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Recent Case Decisions

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RECENT CASE DECISIONS

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Upstream

Posse Energy, Ltd. v. Parsley Energy, LP, No. 08-20-00061-CV, 2021 WL 3140054 (Tex. App. July 26, 2021).

Posse Energy ("Posse") filed for a declaratory judgment and motion for summary judgment against Pacer Energy ("Pacer"), arguing that the conveyance of an oil and gas lease known as the Morgan Lease included rights to all depths. Conversely, Pacer argued that the assignment to Posse only included shallow rights because (1) the intent of the acquisition agreement and circumstances show that the depth was limited, and (2) no production at deep depths occurred at the time of the conveyance. Parsley Energy ("Parsley") later acquired its interest from Pacer. Parsley filed a motion for summary judgment, claiming that the Morgan Lease only conveyed 24.2333% of the interest regardless of depth. The trial court denied Parsley and Posse's motions, and entered summary judgment in favor of Pacer. Both Posse and Parsley appealed the judgment. The primary issue addressed by the Court of Appeals of Texas, El Paso, was whether the Morgan Lease conveyed quarter sections in their entirety (shallow and deep depths) or limited them to just shallow depths. The court held that the intent of the conveyed interests was limited to shallow depths based on several findings. First, the express language of the acquisition agreement and other documents showed the intent did not include deep depths because deep rights were never a part of the prior deed, and the term "insofar and only insofar" showed a limitation on conveyance. Second, the only units in production at the time were in shallow depths. Third, the property's location was referenced within the Spraberry trend, which was only located in the shallow section. Ultimately, the court found that the acquisition agreement and assignment conveyed no leasehold interests deeper than 8,900 feet. Accordingly, the court affirmed the trial court's judgment, and concluded that there was no need to reach Parsley's cross-appeal.

Romeo v. Antero Res. Corp., No. 1:17CV88, 2021 WL 2933176 (N.D. W.Va. July 12, 2021).

A class action group of plaintiffs leased their oil and gas interests to Antero Resources Corporation ("Antero"). The group, led by Romeo, alleged that Antero breached contract by deducting post-production costs from royalty payments. A similar case, *Corder v. Antero Res. Corp*., No. 1:18CV30, 2021 WL 1912383 (N.D. W. Va., May 12, 2021), was currently

under appeal in the Fourth Circuit Court of Appeals. Antero moved to stay the case until *Corder* was resolved, arguing that its outcome would affect this case. Romeo argued that Antero was only seeking a stay to delay monetary recovery for the class action group. The United States District Court, North District of West Virginia considered multiple factors in granting Antero's motion to stay. First, the court found that the judicial economy leaned heavily towards staying the case because it was extremely similar to *Corder* due to several contractual provisions that were identical in both cases. If the case was not stayed, and *Corder* was reversed or vacated, the court would be forced to reconsider the case. This would result in a waste of resources and finances. Second, the court found that the hardship Antero faced also pointed towards staying the case because if the stay was denied, Antero would face irreparable harm in expenses. Third, the court determined that the potential prejudice to Romeo and the other plaintiffs was not unfair because (1) there were no prior settlement negotiations, (2) *Corder* would be resolved in a timely manner, and (3) *Corder* would address the primary issue of the present case. Accordingly, the court granted Antero's motion to stay pending the resolution of appeal in *Corder*. The court directed the parties to advise it when the Fourth Circuit issued a final decision in *Corder*.

BBX Operating, LLC v. American Fluorite, Inc., NO. 09-19-00278-CV, 2021 WL 3196514 (Tex. App. July 29, 2021).

BBX Operating, LLC (BBX) and American Fluorite, Inc., GeoSouthern Energy Partners, LP, and GeoSouthern Energy Corp. (collectively, "GeoSouthern") entered joint development agreements (JDAs) setting the terms for well proposal submissions and including authorization for expenditure (AFEs), detailing costs. . After interest owners agreeing to participate, BBX would send joint interest billings to BBX (JIBs) for monthly costs to each participating interest owner. In May 2015, BBX sent nine "cash calls" to GeoSouthern entities, asserting the authority of the contracts in dispute here, "Neches II" Area of Mutual Interest (AMI) and the "Make My Day" JDA. GeoSouthern asserted they did not owe payment unless for a well proposal in which they consented. In August 2015, BBX withheld GeoSouthern's revenue payments. GeoSouthern demanded release of revenue payments, subsequently filing suit. BBX appealed on the trial court's final summary judgment against BBX in its entirety. Seven issues were considered on appeal. The Appellant Court affirmed trial court's judgment on five issues: The breach of contract claim was overruled,

because GeoSouthern established its damages and no material breach of the contract was found; Declaratory judgment was overruled, because the consequence of non-participation under the contract was clear and did not include offsetting or netting revenues; The quantum meruit claim was overruled, because the JDA contracts expressly covered the services at issue. Promissory estoppel was barred as a matter of law because an express contract governs the subject matter of the parties' dispute; The Texas Natural Resources Code (TNRC) claim was overruled because the pre-interest amount accounted for revenue amounts not paid by BBX. The Appellant Court reversed the prejudgment interest issue and the attorneys' fees issue, remanded a prejudgment interest calculation under the Texas Natural Resources Code instead of Texas Finance Code, and remanded regarding the reasonableness of the attorney's fees.

Ramirez v. Quanta Servs. Inc., No. H-20-1698, 2021 WL 3089295 (S.D. Tex. July 22, 2021).

A Subcontractor on an oil-and-gas rig sued his Roommate's Employer for Roommate's negligence in providing aid during Subcontractor's medical emergency. Employer moved for summary judgment, arguing that Roommate neither owed nor breached any duty to Subcontractor. The court granted the motion based on several findings. First, undisputed facts show that, under Louisiana negligence law, Roommate did not have a general duty to assist, nor did Roommate create a duty through causing the need for the aid, discouraging others from giving aid, or the existence of a special relationship. Second, even if Roommate did owe a duty to Subcontractor, undisputed evidence shows that he did not breach it because he lacked authority to control the medical emergency and he did not delay in getting medical attention. Further, Subcontractor does not point to affirmative acts Roommate took to exercise control after notifying the Person-in-Charge or to acts of omission that delayed the Person-in-Charge's assumption of control. Even if the timeline is disputed, the dispute is immaterial. Because no genuine dispute as to any material facts exists, the movant is entitled to judgement as a matter of law. The court granted the motion for summary judgement and dismissed with prejudice Subcontractor's claims against Employer.

Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC, Civil No. 1:21-CV-00658, 2021 WL 1945699, slip op. (M.D. Pa. May 18, 2021).

Epsilon Energy USA, Inc. ("Epsilon") sought a preliminary injunction related to its Joint Operation Agreements ("JOAs") with Chesapeake Appalachia, LLC ("Chesapeake"). Previously, the parties settled a dispute over the JOAs. The settlement resulted in an agreement that Chesapeake would cooperate with proposals under the JOAs even where it did not consent to a proposal. The present suit arose when Chesapeake, the default operator under the JOAs, later refused to participate in the drilling of a new well. Epsilon sought declaratory relief, regarding its right to drill the well and access jointly owned assets to do so. Further, Epsilon claimed breach of the JOAs and its settlement agreement. In order to succeed in its motion for preliminary injunctive relief a party must establish a sufficient likelihood of success on the merits of the case. Epsilon argued the JOAs allow for a JOA party to act as operator in place of Chesapeake if Chesapeake chooses not to participate in the proposal. Chesapeake rebutted, claiming Epsilon failed to properly execute the procedures to replace the operator in accordance with the JOAs. The court agreed, pointing also to Epsilon's misinterpretation of the plain language of the JOAs. Further, Epsilon's proposed commencement date for the drilling of the well passed. However, Epsilon argued that its motion for preliminary injunctive relief is not moot because it is entitled to an extension of the deadline, under the JOAs, due to a purported title defect. The court held that Epsilon was not entitled to an extension because the relevant article of the JOAs required all JOA parties to consent to a proposal in order to permit an extension. Thus, the likelihood of success on the merits of the case was insufficient to sustain a preliminary injunction.

Sundown Energy LP v. HJSA No. 3, Ltd. P'ship, 622 S.W.3d 884 (Tex. 2021).

Lessor filed suit against Lessee seeking to terminate the oil-and-gas lease due to lessee's failure to maintain continuous drilling operations. Lessor sued under a breach of contract claim, arguing the "continuous drilling program" provision of the lease provided for termination as to non-producing tracts due to a special limitation that required lessee to timely "spud-in" new wells. Lessor contends that to maintain the lease, Lessee had to spud-in a new well every 120 days following the completion or abandonment of operations on a prior well. Lessee counterclaimed that the lease's plain language allowed the lease to be maintained by engaging in

"drilling operations" which included drilling, reworking, fracturing, and other well operations not limited to "spudding-in" new wells. The parties disputed whether the broader definition of "drilling operations" in one paragraph of the contract applies to the continuous drilling program provision or whether the provision's context provides a different definition that meant only spudding-in a new well. The trial court granted partial summary judgment for Lessee. On permissive interlocutory appeal, a divided court of appeals reversed, finding the provision assigned a more specific definition that controlled over the general definition. The dissent found the court's reversal against the plain language of the contract. The Supreme Court of Texas agreed, observing that the parties expressly agreed that the broad definition would apply whenever that phrase is used in the lease. The Court found they cannot substitute "spudded-in" for "drilling operations" when the parties did not choose to do so. The Court found Lessor's concern that Lessee could stymie production to be unpersuasive, as Lessee retains the implied duty to reasonably develop the leased premises and nothing in the lease relieves that duty. The Court reversed the appellate court finding that lessee's timely drilling operations delayed the reassignment of non-producing tracts.

MRC Permian Co. v. Point Energy Partners Permian LLC, 624 S.W.3d 643 (Tex. 2011).

Former Lessee ("Lessee") filed suit against lessors and subsequent lessee to protect its leasehold interests in leases executed with four mineral estate owners. The lease provided a primary term and upon expiration, Lessee's interest automatically terminated all lands and depths not included in a production unit. Lessee could suspend termination by conducting a continuous drilling program. The lease included a force majeure clause extending a continuous drilling deadline in the event of a non-economic event beyond lessee's control which delayed its operations. Lessee was operating within the continuous drilling program when it encountered off-site wellbore instability that delayed a rig's arrival. Lessee provided notice to lessors yet received a response from subsequent Lessee to release all interest in the leases outside the specified production units. Lessee then filed suit. The trial court ruled on competing motions for summary judgment and permitted the parties to pursue an interlocutory appeal on three identified controlling questions of law: (1) whether the force majeure clause operated to perpetuate the lease, (2) if the lease terminated, what acreage was retained in Production Units, and (3) if the leases did not

terminate, whether the Lessee had valid claims of tortious interference. The Court of Appeals of Texas found as to question (1) that off-lease delays can fall within the force majeure clause's scope and such delays are not required to be a substantial factor in Lessee's failure to meet its deadline. They further found the issue to be fact determinative. The court declined to answer question (2) finding that a ruling on the quantity of retained acreage would rely on contingent or hypothetical facts resulting in an impermissible advisory opinion. The court found question (3) contained genuine issues of material fact as to each element of Lessee's tortious interference claims that would require a jury.

SLT Holdings, LLC v. Mitch-Well Energy, Inc., 219 A.3d 888 (Pa. 2021).

Lessors filed a complaint in equity against lessees claiming abandonment of the leases. Lessors sought several remedies including injunctive relief, declaratory judgment, and damages for conversion and moved for partial summary judgment on those counts. The trial court granted the motion and the Superior Court affirmed. Lessee appealed, claiming that Lessor failed to provide notice of a default that would open a 30-day window of opportunity to cure any defaults as written in the lease. Lessee further argued the ruling failed to give effect to the express terms of the lease, which provided the remedy in the event of an uncured breach. The lease further stated that if a court determined that a default had not been timely cured, the exclusive remedy was termination. Lessor argued that when a duty of reasonable diligence goes unmet for an extended time, a presumption of abandonment is created by the lessee. The Supreme Court of Pennsylvania found the analysis of both lower courts lacked the initial step of determining whether the case could be resolvable by employing the equitable doctrine of abandonment. Injunctive relief is applicable when there is no adequate remedy at law. The essential element of the doctrine of abandonment is the party's intention, not the party's non-performance. The Court found that Lessor's allegations of various breaches of the lease did not evidence the intention of lessees to abandon its property rights under the lease. Furthermore, lessors failed to explain why the remedies provided in the lease agreement were unavailable or inadequate. The pursuit of an equitable remedy was improperly used to bypass the notice requirement of the lease. The Court reversed and remanded the case for the trial court to perform a contractual analysis to determine if an adequate remedy at law existed.

State ex rel. Tureau v. BEPCO, L.P., 2021-0080, 2021 WL 1997498 (La. App. 1 Cir. May 19, 2021).

A landowner ("appellant) sought to remediate contamination caused to property by multiple companies' ("appellees") oil and gas exploration activities. The district court sustained the appellees' objection asserting a peremptory exception of prescription, finding that the one-year liberative prescription period prevented the appellant's action. Sustaining this objection, the court dismissed in favor of the appellees. Appellant appealed from the district court judgment. Appellant alleged that on-tract companies operated numerous oil and gas wells on his property, which included the construction of and use of unlined earthen pits that have never been closed, or not closed in conformance with Statewide Order 29-B, L.A.C. 43:XIX.101, et seq. Appellant further alleged that the off-tract companies drilled and operated oil and gas wells on adjacent property that caused contamination of his property in violation of Statewide Order 29-B. In the district court, the appellees raised two objections, one seeking to dismiss under a peremptory exception stating there was no cause of action, and another seeking to dismiss under a dilatory exception of prematurity. The district court sustained these objections, and thereafter appellant amended his petition to satisfy the objections. In response to the amended complaint, the appellees filed an objection for a peremptory exception of prescription for dilatory action, pursuant to a one-year liberative prescription period. The district court sustained the objection and dismissed the appellant from the suit. The appellate court disagreed with the district court and held the appellee's peremptory exception is properly dismissed following the legislature's intention that actions under La. R.S. 30:16, which are premised on inaction from the Commission of Conservation, invoke the State of Louisiana as the party of interest and are not subject to a one-year liberative prescriptive period for delictual actions. The appellate court reversed and remanded to the district court.

Hill v. Welsh, 2020-0087, 2021 WL 1478341 (La. App. 1 Cir. April 16, 2021).

Landowners filed a rule with the district court to show why a rehearing on proposed production units should not be ordered. The rehearing was to be before Louisiana's Commissioner of Conservation. The Commissioner had previously adopted an oil company's proposal to create two production units on the landowners' property which the landowners opposed. The landowners had requested a rehearing on the proposal to account for

additional evidence, but it was denied by the Commissioner. The district court ordered a rehearing before the Commissioner who upheld the original order. Subsequently, the landowners timely appealed to the district court to review the Commissioner's order. The district court found that the landowners had been prejudiced by the Commissioner's order because the Commissioner's decision was arbitrary, capricious, and an abuse of discretion. The district court ordered the Commissioner to adopt the landowners' proposed plan. The Commissioner appealed to appellate court. The Commissioner's appeal focused on two issues: (1) timeliness of the landowners' request to the district court for judicial review and (2) the district court's finding that the decision had prejudiced the landowners. The appellate court held that (1) the landowners' request for judicial review was timely and (2) that the Commissioner's decision was not arbitrary or capricious or an abuse of discretion. The request was considered timely because the landowners made it within sixty days of the Commissioner's final order. The Commissioner's decision had a rational basis because based on the evidence, the Commissioner had determined that a smaller production unit would not efficiently drain the unit areas. Therefore, the Commissioner's decision was not arbitrary or capricious or an abuse of discretion because the decision had a rational basis. The appellate court reinstated the Commissioner's order.

Headington Royalty, Inc. v. Finley Resources, Inc., 623 S.W.3d 480 (Tex. App. 2021).

Holders of "deep rights" interests in an oil and gas lease sued the record-title owner, an oil and gas company, to recover damages caused by the termination of the lease because of the company's cessation of production on the wells. The top lessee intervened on behalf of the record-title owner because of an indemnification provision in an assignment agreement between the two. The top lessee argued that the release provision in a swap acreage agreement between the top lessee and the deep rights holder barred the claims. The agreement contained a categorical release provision which waived and released the top lessee's "predecessors" from liability. The agreement did not name the record-title owner as a predecessor. All the parties filed motions for summary judgement. The top lessee and the record-title owner's motions were granted by the trial court. The trial court found that the release provision was unambiguous, and the term predecessor included predecessors-in-title to the property interest like the record-title owner. The appellate court disagreed. The appellate court

reasoned that because of Texas precedent, categorical releases are to be construed narrowly. Because the term predecessors in the release provision was in a string that referred to entities that related to the top lessee's company like affiliates and shareholders, a narrow reading suggested that it was meant only to apply to those type of entities—not predecessors in real property interest. Additionally, the appellate court found that the record-title owner was not a third-party beneficiary because the swap acreage agreement contained no clear or unequivocal language that suggested the agreement was to benefit the record-title owner. The appellate court reversed the trial court's judgment and remanded the case to the trial court.

Louisiana v. Biden, No. 21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021).

Thirteen Plaintiff states (Louisiana, Alabama, Alaska, Arkansas, Georgia, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Texas, Utah, and West Virginia) motioned for a preliminary injunction against Government Defendants regarding implementation of a pause on new oil and gas leases on public lands and offshore waters ("Pause") after Executive Order 14008, signed by President Joseph R. Biden, Jan. 27, 2021. Plaintiff States claimed that the Government Defendants violated the Administrative Procedure Act ("APA"), therefore entitling them to the injunction. The Court found that the Outer Continental Shelf Lands Act ("OCSLA") does not grant specific authority to a President to "Pause" offshore oil and gas leases, the power to "Pause" lies solely with Congress, therefore Plaintiff States made a sufficient case that there is a substantial likelihood that President Biden exceeded his powers under Section 208 of Executive Order 14008. The Court further held that States had substantial likelihood of success of their claims that Government Defendants acted in an arbitrary and capricious manner in violation of the APA, failed to comply with APA notice provisions, and unreasonably withheld and unreasonably delayed agency-required activity in violation of the APA. The Court held that Plaintiff states demonstrated a substantial threat of irreparable injury absent preliminary injunction and that balance of equities and the public's interest favored issuance of the injunction, and accordingly granted Plaintiff States' Motion for Preliminary Injunction. This case has since been appealed, but there is no decision from the higher court as of publication.

Marker v. Dep't of the Interior, No. 2:20-cv-00631 MV/KRS, 2021 WL 1207462 (D.N.M. Mar. 31, 2021).

Plaintiff brought this suit against the Department of the Interior, Bureau of Land Management, Pecos District (BLM); New Mexico Energy Minerals and Natural Resources, New Mexico Oil Conservation Division (NM OCD); and New Mexico State Land Office (NM SLO). Plaintiff is the owner and operator of oil and gas wells on federal and state leases in New Mexico. Plaintiff brings claims of Fraud, Civil Conspiracy, and Fifth Amendment Regulatory Takings under the Federal Tort Claims Act (FTCA) and 42 U.S.C. § 1983. The Magistrate Judge's proposed findings and recommended disposition (PFRD) supported granting NM OCD and NM SLO's motions for summary judgment. The court adopted the findings of the PFRD, dismissing the claims against the state defendants without prejudice, while the claims against the BLM will continue. The first ground for dismissal was lack of subject matter jurisdiction. To use the FTCA, the United States must be the defendant. Additionally, § 1983 does not give jurisdiction for the state defendants but would provide jurisdiction for individuals working at the state agencies who deprived the plaintiff of his rights. The individuals named by the plaintiff in his brief did not justify the naming of NM OCD and NM SLO as defendants. The individuals must be named in the complaint and tied to specific acts which deprived plaintiff of his constitutional rights. The second reason for dismissal was for failure to state a claim of fraud. The court found that the complaint was hypothetical and conclusory. It also fails the make a claim with any specificity. The claim of civil conspiracy was likewise conclusory. The claim of regulatory taking also failed because the plaintiff did not allege that he was prohibited from use of his property.

Cook v. Cimarex Energy Co., No. 07-19-00099-CV, 2021 WL 1603249 (Tex. App. Mar. 31, 2021).

Lessor brought this suit against the lessee for trespass. The two parties began to disagree as to the meaning of the contract with regards to the roads, and lessor refused lessee's payment. The trial court granted lessee's motion for summary judgement, overruling lessor's objections. The appeal court reviewed *de novo* and reversed and remanded the case. Lessee's motion for summary judgment attacked the consent element of trespass, arguing that the contract gave consent for them to use the lessor's private road to access their wells. The court looked to the language of the contract to see if it was unambiguous when referencing the applicable roads. The

contract used "road' and "lease road" without defining either term. The appeals court found that these terms were ambiguous. The use of extrinsic evidence also found that a genuine issue of material fact existed as to which road was referenced in the contract. The trial court also erred by granting summary judgement if it was granted as a result of the lessee's affirmative defenses. The first affirmative defense raised was equitable estoppel. This argument fails because the lessee failed to show that the lessor knowingly misrepresented a material fact intending for the lessee to act upon it. The argument of quasi-estoppel fails because the terms of the contract are ambiguous, and the agreement to use of the private road was not clear if it was permanent or temporary. Finally, the lessee's argument of waiver fails because the contract was not conclusive, so it cannot be said that the lessor waived his right to eject the lessee. Further, the court ruled that the trial court abused its evidentiary discretion by sustaining the lessee's objections of parol evidence and hearsay. The appeals court instructed the trial court to reexamine the admissibility of evidence.

Tomechko v. Garrett, 172 N.E.3d 1087 (Ohio App. 7th Dist. 2021), appeal not allowed, 173 N.E.3d 1230 (Ohio 2021).

Mineral Owner One inherited one-half interest in land. She had it for her natural life and upon her death, her children would inherit the land. Before she died, she conveyed the land to Mineral Owner Two but reserved half of the mineral rights, "EXCEPTING a one-half interest in all mineral rights." Mineral Owner Two leased the Oil and Gas rights of the entire property to Trans-Atlantic Energy on March 8, 1989. In 2013 and 2014, the heirs of Mineral Owner One leased their Oil and Gas rights that were reserved by Mineral Owner One to Gulfport Energy Corporation. The Mineral Owner Two sued and moved for summary judgment. There are two issues—the word "minerals" and adverse possession. The heirs of Mineral Owner Two claim "minerals" includes Oil & Gas; Mineral Owner One disagrees. The court decides that minerals does include Oil & Gas for two reasons. First, historically Oil & Gas is included as minerals in Ohio. Second, the Court looks to the surrounding area and asks if Oil & Gas is prevalent. Here, it was. Next—adverse possession. The trial court split the mineral rights into two parts: the shallow rights and the deep rights. The deep rights were everything below the point that Mineral Owner Two had drilled. The Court overruled this. Because the drilling of the land for Oil & Gas had so altered and changed the fugacious nature of the land, Mineral Owner Two had

adversely possessed all minerals and not just up to where they had drilled. Summary Judgment was granted on adverse possession.

PLC v. Alaska, 484 P.3d 572 (Alaska 2021).

Producer sued Corporation because land they owned a royalty that was not included in an expansion that was approved by the Department of Natural Resources. Producer sought a reversal of the Superior Court on grounds of standing and abuse of discretion. Corporation operates a unit of land which Producer has a lease on. Corporation submitted a proposal for a right to expand drilling on more land to the Department of Natural Resources. The original proposal had 80 acres included in it that PLC had a lease on. This proposal was denied. Another proposal—that Producer was not a part of—was approved. The Superior Court held that Producer lacked Standing. The Supreme Court reversed because Producer had an adequate personal stake in the proposal. Their personal stake is—they get paid if they're land is included. Also, if gas is being produced beneath Producer's lease, then it has an interest in realizing profits. The court ruled Producer had standing and reversed and remanded on these grounds. The abuse of discretion claim was because an appendix was stuck from the record. Producer added this appendix because Corporation did not include their methodology for expanding the acreage in their report. The court held this is not abuse because "absence of one document from the record does not give a party the right to attach an entirely different document." The Superior Court found no abuse of discretion.

Pogo Res., LLC v. St. Paul Fire and Marine Ins. Co., No. 3:19-CV-2682-BH, 2021 WL 1923301 (N.D. Tex. May 13, 2021).

Operator obtained coverage where Insurer would not cover pollution clean-up costs, pollution injury or damage, or pollution work loss costs. Operator filed for bankruptcy and the assets and insurance policies were bought by Developer. Developer assumed all responsibility and liability for any acts or omissions by Operator. Operator had an oil spill. Insurer stated they would pay for the incidents. Insurer later sent a letter to Developer denying coverage for the spill based on the total pollution exclusion that denied pollution clean-up costs. Developer filed suit in state court, Insurer removed it to federal court where Developer amended the complaint to assert new claims. Developer again moved to file a second amended complaint. The deadline in the scheduling order had expired. Under FRCP 16(b), there are four factors to determine if the movant has shown good

cause for an untimely motion to amend pleadings: (1) explanation for the failure to timely move for leave to amend; (2) importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice. The court said the first factor weighs against granting the motion for leave to amend because a partial dismissal based on deficient pleading is not an appropriate reason for not timely moving for leave to amend. The court said the second factor weighs in favor of granting leave to amend because the Developer would be foreclosed from pursing important claims at trial without them. The court said for the third and fourth factors the potential for prejudice is minimal and the Developer has met the good faith standard. The court granted Developer's motion for leave to amend the complaint.

EME Wyoming, LLC v. BRW E., LLC, 486 P.3d 980 (Wyo. 2021).

District Court of Goshen County granted Producer the right to access 52,000 acres of Landowner's property to survey but restricted them from using the information to file an application for a permit to drill. The district court permanently barred Producer from using the information collected to file APDs. Landowners appealed the access to land and Producers appealed the restriction of using the information for APDs. Producers on appeal argued that because they are an oil and gas company, they have the power to enter the land under Wyoming's Eminent Domain Act and to use that information to file APDs. Producer argues that they are a condemner and that the Act applies to them because of their status in oil and gas production. The Supreme Court of Wyoming says the power of condemnation must be narrowly construed and rejects the producer's argument. The court said that "only those entities with landlocked mineral ownership would have the power to condemn under the Eminent Domain Act." The court said the Act is not intended to be one where an entity can obtain access to see if it wants to acquire mineral ownership in that area. The court said that a condemner must at least show that it owns development rights to landlocked minerals and the location of those minerals. Producers did not show they owned the right to develop landlocked minerals that it could not access without condemning landowner's land. The court reversed the first ruling and says that producers should not be granted access to the property. The court affirmed the order that producers are barred from using the data to file ADP's but allow Producer to use the data to support a condemnation action.

Midstream

Jeanerette Lumbar & Shingle Co. v. Fla. Gas Transmission Co., 2020-249 (La. App. 3 Cir. 7/14/21); 2021 WL 2946282.

Grantor of pipeline servitudes sued Grantees after their alleged failure to maintain canals and banks injured surrounding land. Grantor sued under theories of (1) breach of contract, (2) negligence, (3) nuisance, (4) trespass, (5) unjust enrichment and (6) unfair trade practices. The agreements contained indemnity provisions for property damages and arbitration clauses exempting from the general provision damages to crops, wildlife, timber, fences, or structures (one grantee omitted "timber" and another omitted "structures"). The trial court stayed the proceedings against all Grantees, and compelled arbitration of all claims against two of the three Grantees. The Court of Appeal of Louisiana reversed the trial court's findings, vacated the stay, and remanded for further proceedings based on several holdings. First, the court requires resolution of doubt as to the scope of an arbitration clause be in favor of arbitration. Second, staying all claims against all grantees constituted an abuse of discretion because the non-arbitrable claims could proceed concurrently with arbitration, as is routinely done. Grantee that omitted the term "structures" is not subject to arbitration under the provision and should proceed in court. Third, for Grantees that retained the term "structures," canals are not structures by definition and are not arbitrable under the provision. Further, Grantor is not seeking damages for injuries to the canals themselves. The court reversed the stay and remanded the non-arbitrable claims for damages to the hydrology, sedimentology, and ecology of the land, reversed the exceptions of prematurity as to claims for damages outside the parameters of the arbitration clause to proceed under the general indemnity provisions, and compelled arbitration of arbitrable claims for damages to the forest, wildlife, and flora and fauna.

Kirby Inland Marine v. FPG Shipholding Co., 548 F. Supp. 3d 613 (S.D. Tex. 2021).

Liquified-gas carrier vessel ("Carrier") collided with tank barge operator vessel ("Operator") causing Operator's barges to leak reformate into the bay, resulting in environmental damage. Operator petitioned for exoneration from liability. The United States District Court for the Southern District of Texas identified Carrier's negligence as the sole cause of the collision. Carrier's negligence violated the Inland Navigation Rules, specifically Rules 6, 7, and 9, barring Oil Pollution Act ("OPA") limits

from mitigating Carrier's liability. First, Carrier violated Rule 6 of the Inland Navigation Rules, which requires vessels to travel at safe speeds, when it traveled at a speed of 12 knots—4 knots higher than her maximum safe travel speed—through the channel. Second, Carrier violated Rule 7, which requires use of all means available to determine risk of collision and avoid it, when her crew placed her radar and ECDIS on standby, effectively shutting them down. Third, Carrier violated Rule 9, which requires vessels to proceed along the outside of a narrow channel, when she crossed over to the Operator's side of the channel and again when she sheered back to her original side after the vessels agreed to switch. OPA generally holds the owner of the vessel where pollutants spilled from liable for the cost of removing the oil and damages caused by the spill, but the owner can offload that liability by demonstrating that the damage was caused solely by another party. OPA limits the liability of responsible parties based on vessel size and tonnage, but not where the proximate cause of the incident was in violation of federal operating regulations. Carrier breached her duty to Operator in violation of the Inland Navigation Rules. Therefore, Carrier was solely responsible for the damage caused and OPA liability limits do not mitigate Carrier's liability.

In re Matter of Enbridge Energy, LP, 2021 WL 2407855 (Minn. Ct. App. Jun. 14, 2021).

Applicant is seeking a certificate of need from the Minnesota Public Utilities Commission to replace its existing pipeline with a new one that will transport crude oil on a new route across Minnesota. Applicant asserted that replacing the pipeline would benefit Minnesota and surrounding states by (1) addressing integrity risks of the pipeline by replacing the pipeline with one constructed with the latest technology and materials, (2) reduce apportionment on the Mainline System, and (3) allow applicant to efficiently operate the Mainline System and reduce power utilization. The commission favored replacement of the line. The trial court held that the commission acted arbitrarily in determining the FEIS adequate. The Court of Appeals of Minnesota determined that the inclusion of the impact of an oil spill in Lake Superior and how the location was chosen adequately explains the decision and is acceptable. The trial court held that the relators did not establish a basis to reverse the commission's decision to grant a certificate of need. The appellate court stated that the commission shall grant a certificate of need if four areas of criteria are met: (1) the probable result of denial would adversely affect the future adequacy, reliability, or

efficiency of energy supply too the applicant, (2) a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence, (3) the consequences to society of granting the certificate of need are more favorable than the consequences of denying, and (4) it has not been demonstrated on the record that the proposition will fail to comply with the relevant policies, rules, and regulations. The court found the criteria was met and determined the certificate is proper.

WATER

Federal

Save the Colorado v. Semonite, No. 18-cv-03258-CMA, 2021 WL 1210374 (D. Colo. Mar. 31, 2021).

Save the Colorado, Wildearth Guardians, Living Rivers, Waterkeeper Alliance, and Sierra Club ("Petitioners") are a collection of environmental groups who sued to block a project proposing reservoir expansion in Boulder County, Colorado. Respondents are the heads of three Federal Agencies who approved the process, and Denver Water also intervened as a Respondent. Denver Water owns and operates the Gross Reservoir at issue, which collects and stores water for the City of Denver and surrounding areas under a license issued by the Federal Energy Regulatory Commission ("FERC"). Petitioners claimed that Respondent agencies violated federal law by improperly granting approval on the reservoir expansion project. The respondents claimed that the Army Corps of Engineers ("Corps") violated federal law by failing to fully consider the environmental impact of the reservoir expansion before approving the project and that the U.S. Fish and Wildlife Service issued a flawed biological opinion about the impact of the project. Respondents moved to dismiss the suit for lack of jurisdiction, claiming that the Federal Power Act ("FPA") gives federal courts of appeals exclusive action over cases involving a FERC licensing controversy; under 16 U.S.C. § 825/(b). The Court found that when a party challenges an agency order that is "inextricably linked" to an FERC order, the FPA's exclusive jurisdiction provision applies. Finding that the actions of the Corps and U.S. Fish and Wildlife Service were inextricably intertwined with the FERC's licensure, the Court ruled that it lacked jurisdiction to hear this case, and granted Respondents' Motion to Dismiss.

State

In re Challenge of Delaware Riverkeeper Network, No. A-0709-19, 2021 WL 2562541 (N.J. Super. Ct. App. Div. June 23, 2021).

Appellees desired to construct a waterfront dock and "multi-use deep-water port" to expand their ability to receive and load cargo on ships. The Department of Environmental Protection ("DEP") issued a permit after deciding that the proposed construction satisfied all applicable standards set forth under the Energy Facility Use rule. Appellants contended that DEP acted unreasonably in issuing a permit to Appellees under three main arguments. First, the appellants contend that the dock should have been evaluated as an "energy facility". Failure to evaluate under this category meant that DEP did not have to consider impact upon submerged aquatic vegetation. The court concluded that because the dock itself did not fit into any of the 16 categories set forth in N.J.A.C. 7:7-15.4, DEP did not act erroneously in not evaluating the dock as an "energy facility". The court found that there was substantial supporting evidence that the dock would not present any threat to the existing underwater life. Second, the appellants argue that DEP did not require enough information from Appellee regarding potential impacts to water quality. The court found that Appellees conducted all required pre-dredging chemical testing and that DEP reviewed and approved of all test results and properly considered any possible negative impact on water quality. Third, appellants argue that DEP should have required Appellees to obtain an Industrial Stormwater Permit under N.J.A.C. 7:7-16.6 because the dock constituted a "major development". The court found the dock was not a "major development" because it did not add more than a quarter-acre of impervious surface and it did not involve the movement of soil of more than one acre. In conclusion, the court decided that DEP did not act in an unreasonable manner in issuing a permit to Appellee. This case is an unpublished case of the court; therefore, state (or federal) court rules should be consulted before citing the case as precedent.

Melerine v. Tom's Marine & Salvage, LLC, 315 So.3d 806 (La. 2021).

Oyster bed lessees sued a tugboat captain's employer for damages caused by the captain's grounding of the tugboat on an oyster bed leased to the lessees. The lessees retained an oyster biologist to assess the damage caused by the grounding. The salvage company filed two motions in limine seeking to exclude evidence based on guidelines by the Oyster Lease Damage Evaluation Board and the oyster biologist's testimony on the

movement of sediment through the oyster bed. Additionally, the salvage company argued the biologist's damage calculations were not based on reliable methodology. The trial court denied both motions and admitted the evidence. The Louisiana Supreme Court found that denying the motions was erroneous. The court held that admitting the formulas based on the board's guidelines was erroneous because the board's formulas were normally used with a pre-project biological survey and a post-project biological survey. The oyster biologist had not conducted a pre-project biological survey, only a post-project biological survey. Therefore, the Court held that because the biologist had not conducted the pre-project survey, the board's guidelines were inapplicable. Because the guidelines were inapplicable, their probative value of the evidence was reduced and rendered irrelevant and inadmissible. On the biologist's opinion that the tugboat's grounding dispersed sediment that killed the oysters, the Court held that the evidence should have been excluded because of the biologist's own admission that he lacked expertise in sedimentology. For the damages, the Court held that because the biologist lacked literature or tested scientific methods to support his testimony for calculating the damages, it also should have been excluded. The Court reversed, vacated, and remanded the trial court's decision.

LAND

Easement

Marcum v. Columbia Gas Transmission, LLC, No. 19-3873, 2021 WL 3033749 (E.D. Pa. July 19, 2021).

Landowner sued a pipeline company after stormwater remediation efforts failed to protect their property from extensive damage. Landowner is subject to a pipeline easement that has had larger pipelines added after negotiations. The property is downslope from two other properties, and during construction of a new pipeline in 2015 the pipeline company installed temporary erosion and sediment controls. Landowner asserts claims of: (1) negligent construction and failure to maintain; (2) violation of the Pennsylvania Storm Water Management Act; (3) nuisance; (4) trespass to land by alteration of surface and subsurface drainage; and (5) breach of fiduciary duty. The court considered the pipeline company's Daubert motion and the motion for summary judgement. The Daubert motion challenged the landowner's expert witness—an engineer who works on pipeline projects—but failed due to his findings bases on sufficient factual

foundations and relation to the parties' fundamental factual disputes. Additionally, all but one of the claims in the pipeline company's motion for summary judgement failed. First, the contract release between the landowner and pipeline company did not absolve it from liability for post-execution conduct. Second, the statute of limitations of two years only bars damages incurred before April 5, 2016. Third, the Natural Gas Act does not field preempt or conflict preempt the state and local stormwater management laws that required certain steps by the pipeline company. Fourth, the pipeline company failed to identify a basis for granting summary judgment on the landowner's nuisance and trespass claims. Fifth, a reasonable jury could find that the pipeline company was negligent in failing to implement adequate stormwater management measures. Lastly, however, the landowner's claim of breach of fiduciary duty failed because there was no creation of a fiduciary duty between the landowner and pipeline company.

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (FEB), 2021 WL 2036662 (D.D.C. May 21, 2021).

Tribes sued U.S. Army Corps of Engineers ("USACE") after it granted Dakota Access, LLP, ("Company") an easement to install a pipeline under a lake, near which the Tribes live, without first producing an Environmental Impact Statement. The district court ruled in favor of the Tribes by vacating the easement, which the appellate court affirmed, as the pipeline ran through federal land. The appellate court, however, reversed the district court's order to empty the oil from the pipeline, reasoning that the district court must first find that an injunction to empty the pipeline was necessary to prevent "irreparable harm" to the Tribes. On remand, the district court declined to grant the injunction due to the Tribes' failure to prove that such harm was imminent and likely. Ultimately, the Tribes did not prove the likelihood of an oil spill from the pipeline contaminating the lake on which they rely. Thus, the threat of an oil spill was not sufficient to satisfy the necessary factor for injunctive relief of "irreparable harm" to the Tribes' water source. Likewise, the Tribes did not show how the flow of oil through federal land directly threatened their rights or sovereignty. The court denied not only the Tribes' motion for an injunction but also their motion for clarification regarding whether the court vacated Company's permit to install the pipeline as granting the latter motion would not directly result in the relief the Tribes' requested.

Other Use

Lexington Land Dev., L.L.C. v. Chevron Pipeline Co., 2020 CA 0622, 2021 WL 2102932 (La. App. 1 Cir. May 25, 2021).

Development Company sued Pipeline Company for damages under a theory of negligence after a pipeline leaked on Development Company's property. The trial court ruled in favor of Pipeline Company by granting partial summary judgment and dismissing certain claims due to Development Company's inability to prove damages to the two tracts and the lack of privity of contract between the parties. Thereafter, Development Company acquired assignments of rights as an owner and amended its pleading, and Pipeline Company responded by filing a peremptory prescription of exemption to dismiss the claims regarding damages of which Development Company had knowledge longer than the period necessary for Pipeline Company to gain prescription. Development Company appealed after the trial court granted Pipeline Company's prescription, dismissed all claims in the suit, and denied Development Company's motion for a new trial. The appellate court, however, declined to rule on the issue of the prescription as it determined that it was an interlocutory, rather than a final, judgment. Moreover, the appellate court held that, because the mineral lease expired before the assignment of rights, Development Company did not have standing to sue. Thus, the court affirmed the trial court's judgment, thereby maintaining partial summary judgment and the dismissal of Development Company's claims.

Brown v. Cont'l Res., Inc., No. 5:18-CV-05048-KES, 2021 WL 1192615 (Mar. 30, 2021).

Grantors sued Grantee for alleged damage to Grantors' surface and subsurface estate. Grantee removed the case to federal court under diversity jurisdiction. The court reviewed substantive issues in accordance with state law. Grantors sued Grantee under South Dakota Codified Law chapter 45-5A. Section 45-5A-4 instructs developers to pay owners for damages sustained by "loss of agricultural production, lost land value, and lost value of improvements caused by mineral development." Grantors sought damages for two claims. First, Grantors alleged that Grantee's high volume of truck traffic created dust, which rendered the pasture useless for twenty grazing months. Second, Grantors sought damages for Grantee's occupation of subsurface pore space beneath Grantors' land, which resulted from the injection and removal of saltwater beneath a well. Grantee responded the 2010 Surface Use Drilling Agreement and 2010 Pipeline Agreement

released it from alleged surface damage. First, the plain language of the Surface Use Drilling Agreement released Grantee from "any and all surface damages." Grantors claimed the contract did not include the specific surface damage claim; however, the court noted the release stated, "including but not limited to drilling and completing the Well." The court rejected the Grantors' interpretation, and confirmed the illustrative language was not intended to be complete. Second, the 2010 Pipeline Agreement mirrored the first agreement's plain language and gave the Grantee an unambiguous release from "any and all surface damages." The release section also included an illustrative list of damages that was not complete in nature. The court held the unambiguous language in both agreements released Grantee from "any and all surface damages" including the surface damage claim. The court granted Grantors' motion finding Grantors served responses to Grantee's requests for admission. The court granted Grantee's motion for partial summary judgment.

ELECTRICITY

Traditional Generation

In Re Empire District Elec. Co., 2021 WL 3159769 (Mo. Ct. App. July 27, 2021).

The Empire District Electric Company (Empire) is an electrical corporation providing public utilities and regulated by the Public Service Commission ("Commission"). The Office of Public Counsel ("OPC") and Empire appealed an order and decision from the Commission concerning the historical financial impact of Empire's ownership and operation of "Asbury" coal-fired electricity plant, and the Commission's refusal to use Empire's capital structure to calculate rates, respectively. OPC's point of appeal was denied. The Commission considered the historical financial impact of Asbury, because the "true-up" period following a test year purports to balance historical data with future changes. In deciding whether to include a post-year event, the Commission considers "whether the proposed adjustment is: (1) known and measurable, (2) promotes the proper relationship of investment, revenues, and expenses, and (3) is representative of the conditions anticipated during the time the rates will be in effect." The Commission reasonably found that the effects of Asbury's retirement were not known or measurable at the time the rates were calculated, as the facilities were potentially useful after its retirement, thus making ongoing expenses incalculable. In addition, the Commission's use of the accounting authority order (AAO) was a lawful and reasonable way to consider

implications of Asbury's retirement. Empire's point of appeal was also denied. The Commission had considerable discretion in setting rates and was able to determine reasonable and just rates by creating a hypothetical capital structure. The United States Supreme Court has instructed not to interfere with the Commission's rates unless they are outside of the "zone of reasonableness," or "within a percentage point of the national average for similar utilities." This zone of reasonableness was satisfied. The Missouri Court of Appeals affirmed the order of the Commission.

Renewable Generation

Va. Elec. and Power Co. v. State Corp. Comm'n, 861 S.E.2d 47 (Va. 2021).

Constellation NewEnergy, Inc. ("Constellation") is a service provider for a retail choice program under Code § 56-576(A)(5), which offers electric energy that is 100% renewable. The Code lays out the definitional requirement for "renewable energy" as, among other things, "derived from . . . falling water." Constellation utilizes a pumped storage hydroelectricity facility to generate electricity. The Code was revised in 2020, after contracts were made between Constellation and the Virginia Electric and Power Company ("VEPCO") in 2019. The revised language of the Code explicitly excluded pumped storage from the definition of "renewable energy." VEPCO contested Constellation's use of pumped storage and contended that the amended code be applied retroactively to the parties' agreement. The Supreme Court of Virginia held that pumped storage fell under the definition of "renewable energy" in the Code and refused to retroactively apply the amended code to the 2019 contracts. The court reasoned that the plain language of the Code did not indicate a narrow interpretation of falling water based on method of production, but instead was based on the original source of the energy. The amended code also did not expressly claim to clarify the existing code, and instead expressly excluded pumped storage from the definition in the amendment. Furthermore, the amendment did not suggest a legislative intent to change the substantive rights of the contracting parties by retroactively applying the amended definition, and there was likewise no future performance obligation applied to existing contracts, as the parties have a vested interest in the terms of the existing contractual obligations. Since there was no legislative intent to affect existing contracts and no dispute between those rights and the amendment, the police power of the state is not imposed upon the existing contracts involving private agreements under the retail choice scheme.

Fisheries Survival Fund v. Haaland, No. 20-5094, 2021 WL 2206426 (D.C. Cir. May 20, 2021).

Appellants were organizations of fishermen and seaside municipalities who sued Secretary of the Interior, Deb Haaland, under the National Environmental Policy Act ("NEPA") and the Outer Continental Shelf Lands Act ("OCSLA"), challenging the Bureau of Ocean Energy Management's ("BOEM") decision to issue an offshore lease for a windfarm off the coast of New York. The district court dismissed the fishermen's claims as unripe and for failure to comply with the OSCL's pre-suit notice provision. The Court affirmed that the lease in this case did not trigger the necessary NEPA obligations, upholding the district court ruling regarding ripeness. The Court further held that Appellants' case did not comply with the sixty-day waiting period outlined in OSCLA, and therefore affirmed the faulty notice finding of the lower court. The Court ordered that the judgment of the district court be affirmed. This is an unpublished opinion of the court; therefore, state (or federal) court rules should be consulted before citing the case as precedent.

In re Hawai'ian Elec. Co., Inc., 149 Hawai'i 343, 489 P.3d 1255 (Haw. 2021).

An Environmental Agency ("Agency") sought review of the Public Utilities Commission's ("Commission") denial of Agency's Motion for Relief from a 2014 Order issued by Commission ("Order No. 32600") where they approved an Electric Company's ("Company") agreement to purchase wind energy generated by a Wind Energy Company ("WEC"). In 2019, Agency filed a Motion for Relief from Order 32600 alleging it was void under Hawai'i Rules of Civil Procedure Rule 60(b) ("Rule 60(b)") because WEC obtained an incidental take license ("**ITL"**) after the deadline in the Purchase Power Agreement ("PPA"), Commission failed to consider GHG emissions, and the price of wind energy was unreasonable, stating these issues were not apparent in the original appeal timeframe, among other allegations. Commission denied Agency's motion, stating Commission lacked jurisdiction to rule on the motion because Agency failed to file a timely appeal. Agency appealed to the Supreme Court of Hawai'i, and Company filed a Statement Contesting Jurisdiction, stating court lacked jurisdiction because of Agency's delayed filing. The Court held that it did have jurisdiction to consider whether Rule 60(b) provides authority to re-open agency proceedings due to changed circumstances. The

Court stated that Commission "has the discretion, but is not required," to consider Hawai'i's Rules of Civil Procedure where the Commission's rules are silent**,** and that Commission did not abuse its discretion in declining to re-open Order No. 32600 under Rule 60(b) because: **(1**) the absence of a GHG emissions analysis is evident on the face of Order 32600, (2) because an ITL is a Governmental Approval and there is no provision to void the PPA due to a late Government Approval (the parties were not late in obtaining the ITL**),** and (3) the blog article about decreased wind energy did not warrant a reopening because it did not demonstrate the "extraordinary circumstances" required.

Town of Sudbury v. Energy Facilities Siting Bd., 169 N.E.3d 1157 (Mass. 2021).

Town petitioned for review of Energy Facilities Siting Board's ("Board") decision to approve an electric company's proposal to construct a new electrical transmission line and denying its motion to reopen the administrative record. The Supreme Judicial Court of Massachusetts held that boards receive a great amount of deference in deciding whether to reopen an administrative record, and that this Board did not err when it considered material provided by both parties in determining not to reopen the record because it found that the additional information Town sought to introduce would have no impact on its decision. Additionally, Town failed to establish that Board did not satisfy its statutorily identified objectives in permitting projects: (1) to provide a reliable energy source, (2) with a minimum impact on the environment, and (3) at the lowest possible cost. The court held that Town misunderstood the implications of Board's duty by arguing that Board erroneously approved the proposal because it did not have the lowest cost or least environmental impact of all available alternatives. Instead, these three considerations are mere factors that, when balanced, are intended to *guide* administrative decision-making. First, Board determined the project would provide a reliable and necessary energy source by identifying contingencies in the forecast data that suggested thermal overloads and low voltage violations would pose a risk to more than 72,000 customers. Second, Board weighed environmental impacts of this project against other available alternatives and ultimately determined that the route it chose was comparable in environmental impact to the other alternative routes. Finally, Board considered cost by relying on conceptual cost estimates in comparing the approved project with possible alternatives and was not obligation to select the cheapest one. In conclusion, the court

upheld Board's decisions to approve the new transmission line project and deny Town's motion to reopen the administrative record.

TECHNOLOGY AND BUSINESS

Bankruptcy

In re Fieldwood Energy LLC, No. 20-33948, 2021 WL 2853151 (Bankr. S.D. Tex. June 25, 2021).

Production Company's Chapter 11 bankruptcy plan was approved in whole by the court. The plan approved was a Credit Bid Purchase Agreement. Production Company gave some of their offshore well assets to a group of creditors along with a payment of cash, in exchange for debt forgiveness. This move assisted with the cost of plugging and responsibly abandoning their offshore wells. Production Company will now restructure via a divisive merger into separate, specialized entities. The final order and subsequent executing of the plan does not impact any other current litigation that has been filed against Production Company.

In re MTE Holding LLC, 2021 WL 2258270 (Bankr. D. Del. June 2, 2021).

Debtor is an oil & gas drilling business that generated wastewater as a byproduct, for which Debtor retained a Title Company ("Company") to conduct title and right-of-way research for Debtor's wastewater disposal project. Company provided services before and after Debtor filed for bankruptcy, at which time Company was instructed it would be paid through a separate entity owned by Debtor's CEO ("CEO"). However, CEO failed to make payment and Company sued seeking the court to allow an administrative claim on Debtor estate under section 503(b)(1)(A) of the Bankruptcy Code and for immediate payment of debt. Court noted that Company was entitled to an administrative claim if "(1) there was a post-petition transaction between claimant and the estate and (2) those expenses yielded a benefit to the estate." In application, the court stated that the benefit to the estate needed to be "actual" and "necessary," but a third-party non-insider creditor did not become a guarantor of success. A creditor that provided "post-petition goods or services" to a debtor, did not become "a guarantor of the success of the venture for which the debtor obtained those goods and services." Simply, providing the goods and services meets the creditors' burden and shows entitlement to payment. So, if a debtor fails to make such payment, the debtor breaches the contract, and the damages arising out the breach constitute an administrative expense. The fact that

Company subsequently issued invoices to CEO does not relieve Debtor's obligation because there was no contractual meeting of the minds to form a separate contract between CEO and Company. Since Company delivered its services, the court granted Company's motion to allow an administrative claim. Court denied without prejudice Company's motion for immediate payment but stated Company could renew the motion if the administrative claim was not paid within 60 days.

ENVIRONMENTAL REGULATION

Federal

Growth Energy v. Env't Prot. Agency, 5 F.4th 1 (D.C. Cir. 2021).

The Renewable Fuel Standard program sets annual targets for renewable fuel volumes in the United States. EPA implements these targets and has discretion to lower them. Three groups filed petitions for review of EPA's 2019 rule. The first group ("renewable producers") argued that EPA's required volumes were too low because they failed to adjust annual targets to account for small refinery exemptions. The District of Columbia Circuit Court of Appeals held that judicial review of this issue was barred due to a statute of limitations. The second group ("obliged parties") argued that the required volumes were too high because (1) there were severe economic harms that warranted waivers to refiners, (2) EPA's required volume was unreasonably attainable, (3) EPA's decision not to oblige fuel blenders was an abuse of discretion, and (4) EPA's failure to conduct analysis on the effects of the rule was an abuse of discretion. The court rejected all arguments made by obliged parties, holding that (1) EPA's decisions were reasonable, (2) EPA was not required to reconsider its policies on a yearly basis, (3) including fuel blenders would cause an unnecessary increase the complexity of the program, and (4) obliged parties failed to raise their analysis argument within a timely manner. The third group ("environmental organizations") argued that EPA's statement that the rule would have no effect on endangered species, along with its decision not to reduce volumes to prevent significant environmental harm, were arbitrary and inconsistent. The court agreed with these points, finding that EPA failed to consult proper organizations before publicizing the rule, and that the rule was contrary to the weight of evidence. Accordingly, the court issued a remand without vacatur of the 2019 rule for EPA to revisit its decision not to exercise a waiver for severe environmental harm.

Friends of Animals v. U.S. Bureau of Land Mgmt., No. 18-2029, 2021 WL 2935900 (D.D.C. July 13, 2021).

An advocacy group sought a preliminary injunction from the U.S. District Court, District of Columbia, to block the gather of wild horses during a drought by the Bureau of Land Management (BLM) from the Onaqui Mountain Herd Management Area in Utah. The advocacy group alleged that the BLM: (1) violated the Wild Free-Roaming Horses and Burros Act (WHA) by making long-term removal decisions; (2) violated the Administrative Procedure Act (APA) by "departing from agency guidelines" and not explaining the departure; (3) violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement (EIS); and (4) violated the NEPA by not taking a "hard look" at their proposed actions. The trial court denied the motion and addressed each of the advocacy group's allegations. First, the advocacy group failed to carry the burden of demonstrating that it will succeed on the merits in its claim that the BLM violated the WHA. The court limited the analysis to the prior December 2018 actions because the advocacy group did not amend or supplement its complaint to challenge the BLM's current plan. Therefore, under the current record, the court was also unpersuaded that the advocacy group will succeed in showing the unlawfulness or unreasonableness of the BLM's authorization of gathers over a period of 30 months. Second, the APA claims were not considered because the record was not supplemented since the prior consideration of the issue. Lastly, the advocacy group's NEPA claims did not persuade the court, because the 2018 environmental assessment met the requirements laid out by prior caselaw, and the court did not believe that the advocacy group will succeed on the merits of its challenge to the "hard look" the court took in December 2018 at the long-term consequences of the gathers.

Clean Air Council v. U.S. Steel Corp., No. 20-2215, 2021 WL 3045927 (3d Cir. July 20, 2021).

Environmental watchdog sued a manufacturer for not reporting emissions to the federal government under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The district court dismissed the action, and the watchdog appealed to the Third Circuit. The manufacturer released pollutants into the air due to a fire that shut down control rooms that clean raw coke-oven gas from the production of steel. The emissions were reported to the Allegheny County Health Department as required by Pennsylvania, consistent with the

Clean Air Act that allows states to regulate enforcement of emissions targets. CERCLA does not require federally permitted emissions subject to a state's implementation of the Clean Air Act from being reported. However, the watchdog claimed that the emissions were not "federally permitted releases" under CERCLA and not "subject to" relevant permits because they violated each plant's Title V permit, and therefore had to also be reported to the federal government. The court disagreed with the watchdog's definition of "subject to" under CERCLA, holding that Congress has defined it as "governed or affected by", not "obedient to" as claimed by the watchdog. The court reasoned that: (1) Congress differentiated between "subject to" and "comply with" in CERCLA so they cannot mean the same thing; (2) reading "subject to" to mean "governed by or affected by" makes logical sense; (3) vague legislative history cannot cloud clear statutory text; and (4) deference is not needed to the executive branch's early 1990s reading that "subject to" is ambiguous, because deference is only needed when there is an unresolved ambiguity that does not exist in the current case. Furthermore, the watchdog conceded in documents attached to the complaint that each type of gas that was released was covered by federal permits.

State v. Biden, 338 F.R.D. 219, 109 Fed. R. Serv. 3d 1170 (W.D. La. 2021).

A group of thirteen states ("States"), sought declaratory and injunctive relief regarding Section 208 of Executive Order No. 14008, which ordered a pause on new oil and gas leases on federal lands and waters. States alleged the Executive Order violated the United States Constitution, the Administrative Procedures Act, the Outer Continental Shelf Lands Act, and the Mineral Leasing Act. States then sought preliminary injunction to Government's Executive Order. Conservation Groups ("Groups"), which consisted of multiple environmentalist organizations, filed a motion to intervene, attempting to establish Intervention of Right. An intervenor must show that their interests may not otherwise be adequately represented by existing parties. Groups asserted that their interests and Government's interests differ. Thus, their interest may not be adequately represented. Further, Groups argued the Government's "ultimate objective" is to block States from compelling lease sales. While their "ultimate objective" was to ensure proper environmental protections were implemented before new leases were permitted. States contended that Groups and Government's "ultimate objective" was the same, to halt leasing on federal lands and waters. States then argued that because the "ultimate objective" of Groups

and Government is the same, there is a presumption of adequacy. The court held Groups had the same "ultimate objective" as Government. Although Groups' interests differed from Government's, the case was only about Government's authority to enact the executive order. Thus, Groups' effort to distinguish their "ultimate objective" on environmental grounds failed. Thus, the presumption of adequacy applied. Groups was unable to rebut the presumption. Therefore, Groups' motion to intervene was denied.

Env't Def. Fund v. Fed. Energy Regulatory Comm'n, 2 F.4th 953 (D.C. Cir. 2021).

The Federal Regulatory Commission ("FERC") granted Spire STL ("Spire") a certificate of public convenience and necessity ("Certificate"), authorizing Spire to build a natural gas pipeline. The Environmental Defense Fund ("EDF") challenged the grant, pointing to the fact that all parties conceded that no market need justified the grant. In the subsequent hearing, FERC rejected the challenge reasoning that Spire's affiliate precedent agreement proved market need. EDF sued, asserting that FERC's decision to grant a "Certificate" to Spire was arbitrary and capricious because FERC relied solely on Spire's affiliate precedent agreement in its determination. Spire and its affiliate intervened in the suit. In granting a Certificate, FERC must find that there is a market need for the construction permitted by the Certificate. Then FERC must examine the likelihood of any adverse impacts arising from a new pipeline. Finally, FERC must balance any adverse impacts against the construction's public benefits. FERC and Spire argued that precedent agreements are generally sufficient evidence of market need and affiliated precedent agreements should have the same value as unaffiliated agreements. The court disagreed, pointing out FERC and Spire's lack of support in case law. Further, the court found lack of support for market need or public benefit to justify FERC's granting of the Certificate. In determining whether to vacate the granted Certificate, the court considered the decision's deficiencies and the disruptive consequences of vacating. The Certificate was determined severely deficient, resting almost solely on the affiliate precedent agreement. The pipeline was operational; thus, disruption would occur upon vacating the Certificate. However, the court reasoned the former factor sufficiently outweighed the latter. The court vacated the decision to grant the Certificate and remanded to FERC for further proceedings.

Sierra Club v. U.S. Army Corps of Eng'rs, 997 F.3d 395 (1st Cir. 2021).

An environmental organization appealed the district court's denial of preliminary injunctive relief that sought to prevent the United States Army Corps of Engineers' (the "Corps") involvement in the construction of a segment of an electric transmission power corridor. The construction of the corridor requires the temporary filling of wetlands, permanent filling of wetlands, and construction of a tunnel under the Kennebec River. The Corps is involved as the permitting agency for these construction activities under the Clean Water Act and the River and Harbors Act. The National Environmental Protection Act ("NEPA") is a procedural statute that requires the Corps to consider the environmental impact of permitting these activities. The Council on Environmental Quality ("CEQ") implements NEPA regulations. Two CEQ and Corps regulations are relevant here. First, NEPA applies only to "major federal actions." Under 42 U.S.C. § 4332(C). The Corps identifies four "typical factors to be considered in determining whether sufficient 'control and responsibility' exists" requiring NEPA review beyond the "impacts of the specific activity requiring a [Corps] permit." Weighing the factors relevant to this case, the Corps found the activities requiring the Corps' permit comprised 1.9% of the total corridor project and the court agreed that the Corps' involvement did not amount to a "substantial portion" to warrant analysis of the entire project. Second, CEQ regulations require an environmental assessment ("EA") which briefly provides evidence whether further environmental analyses are necessary. The Corps conducted a comprehensive EA for the activities that fell within its jurisdiction and found no significant environmental impacts. The court found the Corps' actions insufficiently controversial to warrant further study. Further, the court disagreed with the environmental organization's argument that the Corps provided inadequate opportunities for notice and comment. The First Circuit held with the Corps and affirmed the district court's denial of preliminary injunctive relief.

Wild Virginia v. Council on Env't Quality, No. 3:20CV00045, 2021 WL 2521561 (W.D. Va. June 21, 2021).

Various environmental groups ("Plaintiffs") brought suit against the Council on Environmental Quality ("CEQ") under the Administrative Procedure Act. The groups challenged the CEQ's revision of regulations that are used when implementing the National Environmental Policy Act, following a defective notice-and-comment rule making process. Plaintiffs raised three issues. First, the court found that the plaintiffs' claims were not

justiciable because the claims were not ripe, and a decision could result in premature adjudication. The court reasoned that the potential outcomes of the regulatory changes were too speculative, and it would not be able to fully consider how the changes would impact the plaintiffs. The court also found that the claims were not justiciable because the plaintiffs' complaints were insufficient to claim standing under Article III. The court reasoned that the alleged harm to the plaintiffs was too speculative and also that they did not establish that the revised regulation had caused or would imminently cause them concrete injury. The court dismissed the case without prejudice. The case has been appealed since its decision.

WildEarth Guardians v. Steele, No. CV 19-56-M-DWM, 2021 WL 2590143 (D. Mont. June 24, 2021).

This case involved the Flathead National Forest which is a habitat for grizzly bears and bull trout. Plaintiffs are environmental organizations which challenged the plans and decisions made by the United States Forest Service and the United States Fish and Wildlife Service regarding future plans for the forest. Plaintiffs raise four claims: (1) a road density violation under the National Environmental Policy Act ("NEPA"); (2) a culvert based NEPA violation; (3) a violation under the Endangered Species Act ("ESA"), based on road density and other winterized motor travel; and (4) a violation of the Travel Management Rule. The Administrative Procedures Act was controlling in this case and provided that any arbitrary abuse of discretion by an agency is against the law. Regarding the first and second claims, the court found that the Forest Service followed NEPA procedures fully and fulfilled the "hard look" obligation set out by NEPA in considering all foreseeable and direct impacts to the forest; therefore, Plaintiffs' first two claims fail. Regarding the third claim, the court found that the Forest Service violated the ESA because it relied on flawed road reclamation determinations and road density surrogate. Regarding the fourth claim, the court found that the Forest Service's interpretation of a certain executive order was reasonable and therefore the Plaintiffs' argument was unpersuasive. Additionally, plaintiffs were unable to present any specific instances where the Forest Service violated the Travel Management Rule. The court ordered that the provisions that violated the ESA be remanded without vacatur, to the agencies, for a consideration that would be consistent with the opinion.

Cook Inletkeeper v. Raimondo, No. 3:19-cv-00238-SLG, 2021 WL 2169476 (D. Alaska May 27, 2021).

The district court previously ruled in favor of Cook Inletkeeper by declaring the Incidental Take Regulations ("ITR"), Biological Opinion ("BiOp"), Environmental Assessment/Finding of No Significant Impact ("EA/FONSI"), which National Marine Fisheries Service ("NMFS") issued for Hilcorp Alaska, LLC, ("Company"), to be unlawful due to the failure to sufficiently consider the impact of noise from Company's tugs on beluga whales in Cook Inlet. As a consequence of this ruling, the court ordered the parties to present briefs to aid its determination of whether vacatur is the proper remedy for the violations of environmental law. Although the insufficient consideration severely impacted the accuracy of the ITR, BiOp, and EA/FONSI, the court concluded that vacatur of all the documents was not proper as the violations did not affect the entirety of Company's activities. Furthermore, such vacatur could cause more harm than it would prevent as it would keep Company from performing necessary maintenance unrelated to tugs, which could result in harmful oil spills or gas leaks. Additionally, Company planned to implement mitigation measures that rendered complete vacatur unnecessary. Therefore, while the court ordered vacatur of the documents regarding Company's use of tugs for most of its oil production and exploration projects as well as implementation of Company's planned mitigation measures, the court declined to completely vacate, and instead remanded, the documents in regards to Company's other activities and a certain upcoming production project.

HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 141 S.Ct. 2172 (U.S. 2021).

Congress created the renewable fuel program ("RFP") to require domestic refineries to blend renewable fuels with transportation fuels but provided exemptions to small refineries to lessen the impact of the mandate. Congress further allowed EPA to extend the exemption for at least two years if the RFP obligations imposed disproportionate hardships on small refineries and offered "an extension of the exemption . . ." Three small refineries initially received an exemption which lapsed for a period and then sought another exemption. A group of renewable fuel producers (Respondents) petitioned for review of EPA's decisions, alleging EPA acted in excess of their power by granting these petitions. The Tenth Circuit vacated EPA's decisions, stating the refineries were ineligible for the extension because all three had allowed their exemptions to lapse in the

past. The Court looked to define the word "extension" to determine whether a small refinery that complies with RFP is forbidden from applying for another "extension" due to a previous lapse. The Court agrees that "extension" is used in a temporal sense but does not impose a continuity requirement. Rather, statutorily Congress did not add modifying language, such as "consecutive" or "successive" extension to the statute, so naturally "extension" of time can occur even after some lapse. The Court stated that Respondents could not show that the extension requests were in excess of EPA's statutory authority. In the Dissent, Justice Barrett, joined by Justice Sotomayor and Justice Kagan, argued that the text of the statute allows EPA to extend the exemption, but EPA cannot extend an exemption that a refinery no longer has, as the word extension does not imply after lapsed time.

Western Watersheds Project v. Bernhardt, No.: 1:18-cv-00187-REB, 2021 WL 2366092 (D. Idaho Jun 9, 2021).

An administrative agency conducted a competitive oil and gas lease sale, which is one of the greatest threats to greater sage-grouse populations, which sit at 10% of its historical levels. Watershed Project ("Plaintiffs") argued that the Phase Two lease sales should be vacated because they violated NEPA in that Administrative Agency (1) failed to consider the reasonable alternative of deferring priority greater sage-grouse habitat; (2) failed to consider the direct and indirect damages of greater sage-grouse by (a) failing to establish baseline conditions, and (b) failed to identify site-specific impact; and (3) failed to consider the cumulative impact on greater sage-grouse. As to (1), the court agreed with Watershed Project that the Agency violated NEPA standards, as they did not adequately explain why Plaintiff's proposed alternatives were subsumed. The court also agreed with Watershed Project as to (2)(a) and (b), holding that the sources of information used for baseline analysis were inadequate and that agency could have analyzed in greater detail the site-specific impact of lease sales on greater sage-grouse. Finally, the court also agreed with Watershed Project as to (3), holding that the sources used for cumulative analyses (EAs and RMP EISs) did not contain quantified assessments of Phase Two lease sales. However, the court declined to vacate the Phase Two lease sales as vacatur is not required when a flawed action can remain in place while an agency seeks to redress its wrongdoing through other measures. Instead, the court enjoined the Agency from issuing any more APDs for Phase Two leases, and any further activities which would disturb surface-level estates.

The court also remanded the EAs to BLM to revise as necessary. Therefore, the court granted in part and denied in part Plaintiff's Motion for Partial Summary Judgement.

Center for Biological Diversity v. Haaland, No.19-35981, 2021 WL 2232487 (9th Cir. Jun. 3, 2021).

An environmental organization sought review of an administrative agency's ("Defendant's") reversal in 2017 of its 2011 decision to include pacific walruses as an endangered or threatened species under the Endangered Species Act ("ESA"). The United States District Court of Alaska granted summary review for the agency. The ESA directs the Secretary of the Interior to maintain a list of species qualified for protection. The original decision by Agency to classify the pacific walrus as endangered listed three reasons: (1) the loss of sea-ice forced the walrus to retreat to dangerous concentrations on land; (2) subsistence hunting threatened their numbers; and (3) efforts to decrease greenhouse gas emissions were not adequate to mitigate these dangers even at their lowered population levels. Later, an assessment by the review team determined that the pacific walrus was adapting to its changing environment, leading to the Agency in 2017 to reverse their prior decision. The appellate court held that the Agency did not offer a reasoned explanation for its change in position by examining its own publication alone (not the reasons which the district court offered as possibilities). The appellate court reversed the district court decision and remanded for the Agency to provide a sufficient explanation of its 2017 decision.

Yaw v. Delaware River Basin Comm., No.2:21-cv-00119, 2021 WL 2400765 (E.D Penn. Jun. 11, 2021).

Two members of the Pennsylvania Senate, their party caucus, two townships and two counties brought action pursuant to 28 U.S.C. § 2201. These parties alleged: that a 2009 moratorium exceeded authority; was an unconstitutional taking; was an illegal usurpation of Eminent Domain; and violated constitutional republican guarantees. The Delaware River Basin Commission filed motions to dismiss on the basis that Plaintiffs lacked standing and failed to bring forth viable claims. The court agreed that the legislator plaintiff parties failed to show proper standing for the court to grant redress. First, federal courts hold that Legislator-Plaintiffs cannot, on their own behalf, bring suit for an institutional injury (harms which constitute some injury to the legislature's power as a whole, not to the

individual legislator). The institutional injuries alleged included the usurpation of legislative authority of the General Assembly to enact laws with state-wide application: specifically including the power to suspend eminent domain. Furthermore, the legislators did not claim to stand on behalf of the Commonwealth, who they claim suffered injury. The legislators also failed to properly invoke inapposite authority because they did not identify a specific legislative act that would have been passed but for the Moratorium nullifying their voices. Finally, the legislators offered two theories that granted standing outside of Article III: Pennsylvanian courts granted standing through common law, and their role as trustees of the Pennsylvanian Environmental Rights Amendment created standing. The court was not persuaded by either of these theories, and instead determined that the legislator's inability to create standing confirmed the dispute to be partisan in nature and best sorted out through the political process. The court granted Delaware River Basin's motion to dismiss.

N.Y. State Dep't of Env't Conservation v. FERC, 991 F.3d 439 (2d Cir. 2021).

New York State Department of Environmental Conservation ("DEC") petitioned the Second Circuit Court of Appeals for review of orders by Federal Energy Regulation Commission ("FERC"). In the orders, FERC determined that DEC missed the one year deadline to deny a certification request, and therefore waived its authority under Section 401 of the Clean Water Act ("CWA"). The appellate court denied the petition for review based on four holdings. First, the appellate court confirmed jurisdiction to review the petitions. DEC made a timely request to seek appellate review pursuant to the Natural Gas Act ("NGA"). Second, the appellate court rejected DEC's claim that its certification denial was timely because it entered an agreement to extend the deadline with the natural gas company ("Company"). The appellate court analyzed legislative history and confirmed Congress made the bright-line deadline to limit state discretion and prevent potential regulatory abuse. Therefore, CWA's one year deadline precluded the agreement. Third, the appellate court held equitable principles raised by DEC did not impact FERC's ability to review the waiver issue. Pursuant to NGA, FERC had broad discretion to address the waiver sua sponte or at the request of a third party. Fourth, the appellate court held FERC reasonably treated Company's waiver determination request, because NGA gives FERC broad discretion in its own regulation. FERC gave a reasonable interpretation of NGA and FERC had a legitimate

policy reason to review the waiver determination request. The appellate court denied the petition for review.

City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

The City of New York ("City") sued several multinational oil companies ("Companies") and sought damages for global greenhouse gas emissions. City's claims arose under a state nuisance law and City sued under theories of (1) public nuisance, (2) private nuisance, and (3) trespass. The district court granted Companies' motions to dismiss and dismissed the complaint with prejudice. The Second Circuit Court of Appeals affirmed the judgment of the district court based on four holdings. First, the appellate court held that federal common law displaced City's state law claims. The appellate court noted precedents applied federal law to issues involving interstate pollution. Further, the precedents often touched on two federal interests: (1) uniform decisions for national energy and environmental policy and (2) federalism. City's requested damages award would control Companies' behavior beyond state borders, without considering the laws of surrounding states. Second, the appellate court held that the Clean Air Act ("CAA") displaced the federal common law claims regarding domestic greenhouse emissions. Since City's requested damages would serve as a form of regulation, and Congress passed CAA to directly regulate emissions, CAA barred City's claims. The appellate court asserted it may not provide an alternative regulation that would conflict with Congress. Third, the appellate court held CAA cannot regulate foreign emissions. CAA only permitted City to create limited emissions standards within the scope of state common law. City sought to apply its regulations on emissions that sourced from other states and countries. Fourth, the appellate court held that City's suit targeting emissions beyond the country's jurisdiction would impede foreign policy goals. The court noted judicial caution due to Congress' interest in handling delicate international policy issues. The appellate court affirmed the judgment of the district court.

American Fuel & Petrochemical Mfrs. v. Env't Prot. Agency, 3 F.4th 373 (D.C. Cir. 2021).

Petroleum industry, ethanol industry, and petroleum retailers challenged EPA's decision to grant a fuel volatility waiver to fuel blends containing gasoline and up to fifteen percent ethanol, also known as "E15". The United States Court of Appeals for the District of Columbia held that the waiver exceeded EPA's authority under subsection 7545 of the Clean Air Act and

vacated the portion of EPA's rule granting the waiver. EPA exceeded its authority because the text and structure of Subsection 7545(h)(4), as well as its legislative history, support that it applies to E10 alone. The Clean Air Act limits fuel volatility, which measures how readily gasoline evaporates in terms of pounds per square inch ("psi") of Reid Vapor Pressure ("RVP"). It limited the sale of gasoline with an RVP higher than nine psi during the summer months when ozone levels are highest but waived this limit by allowing certain blends containing ten percent ethanol an additional 1-psi. EPA originally interpreted this waiver to apply only to fuel blends containing ten percent ethanol but released the new E15 rule extending the waiver to fuel blends containing *at least* ten percent ethanol at the President's request. EPA argued, unsuccessfully, that the word "contains" in the statute established a threshold amount of ethanol acceptable as opposed to a ceiling. The court held that the phrase, "blends containing gasoline and ten percent ethanol," was unambiguous because its plain meaning and EPA's previous interpretation suggested it meant blends containing ten percent ethanol, not a 10 percent minimum of ethanol. Thus, the Clean Air Act precluded EPA's 1-psi waiver to E15. Finally, the court held that this waiver portion of the E15 Rule was severable because severability depends on the issuing agency's intent and EPA explicitly stated that Section II was to be severable.

Clarke v. Pacific Gas & Electric Company 2021 WL 15808291 (N.D. Cal. Apr. 22, 2021)

Landowner filed a Clean Water Act cause of action against Company. The district court gave Landowner leave to amend its complaint after it granted in part and denied in part Company's motion to dismiss. After Landowner filed its First Amended Complaint, Company filed a second motion to dismiss Individual the claims for the following reasons: (1) the discharges in the complaint amounted to a single CWA violation that first accrued decades ago rather than a series of CWA violations for each discharge, therefore the CWA claim was barred by statute of limitations; (2) the CWA claim was improper because it failed to allege an ongoing discharge by a "person"; (3) The CWA claim failed to allege on ongoing discharge from a "point source"; and (4) Clarke did not provide adequate notice of the claim in NOI. The court denied Company's motion based on its findings. First, whether Landowner's claims fall within statute of limitations was a material dispute because Individual cited case law that supported treating each discharge as a separate offense. Second, the factual

dispute as to who or what caused the discharges cannot be resolved at the pleadings stage. Third, Landowners' description was sufficient enough at pleadings stage to describe point source. Last, the NOI sufficiently notified Company of its activities alleging to violation and the location of its discharges.

Natural Resources Defense Council v. McCarthy 993 F.3d 1243 (10th Cir. 2021).

Environmental alliance filed a complaint in the United States District Court for the District of Utah for declaratory and injunctive relief against field manager and alleged that field manager violated NEPA and the APA by failing to analyze the environmental consequences of its action to lift the temporary closure order and open the Factory Butte area to cross-country OHV use. Environmental alliance requested that the court set aside the field manager's decision to lift the Factory Butte closure order and re-impose the closure order until the agency complied with NEPA. field manager countered with a motion to dismiss for failure to state a claim under which relief can be granted. The district court sided with field manager and granted the motion to dismiss with prejudice because the field manager's decision to impose a temporary closure order was exempt from NEPA analysis, and the decision to lift the temporary closure order is non-discretionary. Environmental alliance timely appealed. The Tenth Circuit Court of Appeals was charged with reviewing whether the field manager's decision to lift a temporary closure order under 43 C.F.R. § 8341.2(a) is likewise a non-discretionary action, such that environmental analysis under NEPA is not required. NRDC argued that (1) the field manager retains discretion to lift the temporary closure order even after it determines the "adverse effects are eliminated and measures implemented to prevent recurrence," and (2) the field manager's determination that "the adverse effects are eliminated and measures implemented to prevent recurrence" is also itself discretionary. In either case, the Plaintiffs contend, environmental analysis under NEPA is required. field manager argued that NEPA analysis is not required because (1) the agency has no discretion to temporarily close an area, and no discretion to keep the closure order in place once the requisite determination has been made, and (2) the determination that "the adverse effects are eliminated and measures implemented to prevent recurrence" is not an open-ended act of discretion; rather, just like the initial determination that OHVs are "causing or will cause adverse effects" in the first place, it is a judgment triggering mandatory action under the

regulation. The Tenth Circuit affirmed the district court because (1) an ordinary reading of the regulation requires the field manager to lift a temporary closure order once it finds that "the adverse effects are eliminated and measures implemented to prevent recurrence." The regulation plainly does not allow the field manager to maintain the temporary closure order after it has made the requisite finding, and (2) the field manager need not conduct environmental analysis before lifting a temporary closure order because an environmental analysis here would not influence whether the field manager lifts a temporary closure order.

Shafer & Freeman Lakes Environmental Conservation Corporation v. Federal Energy Regulatory Commission, 992 F.3d 1071 (D.C. Cir. 2021)

Coalition petitioned for review Federal Energy Regulatory Commission's approval of Oakdale Dam Procedures. Procedures were put in place to limit endangered mussel death. Coalition sought to invalidate FERC's decision by citing errors in Biological Opinion that influenced that decision. Coalition challenged the scientific basis of the Fish and Wildlife Service's new dam operation procedures by claiming the following: (1) FERC's scientific conclusions are undeserving of deference because the personnel who worked on the Biological Opinion lacked hydrological expertise; (2) Linear scaling is an inappropriate scientific tool for managing the flow out of a dam on a day-to-day basis, especially during low flows, and keeping lake levels relatively constant is a better method for ensuring "natural" flow rates on the Tippecanoe River;, and (3) by requiring water flow measures that accord with its linear scaling model and that can materially reduce the level of Lake Freeman during low-flow events, the Service's reasonable and prudent measure is a major change, in violation of a regulation that requires the Fish and Wildlife Service ("The Service") to only use "minor changes" in a proposed agency action. The United States Court of Appeals for the District of Columbia Circuit granted in party and denied in part. The held that the FERC acted reasonably in relying on the Service's resulting scientific judgments in its Biological Opinion for the following reasons: (1) the FERC's Biological Opinion was based upon both hydrology and biology, and the Service personnel had relevant expertise in biology; (2) the Commission acted reasonably in relying on the Service's resulting scientific judgments in its Biological Opinion because the Service acted reasonably in using a linear scaling methodology. On the third point, the court remanded for a reasoned explanation by the Service of its "minor change" regulation's application because the Service and FERC made errors

in analyzing whether the Service's reasonable and prudent measure qualified as "minor." The Court agreed with NIPSCO's argument that the appropriate remedy for the agency error was a remand without vacating either the Incidental Take Statement or the FERC's orders.

State

Pa. Env't Def. Found. v. Commonwealth, 255 A.3d 289 (Pa. 2021).

Pennsylvania Environmental Defense Foundation ("PEDF") brought declaratory judgment action against Commonwealth, challenging, under Environmental Rights Amendment ("ERA"), the constitutionality of budget-related decisions that resulted in additional oil-and-gas lease sales on state forest and game lands. The Commonwealth Court granted summary relief to Commonwealth and PEDF appealed. The Supreme Court of Pennsylvania reversed in part, vacated in part, and remanded. The case returned to the Commonwealth Court, and PEDF appealed on the decision entered on remand. The Supreme Court of Pennsylvania reversed. First, based on contract law, the revenue from upfront bonus payments, rentals, and penalty interest for leases qualified as income and not the sale of trust assets. The inchoate lease used bonus payments as consideration, and the rental payments and late fees had no bearing on the execution of the lease. Second, the income could not be diverted from the corpus to the general fund for non-trust purposes. The disposition of income is determined by the language of ERA, which did not provide a mechanism to allocate revenue from income based on the use of trust assets because the settlors did not intend to create any income entitlements, nor had Commonwealth done so before. Income generated from revenue streams was required to be returned to the corpus to benefit all the people. Third, based on the settlors' intent derived from the language unifying the interest of current and future generations, the beneficiaries' interests were simultaneous. As such, Commonwealth, as trustee, had a fiduciary duty to the beneficiaries to administer the trust in light of its purpose, which was conservation and maintenance of public natural resources. The court ordered all income be returned to the corpus to serve its purpose for and found Sections 1604-E, 1605-E, and 1912 of the Supplemental General Appropriations Act of 2009 unconstitutional.

Lovejoy v. Jackson Res. Co., No. 2:20-cv-00537 (S.D. W.Va. July 16, 2021) (order denying in part and granting in part a motion to dismiss).

This is an order on Company's 12(b)(6) motion to dismiss. Company is the past owner of a natural gas well and pipeline facility on Plaintiff's property. Plaintiff brought seven claims against Company after becoming concerned hazardous waste from Company's facility had migrated (or threatened to migrate) onto her property. The claims are: (1) recovery of response costs associated with the contaminated site under federal law, (2) citizen relief suit from permitting violations under the Resource Conservation and Recovery Act (RCRA) and the West Virginia Hazardous Waste Management Act (WVHWMA), (3) citizen relief for judicial abatement of an imminent and substantial endangerment under RCRA, (4) judicial abatement of a public nuisance under West Virginia law, (5) relief for a private nuisance, (6) negligence, and (7) strict liability. The court denied Company's motion regarding the first claim. The court found the claim "plausibly state[d] a claim to relief" because Plaintiff demonstrated Company's facility could be the source of contaminants. The court granted Company's motion regarding the second claim because the permitting violation was not applicable to past owners, like Company. The court denied Company's motion regarding the third claim. The court held Plaintiff's claim was sufficiently plausible because the contaminants found could cause harm. The court granted Company's motion regarding the fourth claim because the Plaintiff did not establish a plausible possibility that there was a general public endangerment to establish a public nuisance. The court denied Company's motion regarding the fifth claim because the Plaintiff plausibly alleged private nuisance by showing the contaminants interfered with use and enjoyment of her land and water. The court denied Company's motion regarding the sixth claim because the Plaintiff could establish the elements of negligence. The court granted Company's motion regarding the seventh claim because transportation of natural gas is not an abnormally dangerous activity.

Rocky Mountain Peace & Just. Ctr. v. U.S. Fish & Wildlife Serv., No. 18-cv-01017-PAB (D. Colo. July 9, 2021) (order on an appeal of administration actions).

The question presented was whether the Fish and Wildlife Service (FWS) "followed the proper procedural processes in approving limited modifications to the planned multi-use trail system." The court found that FWS did follow the proper procedure and entered judgment for FWS.

Plaintiffs claimed FWS violated the National Environmental Policy Act by failing to include a supplemental environmental impact statement (EIS) and "improperly [relied] on categorical exclusions rather than conducting an environmental assessment" in FWS's environmental action statement (EAS). Under 40 C.R.F. § 1502.9(c), an agency must prepare an EIS if there are substantial changes proposed relevant to environmental concerns, or if there is new information available that could affect the proposed plan's impact. Plaintiffs alleged the proposed modifications to existing trails and the creation of a new one-mile trail were substantial changes to the plan. The court found two of the trails did not need a supplemental EIS because they were not currently being modified and the new trail did not need a supplemental EIS because FWS did not arbitrarily or capriciously rely on a "finding of no significant impact." Plaintiffs also alleged that a recent flood and "new" plutonium levels were significant new information that required a supplemental EIS. The court found Plaintiffs did not submit enough evidence to support the contention that the flood did damage that would require a supplemental EIS. Further, the court found there was not a requirement to remeasure plutonium levels given that a recent previous determination found the levels were fine. Plaintiffs alleged that FWS should not have relied on categorical exclusions to streamline the implementation of the proposed plan because there were six "extraordinary circumstances" that apply. The court found FWS did not improperly rely on the categorical exclusions because FWS's decision that the no extraordinary circumstances applied was not arbitrary or capricious.

Dep't of Nat. Res. v. 5 Star Feedlot, Inc., 486 P.3d 250 (Colo. 2021).

During a once-in-a-half-century rainstorm, a feedlot company's ("Company") wastewater contamination ponds overflowed. The contaminated rain-wastewater overflow traveled several miles over land and into the South Fork of the Republic River, killing an estimated 15,000 fish. Pursuant to section 33-6-110(1), C.R.S. (2020), the State initiated a civil action to recover the value of the fish. The district court sided with the State, granted the State's motion for summary judgment, denied the Company's motion for summary judgment, and ordered the Company to pay $625,755.50 in damages. On appeal, the appellate court reversed, holding that the State failed to prove what the statute requires: that the Company "acted knowingly" or performed an "unlawful voluntary act". The appellate court held that the discharge made its way to the river by an act of God—the rainstorm—not a voluntary act. In a plurality opinion, the

Supreme Court of Colorado held that the State failed to prove the Company acted voluntarily, a requirement implied by the history and legislative structure regarding the meaning of "take" within the statute. The Supreme Court did not reach the issue of whether there is a scienter requirement within the statute. The Supreme Court affirmed the judgement of the appellate court and remanded with instructions to enter judgment against the State and in the Company's favor.

Jacques v. Comm'r of Energy and Env't Prot., 203 Conn. App. 419, A.3d 40 (2021).

Citizen sought an injunction to stop the government from a state park redevelopment. Government had the claim dismissed for lack of standing because of sovereign immunity. The Court affirms the trial courts holding that Citizen lacks standing because of sovereign immunity. There are three exceptions to sovereign immunity. First, when the legislature waives it. Second, when the plaintiff's constitutional rights have been violated. Third, when there is a substantial allegation of wrongful conduct. Here, the legislature did not waive sovereign immunity, the Court deals with the last two exceptions. The Court held that Citizen's constitutional rights were not violated. Citizen alleges they were because she was not allowed to speak at a hearing. The Court says this is not a constitutional right. Next, the wrongful conduct allegation. The wrongful conduct that citizen alleges is a procedural one. Citizen was not allowed to speak at a meeting and question the decision makers. Citizen cites a statute that gives her a right to speak at proceedings. The court rules that this meeting was not a proceeding. The Court defines proceedings as adversarial, that was not the case here. Also, even if there is a procedural violation, the procedural violation being alleged would have to reasonably lead to wrongful conduct. Here, it does not. The court dismissed the case for lack of standing.