RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLIMATE CHANGE

Defamation and Climate Change

The District of Columbia Court of Appeals recently considered a special motion to dismiss under the District of Columbia's Anti-Strategic Law Suits Against Public Participation (Anti-SLAPP). *Competitive Enterprise Institute v. Mann*, No. 14-CV-101, 2016 WL 7404870, at *1 (D.C. Cir. Dec. 22, 2016). The Anti-SLAPP statutes are designed to create a special motion to dismiss when an action is filed in order to punish or prevent opposing expressions in political or policy debate. *Id.* at *6. The purpose of the Act is to protect "the right to free speech guaranteed by the First Amendment—by shielding defendants from meritless litigation that might chill advocacy on issues of public interest." *Id.* at *9. The court had three questions to review: (1) whether Anti-SLAPP motions to dismiss were immediately appealable; (2) what was

the burden of proof to survive a motion to dismiss; and (3) whether certain web articles were defamatory. *Id.* at *1. The D.C. Circuit concluded that a ruling on an Anti-SLAPP motion to dismiss was immediately appealable and interpreted the burden of "likely to succeed on the merits" to mean that a "court can conclude that the claimant could not prevail *as a matter of law*, that is, after allowing for the weighing of evidence and permissible inferences by the jury." *Id.* at 13.

A. Background

1. Legal Background

The District of Columbia's Anti-SLAPP Act creates a special procedural motion to dismiss. *Id.* at *10. If a party believes that a suit is filed as a means for discouraging opposing political views, it has a 45-day window after the complaint is filed to file a special motion to dismiss. Then the party must show that the "the claim arises from an act in furtherance of the right of advocacy on issues of public interest . . . ." Once the party makes that prima facie showing, the burden shifts to the party opposing the motion to "demonstrate that the claim is likely to succeed on the merits." The motion stays proceedings with a small exception for discovery for evidence to defeat the motion to dismiss. The legislation, however, does not provide a statutory definition for "likely to succeed on the merits." *Id.* at *13.

2. Factual Background

Competitive Enterprise Institute v. Mann arises from a 2012 scandal referred to as "Climategate." *Id.* at *4. Three years earlier, a series of e-mails from the Climate Research Unit of the University of East Anglia were leaked on the Internet. *Id.* at *3. Among the e-mails were correspondence between Dr. Michael Mann and the Climate Research Unit. Individuals who questioned global warming cited these emails as proof positive that the date proving global warming had been falsified or doctored.

Dr. Mann is a famous and well respected climate scientist. He is known for a paper published by *Nature* in 1999 that tracked the earth's temperature from 1050 to present. *Id.* at *2. The paper included an eye catching graph that "because of its shape resembling the long shaft and shorter diagonal blade of a hockey stick . . . [it] became known as the 'hockey stick.'" The paper concluded that temperature rise in the 20th century was caused by human produced CO_2 released by the industrial age.

After the leaks of the e-mails, conservative blogs run by the *National Review* began to report on "Climategate." Since Dr. Mann works at Pennsylvania State University, one article on OpenMarket.org compared Dr. Mann to Jerry Sandusky. *Id.* at *4. The article concluded that "Mann could be said to be the Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data in service of politicized science that could have dire consequences for the nation and planet. . . ." A second article made similar claims two days later. The future President of the United States, Donald Trump, also commented on "Climategate" on Twitter—claiming that "[g]lobal warming is based on faulty science and manipulated data which is proven by the emails that were leaked." Donald Trump (@real DonaldTrump), TWITTER (Nov. 2, 2012, 11:59 AM), https://twitter.com/realDonaldTrump/status/264441602636906496.

Since Trump's election, members of his cabinet have been criticized for their stance on climate change. The President himself has softened his tone on climate change. President Trump recently acknowledged that there is "some connectivity" between human activity and climate change. Jeremy Diamond, *Trump Admits 'Some Connectivity' Between Climate Change and Human Activity*, CNN (Nov. 22, 2016), http://www.cnn.com/2016/11/22/politics/donald-trump-climate-change-new-york-times/index.html. He famously boasted on Twitter that "global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive. Donald Trump (@realDonaldTrump), TWITTER (Nov. 6, 2012, 11:15 AM), https://twitter.com/realDonaldTrump/status/265895292191248385. While Mr. Trump has taken a step back on his climate change rules, Scott Pruitt, his choice for head of the EPA, believes there is disagreement among scientists about the connection between human activity and temperature rise. Coral Davenport & Eric Lipton, *Trump Pick Scott Pruitt, Climate Change Denialist, To Lead E.P.A.*, N.Y. TIMES (Dec. 7, 2016), https://www.nytimes.com/2016/12/07/us/politics/scott-pruitt-epa-trump.html?_r=1.

B. Court's Decision

The D.C. Circuit decided two questions of first impression under the Anti-SLAPP Act. First, whether denial of an Anti-SLAPP special motion to dismiss is immediately appealable. *Competitive Enterprise Institute v. Mann*, No. 14-CV-101, 2016 WL 7404870, at *1 (D.C. Cir. Dec. 22, 2016). Second, the court needed to determine the amount of evidence necessary to meet the statute's "likely to succeed on the merits" standard. *Id.*

The court determined an appeal of an Anti-SLAPP special motion to dismiss is immediately appealable. *Id.* at *10. The court looked to the legislative history of the statute to determine whether the purpose of the special motion to dismiss was to protect against frivolous lawsuits designed to chill speech on public interest. *Id.* at *9. By not allowing an immediate appeal, the ruling on the special motion to dismiss "would be effectively unreviewable on appeal from a final judgment."

Determining the statutory meaning of "demonstrate that likely to succeed on the merits" was more difficult for the court. The court had to interpret the ambiguous term in a fashion that made sense of the statute as a whole. *Id.* at *13. The court quickly defined "on the merits" as a burden shifting mechanism to provide additional evidence greater than that alleged in the complaint. *Id.* at *11.

The "likely to succeed" language required deeper analysis. The court determined that "likely to succeed" was not a preponderance of the evidence standard because the legislature would know that legal term of art. *Id.* at *12. The court believed that the limited discovery that statute requires is critical to determining what the legislature meant by "likely to succeed." *Id.* at *13. The court worried about whether the statute raised constitutional issues and whether it could be interpreted to circumvent the right to a jury trial. The court used the canon of constitutional avoidance that will not eliminate the role of the jury by concluding that

> the statute respects the right to a jury trial, the standard to be employed by the court in evaluating whether a claim is likely to succeed may result in a dismissal only if the court can conclude that the claimant could not prevail *as a matter of law*, that is, after allowed for the weighing of the evidence and permissible inferences by the jury.

C. Conclusion

In conclusion, the D.C. Circuit interpreted the statute to avoid a constitutional question in an effort to protect free speech. Additionally, the court recognizes that the science of climate change is solid. It understands that comparing the data used to support climate change to criminal sexual abuse displays actual malice toward the scientists conducting the research.

Christopher Swanson

II. CERCLA

CERCLA: P.H. Glatfelter Co. v. Windward Prospects Ltd., No. 15-3847, 2017 WL 405634 (7th Cir. 2017)

A. Introduction

The United States Court of Appeals for the Seventh Circuit recently addressed "whether a discovery order in an ancillary proceeding is immediately appealable when entered by the very same district court that is presiding over the main action." *P.H. Glatfelter Co. v. Windward Prospects Ltd.*, No. 15-3847, 2017 WL 405634, at *4 (7th Cir. Jan. 31, 2017). Defendant appellee, P.H. Glatfelter Co. (Glatfelter), appealed two district court orders that denied Glatfelter's pretrial motions. Specifically, Glatfelter filed a motion to compel responses from Windward Prospects Ltd. (Windward), a nonparty in the underlying cost recovery action. Ultimately, the Seventh Circuit explained that the federal courts of appeal have jurisdiction over all final district court decisions, but a final decision on the merits is necessary for an appellate court to have jurisdiction over the appeal. Consequently, the Seventh Circuit dismissed the case for lack of jurisdiction.

B. Background

The underlying cost recovery action centers on cleaning up a Superfund site in Wisconsin specifically encompassing parts of the Lower Fox River and Green Bay—a head of the sub-basin of Lake Michigan. *United States v. P.H. Glatfelter Co.*, 768 F.3d 662, 665 (7th Cir. 2014). Beginning in 1998, the Environmental Protection Agency (EPA) and the Wisconsin Department of Natural Resources (WDNR) developed a plan to clean up the Superfund site. At that time, EPA identified Glatfelter as a potentially responsible party (PRP) under CERCLA § 107(a) because "they or their corporate predecessors formerly owned and operated paper mills that discharged wastewater containing PCBs into the River." From 2002 to 2007, EPA issued multiple records of decision that separated the river into operable units for remedial work. Specifically, the remedial work called for dredging the river bed to clean up polychlorinated biphenyls (PCBs) and for capping and covering with sand those areas where dredging would not sufficiently reduce PCBs.

The PCBs were used to produce carbonless copy paper from the mid-1950s to 1971 and ended up in the Lower Fox River in two ways.

NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682, 688 (7th Cir. 2014). First, the emulsion that was used to coat the copy paper was mixed with wastewater and released into the river. The second way that PCBs ended up in the river was more complicated. Essentially, the paper production process created unusable waste that was sold in bulk to recycling mills that would separate usable fibers from the paper coatings containing PCBs. The waste from this recycling process was combined with the recycling producer's wastewater and dumped into the Lower Fox River. In 2007, the EPA issued a unilateral administrative order directing the PRPs, including Glatfelter, to begin remedial dredging and capping in a specific set of operable units. *P.H. Glatfelter Co. v. Windward Prospects Ltd.*, 2017 WL 405634, at *1. Glatfelter was sued by two other PRPs who sought recovery on a portion of the $700 million cleanup bill. In 2014, the Seventh Circuit Court of Appeals ruled that the two PRPs were entitled to equitable contribution for the $700 million cleanup bill and remanded the action back to the Eastern District of Wisconsin.

One of the PRPs, Appvion, is the link between Glatfelter and Windward, who is a nonparty in the underlying cost recovery action. Specifically, Appvion is still seeking recovery from Glatfelter in the underlying action, and Windward is "conducting Appvion's defense of CERCLA claims and managing Appvion's responsibility for the Lower Fox River cleanup operations." *Id.* at 2. Glatfelter attempted to obtain discovery through Windward who refused service and maintained that it was not subject to the jurisdiction of the federal courts. Glatfelter then took two steps in order to compel discovery from Windward. Glatfelter instituted an ancillary proceeding in the District of Massachusetts and simultaneously moved to transfer the proceeding to the Eastern District of Wisconsin. Ultimately, the proceeding was transferred, but Judge Griesbach of the Eastern District of Wisconsin denied the motion to compel discovery. Glatfelter appealed the denial. Thus, the specific issue addressed by the Seventh Circuit was whether Glatfelter could appeal a discovery order in an ancillary proceeding when it was entered by the very same district court presiding over the main action.

C. The Court's Decision

The Seventh Circuit first recognized that appellate courts have jurisdiction over final district court decisions, but final decisions are limited to decisions that end litigation on the merits. *Id.* at 3. Moreover, pretrial orders, such as the district court's order denying Glatfelter's motion to compel discovery, generally are not final decisions that end litigation on the merits. However, there is an exception to this general

rule called the collateral order doctrine. The collateral order doctrine allows appellate review of pretrial discovery orders when the order "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment."

For the Seventh Circuit, whether an order is effectively unreviewable on appeal from a final judgment was a determinative factor. *See id.* at 6. The court had never directly ruled on that issue, but other circuit courts had. Those courts concluded that because the circuit court will have appellate jurisdiction to review pretrial discovery orders issued by district courts in their circuit after final adjudication, pretrial orders should not be immediately appealable. Glatfelter attempted to skirt around this rationale by arguing that the instant action began in the District of Massachusetts, which is outside of the Seventh Circuit's jurisdiction. However, the court recognized that the action had been transferred to the Eastern District of Wisconsin, which is within the Seventh Circuit's jurisdiction. Moreover, the court pointed out that Glatfelter did not demonstrate how appellate review of the district court's denial was precluded from appellate review after a final adjudication on the merits. Ultimately, the court concluded that because Glatfelter can obtain review of the district court's denials when a final judgment is entered, the appeals court lacked jurisdiction to review the orders.

D. Conclusion

The Seventh Circuit's opinion may only delay Glatfelter in the underlying cost recovery action, however, whether Glatfelter can obtain discovery from Windward presents an interesting issue that remains unresolved. Specifically, the Seventh Circuit did not foreclose appellate review over the pretrial discovery order that currently precludes Glatfelter from obtaining discovery from Windward. The court only limited review of that order until there is a final adjudication on the merits in the underlying action. Thus, if Glatfelter is going to convince the Seventh Circuit to overrule the district court's denial of its motion to compel discovery from a nonparty to the underlying cost recovery action, Glatfelter is simply going to have to wait until a final judgment is entered in the underlying action. Ultimately, this drags out the issue of how much each PRP will pay for cleaning up this Superfund site in Wisconsin.

Joshua Sanchez-Secor

III. CLEAN WATER ACT

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (*Catskill III*): *The Second Circuit Declares the Water Transfers Rule a Reasonable Construction of the Clean Water Act*

A. Background

The phrase "water transfer" describes an activity that transports or links waters of the United States without applying the waters to an industrial, municipal, or commercial use along the way. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA* (*Catskill III*), Nos. 14-1823, 14-1909, 14-1991, 14-1997, 14-2003, 2017 WL 192707, at *2 (2nd Cir. Jan. 18, 2017). Examples of water transfer mechanisms include artificial tunnels and channels; natural streams and water bodies; and active pumping or passive direction. *Id.* at *4. In areas where surrounding water is not potable and especially in the Western United States, which faces a scarcity of usable water sources, water transfers are a crucial part of the water-supply infrastructure by conveying water to homes, farms, cities, and factories. *Id.* at *2. At issue in this case is the water transfer, which conveys water from the Schoharie Reservoir in the Catskill Mountains of New York state via the Shandaken Tunnel into the Esopus Creek to eventually quench the thirst of New York City. *Id.* at *1-2.

Despite the aforementioned importance of water transfers in the water-supply infrastructure, some have criticized the Environmental Protection Agency (EPA) for its longstanding decision not to subject water transfers to the National Pollutant Discharge Elimination System (NPDES) permitting program, which was established in Section 402 of the Clean Water Act (CWA). *Id.* at *2. Aside from some narrow exceptions, the CWA makes "the discharge of any pollutant by any person" illegal without an NPDES permit. 33 U.S.C. § 1311(a) (2012). The CWA defines "discharge" as "any addition of any pollutant to navigable waters from any point source" where "navigable waters" refers to "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1362(12)(A), 1362(7) (2014).

The critics' main complaint is that water transfers are analogous to ballast water in ships because the water transfer process has the unintended consequence of transferring not only water, but also pollutants, from one water body to another. *Catskill III*, 2017 WL 192707, at *2. As a result, water transfers can potentially harm the local ecosystems, economies, and public health of the receiving water body.

For example, in the case at hand, the water transfer from the Schoharie Reservoir into Esopus Creek allegedly raises turbidity levels at a popular fishing spot. John Herzfeld, *Judges Explore Deferring to EPA on Water Transfer Rule*, BLOOMBERG BNA (Dec. 3, 2015), https://www.bna.com/judges-explore-deferring-n57982064242/. Additionally, while proponents of the EPA's hands-off approach have alleged that NPDES permitting would inflict such onerous costs on water systems so as to justify the immunity from NPDES permitting, the critics insist that such allegations have never been sufficiently supported by evidence. Moreover, the critics argue that exempting water transfers from NPDES permitting thwarts the CWA's main goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012); *Catskill III*, 2017 WL 192707, at *26.

Because the EPA had only informally explained its hands-off stance on water transfers, in the 1990s and early 2000s environmental groups asserted that NPDES permits were required for certain water transfers in a number of successful lawsuits, including the precursors to this case—*Catskill I* and *Catskill II*. *Id.* at *4. The EPA's defeat was attributable to the courts' reluctance to defer to the EPA because the agency's position was not sufficiently formal to receive deference from the courts. This prompted the EPA to promulgate the "National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule" (Rule) in 2008 to formalize its stance that water transfers are excluded from the NPDES permitting program. *Id.* at *5. The Rule explains that certain water transfers are exempt from NPDES permitting "because they do not result in the 'addition' of a pollutant" if water is "conveyed from one water of the U.S. to another water of the U.S." 73 Fed. Reg. 33,697 at 33,699 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). This is justified on the "unitary-waters" reading of the CWA's text: even when a water transfer moves pollutants, this is not an "'addition' . . . because the pollutant is already present in 'the waters of the United States.'" *Catskill III*, 2017 WL 192707, at *5. That is, the phrase "the waters of the United States" refers to a single unit rather than individual water bodies, so the pollutant is already present in "the waters of the United States." *Id.* at *11.

In response, environmental groups as well as some state, provincial, and tribal governments challenged the Rule in the United States District Court for the Southern District of New York. *Id.* at *6. The district court granted summary judgment in favor of the plaintiffs after finding the Rule to be an unreasonable interpretation of the CWA. *Id.* at *7. On January 18, 2017, the United States Court of Appeals for the Second Circuit reversed the district court, holding that the Water Transfers Rule

is a reasonable construction of the CWA supported by a reasoned explanation.

B. Court's Decision

1. *Chevron* Step One

Under *Chevron* step one, the reviewing court asks whether the statute speaks directly to the issue at hand. *Id.* at *8. If congressional intent is unambiguous, then this clarity resolves the issue because both the reviewing court and the agency must uphold Congress' unambiguously expressed wishes. Like the district court, the Second Circuit concluded that the CWA does not clearly indicate whether water transfers should be subject to NPDES permits. The Second Circuit reached this conclusion after analyzing the CWA's text, structure, and purpose; traditional canons of statutory construction; and its prior holdings in *Catskill I* and *Catskill II* (these decisions ruled certain water transfers subject to NPDES permits but are distinguishable because they concerned the EPA's pre-Rule informal stance). *Id.* at *8-14. Most pertinently, the court said the phrase "waters of the United States" is ambiguous in the CWA. *Id.* at *11. Additionally, while the purpose of the CWA is to restore and maintain the quality of the Nation's water, this is not necessarily to be pursued at all costs such that states no longer have water allocation authority. *Id.* at *14-15. After finding no resolution, the court proceeded to *Chevron* step two. *Id.* at *17.

2. *Chevron* Step Two

Under *Chevron* step two, the reviewing court asks whether the agency's rule is based on a permissible interpretation of the statute and backed by a reasoned explanation. *Id.* at *17-18. If so, then the reviewing court is not to disturb the agency's rule even if the agency's rule is neither the only possibility nor the "best" one in the court's eye. *Id.* at *17. This is based on the assumption that ambiguity in a statute is an indication that Congress intended the agency to resolve the matter. Under *Chevron* step two, the Second Circuit disagreed with the district court and found the Rule to be a reasonable interpretation of the CWA. In fact, while acknowledging that it might not be the best interpretation to promote the CWA's overall goal of restoration and protection, the court said it "view[s] the EPA's promulgation of the Water Transfers Rule here as precisely the sort of policymaking decision that the Supreme Court designed the *Chevron* framework to insulate from judicial second- (or third-) guessing." *Id.* at *2.

The Second Circuit initially considered whether the EPA had provided a rational explanation for the Rule. *Id.* at *20. The court answered in the affirmative based on a number of reasons proffered by the EPA. Specifically, the Rule was based "on a holistic interpretation of the Clean Water Act that took into account the statutory language, the broader statutory scheme, the statute's legislative history, the EPA's longstanding position that water transfers are not subject to NPDES permitting, congressional concerns that the statute not unnecessarily burden water quantity management activities, and the importance of water transfers to U.S. infrastructure."

Having found a reasoned explanation, the court next sought to determine whether the Rule is a reasonable interpretation of the CWA. *Id.* at *21. First, the court said that Congress' silence concerning the fact that water transfers have never been subject to NPDES permits in the nearly four decades since the CWA's enactment is an indication of congressional acceptance of the EPA's position. Second, the court asserted that the Supreme Court's failure in *South Florida Water Management District v. Miccosukee Tribe of Indians* to explicitly conclude that the unitary-waters theory is unreasonable suggests that the theory is potentially reasonable; therefore, the Rule, which is based on the unitary-waters theory, could also be considered reasonable. *Id.* at *22-23. The court said that the Eleventh Circuit's decision in *Friends of the Everglades v. South Florida Water Management District* (*Friends I*) upholding the Rule under *Chevron* deference is additional case law support for the Rule's reasonableness. *Id.* at *22-24. Third, the court explained that another factor in favor of the Rule's reasonableness is that compliance with NPDES permitting might be too costly and disruptive to water distribution entities. *Id.* at *25. Fourth, the court found that the Rule's reasonableness was buoyed by the alternative regulation measures that can cover water transfers, such as nonpoint source programs, other federal statutes and regulations, and state permitting programs. In conclusion, the Second Circuit declared the Rule entitled to *Chevron* deference as a reasonable construction of the CWA supported by a reasoned explanation. *Id.* at *27.

3. Dissent

Judge Chin dissented from the majority and found the Rule to be an unreasonable interpretation of the CWA. *Catskill III*, 2017 WL 192707, at *27 (Chin, J., dissenting). Judge Chin believed the issue is resolvable under *Chevron* step one: the text and structure of the CWA unambiguously express congressional intent to prohibit the unpermitted

movement of polluted water from one water body to a distinct water body. *Id.* at *28. Even if there is ambiguity in the CWA, Judge Chin said that the Rule is an unreasonable, arbitrary, and capricious construction of the CWA, and therefore is not entitled to deference under *Chevron* step two. Judge Chin also pointed out that the Rule is flawed because the unitary-waters theory upon which it is premised is inconsistent with prior Second Circuit and Supreme Court decisions which have characterized the unitary-waters theory as contrary to the CWA's text and purpose.

C. Future of Water Transfers

The situation leaves much to be desired for those concerned with water quality. For example, while engaging in *Chevron* step two, the Second Circuit explains that part of the Rule's reasonableness is the EPA's assurances that there are other pollution mitigation mechanisms that *can* cover water transfers instead of NPDES permitting. *Catskill III*, 2017 WL 192707, at *25. Yet, the mere existence of such other mechanisms does nothing to protect the quality of water bodies on the receiving end of water transfers if these alternatives are not utilized. The case symbolizes the EPA's decades-long, hands-off policy and acknowledges that, with the exception of Pennsylvania, the states have taken a similar stance where water transfers are concerned. *Id.* at *4. Moreover, for states that are desperate for potable water, it is seemingly contrary to their own interests to take it upon themselves to implement pollution mitigation mechanisms that will likely be viewed as costly, time-consuming, and restrictive. Thus, it appears doubtful that the EPA and most states will take the initiative to regulate water transfers to a satisfactory degree for those concerned with water quality.

If the case is challenged further, there is a slight possibility that the Supreme Court would invalidate the Rule to uphold the CWA's goal of water quality protection. *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004). In an assessment of the unitary-waters theory in *Miccosukee*, the Supreme Court seemed dissatisfied with the unitary-waters theory but also acknowledged that applying the NPDES permitting program to water transfers may raise the costs of water distribution prohibitively. *Catskill III*, 2017 WL 192707, at *22. However, the opinion continued that "[o]n the other hand, it may be that such permitting authority is necessary to protect water quality and that the States or EPA could control regulatory costs by issuing *general permits* to point sources associated with water distribution programs." *Miccosukee*, 541 U.S. at 108 (emphasis added).

Though not distinguished in *Catskill III*, permits in the NPDES program fall under two categories—individual and general. *NPDES Wastewater & Stormwater Permits*, U.S. ENVTL. PROTECTION AGENCY, (Feb. 15, 2017, 6:43 PM), https://www3.epa.gov/region9/water/npdes/. An individual permit is developed with the design and water quality standards of a particular facility in mind. A general permit contains overall effluent limitations and other requirements for a category of discharges within a geographical area. In fact, general permits are designed for activities for which it would be administratively, financially, or scientifically difficult to ascertain exact limitations, such as stormwater and agricultural discharges as well as offshore oil and gas exploration facilities. *National Pollutant Discharge Elimination System (NPDES): About NPDES*, U.S. ENVTL. PROTECTION AGENCY (Feb. 15, 2017, 11:57 PM), https://www.epa.gov/npdes/about-npdes#types. The EPA's stance as outlined in the Rule and as upheld by the Second Circuit is that water transfers should not be subject to either type of permit. *Catskill III*, 2017 WL 192707, at *5-7.

A solution which might have struck a better balance between two noteworthy interests—protecting water quality and preserving water allocation flexibility—and eased the minds of those concerned with water quality is to subject water transfers to general NPDES permits. In fact, in *Catskill III*, the Second Circuit cited its own opinion in *Catskill II* when recalling that the flexibility of the NPDES program, such as "general permits" and "consideration of costs in setting effluent limitations," enables "federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either." *Id.* at *16. Utilizing general NPDES permits in the water transfer context could at least establish some minimum national water quality standards while controlling costs and maintaining the states' ability to allocate water.

The *Miccosukee* case was decided before the EPA issued a regulation adopting a final rule concerning the unitary-waters theory upon which the Rule is premised. *Id.* at *23. Therefore, it is possible that the unitary-waters theory and the Rule will receive *Chevron* deference if challenged in the future. However, for those concerned with water quality, the Supreme Court's apparent dissatisfaction with the unitary-waters theory as well as the suggestion to use general permits in *Miccosukee* at least give some glimmer of hope that a Supreme Court challenge to the Water Transfers Rule could be successful. *Id.* at *22.

Kristen Hilferty

IV. PROPOSED LEGISLATION: LOCAL ENFORCEMENT FOR LOCAL LANDS ACT

War on Western Lands: Recent Proposals To Change Federal Management of Public Lands in H.R. 621, H.R. 622, and H.J. Res. 46

A. Background

Since the Division of Forestry, the predecessor of the United States Forest Service, began the process of withdrawing lands for federal use with the Forest Reserve Act of 1891, public lands have been both a way of life and a point of contention in the West. *Our History*, U.S. FOREST SERV., https://www.fs.fed.us/learn/our-history (last visited Feb. 10, 2017). Then came the National Park Service in 1916, which was tasked with conserving and protecting unimpaired natural and cultural resources that have been set aside as parks and leaving them "unimpaired for the enjoyment of future generations." *Evolution of an Idea*, NAT'L PARK SERV., https://www.nps.gov/americasbestidea/templates/timeline.html (last visited Feb. 12, 2017). Finally, the Bureau of Land Management (BLM) was created in 1946 with the merging of the General Land Office, created in 1812, and the U.S. Grazing Service. *Our Heritage, Our Future*, BUREAU LAND MGMT., https://www.blm.gov/wo/st/en/info/history.html (last visited Feb. 13, 2017). BLM is tasked with managing public land resources for energy production, livestock grazing, recreation, and timber production, while also protecting the natural resources found on over 245 million surface acres of BLM public land. *Who We Are, What We Do*, BUREAU LAND MGMT., https://www.blm.gov/wo/st/en/info/About_BLM.html (last visited Feb. 13, 2017).

Public lands are a hot button issue that only western states tend to worry about because most other states have minimal amounts of federal land, while 47% of all land in the twelve western states is owned by the federal government. Quoctrung Bui and Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), https://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html. This means that people thousands of miles away in Washington, D.C., are making decisions regarding the management practices of almost half of the land in the West, many without any understanding of the Western way of life. A way of life wherein families have been grazing cattle on federal lands for generations, and where the hope of striking gold or black gold keeps miners and oil men searching western lands for the next big boom. It is a different world, and it is one which most Westerners feel that Easterners

have never understood. On the one hand there are environmentalists and conservation groups that want more restrictions on public land to allow for better preservation of the natural habitat and for protection of wildlife. On the other hand are ranchers, farmers, miners, and businessmen who want to profit off the land and do not want any oversight from the big bad federal government.

After over a century of controversy, this slow burning fire seems to have finally come to an explosive point. With current legislative proposals to expand oil drilling in national parks, to privatize federal public lands or convert federal lands to state lands, and to strip land management agencies of their power to enforce federal laws, it seems as though the federal government is starting to give in to the demands of many of the western states.

B. Proposed Legislation

With House Resolution 622, introduced by Representative Chaffetz of Utah, the process of trying to dismantle federal power over public lands in the West begins. Local Enforcement for Local Lands Act, H.R. 622, 115th Cong. (1st Sess. 2017). If passed, the bill would prevent the United States Forest Service and the Bureau of Land Management from having any law enforcement functions, and instead it would give funding to the states to manage the lands and to enforce federal law on federal lands. The bill would effectively hand over control of federal lands to the states instead of the federal government, all while allowing the states to use grants from the federal government to manage the land. While this may seem like a small step, it is analogous to making a small crack in a dam with hopes that the whole thing will come crumbling down soon after. Once land management is turned over to the state governments, the fear is that states that believe in limiting regulation and choose not to enforce the current federal laws may open the parks up to commercialization, exploitation by big business, and even poaching.

House Resolution 621, also introduced by Representative Chaffetz, proposes that the legislature direct the Secretary of the Interior to sell selected federal lands in the states of Arizona, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, and Wyoming. Disposal of Excess Federal Lands Act of 2017, H.R. 621, 115th Cong. (1st Sess. 2017). The lands at stake in this bill are all lands that had been "previously identified as suitable for disposal, and for other purposes." The bill makes an exception for lands that have been identified for state selection, lands subject to recreation and public purpose conveyance applications, lands identified for local government use, and lands allotted

to Native American tribes. The result would mean that western states, like Representative Chaffetz's home state of Utah, could pick up these federal lands for their own use and management as well, regardless of whether or not the previously discussed H.R. 622 were to pass.

House Joint Resolution 46, introduced by Representative Gosar of Arizona, asks for a repeal of a National Park Service rule that allows for the National Park Service to decline the drilling rights of private parties that own the mineral rights beneath national park surfaces if the National Park Service finds that the drilling would pose a danger to the environment. H.R.J. Res. 46, 115th Cong. (2017). This would only apply to national parks that have "split-estate ownership" of surface and underground resource rights, such as "Everglades National Park, Mammoth Cave National Park and Theodore Roosevelt National Park." Darryl Fears, *This Lawmaker Wants To Ease Rules on Drilling in National Parks, and Conservationists Aren't Happy*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/02/01/this-lawmaker-wants-more-drilling-in-national-parks-and-he-just-became-more-powerful/?utm_term=.ed50a939d800. According to opponents of the bill, it would weaken the National Park Service's authority to control against drilling. As it is, the National Park Service has no way to receive compensation from drilling companies if they drill beyond the region in which they are permitted, and the financial assurance for cleanup is capped far below the true cost to clean up the land after the disruption of drilling. However, Representative Gosar claims that the bill would only serve to roll back the changes to the National Park Service rule that were put in place by the Obama administration, not change the original rule created in 1970. In fact the bill only states that Congress disapproves of the 2016 rule "relating to 'General Provisions and Non-Federal Oil and Gas Rights' (81 Fed. Reg. 77972 (Nov. 4, 2016))," and the rule would revert back to the previous version. H.R.J. Res. 46, 115th Cong. (2017).

C. Analysis

These three proposals, when taken together, signal major changes coming for national parks, national forests, and BLM lands, as well as for the agencies that manage those lands. If even one of these bills were to pass, a war over western lands would erupt, with the lands themselves becoming the casualties.

What is the reasoning behind taking back the lands? That depends on who is answering the question and what kind of business they are in. To some western governors, usually excluding the Pacific states, the

point of contention is often federal restrictions on industries that can bring jobs and money into the state. In 2012, Utah and its Governor Garry Herbert hosted governors from Colorado, Idaho, Nevada, and Wyoming to ask the federal government to give their states more control of the land within their borders. The states felt that recreational access and energy development were being needlessly inhibited by the federal government. John M. Glionna, *Western Land War: 5 States Fight D.C. for Control of Federal Areas*, L.A. TIMES (Apr. 26, 2012), http://articles.latimes.com/2012/apr/26/nation/la-na-nn-land-war-20120426. The governors that met came from states that are largely impacted by the management of these lands. After all, the federal government owns 84.5% of the land in Nevada, 57.4% of the land in Utah, 50.2% of the land in Idaho, 43.3% of the land in Wyoming, and 36.6% of the land in Colorado. Even in the more developed state of California, 45.3% of the land is owned by the federal government. Frank Jacobs, *Just How Much Land Does the Federal Government Own—and Why?,* BIG THINK, http://bigthink.com/strange-maps/291-federal-lands-in-the-us. For many western states there will always be an underlying frustration with what is seen as having to constantly play host to federal agencies and federal rules within their own state boundaries.

However, a study from Utah released in the same year that the governors met showed that taking over the land management of the state of Utah would cost the state government approximately $275 million a year. Quoctrung Bui and Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), https://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html. In order for states to be able to fund the management, they would likely need to both raise the price for grazing and mining permits as well as ask the federal government for federal funding. This indicates that the desire for a transfer of lands is more about a sense of state pride and sovereignty than it is about making money from public lands.

None of these bills have passed the house yet, and there is no guarantee that they ever will; but, in the current political environment of the country, this flood of proposed legislation favoring changing western public lands is a clear sign of things to come. Some of the more controversial proposals will likely be withdrawn or not make it out of their subcommittees, but less drastic versions may come to replace them and pass through a highly polarized Congress and fall on President Trump's desk. Only time will tell what is going to happen, but it seems imminent that changes are coming for federal land management. Unless

the public keeps a careful eye on Congress's activities, the changes to federal land management may happen without the public even realizing it.

Amelia Carder

V. INTERNATIONAL DEVELOPMENTS

The Standing Committee of the National People's Congress Passes China's First Environmental Protection Tax Law

A. Background

China's rapid modernization, fueled by a heavy reliance on coal, has resulted in a degradation of the nation's environment and one of the world's worst cases of air pollution. Yan-Lin Zhang & Fang Cao, *Fine Particulate Matter (PM2.5) in China at a City Level*, SCI. REP. 5, 1 (2015), http://www.nature.com/articles/srep14884. Therefore, on December 25, 2016, during the Twenty-Fifth session of the Twelfth Standing Committee of the National People's Congress, Chinese lawmakers passed China's first environmental tax law. Liu Weibing, *China Focus: China To Introduce Environmental Tax for Enhanced Pollution Control*, XINHUANET (Dec. 26, 2016, 9:53 PM), http://news.xinhuanet.com/english/2016-12/25/c_135931561.htm. The Environment Tax Law (tax law) will go into effect on January 1, 2018, allowing lawmakers time to draft regulation for implementation of the tax law during 2017. The tax law states how much enterprises and public institutions must pay in taxes for different types of pollutants. Chen Qingqing, *Environmental Protection Tax To Be Binding Measure To Tackle Pollution; Could Raise as Much as $7.2b Annually*, GLOBAL TIMES (Dec. 26, 2016, 10:59), http://www.globaltimes.cn/content/1025824.shtml. The tax rate will be "1.2 yuan ($0.17) per unit of atmospheric pollution, 1.4 yuan per unit of water pollution, 5 yuan per tonne of coal waste and 1,000 yuan per tonne of 'hazardous waste.'" Jason Lee, *China To Levy New Taxes in Bid To Strengthen Pollution Fight*, REUTERS (Dec. 25, 2016, 3:31 AM), http://www.reuters.com/article/us-china-environment-idUSKBN14E05T. In the "Table of Taxable Items" and "Amount of Environmental Protection Tax," the tax law specifies which pollutants are taxable but notably fails to include carbon dioxide. Chinese National People's Congress Network, *Law of the People's Republic of China on Environmental Protection Tax*, NAT'L PEOPLE'S

CONGRESS PEOPLE'S REPUBLIC CHINA, http://www.npc.gov.cn/npc/xinwen/2016-12/25/content_2004993.htm; Liu Weibing, *China Focus: China To Introduce Environmental Tax for Enhanced Pollution Control*, XINHUANET (Dec. 25, 2016, 9:53 PM), http://news.xinhuanet.com/english/2016-12/25/c_135931561.htm.

The tax law, which is China's first independent tax on environmental pollution, focuses on making companies more accountable for their pollution and more responsible for protecting the environment by instituting a system of taxes and levies. The new tax law will not only bind companies to pay taxes based on certain pollutants, but it will also act as a lever for investment in cleaner technologies. Zhang Chun, *China Issues Draft on Environmental Taxes To Combat Pollution*, CHINADIALOGUE (Nov. 6, 2015), https://www.chinadialogue.net/article/show/single/en/7975-China-issues-draft-on-environmental-taxes-to-combat-pollution. The tax law will replace the current system of non-binding pollution fees that has failed to alleviate China's pollution crisis. Jia Kang, head of the Chinese Ministry of Finance's Research Institute for Fiscal Science, stated that "[p]urely relying on traditional administrative interventions is clearly no longer adequate to deal with the current problems."

B. Analysis

An estimated 4400 people die daily in China due to the high levels of airborne particulate matter, which are produced from various types of combustion, industrial processes, electric power plants, and the burning of fossil fuels. ROBERT A. RHODE & RICHARD A. MULLER, AIR POLLUTION IN CHINA: MAPPING OF CONCENTRATIONS AND SOURCES 11 (PLoS ONE eds., 2015). Richard Muller and Robert Rhode of Berkeley Earth found that coal emissions contribute the most to China's air pollution; and, according to National Energy Administration Data, China receives about "64 percent of its primary energy from coal." Alex Morales, *China Air Pollution Kills 4,000 People a Day: Researchers*, BLOOMBERG (Aug. 13, 2015, 1:00 PM), https://www.bloomberg.com/news/articles/2015-08-13/china-air-pollution-kills-4-000-people-a-day-researchers. In December of 2016, multiple Chinese cities were placed under pollution and smog alerts, and even more alarming is the fact that twenty-three of these cities, including China's capital city of Beijing, were under red alert due to serious air pollution. *Smog Alert Issued in 61 Chinese Cities*, ARIRANG NEWS (Jan. 3, 2017), https://www.youtube.com/watch?v=dwleGIu3qF4. Christian Shepherd, *China Wants 23 Northern Cities Put on Red Alert for Smog*, REUTERS (Dec. 16, 2016,

8:27 AM), http://www.reuters.com/article/us-china-pollution-idUSKBN1450GI. China has a four-tier warning system for severe weather in which red is the most serious tier and is activated only after the Air Quality Index reaches 500 or more after four consecutive days of heavy air pollution, including two days of severe air pollution. *Beijing, Tianjin Issue Red Alerts for Air Pollution*, MINISTRY ENVTL. PROTECTION PEOPLE'S REPUBLIC CHINA (Dec. 12, 2016), http://english.mep.gov.cn/News_service/media_news/201612/t20161216_369155.shtml.

In March of 2016, Li Keqiang, Premier of the State Council, acknowledged the extensive air pollution problem facing China and stated the government's focus on improving environmental standards and air quality. Liu Qin, *13th Five-Year Plan Is the First To Include PM2.5 Targets*, CHINADIALOGUE (Aug. 3, 2016), https://www.chinadialogue.net/article/show/single/en/8696-13th-Five-Year-Plan-is-the-first-to-include-PM2-5-targets. Reducing carbon emissions is central to China's Thirteenth Five-Year Plan (FYP), which includes proposals to limit emissions from coal burning industries and vehicles as well as to promote clean production and low-carbon industries. *Highlights of Proposals for China's 13th Five-Year Plan*, XINHUANET (Nov. 4, 2015, 4:56 PM), http://news.xinhuanet.com/english/photo/2015-11/04/c_134783513.htm. The FYP caps coal-fired power generating capacity to 1100 gigawatts (GW) in 2020, up from the current capacity of 920 GW; and, in order to adhere to this coal capacity target, China has suspended 104 power projects that were either planned or under construction. Zachary Davies Boren, *China Suspends 104 Planned Coal Power Plants*, ENERGY DESK GREENPEACE (Jan. 16, 2017, 9:30 AM), http://energydesk.greenpeace.org/2017/01/16/china-coal-power-overcapacity-crackdown/.

China's previous pollution fee system allowed local officials from China's Ministry of Environmental Protection to disrupt the process of levying charges against polluting companies and resulted in abuse of the system. Under the new tax law, local officials from China's Ministry of Environmental Protection will only be responsible for monitoring polluters, and local tax officials will be responsible for enforcing and collecting the environmental tax from polluters. Alice Bryant, *China Places a New Tax on Pollution*, VOA LEARNING ENG. (Jan. 2, 2017), http://learningenglish.voanews.com/a/china-places-a-new-and-higher-tax-on-pollution/3656140.html. This will ensure that local governments do not exempt from fees those firms that contribute to fiscal revenues. When the tax law takes effect, it is estimated that China will collect around 50 billion yuan every year from environmental taxes. Chen Qingqing, *Environmental Protection Tax To Be Binding Measure To*

Tackle Pollution; Could Raise as Much as $7.2b Annually, GLOBAL TIMES (Dec. 26, 2016, 10:59 AM), http://www.globaltimes.cn/content/1025824.shtml. Environment Minister Chen Jining stated that the purpose of this policy "[is not] to increase taxes, but is to improve the system, and encourage enterprises to reduce emission." *China To Levy New Taxes Against Pollution*, SHENZHEN DAILY (Dec. 26, 2016, 8:53), http://www.szdaily.com/content/2016-12/26/content_14663792.htm. It should be noted that the tax law allows local governments to change the tax rates in accordance with the conditions of the local economy and pollution conditions. While this may seem like an unchecked power and an opportunity for corruption by the local government, the tax law states that the local government must act "directly under the Central Government" and "in accordance with the requirements of this law." Chinese National People's Congress Network, *People's Republic of China Environmental Protection Tax Law*, NAT'L PEOPLE'S CONGRESS PEOPLE'S REPUBLIC CHINA (Dec. 25, 2016, 4:20 PM), http://www.npc.gov.cn/npc/xinwen/2016-12/25/content_2004993.htm.

The Finance Ministry stated that "tax revenue is an important economic means to promote environmental protection." Jason Lee, *China To Levy New Taxes in Bid To Strengthen Pollution Fight*, REUTERS (Dec. 25, 2016, 3:31 AM), http://www.reuters.com/article/us-china-environment-idUSKBN14E05T. The tax law is expected to not only raise the operational costs of business but also to force firms to upgrade technology and shift to cleaner production. One of the goals of the tax law is that the tax revenue will allow the government to spend more on "environmental protection and subsidiz[e] the [research and development] of green technology." *China Pins Hopes on Taxation for Environmental Protection*, CHINA DAILY (Dec. 9, 2016, 10:17), http://www.chinadaily.com.cn/business/2016-12/09/content_27621457.htm. This tax is not meant solely to punish polluting firms, but also to change the behavior of firms in China and raise taxpayers' environmental awareness.

Unfortunately, the tax law has major deficiencies, including the exclusion of a tax on carbon dioxide emissions and the narrow application of the tax law on enterprises and public institutions that directly emit pollutants, thus ignoring firms that indirectly discharge pollutants. *China Moves Toward Taxation on Pollutants*, NAT'L PEOPLE'S CONGRESS PEOPLE'S REPUBLIC CHINA (Aug. 30, 2016), http://www.npc.gov.cn/englishnpc/news/Legislation/2016-08/30/content_1996076.htm. Additionally, Article XII of the tax law excludes certain circumstances from environmental taxes, including the discharge of taxable pollutants

in agricultural production (excluding large-scale farming); emissions of pollutants from mobile sources, such as motor vehicles, railway locomotives, non-road mobile machinery, ships, and aircraft; and other circumstances where the State Council approves tax exemption. Chinese National People's Congress Network, *People's Republic of China Environmental Protection Tax Law*, NAT'L PEOPLE'S CONGRESS PEOPLE'S REPUBLIC CHINA (Dec. 25, 2016, 4:20 PM), http://www.npc.gov.cn/npc/xinwen/2016-12/25/content_2004993.htm. The exclusion giving discretion to the State Council is particularly worrisome because it gives the State Council free reign to exempt other situations, in addition to those listed, from environmental taxes with no regulations or rules to consider.

In a recent study conducted by Greenpeace East Asia, the results showed that it may take up to twelve years for China's air pollution levels to fall within the legal limits. Tom Baxter and Guan Siqi, *Data: Chinese Cities Could Take Up to 12 Years To Meet Air Pollution Limits*, ENERGY DESK GREENPEACE (Jan. 17, 2017, 2:00 AM), http://energydesk.greenpeace.org/2017/01/17/china-cities-air-pollution-legal-limits-rankings/. This new tax law will propel China towards the right direction, but more is needed for China to fully address the pollution problem it faces.

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