RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

EME Homer City Generation, L.P. v. EPA, 795 F.3d 118 (D.C. Cir. 2015)

The United States Court of Appeals for the District of Columbia Circuit recently considered challenges made to the Environmental Protection Agency's (EPA) emissions budget that was promulgated under the agency's Transport Rule. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 124 (D.C. Cir. 2014). The court held that (1) the 2014 sulfur dioxide (SO_2) emissions budgets for Texas, Alabama, Georgia, and South Carolina were invalid; (2) the 2014 nitrogen oxides (NO_x) emissions budgets for Florida, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia were invalid; and (3) the EPA had authority to promulgate the Federal Implementation Plans (FIPs). *Id.* at 129-30, 133. The invalidated budgets were remanded to the EPA for reconsideration. *Id.* at 132.

A. Background

1. Legal Background

The EPA, under the Clean Air Act (CAA), established the National Ambient Air Quality Standards (NAAQS). These standards limit the level of common pollutants in ambient air. 42 U.S.C. § 7409(a) (2012). To achieve the prescribed levels, the EPA identifies areas that have not attained the prescribed NAAQS. *EME Homer City*, 795 F.3d at 124 (citing 42 U.S.C. § 7407(d)). Then the states develop a plan to bring the area into compliance with the NAAQS. Certain areas were not compliant with NAAQS because they were downwind from states emitting pollution. In an attempt to fix this problem, the EPA passed the Transport Rule under the CAA's Good Neighbor provision. *Id.* at 125; 42 U.S.C. § 7410(a)(2)(D). The Transport Rule regulates states' emissions of SO_2 and NO_x through a two-step process. First, it identified the states that attributed to nonattainment in other states. *EME Homer City*, 795 F.3d at 125 (citing *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1596 (2014)). Second, the EPA imposed uniform emissions thresholds, which were established by determining the cost of eliminating pollution from each upwind state. The states brought as-applied challenges to the budgets that the EPA set. *Id.* at 126 (citing *EME Homer*, 134 S. Ct. at 1596).

2. Procedural Background

This case was remanded to the D.C. Circuit from the United States Supreme Court. In an earlier decision, the D.C. Circuit vacated the Transport Rule because the rule "led to over-control" of certain states' emissions. *Id.* at 123. The Supreme Court reversed the decision and stated that the overcontrolled states could bring "particularized, as-applied challenge[s]" to the EPA's regulation. *Id.* at 124 (quoting *EME Homer*, 134 S. Ct. at 1609 (alteration in original)).

B. Court's Decision

The court evaluated the states' claims against the SO_2 budgets, NO_x budgets, and finally against the Transport Rule as a whole. *Id.* at 128-37. The court kept in mind the Supreme Court's instructions when considering the validity of the budgets. *Id.* at 128-36. The court provided substantial guidance to the EPA for formulating new budgets. *See id.* at 130-31 (citing Cross-State Air Pollution Rule, 76 Fed. Reg.

48,208, 48,251 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97).

First, the court invalidated the SO_2 budgets because they required certain states to reduce emissions by more than necessary. *Id.* at 129 (quoting *EME Homer*, 134 S. Ct. at 1608). Next, the court invalidated the NO_x emissions budgets for similar reasons. *Id.* at 130. The court held that the EPA did not need to apply uniform cost thresholds. *Id.* at 131. Furthermore, the court noted that the EPA should not regulate one state more heavily than another for the same transgression.

After invalidating the budgets, the court considered whether the EPA had the power to promulgate the Transport Rule FIPs. *Id.* at 132-33 (quoting Cross-State Air Pollution Rule, 76 Fed. Reg. at 48,220). The court found that the EPA did have the power to promulgate the FIPs. The court utilized the D.C. Circuit's decision from *North Carolina v. EPA*, where the court held that the Clean Air Interstate Rule was invalid and instructed the EPA to build the rule from the ground up. *Id.* at 134 (quoting 550 F.3d 1176, 1178 (D.C. Cir. 2008)). The states contended that the court should invalidate the rule instead of just having the budgets vacated.

The court then determined the proper remedy for the overreaching budgets. The states contended that the methodology behind calculating the budgets was flawed to the point where it needed to be completely rebuilt. *See id.* at 135. The EPA argued that the budgets did not need to be vacated and that the Transport Rule did not require invalidation. The D.C. Circuit agreed with the EPA and did not invalidate the rule, but held that the budgets needed to be recalculated. *Id.* at 132.

C. Analysis

This decision was a major victory for the EPA. Previous considerations in the D.C. Circuit have ended up with several rules of the EPA being invalidated or with the EPA being sent back to the drawing board. *See* North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008). Here, the court upheld a rule that could go a long way in bringing about compliance with the NAAQS. Moreover, the D.C. Circuit, declaring that the EPA had the power to promulgate the Transport Rule FIPs, paved a path for other similar regulations of emissions.

While this was a major win for the EPA, it was equally a difficult loss for the energy companies that do business in the states that are being heavily regulated. While the EPA cannot overregulate emissions, it still can heavily regulate them, and now it does not have to be done in a uniform manner. This rule will make it more difficult for energy

companies that own and operate power plants that regularly emit SO_2 and NO_x. Likely, the companies will pass off the increased cost that occurs due to the emissions budgets to their customers. Furthermore, it is likely that the states will place their own increased regulations onto these power plants.

D. Conclusion

In conclusion, the D.C. Circuit vacated and remanded several emissions budgets back to the EPA for reconsideration. Additionally, it held that the EPA has the power to promulgate the Transport Rule FIPs. This holding provided the EPA a major victory. Conversely, the power plants that produce the greatest amount of emissions in the regulated states suffered a defeat. This decision will likely empower the EPA to promulgate similar regulations.

Scott Ferrier

EPA Proposes New Regulations To Curb Methane Emissions from the Oil and Gas Industry

Over the next ten years, the Obama Administration plans to reduce methane emissions from oil and gas exploration by at least 40% from 2012 levels. *See* Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, 80 Fed. Reg. 56,593, 56,599 (Sept. 18, 2015) (to be codified at 40 C.F.R. pt. 60). To meet that goal, the United States Environmental Protection Agency (EPA) plans to impose new regulatory standards on oil and gas production equipment and hydraulically fractured oil and gas wells. *Id.* at 56,600. The standards are intended to maximize the environmental benefits of the U.S. power sector's increasing reliance on natural gas for electricity production.

A. Background

Unconventional drilling technology has allowed the United States to tap into large and inexpensive oil and natural gas reserves. Russell Gold, *Rise in U.S. Gas Production Fuels Unexpected Plunge in Emissions*, WALL ST. J. (Apr. 18, 2013), http://www.wsj.com/articles/SB10001424127887324763404578430751849503848. As a result, the share of electricity produced from burning natural gas increased from 19% in 2005 to 30% in 2012. Over the same period, carbon dioxide emissions fell to their

lowest level since 1994, partially because using natural gas to produce electricity emits half the carbon dioxide emitted by coal.

If the methane emitted from natural gas production exceeds a certain floor, however, natural gas's advantage as a relatively clean source of energy erodes. *See* Patterson Clark, *Unexpected Loose Gas from Fracking*, WASH. POST (Apr. 14, 2014), https://www.washingtonpost.com/apps/g/page/national/unexpected-loose-gas-from-fracking/950/. Methane is more than twenty-five times as potent as carbon dioxide, so even small amounts can have an enormous impact on the climate. *See Proposed Climate, Air Quality and Permitting Rules for the Oil and Natural Gas Industry: Fact Sheet*, EPA (2015), http://www3.epa.gov/airquality/oilandgas/pdfs/og_fs_081815.pdf. Currently, about 30% of methane emissions come from the oil and natural gas industry. As the domestic energy sector continues to grow, controlling methane emissions from production activities will become increasingly important.

Methane emissions result from hydraulic fracturing during both well formation and operation. During formation, large volumes of water are pressurized and forced into rock to create fractures from which natural gas can be extracted. Robert W. Howarth, Renee Santoro & Anthony Ingraffea, *Methane and the Greenhouse-Gas Footprint of Natural Gas from Shale Formations*, SPRINGER LINK (Nov. 12, 2010), http://link.springer.com/article/10.1007%2Fs10584-011-0061-5. A significant amount of the water returns to the surface, carrying methane. This fluid is referred to as "flow-back." Methane emissions from hydraulically fractured wells exceed conventional well emissions, because conventional wells have no such flow-back. *Id.* at 5.

During operation, fugitive methane emissions continue to flow from equipment leaks. The typical well "has 55 to 150 connections to equipment such as heaters, meters, dehydrators, compressors, and vapor-recovery apparatus." Leaks result from loose pipes, storage containers, open valves, and outdated equipment. Roger Real Drouin, *On Fracking Front, a Push To Reduce Leaks of Methane*, YALE ENV'T 360 (Apr. 7, 2014), http://e360.Yale.edu/feature/on_fracking_front_a_push_to_reduce_leaks_of_methane/2754/I.

Research indicates that the EPA may underestimate methane emissions from hydraulically fractured wells. Mark Golden, *America's Natural Gas System Is Leaky and in Need of a Fix, New Study Finds*, STANFORD NEWS (Feb. 13, 2014), http://news.stanford.edu/news/2014/february/methane-leaky-gas-021314.html. Most emissions, though, are thought to result from a small number of leaks, which makes the task of emissions reduction more manageable for the oil and gas industry.

B. The EPA's Proposal

The EPA's proposed standard targets emissions from specific types of equipment, the well formation process, and leaks that occur during well operation. The specific types of equipment covered by the regulation include centrifugal compressors, reciprocating compressors, pneumatic controllers, and pneumatic pumps. Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, 80 Fed. Reg. 56,593, 56,610 (Sept. 13, 2015) (to be codified at 40 C.F.R. pt. 60). Centrifugal compressors are used to move natural gas through pipelines. *Id.* at 56,618. The standard would require a cover and closed vent system to capture and reroute emissions released by the compressors. *Id.* at 56,610. For reciprocating compressors, owners and operators would have to change the rod packing either every thirty-six months or after 26,000 hours of operation. Rod packing provides "a tight seal around the piston rod, preventing the high pressure gas in the compressor cylinder from leaking, while allowing the rod to move freely." *Id.* at 56,620. Finally, the standard would require a switch from high-bleed pneumatic controllers to low-bleed controllers and control devices for pneumatic pumps. *Id.* at 56,610.

During well formation, EPA proposes to reduce emissions from water flow-back by requiring a combination of reduced emissions completions (RECs) and combustion to minimize emissions. *Id.* at 56,628. RECs separate "flowback water, sand, hydrocarbon condensate and natural gas to reduce the portion of natural gas and [volatile organic compounds] vented to the atmosphere, while maximizing recovery of salable natural gas and condensate." EPA estimates this process alone will provide "90 percent control of emissions." It will also allow some natural gas to be recaptured. *Id.* at 56,629. The combined effect of RECs and combustion will provide total emissions controls of 95%.

The EPA proposes to limit fugitive emissions during well operation by requiring leak detection and repair. *Id.* at 56,611. Well-site operators would be required to conduct an initial survey of components like "valves, connectors, open-ended lines, pressure relief devices, closed vent systems and thief hatches on tanks" using optical gas imaging (OGI). *Id.* at 56,612. After the initial survey, monitoring would be required twice a year. Any detected emissions would have to be repaired within fifteen days. The standard would require monitoring surveys semiannually, but high-performing wells will only be required to undergo monitoring once a year. Poor-performing wells, on the other hand, must comply with a quarterly monitoring requirement. The proposed standard

would also apply these monitoring requirements to natural gas compressor stations. *Id.* at 56,613.

The proposal would exclude wells with "no ancillary equipment such as storage vessels, closed vent systems, control devices, compressors, separators and pneumatic controllers." *Id.* at 56,611. The proposal would also exclude low-production well sites.

Capturing fugitive emissions from oil and gas operations has become an important priority for the EPA, which is in the process of finalizing a separate regulatory standard that will require fenceline emissions monitoring at petroleum refineries. *See generally* Ralph Smith, Comment, *Detect Them Before They Get Away: Fenceline Monitoring's Potential To Improve Fugitive Emissions Management*, 28 TUL. ENVTL. L.J. 433 (2015). The EPA estimates that its new standard for hydraulic fracturing related oil and gas production will eliminate 340,000 to 400,000 tons of methane emissions by 2025. *Oil and Natural Gas Sector: Emission Standards for New and Modified Sources*, 80 Fed. Reg. at 56,653. That is the equivalent of 7.7 million to 9 million metric tons of carbon dioxide. *Id.* at 56,654. The total capital cost in 2025 will be an estimated $280 to $330 million, and the total annualized engineering cost will be $370 to $500 million. *Id.* at 56,653. However, when the benefit of recovered natural gas is included, annual operating cost will fall to between $320 and $420 million.

C. Analysis

Methane's potency as a greenhouse gas makes it an understandable target of regulatory scrutiny and an important issue in environmental policy. Still, assessing the appropriateness of additional regulation requires consideration of other, nonregulatory factors that may reduce methane emissions. From 2007 until 2013, even as natural gas production has increased, methane emissions resulting from natural gas production have declined. EPA, EPA 430-R-15-004, Inventory of Greenhouse Gas Emissions and Sinks: 1990-2013, at ES-14 (2013), http://www3.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2015-Main-Text.pdf. Voluntary emissions reductions and improved pollution controls enabled that decrease. Since 1990, overall emissions from natural gas systems have declined by 12.2%.

Complying with the EPA's proposed standard will impose a substantial cost on industry owners and operators. Before subjecting the industry to this compliance burden, the EPA should carefully consider whether its calculations appropriately account for current trends in emissions reduction. If industry-driven improvements offer the potential

to further reduce methane emissions, these regulations may be unnecessary and possibly even counterproductive. However, if existing methods for emissions monitoring prove unreliable, and existing emissions estimates are artificially low, then an updated standard from the EPA may prove essential to maximizing the environmental benefits of the U.S. natural gas boom.

Ralph Smith

II. CLEAN WATER ACT

Clean Water Rule: Definition of "Waters of the United States,"
80 Fed. Reg. 37,054

This past June, the United States Army Corps of Engineers and the United States Environmental Protection Agency jointly published a final rule clarifying and reassessing the definition of "waters of the United States." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, to C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401). The meaning of this phrase has a significant impact on the jurisdictional reach of the agencies under the Clean Water Act (CWA). It controls the scope of application of several important programs that protect our waters from pollution under the CWA, including the National Pollutant Discharge Elimination System, the section 404 permitting program for discharge of dredged or fill material, and the section 311 oil spill prevention and response program.

A. Background

The determinations made under this rule are part of everyday operations of these agencies. Since 2008, "[t]he agencies . . . have made more than 400,000 CWA jurisdictional determinations." *Id.* at 37,065.

This rule change was a massive undertaking. The agencies published a proposed rule on April 21, 2014. *Id.* at 37,057 (citing 79 Fed. Reg. 22,188 (Apr. 14, 2014)). The proposed rule received more than one million comments. Additionally, the agencies conducted extensive outreach by conducting more than 400 meetings nationwide with a variety of different stakeholders, including farmers, municipalities, environmental organizations, and other federal agencies.

The rule change was undertaken partly in response to three decisions by the United States Supreme Court. Those decisions were

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). In all of these cases, the Court addressed whether certain water bodies are waters of the United States and therefore properly under the jurisdiction of the CWA. 547 U.S. at 720-21; 474 U.S. at 123; 531 U.S. at 162. Initially, in *Riverside*, the Court accepted the Corps' reasoning that adjacent wetlands should be included as waters of the United States because they are "inseparably bound up" with those waters. 474 U.S. at 134. In the modern opinions, this reasoning has evolved into the concept of a "significant nexus" between the body of water in question and the integrity of downstream environments. 531 U.S. at 167; 547 U.S. at 717. It is this concept of a significant nexus that now permeates the agencies' mindset in determining what is and is not a water of the United States. 80 Fed. Reg. 37,056.

B. Summary of the Rule

As the rule now stands, there are two distinctions that must be made in order to judge the jurisdictional status of a water, namely whether the water is a water of the United States. The first distinction is whether or not the water is of the type that is considered jurisdictional by rule. *Id.* at 37,073. Those waters not jurisdictional by rule may undergo a "Case-Specific Significant Nexus Determination." The second distinction is whether those waters undergoing the "Case-Specific Significant Nexus Determination" should be considered in combination with other similarly situated waters. The new rule also maintains several exceptions for waters that may have a significant effect on downstream environments but are still excluded from protection under the CWA. *Id.* at 37,059. What group the water falls under determines the standard under which the water's status is decided.

Those waters that are jurisdictional by rule require no further questions: "Waters in these categories are jurisdictional 'waters of the United States' by rule—no additional analysis is required." *Id.* at 37,073. Consistent with the prior rule, "the final rule includes traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of 'waters of the United States.' These waters are jurisdictional by rule." *Id.* at 37,058.

Previously falling under the definition of waters of the United States without limitation, tributaries have been narrowed in their definition. The agencies have limited the definition to "those [waters] that have both a bed and banks and another indicator of ordinary high

water mark." *Id.* at 37,068. "[W]hether they are perennial, intermittent, or ephemeral," is not an important factor.

Adjacent waters continue to be defined as jurisdictional by rule. *Id.* at 37,058. Adjacent waters now also benefit from a definition of the term "neighboring" as a qualifier of adjacency. Specifically, waters are neighboring when they are "within 100 feet of the ordinary high water mark;" within "the 100-year floodplain and . . . within 1,500 feet of the ordinary high water mark;" or "within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas." Neighboring waters are waters of the United States.

Tributaries and adjacent waters were determined by the agencies to always have a "significant nexus." The agencies have determined a long list of factors to be considered when making the determination of a significant nexus. *Id.* at 37,067. These factors include the functions of

> sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas.

These are the functions that have been determined to "significantly affect the chemical, physical, and biological integrity of downstream waters" and will be used to make case specific determinations as well.

A case-specific determination will only be necessary for waters within the 100-year flood plain of a water or within 4,000 feet of the high tide or high water mark of the waterbody. *Id.* at 37,071. Waters outside of these bounds, and not included in the five exceptions, may be presumed not to be waters of the United States.

If it is determined that a water requires a case-specific determination then it must be first considered whether that water deserves to be judged in conjunction with other similarly situated waters. The agencies have determined that there are five waters that will always be considered in conjunction with similarly situated waters: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. These wetlands may be considered similarly situated when "they perform similar functions and they are located sufficiently close to each other to function together in affecting downstream waters." Those similarly situated waters "must be combined with other waters in the same subcategory located in the same watershed

that drains to the nearest traditional navigable water, interstate water, or the territorial seas."

Finally, after all the above determinations, a water may be excluded as a water of the United States if the water is an artificially irrigated area that would revert to dry land if not irrigated; an artificial lake or pond created by excavation or diking; an artificial reflecting or swimming pool; a small ornamental water; a water filled depression created incidental to mining or construction activity; erosional features such as gullies, rills, and other ephemeral features; or a puddle. *Id.* at 37,098.

C. Analysis

The issuance of this rule is meant to provide "more regulatory certainty by narrowing the scope of waters that can be assessed under a case-specific" evaluation. *Id.* at 37096. Having concrete numbers that limit jurisdictional reach will increase industry confidence in its ability to determine what is or is not a "water of the United States," and while some things like certain ditches have been excluded from the definition of a water of the United States, those structures may still be considered as a point source if they are contributing to the destruction of true jurisdictional waters.

T. Jordan Alost

III. RESTRICTIONS ON THE COMMERCIAL TRADE OF ANIMALS AND ANIMAL PARTS

Imprisoned Again: Keith Cantore and the "Turtle Hustle"
United States v. Cantore,
No. 2:14-cr-00197-KDE-MBN (E.D. La. Aug. 5, 2015)

On April 8, 2015, following a federal grand jury indictment charging thirty-five-year-old Keith Cantore of Monee, Illinois, with three counts of illegal trafficking of wildlife, Cantore pled guilty to violating the Lacey Act. *See* Plea Agreement at 1, United States v. Cantore, No. 2:14-cr-00197-KDE-MBN (E.D. La. Aug. 5, 2015). On August 5, 2015, U.S. District Judge Kurt D. Engelhardt sentenced Cantore to forty-one months of incarceration with three years of supervised release to follow, and also ordered him to pay $42,805.87 in restitution and $100 for a special assessment. Judgment at 2-3, 5, *Cantore*, No. 2:14-cr-00197-KDE-MBN (E.D. La. Aug. 5, 2015).

While this case did not create new law in native species protection, Cantore's recent conviction is illuminating as a criminal vignette in illicit global trade of a niche product. As the former editor of *Foreign Affairs*, Dr. Moisés Naím, wrote in his seminal analysis of illicit markets, the illegal market for endangered species operates similarly to illegal drug, arms, and human trafficking markets, and is similarly corrosive of legitimate commerce and governance; this market is considered a "secondary" illicit trade because it has not earned the same degree of public scrutiny and enforcement. MOISÉS NAÍM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 157-58, 163-67 (2005). Regardless of whether the object of sale is an illegal drug, a counterfeit brand, or a protected species, where a market demand exists, the satiating supply will exist as well. *See id.* at 157-58. Profit is the driver. *Id.* at 239.

The instant case of Keith Cantore is intriguing because, as a common criminal with a history of theft, drug, and firearm convictions, he graduated his criminality to the less-scrutinized niche market of live animals. *See* Government's Response to Defendant's Sentencing Memorandum at 2 n.2, *Cantore*, No. 2:14-cr-00197-KDE-MBN (E.D. La. Aug. 5, 2015). As they would with a sophisticated investigation into an illicit drug or arms deal, in this case federal and state authorities used a cooperating informant to execute a sting operation to take down an overconfident turtle hustler. *See* Factual Basis, *Cantore*, No. 2:14-cr-00197-KDE-MBN (E.D. La. Aug. 5, 2015).

A. Background and Sting Operation

1. The Lacey Act, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and State Law

The Lacey Act makes it illegal to import, export, transport, sell, receive, acquire, or purchase, in interstate or foreign commerce, any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or Foreign law or attempt to do so. 16 U.S.C. § 3372(a)(2)(A), (a)(4) (2012). Any person who knowingly engages in such conduct when the wildlife has a market value in excess of $350 is subject to criminal penalties. *Id.* § 3373(d)(1)(B). Although the North American Wood Turtle (*Glyptemys Insculpta*) is not yet on the Endangered Species List, it has been listed since 1992 in the CITES as a species that "may become threatened with extinction unless trade is strictly regulated." Factual Basis, *supra*, at 2 n.1. Also, these turtles are protected at the state level. Pennsylvania law prohibits taking North

American Wood Turtles from the wild and shipping them outside state lines. 58 PA. CONS. STAT. §§ 79.3, .9 (2010). Furthermore, the transactions and attempted transactions between Cantore and the cooperating informant were illegal under Louisiana law because neither buyer nor seller possessed the required turtle farming license. LA. STAT. ANN. §§ 3:2358.4, .10, .13 (2015).

2. Inter-Agency Cooperation: Count One, Count Two

In 2014, special agents from three federal agencies, the U.S. Fish and Wildlife Service (FWS), Homeland Security Investigations (HSI), and the U.S. Postal Inspection Service (USPIS), were investigating "the unlawful capture, possession, interstate sale, and export of various domestic turtle species." Factual Basis, *supra*, at 1. The original focus of their investigation was another reptile smuggler, former U.S. Postal Service (USPS) employee Lawrence Treigle of Covington, Louisiana. Treigle received a suspicious amount of wire transfers from a Hong Kong bank account, totaling more than $200,000. *See* Sentencing Memorandum for the Defendant at 4, United States v. Cantore, No. 2:14-cr-00197-KDE-MBN (E.D. La. Aug. 5, 2015). Treigle ultimately pled guilty to conspiring to smuggle turtles from the United States to Hong Kong. *See* Factual Basis at 1-4, United States v. Treigle, No. 2:14-cr-181-HGB-SS, (E.D. La. Apr. 23, 2015).

Prior to his sentencing, Treigle cooperated with investigators and, at their direction, continued electronic communications about the purchasing, trading, and selling of turtles. Factual Basis, *Cantore*, *supra*, at 1-2. Cantore initiated a conversation with Treigle on July 18, 2014, via Facebook Messenger: "I buy all morphs and oddballs and wholesale stock for my CHINESE customers let me know what you have or can get me." *Id.* at 2. Cantore sought the purchase of Bog Turtles (*Clemmys muhlenbergii*), which have been listed as threatened and protected under the Endangered Species Act (ESA) since 1997. *Id.* at 2 n.2. Also, emails to a Hong Kong turtle buyer surfaced during the investigation in which Cantore advertised the sale of Alligator Snapping Turtles, which are listed on the Illinois endangered species list. Criminal Complaint at 19, *Cantore*, No. 2:14-cr-00197-KDE-MBN (E.D. La. Aug. 5, 2015).

Over the next week, Cantore and Treigle exchanged text messages in which they discussed the risks of trading with new partners and the risks of being caught, especially with their prior criminal histories. Factual Basis, *supra*, at 3; Criminal Complaint, *supra*, at 7-8. Each of them had been convicted of violating the Lacey Act in the past; Cantore was previously convicted in the Central District of Illinois for selling

undersized turtles in 2006. *See* Criminal Complaint, *supra*, at 20. After negotiating the price of the wood turtles, "CANTORE agreed to pay [Treigle] nine hundred dollars ($900) for each pair of North American Wood turtles." Factual Basis, *supra*, at 4.

On July 24, 2014, Treigle received a USPS Express Mail Envelope containing money orders totaling $3,600 for the purchase of four pairs of turtles. In exchange, "law enforcement officers packed eight live North American Wood turtles (four female and four male) into a cardboard box" and shipped them to Cantore's home as previously negotiated with Treigle. An undercover USPIS Inspector delivered the package to Cantore's home and identified the signee as Cantore. This completed transaction amounted to Count One of the indictment. *See* Criminal Complaint, *supra*, at 21. Cantore and Treigle arranged an identical order for eight turtles to be shipped from Treigle in Louisiana to Cantore in Illinois, but the turtles were returned to sender due to unknown issues with the USPS. Factual Basis, *supra*, at 5. This attempted transaction amounted to Count Two in the indictment. *See* Criminal Complaint, *supra*, at 21-22.

3. The Sting: Count Three

Apparently pleased with the first shipment, Cantore contacted Treigle on August 23, 2014, for a much larger order of North American Wood Turtles that Treigle ordered from a supplier in Pennsylvania. Factual Basis, *supra*, at 5. Cantore emphasized the need for urgency: "Hurry and lets get them woods before they no longer want them market changes fast man the albino red ears is starting to fade already." They agreed to fifty pairs of North American Wood Turtles at the price of $400 per turtle. They met on September 5, 2014, at a hotel in Slidell, Louisiana. *Id.* at 6. Cantore called Treigle to change their rendezvous point to the McDonald's nearby, and when they met there, Cantore asked to follow Treigle home to complete their transaction. Treigle was driving an undercover government vehicle equipped with a video recorder and audio transmitter for investigators to monitor the meeting. He also carried thirty-seven turtles with him as a sign of good faith.

En route to Treigle's home to complete the exchange, St. Tammany Parish Sheriff's office executed a traffic stop of Cantore's vehicle. *Id.* at 6-7. After being detained, a search of Cantore's vehicle produced ten boxes of various species of turtles and $20,000 in cash. *Id.* at 7. Agents then executed searches of Cantore's home and storage unit in Illinois, where they found six alligators and more than 290 different turtles.

In addition to the physical evidence seized during the Slidell sting operation and the home searches in Illinois, investigators saved screen shots of Cantore's Facebook posts in which he had advertised his reptile business, offering groups of turtles for sale, including price offers, and advertising the turtle as "ready for export over seas!" Criminal Complaint, *supra*, at 13-18. He also posted many photos of various species of turtles, and wooden boxes with "Live Animals" caution stickers. In one of his more self-congratulatory Facebook postings, Cantore posted photos of himself, shirtless and silhouetted against a sunny glass door, standing beside Tupperware bins apparently separating his live turtles. *Id.* at 15. As a caption to these photos, he wrote, "You know the Turtle Hustle is seriously extreme when your kitchen has been takin over once again! And your turtle helper has to smoke a joint to cope with the hustle!!"

B. Guilty Plea and Analysis

Cantore pleaded guilty to Count Three and was sentenced to forty-one months of incarceration and three years of supervised release, and ordered to pay $42,805.87 in restitution. Judgment, *supra*, at 1-3, 5. This Recent Development illustrates that money is the primary driver of criminal activity involving illicit markets; whether the market involves illegal drugs, arms, or turtles, authorities should view their investigation and enforcement of criminal law through the lens of economic supply and demand. If subject references (North American Wood Turtles) were redacted from the Plea Agreement and Factual Basis, et al, and replaced with references to sales of controlled substances or weapons, the narrative would be familiar: *A young male brags on social media about hustling, has a criminal past that includes theft, drug, and firearm possession, and he uses electronic communications to arrange and negotiate illegal exchanges of money for goods*. In other words, just as Dr. Moisés Naím argued a decade ago, the salient consideration in a criminal market is the legitimacy of the transaction rather than the particular object of sale. *See* NAÍM, *supra*, at 239-41. What differs among various illicit transactions is the scale of public attention and legal enforcement.

Hopefully, other inter-agency efforts will succeed at damming the flows of illicit streams of commerce of all types. The U.S. Department of Homeland Security has grown more effective since its inception after the September 11th terrorist attacks. NAÍM, *supra*, at 177-98. Its HSI special agents work every day on interagency investigations like the FWS-HSI-USPIS effort that brought Cantore and

Treigle to justice. There are rarer, more threatened species being stolen and sold, and there are smarter criminals engaged in the same illicit markets who do not use social media to incriminate themselves. But, as evidenced with Cantore's style of poaching protected species, this market is larger than ivory and hides: "More than 30,000 species of animals and plants are considered protected." NAÍM, *supra*, at 163. The American public should support the government's efforts to enforce these laws, because efforts to prevent the illicit trade in turtles or any other protected species benefit parallel efforts to prevent other illegal markets as well.

Alex B. Johnson

Chinatown Neighborhood Association v. Harris,
794 F.3d 1136 (9th Cir. 2015)

In *Chinatown Neighborhood Ass'n v. Harris*, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the Northern District of California ruling that upheld California's Shark Fin Law. 794 F.3d 1136, 1147 (9th Cir. 2015). The Ninth Circuit Court of Appeals held that (1) the Shark Fin Law does not violate the Supremacy Clause by interfering with the national government's authority to manage fishing off the coast of California under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and (2) California's Shark Fin Law did not violate the Dormant Commerce Clause because it does not significantly interfere with interstate commerce. *Id.* at 1145, 1147.

A. Background

1. Factual Background

Shark finning is the practice of removing the fins from a shark's body while the shark is still alive. *Id.* at 1140. Shark fins are primarily sold to make shark fin soup, a Chinese delicacy. Prior to enacting the 2012 Shark Fin Law, California enacted other laws and statutes to regulate the state's shark fin market, and both federal and state laws prohibited finning in the waters off the California coast. In 1995, the California legislature made it unlawful to possess or deliver for commercial purposes on any commercial fishing vessel shark fins or tails that had been removed from the carcass. In 2000, Congress added a shark finning prohibition to the MSA.

However, in 2011, the California legislature found that, in spite of existing shark finning prohibitions and regulations, shark finning caused "tens of millions of sharks to die each year," threatening shark populations, an important element of marine life. The legislature also found that California has a shark fin market that contributes to shark finning practices. California's Shark Fin Law, enacted in 2012, makes it "unlawful for any person to possess, sell, offer for sale, trade, or distribute a shark fin." CAL. FISH & GAME CODE § 2021(b) (West 2015). Under the Shark Fin Law, it is a misdemeanor to possess, sell, trade, or distribute a shark fin that is detached from a shark's body. *See* CAL. FISH & GAME CODE § 12000 (West 2014).

2. Procedural Background

Plaintiffs in this case, Chinatown Neighborhood Association and Asian Americans for Political Advancement, are associations representing people who used shark fins for cultural purposes and who participated in shark fin trade. *Chinatown Neighborhood Ass'n*, 794 F.3d at 1140. Originally, plaintiffs also included an argument that the Shark Fin Law violated the Fourteenth Amendment because they are Chinese Americans practicing a cultural tradition, but abandoned this argument before oral arguments. *Id.* at 1140 n.3.

Plaintiffs moved the district court to preliminarily enjoin the Shark Fin Law in August 2012. *Id.* at 1140. The district court dismissed the motion, and the Ninth Circuit Court of Appeals affirmed the district court's decision, citing the plaintiffs' failure to show a likelihood of success on the merits of their preemption and Dormant Commerce Clause claims. The plaintiffs filed an amended complaint on December 9, 2013, and the district court granted the defendants' motion to dismiss with prejudice on March 24, 2014. *Id.* at 1141.

B. The Court's Decision

1. The Supremacy Clause

The MSA, 16 U.S.C. §§ 1801-1884, was enacted to combat overfishing and its effects on marine life by establishing "a federal-regional partnership to manage fishery resources." *Id.* at 1139 (quoting Nat. Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 749 (D.C. Cir. 2000)). The MSA gives the federal government "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone" (EEZ). The EEZ is the area of water extending from a state's coast to 200 nautical miles

offshore. The MSA calls for the creation of Fishery Management Councils—comprised of state and federal officials and experts that are appointed by the Assistant Administrator of the National Marine Fisheries Service—to create Fishery Management Plans that achieve and maintain optimum yield for each fishery. *Id.* at 1139-40 (quoting 16 U.S.C. § 1801(b)(4) (2012)).

The plaintiffs first argued that the Shark Fin law is invalid because it interferes with the federal government's authority to regulate shark fishing in the EEZ off the California coast. *Id.* at 1142 (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963)). However, the Ninth Circuit found that the plaintiffs failed to find any conflicts between the federal government's authority to manage fisheries under the MSA and the California Shark Fin Law. Although the MSA does not have a preemption clause, preemption occurs when a federal law conflicts with a state law. This preemptive effect can occur either when it is impossible to comply with both the state and federal law or when a state law impedes the "accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1141 (quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43; Arizona v. United States, 132 S. Ct. 2492, 2501 (2012)).

The plaintiffs argued that there are competing objectives between the MSA and the Shark Fin Law that lead to preemption of the California law. *Id.* at 1142. The court reasoned that the MSA does in fact have many competing values within its framework, but that "[a]mong them . . . conservation is paramount." *Id.* at 1142-43. The court further added that the MSA has a provision for broad state-level participation and that "[c]ourts have found conflicts between state and federal schemes with overlapping purposes when the federal scheme is comprehensive and exclusive . . . but not when, as here, the federal scheme is cooperative." *Id.* at 1143.

The court also reasoned that the plaintiffs' preemption argument—that the Shark Fin Law is preempted by the MSA because the MSA fails to make any regulations related to activities that involve shark fins on land—is null because silence does not create a clear reason for preemption. The court also stated that the MSA leaves in-state fishing activities as subject to state regulations, which is applicable to on-land fishing activities such as shark fin trade. *Id.* at 1144. In conclusion, the Ninth Circuit stated that no federal law guarantees the use of shark fins on shore and that there are viable commercial uses for sharks rather than just their fins, therefore resolving the preemption issue. *Id.* at 1145.

2. The Dormant Commerce Clause

Plaintiffs claimed that the Shark Fin Law was per se invalid under the Dormant Commerce Clause because it regulates extraterritoriality by (1) preventing trade of shark fins between California and other states, and (2) preventing the movement of shark fins through California from one out-of-state location to another. The Ninth Circuit held that this argument was invalid, stating that California may regulate a commercial activity in which at least one party involved is located within the state, and even when a state law has significant extraterritorial effect, it does not violate the Dormant Commerce Clause when those effects are caused by regulation of in-state activities. Therefore, the Shark Fin Law passes "Commerce Clause muster."

The Ninth Circuit also stated that the plaintiffs' argument relied on several cases regarding price-setting and price-affirmation statutes that were invalidated due to their effect or interference with interstate commerce that were not applicable to this case because the "Shark Fin Law does not fix prices in other states, require those states to adopt California standards, or attempt to regulate transactions conducted wholly out of state." *Id.* at 1146. Lastly, the court stated that the Shark Fin Law does not interfere with activity that is "inherently national or require a uniform system of regulation." Therefore, the court held that California's Shark Fin Law does not violate the Dormant Commerce Clause. *Id.* at 1146-47. The Ninth Circuit affirmed the district court's decision to dismiss the case with prejudice.

C. Analysis

The Ninth Circuit's decision is an important step for conservation efforts, especially the critical efforts to support waning shark populations. Fishery management laws are a complex mixture of federal and state legislation. The court's opinion shows that conservation can be a priority of state and federal government and can be achieved through cooperative state and federal legal efforts. The court gave a well-reasoned and well-supported decision that will likely serve as precedent for future cases that challenge the constitutionality of conservation statutes.

Deirdre MacFeeters