added to the "challenges to coal-fired power plants" slide. A federal court in Arkansas granted the Sierra Club's request for an injunction that would prevent the construction of a 600 megawatt coal-fired power plant in Hempstead County, Arkansas, holding that it and other plaintiffs made a sufficient showing that environmental damage was likely to occur. In their complaint, plaintiffs alleged that the U.S. Army Corps of Engineers granted a permit to the plant without carrying out the necessary environmental studies required under NEPA and the Clean Water Act. The permit would have allowed the company to fill in eight acres of wetlands, divert large amounts of water from the Little River, and build three new power lines. In February 2010, the Sierra Club and three chapters of the Audubon Society filed suit against the Corps, alleging that the Corps violated NEPA and the Clean Water Act when it issued the permit.

Erickson v. Gregoire (Wash. Sup. Ct. Oct. 22, 2010): added to the "challenges to state action" slide. A state court in Washington dismissed a lawsuit challenging an executive order by Governor Christine Gregoire that laid the groundwork for a greenhouse gas emissions control program, holding that the executive order fell within the Governor's constitutional and statutory authority to issue policy statements and directives to state agencies. Earlier this year, a conservative legal foundation filed a lawsuit challenging the 2009 executive order, which directed the Washington Department of Ecology to, among other things, continue participating in the Western Climate Initiative, to contact industrial facilities to determine a baseline for GHG emissions, and to develop information for large facilities to determine how they could help meet GHG emissions goals in 2020. The lawsuit alleged that the executive order is unconstitutional because it has the force and effect of law and that such an obligation cannot be created through an executive order.

In re Polar Bears Endangered Species Litigation (D.D.C. Oct. 20, 2010): added to the "Endangered Species Act" slide. A district court hearing a multi-district litigation concerning whether to extend endangered species protection to polar bears orally issued an order requiring the U.S. Fish and Wildlife Service (FWS) to clarify why it determined that polar bears are merely threatened rather than endangered. In 2008, the FWS made the determination that polar bears are threatened rather than endangered under the ESA. On November 4, 2010, the court issued a written decision giving FWS until December 23, 2010 to file its conclusions with the court.

Center for Biological Diversity v. California Fish and Game Commission (Cal. Sup. Ct. Oct. 19, 2010): added to the "Endangered Species Act" slide. For the second time, a state court ordered California's Fish and Game Commission to study whether the America pika has become endangered under California's Endangered Species Act because of climate change, holding that the Commission improperly refused to consider new scientific studies since environmental groups first petitioned for the species' protection. The Center for Biological Diversity (CBD) filed its lawsuit challenging the Commission's rejection of its petition. The complaint alleges that the Commission ignored scientific evidence showing that climate change pose a threat to the pika, a hamster-like mammal that lives near mountain peaks in the western U.S. In May 2009, a state court found that the Commission had applied the wrong legal standard in rejecting CBD's

petition in 2008 and ordered it to reconsider the request. In October 2009, the Commission finalized a decision that found that listing the pika as endangered or threatened was unwarranted.

Sierra Club v. Clinton (D. Minn. Oct. 19, 2010): added to the "NEPA" slide. A district court dismissed with prejudice a lawsuit brought by environmental groups against the United States seeking to halt construction of a pipeline extending from Alberta, Canada to Wisconsin. The environmental groups alleged that several federal agencies violated NEPA during the permitting process of the Alberta Clipper Pipeline. The pipeline will transport heavy crude oil extracted from tar sands in Canada. Among other things, plaintiffs alleged that the State Department violated NEPA by issuing an environmental impact statement (EIS) that did not address impacts of increased greenhouse gas emissions that would be caused by increased exploitation of the tar sands. In granting the motion to dismiss, the court held that the EIS supported the need for the pipeline. In addition, the court held that the Canadian oil sands were being developed separately from the pipeline and, thus, there was an insufficient causal relationship between the pipeline and the oil sands such that the EIS was not deficient in its failure to consider the transboundary impacts of increased greenhouse gases caused by increased exploitation of the tar sands.

United States v. Cinergy Corp. (7th Cir. Oct. 12, 2010): added to the "coal-fired power plant challenges" slide. The Seventh Circuit reversed and remanded a lower court decision finding a coal-fired power plant in Indiana liable under the Clean Air Act for making major modifications to the plant without first obtaining a permit from EPA. In a unanimous decision, the court held that the plant acted in accordance with Indiana's state implementation plan, which had been approved by EPA, when it made modifications between 1989 and 1992. The court held that the plant did not need a new source review permit to perform the modifications because the changes did not increase the plant's hourly emissions output as stipulated by the state's plan.

Steadfast Insurance Co. v. The AES Corp. (Arlington Co. Cir. Ct. Feb. 5, 2010): added to the "common law claims" slide. In February 2010, a state court denied the defendant's motion for summary judgment without comment. In July 2008, Steadfast filed a lawsuit seeking a declaratory judgment that the company, which issued a series of general liability insurance policies to AES, is not liable for any damages AES is obligated to pay in *Native Village of Kivalina v. ExxonMobil Corp*., a lawsuit seeking damages from AES and other parties caused by climate change that threatens a village in Alaska. The complaint alleges several bases for non-coverage, including that the policies only apply to claims arising from an "accident" which is not alleged by the *Kivalina* plaintiffs, that the damages occurred prior to September 2003 when the policies were issued, and because greenhouse gases are considered a pollutant which is subject to the pollution exclusion clauses in the policies.

COMPLAINTS/PETITIONS/MOTIONS/SUBPOENAS

In re **Tongue River Railroad Co.** (Surface Trans. Bd., filed July 26, 2010): added to the "NEPA" slide. Petitioners, including the Northern Plains Resource Council, moved to reopen a proceeding before the Surface Transportation Board concerning a proposed railroad that would access coal in the Powder River Basin in Montana and Wyoming. Among other things, the petition alleges that the final Environmental Impact Statement prepared pursuant to NEPA in

October 2006 did not consider the emergence of new scientific evidence concerning accelerating effects of climate change and the need to reduce greenhouse gas emissions from the burning of coal and other fossil fuels.

NON-U.S. COURT DECISIONS

Afton Chemical Limited v. Secretary of State for Transport (European Court of Justice, 2010) Case C-343/09: Afton Chemical, a British MMT producer, challenged the EU limits and labeling requirements for the use of the metallic fuel addictive MMT. The European Court of Justice ruled that the limit on MMT, adopted in the revised fuel quality Directive 98/70/EC, does not violate the precautionary principle and the principles on equal treatment and proportionality. The court concluded that the EC places significant weight on the protection of human health and the environment. Reducing the health and environmental risks associated with MMT use outweighs the economic interests of Afton Chemical.

Republic of Poland v. Commission of the European Communities (Court of First Instance, Second Chamber, 2009), Case T-183/07: In 2006, the Republic of Poland notified the Commission of its NAP for the period from 2008 to 2012. In 2007, the Commission held that its NAP was incompatible with the criteria set forth in Directive 2003/87 and decided that the total annual quantities of emission allowances should be reduced to 26.7% less than that proposed. Poland appealed the Commission's decision. As a preliminary issue, the Court held that each member state is to decide, on the basis of its NAP, on the total quantity of allowances it will allocate for a period in question, and the Commission's power to review these NAPs is very restricted. In the present case, the Commission's rejection of Poland's plan based on doubts as to the reliability of the data used exceeded the Commission's authority and violated the principle of equal treatment.

Republic of Estonia v. Commission of the European Communities (Court of First Instance, Seventh Chamber, 2009), Case T-263/07: In 2006, the Republic of Estonia notified the Commission of its NAP for the period from 2008 to 2012. In 2007, the Commission held that its NAP was incompatible with the criteria set forth in Directive 2003/87 and decided that the total annual quantities of emission allowances should be reduced to 47.8% less than that proposed. Estonia appealed the Commission's decision. As a preliminary issue, the Court held that each member state is to decide, on the basis of its NAP, on the total quantity of allowances it will allocate for a period in question, and the Commission's power to review these NAPs is very restricted. In the present case, Estonia claimed that the Commission erred in finding that its NAP had failed to include a "reserve" of allowances. The Court disagreed and held that the Commission did not properly examine the NAP and infringed on the principle of sound administration.

Decision No. 2009-599 DC of December 29 2009 (French Constitutional Council, 2009): The French Constitutional Council annulled a tax on carbon emissions. The tax was set at 17 euros per ton of carbon dioxide. The Council ruled that the proposed tax contained too many exemptions and would not have applied to 93% of industrial emissions.

Barbone and Ross (on behalf of Stop Stansted Expansion) v. Secretary of State for Transport (Queen's Bench Division, Admin Court, 2009), [2009] EWHC 463: A United Kingdom court dismissed an application by the "Stop Stansted Expansion" group challenging the grant of planning permission relating to the increase in capacity of Stansted Airport under the Town and Country Planning Act 1990. Plaintiffs claimed that the government had, among other things, failed to take into account the project's effects on greenhouse gas emissions prior to granting the planning permission. However, the court held that the government had considered the impacts of the proposed development on climate change. The court held that although the government is committed to tackling the problem of climate change and reducing greenhouse gas emission across the economy, this does not mean that every sector is expected to follow the same path.

Aldous v. Greater Taree City Council and Another (Land and Environment Court of New South Wales, 2009), [2009] NCWELC 17: An Australian court upheld approval of a development application by a city council for a dwelling on a beachfront property. The applicant land owner argued, among other things, that the Council had failed to take into account the principles of ecologically sustainable development (ESD), specifically the principles of intergenerational equity and the precautionary principles, by failing to assess climate change induced coastal erosion. The Council was in the process of conducting a coastal impact study, but made its decision prior to the completion of the study. The court concluded that the Council had a mandatory obligation under the Environmental Planning and Assessment Act 1979 to take into consideration the public interest, which included the principles of ESD, but in the present case, the defendant had considered the issue of coastal erosion.

Update #24 (Oct. 19, 2010)

NEW COURT AND AGENCY DECISIONS

Hapner v. Tidwell (9th Cir. Sept. 15, 2010): added to the "NEPA" slide. Environmental groups filed a lawsuit challenging a U.S. Forest Service decision to remove timber for fire protection purposes on the ground that the Environmental Assessment (EA) prepared by the agency pursuant to NEPA did not adequately address the effects that climate change would have on the decision. The Forest Service moved for summary judgment. The district court granted the motion, holding that no such analysis was required because the action would not have a direct effect on climate change. On appeal, the 9th Circuit affirmed the district court's decision, holding that the brief discussion of climate change in the EA was appropriate given that the project involved a small amount of land and it would thin rather than clear cut trees.

Sierra Club v. Duke Energy Indiana, Inc. (S.D. Ind. Sept. 14, 2010): added to the "challenges to coal-fired power plants" slide. A federal court in Indiana granted summary judgment in favor of a power company, holding that the Sierra Club filed its lawsuit after the applicable five-year statute of limitations expired. The Sierra Club filed a lawsuit in 2008, alleging that Duke Energy had modified its power plant in Knox County, Indiana between 1993 and 2001 without obtaining the necessary prevention of significant deterioration (PSD) permits. Duke Energy moved for summary judgment, arguing that the action was time-barred. In granting the motion, the court rejected the Sierra Club's argument that the company's failure to obtain the necessary permits

constituted an ongoing violation under the Clean Air Act (CAA) such that the statute of limitations had not run. However, the court stayed its decision pending the outcome of an appeal before the Seventh Circuit that addresses the same issue (***United States v. Cinergy Corp.***, No. 09-3344 (7th Cir., filed Sept. 21, 2009)).

Association of Taxicab Operators USA v. City of Dallas (N.D. Tex. Aug. 30, 2010): added to the "challenges to state and municipal vehicle standards" slide. An organization representing taxicab operators in Dallas, Texas filed a lawsuit against the city, alleging that a new ordinance giving preference to taxis that run on compressed natural gas is preempted by the CAA. The ordinance allows taxis running on compressed natural gas to automatically move to the front of the line in taxi queues at Dallas Love Field Airport. The same day the lawsuit was filed, the court granted the organization's request for a temporary restraining order preventing the city from enforcing the ordinance. On August 30, 2010, the court denied the organization's motion for a preliminary injunction, holding that the ordinance did not amount to a "standard" under CAA Section 209(a) because it did not mandate quantitative emissions levels, establish manufacturer requirements, establish purchase requirements, mandate emissions control technology, or establish a penalty or fee system.

Metropolitan Taxicab Board of Trade v. City of New York: (2d Cir. July 27, 2010): added to the "challenges to state and municipal vehicle standards" slide. In March 2009, New York City adopted a package of incentives to encourage taxicab owners to convert to all-hybrid fleets. The incentives had been designed as an alternative to city fuel efficiency rules for taxis struck down earlier by a federal district court on federal preemption grounds. To encourage the purchase of hybrid vehicles, the alternative plan relied on incentives in City lease cap rules rather than miles-per-gallon fuel efficiency standards. The fleet owners and a trade association filed an action in federal court alleging that the rules that reduced the lease caps for non-hybrid, non-clean diesel vehicles constituted a mandate that was preempted by the Energy Policy and Conservation Act (EPCA) and the CAA. In June 2009, the district court granted a motion for a preliminary injunction blocking the incentive plan, holding that the new rules amounted to a de facto mandate to purchase hybrid vehicles and thus they were related to fuel economy and preempted under the EPCA and the CAA. On appeal, the Second Circuit affirmed, holding that the rules "relate" to fuel economy standards as that term is understood in statutory construction. The court found that imposing reduced lease caps solely on the basis of whether or not a vehicle has a hybrid engine has no relation to an end other than an improvement in fuel economy. Thus, it was preempted by EPCA. Because the court found that it was preempted by EPCA, it did not reach the issue of whether it was also preempted under the CAA.

NEW COMPLAINTS/PETITIONS/MOTIONS/SUBPOENAS

Virginia Attorney General subpoena concerning "climategate" controversy (Sept. 29, 2010): added to the "climate change protestors and scientists" slide. In May 2010, the University of Virginia filed a lawsuit objecting to a subpoena served by the Virginia Attorney General on the University concerning five grants received by a professor previously employed by the University who was involved in the so-called "climategate" controversy. On August 30, 2010, the court held four of the five grants were federal grants and thus the Attorney General could not question the professor regarding them. With regard to the state grant, the court held

that the it could question the professor about it and allowed the Attorney General to serve a revised subpoena. On September 29, 2010, the Attorney General served a revised subpoena.

Petition to regulate black carbon from locomotives: (EPA, filed September 21, 2010): added to the "Clean Air Act" slide. The Center for Biological Diversity, along with Friends of the Earth and the International Center for Technology Assessment, petitioned the EPA to regulate black carbon from locomotives. According to the petition, GHG emissions from locomotives are expected to increase more rapidly than emissions from other transportation sources by 2030. The petition further contends that locomotives currently emit more than 25,000 tons of particulate matter, which includes black carbon, and are expected to account for more than 65% of particulate matter emissions from mobile source diesel engines by 2030.

Coalition for Responsible Regulation, Inc. v. EPA and ***Southeastern Legal Foundation v. EPA*** (D.C. Cir., filed Sept. 15, 2010): added to the "challenges to federal action" slide. Industry groups seeking review of EPA rulemakings regarding requirements for new and modified stationary sources beginning January 2, 2011 and the so-called "tailoring rule" that limits GHG regulation to large stationary sources filed a motion seeking to stay the effectiveness of the regulations. In addition, other petitioners, including the State of Texas, filed a separate motion seeking a stay of EPA's endangerment finding and its fuel economy standards for cars and light trucks. Among other things, the petitioners contend that EPA's regulations violate the CAA and that they will irreparably harm petitioners and the economy.

Sierra Club v. Wisconsin Power & Light Co. (W.D. Wis., filed Sept. 9, 2010): added to the "challenges to coal-fired power plants" slide. The Sierra Club filed a lawsuit in federal court against a Wisconsin power company alleging that the company violated the CAA and Wisconsin's state implementation plan by modifying and operating boilers at two of its plants without obtaining necessary permits authorizing such construction. The lawsuit also accuses the company of failing to meet emissions limits through the use of best available control technology (BACT) and by generally failing to install technology to control emissions.

Texas v. EPA (D.C. Cir., filed Sept. 7, 2010): added to the "challenges to federal action" slide. Texas filed a lawsuit against EPA challenging the agency's rejection of Texas' petition requesting that EPA reconsider its finding that greenhouse gases (GHGs) from cars and light trucks endanger human health and welfare. In its earlier petition for reconsideration, Texas alleged that the endangerment finding relied on flawed science. This petition follows a similar petition filed by the U.S. Chamber of Commerce on Aug. 13, 2010. The deadline for filing lawsuits based on EPA's rejection of reconsideration is Oct. 12, 2010.

Coalition for Responsible Regulation v. EPA (D.C. Cir., motion filed Aug. 26, 2010): added to the "challenges to federal action" slide. Petitioners in this case, which include 14 House Republicans and several industrial associations and companies, filed a motion to consolidate all the challenges to the four separate rules involving regulation of GHGs under the CAA. These four rules include EPA's endangerment finding, the new fuel economy standards for cars and light trucks, requirements for new and modified stationary sources under the prevention of significant deterioration (PSD) provisions beginning January 2, 2011, and the so-called "tailoring rule" that limits PSD requirements to large sources. On September 10, 2010, EPA filed papers

opposing the consolidation motion and asking the court to conduct three separate proceedings. One proceeding would combine all cases challenging EPA regulation of motor vehicle emissions. A second proceeding would combine all cases dealing with EPA's endangerment finding. A third proceeding would combine all cases challenging the requirements for new and modified stationary sources as well as the tailoring rule.

Sierra Club v. U.S. Defense Energy Support Center (N.D. Cal., filed June 18, 2010): added to the "other statutes/EISA" slide. The Sierra Club filed a lawsuit seeking to stop the U.S. military from buying fuels derived from Canadian oil sands, alleging that the fuels violate Section 526 of the Energy Independence and Security Act (EISA), which states that for federal agency purchases of fuels produced from nonconventional sources like oil sands, "the lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources." Sierra Club contends that given the higher GHG emissions associated with oil sands production, the Defense Department is violating the EISA as well as the Administrative Procedure Act and NEPA. On September 29, 2010, several business and energy trade groups sought to intervene in the case, arguing that because oil sands fuels are often blended by refiners from other types of crude oil, it would be virtually impossible to apply the EISA restriction to Canadian oil imports.

Update #23 (September 13, 2010)

NEW COURT AND AGENCY DECISIONS

University of Virginia v. Virginia Attorney General (Vir. Cir. Ct., Aug. 30, 2010): added to the "climate change protestors and scientists" slide. In May 2010, the University of Virginia filed a lawsuit objecting to the "civil investigative demands" served by the Virginia Attorney General on the University concerning a professor previously employed by the University who was involved in the so-called "climategate" controversy. On August 30, 2010, the court held that the university does not have to comply with the demands. In its decision, the court rejected the argument by the Attorney General that it lacked authority to review whether the Attorney General had reason to believe that fraud had been committed and held that the demands did not contain sufficient information about what the professor did that would indicate fraud.

Arkema Inc. v. EPA (D.C. Cir. Aug. 27, 2010): added to the "challenges to federal action" slide under "other rules." The D.C. Circuit vacated portions of EPA's cap-and-trade program for reducing ozone-depleting substances, holding that the agency illegally invalidated credit transfers. The lawsuit concerned EPA regulations designed to meet U.S. commitments under the Montreal Protocol, which requires member countries to phase out production and consumption of a range of ozone depleting substances, including hydrochlorofluorocarbons (HCFCs), a potent greenhouse gas. In 2003, EPA set rules for HCFC production and consumption between 2004 and 2009 that allowed allowances to be transferred between and within companies for one year or permanently through baseline credit transfers. In December 2009, EPA issued a rule governing 2010-14 credits that determined that the Clean Air Act bars permanent baseline transfers. In the lawsuit, plaintiffs alleged that EPA's 2009 rule illegally invalidated baseline

emissions transfers within companies. The district court held that the rule was illegally retroactive because it altered transactions approved under the 2003 rule that were intended to be permanent. The Circuit Court affirmed the district court's ruling and invalidated the 2009 rule.

Mirant Mid-Atlantic LLC v. Montgomery County (D. Md. July 12, 2010): added to the "challenges to state action" slide. In May 2010, Montgomery County, Maryland enacted a law that imposes a $5-per-ton tax on carbon dioxide emissions from stationary sources emitting more than one million tons of carbon dioxide annually, effectively applying to only one coal-fired power plant in the state. The plant commenced a lawsuit in federal court, challenging the tax on the grounds that it constituted a bill of attainder and that it violated the 14th Amendment's guarantee of equal protection and the 8th Amendment's ban on excessive fines. The county moved to dismiss. The district court granted the motion in an unpublished decision, rejecting the plant's arguments that the tax violated the 14th and 8th Amendments. The plant has since appealed the decision to the 4th Circuit.

NEW COMPLAINTS/PETITIONS/MOTIONS

Sierra Club v. Energy Future Holdings Corp. (E.D. Texas, filed Sept. 2, 2010): added to the "coal-fired power plant challenges" slide. The Sierra Club filed a lawsuit in federal court against the owners of a power plant near Longview, Texas, alleging that it has committed more than 50,000 violations under the Clean Air Act concerning mercury and other toxic air emissions. The complaint alleges that the plant has the highest total air pollution out of more than 2,000 industrial plants across the state and accounted for more than 13 percent of all industrial air pollution in Texas in 2008 and 20 percent of all coal-fired power plant pollution.

Comer v. Murphy Oil USA, Inc. (U.S. Sup. Ct., filed Aug. 26, 2010): added to the "common law claims" slide. Plaintiffs filed a lawsuit alleging that defendants, including a number of companies that produce fossil fuels, caused the emission of greenhouse gases that contributed to climate change and thereby added to the ferocity of Hurricane Katrina, ultimately causing damages to plaintiffs' property. Defendants' motion to dismiss was granted by the district court. On appeal, the Fifth Circuit partially reversed, holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims presented nonjusticiable political questions. The Fifth Circuit subsequently granted a motion to reconsider its decision *en banc*. In May 2010, *d*ue to the loss of a quorum because of recusal of an additional judge, the Fifth Circuit dismissed the *en banc* review, and determined that the district court's dismissal of the lawsuit should stand. In August 2010, the plaintiffs filed a petition for a writ of mandamus with the U.S. Supreme Court, seeking an order that would, in effect, overturn the Fifth Circuit's dismissal of the appeal.

American Electric Power Co. v. Connecticut (U.S. Sup. Ct, briefs filed Aug. 24 and Sept. 3, 2010): added to the "common law claims" slide. Eight states and New York City filed a lawsuit against six large electric power generators, seeking to limit the generators' GHG emissions by claiming that these emissions contributed to the public nuisance of climate change. In 2005, the district court dismissed the lawsuit, holding that the claims represented "non-judiciable political questions." In September 2009, the Second Circuit reversed, holding that although Congress has

enacted laws affecting air pollution, none of those laws concerned greenhouse gas emissions and thus none displaced federal common law. On August 2, 2010, four electric power companies named as defendants in a nuisance lawsuit filed a petition for certiorari with the U.S. Supreme Court seeking to overturn the Second Circuit's ruling. On August 24, 2010, the Solicitor General, appearing on behalf of one of the named defendants (Tennessee Valley Authority), filed a brief in support of petitioners also seeking to overturn the Second Circuit's decision. The brief questioned whether the plaintiffs had standing to bring the lawsuit and whether recent actions by EPA to regulate GHG emissions supplant the reason given by the Second Circuit for allowing the case to proceed. On September 3, 2010, Indiana, joined by 11 other non-party states, filed an amicus brief also seeking to overturn the Second Circuit's decision, arguing that the establishment of emissions standards for GHG emissions should be left to the political branches of government.

Notice of Intent to Sue Washington State (Washington Env. Council, Aug. 24, 2010): added to the "Clean Air Act" slide. The Washington Environmental Council and the Sierra Club sent a notice of intent to sue Washington State's Department of Ecology concerning its lack of restrictions regarding greenhouse gas emissions from the state's five oil refineries. According to the letter, the state is required under the Clean Air Act to review and implement reasonable available technologies for emissions of air contaminants from major sources under its state implementation plan. A 2009 executive order from Governor Christine Gregoire states that greenhouse gases are defined as "air contaminants" under the state's Clean Air Act. The letter states that the Department of Ecology and other state agencies have not taken steps to control GHG emissions at these refineries and that suit will be filed if immediate action is not taken.

Petition challenging data relied on in making endangerment finding (EPA, filed July 30, 2010): added to the "challenges to federal action" slide. Peabody Energy filed a petition with EPA challenging the global surface temperature records relied on in EPA's December 2009 endangerment finding regarding greenhouse gases under the Clean Air Act. The petition is based on the Data Quality Act, which requires federal agencies to ensure that scientific data used in rulemakings are objective, reproducible, and peer-reviewed. Under the Act, agencies must respond to petitions challenging scientific data and ensure that any data falling short of the Act's standards are corrected. The petition requests that EPA correct the temperature data that underpinned its endangerment finding, arguing that various datasets used in the finding were not independent and all relied on the same flawed temperature records.

Update #22 (August 23, 2010)

NEW DECISIONS

Sierra Club v. Otter Tail Power Co. (8th Cir. Aug. 12, 2010): added to the "coal-fired power plant challenges" slide. The Eighth Circuit held that the Sierra Club failed to establish violations by a coal-fired power plant in South Dakota under the prevention of significant deterioration (PSD) provisions of the Clean Air Act. In 2008, the Sierra Club challenged three modifications at the plant that occurred in 1995, 1998, and 2001 respectively, alleging that the plant violated the CAA by failing to obtain PSD permits before making the three modifications. The district

court dismissed the lawsuit on statute of limitations grounds. The Eighth Circuit affirmed the district court, holding that the lawsuit was barred by the applicable five-year statute of limitations and on jurisdictional grounds given that the group failed to raise its claims during the permitting process to EPA.

EPA dismissal of petitions for reconsideration of GHG endangerment finding (EPA July 29, 2010): added to the "challenges to federal action" under the "endangerment finding" section. EPA denied 10 petitions challenging the validity of the climate science used as the basis of its 2009 finding that GHG emissions endanger public health and welfare and thus can be regulated under the Clean Air Act. The petitions alleged that emails stolen from University of East Anglia's Climate Research Unit indicated that scientists had manipulated data to make climate change more dramatic than it really is. Several investigations of the emails have concluded that the scientists have not manipulated the data. In its denial, EPA said it conducted a thorough review of the science it used and concluded that "climate science is credible, compelling, and growing stronger."

North Carolina v. Tennessee Valley Authority (4th Cir. July 26, 2010): added to "coal-fired power plant challenges" slide. The Fourth Circuit held that public nuisance laws cannot be used to control transboundary air pollution, overturning a January 2009 decision by the district court (*North Carolina v. TVA*, W.D.N.C. Jan. 13, 2009) that held that TVA's plant emissions impacting North Carolina were a public nuisance. In that ruling, the district court held that four of TVA's 11 coal-fired power plants had to meet specific emission caps and install control technologies by the end of 2013. The 4th Circuit reversed, holding that an activity expressly permitted and extensively regulated by federal and state government could not constitute a public nuisance. In the lawsuit, North Carolina alleged that emissions of sulfur dioxide, nitrogen oxides, mercury, and particulate matter from TVA plants migrate into North Carolina and that TVA failed to take reasonable measures to control such emissions.

Appalachian Voices v. Dept. of Energy (D.D.C. July 26, 2010): added to the "coal-fired power plant challenges" slide. A federal district court in the District of Columbia held that an environmental group challenging federal tax credits issued to Duke Energy for a "clean" coal project was not entitled to a preliminary injunction because it failed to demonstrate the likelihood of imminent harm as a result of the project. Appalachian Voices alleged that the Departments of Energy and the Treasury failed to consider the environmental consequences of its clean coal tax credit program, violating both the Endangered Species Act and the National Environmental Policy Act. The court held that because Appalachian Voices did not expect an injunction to prevent Duke from proceeding with the project and the plant is not expected to begin operating until 2012, the injury was not imminent.

Coupal v. Bowen (Cal. Sup. Ct., filed July 27, 2010): added to the "challenges to state action" slide. Proponents of a ballot initiative to suspend implementation of California's Global Warming Solutions Act of 2006 (AB 32) filed a lawsuit in state court to amend the legal title and summary of the proposed measure. The complaint alleges that the title Attorney General Edmund "Jerry" Brown prepared for the measure, Proposition 23, is misleading and unfair. When submitted to the Attorney General, the measure was titled "California Jobs Initiative." After reviewing the measure, the Attorney General changed the title to "Suspends Air Pollution

Control Laws Requiring Major Polluters to Report and Reduce Greenhouse Gas Emissions That Cause Global Warming Until Employment Drops Below Specified Level for Full Year." On August 3, 2010, the state court issued an order making certain revisions to the title and summary of the initiative.

NEW COMPLAINTS/PETITIONS/MOTIONS

Chamber of Commerce v. EPA (D.C. Cir., filed Aug. 13, 2010): added to the "challenges to federal action" slide under "endangerment finding." The U.S. Chamber of Commerce filed a lawsuit against EPA following EPA's July 29, 2010 rejection of its petition to reconsider its 2009 endangerment finding (see above).

Georgia Coalition for Sound Environmental Policy v. EPA (D.C. Cir., filed Aug. 12, 2010): added to the "challenges to federal action" under "tailoring rule." Between July 30 and August 2, 2010, 19 lawsuits were filed challenging EPA's GHG tailoring rule. On August 12, 2010, the court issued an order consolidating these challenges. The lawsuits that are part of this consolidation order are set forth on the case chart. On June 3, 2010, EPA published the final GHG tailoring rule, which limits the scope of the emissions control requirements for new and modified stationary sources to those emitting 100,000 tons or more per year and modified sources with emissions greater than 75,000 tons per year beginning in January 2011. The deadline for challenging the rule was August 2, 2010.

Connecticut v. American Electric Power (U.S. Sup. Ct, cert. petition filed Aug. 2, 2010): added to the "common law claims" slide. Four electric power companies named as defendants in a nuisance lawsuit filed a petition for certiorari with the U.S. Supreme Court to review the Second Circuit's September 2009 ruling that eight states, New York City, and three environmental groups could proceed with lawsuits that alleged that the companies' carbon dioxide emissions constituted a nuisance under federal law.

Petition to include emissions from biomass in GHG inventory (EPA, filed July 28, 2010): added to the "challenges to federal action" slide under "other rules." The Center for Biological Diversity petitioned EPA to include emissions from biomass combustion in its national GHG inventory. According to the inventory, EPA recognizes that biomass and biofuels combustion produces GHG emissions, but it excluded them from calculations of GHG emissions "because biomass fuels are of biogenic origin" and it "assumed that the carbon released during the consumption of biomass is recycled as U.S. forests and crops regenerate, causing no net addition of CO2 to the atmosphere." The petition alleges that EPA ignored scientific evidence concerning GHG emissions from biomass combustion.

Update #21 (July 30, 2010)

NEW COURT AND AGENCY DECISIONS

Sierra Club v. Jackson (D.D.C. July 20, 2010): added to the "coal-fired power plant challenges" slide. A federal court dismissed a lawsuit seeking to force EPA to stop the construction of three

coal-fired power plants in Kentucky, holding that it lacked jurisdiction over the matter. The lawsuit alleged that because Kentucky's State Implementation Plan (SIP) under the Clean Air Act was out of date, EPA was required to stop the construction of new sources of air pollution. EPA claimed that its ability to intervene was discretionary and that federal courts lacked jurisdiction to force it to act in such cases. The district court agreed and dismissed the case.

South Yuba River Citizens League v. National Marine Fisheries Service (E.D. Cal. July 8, 2010): added to the "Endangered Species Act" slide. Two environmental groups filed suit against the National Marine Fisheries Service (NMFS) concerning a biological opinion issued by the agency concerning two dams on the Yuba River that are operated by the U.S. Army Corps of Engineers. The biological opinion concluded that the Corps' future operations would not violate the Endangered Species Act. The plaintiffs alleged that the biological opinion was arbitrary and capricious and that the Corps' operations are causing take of protected salmon and steelhead. Among other things, the plaintiffs alleged that the biological opinions failed to discuss the impact of climate change on the species. Both sides moved for summary judgment. The court, after finding that plaintiffs had standing, found that the NMFS acted arbitrarily and capriciously in failing to address this and other issues in its biological opinion.

Coalition for Responsible Regulation v. EPA (D.C. Cir. June 18, 2010): added to the "challenges to federal action" slide. The D.C. Circuit set aside one group of challenges to EPA's finding that GHG emissions endanger human health and welfare. The court ruled that 17 consolidated cases challenging the endangerment finding will be held in abeyance until EPA resolves pending petitions to reconsider its finding. The court's order states that these cases will be held in abeyance until EPA completes its reconsideration proceedings or until August 16, 2010, whichever comes first. [Note: EPA announced its rejection of the reconsideration petitions on July 29, 2010.]

Shenandoah Valley Network v. Capka (W.D. Va. June 17, 2010): added to the "NEPA" slide. Plaintiffs filed suit challenging the Federal Highway Administration's issuance of a record of decision concerning a highway improvement plan in Virginia. Among other things, the complaint alleged that FHWA failed to take the requisite "hard look" at the plan's contribution to climate change and oil dependence. The complaint alleged that FHWA prematurely issued the record of decision. The defendants moved for summary judgment. In an earlier decision issued in September 2009, the court granted the motion, holding that the record of decision was not issued prematurely and that plaintiffs' due process rights were otherwise not violated. The plaintiffs subsequently moved for leave to alter or amend the judgment, alleging that the court failed to address several issues raised in its briefing papers. The plaintiffs also moved to file a second amended complaint. The court denied both motions, finding that the plaintiffs did not show grounds for altering or amending the judgment and that allowing the requested amendments to the complaint would be futile.

San Diego Navy Broadway Complex Coalition v. City of San Diego (Cal. App. Ct., June 17, 2010): added to the "state NEPA" slide. A California appellate court held that a local development agency was not required to prepare a subsequent or supplemental environmental impact report (EIR) under the California Environmental Quality Act (CEQA) regarding the potential impact of a redevelopment project on global climate change. CEQA requires a public

agency to prepare an EIR whenever the agency undertakes a discretionary project that may have a significant impact on the environment. The "touchstone" for determining whether an agency has undertaken such a discretionary action is whether the agency would be able to meaningfully address the environmental concerns that might be identified in the EIR. The court held that in this instance, the development agency lacks authority to address the project's impact on climate change, and thus environmental review would thus be a meaningless exercise.

National Petrochemical and Refiners Association v. Goldstene (E.D. Cal. June 16, 2010): added to the "challenges to federal action" slide. A federal district court in California denied California's motion to dismiss a lawsuit challenging the state's low-carbon fuel standard, finding that the Clean Air Act does not grant California unfettered authority to regulate fuels. The lawsuit alleges that both the Commerce Clause and the Energy Independence and Security Act of 2007 preempt California's low-carbon fuel standard. The standard was adopted by the California Air Resources Board in 2009 and establishes a methodology for calculating the life-cycle emissions of all vehicle fuels. The standard is designed to reduce the average carbon intensity of fuels by 10 percent over the next 11 years.

NEW SETTLEMENTS/VOLUNTARY DISMISSALS

American Chemistry Council v. EPA (D.C. Cir., settlement dated July 20, 2010); ***Energy Recovery Council v. EPA*** (D.C. Cir., settlement dated July 20, 2010); ***American Petroleum Institute v. EPA*** (D.C. Cir., settlement dated July 20, 2010); ***Fertilizer Institute v. EPA*** (D.C. Cir., settlement dated July 20, 2010); ***American Public Gas Association v. EPA*** (D.C. Cir., settlement dated July 20, 2010): added to the "challenges to federal action" slide. EPA agreed to make a number of changes to its rule for GHG reporting addressing the chemical, fertilizer, natural gas, and refining industries to partially resolve litigation over the rule. In the proposed settlement with the American Chemistry Council, EPA agreed to make changes to monitoring and reporting requirements from fluorinated GHG production. In its settlement with the Energy Recovery Council, EPA has agreed to propose and finalize changes to reporting requirements for general stationary fuel combustion sources. In its settlement with the other three groups, EPA has agreed to modify monitoring and reporting requirements for oil refinery, fertilizer production, and for suppliers of natural gas.

Sierra Club v. Jackson (W.D. Wis., consent decree filed June 29, 2010): added to the "coal-fired power plant challenges" slide. EPA agreed to review the Clean Air Act operating permit for a Wisconsin coal-fired power plant, settling a lawsuit brought by the Sierra Club. The Sierra Club sued EPA in March 2010 after the agency allegedly failed to respond to the group's petition raising objections to the permit issued to the plant. Under the terms of the decree, EPA was required to respond to the petition by August 10, 2010, or within 20 days of the agreement being finalized, whichever is later.

NEW COMPLAINTS/PETITIONS/MOTIONS/NOTICES/FINDINGS

Erickson v. Gregoire (Washington Sup. Ct., filed July 21, 2010): added to the "challenges to state action" slide. A conservative legal foundation filed a lawsuit challenging a 2009 executive order by Washington Governor Christine Gregoire. The executive order directed the

Washington Department of Ecology to, among other things, continue participating in the Western Climate Initiative, to contact industrial facilities to determine a baseline for GHG emissions, and to develop information for large facilities to determine how they could help meet GHG emissions goals in 2020. The lawsuit claims that the executive order is unconstitutional because it has the force and effect of law and that such an obligation cannot be created through an executive order.

Sierra Club v. U.S. Army Corps of Engineers (W.D. Ark., filed July 16, 2010): added to the "coal-fired power plant challenges" slide. Several environmental groups filed a lawsuit against the U.S. Army Corps of Engineers, alleging that the agency approved a proposed coal-fired power plant without issuing an environmental impact statement (EIS) under NEPA. Specifically, the suit alleges that the Corps allowed the plant to fill in wetlands and divert water from a nearby river without issuing an EIS.

Petition to Reconsider PSD Regulations (July 6, 2010): added to the "challenges to federal action" slide. The National Association of Manufacturers and the American Chemistry Council filed petitions with EPA requesting that the agency reconsider or rescind its tailoring rule. The petitions allege that EPA wrongfully declined to adopt an interpretation of the Clean Air Act that would have narrowed the scope of PSD permitting for stationary sources of GHGs and made it unnecessary for EPA to "tailor" the Clean Air Act's PSD emission thresholds to GHGs.

WildEarth Guardians v. Salazar (D.D.C., filed July 13, 2010): added to the "NEPA" slide. Several environmental groups sued the U.S. Department of the Interior (DOI) concerning its decision to offer coal leases in Wyoming's Powder River Basin. In March 2010, DOI's Bureau of Land Management decided to sell the coal leases, which cover a region with more than 406 million tons of coal. The lawsuit alleges that the agency's authorization of the leases violates NEPA by not analyzing the regional environmental impacts, particularly climate change impacts, of increased emissions.

Southeastern Legal Foundation v. EPA (D.C. Cir., motions to intervene filed July 6, 2010): added to the "challenges to federal action" slide. Four conservation groups filed motions to intervene in a lawsuit against the EPA to defend the agency's decision not to exempt emissions from biomass energy production from control requirements for GHG emissions from new and modified stationary sources under the tailoring rule. The groups are the Conservation Law Foundation, the Natural Resources Council of Maine, Georgia ForestWatch, and Wild Virginia. EPA issued the tailoring rule on June 3, 2010, limiting GHG emissions regulation to the largest new and modified stationary sources. In the rule, EPA said that it will include GHG emissions from biomass burning but will initiate a process for taking comment on exempting emissions from some types of biomass burning.

Competitive Enterprise Institute v. EPA (D.C. Cir., filed June 29, 2010); ***Ohio Coal Association v. EPA*** (D.C. Cir., filed June 29, 2010): added to the "challenges to federal action" slide. Two industry groups filed lawsuits challenging EPA's GHG emissions rules for cars and light trucks. The rules set the first GHG emissions standard for cars and light trucks of 250 grams per mile of carbon dioxide-equivalent.

American Iron and Steel Institute v. EPA (D.C. Cir., filed June 29, 2010)); ***Ohio Coal Association v. EPA*** (D.C. Cir., filed June 29, 2010); ***Gerdau Ameristeel U.S. Inc. v. EPA*** (D.C. Cir., filed June 29, 2010): added to the "challenges to federal action" slide. Three industry groups filed lawsuits challenging EPA's GHG tailoring rule.

Sierra Club v. Mississippi Public Service Commission (Mississippi Chancery Ct., filed June 17, 2010): added to the "coal-fired power plant challenges" slide. The Sierra Club filed an appeal of the Mississippi Public Service Commission (PSC), which voted to allow the construction of a proposed 582-megawatt power plant in Kemper County Mississippi. The PSC voted to allow the construction after first voting to block it, citing cost overruns. In its first ruling on April 29, 2010, the PSC unanimously found that the plant would only be in the public interest if it capped its cost at $2.4 billion and did not charge for the customers up front. The plant filed a motion for reconsideration. On May 26, 2010, two PSC commissioners changed their votes to allow the plant to be built.

Update #20 (June 21, 2010)

NEW COURT AND AGENCY DECISIONS

New Energy Economy, Inc. v. Leavell (N.M. June 7, 2010): added to the "challenges to state enactments" slide. The New Mexico Supreme Court issued a ruling allowing the State Environmental Improvement Board to proceed with a rulemaking for GHG regulations. The court vacated a preliminary injunction issued in April 2010 by a lower court, holding that the injunction would harm the agency's ability to do its job. The court remanded the case to the State Environmental Improvement Board so it could resume public hearings on the proposed regulations.

Comer v. Murphy Oil USA (5th Cir. May 28, 2010): added to the "common law claims/money damages" slide. Due to the loss of a quorum because of recusal of an additional judge, the Fifth Circuit dismissed the en banc review of a climate change tort lawsuit in which Mississippi property owners alleged that a group of energy and other companies should be held liable for some of the hurricane damage to their properties. The action means that the district court's dismissal of the lawsuit stands. In February 2010, the Fifth Circuit granted en banc review to a 2009 decision by the Circuit that held that plaintiffs could proceed, and vacated the 2009 decision. However, in the May 2010 decision the court held that it could not give the lawsuit en banc review because it no longer had a quorum to do so, but it left standing the order vacating the panel decision. Thus court said plaintiffs may now seek review from the U.S. Supreme Court. Three judges vigorously dissented.

Seeds of Peace Collective v. City of Pittsburgh (W.D. Penn. May 26, 2010): added to the new "climate protestors and scientists" slide. A community group filed a civil rights action against the City of Pittsburgh, alleging that the City violated their constitutional rights by interfering with their ability to freely assemble and demonstrate in September 2009 when the International Coal Conference and the Group of 20 Summit took place in Pittsburgh. The City moved to dismiss. The district court partially denied the motion, holding that the groups' First

Amendment claims had been adequately plead and could proceed to discovery. However, it dismissed the remaining claims.

Center for Biological Diversity v. County of San Bernardino: (Cal. Ct. App. May 25, 2010): added to the "state NEPAs" slide. The Center for Biological Diversity successfully challenged San Bernardino County's approval of an open-air human waste composting facility under the California Environmental Quality Act (CEQA) on various grounds, including its failure to analyze GHG emissions. The challenge resulted in the final environmental impact report (FEIR) being decertified. The county appealed, alleging that the trial court erred by decertifying the FEIR on the grounds that it, among other things, did not analyze the feasibility of an enclosed facility as an alternative. The appellate court disagreed and upheld the trial court's determination.

Appalachian Voices v. State Air Pollution Control Board (Vir. Ct. App. May 25, 2010): added to the "coal-fired power plant challenges" slide. A Virginia state appellate court affirmed a lower court's decision to allow an energy company to receive a permit for a coal-fired power plant in Southwestern Virginia, rejecting claims that the permit was not valid because it did not regulate carbon dioxide as a pollutant. The appellate court held that because no provision of the Clean Air Act or Virginia state law controlled or limited carbon dioxide emissions, it was not a pollutant subject to regulation and thus that the State Air Pollution Control Board was not under any obligation to do an analysis to establish permit limits for such emissions.

Sierra Club v. Federal Highway Administration (S.D. Tex. May 19, 2010): added to the "NEPA" slide. Two environmental groups filed an action seeking to block construction of a new highway in northwest Houston, Texas. Among other things, the plaintiffs alleged that the final environmental impact statement (FEIS) failed to consider GHG emissions. Both sides moved for summary judgment. The court granted the defendant's motion, holding that an analysis of GHG emissions was not required under federal law.

North Carolina Alliance for Transportation Reform v. U.S. Dept. of Transportation (M.D.N.C. May 19, 2010): added to the "NEPA" slide. Several environmental groups challenged the construction of a federal highway project in North Carolina, alleging that an environmental impact statement (EIS) prepared in connection with the project failed to evaluate the project's effect on climate change. Both sides moved for summary judgment. The district court granted defendant's motion, holding that NEPA requires an analysis of air quality but that it does not expressly refer to climate change or GHG emissions and thus such an analysis was not necessary.

Hempstead Co. Hunting Club v. Arkansas Public Service Comm. (Arkansas May 13, 2010): added to the "coal-fired power plant challenges" slide. The Arkansas Supreme Court reversed the Arkansas Public Service Commission's decision to allow a $1.6 billion power plant to be built by American Electric Power Co. (AEP), holding that the Commission had incorrectly determined the need for the power plant. Specifically, the court found that the Commission assessed the need for a plant in a proceeding that was separate from the main proceeding in violation of state law.

Western Watersheds Project v. U.S. Forest Service (D. Idaho May 4, 2010): added to the "NEPA" slide. Several parties moved to intervene in a case challenging the U.S. Forest Service's decision to allow grazing on certain federal lands. The plaintiff in the case alleged that that the Forest Service failed to discuss in its EIS new information on noxious weeds and climate change. In a previous decision, the court held that the Forest Service violated NEPA by not fully considering grazing's impact on the environment and ordered it to complete a supplemental environmental impact statement (SEIS). Two proposed interveners hold permits to graze sheep on certain allotments of federal land and two others are associations dedicated to advancing the sheep industry. The court denied the intervention as to liability but allowed it with respect to remedies, holding that none of the interveners had any unique insight into the Forest Service's conduct with respect to its liability.

WildEarth Guardians v. U.S. Forest Service (D. Col. April 1, 2010): added to the "NEPA" slide. An environmental group filed an action seeking to halt the expansion of a coal mine on federal land, alleging that the EIS prepared in connection with the proposed expansion was inadequate because, among other things, it failed to analyze a range of alternatives to methane venting, to mitigate such effects, or to analyze the effects of such venting. The group brought a motion to compel certain administrative records in connection with the approval of the expansion. The district court held the records should be remanded to the U.S. Forest Service to include all materials directly and indirectly considered in its decision and that these records should be produced to the group.

NEW SETTLEMENTS/VOLUNTARY DISMISSALS

Center for Biological Diversity v. Salazar (N.D. Cal., June 3, 2010): added to the "Endangered Species Act" slide. The U.S. Fish and Wildlife Service (FWS) agreed to complete proposed listings for six penguin species and a subgroup of a seventh under the ESA by early 2011 to protect them from the effects of climate change. The settlement requires the FWS by July 30, 2010 to publish determinations on five of the species, by September 30, 2010 on the other species, and by January 30, 2011 on the subspecies.

Sierra Club v. Jackson (W.D. Wis., consent decree filed April 16, 2010): added to the "challenges to coal-fired power plants" slide. EPA agreed to review a Sierra Club challenge to an operating permit issued for a coal-fired power plant in Wisconsin, settling a lawsuit filed by the Sierra Club. The lawsuit alleged that EPA failed to respond to the Sierra Club's petition raising objections to an operating permit issued to the plant by EPA.

NEW COMPLAINTS/PETITIONS/MOTIONS/NOTICES/FINDINGS

Petition to EPA to List Coal Mines as a Source of Air Pollution (EPA, filed June 16, 2010): added to the "Clean Air Act" slide. Several environmental groups petitioned EPA to list coal mines as a source of air pollution and to establish emissions standards for several pollutants, including methane, alleging that the emissions pose a threat to public health and thus should be regulated under the CAA. The petition asked EPA to establish new source performance

standards for emissions of particulate matter, nitrogen oxide gases, volatile organic compounds, and methane from coal mines.

Center for Biological Diversity v. EPA (D.D.C., filed June 11, 2010): added to the "Clean Air Act" slide. Several environmental groups filed an action seeking to force EPA to regulate GHG emissions from aircraft, ships and nonroad engines used in heavy industrial equipment. According to the complaint, these sources produce about a quarter of GHG emissions from mobile sources in the U.S. but have not yet been regulated by EPA.

Southeastern Legal Foundation v. EPA (D.C. Cir., filed June 3, 2010); ***Coalition for Responsible Regulation v. EPA*** (D.C. Cir., filed June 3, 2010): added to the "challenges to federal action" slide. A legal foundation, 14 House Republicans, and 15 businesses filed lawsuits challenging EPA's "tailoring" rule that requires only the largest new and modified sources of GHGs, such as power plants and refineries, to control their emissions. The lawsuits challenge EPA's ability under the Clean Air Act to exempt smaller sources from emissions control requirements. EPA's rule, which was published on June 3, is intended to shield small GHG emitters from emissions control requirements that will take effect on January 2, 2011. For six months, only new and modified sources already required to control emissions of other air pollutants will be required to control GHG emissions. After that period, only new sources with emissions exceeding 100,000 tons a year and modified existing sources with emissions above 75,000 per year will be required to control emissions.

Chamber of Commerce v. EPA (D.C. Cir., filed June 1, 2010); ***National Association of Manufacturers v. EPA*** (D.C. Cir., filed June 1, 2010): added to the "challenges to federal action" slide. Two industry groups filed lawsuits challenging the schedule by which EPA plans to regulate GHG emissions from new and modified sources. On April 2, 2010, EPA published a final rule that set January 2, 2010 as the date on which it will begin to enforce emission control requirements for GHG emissions at major stationary sources.

Mirant Mid-Atlantic LLC v. Montgomery County (D. Md., filed June 1, 2010): added to the "challenges to state enactments" slide. An electric utility filed a lawsuit against Montgomery County, Maryland, challenging its new tax on local carbon dioxide emitters that effectively applies only to the utility's coal-fired power plant. The lawsuit contends that the tax constitutes a bill of attainder and that it violates the Fourteenth Amendment's guarantee of equal protection and the Eighth Amendment's ban on excessive fines. In May 2010, the county enacted a law that imposes a $5-per-ton tax on carbon dioxide emissions from stationary sources emitting more than one million tons of carbon dioxide annually.

Center for Biological Diversity v. EPA (D.C. Cir. May 28, 2010): added to the "challenges to federal action" slide. The Center for Biological Diversity filed a lawsuit challenging the schedule by which EPA plans to regulate GHG emissions from stationary sources, alleging that it constitutes an unlawful delay.

Competitive Enterprise Institute v. NASA (D.D.C. May 27, 2010): added to the "climate protestors and scientists" slide. A free market advocacy group filed a lawsuit against NASA

under the Freedom of Information Act seeking documents related to alleged errors in temperature readings and a scientist involved in the so-called "climategate" controversy.

The University of Virginia v. Attorney General of Virginia (Virginia Cir. Ct., filed May 27, 2010): added to the "climate protestors and scientists" slide. The University of Virginia filed a lawsuit objecting to the "civil investigative demands" served by the Virginia Attorney General on the University concerning a professor previously employed by the University who was involved in the so-called "climategate" controversy.

American Iron and Steel Institute v. EPA (D.C. Cir., filed May 26, 2010); ***Gerdau Ameristeel US Inc. v. EPA*** (D.C. Cir., filed May 26, 2010): added to the "challenges to federal action" slide. A steel industry group and a steel company filed separate actions challenging a rule issued by EPA that will cover GHG emissions from new and modified stationary sources starting January 2, 2011. The lawsuits ask the court to review EPA's reconsideration of the so-called "Johnson memorandum" concerning the timing of the regulation of such sources.

Friends of the Earth v. EPA (D.C. Cir., filed May 25, 2010): added to the "challenges to federal action" slide. Several environmental organizations filed a lawsuit challenging an EPA final rule that established criteria for determining which biofuels meet the renewable fuels standard. The lawsuit alleges that the regulations would increase greenhouse gas emissions. Specifically, the lawsuit objects to provisions in the final rule which said that most corn-based ethanol would reduce GHG emissions over its lifetime. To qualify as renewable, a fuel must reduce life-cycle GHG emissions by at least 20 percent compared with gasoline. The rule implements provisions of the Energy Independence and Security Act and required EPA to analyze indirect emissions arising from farmers' converting forests to cropland overseas due to food shortages resulting from using corn and other food grains for energy in the U.S.

National Chicken Council v. EPA (D.C. Cir., filed May 25, 2010); ***Pinnacle Ethanol v. EPA*** (D.C. Cir., filed May 25, 2010): added to the "challenges to federal action" slide. A coalition of meat industry groups and a group of ethanol producers filed lawsuits challenging EPA criteria for determining which biofuels meet the U.S. renewable fuels standard. The meat industry lawsuit objected to provisions in the rule that deem some ethanol facilities at which construction commenced in 2008 and 2009 to be compliant with the standard. The final rule exempted ethanol produced from corn at facilities in or at which construction commenced before December 17, 2007 from the requirement that a renewable fuel must reduce life-cycle GHG emissions by at least 20 percent compared with gasoline. In the final rule, EPA extended the exemption to ethanol produced at facilities that use natural gas or biofuels as an energy source at which construction began before December 31, 2009.

Clean Air Implementation Project v. EPA (D.C. Cir., filed May 17, 2010): added to the "challenges to federal action" slide. An association of companies in the petroleum, chemical, pharmaceutical, and glass sectors filed a petition for review of EPA's March 2010 decision that the Clean Air Act's Prevention of Significant Deterioration (PSD) permitting requirements would apply to GHG emissions from stationary sources. The petition alleges that PSD requirements can only apply to pollutants for which EPA has established air quality criteria under the National Ambient Air Quality Standards program of the Clean Air Act.

Northern Plains Resource Council, Inc. v. Montana Board of Land Commissioners (D. Montana, filed May 13, 2010); ***Montana Environmental Information Center v. Montana Board of Land Commissioners*** (D. Montana, filed May 14, 2010): added to the "state NEPAs" slide. Environmental groups and a coalition of farmers and ranchers filed lawsuits challenging the lease of 8,300 acres of state school trust land in southeastern Montana, alleging that it would become the country's largest new surface coal mine. Among other things, the lawsuits allege that the lease should not have been exempted from environmental analysis under the Montana Environmental Policy Act given that the coal will emit 2.4 billion tons of GHGs.

Southeastern Legal Foundation v. EPA (D.C. Cir., filed May 11, 2010): added to the "challenges to federal action" slide. Fourteen House Republicans, a nonprofit legal foundation, and several business groups sued EPA and the National Highway Traffic Safety Administration (NHTSA), challenging GHG emission limits and increased fuel economy standards for cars and light trucks. On May 7, 2010, NHTSA issued a rule that increases fuel economy for cars and light trucks from the current combined 25 miles per gallon to 35 miles per gallon by model year 2016. The case is one of several challenging the rule.

Friends of the Chattahoochee v. Georgia Dept. of Natural Resources (Georgia Dept. of Adm. Hearings, filed May 10, 2010): added to the "challenges to coal-fired power plants" slide. Several environmental groups filed court challenges to block the construction of two coal-fired power plants in Georgia. With respect to one of the plants, the petitions alleged that state regulators failed to classify the plants as a "major" source of air pollution, meaning that it would only have to meet a basic set of requirements as opposed to more stringent regulation. With respect to the other, the petitions alleged that it would harm water resources for downstream communities along the Oconee River while emitting harmful pollutants into the air.

Coalition for Responsible Regulation v. EPA (D.C. Cir., filed May 7, 2010): added to the "challenges to federal action" slide. A coalition of industry groups sued EPA, challenging the final rule that sets limits on GHG emissions from cars and light trucks. That same day, the NHTSA issued a rule that increases fuel economy for cars and light trucks from the current combined 25 miles per gallon to 35 miles per gallon by model year 2016. On June 17, 2010, 13 states, New York City, and two other groups (NRDC and the Association of International Automobile Manufacturers) filed motions to intervene on behalf of EPA in the case. The states which sought to intervene include California, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington.

NRDC v. Bureau of Land Management (D.D.C., filed May 6, 2010): added to the "NEPA" slide. Several environmental groups filed suit against the Bureau of Land Management (BLM), alleging that it failed to consider the environmental impact of its plan to authorize oil and gas development on more than three million acres of federal land in Wyoming, including its effect on climate change. The plan was approved in December 2008. According to the complaint, of the three million acres managed by the plan, only slightly more than 100,000 acres is closed to oil and gas drilling.

Notice of Intent to Sue (Center for Biological Diversity, May 5, 2010): added to the "Endangered Species Act" slide. The Center for Biological Diversity (CBD) filed a notice of intent to sue the Department of the Interior (DOI) for approving drilling plans by Shell Oil Co. in the Beaufort and Chukchi seas without an assessment of the potential environmental impacts on a large oil spill on polar bear habitat. In approving the drilling plans, DOI concluded that the risk of a large oil spill from exploratory drilling was so remote that no EIS was necessary.

NON-U.S. CLIMATE LITIGATION (posted on Non-U.S. Litigation Chart)

Weaver v. Corcoran and Others (British Columbia Supreme Court, Canada). Professor Andrew Weaver, a Canadian climate scientist, has filed suit against the *National Post* for allegedly publishing a series of unjustified libels based on erroneous information. Plaintiff Weaver seeks an injunction against the *National Post*, which would require the newspaper to remove the allegedly false statements from its websites as well as from any sites at which such statements have been reposted.

Update #19 (May 6, 2010)

NEW COURT AND AGENCY DECISIONS

NRDC v. U.S. Army Corps of Engineers (N.D. Ohio March 31, 2010): added to the "NEPA" slide. Plaintiffs filed a lawsuit challenging a permit issued by the U.S. Army Corps of Engineers to a company to build a coal-to-liquid fuel plant in Ohio. Among other things, plaintiffs alleged that the Corps violated NEPA, the Clean Water Act, and the Administrative Procedure Act in issuing the permit. The Corps moved to dismiss. With respect to NEPA, the Corps limited its review to the filling of U.S. waters to construct the plant and issued a "finding of no significant impact" under NEPA. Consequently, it did not complete an environmental impact statement (EIS). Plaintiffs alleged that the Corps erred in limiting its scope of review and that it should have considered all of the environmental impacts of the project, including greenhouse gas emissions from the plant. The court disagreed, finding that the Corps properly conducted its review given that its jurisdiction was limited to review of U.S. waters and granted the motion to dismiss.

Communities for a Better Environment v. City of Richmond (Cal. Ct. App. April 26, 2010): added to the "state NEPAs" slide. A California state appellate court held that the environmental impact report (EIR) for upgrades to a refinery located in Richmond, California failed to consider the project's greenhouse gas emissions impacts as required under the California Environmental Quality Act (CEQA). The decision affirmed a June 2009 decision by the lower court that the environmental assessment fell short of the requirements of CEQA. The appellate court found that the EIR merely proposed a generalized goal of no net increase in greenhouse gas emissions and then set out vaguely described future mitigation measures. The court stated that greater specificity was required.

Leavell v. New Mexico Environmental Improvement Board (N.M. Dist. Ct. April 13, 2010): added to the "challenges to state enactments" slide. A New Mexico state court issued a preliminary injunction that halted state regulators' plans for regulations to cap greenhouse gas emissions. The injunction was requested by a group representing New Mexico legislators, as well as business, agricultural, and other interests. In April 2009, the New Mexico Environmental Improvement Board voted to classify greenhouse gas emissions as air pollutants under the New Mexico Air Quality Control Act and make them subject to rulemaking by the Board. A lawsuit challenging the Board's authority to do so was filed in January 2010.

Sierra Club v. Southwest Washington Clean Air Agency (Wash. Pollution Control Hearings Board April 19, 2010): added to the "coal-fired power plant challenges" slide. Several environmental groups filed an appeal with the Washington State Pollution Control Hearings Board challenging the Southwest Washington Clean Air Agency's issuance of an air permit to a coal-fired power plant. The Board rejected arguments that the air permit was required to establish emissions limitation and impose Reasonably Available Control Technology (RACT) requirements for carbon dioxide.

NEW SETTLEMENTS/VOLUNTARY DISMISSALS

Central Valley Chrysler-Jeep, Inc. v. Goldstein (9th Cir., motion to dismiss filed April 6, 2010), ***Lincoln-Dodge, Inc. v. Sullivan*** (D. R.I., motion to dismiss filed April 7, 2010), ***Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Crombie*** (D. Vt., motion to dismiss filed April 7, 2010): added to the "challenges to state vehicle standards" slide. The automobile industry voluntarily dismissed three lawsuits challenging California regulations to limit greenhouse gas emissions from vehicles. The lawsuits filed in Vermont and Rhode Island were challenging state enactments that adopted the California regulations. Automobile manufacturers had pledged to drop the lawsuits after the Obama administration finalized national greenhouse gas regulations and fuel economy standards. The Obama administration issued such final regulations on April 1, 2010.

Musicraft, Inc. v. City of Ann Arbor (Mich. Cir. Ct., settled March 24, 2010): added to the "state NEPAs" slide. In May 2009, several environmental organizations filed suit in Michigan state court over concerns about increased greenhouse gas emissions from the City of Ann Arbor's new parking structure. The parties settled the suit in March 2010. Under the terms of the settlement agreement, the City will conduct an environmental study of the new parking structure looking specifically at parking supply and demand, impact on vehicle miles traveled in the city, and resulting greenhouse gas emissions. The City will also consider measures to mitigate any increased greenhouse gas emissions in an effort to meet its resolution to reduce greenhouse gas emissions 20% from 2005 levels by 2015.

NEW COMPLAINTS/PETITIONS/MOTIONS/NOTICES/FINDINGS

Virginia v. EPA (D.C. Cir., filed April 15, 2010): added to the "challenges to federal action" slide. The attorneys general from Virginia and Alabama filed a motion seeking an order requiring EPA to reopen its December 2009 finding that greenhouse gas emissions from cars and light trucks endanger public health and welfare. The motion filed with D.C. Circuit seeks to compel EPA to hold public hearings on the science it used to back up the endangerment finding. The petition filed by the attorneys general contends that much of the science used to justify the finding is based on data from the Climate Research Unit at the United Kingdom's University of East Anglia and that the Unit sought to suppress information contradicting its conclusion that human emissions of greenhouse gases are causing climate change.

Coalition for Responsible Regulation v. EPA (D.C. Cir., filed April 2, 2010): added to the "challenges to federal action" slide. Mining and agriculture groups filed suit challenging an EPA rule that allows the agency to limit greenhouse gases emitted by power plants and other stationary sources starting in January 2011. The petition seeks court review of a March 29, 2010 EPA final action that said that the agency had completed its reconsideration of the December 18, 2008 memorandum entitled "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program"--the so-called Johnson memo. Pursuant to the final action, EPA not begin enforcing greenhouse gas limits for stationary sources until January 2, 2011, the same date it expects to begin enforcing similar limits for cars and light trucks.

National Petrochemical and Refiners Association v. EPA (D.C. Cir., filed March 29, 2010): added to the "challenges to federal action" slide. Two petroleum industry associations sued the EPA over provisions in a final rule requiring motor fuel producers to include certain percentages of renewable fuels in their products. EPA published the final rule on March 25, 2010, which changes EPA regulations to include renewable fuel requirements for motor fuels established by Energy Independence and Security Act (EISA) in 2007. The EISA requires the industry to supply 12.95 billion gallons of renewable fuel in 2010. EPA's final rule puts this requirement into EPA regulations retroactive to January 1, 2010. The associations are challenging these retroactive requirements.

Association of Taxicab Operators v. City of Dallas (N.D. Tex, filed April 15, 2010): added to the "challenges to state and municipal vehicle standards" slide. An organization representing taxicab operators in Dallas, Texas filed suit against the city alleging that a new ordinance giving preference to taxis that run on compressed natural gas is preempted by the Clean Air Act. The ordinance allows taxis running on compressed natural gas to automatically move to the front of the line in taxi queues at Dallas Love Field Airport. The same day the lawsuit was filed, the court granted the plaintiff's request for a temporary restraining order preventing the city from enforcing the ordinance.

NRDC v. Michigan Dept. of Natural Resources and Environment (Mich. Cir. Court, filed March 25, 2010): added to the "coal-fired power plant challenges" slide. NRDC and the Sierra Club filed a lawsuit in Michigan state court challenging an air permit issued by the Michigan Department of Natural Resources and Environment to a proposed coal-fired power plant. The complaint alleges that the proposed plant violates the Clean Air Act for, among other reasons,

not regulating emissions of carbon dioxide from the plant and for rejecting cleaner energy alternatives.

In re U.S. Chamber of Commerce (EPA, filed March 15, 2010): added to the "challenges to federal action" slide. The U.S. Chamber of Commerce filed a petition with the EPA asking it to reconsider its finding that greenhouse gases endanger public health under the Clean Air Act. The petition focuses on statements made and data collected after the close of public comments on the proposed endangerment finding.

NON-U.S. CLIMATE LITIGATION (posted on Non-U.S. Litigation Chart)

Peter Gray & Naomi Hodgson v. Macquarie Generation (Land Environment Court of New South Wales, [2010] NSWLEC 34, March 22, 2010). Environmental activists brought suit against a state-owned power company, seeking a declaratory judgment that one of their power stations has been emitting carbon dioxide into the atmosphere in a manner that has harmed or is likely to harm the environment in contravention of Sec. 115(1) of the Protection of the Environment Operations Act 1997. In denying Defendant Macquarie Generation's motion for dismissal, the court found that even if Defendant has an implied authority to emit some amount of carbon dioxide in generating electricity, that authority must be limited to an amount which has reasonable regard and care for people and the environment. The case is now proceeding to trial.

R on the application of the London Borough of Hillingdon and others v. Secretary of State for Transport (High Court, Administrative Court, [2010] EWHC 626, March 26, 2010). A British high court ordered government officials to consider the implications of climate change prior to making any final decision on a third runway at London's Heathrow Airport. The court found that the government had failed to adequately review all environmental and economic issues, and that the aviation policy should probably be revisited in light of the 2008 Climate Change Act.

Update # 18 (March 26, 2010)

NEW COURT AND AGENCY DECISIONS

Jones v. Regents of the University of California (Cal. Ct. App. March 12, 2010): added to the "state NEPAs" slide. Several individuals filed a petition in state court challenging the certification of an environmental impact report (EIR) issued pursuant to the California Environmental Quality Act (CEQA) regarding the renovation of the Lawrence Berkeley National Laboratory. The trial court held that the Board of Regents of the University of California violated CEQA by amending the EIR in response to public comments about greenhouse gas emissions without recirculating the final EIR for public review. On appeal, the appellate court reversed, holding that a lead agency was not required to provide an opportunity for the public to review a final EIR.

Connecticut v. American Electric Power Co. (2d Cir. March 5, 2010): added to the "common law claims" slide. The Second Circuit denied a motion for rehearing or a rehearing *en banc* concerning its September 2009 decision reinstating a lawsuit by eight states and New York City against six large electric power generators that sought to limit the generators' GHG emissions by claiming that these emissions contributed to the public nuisance of climate change. In 2005, the district court dismissed the lawsuit, holding that the claims represented non-justiciable political questions. The Second Circuit reversed, holding that although Congress has enacted laws affecting air pollution, none of those laws has displaced federal common law.

Comer v. Murphy Oil Co. (5th Cir. Feb. 26, 2010): added to the "common law claims" slide. The Fifth Circuit granted a motion to reconsider en banc a decision allowing a group of Mississippi property owners to sue a group of energy companies and the Tennessee Valley Authority in federal court for alleged climate-change related damages. A federal district court initially granted the defendants' motion to dismiss on the grounds that the claims were non-justiciable. A panel of the Fifth Circuit disagreed, holding that until Congress acts on climate change, the common law claims raised by plaintiffs could proceed. The Fifth Circuit will rehear the case en banc.

Powder River Basin Resource Council v. Wyoming Dept. of Env. Quality (Wyoming March 5, 2010): added to the "coal-fired power plant challenges" slide. The Wyoming Supreme Court upheld the Wyoming Department of Environmental Quality's permit issued to a coal-fired power plant, holding that carbon dioxide is not subject to regulation under the Clean Air Act and therefore utility permits need not include CO2 limits. The Court held that such permits need only address pollutants "subject to regulation" under the Clean Air Act and that carbon dioxide is not currently subject to such regulation.

Sierra Club v. Clinton (D. Minn. Feb. 24, 2010): added to the "NEPA" slide. A coalition of environmental groups commenced an action alleging that several federal agencies violated NEPA concerning the permitting of the Alberta Clipper Pipeline, which, when built, will run from Alberta, Canada to Wisconsin. The pipeline will transport heavy crude oil extracted from tar sands in Canada. Among other things, plaintiffs alleged that the State Department violated NEPA by issuing an environmental impact statement (EIS) did not address impacts of increased greenhouse gas emissions. The defendants moved to dismiss. The court denied the motion, holding that the EIS prepared by the State Department constituted a final agency action that was reviewable under the Administrative Procedure Act and that the allegations that the EIS did not sufficiently address indirect and cumulative impacts of the project on climate change were sufficient to withstand a motion to dismiss.

Sierra Club v. Clinton (D. Minn. Feb. 3, 2010): added to the "NEPA" slide. In an earlier decision involving the case detailed above, the coalition of environmental groups moved for a preliminary injunction concerning the permitting of the Alberta Clipper Pipeline. The court denied the motion, holding that the EIS adequately addressed impacts concerning the possible effects of the pipeline on climate change and thus that plaintiffs did not show a substantial probability of success necessary to obtain a preliminary injunction.

Citizens for Environmental Inquiry v. Dept. of Environmental Quality (Mich. Ct. App. Feb. 9, 2010): added to the "coal-fired power plant challenges" slide. A state appellate court in Michigan upheld a lower court's finding that the Michigan Department of Environmental Quality is not required to promulgate rules regulating carbon dioxide emissions. In 2008, Citizens for Environmental Inquiry sued the Department, seeking to force it to issue rules regarding carbon dioxide emissions with respect to the construction of a power plant. In rejecting the challenge, the Court held that the group did not have standing--i.e. that it did not demonstrate that it would suffer harm as a result of the construction of the plant beyond what would be experienced by the public at large.

Amigos Bravos v. U.S. Bureau of Land Management (D. N.M. Feb. 9, 2010): added to the "NEPA" slide. A federal district court in New Mexico denied the Bureau of Land Management's (BLM) motion to dismiss a lawsuit brought by several environmental organizations seeking to halt a series of federal oil and gas lease sales in 2008 on the grounds that they violated NEPA by failing to consider the projects' emissions of methane, a potent greenhouse gas.

NEW SETTLEMENTS

Montana Environmental Information Center v. Bureau of Land Management (D. Montana March 18, 2010): added to the "NEPA" slide. The Bureau of Land Management (BLM) agreed to a settlement with several environmental organizations concerning its alleged duty under NEPA to consider the climate impacts of oil and gas leasing decisions. According to the settlement, BLM will immediately suspend 61 oil and gas leases it issued covering more than 30,000 acres in Montana. During the suspension, BLM will review its obligations under NEPA. The plaintiffs commenced the lawsuit in January 2009, alleging that BLM violated NEPA, the Federal Land Policy and Management Act, the Mineral Leasing At, and an Interior Department Secretarial Order which allegedly requires all Department of Interior agencies to conduct climate analyses in parallel with planning and decision making.

Center for Biological Diversity v. EPA (W.D. Wash. March 11, 2010): added to the "Other Statues/Clean Water Act" slide. EPA agreed to consider issuing nationwide guidance under the Clean Water Act to help states deal with the threat of ocean acidification as part of a settlement of a lawsuit brought by the Center for Biological Diversity (CBD). Under the terms of the settlement, EPA will seek comments on approaches for states to determine if waters are threatened or impaired by ocean acidification and how states might help monitor ocean acidification and its effects on marine life and ecosystems. In May 2009, CBD sued EPA, alleging that it failed to comply with the Clean Water Act and the Administrative Procedure Act by failing to identify waters as impaired due to ocean acidification.

Center for Biological Diversity v. Town of Yucca Valley (Cal. Sup. Ct. March 5, 2010) and ***Center for Biological Diversity v. City of Perris*** (Cal. Ct. App. March 5, 2010): added to the "state NEPAs" slide. Wal-Mart agreed to install rooftop solar systems and take other steps to reduce the carbon footprint of their stores in a settlement resolving two lawsuits filed by CBD. The retailer agreed to installing a rooftop solar system of at least 250 kW each at three proposed

stores, to build stat-of-the-art energy efficiency measures into the design of each of the planned stores, to conduct an audit to measure the energy efficiency of refrigeration units in existing stores in California, and to contribute $120,000 to the Mojave Desert Land Trust for land conservation purposes. The lawsuits alleged that the cities which approved the stores violated the California Environmental Quality Act (CEQA) by not taking into account the greenhouse gas impacts of planned stores. As part of the settlements, both cases were dismissed.

NEW COMPLAINTS/PETITIONS/NOTICES/FINDINGS

Center for Biological Diversity v. Dept. of Interior (N.D. Cal., filed March 9, 2010): added to the "Endangered Species Act" slide. CBD filed a complaint against the Department of the Interior, alleging that it has missed the deadline mandated by the Endangered Species Act to make a final determination listing seven penguin species as endangered or threatened because of climate change. In December 2008, the Fish and Wildlife Service recommended endangered status for the African penguin and threatened status for the yellow-eyed penguin, the white-flippered penguin, the Fiorland crested penguin, the erect-crested penguin, the Humboldt penguin and a portion of the range of the southern rockhopper penguin. According to the complaint, the federal government had one year from this date to reach a final decision pursuant to the Endangered Species Act.

Petition to EPA Regarding Black Carbon (Feb. 22, 2010): added to the "Other Statutes/Clean Water Act" slide. The Center for Biological Diversity petitioned the EPA to set standards under the Clean Water Act (CWA) to protect sea ice and glaciers from the warming effects of soot, otherwise known as black carbon, and to issue guidance enabling state regulators to control emissions of black carbon. The petition asks EPA to issue water quality criteria under Section 304 of the CWA capping black carbon deposition on sea ice and glaciers at pre-industrial concentrations. According to the petition, black carbon deposition on glaciers can reduce ice's reflectivity, increasing the rate at which sea ice and glaciers melt.

Judicial Watch v. Dept. of Energy (D. D.C., filed Feb. 18, 2010): added to the "Other Statutes/Freedom of Information Act" slide. A government watchdog group filed a Freedom of Information Act (FOIA) lawsuit against the Department of Energy and the EPA seeking documents related to White House "climate czar" Carol Browner's part in crafting U.S. climate policy. The group asked the agencies to turn over records of any communication, contact or correspondence between Browner and the Dept. of Energy or EPA pertaining to White House negotiations with the auto industry and the State of California on fuel standards and auto emissions standards between January 20, 2009 and June 1, 2009, and additional negotiations pertaining to a proposed cap-and-trade scheme to limit greenhouse gas emissions from between June 2009 and October 2009.

Sierra Club v. U.S. Army Corps of Engineers (W.D. Ark., filed Feb. 11, 2010): added to the "coal-fired power plant challenges" slide. The Sierra Club and three chapters of the Audubon Society filed suit against the U.S. Army Corps of Engineers, seeking an injunction to halt construction of a planned 600 megawatt power plant in Hempstead County, Arkansas. The plaintiffs allege that the Corps violated NEPA and the Clean Water Act when it issued the permit

allowing the company to take water from the Little River and fill wetlands during project construction.

Linder v. EPA (D.C. Cir., filed Feb. 10, 2010); ***American Farm Bureau Federation v. EPA*** (D.C. Cir., filed Feb. 12, 2010); ***Peabody Energy Co. v. EPA*** (D.C. Cir., filed Feb. 12, 2010); ***National Mining Association v. EPA*** (D.C. Cir., filed Feb. 12, 2010);***U.S. Chamber of Commerce v. EPA*** (D.C. Cir., filed Feb. 12, 2010);***Virginia v. EPA*** (D.C. Cir., filed Feb. 16, 2010); ***National Association of Manufacturers v. EPA*** (D.C. Cir., filed Feb. 16, 2010); ***Alabama v. EPA*** (D.C. Cir., filed Feb. 16, 2010);***Texas v. EPA*** (D.C. Cir., filed Feb. 16, 2010); ***Utility Air Regulatory Group v. EPA*** (D.C. Cir., filed Feb. 16, 2010); ***Ohio Coal Association v. EPA*** (D.C. Cir., filed Feb. 16, 2010); ***Gerdau Ameristeel v. EPA*** (D.C. Cir., filed Feb. 16, 2010); ***Portland Cement Association v. EPA*** (D.C. Cir., filed Feb. 16, 2010); ***Competitive Enterprise Institute v. EPA*** (D.C. Cir., filed Feb. 16, 2010): added to the newly created "challenges to federal action" slide. These lawsuits were filed by states and industry groups on or before the February 16, 2010 deadline for challenging EPA's finding that greenhouse gas emissions endanger public health and welfare.
In related filings, **Wetlands Watch** filed a motion on March 18, 2010 with the D.C. Circuit seeking to intervene on behalf of the EPA in Virginia's lawsuit against the agency. Sixteen states have also sought to intervene in the case. These states include Florida, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Alaska, Pennsylvania, and Minnesota.

NON-U.S. CLIMATE LITIGATION (posted on Non-U.S. Litigation Chart)

Arcelor SA v. Parliament and Council (2010), Case T-16/04: General Court of the European Union dismissed an action brought by Arcelor, a steel producer, challenging the validity of the Emissions Trading Directive. Arcelor claimed that application of certain articles of the directive violated several principles of Community law, including the right of property, the freedom to pursue an economic activity, the principle of proportionality, the principle of equal treatment, freedom of establishment and the principle of legal certainty. The General Court dismissed the action for annulment as inadmissible, noting that Arcelor is neither individually nor directly concerned by the directive.

Pembina Institute for Appropriate Development, et al v. Attorney General of Canada and Imperial Oil (2008), 2008 FC 302: Federal Court of Canada found legal errors in a government joint review panel's environmental assessment of the Kearl Tar Sands Project. Ecojustice and several non-profit organizations challenged the panel's approval of the project, alleging that it had failed to seriously consider the climate change impacts of the project. The court agreed with the petitioner, holding that the panel failed to adequately support their conclusion that the project would cause only insignificant environmental harm.

NEW COURT AND AGENCY DECISIONS

Center for Biological Diversity v. Kempthorne (D. Alaska Jan. 8, 2010): added to the "Endangered Species Act" slide. A federal court in Alaska upheld a rule by the U.S. Department of the Interior (DOI) that allows the incidental take of polar bears and Pacific walruses during oil and gas exploration in Alaska's Chukchi Sea. The court dismissed the lawsuit brought by the Center for Biological Diversity (CBD) seeking to revoke the rule, holding that it was similar to another agency rule concerning Alaska's Beaufort Sea, which was recently upheld by the Ninth Circuit. The court concluded that DOI had properly considered the impact of climate change when it approved the removal of otherwise protected polar bears and walruses from oil and gas exploration sites in an Arctic body of water under U.S. jurisdiction.

Save the Plastic Bag Coalition v. City of Manhattan Beach (Cal. App. 2 Dist. Jan. 27, 2010): added to the "state NEPAs" slide. The City of Manhattan Beach issued a negative declaration under the California Environmental Quality Act (CEQA) in connection with an ordinance prohibiting certain retailers from providing plastic bags to customers. A coalition of retail groups commenced an action seeking to invalidate the ordinance. A state trial court vacated the ordinance pending an environmental impact report (EIR). On appeal, the appellate court affirmed, holding that the City should have prepared an EIR given that the ordinance could have a significant environmental impact.

Underwriter of Lloyd's of London v. NFC Mining, Inc. (E.D. Kentucky, Jan. 27, 2010): added to the "coal-fired power plant challenges" slide. A federal court held that Lloyd's of London does not have to defend or indemnify a Kentucky coal processing facility against most of the claims of a personal injury and property damage suit because the pollution exclusion of the insurance policy provides the insurer immunity from the underlying claims. The court held that the insurance company's duty to defend the plant extended only to bodily injuries and property damages caused by noise, but not with respect to punitive damages or damages to air, land or water.

In re Black Mesa Complex (Dept. of Interior Jan. 5, 2010): added to the "NEPA" slide. An administrative law judge with DOI vacated a permit for a large coal-mining complex in response to one of several appeals filed by Navajo and Hopi residents, finding that the final Environmental Impact Statement (EIS) for the complex was inadequate because the design of the complex changed substantially between the filing of the draft EIS and the final EIS. Thus, a supplemental EIS was required. In addition, the judge found that the final EIS did not consider a reasonable range of alternatives to the complex.

San Luis & Delta-Mendota Water Authority v. Salazar (E.D. Cal. Dec. 16, 2009): added to the "Endangered Species Act" slide. The plaintiffs, two water districts, are plaintiffs in the lawsuit that challenges a December 2008 biological opinion by the U.S. Fish and Wildlife Service (FWS) aimed at protecting the Delta smelt. Plaintiffs filed a motion seeking to supplement the administrative record to include scientific reports and articles concerning the fish and its habitat, including documents concerning climate change and the future of the species. The court denied the motion as to these documents.

United States v. Sholtz (C.D. Cal. Dec. 15, 2009): added to the "other statutes" slide. Two U.S. Congressmen filed suit to unseal pleadings in a criminal case concerning an alleged fraudulent pollution credit trading scheme carried out in the context of the Southern California Regional Clean Air Incentives Market. According to the Congressman, they sought the information to aid in Congress's consideration of federal cap and trade legislation and to shed light on the possibility of fraud in such a system. The court ordered the pleadings to be unsealed, but allowed the defendant to submit proposed redactions concerning private or privileged information.

NEW SETTLEMENTS

WildEarth Guardians v. Jackson (D. Col, filed Jan. 13, 2010): added to the "coal-fired power plants" slide. EPA has agreed to review by March 25, 2010 the operating permit for a coal-fired power plant in Colorado pursuant to a proposed consent decree. The decree would resolve a lawsuit alleging that the agency failed to act in a timely manner with respect to objections filed by the plaintiff organization to the plant's operating permit for particulate matter and carbon monoxide.

United States v. Cinergy (S.D. Indiana, filed Dec. 22, 2009): added to the "challenges to coal-fired power plants" slide. Duke Energy/Cinergy agreed to spend $85 million to reduce air pollution at an Indiana power plant and pay a $1.75 million civil penalty pursuant to a settlement to resolve violations of the Clean Air Act. The settlement is expected to reduce sulfur dioxide emissions at the plant by almost 35,000 tons every year. The company is also required to spend $6.25 million on environmental mitigation projects. The settlement also requires the company to repower two of the operating units with natural gas or shut them down and to install new pollution controls for sulfur dioxide at the other two units.

NEW COMPLAINTS/PETITIONS/NOTICES/FINDINGS

Endangered Species Act finding concerning American Pika: added to the "Endangered Species Act" slide. On February 5, 2010, the U.S. Fish and Wildlife Service (FWS) determined that the American pika can adapt to the changing climate and is therefore not endangered. The decision came after a court-mandated review of the species. CBD filed a lawsuit seeking an endangerment finding after the agency did not respond to a petition it filed in 2007. The lawsuit was settled in May 2009 when the FWS launched a status review of the pika, a small member of the rabbit family similar to a hamster.

National Petrochemical & Refiners Association v. Goldstene (E.D. Cal, filed Feb. 2, 2010): added to the "challenges to state enactments" slide. Industry and business groups filed a lawsuit challenging California's low-carbon fuel standard, alleging that it violates the commerce clause of the U.S. Constitution because it interferes with interstate commerce. The California Air Resources Board adopted the standard in April 2009, which measures the level of greenhouse gas emissions associated with the production, distribution, and consumption of gasoline and

diesel fuels and their alternatives. It is designed to cut the average carbon intensity of fuels by 10 percent over the next 11 years.

Center for Biological Diversity v. California Dept. of Forestry and Fire Protection (Cal. Superior Ct., filed Jan. 27, 2010): added to the "state NEPAs" slide. CBD filed a lawsuit alleging that state forestry officials violated CEQA by approving a logging company's plan to clear-cut 5,000 acres of forests without properly analyzing the project's greenhouse gas impacts. The complaint alleges that state officials arbitrarily and unlawfully concluded that greenhouse gas emissions resulting from the logging projects would be minimal.

Petition to protect corals under the Endangered Species Act: added to the "Endangered Species Act" slide. On January 20, 2010, the Center for Biological Diversity announced that it would sue the National Marine Fisheries Service (NMFS) to force a decision on its petition that sought to protect 83 coral species it states are threatened by climate change. The notice was filed after the NMFS missed a statutory deadline for an endangered species listing decision for dozens of coral species.

Leavell v. New Mexico Environmental Improvement Board (D. N.M, filed Jan. 13, 2010): added to the "challenges to state enactments" slide. Plaintiffs which include state legislators, businesses, agricultural interests and others, filed a complaint seeking to stop state regulators from adopting a cap on greenhouse gas emissions, alleging that New Mexico's Environmental Improvement Board lacks statutory authority to consider or adopt an emissions cap. In April 2009, the Board determined that greenhouse gas emissions qualify as air pollutants under state law.

Savoy Energy LLC v. New Mexico Institute of Mining and Technology (D. Utah, filed Jan. 4, 2010): added to the "statutory claims/other challenges" slide. An energy company filed suit against the New Mexico university, alleging that the university fraudulently backed out of a $10 million contract for the company to operate a Utah gas field as part of a government-sponsored carbon sequestration project. According to the complaint, the university used the company as a "stop-gap contractor" in order to maintain funding from the U.S. Department of Energy, which later awarded the project to the school. The complaint alleges that the university breached the contract between the entities given that the partnership could only be ended "for cause."

Rocky Mountain Farmers Union v. Goldstene (E.D. Cal, filed Dec. 23, 2009): added to the "challenges to state enactments" slide. Industry and business groups filed a lawsuit challenging California's low-carbon fuel standard, alleging that it violates the commerce clause of the U.S. Constitution because it interferes with interstate commerce, specifically because it discriminates against products made in other states such as corn-based ethanol. The complaint is similar to *National Petrochemical & Refiners Association v. Goldstene* mentioned above.

Coalition for Responsible Regulation, Inc. v. EPA (D.C. Cir., filed Dec. 23, 2009): added to the "Clean Air Act" slide. A coalition of agriculture, mining and energy groups filed a petition with the District of Columbia Circuit seeking a review of EPA's finding that greenhouse gases endanger human health. On January 21, 2010, 16 states filed a motion to intervene in the case, seeking to support EPA in its defense of the finding.

American Chemistry Council v. EPA (D.C. Cir., filed Dec. 28, 2009), ***American Petroleum Institute v. EPA*** (D.C. Cir., filed Dec. 28, 2009), ***Energy Recovery Institute v. EPA*** (D.C. Cir., filed Dec. 28, 2009), ***Fertilizer Institute v. EPA*** (D.C. Cir., filed Dec. 29, 2009): added to the "Clean Air Act" slide. Four industry groups filed separate petitions with the D.C. Circuit seeking review of EPA's ruling that certain emitters of greenhouse gases must report their emissions.

Petition for Reconsideration of Endangerment Finding (EPA, filed Dec. 23, 2009): added to the "Clean Air Act" slide. The Southeastern Legal Foundation filed a petition with EPA on behalf of nine Republican members of Congress asking the agency to reconsider its endangerment finding in light of the so-called "climategate" controversy.

NEW GUIDANCE

SEC interpretative guidance: added to the "regulate private conduct" slide. On January 27, 2010, the Securities and Exchange Commission approved an interpretative release requiring companies to discuss several items related to climate change. According to SEC Commissioner Aguilar, the following must be disclosed: (1) the direct effects of existing and pending environmental regulation, legislation, and international treaties on the company's business, its operations, risk factors, and in Management's Discussion and Analysis for Financial Condition and Results of Operations (MD&A); (2) the indirect effects of such legislation and regulation on a company's business, such as changes in demand for products that create or reduce greenhouse gas emissions; and (3) the effect on a company's business and operations related to the physical changes to our planet caused by climate change -- such as rising seas, stronger storms, and increased drought. These changes to the environment could have a number of material effects on corporations, such as impairing the distribution and production of goods and damaging property, plant, and equipment.

NON-U.S. CLIMATE LITIGATION (posted on Non-U.S. Litigation Chart)

Citizens of Riverdale Hospital v. Bridgepoint Health Services, O.J. No. 2527 (2007), Ontario Superior Court of Justice, Canada. A citizens' group opposed the demolition of a hospital in the City of Toronto. Among other reasons, the group argued that the Ontario Municipal Board had failed to adequately consider the issue of greenhouse gas emissions. The Court concluded that although CO_2 emissions are an important environmental concern, the City and the Board had adequately considered the issue and correctly found the proposal to meet the requirements of section 24(1) of the Planning Act, R.S.O. 1990, c. P-13, as amended.

Micronesia Transboundary EIA Request. On December 3, 2009, the Federated States of Micronesia requested the Czech Republic, in accordance with § 11(1)(b) of the Act on Environmental Impact Assessment, to initiate a Transboundary Environmental Impact Assessment (EIA) proceeding for its plans to modernize and extend operations of the Prunerov II

coal-fired power plant. Micronesia asserted that it has reasonable grounds to believe that its territory will be affected by the continued operation of the power plant.

Environment-People-Law v. Cabinet of Ministers of Ukraine and National Agency of Environmental Investments (Lviv Circuit Admin. Court, 2009). In October 2009, the Ukrainian public interest organization Environment-People-Law (EPL) filed suit against the government, seeking to compel the dissemination of information on international greenhouse gas emissions trading. EPL specifically seeks information regarding an agreement between Ukraine and Japan, where the Japanese government agreed to buy 30 million tons of carbon offsets from the Ukrainian government. EPL contends that both the Aarhus Convention and the Constitution of Ukraine compels public access to the information.

Environment-People-Law v. Ministry of Environmental Protection (Commercial Court of Lviv, 2008). On July 31, 2008, a Ukrainian court ordered the Ministry of Environmental Protection to take certain actions aimed at national greenhouse gas reductions. The Ukrainian public interest organization Environment-People-Law (EPL) sought to compel the Ministry to develop a climate change policy for Ukraine; work towards fulfilling its climate change obligations under the United Nations Framework Convention on Climate Change (UNPCCC), the Kyoto Protocol and the National Plan; and raise public awareness on climate change issues.

Update #16 (January 4, 2010)

NEW COURT DECISIONS

Conservation Northwest v. Rey (W.D. Wash. Dec. 17, 2009): added to the "NEPA" slide. A coalition of environmental groups filed a lawsuit challenging a plan prepared by the U.S. Forest Service concerning forest areas where the northern spotted owl is located. The plan covers 24.5 million acres of federal land in three states in the Northwest. The plan was amended in 2001 based on a 2000 supplemental environmental impact statement (SEIS). After the SEIS was challenged, a new SEIS was prepared in 2004, which was finalized in 2007 (FEIS). The FEIS was challenged on the grounds that it violated NEPA, including that it did not take the requisite "hard look" at the impact of increased logging on climate change and vice versa. The district court held that the agencies which prepared the FEIS were only obligated to disclose opposing viewpoints in the FEIS and explain their decision, which they did.

Utah Chapter of the Sierra Club v. Air Quality Board (Utah Sup. Ct., Dec. 4, 2009): added to the "coal-fired power plant challenges" slide. The Utah Chapter of the Sierra Club and other groups challenged the Utah Air Quality Board's approval of an extension to a power plant's air pollution permit. The court found that the only documentation in state records concerning the review was a post-it not that someone was contacted regarding a review and held that this was "woefully inadequate" to convince a reasonable person that a review took place.

Center for Biological Diversity v. Kempthorne (9th Cir. Dec. 2, 2009): added to the "Endangered Species Act" slide. The Ninth Circuit held that companies exploring for oil and gas in the Beaufort Sea may accidently disturb polar bears and Pacific walruses without violating federal law. The court held that the incidental take rules for the animals in and around the sea, which is on Alaska's north coast, were carefully and properly issued by the U.S. Fish and Wildlife Service in 2006. The court ruled that the climate change evidence presented by the Center for Biological Diversity (CBD) showed only a "generalized threat to polar bear populations" and did not show a significant impact.

Center for Biological Diversity v. Lubchenco (N.D. Cal. Nov. 30, 2009): added to the "Endangered Species Act" slide. CBD commenced a lawsuit alleging that the National Marine Fisheries Service (NMFS) and other government agencies violated the Endangered Species Act by failing to list the ribbon seal as threatened or endangered. The lawsuit alleged that the NMFS used an improperly truncated time frame of 43 years as the "foreseeable future" when determining that the ribbon seals' sea-ice habitat was expected to continuing forming annually for the foreseeable future, failed to consider whether there might be a distinct population segment of ribbon seals that should be listed, and failed to consider whether the seals might be threatened or endangered in a significant portion of their range. The defendants moved to transfer the action to Alaska. The magistrate judge assigned to the case denied the motion, holding that local interests in Alaska did not outweigh the CBD's choice of forum in California.

NEW SETTLEMENT

Indeck Cornith v. Paterson (N.Y. Sup. Ct., settled on Dec. 23, 2009): added to "challenges to state enactments" slide. A settlement was reached concerning a lawsuit that had been brought by a New York power company against several New York State agencies concerning the state's implementation of the Regional Greenhouse Gas Initiative (RGGI). The lawsuit alleged that the state agencies, including the New York State Department of Environmental Conservation (DEC) and the New York State Energy Research and Development Authority (NYSERDA), did not have authority from the New York legislature to implement RGGI and that the multi-state compact was unconstitutional without state congressional authorization. According to NYSERDA and DEC, the settlement leaves intact the mechanisms to achieve the goals of the RGGI program. Under the settlement, the plaintiff company will withdraw the lawsuit and in return Con Edition will pay the company and other power producers for the amount of pollution allowances that they do not receive directly from DEC from a pool of allowances that were set aside under the regulations for qualifying power generators bound by long-term contracts. In addition, NYSERDA will allot a portion of the RGGI proceeds to offset Con Edison's costs.

NEW COMPLAINTS AND PETITIONS

Coalition for Responsible Regulation, Inc. v. EPA (D.C. Cir., filed Dec. 23, 2009): added to the "Clean Air Act" slide. A beef industry group filed a petition challenging EPA's endangerment finding concerning greenhouse gases. Among other things, the petition alleges that the endangerment finding jeopardizes large farms' ability to remain competitive in the

global marketplace and could force many farms to get permits to emit greenhouse gases or slow operations, which could force many out of business.

Sierra Club v. EPA (D.C. Cir, filed Dec. 7, 2009): added to the "Clean Air Act" slide. A coalition of environmental advocates filed a lawsuit to force the EPA to reconsider performance standards for coal preparation and processing facilities and require fugitive coal dust controls. The lawsuit alleges that EPA failed to require the facilities to take additional steps to prevent fugitive dust emissions from roadways as required by the Clean Air Act. The lawsuit also challenges EPA's decision not to require that the facilities' fugitive dust control plans be reviewed and approved by state or federal permitting authorities.

Center for Biological Diversity and 350.org petition to EPA (EPA, filed Dec. 2, 2009): added to the "Clean Air Act" slide. CBD and 350.org petitioned EPA to designate greenhouse gases as "criteria" air pollutants, which would require EPA to establish allowable nationwide concentrations for the gases. The groups are requesting that EPA cap atmospheric concentration of CO2 at 350 parts per million.

Revised petition to SEC for interpretative guidance on climate disclosure: (SEC, filed Nov. 23, 2009): added to the "regulate private conduct" slide. A coalition of state officials and investment organizations filed a revised petition to the SEC to require publicly traded corporations to report their climate change liabilities, citing recent EPA actions and proposals for regulating greenhouse gas emissions.

NON-U.S. CLIMATE LITIGATION

Rivers SOS Inc. v. Minister for Planning (Land and Environment Court of New South Wales, 2009), [2009] NSWELC 213: In June 2009, New South Wales Planning Minister approved a $50 million expansion of the Metropolitan coal mine, allowing longwall mining to take place underneath the Woronora Reservoir. The Minister approved a substantially revised version of the project at a late stage in the assessment process, without providing any further opportunities for public participation and agency involvement. Rivers SOS, a community group, challenged the legality of the mining approval process. On December 16, 2009, the Land and Environment Court upheld the decision of the Minister.

Commission of the European Communities v. Finland (European Court of Justice, 2006), Case C-107/05: Finland failed to apply in full the EU ETS to the province of Aland. The Commission brought this action under the Article 226 EC procedure, contending that Finland had failed to properly implement the Directive. The Court agreed with the Commission, holding that Finland, by not implementing Directive 2003/87/EC in due time, failed to fulfill its obligations.

R. (on the application of People & Planet) v. HM Treasury (High Court of Justice, Queen's Bench Division, 2009), [2009] EWHC 3020: Campaigners from the World Development Movement, PLATFORM, and People & Planet brought suit against the United Kingdom Treasury for its lack of adequate environmental and human rights considerations in investing

with with the Royal Bank of Scotland (RBS). RBS has allegedly used public monies to finance several controversial companies and projects that undermine the UK's commitment to halt climate change. The High Court denied the request for permission to hold a judicial review over the Treasury's actions.

Commission of the European Communities v. Italian Republic (European Court of Justice, 2006), C-122/05: Action brought against the Italian Republic by the Commission for its failure to adopt all laws, regulations, and administrative provisions necessary to comply with Directive 2003/87/EC. The court ruled that the Italian Republic had failed to fulfill its obligations under Article 31(1) of the directive.

Drax Power and others v. Commission of the European Communities (Court of First Instance, 2007), Case T-130/06: Applicant contended that the Commission wrongly rejected the United Kingdom NAP for a second time following its decision in Case T-178/05, *United Kingdom v. Commission,* on the grounds that the proposed amendments were notified too late. The court dismissed the application as inadmissible.

Fels-Werke GmbH v. Commission of the European Communities (Court of First Instance, 2007), Case T-28/07: Applicants sought to annul Commission decision rejecting part of the German Phase II national allocation plan (NAP). The court dismissed the action as inadmissible because the Applicants were not individually affected. The decision as appeal to the European Court of Justice in Case C-503/07, *Saint-Gobain Glass Deutschland v. Commission of the European Communities* (European Court of Justice, 2008). The Court affirmed the lower court's decision and dismissed the appeal, ruling that the Appellant could not sufficiently demonstrate that it was individually affected by the contested decision.

Buzzi Unicem SpA v. Commission of the European Communities (Court of First Instance, 2008), Case T-241/07: Applicant Italian cement producer sought to annual a Commission decision rejecting in part the Italian Phase II national allocation plan (NAP). The court dismissed the action as inadmissible because the Applicant was unable to demonstrate that it was directly and individually affected.

The following decisions were issued by the Court of First Instance on September 23, 2008 regarding challenges to the Commission rejection of the Polish NAP:

Górażdże Cement S.A. v. Commission of the European Communities (Court of First Instance, 2008), Case T-193/07: Applicant sought to challenge Commission decision rejecting the Polish Phase II national allocation plan (NAP) for the allocation of GHG emission allowances. The Court dismissed the action as inadmissible because the decision does not directly and individually affect the Applicant.

Lafarge Cement S.A. v. Commission of the European Communities (Court of First Instance, 2008), Case T-195/07: Applicant sought to challenge Commission decision rejecting the Polish Phase II national allocation plan (NAP) for the allocation of GHG emission allowances. The Court dismissed the action as inadmissible because the decision does not directly and individually affect the Applicant.

Dyckerhoff Polska sp. z o.o. v. Commission of the European Communities (Court of First Instance, 2008), Case T-196/07: Applicant sought to challenge Commission decision rejecting the Polish Phase II national allocation plan (NAP) for the allocation of GHG emission allowances. The Court dismissed the action as inadmissible because the decision does not directly and individually affect the Applicant.

Grupa Ożarów S.A. v. Commission of the European Communities (Court of First Instance, 2008), Case T-197/07: Applicant sought to challenge Commission decision rejecting the Polish Phase II national allocation plan (NAP) for the allocation of GHG emission allowances. The Court dismissed the action as inadmissible because the decision does not directly and individually affect the Applicant.

Cementownia "Warta" S.A. v Commission of the European Communities (Court of First Instance, 2008), Case T-198/07: Applicant sought to challenge Commission decision rejecting the Polish Phase II national allocation plan (NAP) for the allocation of GHG emission allowances. The Court dismissed the action as inadmissible because the decision does not directly and individually affect the Applicant.

Cementownia "Odra" S.A. v Commission of the European Communities (Court of First Instance, 2008), Case T-199/07: Applicant sought to challenge Commission decision rejecting the Polish Phase II national allocation plan (NAP) for the allocation of GHG emission allowances. The Court dismissed the action as inadmissible because the decision does not directly and individually affect the Applicant.

Cemex Polska sp. z o.o. v Commission of the European Communities (Court of First Instance, 2008), Case T-203/07: Applicant sought to challenge Commission decision rejecting the Polish Phase II national allocation plan (NAP) for the allocation of GHG emission allowances. The Court dismissed the action as inadmissible because the decision does not directly and individually affect the Applicant.

BOT Elektrownia Bełchatów S.A. and Others v. Commission of the European Communities (Court of First Instance, 2008), Case T-208/07: Applicant sought to challenge Commission decision rejecting the Polish Phase II national allocation plan (NAP) for the allocation of GHG emission allowances. The Court dismissed the action as inadmissible because the decision does not directly and individually affect the Applicant.

Update #15 (November 25, 2009)

NEW COURT DECISIONS

United States v. DeChristopher (D. Utah Nov. 16, 2009): added to the "climate change protests" slide. A federal court in Utah held that an individual will not be allowed to present the

"necessity defense" in a criminal proceeding. The individual was indicted for submitting several bids for oil and gas drilling leases on federal land that he did not intend to pay for. He argued that he did so to prevent the leases from being used in a way that would worsen the effects of climate change. The court held that the government's motion *in limine* to prevent the individual from using the defense should be granted because the individual did not meet the criteria for allowing such a defense.

NEW SETTLEMENT

AES Corp. (Nov. 19, 2009): added to the "regulate private conduct" slide. AES Corporation became the third energy company to enter into an agreement with the New York State Attorney General's Office regarding a disclosure regimen intended to provide investors with information on financial risks posed by climate change. This agreement follows settlements by Dynegy Inc. and Xcel Energy in 2008. In September 2007, the AG's office issued subpoenas to five energy companies in an investigation into charges that they had failed to disclose to shareholders the "increased financial, regulatory, and litigation risks" likely to be triggered by planned coal-fired power plants.

NEW COMPLAINTS AND PETITIONS

Center for Biological Diversity letter to the California Air Resources Board (CBD, filed Nov. 12, 2009): added to the "State NEPAs" slide. The Center for Biological Diversity (CBD) filed a formal letter with the California Air Resources Board (CARB) seeking a revocation of its Forest Project Protocol, which gives carbon credits to certain forest projects. CBD alleged in the letter that the Protocol gives carbon credits to projects that involve clear-cutting and other destructive practices and thus contributes to GHG emissions rather than helping to reduce them. CBD alleged that CARB violated the California Environmental Quality Act (CEQA) by failing to consider the environmental consequences of adopting the policy.

In re Transalta Corp. (EPA, filed Nov. 2, 2009): added to the "coal-fired power plant challenges" slide. Earthjustice filed a petition with EPA seeking to block the renewal of an air pollution permit for a coal-fired power plant in Centralia, Washington. The Southwest Clean Air Agency had renewed the permit in September 2009. The petition alleges violations of the Clean Air Act and state pollution laws. In particular, the petition alleges that the permit does not contain emissions limits for GHGs or mercury and does not require the best controls for regional haze pollution.

Center for Biological Diversity v. California Fish and Game Commission (Cal. Sup. Ct., filed Oct. 28, 2009): added to the "Endangered Species Act" slide. CBD filed a lawsuit challenging the California Fish and Game Commission's rejection of its petition to protect the American pika under the California Endangered Species Act. The complaint alleges that the Commission ignored scientific evidence showing that climate change pose a threat to the pika, a hamster-like mammal that lives near mountain peaks in the western U.S. On October 1, 2009, the Commission finalized a decision that found that listing the pika as endangered or threatened was

unwarranted. In May 2009, the same court found that the Commission had applied the wrong legal standard in rejecting the CBD's petition in 2008 and ordered it to reconsider the request.

Chamber of Commerce v. Servin (D. D.C., filed Oct. 26, 2009): added to the "climate change protests" slide. The U.S. Chamber of Commerce sued the individuals that make up the "Yes Men," a comedic group that often parodies certain industry groups. On October 19, 2009, a press release from the group but purporting to be from the Chamber said that the Chamber was "throwing its weight behind strong climate legislation." Numerous mainstream news outlets ran stories about the release, but later had to retract or correct the stories after the Chamber confirmed that the release was a hoax. In addition to the press release, the group staged a fake press conference. The suit demands that the group take down a website that mimics the Chamber's site and seeks a ban on any further attempts by the group to impersonate the Chamber or any of its representatives.

Public Citizen v. Texas Commission on Environmental Quality (Texas Dist. Ct., filed Oct. 6, 2009): added to the "State NEPAs" slide. A Texas environmental group filed a lawsuit seeking to force the Texas Commission on Environmental Quality to regulate GHGs when it approves new coal-fired power plants and other facilities in the state. The group alleged that existing Commission rules unlawfully eliminate all opportunity for people facing significant harm to present facts about climate change in permit proceedings on coal- and petroleum coke-fired power plants. The group seeks a judgment declaring Commission rules invalid under the federal Clean Air Act and the Texas Clean Air Act.

Center for Biological Diversity v. California Dept. of Forestry (Tehama Co. Sup. Ct., filed Aug. 13, 2009): added to the "state NEPA's" slide. CBD filed a lawsuit against the California Department of Forestry over the agency's failure to analyze the GHG impacts when it approved a logging plan in the Sierra Nevada. CBD alleged that the Department was required to analyze and mitigate the GHG emissions of the project pursuant to CEQA but failed to do so.

NEW CRITICAL HABITAT PROPOSAL

Polar Bear (Dept. of the Interior, Oct. 22, 2009): added to the "Endangered Species Act" slide. In October, the Department of the Interior proposed designating more than 200,000 square miles of land, sea and ice along the northern coast of Alaska as critical habitat for the shrinking polar bear population. The area encompasses the entire range of the two polar bear populations that exist on American land and territorial waters. In May 2008, the Interior Department declared the polar bear a threatened species under the Endangered Species Act. The proposed designation requires a government agency or commercial interest to show that any proposed activity, including oil drilling or shipping, would not destroy or adversely affect the bears' habitat or accelerate the extinction of the species.

NEW SEC POLICY

SEC Policy on Climate Risk in Shareholder Resolutions (SEC Oct. 27, 2009): added to the "regulate private conduct" slide. In October 2009, the SEC released a staff bulletin that reversed a Bush Administration policy that excluded shareholder resolutions which asked companies to disclose their climate-related financial exposure. The bulletin stated that, going forward, the Corporation Finance Division will no longer automatically allow the exclusion of proposals that deal with the evaluation of risk, but will look at the subject matter giving rise to the risk, and it will generally not permit a company to exclude a shareholder proposal that deals with significant policy issues relating to the evaluation of risk.

PETITION TO THE WORLD HERITAGE COMMITTEE

Petition Concerning the Role of Black Carbon in Endangering World Heritage Sites (World Heritage Committee Jan. 29, 2009): added to the "public international law claims" slide. In January 2009, Earthjustice and the Australian Climate Justice Program submitted a petition which requested that the World Heritage Committee take action to protect certain World Heritage Sites most vulnerable to climate change--high latitude and altitude glaciers and low-elevation sites threatened by sea level right--by advancing strategies to reduce emissions of black carbon.

Update #14 (October 16, 2009)

NEW COURT DECISIONS

Comer v. Murphy Oil USA (5th Cir. Oct. 16, 2009): added to the "common law claims" slide. Plaintiffs alleged that defendants, including a number of companies that produce fossil fuels, caused the emission of greenhouse gases that contributed to climate change and thereby added to the ferocity of Hurricane Katrina, ultimately causing damages to plaintiffs' property. Defendants' motion to dismissed was granted by the district court. On appeal, the Fifth Circuit partially reversed, holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims, and that none of these claims presented nonjusticiable political questions.

Village of Kivalina v. ExxonMobil Corp. (N.D. Cal. Sept. 30, 2009): added to the "common law claims" slide. A federal court granted a motion to dismiss in a lawsuit brought against 24 oil, energy and utility companies by Inupiat Eskimos from Kivalina, Alaska. In dismissing the case for lack of subject matter jurisdiction, the court held that the question of how best to address climate change is a political question not appropriate for a federal trial court to decide. The court also held that the plaintiffs could not demonstrate that the companies had caused them injury. The lawsuit alleged that as a result of climate change, the Arctic sea ice that protects the Kivalina coast from storms has been diminished and that resulting erosion will require relocation of the residents at a cost of between $95 and $400 million.

NRDC v. U.S. State Dept. (D.D.C. Sept. 29, 2009): added to the "NEPA" slide. A federal court denied a motion by NRDC to block a planned pipeline that would carry oil from Canadian tar sands to the United States. NRDC claimed that the State Department violated NEPA by issuing a permit to a company to build a cross-border oil pipeline. The court held that the group had no legal right to intervene in a permitting action carried out by a federal agency, holding that the President had complete, unfettered discretion over the permitting process. A related action (*Sierra Club v. U.S. Dept. of State*, see below) was filed in federal court in California and subsequently transferred to Minnesota.

Friends of the Chattahoochee v. Longleaf Energy Associates (Georgia Sup. Ct. Sept. 28, 2009): added to the "coal-fired power plant challenges" slide. The Georgia Supreme Court denied an appeal by environmental groups regarding a decision that found a proposed coal-fired power plant was not required to limit its CO2 emissions. In July 2009, the appellate court reversed a lower court's decision to vacate the state permit for construction of the plant because it did not limit such emissions.

Minnesota Center for Environmental Advocacy v. Holsten (Minn. Ct. App. Sept. 22, 2009): added to the "state NEPAs" slide. The Minnesota Court of Appeal rejected a challenge to the environmental impact statement (EIS) for a proposed steel production plant, which alleged that the EIS was inadequate since did not include a substantial discussion of the project's projected GHG emissions. The court held that the plaintiffs' challenge was without merit, holding that the EIS adequately addressed the plant's projected GHG emissions and its effect on climate change. The court found that the EIS included a carbon footprint section that acknowledged the proposed plant's CO2 emissions and that there were no regulations concerning GHG emissions.

Greater Yellowstone Coalition v. Servheen (D. Montana Sept. 21, 2009): added to the "Endangered Species Act" slide. A federal judge in Montana restored threatened-status protection for grizzly bears in and around Yellowstone National Park, citing a decline in food supplies caused in part by climate change. The court vacated a March 2007 decision by the Fish and Wildlife Service to remove the grizzly bear from the list of threatened species. Specifically, the court held that the FWS's decision did not adequately consider the impact of climate change and other factors on whitebark pine nuts, a major food source for the animals.

Connecticut v. American Electric Power (2d Cir. Sept. 16, 2009): added to the "common law claims" slide. In a long-awaited and important decision, the Second Circuit vacated a lower court decision and reinstated a lawsuit by eight states and New York City against six large electric power generators that sought to limit the generators' GHG emissions by claiming that these emissions contributed to the public nuisance of climate change. In 2005, the district court dismissed the lawsuit, holding that the claims represented "non-judiciable political questions." The Second Circuit reversed, holding that although Congress has enacted laws affecting air pollution, none of those laws has displaced federal common law. The court stated that there may be a time where federal laws and regulations pre-empt the the field of common law nuisance, but that this had not yet occurred.

Hanosh v. King (N.M. Sept. 10, 2009): added to the "challenges to state vehicle standards" slide. The New Mexico Supreme Court affirmed a state appeals court's decision allowing

plaintiffs to bring a declaratory judgment action against the New Mexico Environmental Improvement Board instead of filing an administrative appeal. The plaintiffs commenced the action in state court in 2007 after the Board signed off on emissions regulations that were tougher than federal standards. New Mexico is one of 13 states to adopt California's emissions laws after EPA granted the state a waiver under the Clean Air Act in June 2009 to enact its own regulations. The plaintiffs alleged that the Board did not have the power under state law to approve the stricter standards. The state court dismissed the complaint, holding that plaintiffs had to pursue an administrative appeal and could not file a separate declaratory judgment action. A state appellate court reversed, holding that the plaintiffs could raise a purely legal challenge to the Board's statutory authority through a declaratory judgment action. The Supreme Court agreed and remanded the case back to the lower court.

Shenandoah Valley Network v. Capka (W.D. Vir. Sept. 3, 2009): added to the "NEPA" slide. Plaintiffs filed suit challenging the Federal Highway Administration's issuance of a "record of decision" concerning a highway improvement plan in Virginia. Among other things, the plaintiffs' complaint alleged that FHA failed to take the requisite "hard look" at the plan's contribution to climate change and oil dependence. In their complaint, plaintiffs alleged that FHA prematurely issued the record of decision. The defendants moved for summary judgment. The court granted the motion, holding that the record of decision was not issued prematurely and that plaintiffs' due process rights were otherwise not violated.

Center for Biological Diversity v. Office of Management and Budget (N.D. Cal. Aug. 25, 2009): added to the "other statutes" slide under "FOIA": In 2007, the Center for Biological Diversity filed suit against the Office of Management and Budget, alleging violations of the Freedom of Information Act (FOIA) in connection with a lawsuit that sought documents in connection with rulemaking concerning CAFE standards for light trucks. In July 2009, the district judge assigned to the case referred the matter to a magistrate judge for an "in camera" review of certain documents that were claimed by OMB to be privileged, including those addressing greenhouse gases. In this decision, the magistrate listed each document at issue and determined whether it remained privileged.

NEW ADMINISTRATIVE DECISIONS

In re Desert Rock Energy Co. (EPA Env. App. Board Sept. 24, 2009): added to the "coal-fired power plant challenges" slide. The EPA Env. Appeals Board remanded a pre-construction permit for a proposed power plant in New Mexico to EPA for consideration of gasification technology as a less-polluting alternative to the pulverized-coal boiler that would power the plant. The Board granted EPA's request for a voluntary remand of the permit, as the Obama Administration is seeking to review a 2008 decision by the Bush Administration to issue the permit without considering integrated gasification combined cycle (IGCC) as a potential emissions control technology. At issue is a permit for a 1,500 megawatt coal-fired electric generating facility to be built in New Mexico on the Navajo Indian Reservation.

Appalachian Voices v. State Air Pollution Control Board (Va. Air Quality Control Board Sept. 3, 2009): added to the "coal-fired power plant challenges" slide. On September 2, 2009, the

Virginia Dept. of Environmental Quality tightened the mercury emissions limit for a coal-fired power plant that Dominion Resources, Inc. is considering in the southwest corner of the state. The revised permit eliminates a clause in the original permit that provided an "escape hatch" from compliance with standards based on maximum achievable control technology (MACT). The change came in response to an August 10, 2009 Virginia Circuit Court ruling that invalidated the plant's permit over the escape-hatch clause (*Appalachian Voices v. State Air Pollution Control Board*, *see* Climate Case Chart Update #13). On September 3, 2009, the Virginia Air Quality Control Board approved the revised permit.

NEW SETTLEMENT

Sierra Club v. Jackson (E.D. Kentucky, order signed Sept. 21, 2009): added to the "coal-fired power plant challenges" slide. EPA ordered Kentucky officials to set emissions standards for hazardous air pollutants for a coal-fired power plant as part of an agreement settling a lawsuit. Under the order, the Kentucky Division of Air Quality will be required to revise the operating permit issued to the plant to include a MACT standard for mercury and other air toxics. EPA issued the order as part of a consent decree with the Sierra Club. The decree required EPA to take action on a revised operating permit to be issued to the plant. In addition, EPA agreed to respond to the Sierra Club's other objections by November 30, 2009. Sierra Club had sued EPA, alleging that it failed to take any action on the operating permit for the plant within the time frame required by the CAA after EPA had ordered state officials to strengthen the permit's pollution control requirements.

NEW COMPLAINTS AND PETITIONS

Humane Society v. Jackson (EPA, filed Sept. 21, 2009): added to the "Clean Air Act" slide. The Humane Society and other organizations petitioned EPA to limit emissions of the GHGs methane and nitrous oxide, as well as emissions from other air pollutants, from concentrated animal feeding operations (CAFOs). The petition asked EPA to list the emissions from the CAFOs as air pollutants that endanger public health and welfare and issue new source performance standards under Section 111 of the CAA. According to the petition, livestock raising produces 27% of the nation's methane emissions and 16% of its nitrous oxide emissions.

Chamber of Commerce v. EPA (D.C. Cir., filed Sept. 8, 2009): added to the "Clean Air Act" slide. The Chamber of Commerce and the National Automobile Dealers Association sued EPA in federal appeals court, challenging EPA's approval of limits on GHG emissions issued by California and adopted by 13 other states. On June 30, 2009, EPA announced that it had approved a Clean Air Act waiver for California to implement its own GHG emissions limits for vehicles. This followed an announcement by President Obama on May 19, 2009 that EPA and the National Highway Traffic Safety Administration will propose GHG emissions limits and new fuel economy standards for cars and light trucks that will mirror the California standards for model years 2012 and 2016. Under an agreement with EPA, California is free to enforce its standards from the 2009-11 model years.

Center for Biological Diversity v. Lubchenco (N.D. Cal., filed Sept. 3, 2009): added to the "Endangered Species Act" slide. Two environmental organizations filed suit against the National Oceanic and Atmospheric Administration (NOAA) based on the agency's failure to list the ribbon seal as threatened because of climate change. On December 23, 2008, the NOAA rejected the Center's petition to list the species, stating that although the loss of sea ice looms as a problem for ribbon seals, it was likely that enough summer ice would remain in the seals' habitat such that population extinction was not a risk in the foreseeable future.

Sierra Club v. U.S. Dept. of State (N.D. Cal., filed Sept. 3, 2009): added to the "NEPA" slide. The lawsuit seeks to stop construction of a cross-border pipeline that would bring large volumes of oil from Canadian tar sands into the United States for refining and marketing. The plaintiffs allege that the State Department's EIS did not adequately consider the environmental impact of tar sands production. According to the plaintiffs, such production accounts for three times the amount of GHGs as normal production. On Sept. 23, 2009, the district court ruled on a motion to transfer venue to Minnesota (the decision has been added to the "NEPA" slide). The court granted the motion, holding that most of the plaintiffs did not reside in California, the decisions were made outside of California and the district had little interest in the subject matter. The court held that the majority of activities underlying the lawsuit took place in Minnesota.

Transportation Solutions Defense and Education Fund v. Cal. Dept. of Transportation (Sac. Co. Sup. Ct., filed Aug. 26, 2009): added to the "state NEPAs" slide. An environmental nonprofit group filed a lawsuit against the California Department of Transportation, alleging that the agency's EIS, which is required pursuant to the California Environmental Quality Act (CEQA), with respect to a highway widening project is flawed. The lawsuit alleges that while the EIS discloses that the project will increase GHG emissions on the highway by 27% annually, it does not analyze the significance of that impact on climate change, and it does not consider alternative means of accomplishing the project's goals in a way that would avoid climate impacts.

Update #13 (September 10, 2009)

NEW COURT DECISIONS

North Slope Borough v. Minerals Management Service (9th Cir. Aug. 27, 2009): added to the "NEPA" slide. The Ninth Circuit upheld a federal agency's decision not to prepare a supplemental environmental impact statement for a proposed oil and gas lease sale on a tract of the outer continental shelf in the Beaufort Sea. The court upheld the lower court's decision holding that the agency did not act arbitrarily in determining that the risks posed to polar bears by the cumulative effects of climate change could be mitigated.

Ophir v. City of Boston (D. Mass. Aug. 14, 2009): added to the "challenges to state vehicle standards" slide. A federal judge in Boston enjoined the city from requiring taxicab companies to purchase new hybrid cars by 2015. A taxicab owners association filed suit alleging that the

city's requirement that taxicab owners purchase 2008 or 2009 or later-model vehicles is prohibited under the preemption provisions of the CAA and the Energy Policy and Conservation Act. The plaintiffs argued that local regulation of air quality is preempted by federal law and that the CAA preempts not only regulations targeted at vehicle manufactures and sellers, but also regulations targeted at the purchase of vehicles. The court agreed and enjoined the city from enforcing the requirement. In July, the court issued a temporary injunction regarding the requirement (*see* climate case chart update #12).

Mirant Potomac River LLC v. EPA (4th Cir. Aug. 12, 2009): added to the "coal-fired power plant challenges" slide. The Fourth Circuit held that a power plant in Virginia may not use emissions trading to meet its obligations under a state implementation plan approved by the EPA as part of the Clean Air Interstate Rule (CAIR). The court held that the company could not use the emissions allowances because of nonattainment provisions in Virginia state air pollution regulations. While CAIR allows emissions trading, Virginia state law does not allow such trading in state nonattainment areas. Because the plant was located in such a nonattainment area, the court found a lack of subject matter jurisdiction and dismissed the lawsuit.

Appalachian Voices v. State Air Pollution Control Board (Vir. Cir. Ct. Aug. 10, 2009): added to the "coal-fired power plant challenges" slide. A Virginia state court invalidated one of the permits for a coal-fired power plant that Dominion Resources has been building for more than a year. The permit for a maximum achievable control technology (MACT) was approved by the State Air Pollution Control Board with an "escape hatch" clause stating that if federal limits on mercury emissions "are not achievable on a consistent basis under reasonably foreseeable conditions, then testing and evaluation shall be conducted to determine an appropriate adjusted maximum annual emissions limit." The court rejected this clause, holding that the Clean Air Act (CAA) allows for no such adjustment.

Palm Beach Co. Env. Coalition v. Florida (S.D. Florida July 27, 2009): added to the "coal-fired power plant challenges" slide. An environmental nonprofit group filed suit in federal court challenging the construction of a natural gas pipeline for a proposed power plant. Among other things, the plaintiffs challenged the construction of the pipeline on the grounds that it violated NEPA, the CAA, and other federal statutes. The defendants moved to dismiss on various jurisdictional grounds, contending that the environmental group failed to fulfill the 60-day notice requirement for citizen suits required under the CAA and that the state was immune from suit under the Eleventh Amendment. The court dismissed the suit on these grounds.

NEW ADMINISTRATIVE DECISION

In re Progress Energy Florida (Florida Cabinet, Aug. 11, 2009): added to the "coal-fired power plant challenges" slide. Florida Governor Charlie Crist and other state officials approved an application by Progress Energy Florida to build a nuclear-powered electric generating facility in Levy County, replacing coal-fired generating units at the site. The approval followed the August 2008 approval by the Florida Public Service Commission of a determination of need for the $17 billion facility, which would consist of 2 1,100 megawatt nuclear-powered units. The

project still must obtain approval from the Nuclear Regulatory Commission, which is expected by early 2012.

OLD COURT DECISION

Minn. Center for Env. Advocacy v. Holsten (Minn. Co. Ct. Oct. 15, 2008): added to the "state NEPAs" slide. The plaintiff, an environmental advocacy group, filed suit in state court against the Minnesota Department of Natural Resources alleging that it did not adequately consider the amount of greenhouse gases a proposed $1.65 billion direct taconite-to-steel plant would produce when it approved an environmental impact statement (EIS) concerning the plant. The state court upheld the EIS, holding that the state agency followed the law when drafting the EIS. The environmental advocacy group has appealed the ruling.

NEW SETTLEMENTS

U.S. v. Ohio Edison (D. Ohio, proposed consent decree filed Aug. 11, 2009): added to the "coal-fired power plant slide." A proposed consent decree was filed in federal court, settling a lawsuit brought against an Ohio power plant over CAA violations. The decree requires the plant to reduce greenhouse gases at the facility by 1.3 million tons per year. According to a press release from the Department of Justice, the plant will be the largest coal-fired power plant in the U.S. to repower with renewable biomass fuels and the first such plant at which greenhouse emissions will be reduced under a CAA consent decree. The proposed decree modifies an original 2005 settlement that gave the company three options: shut down the plant, install a scrubber or re-power by natural gas by 2010. The decree stems from a 1999 new source review lawsuit that alleged that the company made unlawful modifications to its plant that resulted in excess SO2 and NOx emissions.

Sierra Club v. Jackson (W.D. Wis., proposed consent decree filed July 22, 2009): added to the "coal-fired power plant slide." In March 2009, the Sierra Club sued the EPA, alleging that the agency had failed to respond to the group's objections to the Title V operating permit issued to Wisconsin Power and Light for its generating station in Pardeeville. The group alleged that the permit violated the CAA because it did not have adequate emissions monitoring, reporting and recordkeeping requirements. Under the decree, EPA will respond to the petition by September 18, 2009.

NEW COMPLAINTS AND PETITIONS

U.S. Chamber of Commerce Petition (EPA, filed Aug. 25, 2009): added to the "Clean Air Act" slide. The U.S. Chamber of Commerce filed a second petition with EPA requesting a formal "on the record" hearing regarding EPA's proposed endangerment finding concerning greenhouse gases. On April 17, 2009, EPA issued a proposed finding that greenhouse gases pose a danger to the public health and welfare. In its petition, the Chamber alleged that EPA "ignored

evidence" that does not support the agency's proposed rule. The Chamber filed an initial petition for a formal hearing on June 23, 2009 (*see* climate case chart update # 11).

Institute for Policy Integrity Petition (EPA, filed July 29, 2009): added to the "Clean Air Act" slide. The institute, a nonprofit advocacy group at NYU School of Law, filed a petition to EPA Administrator Lisa Jackson outlining the reasons why she already has authority to set up a cap-and-trade system to regulate greenhouse gases from motor vehicle fuels, non-road vehicles, and aircraft.

Sunflower Electric Power Corp. v. Sebelius (Kan. Dist Ct. , filed July 16, 2009): added to the "coal-fired power plant challenges" slide. Sunflower filed a lawsuit in federal court alleging that then-governor Kathleen Sebelius and officials in her administration violated the company's right to fair and equal treatment by blocking its air quality permits over concerns about greenhouse gases. The suit also accuses the defendants of unlawfully prohibiting interstate commerce. Sunflower has sought to build two coal-fired power plants since 2007. In July 2009, EPA Region 7 stated that a comprehensive analysis of the new project would be needed in light of design changes in the new proposal. The analysis would be needed to establish that emissions from the new plant would not violate the prevention of significant deterioration (PSD) requirements of the CAA. However, the review would not take into account emissions of CO2 (*see* climate case chart update #12).

Update #12 (August 10, 2009)

CAA WAIVER

EPA Clean Air Act Waiver to California (EPA, June 30, 2009): added to the "Clean Air Act" slide. In June 2009, EPA granted California a waiver under the Clean Air Act (CAA) to implement its own GHG emissions limits for cars and light trucks. The decision reverses the denial of a CAA waiver by the agency under the Bush administration. The state is now free to implement the standards, which it issued in 2004. These standards take effect beginning with model year 2009. In announcing the waiver, EPA Administrator Lisa Jackson said that manufacturers will not be held liable for failing to meet the standards for model year 2009. The state has agreed that for model years 2012 to 2016, cars may demonstrate compliance with the California standards by complying with forthcoming, more stringent federal fuel economy standards and accompanying GHG emissions standards for cars announced May 19, 2009 by the Obama administration.

SEC BRIEFING PAPER

SEC Paper "Possible Refinements to the Disclosure Regime" (SEC July 27, 2009): added to the "regulate private conduct" slide. The Securities and Exchange Commission issued a paper

that discusses the possibility of requiring a number of enhanced disclosures in securities filings, including environmental and climate change disclosure.

NEW COURT DECISIONS

Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Association of Governments (Cal. Super. Ct., Santa Barbara Co. June 30, 2009): added to the "state NEPAs" slide. In 2008, the Santa Barbara County Association of Governments approved an updated regional transportation plan, which included an Environmental Impact Review (EIR) under the California Environmental Quality Act (CEQA). Sustainable Transportation Advocates filed an action alleging that the EIR was inadequate because, among other things, it failed to discuss statewide energy use patterns within the traffic impacts analysis and the potential for "induced traffic" that would occur from freeway expansion. The court granted the petition and suspended approval of the plan until the Association provided sufficient detail in the EIR regarding information on consumption and use patterns within the county, as well as information on the energy impacts of the plan and the potential for "induced traffic" resulting from freeway expansion.

Southern Alliance for Clean Energy v. Duke Energy Carolinas, Inc. (W.D.N.C. July 2, 2009): added to the "coal fired power plant challenges" slide. A federal court ruled that North Carolina's administrative appeals process is the proper venue to review a challenge to Duke Energy's plans for expansion of a power plant. In January 2008, the North Carolina Department of Environment and Natural Resources issued a permit to Duke Energy for construction of a new coal-fired boiler. In July 2008, several environmental nonprofit groups filed a lawsuit against Duke in federal court, alleging that construction of the boiler without a determination whether it would meet the maximum achievable control technology (MACT) under the CAA was illegal. In May 2009, most of the same environmental groups filed a challenge to the permit with the North Carolina Office of Administrative Hearings. Duke Energy sought to dismiss the federal lawsuit. In granting the motion, the court held that the issues raised and relief sought in the two actions "are either identical or essentially the same" and that the administrative process was an adequate avenue for such a challenge.

Longleaf Energy Associates LLC v. Friends of the Chattahoochee (Ga. Ct. App., July 7, 2009): added to the "coal fired power plant challenges" slide. The Georgia Court of Appeals reversed a lower court ruling that had vacated a state permit for the construction of a 1,200-watt coal-fired power plant on the Chattahoochee River because it did not limit CO2 emissions. The Court held that the lower court erred by ruling in June 2008 that under the CAA, the Georgia Environmental Protection Division was required to include CO2 emissions limitations in its permitting process, finding that it would compel the state agency to limit these emissions even though no provision of the CAA or state law or regulation actually controls or limits them.

Ophir v. City of Boston (D. Mass July 23, 2009): added to the "challenges to state vehicle standards" slide. A federal judge in Boston issued a temporary injunction prohibiting the city from requiring taxicab companies to purchase new hybrid cars by 2015. A taxicab owners association filed suit alleging that the city's requirement that taxicab owners purchase 2008 or

2009 or later-model vehicles is prohibited under the preemption provisions of the CAA and the Energy Policy and Conservation Act. The plaintiffs argued that local regulation of air quality is preempted by federal law and that the CAA preempts not only regulations targeted at vehicle manufactures and sellers, but also regulations targeted at the purchase of vehicles.

WildEarth Guardians v. U.S. Forest Service (10th Cir. July 24, 2009): added to the "NEPA" slide. A nonprofit environmental group commenced a lawsuit challenging the approval of a plan by the U.S. Forest Service to allow a coal company to vent methane gas from a mine it owned in Colorado, alleging that the approval violated NEPA because the approval failed to analyze reasonable alternatives to methane venting, measures to mitigate the effects of venting, and the climate change impact of venting. The coal company sought to intervene in the case. The district court denied the motion. On appeal, the 10th Circuit reversed, holding that the company demonstrated that the outcome of the case could potentially impair its interests and that its interests were not adequately represented by the Forest Service in the action.

NEW ADMINISTRATIVE DECISION

Sunflower Electric Power Corp. (EPA Region 7, July 1, 2009): added to the "coal fired power plant challenges" slide. The Administrator for EPA Region 7 said in a letter that Sunflower Electric Power Corp. must submit its proposed expansion of a coal-fired power plant in western Kansas to a new air quality review rather than relying on a review conducted for an earlier version of the proposal. The company reached an agreement in May 2009 with Governor Mark Parkinson allowing it to build a new 895-megawatt coal-fired generator at his power plant in Holcomb, Kansas. That agreement appeared to end a two-year dispute over the company's earlier proposal to build two 700-megawatt generators. However, the Region 7 Administrator said in a letter to the Kansas Department of Health and Environment that a comprehensive analysis of the new project would be needed in light of design changes in the new proposal. The analysis would be needed to establish that emissions from the new plant would not violate the prevention of significant deterioration (PSD) requirements of the CAA. However, the review would not take into account emissions of CO2.

NEW COMPLAINTS AND PETITIONS

In re MGP Ingredients of Illinois, Inc. (EPA Env. App. Board July 20, 2009): added to the "coal fired power plant challenges" slide. Sierra Club filed a permit challenge with the EPA Environmental Appeals Board alleging that a permit that the Illinois EPA issued for a coal-fired ethanol plant is unlawful because it lacks a CO2 limit. The petition asks the Board to determine whether the Illinois EPA's failure to include a best available control technology (BACT) emission limit for CO2 is clearly erroneous as a matter of law.

The Wilderness Society v. Department of Interior (N.D. Cal., filed July 7, 2009): added to the "NEPA" slide. Fourteen environmental nonprofit groups sued the Department of Interior, alleging that it violated NEPA and other environmental laws in designating 6,000 miles of electricity transmission corridors on public lands in the West. The corridors were designated in

January 2009, just one week before former President Bush left office. The plan covers 3.2 million acres of federal lands in 11 western states and creates a network of right-of-ways known as the "West-Wide Energy Corridor." The plaintiffs allege that the plan ignores the renewable electricity standards that have been adopted by 9 of the 11 states, which call for the increased use of the region's wind, solar and geothermal resources. The lawsuit alleges that the plan failed to consider the environmental impacts or analyze alternatives.

Update #11 (July 1, 2009)

NEW CLIMATE CHANGE BILL (H.R. 2454)

American Clean Energy and Security Act of 2009 (Waxman-Markey bill) (passed by the U.S. House of Representatives on June 26, 2009): added to the first slide. The Congressional Record version and the Governmental Printing Office version of H.R. 2454 are both available on this slide.

NEW DECISIONS

Franklin County Power of Illinois LLC v. Sierra Club (U.S. Sup. Ct. June 29, 2009): added to the "coal-fired power plant challenges" slide. The U.S. Supreme Court denied a request to review a decision barring the construction of a coal-fired power plant in Southern Illinois whose permit under the Clean Air Act (CAA) had expired. This leaves intact Sierra Club v. Franklin Co. Power of Illinois, 546 F.3d 919 (7th Cir. 2008), which blocked construction of the plant because its Prevention of Significant Deterioration (PSD) permit had expired. In 2001, Illinois granted Franklin PSD permit to build a new power plant. However, the company failed to commence construction within the 18 month window required under the permit and then, after commencing construction, discontinued it for almost two years during a payment dispute. In May 2005, the Sierra Club filed a citizen suit under the CAA seeking an injunction to halt further construction due to the expired permit. The district court held that the PSD permit expired and that the company would have to obtain a new permit before continuing construction. The Seventh Circuit affirmed the district court's decision, holding that the company both failed to commence construction within the 18 month window and discontinued construction activities for more than 18 months.

Hempstead County Hunting Club, Inc. v. Arkansas Public Service Commission (Ark Ct. App., June 24, 2009): added to the "coal-fired power plant challenges" slide. An Arkansas appellate court struck down a state permit allowing an electric company to build a $1.6 billion coal-fired power plant near the state's southwest border with Texas. The court held that the state public service commission failed to require the company to address alternative locations in its permit application and that it failed to make a finding regarding the basis of the need for a new plant. In addition, the court held that the commission failed to resolve all matters concerning the plant and associated transmission lines in a single proceeding.

Metropolitan Taxicab Board of Trade v. City of New York (S.D.N.Y. June 22, 2009): added to the "challenges to state vehicle standards" slide. A federal court held that a package of financial incentives adopted by New York City to encourage taxicab owners to convert to an all-hybrid fleet constituted a mandate that is preempted by the Energy Policy and Conservation Act (EPCA). The court granted a motion by taxicab fleet owners and a trade association for a preliminary injunction blocking the incentive plan which had been designed as an alternative to city fuel efficiency rules for taxis struck down earlier by the court. Of the more than 13,000 taxicabs regulated by New York City, approximately 16% are hybrid or clean-diesel vehicles.

Sierra Club v. EPA (D.D.C. June 8, 2009): added to the "coal-fired power plant challenges" slide. The federal court reviewing a lawsuit filed by the Sierra Club against EPA over a permit for a coal-fired power plant entered an order June 8, 2009 rejecting a motion to dismiss and sending the lawsuit to federal district court in Kentucky for further proceedings. The court rejected an EPA motion to dismiss Sierra Club's lawsuit over a new generating unit in Maysville, Kentucky and ordered the lawsuit transferred to the U.S. District court for the Eastern District of Kentucky. In August 2006, the Sierra Club petitioned EPA to object to a Title V operating permit for the proposed new generating unit. In August 2007, EPA objected to the permit. Kentucky proposed a revised permit in March 2008. The Sierra Club sued EPA in September 2008, alleging that the agency had failed to perform a mandatory duty to rule on the proposed permit.

Communities for a Better Environment v. City of Richmond (Contra Costa Co. Sup. Ct. June 5, 2009): added to the "state NEPAs" slide. A state court in California held on June 5, 2009 that the City of Richmond's environmental impact report pursuant to the California Environmental Quality Act (CEQA) concerning a major expansion of an oil refinery in the City violated CEQA's greenhouse gas requirements. The court held that although the City identified a standard of no net increases in greenhouse gas emissions, it failed to identify any means of achieving that standard. In addition, the court held that the City improperly deferred its formulation of greenhouse gas mitigation measures until a future date. The court also found that the environmental impact report (EIR) failed to clearly state whether the expansion project will allow the refinery to process heavier crude oil than it is currently processing.

San Luis & Delta-Mendota Water Authority v. Salazar (E.D. Cal., May 29, 2009): added to the "other statutes" slide under the "Endangered Species Act" subsection. The court granted a preliminary injunction in favor of two California water districts to prevent until June 30 any federal river flow restrictions aimed at protecting the endangered Delta smelt. The two water districts are plaintiffs in the lawsuit that challenges a December 2008 biological opinion by the U.S. Fish and Wildlife Service (FWS) aimed at protecting the fish. The order, which found that plaintiffs are likely to succeed on their claim that the opinion violates the National Environmental Policy Act, enjoins FWS from implementing "unnecessarily restrictive" flow restrictions under its biological opinion "unless and until" it considers the harm its decisions "are likely to cause humans, the community, and the environment."

NEW PETITION

Petition for On-the-Record Endangerment Finding Regarding Greenhouse Gases (EPA, filed June 23, 2009): added to the "Clean Air Act" slide. On June 23, 2009, the U.S. Chamber of Commerce filed a petition with EPA pursuant to the Administrative Procedure Act for a formal "on the record" endangerment finding concerning greenhouse gases. On April 17, 2009, EPA issued a proposed finding that greenhouse gases pose a danger to the public health and welfare. EPA stated that it found that "greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations" and human activities contribute to global warming. EPA stated in its finding that "[t]hese high atmospheric levels are the unambiguous result of human emissions, and are very likely the cause of the observed increase in average temperatures and other climatic changes." The proposed finding's 60 day comment period closed on June 23, 2009.

WITHDRAWAL OF APPEAL

California v. General Motors Corp. (9th Cir. June 19, 2009): added to the "common law claims" slide. On June 19, 2009, the California Attorney General's Office voluntarily dropped its appeal to the Ninth Circuit to review the district court's dismissal of the state's public nuisance lawsuit against six major automobile companies. The lawsuit was filed in 2006 and alleged that the companies' cars were a substantial source of greenhouse gas emissions, which caused climate change, resulting in millions of dollars in damages to the state. In September 2007, the district court granted the companies' motions to dismiss, holding that the issues raised were "political questions" which were reserved for the President and Congress. The withdrawal contained a statement that recent policy changes by the Obama Administration indicated progress on certain related issues, specifically an increase in fuel economy standards and EPA's "endangerment finding" that greenhouse gases pose a threat to public health and welfare.

NEW COMPLAINTS

Association of Irritated Residents v. California Air Resources Board (S.F. Co. Superior Court, filed June 10, 2009): added to the "state NEPAs" slide. Environmental justice advocates filed a lawsuit challenging the plan of the California Air Resources Board (CARB) to implement the Global Warming Solutions Act of 2006 (also known as AB 32). The complaint alleges that the plan fails to minimize greenhouse gas emissions and protect vulnerable communities as required by the Act. Plaintiffs also allege that CARB violated CEQA in approving the plan. The complaint seeks an injunction preventing implementation of the plan until CARB brings it into compliance with AB 32 and CEQA.

Animal Welfare Institute v. Beech Ridge Energy LLC (D. Md., filed June 10, 2009): added to the "other statues" slide under the "Endangered Species Act" subsection. Opponents of a proposed wind farm in Greenbrier County, Maryland filed a lawsuit on June 10, 2009 in Maryland federal district court alleging that the proposed 124-windmill project will result in a "taking" of endangered Indiana bats in violation of the ESA. The complaint alleges that the proposed project is located seven miles from the Lobelia Saltpeter Cave Preserve, a destination for hibernating and mating Indiana bats and that construction of the windmills is likely to result

in deaths and injuries to the bats from turbine-bat collisions. The complaint seeks an injunction preventing construction of the windmills unless and until the project developers are granted permission to do so under the ESA.

Center for Biological Diversity v. Locke (N.D. Cal, filed May 28, 2009): added to the "Endangered Species Act" slide. The Center for Biological Diversity and other nonprofit environmental groups filed a complaint against the Secretary of Commerce and the National Marine Fisheries Service alleging violations of the Endangered Species Act and the Administrative Procedure Act based on allegations that the habitat of the leatherhead and loggerhead sea turtles is being destroyed by climate change. In particular, the plaintiffs allege that government defendants failed to make a timely determination on petitions that the groups had filed in 2007 to designate certain areas as "critical habitats" and the two species of sea turtles as endangered. In 2007, the government determined that the petition was warranted but failed to make a final determination within the statute's mandatory 12-month period.

Update #10 (May 30, 2009)

NEW DECISIONS

Center for Biological Diversity v. Town of Yucca Valley (Cal. Sup. Ct. San Bernardino Co. May 15, 2009): added to the "state NEPAs" slide. A California state court overturned a town's approval of a 185,000 square foot Wal-Mart Supercenter near Joshua Tree National Park, holding that an environmental impact review pursuant to the California Environmental Quality Act (CEQA) did not take into account the impacts of the project's projected greenhouse gas emissions. The court found that the review violated CEQA because it did not provide evidence that the proposed store complied with strategies to reduce climate change as required by state law. The court ordered the town to revise its environmental impact review to include an analysis of climate change impacts from the proposed store and ways to mitigate greenhouse gas emissions.

North Carolina Waste Awareness & Reduction Network v. North Carolina Dept. of Env. and Natural Resources (N.C. Office of Administrative Hearings May 13, 2009): added to the "coal-fired power plants" slide. An administrative law judge in the North Carolina Office of Administrative Hearings denied a power plant operator's motion to dismiss environmentalists' claims that state air regulators failed to consider carbon dioxide emissions in the air pollution permits issued to a proposed power plant in southwestern North Carolina in January 2009. The judge held that the petitioners had the right to demonstrate that carbon dioxide was a regulated pollutant under the New Source Review (NSR) provisions of the Clean Air Act.

Western Watersheds Project v. Salazar (D. Idaho, May 7, 2009): added to the "NEPA" slide. A federal district court in Idaho partially denied a motion to dismiss a lawsuit brought by an environmental group challenging 18 environmental impact statements prepared by the Bureau of Land Management (BLM) concerning resource management plans in six states for failing to

consider the cumulative effects of, among other things, climate change. The court held that, in 16 of the statements, the plaintiffs were challenging a final agency action and thus they were ripe for review. In two of the statements, records of decisions had not been issued, thus no final agency action existed. The court also denied the government's motion to transfer the challenges to other federal courts given that they governed land outside Idaho, holding that the action was properly filed in Idaho given that several of the statements concerned land located in Idaho and there was no evidence of forum shopping.

Arizona Public Service Co. v. EPA (10th Cir. April 14, 2009): added to the "coal-fired power plants" slide. The Tenth Circuit remanded to EPA part of a plan to reduce pollutants at a power plant in New Mexico, but it dismissed challenges from environmental groups and the plant's operator. At the request of EPA, which asked for an opportunity to clarify the requirements, the court remanded the part of the federal implementation plan that established control requirements for fugitive dust emissions at the Four Corners power plant on a Navajo reservation in northwestern New Mexico. The court also dismissed legal challenges from the Sierra Club and other environmental organizations and from the Arizona Power Service Co., operator of the power plant, which argued, respectively, that the federal plan was too weak and too restrictive.

NEW ENDANGERED SPECIES ACT RULING

American Pika (May 7, 2009): added to the "Endangered Species Act" slide: In May 2009, the U.S. Fish and Wildlife Service issued a notice in the Federal Register that higher temperatures linked to climate change may pose a sufficient threat to the American pika, a hamster-like animal that lives near mountain peaks in the western U.S., to warrant protection under the Endangered Species Act (ESA). The notice announces the launch of a 12-month status review of the species. EarthJustice and the Center for Biological Diversity sued the Bush Administration after it failed to act on a petition filed in 2007 seeking protection under the ESA for the species (*Center for Biological Diversity v. Kempthorne* (E.D. Cal.)).

NEW VOLUNTARY REMAND

In re Desert Rock Energy Co. LLC (EPA Env. App. Bd., filed April 27, 2009): added to the "coal fired power plants" slide. In April 2009, EPA Region 9 filed a motion with the EPA Environmental Appeals Board seeking a "voluntary remand" of a construction permit that it issued in July 2008 under the Clean Air Act's Prevention of Significant Deterioration (PSD) program. The permit was issued to Desert Rock Energy Company, LLC to construct a new 1,500 megawatt coal-fired power plant in New Mexico. Region 9 issued a final permit in July 2008. Various environmental groups and the State of New Mexico appealed the permit and the Board granted review in January 2009. In its motion, EPA Region 9 states that it wants time to reconsider its permitting decision on a number of issues. In January 2009, prior to a change in federal administrations, Region 9 filed a brief with the Board arguing that it had adequately addressed these issues. Although EPA's administrative rules permit a Region to withdraw all or part of a PSD permit prior to the time that the Board either grants or denies review, they say

nothing about withdrawing or remanding the permit for further consideration after the Board grants review.

NEW COMPLAINTS

Center for Biological Diversity v. EPA (D. Washington, filed May 14, 2009): added to the "other statutes" slide under the "Clean Water Act" subsection. The Center for Biological Diversity filed suit against the EPA in federal court in Washington state, alleging that the agency failed to recognize the impacts of ocean acidification on waters off the state's coast. The suit was brought under the Clean Water Act, which requires states to identify water bodies that fail to meet water-quality standards. According to the Center, since 2000, the pH of Washington's coastal waters has declined by more than .2 units, which violates the state's water-quality standard for pH. The complaint states that carbon dioxide, which is absorbed by seawater, causes seawater to become more acidic, lowering its pH. This impairs the ability of certain marine animals to build protective shells and skeletons they need to survive.

California Business Properties Association v. California Air Resources Board (Cal. Sup. Ct. Sacramento Co., filed May 7, 2009): added to the "Challenges to State Enactments" slide. A coalition of business and taxpayers filed suit in state court alleging that California has violated the state's public records act by failing to turn over certain documents relating to a pending greenhouse gas emissions fee. The plaintiffs claim that the documents are necessary for substantiating the basis for the amount of fees and the nexus between the fees, fee payers and the regulatory activity to be funded. The groups first requested the documents in February 2009 and allege that CARB has failed after repeated requests to provide all relevant documents related to the development of the GHG "administrative fee" which is scheduled to be adopted this summer. The fee aims to collect about $56 million from a variety of major GHG-emitting sources in the state to pay for the first two years of implementing AB 32, the state's 2006 climate change bill, and a projected $39 million per year after that.

WildEarth Guardians v. U.S. Forest Service (D. Colo., filed Oct. 7, 2008): added to the "NEPA" slide. Environmental groups sued the U.S. Forest Service, alleging that in an environmental impact statement concerning a coal mine, it failed to identify a reasonable range of alternatives to methane venting, as well as failing to identify measures that would mitigate the effects of the release of the methane and failing to analyze the climate change impacts of methane venting.

Update #9 (April 25, 2009)

NEW DECISIONS

Center for Biological Diversity v. U.S. Department of Interior (D.C. Cir. April 17, 2009): Added to the "NEPA" slide. The District of Columbia Circuit Court of Appeals held that the

U.S. Supreme Court's decision in *Massachusetts v. EPA* does not grant standing to citizens to sue on the merits of their climate claims. CBD challenged a leasing plan for oil and gas development on the Outer Continental Shelf in the Beaufort, Bering and Chukchi Seas off the coast of Alaska, alleging that the Department of Interior failed to consider the climate change impacts of the plan under NEPA. The court held that CBD's NEPA claims were unripe and did not rule on the substantive standing issue. However, it included a lengthy discussion on standing in the ruling, stating that CBD only had standing to bring procedural rather than substantive climate claims. The court found that CBD failed to show that the harm from climate change caused by leasing was actual or imminent and failed to show that the generalized harm of climate change would hurt its members more than the rest of the population. In addition, the court found that CBD failed to show how the leasing would be a proximate cause of climate change.

Appalachian Voices v. Virginia State Corporation Commission (Va. Sup. Ct. April 17, 2009): added to the "coal-fired power plant challenges" slide. The Virginia Supreme Court rejected a challenge to the constitutionality of the state utility law, upholding state approval for construction of a coal-fired power plant in the southwest portion of the state. The lawsuit alleged that the requirements of Title 56 of the Virginia Code that power plants "utilize Virginia" coal violated the dormant Commerce Clause because it discriminated against out-of-state coal. The Supreme Court disagreed, holding that the Code did not violate the Commerce Clause because it did not require the plant to only use Virginia coal.

Alaska Department of Fish and Game : added to the "Endangered Species Act" slide. On April 7, 2009, the Alaska Department of Fish and Game rejected a petition from the Center for Biological Diversity (CBD) to grant the Kittlitz's murrelet, a small seabird that forages in waters near tidewater glaciers, protection under the state's Endangered Species Act. The Department determined that, although the bird's population has sharply decreased in certain habitat areas, this did not warrant protection under the formal terms in the state law. In its petition, CBD argued that the bird's habitat was threatened because of climate change as well as oil spills and other disturbances.

OLD DECISIONS

Hapner v. Tidwell (D. Montana, Oct. 30, 2008): added to the "NEPA" slide. Environmental groups filed a lawsuit challenging a U.S. Forest Service decision to remove timber for fire protection purposes on the ground that the Environmental Assessment prepared by the agency did not look at the effects of climate change would have on the decision. The court disagreed, finding that no such analysis was required because the action would not have a direct effect on climate change.

NEW COMPLAINTS

Center for Biological Diversity v. National Highway Traffic Safety Administration (9th Cir., filed April 2, 2009): added to the "challenges to vehicle standards" slide. CBD sued the Department of Transportation over fuel economy standards, alleging that they were not the maximum feasible required by law. On March 27, 2009, the Obama Administration announced

that it was raising fuel economy standards for passenger cars and light trucks to a combined average of 27.3 miles per gallon for the 2011 model year, a 2 mpg increase over the 2010 model year. The Bush administration had proposed a combined average standard of 27.8 mpg in model year 2011. According to CBD, European and Japanese fuel economy standards are 43.3 mpg and 42.6 mpg, respectively.

Environmental Defense Fund v. South Carolina Board of Health and Env. Control (S. Car. Adm. Law Court, filed April 9, 2009): added to the "coal-fired power plant challenges" slide. Environmental Defense Fund and other environmental groups sued South Carolina regulators seeking to block an air pollution permit for a proposed coal-fired power plant along the Great Pee Dee River. The lawsuit alleges that the state agency violated the Clean Air Act by granting a permit that will emit more than 10 million tons of carbon dioxide and that the agency did not require the maximum mercury controls required by law.

NEW NOTICE OF INTENT TO SUE

***Ribbon Seal*:** added to the "Endangered Species Act" slide. On March 31, 2009, CBD and Greenpeace sent a 60-day notice to the National Oceanic and Atmospheric Administration (NOAA), signaling their intent to sue NOAA over its failure to grant Endangered Species Act protections to the ribbon seal. CBD originally petitioned for the ribbon seal to be listed on December 20, 2007. On March 31, 2008, when the statutory deadline for listing passed, CBD issued a Notice of Intent to Sue. Five days later, NOAA announced that the petition warranted a population status review. However, on December 23, 2008, NOAA issued a decision declining to list the species as endangered.

GREENHOUSE GAS ENDANGERMENT FINDING

Proposed EPA endangerment finding regarding greenhouse gases: added to the Clean Air Act slide. On April 17, 2009, the Environmental Protection Agency issued a proposed finding that greenhouse gases pose a danger to the public health and welfare. EPA stated that it found that "greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations" and human activities contribute to global warming. EPA stated in its finding that "[t]hese high atmospheric levels are the unambiguous result of human emissions, and are very likely the cause of the observed increase in average temperatures and other climatic changes." EPA is holding a 60-day comment period on the proposed finding.

Update #8 (March 25, 2009)

NEW DECISIONS

In re Northern Michigan University Ripley Heating Plant (EPA Env. Appeals Board, Feb. 18, 2009): added to the "coal-fired power plant challenges" slide. The Michigan Department of Environmental Quality (MDEQ) issued federal air permits to Northern Michigan University, authorizing construction of a new boiler to burn coal, wood and natural gas. The Sierra Club challenged the permits, arguing that MDEQ had failed to conduct proper reviews for carbon dioxide and nitrous oxide from the boiler. Citing its recent decision in *in re Deseret Power Electric Cooperative* in which it found that EPA has discretion to regulate carbon dioxide from coal-fired power plants, the Board issued a decision ordering MDEQ to reconsider the permits to take into account carbon dioxide and nitrous oxide.

Laidlaw Energy v. Town of Ellicottville (N.Y. App. Div. Feb. 6, 2009): added to the "state NEPAs" slide. A company that sought to convert a cogeneration facility from natural gas to biomass commenced an action after the Town planning board denied site plan approval for the facility. The board based its denial largely on the company's claim that the biomass plant would be carbon neutral. The board found that biomass plants can only be carbon neutral if the plan provides for sustainable fuel source management. However, the company stated that it would not be operating a companion wood growth management plan. In addition, the board found that the company failed to consider the impacts of transporting the fuel source over the 100 mile harvest area. The board found these impacts to be unacceptable. On appeal, the court found that under New York's State Environmental Quality Review Act (SEQRA), the board had taken the requisite "hard look" at the evidence and made a reasonable elaboration for its determination.

North Carolina v. Tennessee Valley Authority (W.D.N.C., Jan. 13, 2009): added to the "coal-fired power plant challenges" slide. North Carolina filed a public nuisance action against the Tennessee Valley Authority over air pollution caused by eleven of TVA's coal-fired power plants in other states. The state sought an injunction and attorneys' fees. After the court denied motions for summary judgment filed by both parties, a 12 day trial was held in July 2008. The court subsequently issued a decision finding that the state had demonstrated that four of TVA's plants (one in Alabama and three in Tennessee) constituted a public nuisance. However, it held that the state had not demonstrated that the plants located in other states constituted a public nuisance because they were not located in close proximity to North Carolina. Accordingly, the court issued an injunction requiring TVA to promptly install or retrofit "scrubbers" at the four plants to decrease emissions of certain air pollutants.

NEW COMPLAINTS

San Luis Water Authority v. Salazar (E.D. Cal., filed March 2, 2009): added to the "Other Statutes" slide in the "ESA/MMPA" column. Two water districts in California's Central Valley filed suit challenging a U.S. Fish and Wildlife Service (FWS) biological opinion that was issued in December 2008 with respect to the delta smelt, an endangered fish. The lawsuit alleges that the biological opinion, which imposes restrictions on the pumping of Sacramento-San Joaquin River Delta water through the Central Valley, will put farmers out of business and do little to protect the delta smelt. Specifically, the lawsuit alleges that the FWS failed to consider the best available scientific data and was selective in its use of the data, as well as failing to assess the

effects of the proposed restrictions as required under the Endangered Species Act. The pumping restrictions would cut water deliveries already reduced as a result of three years of dry weather.

Sierra Club v. Two Elks Generation Partners (D. Wyoming, filed Jan. 29, 2009): added to the "NEPA" slide. The Sierra Club filed suit against a proposed tar sands oil project, alleging that it will harm human health by, among other things, increasing greenhouse gas emissions. Specifically, the complaint alleges that the Department of the Interior (DOI) and other defendants violated the National Environmental Policy Act (NEPA) and the Administrative Policy Act by failing to prepare an Environmental Impact Statement (EIS) and failing to allow for public participation in DOI's decision. The complaint further alleges that the project anticipates the construction of 288 closely-spaced new oil wells. According to the Sierra Club, greenhouse gas emissions from tar sands production are three times those of conventional oil and gas production.

NRDC v. Army Corps of Engineers (S.D.N.Y., filed Jan. 14, 2009): added to the "Other Statutes" slide in the "Clean Water Act" column. NRDC and the Sierra Club filed suit against the Army Corps of Engineers alleging that the agencies failed to evaluate the climate change impacts of a proposed Ohio coal-to-liquids fuel plant when it issued a Clean Water Act (CWA) Section 404 permit for grading and filling in wetlands. The lawsuit alleges that the plant would account for more than 26 million tons of carbon dioxide annually and that this is contrary to CWA's requirement that permits be issued for projects "in the public interest." The complaint seeks to revoke the permit and to require environmental reviews under the CWA and NEPA.

NEW PETITION

Kittlitz's Murrelet: added to the "Endangered Species Act" slide: On March 5, 2009, the Center for Biological Diversity petitioned the Alaska Department of Fish and Game to grant protection under the state's endangered species law for the Kittlitz's murrelet, a seabird that dwells in habitat near tidewater glaciers and glacier outflows. According to the petition, the population of the bird has fallen 80-90 percent in the past two decades as a result of accelerated glacial retreat and reduced ice cover linked to climate change.

Update #7 (February 17, 2009)

NEW DECISIONS

In re Desert Rock Energy Co. (EPA Env. Appeals Bd, Jan. 22, 2009): added to the "coal-fired power plant challenges" slide. The EPA Environmental Appeals Board issued an order agreeing to review the approval of a permit for a coal-fired power plant on Navajo tribal land in northwest New Mexico. In addition, the Board severed the issue of CO2 emissions from the proposed power plant and will address that matter separately. New Mexico and the other nongovernmental petitioners had until February 13, 2009 to file additional responses. EPA

issued a permit for the plant in July 2008 and New Mexico asked for a review of the permit in October 2008. In November 2008, the Board remanded the permit to EPA for elaboration on CO2 emissions. In December 2008, then-EPA Administrator Stephen Johnson issued a memorandum in response reaffirming that the agency cannot regulate CO2 emissions under the Clean Air Act.

Blue Skies Alliance v. Texas Commission on Environmental Quality (Tex. App. Ct. Jan. 29, 2009): added to the "coal-fired power plant challenges" slide. A Texas state appellate court upheld the Texas Commission on Environmental Quality's approval of a permit to operate a coal-fired power plant. The court held that the plant would have no significant impact on compliance with federal air quality standards in the Dallas-Fort Worth area to the north. It also held that "best available control technology" must be a technology that can be installed at the plant, and that Clean Air Act technology requirements cannot require a redesign of a plant. The court rejected an argument from plaintiffs that the Commission should have required the integrated gasification combined cycle coal conversion process, holding that they offered no evidence showing that this process could be used by the plant developer.

NEW COMPLAINTS

Center for Biological Diversity v. Department of Interior (D.D.C. Jan. 15, 2009): added to the "Endangered Species Act" slide. The Center for Biological Diversity (CBD) filed suit against six federal agencies alleging that they failed to protect endangered species from climate change. The lawsuit alleges that the federal agencies failed to respond to a petition filed by CBD in 2007 seeking a federal conservation plan for species that were threatened by climate change. The petition asked the agencies for, among other things, a review of all threatened, endangered, and candidate species to determine which are threatened by climate change; a review of all federal recovery plans to ensure endangered species are able to adapt to a warming environment; a requirement for all federal agencies to implement endangered species recovery plans; and a review of the climate change contribution of all federal projects and mitigation of impacts on imperiled species.

Bravos v. Bureau of Land Management (D. N.M. Jan. 21, 2009): added to the "NEPA" slide. Plaintiffs, represented by the Western Environmental Law Center, filed suit in New Mexico federal court alleging that a 2008 grant by the Bureau of Land Management (BLM) of 92 oil and gas leases in New Mexico violated federal law by failing to address GHG emissions. The complaint also alleges that BLM failed to adopt policies designed to make drilling more efficient. Plaintiffs allege that BLM's grants of the leases were improper under the Federal Land Policy and Management Act, the Mineral Leasing Act, the National Environmental Policy Act (NEPA), and a 2001 order by the Department of the Interior. Plaintiffs base their standing to sue on the alleged impairment of their use and enjoyment of lands affected by the leases.

Center for Biological Diversity v. California Pub. Utilities Comm. (Cal. Sup. Ct., filed Jan. 21, 2009): added to the "state NEPAs" slide. CBD petitioned the California Supreme Court challenging the California Public Utility Commission's approval of a transmission corridor for moving power from Imperial County to San Diego. The Commission approved the transmission

project on December 18, 2008. The complaint primarily alleges violations of the California Environmental Quality Act (CEQA). Specifically, CBD alleges that the environmental impact statement filed by San Diego Gas & Electric Company fails to articulate how specific renewable energy thresholds might mitigate GHG emissions and therefore violates CEQA.

Sierra Club v. Two Elks Generation Partners (D. Wyoming, filed Jan. 29, 2009): added to the "coal-fired power plant challenges" slide. The Sierra Club filed suit against a company seeking to build a coal-fired power plant, alleging that permit that was issued in 1998 was no longer valid and that stricter emission controls should be put into place. According to the complaint, the permit required that the project not idle for 24 consecutive months.

Indeck Corinth v. Paterson (Saratoga Co. Sup. Ct., filed Jan. 29, 2009): added to the "challenges to state enactments" slide. Plaintiff, a 128-megawatt natural gas-fired cogeneration plant, sued New York to overturn the state regulations that implement the Regional Greenhouse Gas Initiative (RGGI). In its complaint, the company claims that the regulations are unconstitutional and were implemented without the necessary statutory authority from the state legislature. In addition, the lawsuit alleges that RGGI should be declared void because it was never approved by Congress and is therefore in violation of the Commerce Clause of the U.S. Constitution. The company's main claim is that, under the RGGI regulations, it is unable to pass through the costs for purchasing CO2 allowances because it is obligated to a long-term fixed-price contract for electricity with Consolidated Edison.

NEW SETTLEMENT

Friends of the Earth v. Spinelli (formerly *Friends of the Earth v. Mosbacher*) (N.D. Cal., settled Feb. 6, 2009): added to the "NEPA" slide. The Overseas Private Investment Corp. (OPIC) and the U.S. Export-Import Bank (Ex-Im Bank) settled a lawsuit filed by several city governments and environmental groups, agreeing to consider GHG emissions that would result from the projects they finance. The lawsuit was filed by Friends of the Earth and several other plaintiffs in 2002 and alleged that OPIC and Ex-Im Bank, both independent government entities, provide monetary assistance to projects without assessing the CO2 emissions of these projects as mandated by NEPA and the Administrative Procedure Act. In 2005, the district court held that the plaintiffs had the right to sue the two agencies to force compliance. Under the terms of the settlement, the Ex-Im Bank, which provides financing for exports from the U.S., and OPIC, which offers insurance and loan guarantees for projects in developing countries, will revise their policies regarding the environment in consultation with representatives of the plaintiffs. Additionally, the bank will be required, whenever possible, to post environmental documents online for public comment and will, in conjunction with representatives of the plaintiffs, "develop and implement a carbon policy." Further, the settlement requires the bank to assume a "leadership role" by taking actions such as encouraging transparency with regard to GHG emissions and "proposing common greenhouse gas mitigation standards for financed projects." The settlement with OPIC requires that any project that emits more than 100,000 tons of CO2 equivalent a year be subject to an environmental impact assessment that takes into account GHG emissions. In addition, the settlement requires OPIC to report the emissions from such projects

to the public on a yearly basis and to reduce the number of projects by 20% over the next 10 years.

NEW PRESIDENTIAL MEMORANDA

Presidential memorandum to EPA regarding denial of EPA waiver (Jan. 26, 2009): added to the "Clean Air Act" slide. On January 26, 2009, President Obama issued a memorandum directing the EPA Administrator to assess whether the agency properly denied a waiver of federal preemption for California's motor standards concerning GHG emissions. The Memo directs the EPA Administrator to "assess whether the EPA's decision to deny a waiver based on California's application was appropriate in light of the Clean Air Act" and, "based on that assessment," to "initiate any appropriate action."

Presidential memoranda regarding the Energy Independence and Security Act (Jan. 26, 2009): added to the "challenges to state vehicle standards" slide. On January 26, 2009, President Obama issued a memorandum concerning the Energy Independence and Security Act (EISA), which mandates that the Secretary of Transportation prescribe annual fuel economy increases for automobiles, beginning with model year 2011, resulting in a combined fuel economy fleet average of at least 35 mpg by model year 2020. Federal law requires that these standards be adopted at least 18 months before the beginning of the model year. Thus, the National Highway Traffic Safety Administration (NHTSA) is required to publish the final rules in the Federal Register no later than March 30, 2009. The Memo directs the NHTSA Administrator to publish a final rule by this date, and, before publishing such a rule, to consider the appropriate legal factors under EISA as well as relevant technical and scientific considerations.

Update #6 (January 21, 2009)

NEW DECISION

California v. EPA (N.D. Cal. Nov. 22, 2008): added to the "Clean Air Act" slide. California filed a lawsuit seeking documents under the Freedom of Information Act (FOIA) concerning statements made by officials at the National Highway Transportation Safety Administration (NHTSA) that the state's regulation of CO2 is preempted by federal law. Specifically, the state sought documents concerning NHTSA's discussion of California's regulations and preemption with certain officials as well as certain meetings and phone conversations where these topics were discussed. NHTSA contended that many of these documents were exempt from disclosure under the deliberative process privilege. Both sides moved for summary judgment. The magistrate judge assigned to the case issued a ruling recommending that some of the documents in dispute were not covered by the privilege and thus should be disclosed.

NEW EPA INTERPRETATION

Carbon dioxide and Clean Air Act's PSD Program (EPA, issued Dec. 18, 2008): added to the "coal-fired power plant challenges" slide. On December 18, 2008, EPA Administrator Stephen Johnson issued a memorandum interpreting EPA regulations as not requiring the agency to consider the potential for major sources of air pollution to emit CO2 when issuing permits under the Clean Air Act's prevention of significant deterioration (PSD) program. The memo was written in response to a November 2008 EPA Environmental Appeals Board ruling in *In re Deseret Power Electric Cooperative* that EPA had not adequately justified its position that CO2 controls are not required in the PSD program. According to the memo, CO2 is not currently subjected to emissions controls and therefore is not a regulated permit under the PSD program. The memo rejected the Sierra Club's contention that CO2 is subject to PSD regulations because it is subject to monitoring and reporting requirements that are enforceable under the CAA. In response, Sierra Club filed a lawsuit challenging this interpretation (see below).

NEW COMPLAINTS

Ash Grove Texas, LP v. City of Dallas (N.D. Texas, filed Nov. 26, 2008): added to the "challenges to state enactments" slide. A cement manufacturer filed a lawsuit against several Texas municipalities that passed "green cement" resolutions, which favor cement companies that use dry process kilns, which emit less pollution than old-style, wet process kilns. Plaintiff Ash Grove has only wet process kilns. The resolutions have been adopted by Dallas, Plano, Arlington and Fort Worth. The company alleges in its complaint that these resolutions violate Texas law regarding competitive bidding and public contracts, and that they also violate the company's constitutional rights.

American Nurses Association v. EPA (D.C. Cir., filed Dec. 18, 2008): added to the "coal-fired power plant challenges" slide. A coalition of environmental groups filed a lawsuit against EPA seeking to force the agency to comply with a six-year-old mandate to reduce toxic chemical emissions from coal-fired power plants. The suit seeks a court order requiring EPA to set limits for mercury and other hazardous air pollutants. EPA was required under Section 112(d) of the CAA to issue final national emissions standards for hazardous air pollutants emitted by new and existing coal- and oil-fired electric utility steam generating units by December 2002 under its maximum achievable control technology (MACT) program. In March 2005, the EPA issued a rule removing these plants from the list of industries for which MACT standards were required. However, this rule was vacated in March 2008.

Sierra Club v. EPA (D.C. Cir., filed Jan. 15, 2009): added to the "coal-fired power plant challenges" slide. On January 15, 2009, Sierra Club and other environmental groups filed a lawsuit in the District of Columbia Circuit Court of Appeals challenging a memo issued by EPA Administrator Stephen Johnson stating that power plants and other major industrial sources do not need to limit CO2 emissions.

Update #5 (December 11, 2008)

NEW DECISIONS

In re Wisconsin Power and Light (Wisconsin Public Service Comm. Nov. 11, 2008): added to the "coal-fired power plant challenges" slide. The Wisconsin PSC rejected Wisconsin Power and Light's proposal to build a new 300 MW coal-fired plant based on concerns of increasing construction costs and the uncertainty of future climate regulations. The plant was slated to generate 20% of its electricity by burning wood waste, switchgrass and cornstalks, yet this was not seen as enough to offset the plant's GHG emissions.

In re Deseret Power Electric Cooperative (EPA Env. Appeals Board Nov. 13, 2008): added to the "coal-fired power plant challenges" slide. The EPA Env. Appeals Board held that the EPA must reconsider its refusal to impose limits on CO2 emissions when it granted a permit for a new coal-fired unit at an existing Utah power plant. The issue before the Board was whether Clean Air Act best available control technology (BACT) regulations can be used to force power plants to control CO2 emissions. The Board did not directly answer this question, holding that EPA must reconsider whether to require Deseret to address the potential CO2 emissions from the new power unit "and develop an adequate record for its decision."

Center for Biological Diversity v. Kempthorne (N.D. Cal. Nov. 18, 2008): added to the "Center for Biological Diversity petitions" slide. In a case first challenging the Department of the Interior's failure to list the polar bear as a threatened or endangered species and then challenging DOI's "threatened" determination, several industry groups moved to intervene in the case. The plaintiffs did not challenge the motions, but requested that the intervenors' involvement in the case be subject to certain limitations. The court held that the groups could intervene with respect to the plaintiffs' ESA claims challenging DOI's decision to classify the polar bear as a threatened species, but not with respect to plaintiffs' claim that DOI did not comply with NEPA or the Administrative Procedure Act in doing so.

Palm Beach Co. Env. Coalition v. Florida (S.D. Florida Nov. 18, 2008): added to the "coal-fired power plant challenges" slide. An environmental coalition brought an action against state and county officials which sought a temporary injunction against the construction of a coal-fired power plant on the grounds that the plant would emit over 12.5 million tons of GHGs and would "greatly exacerbate global warming." The district court denied the motion, holding that the defendants had not been served with process, nor did the plaintiffs provide the federal defendants with the required 60 day notice of intent to sue. The court stated that even if the jurisdictional defects did not exist, it would still have denied the motion because plaintiffs did not show a substantial likelihood of success on the merits.

In re Kentucky Mountain Power (Ken. Energy and Env. Cabinet Nov. 24, 2008): added to the "coal-fired power plant challenges" slide. The Kentucky Energy and Environmental Cabinet denied Kentucky Mountain Power's application to build a 600 MW coal-fired power plant on the grounds that its prevention of significant deterioration (PSD) permit had expired and that the company failed to respond to the state's notice of deficiencies in its application to renew its

Clean Air Act Title V operating permit. The company had applied to have its PSD and operating permits renewed, but the application was rejected by the Cabinet on the grounds that construction of the plant had not begun. The Cabinet held that if the company wished to build the plant, it would have to apply for a new permit that included an updated BACT analysis.

Lincoln-Dodge, Inc. v. Sullivan (D. R.I. Nov. 25, 2008): added to the "challenges to state vehicle standards" slide. Automobile manufacturers and associations, as well as a number of automobile dealers, commenced an action seeking a declaration that Rhode Island's GHG emission standards for new vehicles, based upon California's regulations, are preempted by the Clean Air Act and the Energy Policy and Conservation Act (EPCA). The defendants moved to dismiss on collateral estoppel grounds based on previous decisions in California and Vermont, both of which rejected identical CAA and EPCA preemption claims. The court granted the motion in part, holding that collateral estoppel applied to the manufacturers and associations given that they were parties to the Vermont and California cases. However, the court denied the motion with respect to the dealers given that they were not parties to these cases.

Southern Alliance for Clean Energy v. Duke Energy Carolinas, Inc. (W.D.N.C. Dec. 2, 2008): added to the "coal-fired power plant challenges" slide. Duke Energy sought to add 800 MW of new coal-fired generation at one of its existing facilities. After North Carolina issued a permit for the project, environmental groups filed a lawsuit alleging that construction of the new unit without a maximum achievable control technology (MACT) determination was illegal under the Clean Air Act. The company moved to dismiss on jurisdiction and standing grounds. The court denied the motion, holding that the environmental groups had standing and that the venue was proper. The court further held that the company must initiate and participate in a full MACT public process within 10 days.

OLD DECISION

In re Energy Northwest (Washington Ene. Facility Site Evaluation Council Nov. 27, 2007): added to the "coal-fired power plant challenges" slide. Washington Energy Facility Site Evaluation Council (EFSEC) stayed a permit application for a new coal-fired power plant. EFSEC held that the company failed to include an adequate plan for carbon sequestration as required under state law. Energy Northwest had argued that such a plan was technically impracticable and that it would submit a plan for carbon sequestration once the technology was sufficiently developed. EFSEC rejected this argument and stayed the permit proceeding.

NEW COMPLAINTS

Sunflower Electric Power Corp. v. Sebelius (D. Kansas, filed Nov. 17, 2008): added to the "coal-fired power plant challenges" slide. A company that is seeking to construct two 700 MW coal-fired power plants filed a lawsuit against state officials alleging that its 14th amendment rights to fair and equal treatment under the law were violated and that the officials illegally restricted interstate commerce. In 2007, a state agency denied the company air quality permits

for construction of the plants and subsequent bills introduced in the state legislature allowing construction of the plants were vetoed by Governor Kathleen Sebelius.

Center for Biological Diversity v. FWS (D. Alaska, filed Dec. 3, 2008): added to the "Center for Biological Diversity petitions" slide. The Center sued the FWS for failing to issue a decision regarding its petition to list the Pacific walrus as a threatened or endangered species under the Endangered Species Act because of climate change. The Center filed its petition in February 2008.

NOTICES OF INTENT TO SUE

Ocean Acidification: added to the "Center for Biological Diversity petitions" slide. On November 14, 2008, the Center for Biological Diversity served EPA with a 60-day notice letter that it would file a lawsuit if the agency does not take steps to address ocean acidification. According to the Center, EPA has an obligation under the Clean Air Act to update the current acidity standards, set in 1976, to reflect the most recent scientific consensus. Oceans naturally absorb CO2, and too much absorption could cause them to become overly acidic. According to the Center, oceans absorb approximately 22 million tons of CO2 daily.

Coral Habitat: added to the "Center for Biological Diversity petitions" slide. On November 26, 2008, the Center served EPA with a 60-day notice letter that it would file a lawsuit regarding the agency's decision to exclude climate change and ocean acidification threats in its new rule regarding habitat for elkhorn and staghorn corals. EPA adopted a rule in November designating approximately 3,000 square miles of reef off the coasts of Florida, Puerto Rico, and the U.S. Virgin Islands as critical habitat under the Endangered Species Act. The Center contends that the rule violates the ESA by disregarding two primary threats to coral habitat—elevated seawater temperatures and ocean acidification.

Update #4 (November 8, 2008)

NEW DECISIONS

Sierra Club v. Franklin Co. Power of Illinois, LLC (7th Cir. Oct. 27, 2008): added to the "coal-fired power plant challenges" slide. The State of Illinois granted Franklin Co. Power a Prevention of Significant Deterioration (PSD) permit in 2001 to build a new power plant. However, the company failed to commence construction within the 18 month window required under the permit and then, after commencing construction, discontinued it for almost two years during a payment dispute. In May 2005, the Sierra Club filed a citizen suit under the CAA seeking an injunction to halt further construction due to the expired permit. The district court held that the PSD permit expired and that the company would have to obtain a new permit before continuing construction. The Seventh Circuit affirmed the district court's decision, holding that

the company both failed to commence construction within the 18 month window and discontinued construction activities for more than 18 months.

Sevier Power Co. LLC v. Board of Sevier Co. Commissioners (Utah Supreme Ct., Oct. 17, 2008): added to the "coal-fired power plant challenges" slide. Individuals who were opposed to the construction of a coal-fired power plant in their county attempted to modify a county zoning ordinance regarding such facilities to require voter approval. The initiative was approved by the Board of County Commissioners for placement on the ballot for the November 2008 general election. Sevier Power brought an action in state court, alleging that this amounted to a land use ordinance which could not be changed by voter initiative pursuant to the Election Code. On appeal, the Utah Supreme Court reversed, holding that that portion of the Election Code that limited citizen initiatives was unconstitutional given that the Utah Constitution allowed citizens the right to initiate "any desired legislation" to voters for approval or rejection unless otherwise forbidden by the Utah Constitution.
[Editor's note: On November 4, the voters of Sevier County approved the initiative by a vote of 4,567 to 3,239.]

Citizen Action Coalition of Indiana v. PSI Energy (Indiana Ct. App., Oct. 16, 2008): added to the "coal-fired power plant challenges" slide. In 2007, the Indiana Utility Regulatory Commission approved the construction of a 630 MW power plant in southwest Indiana. Several environmental groups appealed the Commission's approval, alleging that it erred by failing to reopen proceedings to admit new evidence, failing to consider the potential future costs and that state laws favoring the use of Indiana coal violated the Commerce Clause. The Indiana Court of Appeals upheld approval of the project, finding that the evidence of increased construction costs did not require that the proceedings be reopened, that the Commission had anticipated the potential costs that might be imposed by federal greenhouse gas regulations and that the use of Indiana coal did not violate the Commerce Clause.

OLD DECISION

CleanCOALition v. TXU Power (5th Cir., July 21, 2008): added to the "coal-fired power plant challenges" slide. Environmental groups brought a citizen suit against several utility entities to enjoin their construction of a pulverized coal-fired power plant in their community, based on various violations of the preconstruction permit process of the Clean Air Act. The district court dismissed the suit for lack of subject matter jurisdiction, holding that held that Sections 7604(a)(1) and (a)(3) did not authorize citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations. The Fifth Circuit upheld the district court's decision. The environmental groups filed a petition for a writ of certiorari with the U.S. Supreme Court on October 20, 2008.

NEW SETTLEMENT

Dynegy Inc. and the New York Attorney General's Office (entered into on Oct. 23, 2008): added to the "regulate private conduct" slide. Dynegy, an energy company, became the second

company to agree to a disclosure regimen intended to provide investors with information concerning the financial risks posed by climate change. In September 2007, New York Attorney General Andrew Cuomo issued subpoenas to Dynegy and four other energy companies seeking detailed disclosures on carbon dioxide emissions expected from several planned coal-fired power plants. The first company to adopt a disclosure regimen was Xcel Energy in August 2008. The agreement calls for Dynegy to provide disclosure of material risks associated with climate change in its Form 10-K filings with the SEC. The required disclosures include an analysis of material financial risks related to present and probable future climate change regulation and legislation, climate change-related litigation, and physical impacts of climate change. The company also committed to a broad array of climate change disclosures.

NEW COMPLAINT

Center for Biological Diversity v. San Joaquin Valley Air Pollution Control District (Fresno Co. Sup. Ct., filed Oct. 16, 2008): added to the "state NEPAs" slide. The complaint challenges the September 2008 decision of the District to approve a 3,200 cow dairy project and certify the Environmental Impact Report for it. The complaint alleges that the EIR violates the California Environmental Quality Act because it understated the number of cows and arbitrarily concluded that the project's climate change impacts were insignificant, thus avoiding an obligation to consider mitigation measures.

OLD COMPLAINT

Steadfast Insurance Co. v. The AES Corporation (Arlington Co. Cir. Court, filed July 9, 2008): added to the "common law claims" slide. The complaint seeks a declaratory judgment that Steadfast , which issued a series of general liability insurance policies to AES, is not liable for any damages AES is obligated to pay in the *Native Village of Kivalina v. ExxonMobil Corp.* lawsuit filed in federal court. Plaintiffs in *Kivalina* seek to recover damages from AES and other parties caused by climate change that threatens their village in Alaska. The complaint alleges several bases for non-coverage, including that the policies only apply to claims arising from an "accident" which is not alleged by the *Kivalina* plaintiffs, that the damages occurred prior to to September 2003 when the policies were issued, and because greenhouse gases are considered a pollutant which is subject to the pollution exclusion clauses in the policies.

Update #3 (October 4, 2008)

NEW DECISIONS

Commonwealth of Kentucky Env. and Pub. Protection Cabinet v. Sierra Club (Ken. Ct. App. Sept. 19, 2008): added to the "coal-fired power plant challenges" slide. The Kentucky Court of Appeals overturns a lower court's decision to revoke a permit for a coal-fired power plant,

holding that the lower court was wrong in sending the permit back for review by Kentucky state regulators. After the permit was reissued by the Cabinet in 2006, environmental groups filed an appeal in state court, alleging that the agency did not provide an accurate measure of the plant's emissions because it did not take into account the plant's generator. The state court remanded the case to the Cabinet. Rather than conducting another hearing, the Cabinet appealed the decision to the state appeals court, which held that there was no proof that sporadic use of the generator would cause any additional impact to air quality.

Sierra Club v. EPA (11th Cir. Sept. 2, 2008): added to the "coal-fired power plant challenges" slide. The 11th Circuit holds that the EPA did not violate the Clean Air Act when it refused to object to the issuance of state air pollution permits from Georgia regulators covering two coal-fired power plants, concluding that EPA has wide discretion in overseeing state regulators who issue operating permits under Title V. Both plants maintained for years that they were exempt from prevention of significant deterioration (PSD) requirements under the 1997 CAA amendments. Sierra Club argued that, given the fact that EPA issued a violation notice to the plants in 1997, it should have objected in 2004 when the plants sought to renew operating permits that omitted any PSD requirements.

NEW SETTLEMENTS

City of Stockton and Cal. Attorney General's Office (entered into Sept. 10, 2008): added to the "state NEPAs" slide: Stockton entered into an agreement with the California Attorney General's office to cut greenhouse gas emissions through improved land use planning and other measures. The agreement resolves objections the Attorney General had to an environmental impact report the city prepared for its long-term growth plan which did not take into account climate change impacts. In the agreement, the city agrees to build 18,000 new homes within the city limits to help reduce sprawl in the area and commits to ease building height requirements and reduce permit fees to encourage downtown development. The agreement also calls for the city to prepare a climate action plan that includes target dates for reducing greenhouse gas emissions, inventory its current emissions, and adopt green building standards for new residential and commercial buildings.

Center for Biological Diversity v. Hall (D.D.C., entered Sept. 8, 2008): added to the "Endangered Species Act" slide. The Center for Biological Diversity entered into a settlement with the U.S. Fish and Wildlife Service concerning its lawsuit seeking to compel the agency to determine whether 12 penguin species should be listed as endangered under the ESA because of climate change. The lawsuit was filed in February 2008 after the agency missed a statutory deadline to determine if listing the species was warranted. Under the terms of the settlement, the agency has until December 19, 2008 to make such a determination.

NEW COMPLAINT

Communities for a Better Environment v. City of Richmond (Cal. Sup. Ct., filed Sept. 4, 2008): added to the "state NEPAs" slide. Three environmental groups have sued Richmond, California

over its decision to grant a subsidiary of Chevron permission to expand a local oil refinery, which the groups allege will emit at least 898,000 metric tons of greenhouse gases annually and disproportionately affect nearby minority communities. The groups allege that the city certified the environmental impact report without providing a specific plan for mitigating greenhouse gas emissions.

Update #2 (September 5, 2008)

NEW COMPLAINTS AND PETITIONS

American Petroleum Institute v. Kempthorne (D.D.C., filed Aug. 27, 2008): added to the "other statutes" slide. Five business and industry trade groups seek to overturn one paragraph of an interim final rule meant to protect polar bears under the Endangered Species Act, alleging that the interim rule subjects operations in Alaska to stricter permitting and regulations than other states. The lawsuit does not challenge the Department of Interior's listing of the polar bear as threatened.

New York v. EPA (D.C. Cir., filed Aug. 25, 2008): added to the "Clean Air Act" slide. Twelve states, New York City and the District of Columbia allege that EPA violated the Act by declining to add greenhouse gas emissions to the new source performance standards for petroleum refineries. EPA declined to regulate greenhouse gas emissions from refineries when it issued the performance standards in June, saying that the pending rulemaking on regulating such gases under the Act would address whether emissions from refineries and other stationary sources should be regulated.

Longleaf Energy v. Friends of the Chattahoochee (Georgia Ct. App., rev. granted Aug. 20, 2008): added to the "coal-fired power plant challenges" slide. The Georgia Court of Appeals granted review of a lower court's rejection of a state permit for construction of a coal-fired power plant on the Chattahoochee River. In that decision, the court held that the Georgia Environmental Protection Division must limit the amount of carbon dioxide from the proposed plant before construction can begin, overruling an administrative law judge's decision upholding the agency's approval of the plant.

Center for Bio. Diversity v. California Fish and Game Comm. (Cal. Super Ct., filed Aug. 19, 2008) and *Center for Bio. Diversity v. Kempthorne* (E.D. Cal. filed Aug. 19, 2008): added to the "Endangered Species Act" slide. Conservation group seeks protection for the American pika, a small member of the rabbit family, under both the federal and California's Endangered Species Act. The lawsuit against the California Fish and Game Commission challenges an April 2008 decision by the agency denying a request to list the pika as a "threatened" species under the state Act. The lawsuit against the Fish and Wildlife Service alleges that the federal agency did not issue a timely finding on the group's petition to list the pika as a "threatened" species under the federal Act.

Sierra Club v. U.S. Department of Agriculture (D.D.C., filed Oct. 16, 2007): added to the "coal-fired power plant challenges" slide. Plaintiffs challenge USDA's Rural Utilities Service's use of low-interest loans to finance the construction of new generating units at a coal-fired power plant in western Kansas, alleging that the agency did not prepare an environmental impact statement for the plant and failed to analyze impacts of climate change and renewable energy alternatives.

NEW DECISION

Center for Biological Diversity v. Kempthorne (N.D. Cal. Aug. 13, 2008): added to the Polar Bear portion of the "Endangered Species Act" slide. The court grants the motions of two industry groups to intervene in a case challenging the Department of Interior's decision to list the Polar Bear as "threatened" rather than "endangered." The court limited the participation of both groups to issues in which they have a concrete interest.

OLD DECISIONS

National Audubon Society v. Kempthorne (D. Alaska Sept. 25, 2006): added to the "NEPA" slide. Plaintiffs challenged the Bureau of Land Management's final EIS that opened up land to oil and gas development, alleging that it did not analyze the effects of these activities on climate change. Court upholds EIS, holding that agency's methodology was reasonable and that plaintiff's affidavits did not contain any evidence of the cumulative effects of climate change.

National Environmental Advocates v. National Marine Fisheries Service (9th Cir. Aug. 23, 2006): added to the "NEPA" slide. Court holds that U.S. Army Corps of Engineers' EIS associated with a project to dredge and deepen the Columbia River navigation channel was adequate. One judge dissents, stating that the Corps' analysis of the salinity impacts of the project was deficient because it did not contain any analysis of the impacts of climate change on the Pacific Ocean and Columbia River and how this would affect salinity.

Friends of the Earth v. Watson (N.D. Cal. Aug. 23, 2005): added to the "NEPA" slide. Court holds that environmental organization has standing to challenge Overseas Private Investment Corporation's loans to projects in developing countries, denying the Corporation's motion for summary judgment. Plaintiffs alleged that the Corporation invested in overseas projects that contribute to climate change without complying with the requirements of NEPA or the Administrative Procedure Act.

Senville v. Peters (D. Vermont May 10, 2004): added to the "NEPA" slide. Court rejects challenge to the Federal Highway Administration's approval of one segment of a 16.7 mile highway that alleged that the EIS failed to analyze the project's effect on climate change, holding that plaintiffs did not establish that small increase in vehicle congestion would lead to significant air quality impacts. However, the court held that the EIS was inadequate for other reasons.

OTHER NEW ITEM

New York Attorney General Settlement with Xcel Energy (Aug. 26, 2008): added to the "regulate private conduct" slide: The New York Attorney General reached an agreement with Xcel Energy concerning the disclosure of financial risks from climate change to its investors. Under the agreement, the company will disclose these risks in its 10-K filings.

OTHER OLD ITEM

Council on Environmental Quality Draft Memorandum on Climate Change (Oct. 7, 1997): added to the "NEPA" slide. The memo states that available scientific evidence indicates that climate change is a "reasonably foreseeable" impact of greenhouse gas emissions and that two aspects of climate change should be considered in NEPA documents: (1) the potential for federal action to influence climate change and (2) the potential for climate change to affect federal actions. The memo recommends that climate change analysis be conducted on a programmatic level rather than on a project level. The memo was never finalized.

Update #1 (August 25, 2008)

COMPLAINTS AND PETITIONS

Southern Alliance for Clean Energy v. Duke Energy Carolinas, Inc. (W.D.N.C., filed July 16, 2008): added to the "coal-fired power plant challenges" slide. Plaintiffs seek to prevent Duke Energy from building an 800-megawatt coal-fired plant in North Carolina, alleging that the plant has not received a final determination that it will achieve a level of hazardous air pollutant emissions control that satisfies the Maximum Achievable Control Technology requirements of the Clean Air Act.

In re Desert Rock Energy Co. LLC (EPA Env. Appeals Board, filed Aug. 14, 2008): added to the "coal-fired power plant challenges" slide. Environmental and Native American groups seek to block an air permit issued by the EPA for a proposed 1,500-megawatt power plant in New Mexico that is located on Navajo Reservation land, alleging deficiencies in the permit.

DECISIONS

Center for Biological Diversity v. NHTSA (9th Cir. Aug. 18, 2008): added to the "NEPA" slide. The 9th Circuit rejected the federal government's request to revisit its November 2007 ruling that struck down new fuel economy standards for sport utility vehicles and other light-duty trucks, reaffirming its decision that NHTSA did not adequately consider carbon dioxide emissions when developing new corporate average fuel economy (CAFE) standards for these vehicles, but slightly revising the relief granted.

Center for Biological Diversity v. City of Desert Hot Springs (California -- Riverside Co. Sup. Ct., August 6, 2008): added to the "state NEPA" slide. Court finds that an environmental impact report (EIR) required under the California Environmental Quality Act for a large residential and commercial development is inadequate because, among other things, it failed to make a meaningful attempt to determine the project's effect on global warming before determining that any attempt would be speculative.

Santa Clarita Oak Conservatory v. City of Santa Clara (California -- L.A. Co. Sup. Ct. Aug. 15, 2007): added to the "state NEPA" slide. Court holds that an EIR analysis for a proposed industrial park project adequately evaluated the impact of climate change on water supply for the project. The analysis concluded that the impact of climate change on water supply was too speculative to conduct a quantitative review of the specific impacts.

El Charro Vista v. City of Livermore (California -- Alameda Co. Sup. Ct. July 28, 2008): added to the "state NEPA" slide. Court rejects a climate change challenge to an EIR on jurisdictional grounds but notes that there is substantial evidence in the record to support the city's determination that such impacts are too speculative for further evaluation.