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

Update #96 (March 6, 2017)

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

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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 petroelum 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

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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

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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

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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

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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 CO_2. 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 CO_2 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 CO_2 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

<u>Hapner v. Tidwell</u> (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, 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.

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 CO_2 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.

Update # 17 (February 19, 2010)

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 CO_2 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 CO_2 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.