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CLIMATE CHANGE

A court of appeals reluctantly concluded that plaintiffs' injuries were not redressable by an Article III court; it was beyond the power of an Article III court to order, design, supervise, or implement plaintiffs' requested remedial plan (p.119).

What Environmental and Real Estate Practitioners Need to Know About the Navigable Waters Protection Rule

Commentary by

Scott Birkey & Clark Morrison

On January 23, 2020, the White House announced adoption of its long-awaited redefinition of "waters of the United States," which are those wetlands, streams, lakes and other bodies of water that are protected by the federal Clean Water Act. Referred to as the "Navigable Waters Protection Rule,"¹ this new regulation will significantly restrict the role of the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) in regulating development and other activities that discharge fill or other pollutants into wetlands and other waters.

Why This Definition Is Important

Perhaps somewhat surprisingly, the Clean Water Act does not define the term, "waters of the United States." The definition of this term has been left to the two federal agencies responsible for implementing the Act, EPA and the Corps. The only guidance provided by the statute is that waters of the United States are "navigable" in one form or another.

These definitions are important because they define the scope of the federal government's authority over certain water features throughout the United States. Given the regulatory importance of the phrase "waters of the United States," the environmental community, the agricultural community and other stakeholders have been justifiably concerned since the inception of the Act as to how that phrase is defined and interpreted.

This definition is particularly important to the agricultural, real estate and other business sectors. From the perspective of the regulated community, landowners seeking to buy, build on, or farm property with wetlands or other water features must be careful. If their proposed activities would result in any impacts to those features – such as filling or working within the features – then the landowner may need a permit for that work from the

¹ The final rule has not yet been published in the *Federal Register*. It is currently available only in its pre-publication version. It can be accessed at https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepublication.pdf.

CONTENTS:

LEAD ARTICLE

What Environmental and Real Estate Practitioners Need to Know About the Navigable Waters Protection Rule 115

CLIMATE CHANGE

Plaintiffs Lacked Article III Standing To Pursue Their Constitutional Claims (*Juliana v. United States*) 119

CUMULATIVE SUBJECT INDEX 125

CUMULATIVE TABLE OF CASES 126

text continued from page 115

federal government under the Clean Water Act. Otherwise, he or she risks being in violation of the Act.

These risks are very real. In administrative enforcement actions, the EPA can issue compliance orders requiring a violator to stop any ongoing illegal discharge activity or to remove the illegal discharge and restore the site. EPA can also assess significant administrative civil penalties. In judicial enforcement actions, EPA and the Corps have the authority to take civil judicial enforcement actions, seeking restoration and other types of injunctive relief, as well as civil penalties. The agencies also have authority to bring criminal judicial enforcement actions for knowingly or negligently violating Section 404.

What is particularly troublesome about efforts to define the phrase “waters of the United States” is that the determination as to whether a feature on the ground – wet or not – actually constitutes a “water of the United States” is not always immediately obvious. A good example of this are topographical features called swales that may be normally dry throughout the year but collect water or convey flow during a significant rain event. Does this mean that grading or placing fill into that swale requires a permit? That answer turns on whether the swale is a “water of the United States.”

In the authors’ experience, many other such close-call examples are typical. These disputes typically boil down to how lines on a map are drawn, and these maps, or “delineations,” can be the jousting field for arguments as to which features are jurisdictional (therefore subject to federal regulation), and which features are not jurisdictional (therefore not subject to federal regulation).

The Evolution of a Phrase

This most recent effort to redefine “waters of the United States” is just another plot twist in the long-running saga over the scope of the federal government’s jurisdiction

over waters. Since the inception of the Clean Water Act permitting program in 1973, the definition of “waters of the United States” has been hotly contested. After some initial legal skirmishes, the federal government established a set of regulations in 1986 defining the definitional contours of “waters of the United States” that reflected an impasse rather than a resolution of the issue.

Much has been written on the evolution of the phrase “waters of the United States.” Instead of engaging in that exegesis here, the authors recommend that anyone interested in this history read the preamble to the redefinition rule in the Federal Register.

That said, there are certain milestones in this story that must be understood in order to put the new definition into context. Those milestones pertain to the evolution of the U.S. Supreme Court’s view as to what constitutes “waters of the United States.” The Court has issued three opinions on the scope of federal jurisdiction under the Clean Water Act:

- *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (holding that the federal government has the authority to regulate wetlands as waters of the United States based on their adjacency to a navigable water)
- *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (holding that the waters of the United States did not include non-navigable, isolated, and intrastate waters)
- *Rapanos v. United States*, 547 U.S. 715 (2006) (decision did not command a majority opinion; plurality decision found waters of the United States should constitute only relatively permanent, standing or continuously flowing bodies of water; opinion concurring in judgment relying on “significant nexus” concept)

Each of these decisions resulted in various responses from democratic and republican administrations. Of the three, the fractured *Rapanos* decision prompted perhaps the strongest administrative reaction. Because its decision in *Rapanos* did not result in a majority opinion, the Court did little to resolve the issue. In fact, in many ways, it only complicated things.

Rapanos staked out three different perspectives on the issue. The late Justice Scalia was the architect of the opinion that drew the most support from the court. Justice Scalia’s take on the meaning of the phrase “waters of the United States” was informed by an ordinary usage of words, and the word “waters” in particular. Justice Scalia turned to the dictionary, and based on the definitions he found there, he concluded that “waters of the United States” should be understood to mean relatively

permanent, standing or continuously flowing bodies of waters – such as streams, oceans, rivers, and lakes – or waters that abut those bodies of water.

Shortly after *Rapanos*, there were many attempts by the Legislature to provide a legislative fix to the problem, none of which was successful. Feeling pressure from both the regulated community and environmental organizations, the Obama administration attempted to settle the issue once and for all by redefining “waters of the United States” using a concept articulated by Justice Kennedy in *Rapanos* called “significant nexus” and creating certain bright-line rules as to the limits of jurisdictional waters. This effort resulted in the “Clean Water Rule” adopted by the Obama administration in 2015.

Without a doubt, the Clean Water Rule would have expanded the federal government’s Clean Water Act jurisdiction. In the wake of *Rapanos*, EPA and the Corps under the Obama administration claimed jurisdiction over just about any wetland, pond or swale in the landscape, based on the theory that those features have some significant ecological nexus to larger (i.e., navigable) bodies of water such as lakes, rivers or their tributaries, or territorial seas. Builders, industry, and others in the regulated community viewed this expansion as an impermissible overreach and strongly objected to the Clean Water Rule.

The impetus for this most recent attempt to redefine “waters of the United States” is the culmination of President Trump’s promise on the campaign trail in 2016 to dismantle the Obama administration’s Clean Water Rule. Shortly after his election, Trump issued an Executive Order that called for a rescission of the Clean Water Rule and a reevaluation of what should constitute “waters of the United States.” But the Executive Order went further. It specified that EPA and the Corps must reevaluate the meaning of “waters of the United States” consistent with Justice Scalia’s opinion in the *Rapanos* case, in other words, with an eye toward a common understanding of the meaning of “water.”

The New Definition

According to White House staff, the final rule defines “waters of the United States” based upon a “unifying legal theory” that asserts jurisdiction based over features that have an actual surface water connection with traditional navigable waters and territorial seas. This is clearly a reflection of the Justice Scalia approach mandated by President Trump’s Executive Order.

In summary, the new definition of “waters of the United States” rejects the broad theory of federal regulation rooted in the concept of “significant nexus.” Instead, the new rule relies on Justice Scalia’s concept of “relatively permanent, standing or continuously flowing bodies of water”

articulated in *Rapanos*. As such, the new rule will regulate wetlands or other features only if they actually abut a navigable waterway and will only regulate a stream if it flows perennially or intermittently. A drainage feature that

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flows only during a rain event will not be covered by the Clean Water Act. The new regulations establish a fairly comprehensive list of exemptions, including exemptions for sheet flow, groundwater, certain farmlands, most irrigation or drainage ditches, and various types of water treatment facilities. Although some of these exemptions existed prior to the new rule, in many cases they have been expanded or made more concrete.

More specifically, under the new rule, the Corps and EPA will assert jurisdiction over four basic categories of waters:

- Traditional navigable waters and territorial seas, i.e., those waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;
- Tributaries that have perennial or intermittent flow in a typical year;
- Lakes, ponds and impoundments of jurisdictional waters; and
- Adjacent wetlands.

“Adjacent wetlands,” a concept that has bedeviled courts, consultants, and counselors alike, is further defined as wetlands that (i) abut, meaning to touch at least at one point or side, of a jurisdictional water; (ii) are inundated by flooding from a jurisdictional water in a typical year; (iii) are physically separated from a jurisdictional water only by a natural berm, bank, dune, or similar natural feature; or (iv) are physically separated from a jurisdictional water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the jurisdictional water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature.

Perhaps not surprisingly, the new rule excludes from the agencies’ jurisdiction any water features not described above. It also contains specific exclusions for:

- Groundwater
- Ephemeral features that flow only in response to precipitation
- Diffuse stormwater and sheet flow
- Most ditches that are not constructed in jurisdictional wetlands
- Prior converted cropland
- Artificially irrigated areas that would revert to upland if irrigation ceases
- Artificial lakes and ponds, and construction and mining pits, constructed in upland or non-jurisdictional waters

- Stormwater control features constructed in upland to convey, treat, infiltrate or store stormwater runoff
- Groundwater, water reuse, wastewater recycling structures constructed in upland or non-jurisdictional waters
- Waste treatment systems

As with any new regulations, the devil is in the details. The new rule provides some of these details in a section that defines key terms in the regulation. For example, “upland,” “prior converted cropland,” and “waste treatment system” have now been defined in the hopes of providing more direction to the regulated community.

At this time, of course, we have no other guidance on how EPA and the Corps will implement the new rule. We anticipate that the agencies will provide regulatory guidance once the rule becomes effective, and as staff in the field begin to struggle with how these new terms and concepts will be applied.

Practical Effects of the New Definition

From the perspective of the environmental community, the new definition of “waters of the United States” is anathema because it will eliminate much-needed federal protection over many water features. That perspective is informed by data indicating that wetlands and other water features are disappearing at a fast and disconcerting rate. We anticipate that the definition will be challenged in court, as has happened with other efforts by the Trump administration to loosen environmental restrictions.

As for the regulated community, contrary to what one might expect, the overall effect of the new definition will not be positive for development, at least not in California. Soon after Trump issued his Executive Order telegraphing his intent to roll back jurisdiction under the Clean Water Act, California’s State Water Resources Control Board responded by kicking into high gear a new set of regulations to regulate all wetlands and other waters in California, including those waters that will lose their federal protection with the new definition.²

² The State Water Board’s new regulations are not codified or regulations in a technical sense. Instead, the Board refers to them as the *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State*. The Board often refers to them simply as “Procedures.” They can be accessed at https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/procedures_conformed.pdf. The Board adopted the Procedures pursuant to Resolution No. 2019-0015, which can be accessed at https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/rs2019_0015.pdf.

Making matters worse for the development community, the state's new regulations, which become effective in May 2020, are more rigorous than even those federal regulations that existed before the new definition was issued. Given that federal jurisdiction will still remain over certain types of waters notwithstanding the new definition, and that we now have a duplicative but more expansive program at the state level, the new federal rule has made it more complex to permit development projects in California. Although the State Water Board recently issued guidelines on the state's new regulations, there is likely to be a steep learning curve for the nine Regional Water Quality Control Boards tasked with implementing the new state regulations. This may affect both the timing and expense of any permit process.

Another perhaps less obvious implication of the new rule is that it may curtail the ability for developers to rely on Section 7 of the Endangered Species Act. Section 7 consultation is a form of incidental take authorization for projects that result in impacts to federally listed species and their habitat. The Section 7 process is relatively quick because the U.S. Fish and Wildlife Service must adhere to certain timing requirements established by regulations. In order to trigger the process, a project must have some kind of federal nexus.

For most development projects, that federal nexus is typically a permit, such as a Clean Water Act Section 404 permit for the fill or impacts to waters of the United States. In fact, a typical development project located on a property with both federally listed species and waters of the United States results in a Clean Water Act Section 404 permit coupled with a Section 7 "biological opinion" providing fill authorization and incidental take authorization, respectively.

In the absence of a federal nexus, development projects located on properties with listed species or their habitat must apply for a Section 10 incidental take permit, which is issued in connection with the preparation of a habitat conservation plan. Unlike the Section 7 consultation process, the Section 10 process has no regulatory timing restrictions or requirements. A typical Section 10 incidental take permit and habitat conservation plan process can take years to complete. The extra time and costs associated with this approach to incidental take approval under the Endangered Species Act alone may cause a project to die – or at least wither away – on the vine.

Final Thoughts

In announcing its final rule redefining "waters of the United States," the White House celebrated its deregulatory action as both furthering economic development and

establishing a proper balance between federal authority and the states' primary role in the regulation of land and water use. Politics aside, the administration's action undoubtedly will be litigated by environmental and other groups who view it as unjustified under the Clean Water Act. We can expect these groups to request the federal courts to stay the new rule until such time as its legality can be adjudicated. In this case, the definition of a phrase really is worth fighting over.

CLIMATE CHANGE

Cases

Plaintiffs Lacked Article III Standing to Pursue Their Constitutional Claims

Juliana v. United States

No. 18-36082, 9th Cir.

2020 U.S. App. LEXIS 1579

January 17, 2020

In an action brought by an environmental organization and individual plaintiffs against the federal government, plaintiffs claimed that the government has violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a "climate system capable of sustaining human life." The central issue before the court of appeals was whether, even assuming such a broad constitutional right exists, an Article III court could provide plaintiffs the redress they sought—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO₂." Reluctantly, the court concluded that such relief was beyond the court's constitutional power. Rather, the court stated that plaintiffs' case for redress must be presented to the political branches of government.

Facts and Procedure. Plaintiffs were twenty-one young citizens, an environmental organization, and a "representative of future generations." Their original complaint named as defendants the President, the United States, and federal agencies (collectively, "the government"). The operative complaint accused the government of continuing to "permit, authorize, and subsidize" fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to plaintiffs. Some plaintiffs claimed psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. The

complaint asserted violations of: (1) plaintiffs' substantive rights under the Due Process Clause of the Fifth Amendment; (2) plaintiffs' rights under the Fifth Amendment to equal protection of the law; (3) plaintiffs' rights under the Ninth Amendment; and (4) the public trust doctrine. Plaintiffs sought declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."

The district court denied the government's motion to dismiss, concluding that plaintiffs had standing to sue, raised justiciable questions, and stated a claim for infringement of a Fifth Amendment due process right to a "climate system capable of sustaining human life." The court defined that right as one to be free from catastrophic climate change that "will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem." The court also concluded that plaintiffs had stated a viable "danger-creation due process claim" arising from the government's failure to regulate third-party emissions. Finally, the district court held that plaintiffs had stated a public trust claim grounded in the Fifth and the Ninth Amendments.

The government unsuccessfully sought a writ of mandamus [*In re United States* (9th Cir. 2018) 884 F.3d 830]. Shortly thereafter, the Supreme Court denied the government's motion for a stay of proceedings [*United States v. U.S. Dist. Court for Dist. of Or.* (2018) 139 S. Ct. 1]. Although finding the stay request "premature," the Court noted that the "breadth of respondents' claims is striking . . . and the justiciability of those claims presents substantial grounds for difference of opinion."

The government then moved for summary judgment and judgment on the pleadings. The district court granted summary judgment on the Ninth Amendment claim, dismissed the President as a defendant, and dismissed the equal protection claim in part. But the district court otherwise denied the government's motions, again holding that plaintiffs had standing to sue and finding that they had presented sufficient evidence to survive summary judgment. The district court also rejected the government's argument that plaintiffs' exclusive remedy was under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*

The district court initially declined the government's request to certify those orders for interlocutory appeal. But, while considering a second mandamus petition from the government, the court of appeals invited the district court to revisit certification, noting the Supreme Court's justiciability concerns [*United States v. U.S. Dist. Court for the Dist. of Or.*, No. 18-73014; *see In re United States* (2018)

139 S. Ct. 452 (reiterating justiciability concerns in denying a subsequent stay application from the government)]. The district court then reluctantly certified the orders denying the motions for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed the proceedings, while "standing by its prior rulings . . . as well as its belief that this case would be better served by further factual development at trial" [*Juliana v. United States* (D. Or. Nov. 21, 2018) 2018 U.S. Dist. LEXIS 207366]. The court of appeals granted the government's petition for permission to appeal. The court reversed the district court's orders and remanded the case.

Expert Opinions. The court stated that plaintiffs had compiled an extensive record, which at this stage in the litigation the court took in the light most favorable to their claims [*see Plumhoff v. Rickard* (2014) 572 U.S. 765]. The record left little basis for denying that climate change is occurring at an increasingly rapid pace. It documented that since the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years. For hundreds of thousands of years, average carbon concentration fluctuated between 180 and 280 parts per million. Today, it is over 410 parts per million and climbing. Although carbon levels rose gradually after the last Ice Age, the most recent surge has occurred more than 100 times faster; half of that increase has come in the last forty years.

Copious expert evidence established that this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked. Temperatures have already risen 0.9 degrees Celsius above pre-industrial levels and may rise more than 6 degrees Celsius by the end of the century. The hottest years on record all fall within this decade, and each year since 1997 has been hotter than the previous average. This extreme heat is melting polar ice caps and may cause sea levels to rise 15 to 30 feet by 2100. The problem is approaching "the point of no return." Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.

The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions. As early as 1965, the Johnson Administration cautioned that fossil fuel emissions threatened significant changes to climate, global temperatures, sea levels, and other stratospheric properties. In 1983, an Environmental Protection Agency ("EPA") report projected an increase of 2 degrees Celsius by 2040, warning that a "wait and see" carbon emissions policy was extremely risky. And, in the 1990s, the EPA implored the government to act before it was too late. Nonetheless, by 2014, U.S. fossil fuel emissions had climbed to

5.4 billion metric tons, up substantially from 1965. This growth shows no signs of abating. From 2008 to 2017, domestic petroleum and natural gas production increased by nearly 60%, and the country is now expanding oil and gas extraction four times faster than any other nation.

The record also established that the government's contribution to climate change was not simply a result of inaction. The government affirmatively promoted fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.

APA. The government by and large had not disputed the factual premises of plaintiffs' claims. But it first argued that those claims must proceed, if at all, under the APA. The court rejected that argument. The court stated that plaintiffs did not claim that any individual agency action exceeded statutory authorization or, taken alone, was arbitrary and capricious [*see* 5 U.S.C. § 706(2)(A) and (C)]. Rather, they contended that the totality of various government actions contributed to the deprivation of constitutionally protected rights. Because the APA only allows challenges to discrete agency decisions [*see Lujan v. Nat'l Wildlife Fed'n* (1990) 497 U.S. 871] plaintiffs could not effectively pursue their constitutional claims—whatever their merits—under that statute.

Defendants argued that the APA's "comprehensive remedial scheme" for challenging the constitutionality of agency actions implicitly barred plaintiffs' freestanding constitutional claims. But, the court stated that even if some constitutional challenges to agency action must proceed through the APA, forcing all constitutional claims to follow its strictures would bar plaintiffs from challenging violations of constitutional rights in the absence of a discrete agency action that caused the violation [*see Sierra Club v. Trump* (9th Cir. 2019) 929 F.3d 670 (stating that plaintiffs could "bring their challenge through an equitable action to enjoin unconstitutional official conduct, or under the judicial review provisions of the [APA]"); *Navajo Nation v. Dep't of the Interior* (9th Cir. 2017) 876 F.3d 1144 (holding "that the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's 'final agency action' limitation applies only to APA claims")]. The court stated that because denying "any judicial forum for a colorable constitutional claim" presents a "serious constitutional question," Congress's intent through a statute to do so must be clear [*see Webster v. Doe* (1988) 486 U.S. 592, quoting *Bowen v. Mich. Acad. of Family Physicians* (1986) 476 U.S. 667; *see also Allen v. Milas* (9th Cir. 2018) 896 F.3d 1094 ("after *Webster*, we have assumed that the courts will be open to review of constitutional claims, even if

they are closed to other claims")]. The court stated that nothing in the APA evinces such an intent. Whatever the merits of plaintiffs' claims, they may proceed independently of the review procedures mandated by the APA [*see Sierra Club, above* ("any constitutional challenge that Plaintiffs may advance under the APA would exist regardless of whether they could also assert an APA claim . . . Claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA"; *Navajo Nation, above* (explaining that certain constitutional challenges to agency action are "not grounded in the APA")].

Plaintiffs Lacked Article III Standing. The government also argued that plaintiffs lacked Article III standing to pursue their constitutional claims. To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision [*see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* (2000) 528 U.S. 167; *Jewel v. NSA* (9th Cir. 2011) 673 F.3d 902]. A plaintiff need only establish a genuine dispute as to these requirements to survive summary judgment [*see Cent. Delta Water Agency v. United States* (9th Cir. 2002) 306 F.3d 938].

The court stated that the district court correctly found the injury requirement met. At least some plaintiffs claimed concrete and particularized injuries. Jaime B., for example, claimed that she was forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation [*see Trump v. Hawaii* (2018) 138 S. Ct. 2392 (finding separation from relatives to be a concrete injury)]. Levi D. had to evacuate his coastal home multiple times because of flooding [*see Maya v. Centex Corp.* (9th Cir. 2011) 658 F.3d 1060 (finding diminution in home property value to be a concrete injury)]. The court stated that these injuries are not simply "'conjectural' or 'hypothetical;'" some of the plaintiffs had presented evidence that climate change was affecting them now in concrete ways and would continue to do so unless checked [*Lujan v. Defs. of Wildlife* (1992) 504 U.S. 555, quoting *Whitmore v. Arkansas* (1990) 495 U.S. 149; *cf. Ctr. for Biological Diversity v. U.S. Dep't of Interior* (D.C. Cir. 2009) 563 F.3d 466 (finding no standing because plaintiffs could "only aver that any significant adverse effects of climate change 'may' occur at some point in the future")].

The government argued that plaintiffs' alleged injuries were not particularized because climate change affects everyone. But, "it does not matter how many persons have been injured" if plaintiffs' injuries are "concrete and personal" [*Massachusetts v. EPA* (2007) 549 U.S. 497, quoting *Lujan, above*; *see also Novak v. United States*

(9th Cir. 2015) 795 F.3d 1012 (“the fact that a harm is widely shared does not necessarily render it a generalized grievance”) quoting *Jewel, above*]. And, the Article III injury requirement is met if only one plaintiff has suffered concrete harm [see *Hawaii, above*; *Town of Chester, N.Y. v. Laroe Estates, Inc.* (2017) 137 S. Ct. 1645 (“at least one plaintiff must have standing to seek each form of relief requested in the complaint . . . For all relief sought, there must be a litigant with standing”)]].

The court stated that district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment. Causation can be established “even if there are multiple links in the chain” [*Mendia v. Garcia* (9th Cir. 2014) 768 F.3d 1009] as long as the chain is not “hypothetical or tenuous” [*Maya*, 658 F.3d at 1070 (quoting *Nat’l Audubon Soc’y, Inc. v. Davis* (9th Cir. 2002) 307 F.3d 835 *amended on denial of reh’g*, (9th Cir. 2002) 312 F.3d 416)]. The court stated that the causal chain here was sufficiently established. Plaintiffs’ alleged injuries were caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15% [see *Massachusetts, above* (finding that emissions amounting to about 6% of the worldwide total showed cause of alleged injury “by any standard”)]. And, plaintiffs’ evidence showed that federal subsidies and leases had increased those emissions. About 25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government [see 30 U.S.C. §§ 181-196 (establishing legal framework governing the disposition of fossil fuels on federal land), § 201 (authorizing the Secretary of the Interior to lease land for coal mining)].

Substantial Factor. Relying on *Washington Environmental Council v. Bellon* [(9th Cir. 2013) 732 F.3d 1131] the government argued that the causal chain was too attenuated because it depends in part on the independent actions of third parties. *Bellon* held that the causal chain between local agencies’ failure to regulate five oil refineries and plaintiffs’ climate-change related injuries was “too tenuous to support standing” because the refineries had a “scientifically indiscernible” impact on climate change. But the court stated that plaintiffs here did not contend that their injuries were caused by a few isolated agency decisions. Rather, they blamed a host of federal policies, from subsidies to drilling permits, spanning “over 50 years,” and direct actions by the government. There was at least a genuine factual dispute as to whether those policies were a “substantial factor” in causing plaintiffs’ injuries [*Mendia, above*, quoting *Tozzi v. U.S. Dep’t of Health & Human Servs.* (D.C. Cir. 2001) 271 F.3d 301].

The more difficult question was whether plaintiffs’ claimed injuries were redressable by an Article III court. In analyzing that question, the court started by stressing what plaintiffs did and did not assert. The court stated that they did not claim that the government had violated a statute or a regulation. They did not assert the denial of a procedural right. Nor did they seek damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Rather, their sole claim was that the government had deprived them of a substantive constitutional right to a “climate system capable of sustaining human life,” and they sought remedial declaratory and injunctive relief.

The court stated that reasonable jurists could disagree about whether the asserted constitutional right exists [*Compare Clean Air Council v. United States* (E.D. Pa. 2019) 362 F. Supp. 3d 237 (finding no constitutional right), with *Juliana, above*; see also *In re United States, above* (reiterating “that the ‘striking’ breadth of plaintiffs’ below claims ‘presents substantial grounds for difference of opinion’”)]. In analyzing redressability, however, the court assumes its existence [see *M.S. v. Brown* (9th Cir. 2018) 902 F.3d 1076]. But the court stated that “not all meritorious legal claims are redressable in federal court.” To establish Article III redressability, plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court’s power to award. *Id.* Redress need not be guaranteed, but it must be more than “merely speculative” [quoting *Lujan, above*].

Plaintiffs first sought a declaration that the government is violating the Constitution. But the court stated that relief alone was not substantially likely to mitigate plaintiffs’ asserted concrete injuries. A declaration, although undoubtedly likely to benefit plaintiffs psychologically, was unlikely by itself to remediate their alleged injuries absent further court action [see *Clean Air Council, above*; *Steel Co. v. Citizens for a Better Env’t* (1998) 523 U.S. 83 (“by the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation’s laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury”); see also *Friends of the Earth, above* (“A plaintiff must demonstrate standing separately for each form of relief sought”)].

The court stated that the crux of plaintiffs’ requested remedy was an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. Plaintiffs thus sought not only to enjoin the Executive from exercising

discretionary authority expressly granted by Congress [*see, e.g.*, 30 U.S.C. § 201 (authorizing the Secretary of the Interior to lease land for coal mining)] but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands [*see* U.S. Const. art. IV, § 3, cl. 2 (“the Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”)]].

The court noted that although plaintiffs contended at oral argument that they challenged only affirmative activities by the government, an order simply enjoining those activities would not, according to their own experts’ opinions, suffice to stop catastrophic climate change or even ameliorate their injuries. Plaintiffs’ experts opined that the federal government’s leases and subsidies had contributed to global carbon emissions. But they did not show that even the total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth. Nor did any expert contend that elimination of the challenged pro-carbon fuels programs would by itself prevent further injury to plaintiffs. Rather, the record showed that many of the emissions causing climate change happened decades ago or came from foreign and non-governmental sources.

Plaintiffs’ experts made plain that reducing the global consequences of climate change demands much more than cessation of the government’s promotion of fossil fuels. Rather, these experts opined that such a result calls for no less than a fundamental transformation of this country’s energy system, if not that of the industrialized world. One expert opined that atmospheric carbon reductions must come “largely via reforestation,” and include rapid and immediate decreases in emissions from many sources. “Leisurely reductions of one of two percent per year,” he explains, “will not suffice.” Another expert had opined that although the required emissions reductions are “technically feasible,” they can be achieved only through a comprehensive plan for “nearly complete decarbonization” that includes both an “unprecedentedly rapid build out” of renewable energy and a “sustained commitment to infrastructure transformation over decades.” And, that commitment, another expert emphasized, must include everything from energy efficient lighting to improved public transportation to hydrogen-powered aircraft.

Plaintiffs conceded that their requested relief would not alone solve global climate change, but they asserted that their “injuries would be to some extent ameliorated.” Relying on *Massachusetts v. EPA*, the district court apparently found the redressability requirement satisfied because the requested relief would likely slow or reduce emissions. The court stated that case, however, involved a procedural

right that the State of Massachusetts was allowed to assert “without meeting all the normal standards for redressability;” in that context, the Court found redressability because “there [was] some possibility that the requested relief [would] prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant” [quoting *Lujan, above*]. Plaintiffs here did not assert a procedural right, but rather a substantive due process claim.

The court was therefore skeptical that the first redressability prong was satisfied. But even assuming that it was, plaintiffs did not surmount the remaining hurdle—establishing that the specific relief they sought was within the power of an Article III court. The court stated that there is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement plaintiffs’ requested remedial plan. As the opinions of their experts made plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches [*see Brown, above* (finding plaintiff’s requested declaration requiring the government to issue driver cards “incompatible with democratic principles embedded in the structure of the Constitution”)]]. These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of “competing social, political, and economic forces,” which must be made by the People’s “elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country” [*Collins v. City of Harker Heights* (1992) 503 U.S. 115; *see Lujan, above* (“separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts”)]].

Plaintiffs argued that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best “phase out fossil fuel emissions and draw down excess atmospheric CO₂.” To be sure, in some circumstances, courts may order broad injunctive relief while leaving the “details of implementation” to the government’s discretion [*Brown v. Plata* (2011) 563 U.S. 493]. But, the court stated that even under such a scenario, plaintiffs’ request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government’s response to the order, which necessarily would entail a broad range of policy-making. And inevitably, this kind of plan will demand action not only by the Executive, but also by Congress.

Absent court intervention, the political branches might conclude—however inappropriately in plaintiffs’ view—that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate change than plaintiffs believe is necessary. “But we cannot substitute our own assessment for the Executive’s [or Legislature’s] predictive judgments on such matters, all of which ‘are delicate, complex, and involve large elements of prophecy’” [*Hawaii, above*, quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.* (1948) 333 U.S. 103]. And, given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government’s compliance with any suggested plan for many decades [*see Nat. Res. Def. Council, Inc. v. EPA* (9th Cir. 1992) 966 F.2d 1292 (“injunctive relief could involve extraordinary supervision by this court . . . [and] may be inappropriate where it requires constant supervision”)].

The court noted as the U.S. Supreme Court explained, “a constitutional directive or legal standards” must guide the courts’ exercise of equitable power [*Rucho v. Common Cause* (2019) 139 S. Ct. 2484]. *Rucho* found partisan gerrymandering claims presented political questions beyond the reach of Article III courts. The Court did not deny extreme partisan gerrymandering can violate the Constitution. But, it concluded that there was no “limited and precise” standard discernible in the Constitution for redressing the asserted violation. The Court rejected plaintiffs’ proposed standard because unlike the one-person, one-vote rule in vote dilution cases, it was not “relatively easy to administer as a matter of math.”

Rucho reaffirmed that redressability questions implicate the separation of powers, noting that federal courts “have no commission to allocate political power and influence” without standards to guide in the exercise of such authority. Absent those standards, federal judicial power could be “unlimited in scope and duration,” and would inject “the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role” [*see also Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (noting the “separation-of-powers principles underlying” standing doctrine); *Brown, above* (stating that “in the context of Article III standing, . . . federal courts must respect their ‘proper—and properly limited—role . . . in a democratic society,’” quoting *Gill v. Whitford* (2018) 138 S. Ct. 1916)]. Because “it is axiomatic that ‘the Constitution contemplates that democracy is the appropriate process for change’” [*Brown, above*, quoting *Obergefell v. Hodges* (2015) 135 S. Ct. 2584] some questions—even those existential in nature—are the province of the political branches. The Court found in *Rucho* that a proposed standard involving a mathematical comparison to a baseline election map

is too difficult for the judiciary to manage. The court stated that it was impossible to reach a different conclusion here.

Plaintiffs’ experts opined that atmospheric carbon levels of 350 parts per million are necessary to stabilize the global climate. But, the court stated that even accepting those opinions as valid, they did not suggest how an order from this court could achieve that level, other than by ordering the government to develop a plan. The court stated that although plaintiffs’ invitation to get the ball rolling by simply ordering the promulgation of a plan was beguiling, it ignored that an Article III court would thereafter be required to determine whether the plan was sufficient to remediate the claimed constitutional violation of plaintiffs’ right to a “climate system capable of sustaining human life.” The court doubted that any such plan could be supervised or enforced by an Article III court. And, in the end, any plan was only as good as the court’s power to enforce it.

The court stated that dissenting judge correctly noted the gravity of plaintiffs’ evidence; the court differed only as to whether an Article III court could provide their requested redress. In suggesting that the court could, the dissent reframed plaintiffs’ claimed constitutional right variously as an entitlement to “the country’s perpetuity,” or as one to freedom from “the amount of fossil-fuel emissions that will irreparably devastate our Nation.” But the court stated that if such broad constitutional rights exist, the court had doubts that plaintiffs would have Article III standing to enforce them. The court stated that their alleged individual injuries did not flow from a violation of these claimed rights. Any injury from the dissolution of the Republic would be felt by all citizens equally, and thus would not constitute the kind of discrete and particularized injury necessary for Article III standing [*see Friends of the Earth, above*]. A suit for a violation of these reframed rights, like one for a violation of the Guarantee Clause, would also plainly be nonjusticiable [*see, e.g., Rucho, above* (“this Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim,” citing *Pac. States Tel. & Tel. Co. v. Oregon* (1912) 223 U.S. 118; *Luther v. Borden* (1849) 48 U.S. 1)].

Further, the court stated that the dissent offered no metrics for judicial determination of the level of climate change that would cause “the willful dissolution of the Republic,” nor for measuring a constitutionally acceptable “perceptible reduction in the advance of climate change.” Contrary to the dissent, the court could not find Article III redressability requirements satisfied simply because a court order might “postpone the day when remedial measures become insufficiently effective” [*see Brown, above* (“if, however, a favorable judicial decision would

not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability"). As the dissent recognized, a guarantee against government conduct that might threaten the union—whether from political gerrymandering, nuclear proliferation, Executive misconduct, or climate change—has traditionally been viewed by Article III courts as “not separately enforceable.” Nor has the Supreme Court recognized “the perpetuity principle” as a basis for interjecting the judicial branch into the policy-making purview of the political branches.

Contrary to the dissent, the court did not “throw up [our] hands” by concluding that plaintiffs' claims were nonjusticiable. Rather, the court recognized that “Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges” [*Stern v. Marshall* (2011) 564 U.S. 462]. The court stated that not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges. As Judge Cardozo once aptly warned, a judicial commission does not confer the power of “a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness;” rather, we are bound “to exercise a discretion informed by tradition, methodized by analogy, disciplined by system” [Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921)].

The court stated that the dissent correctly noted that the political branches of government have to date been largely deaf to the pleas of plaintiffs and other similarly situated individuals. But, the court stated that although inaction by the Executive and Congress may affect the form of judicial relief ordered when there is Article III standing, it cannot bring otherwise nonjusticiable claims within the province of federal courts [see *Rucho*, above; *Gill*, above (“failure of political will does not justify unconstitutional remedies.” . . . Our power as judges . . . rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right,” quoting *Clinton v. City of New York* (1998) 524 U.S. 417; *Brown*, above (“the absence of a law, however, has never been held to constitute a ‘substantive result’ subject to judicial review”)]].

The court stated that plaintiffs had made a compelling case that action was needed; it would be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that the court's elected officials have a moral responsibility to seek solutions. The court did not dispute that the broad judicial relief plaintiffs sought could well goad the political branches into action. However, the court reluctantly concluded that

plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

Dissenting Opinion. District Judge Staton dissented, and affirmed the district court's judgment. Judge Staton stated that plaintiffs brought suit to enforce the most basic structural principal embedded in the system of liberty: that the Constitution does not condone the Nation's willful destruction. She held that plaintiffs had standing to challenge the government's conduct, had articulated claims under the Constitution, and had presented sufficient evidence to press those claims at trial.

♦ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 10.03 (Administrative Law Issues—Creation and Power of Agencies).

CUMULATIVE SUBJECT INDEX

The following is an index of the subject matter covered in the CALIFORNIA ENVIRONMENTAL LAW REPORTER for the current volume (January 2020 forward). This table directs the reader to the page on which each subject discussion begins.

Vol.:Page

CALIFORNIA ENVIRONMENTAL QUALITY ACT

California Environmental Quality Act—EIR—lead agency did not adequately analyse proposed additional mitigation measures	20:70
California Environmental Quality Act—infill development—consistency with general plan and community plan—project was exempt	20:77
General Plan—valid local legislation	20:61

CLIMATE CHANGE

Building resilience standards	20:1
Constitutional rights—lacked Article III standing—failed to show relief sought substantially likely to redress injuries	20:119

CONTROLS ON NOISE

City Ordinance—Permission to use—sound amplifying devices—prior restrain chilling free speech rights	20:105
---	--------

HAZARDOUS WASTE AND TOXIC SUBSTANCE CONTROL

Explosion—Investigation by Board—Causes and effects	20:83
Porter-Cologne Water Quality Control Act—cleanup order—prior owner—knowledge of risk of discharge	20:13

LAND USE AND ENVIRONMENTAL PLANNING

Attorneys' Fees—denial of plaintiff's fee motion was an abuse of discretion	20:86
---	-------

Mitigation Fee Act—refund of unexpended funds—subject to one-year limitations period	20:30
Navigable Waters Protection Rule	20:115
Oil and gas permitting ordinance—promoted cooperation between owners of mineral rights and owners of surface rights—legitimate government purpose	20:34

LEGISLATION

2020 Environmental Legislative Update	20:45
---	-------

WATER QUALITY CONTROL

Issuance of Cleanup and abatement order—Circumstantial Evidence—Pipelines as source of contamination	20:5
--	------

CUMULATIVE TABLE OF CASES

The following is a table of cases discussed in the CALIFORNIA ENVIRONMENTAL LAW REPORTER for the current volume (January 2020 forward). This table directs the reader to the page on which each case discussion begins. Citations to the Official Reports will be included as they become available.

Vol.:Page

Beames v. City of Visalia (2019) 2019 Cal. App. LEXIS 1280	20:86
Citizens for Positive Growth & Preservation v. City of Sacramento (2019) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2019 Cal. App. LEXIS 1274	20:61

County of El Dorado v. Superior Court (2019) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2019 Cal. App. LEXIS 1205	20:30
---	-------

Covington v. Great Basin Unified Air Pollution Control Dist. (2019) 2019 Cal. App. LEXIS 1288	20:70
--	-------

Cuviello v. City of Vallejo (2019) — F.3d —, 2019 U.S. App. LEXIS 36504	20:105
--	--------

Juliana v. United States (2020) — F.3d —, 2020 U.S. App. LEXIS 1579	20:119
--	--------

Tesoro Refining & Marketing Co. LLC v. Los Angeles Regional Water Quality Control Bd. (2019) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2019 Cal. App. LEXIS 1169	20:5
---	------

United Artists Theatre Circuit, Inc. v. Regional Water Quality Control Bd., San Francisco Region (2019) 2019 Cal. App. LEXIS 1198	20:13
--	-------

United States v. Exxon Mobil Corp. (2019) 943 F.3d 1283—2019 U.S. App. LEXIS 36375	20:83
---	-------

Vaquero Energy, Inc. v. County of Kern (2019) 2019 Cal. App. LEXIS 1148	20:34
--	-------