Golden Gate University Environmental Law Journal

Volume 10 | Issue 1 Article 1

May 2018

Front Matter

Follow this and additional works at: https://digitalcommons.law.ggu.edu/gguelj

Part of the Environmental Law Commons

Recommended Citation
, *Front Matter*, 10 Golden Gate U. Envtl. L.J. i (2018).
https://digitalcommons.law.ggu.edu/gguelj/vol10/iss1/1

This Masthead is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Environmental Law Journal by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

GOLDEN GATE UNIVERSITY ENVIRONMENTAL LAW JOURNAL

VOLUME 10 **NUMBER 1** **SPRING 2018**

EDITOR-IN-CHIEF
Elena Idell

MANAGING EDITOR
Ana Allec

SYMPOSIUM EDITOR
Julia Chernova

RESEARCH EDITOR
Alexander Heaukulani

PACIFIC REGION EDITOR
Valorraine Dattan

ASSOCIATE EDITORS
Sydney Chase
Aceilya Garduno
Julia Morreale

WRITERS

Annie Banh
Nicholas Bilof

FACULTY EDITOR
Paul Stanton Kibel

FACULTY ADVISORS
Paul Stanton Kibel (Chair)
Michele Benedetto Neitz
Hina Shah

Students of Golden Gate University School of Law publish the *Golden Gate University Environmental Law Journal* in one volume in the spring of each school year. Business and editorial offices are located at 536 Mission Street, San Francisco, California 94105. Views expressed herein are those of the authors and do not necessarily reflect the policies or opinions of the *Golden Gate University Environmental Law Journal* or Golden Gate University School of Law.

Subscriptions for the annual volume are $25. International shipping carries an additional $7.00 charge. To subscribe, contact William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, NY 14068 or call (800) 828-7571. Subscription inquiries can also be directed to the current Editor-in-Chief by emailing ELJ@ggu.edu. Back issues may be ordered directly from Hein, and can also be found in electronic format on our Digital Commons and from Hein Online. Claims for issues not received must be filed within six months of publication or they will not be honored without charge.

Member National Conference of Law Reviews
© Golden Gate University 2018
Cite as: GOLDEN GATE U. ENVTL. L.J.
Printed on 100% recycled paper.

SCHOOL OF LAW FACULTY

JENNIFER BABCOCK, Associate Professor of Law; B.A., University of California, San Diego; MSW, San Jose State University; J.D., Santa Clara University School of Law

MICHELE BENEDETTO NEITZ, Professor of Law; B.A., Santa Clara University; J.D., New York University

RANA BOUJAOUDE, Associate Professor of Law and Director of Bar Services; B.A., San Francisco University; J.D., Golden Gate University School of Law

STEVEN CASTLEMAN, Visiting Associate Professor and Clinical Staff Attorney, Environmental Law and Justice Clinic; B.A., Yale University; J.D., University of San Francisco School of Law

HELEN Y. CHANG, Professor of Law; B.A., University of Texas; J.D., Southern Methodist University Law School

ERIC C. CHRISTIANSEN, Professor of Law; B.A., University of Notre Dame; M.A., University of Chicago Divinity School; J.D., New York University

LAURA CISNEROS, Professor of Law and Director of Honors Lawyering Program; B.A., University of San Diego; J.D., Loyola University New Orleans School of Law; LL.M., University of Wisconsin Law School

MORT P. COHEN, Professor of Law; B.S., New York University; LL.B., Brooklyn Law School; LL.M., Harvard University

MICHAEL DAW, Professor of Law and Associate Dean and Director, Law Library; B.A., J.D., Valparaiso University; M.L.I.S., San Jose State University

DAN DEVOY, Visiting Associate Professor of Law, Director Veterans' Advocacy Legal Center; B.A., University of California, San Diego, J.D., Golden Gate University School of Law

SAMUEL ERNST, Associate Professor of Law; B.A., University of California, Santa Cruz; M.A., University of California, Los Angeles; J.D., Georgetown University School of Law

BENEDETTA FAEDI DURAMY, Professor of Law, Associate Dean for Faculty Scholarship; J.S.D., Stanford Law School; LL.M., London School of Economics and Political Sciences; M.A., Political Science, University of Florence; LL.B., University of Rome

ELIZABETH FISHMAN, Visiting Associate Professor of Law; B.A., Brown University; J.D., Stanford Law School

WILLIAM GALLAGHER, Professor of Law and Co-Director, Intellectual Property Law Center; B.A., University of California, Berkeley; M.A., University of Chicago; J.D., University of

California, Los Angeles, School of Law; Ph.D., University of California, Berkeley, Boalt Hall School of Law

MARC GREENBERG, Professor of Law and Co-Director, Intellectual Property Law Center; A.B., University of California, Berkeley; J.D., University of California, Hastings College of the Law

HELEN KANG, Professor of Law and Director, Environmental Law and Justice Clinic; B.A., Yale College; J.D., University of California, Berkeley, Boalt Hall School of Law

PAUL KIBEL, Professor of Law; B.A., Colgate University; J.D., Willamette University College of Law; LL.M., University of California, Berkeley, Boalt Hall School of Law

ANNA KIRSCH, Visiting Associate Professor of Law and Clinical Staff Attorney, Women's Employment Rights Clinic; B.A. Virginia Tech Institute; J.D., University of California, Hastings College of Law

REICHI LEE, Associate Professor of Law and Director of Academic Development; B.A. University of California, Los Angeles; J.D., University of California, Hastings College of Law

ELEANOR LUMSDEN, Associate Professor of Law; A.B., Princeton University; J.D., New York University

FIONA MCKENNA, Associate Professor of Law and Interim Director, Legal Writing; B.A., University of California, Berkeley; J.D., American University, Washington College of Law

KATHLEEN MORRIS, Professor of Law; B.A., California State University, Northridge; M.Sc., University of Edinburgh; J.D., University of California, Berkeley, Boalt Hall School of Law

ANTHONY NIEDWIECKI, Dean of the School of Law and Professor of Law; B.A. Wayne State University; J.D., Tulane University School of Law; LL.M., Temple University Beasley School of Law

CHRISTIAN N. OKEKE, Professor of Law, Director of LL.M. and SJ.D. International Legal Studies Program, and Director, Sompong Sucharitkul Center for Advanced International Legal Studies; LL.M. (magna cum laude), Kiev State University, Ukraine; D.Jur., Free University of Amsterdam

KAELYN ROMEY, Associate Professor of Law and Director of Litigation Program; B.A. University of California, Santa Barbara; J.D., University of San Diego School of Law; LL.M., University of San Diego School of Law

LESLIE ROSE, Professor of Law and Director, Advanced Legal Writing Program; B.S. (magna cum laude), Boston University; J.D., LL.M. (highest honors), Golden Gate University School of Law

THOMAS A. SCHAAF, Associate Professor of Law; B.A., The Evergreen State College; J.D., University of California, Hastings College of the Law

HINA SHAH, Associate Professor of Law and Director of Women's Employment Rights Clinic; B.S., University of Texas, Austin; J.D., University of California, Hastings College of the Law

KIMBERLY STANLEY, Professor of Law; B.S., Brigham Young University; J.D. (honors), George Washington University; LL.M., Georgetown University

RACHEL VAN CLEAVE, Professor of Law; B.A., Stanford University; J.D., University of California, Hastings College of the Law; J.S.M., Stanford University

TERESA WALL-CYB, Associate Professor of Law and Externship Director; B.A., University of California Santa Barbara; M.A., San Diego State University; J.D., Golden Gate University School of Law

MARK YATES, Professor of Law and Associate Dean of Academic Affairs; B.A., University of California, Santa Barbara; J.D., University of California, Hastings College of the Law

Published by GGU Law Digital Commons, 2018

ADJUNCT FACULTY

Heather Abelson
Frank Adam
Hamed Adibnatanzi
Zakia Afrin
Cesar Alvarado
Ashmeed Ali
David Ammons
Marie Appel
Nicholas Baran
Deborah Bardwick
Anthony Barnes
Edward Baskauskas
Philip Batchelder
Rebecca Bauer-Kahan
Judge Sandra Bean
Jeannie Becker
Anthony Berman
Kate Black
Daniel Borson
Heather Borlase
Basil Boutris
Robert Byrne
Alicia Cabrera
Timothy Cahn
Caren Cambre
Cynthia Chandler
Rick Chang
Remigius Chibueze
Laura Chiera
Claudia Choy
Penelope Chronis
Peter Claude
Matthew Clausen
Judith Cohen
Cari Cohorn
Stephen Collier
Corey Farris
Adam Forest
Jason Galek
Marc Goldman
Jonathan Golinger
Johanna Gomez
James Hastings
Kristin Henry
Lynn Humphreys
Megan Hutchinson
The Hon. Maria-Elena James
David Jargiello
Peter Jovanovic
Matthew Kramer
Rosemary La Puma
Michael Larkin
Carolyn Lee
Marguerite Lee
Susan Leff
Noah Levin
Philip Lo Scalzo
Michael Longfelder
Jorge Lopez
Samuel Luzadas
Christine Mahanpour
Sara Malan
Matthew Mandel
Harry Maring
Bradley Marsh
Kelly Martin
Christopher Martz
Eva McComas
Robert McFarlane
Justin Miller
Brian Mitchell
Will Morehead
Gail Mullikin
Nima Nayebi
Daniel Newbold
Ronald Niver
Jennifer Pesetsky
Gail Quan
Amir Rang
Elizabeth Rest
Susan Roberts
Sue Rokaw
Carrie Rosenbaum
Roger Royce
Larry Sager
Adam Sand

Amir Sarreshtehdary
Harriet Schiffer-Scott
Lois Schwartz
Owen Seitel
Acadia Senese
Craig Shaltes
Peter Sherwood
Kelly Shindell DeLacey
Maggie Shrout
Warren E. Small
Matthew Smith
Alyssa Snyder
Catherine Souders
Paul N. Stam
Russell Stanaland
Cliff Stanley
Deborah Teitler
Christine Tour Sarkissian
Tim Treichelt
Jon Vaught
Michael Vinson
Allison Wang
Julia Weber
Lindsay Witzel
Jennifer Wyllie-Pletcher
William Woodward
Megan Yip
Dr. Nancy Yonge
Paul Zamolo
Gregg Zywicke

Published by GGU Law Digital Commons, 2018

ADMINISTRATION
Anthony Niedwiecki
Dean of the School of Law

Rana Boujaoude, *Director of Bar Services and Associate Professor*
Jessica Bride, *Associate Dean of Law Student Services*
Laura Cisneros, *Faculty Director of Honors Laywering Program*
John Chalmers, *Associate Dean of Law School Admissions*
Michael Daw, *Associate Dean and Director, Law Library, and Professor of Law*
Dan Devoy, *Director of Veterans' Advocacy Legal Center and Visiting Professor of Law*
Greg Egertson, *Associate Dean, Budget and Enrollment Management*
Benedetta Faedi Duramy, *Associate Dean for Faculty Scholarship and Professor of Law*
Corey Farris, *Associate Dean of Law Career Services and Alumni Relations*
Gabriela De La Vega, *Director of Financial Aid*
Helen Kang, *Director of Environmental Law and Justice Clinic and Professor of Law*
Reichi Lee, *Director of Academic Development and Associate Professor of Law*
Fiona McKenna, *Interim Director of Writing Program and Associate Professor of Law*
Christian Okeke, *Director of LL.M. and J.D. International Legal Studies Program, Director of Sompong Sucharitkul Center for Advanced International Legal Studies, and Professor of Law*
Kaelyn Romey, *Director of Litigation Center and Professor of Law*
Leslie Rose, *Director of Advanced Legal Writing Program and Professor of Law*
Hina Shah, *Director of Women's Employment Rights Clinic and Associate Professor of Law*
Teresa Wall-Cyb, *Director of Externships and Associate Professor of Law*
Mark Yates, *Associate Dean of Academic Affairs and Professor of Law*

GOLDEN GATE UNIVERSITY ENVIRONMENTAL LAW JOURNAL

VOLUME 10 NUMBER 1 SPRING 2018

TABLE OF CONTENTS

ARTICLES

CHERISHING THE COAST: CALIFORNIA GOES LONG
Ariel Rubissow Okamoto, ... 1
Nate Seltenrich,
Lisa Owens Viani,
Jonathon Gurish

A BATTLE OVER OYSTERS:
DRAKES BAY OYSTER CO.
V. JEWELL AND ITS AFTERMATH
Elena Idell 33

POWERING MARY JANE: MARIJUANA
AND ELECTRIC PUBLIC UTILITIES
Ryan Dadgari 55

TAKING A BREATH: LESSONS FOR THE
PORT OF OAKLAND FROM THE CLEAN
TRUCKS PROGRAM AT THE PORTS OF
LOS ANGELES AND LONG BEACH
Julia Chernova 87

THE RIGHT TO FLOURISH, REGENERATE,
AND EVOLVE: TOWARDS JURIDICAL
PERSONHOOD FOR AN ECOSYSTEM
Nicholas Bilof 111

Golden Gate University Environmental Law Journal

Volume 10 | Issue 1 Article 2

May 2018

Cherishing the Coast: California Goes Long

Ariel Rubissow Okamoto

Nate Seltenrich

Lisa Owens Viani

Jonathon Gurish

Follow this and additional works at: https://digitalcommons.law.ggu.edu/gguelj

Part of the Environmental Law Commons

Recommended Citation
Ariel Rubissow Okamoto, Nate Seltenrich, Lisa Owens Viani, and Jonathon Gurish, *Cherishing the Coast: California Goes Long*, 10 Golden Gate U. Envtl. L.J. 1 (2018).
https://digitalcommons.law.ggu.edu/gguelj/vol10/iss1/2

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Environmental Law Journal by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

CHERISHING THE COAST: CALIFORNIA GOES LONG

ARIEL RUBISSOW OKAMOTO[1], *NATE SELTENRICH*[2], *LISA OWENS VIANI*[3], *JONATHON GURISH*[4]

I. INTRODUCTION

Each Western state cherishes one relationship with the Pacific Ocean above all others. For Washington, it is the Pacific salmon returning to their natal creeks each year to spawn;[5] for Hawaii it is the *aina,* the land they hold in a vast sea;[6] and for California it is more than 1,000 miles of unusually undeveloped and scenic coastline. Each state's rituals and rulemaking reflect extraordinary public regard for these resources and the ocean that supports them.

In California's case, the relationship coalesced with concern over a few excesses in oceanfront construction, percolated as pretty beach

---

[1] Ariel Rubissow Okamoto is a science and climate change writer based in San Francisco. Over the last 25 years, she has focused on interpreting the often-complex science and policy findings of local, state and federal research and planning institutions for use by decision makers. She is co-author of The Natural History of San Francisco Bay (UC Press 2011), the editor of the San Francisco Estuary Partnership's long-standing ESTUARY News magazine, and a frequent contributor to Bay Nature magazine.

[2] Nate Seltenrich is a freelance environmental and science writer based in Sonoma County. Over the last 15 years, the Bay Area native has covered a wide variety of subjects for regional, national, and international newspapers and magazines, and received numerous awards and fellowships. His current work focuses on infrastructure, public lands, and environmental health.

[3] Lisa Owens Viani is a science and environmental writer and a Contributing Editor with Landscape Architecture Magazine.

[4] Jonathon Gurish J.D., LL.M., is Senior Staff Counsel with the California State Coastal Conservancy. Jonathon Gurish provided legal support in the writing of this paper.

[5] As an example, the annual salmon harvest contributes more than $1 billion to Washington's economy. 2015 Washington Senate Joint Memorial No. 8007, (64th Leg. 2015) http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Joint%20Memorials/8007-S-PS%20hatchery%20&%20gen%20mgmt%20plans.pdf.

[6] For example, cases construing Haw. Const. art. XII, § 7 protecting land uses for subsistence, cultural and religious purposes by Native Hawaiian *ahupua'a* tenants, *see, e.g.*, Kalipi v. Hawaiian Tr. Co., Ltd., 656 P.2d 745 (1982) (discussing customary and traditional rights exercised for subsistence, cultural and religious purposes by ahupua'a tenants); Pele Defense Fund v. Paty, 837 P.2d 1247, 1270 (1992).

towns grew ugly, gathered steam as developers proposed exclusive developments sprawled over coastal bluffs, and came to a head in the late 1960s with disastrous oil spills and proposed nuclear power plants too close to shore.[7] At the time, California had long stretches of cliffs, bluffs, beaches, lagoons, wetlands, and surf relatively unfettered by industry and urbanization compared to Eastern or Southern states. And it was soon clear Californians wanted to keep it that way.

Both California and the nation were riding a wave of public concern about compromised coastlines that eventually led to federal coastal protections in 1972. The United States' Coastal Zone Management Act[8] is widely viewed as classic federalism: environmental legislation that, unlike the top-down mandates of the Clean Water Act,[9] for example, allows states to decide how best to implement coastal protections from the bottom up, based on common national criteria.[10] In essence, the federal act established regulatory control of coastal land-use and provided funding for preservation and conservation.[11]

[7] For a discussion of the relationship between the Santa Barbara Oils Spills and the development of state and federal cooperation through the federal Coastal Zone Management Act, *see* Cal. v. Norton, 311 F.3d 1162 (9th Cir. 2002) ("Some would trace the current framework of environmental protections in substantial measure directly to the foot Santa Barbara spill. Of particular relevance here, the federal Coastal Zone Management Act and California's Coastal Act followed in the wake of the spill and both provided California substantial oversight authority for offshore oil drilling in federally controlled areas"), cited in Linda Krop, *Defending State's Rights Under the Coastal Zone Management Act-State of California v. Norton*, 8 Sustainable Dev. L. & Pol'y 54 (2007).

[8] 16 U.S.C.§§ 1451, et seq. (2017).

[9] 33 U.S.C. § 1251, et seq. (2017). *See* Andrew P. Morris, et al., *The Failure of EPA's Water Quality Reforms: From Environment-Enhancing Competition to Uniformity and Polluter Profits*, 20 UCLA J. Envtl. L. & Pol'y 25, 27 (2002) ("The modern Clean Water Act largely relies on a "command-and-control" approach to limiting the discharge of effluent in waters through permits").

[10] *See* 16 U.S.C. § 1456(c)(3)(A) (2017) (federal consistency requirements of the Coastal Zone Management Act); Telephone interview with Meg Caldwell, Deputy Director, Oceans, David and Lucile Packard Foundation (Aug. 30, 2016). *See also*, *Too Much of a Good Thing? Federal Supremacy & the Devolution of Regulatory Power: The Case of the Coastal Zone Management Act*, 48 Naval L. Rev. 84, 85 (2001) ("In a departure from federal supremacy, Congress effectively assimilates a state's law as codified in its coastal management plan and applies it to federal agencies. Once a state coastal management plan is approved by the Secretary of Commerce, all federal agency activities directly affecting or within the coastal zone must be consistent with the state plan 'to the maximum extent practicable'") (footnotes omitted). *But see*, Rachael E. Salcido, *Offshore Federalism and Ocean Industrialization*, 82 Tul. L. Rev. 1355, 1415 (2008) (criticizing the CZMA's dueling sovereign model as negatively affecting environmental protection of marine resources).

[11] 16 U.S.C. §§ 1455 & 1456 (2017). "Through a system of grants and other incentives, CZMA encourages each coastal state to develop a coastal management plan. Further grants and other benefits are made available to a coastal state after its management plan receives federal approval from the Secretary of Commerce. To obtain such approval a state plan must adequately consider the 'national interest' and 'the views of the Federal agencies principally affected by such program.'" Sec. of the Interior v. Cal., 464 U.S. 312, 316 (1984).

California never looked back. By 1976, the Golden State had powered through various commissions and studies to pass its own coastal[12] and conservancy acts.[13] It also made a decision that continues to distinguish its approach to coastal zone management from most other states and countries: to not only create a regulatory California Coastal Commission, expanding on the tradition of the preexisting San Francisco Bay Conservation and Development Commission, but also to launch a non-regulatory California State Coastal Conservancy (the Conservancy).[14]

This article focuses on the Conservancy. It explores the Conservancy's uniquely proactive approach to coastal zone management through both oral history (collected via telephone interviews) and literature research. In general, being proactive has involved the Conservancy in activities such as identifying coastal areas or wildlife habitats in need of protection; developing plans and priorities for acquisition or restoration; assembling and supporting local stewards and partners; leading and shepherding collaborative projects to fruition; and often providing significant funding.

In retrospect, while it may have been relatively simple for California to set up several entities to restrict coastal development, it was unusually creative to set up a distinct entity with a more proactive conservation role.[15] Many states have conservation agencies but few have agencies specifically focused on preserving and restoring coastal areas.[16] California has such an agency—the Conservancy.

Today, both the Commission's clout and the Conservancy's vision protect the coast. Some see the relationship between the two agencies as working hand and glove,[17] with the Commission ensuring public access when new coastal development is approved and the Conservancy ensuring that public access to the shoreline is achieved even in the absence of

---

[12] The California Coastal Act of 1976 (codified at Pub. Res. Code Div. 20 (§§ 30000 et seq.)) replaced the California Coastal Zone Conservation Act of 1972, which had been enacted by voter initiative, Proposition 20 (1972).

[13] The Coastal Conservancy Act, Stats.1976, ch. 1441, § 1 (codified at Pub. Res. Code Div. 21 (§ § 31000, et seq.)) (2017). For a fuller discussion of the California Coastal Act and the Conservancy Act, *see* Legal Origins of the Conservancy, *infra* section II.

[14] For a discussion of the unique approach of the Coastal Conservancy, *see* Joseph Patrillo, *The Coastal Concept*, 16 COASTAL MGMT. 1, 3-7 (1988) (article by the first Executive Officer of the Conservancy). *See also* Peter Grenell, *The Once and Future Experience of the California Coastal Conservancy*, 16 COASTAL MGMT. 13 (1988).

[15] Telephone Interview with Philip Williams, Principal, Philip Williams & Associates (July 29, 2016).

[16] One exception is Louisiana. The Coastal Protection, Conservation, Restoration and Management Act establishes the state's Coastal Protection and Restoration Authority and Coastal Protection, and Restoration Fund, which was later repealed and replaced by a coastal zone management act. *See* LA REV. STAT. T. 49, Ch. 2, Pt. II, Subpt. A, *repealed by Acts 2009,* NO. *523* (West 2017).

[17] Telephone Interview with Meg Caldwell, *supra* note 10.

development. California's growing Coastal Trail, now more than 700 miles long, demonstrates the effectiveness of this dual approach. Others point out that the Conservancy's non-regulatory role allows it to operate independently of the Commission on many fronts.[18]

As a unique and independent agency, the Conservancy has been able to engage in two activities not always associated with government work: taking risks and creating opportunities for collaboration with local partners, non-profits, and communities.[19] As it goes about its work, the Conservancy strives to make sure that local voices are heard in the conservation process and that long-term stewardship of coastal lands is achieved through a clear sense of place. With this kind of support, many local land-trust and environmental organizations have become fierce advocates for coastal protection and stopped development even when the state has been unable to do so.[20] Collaboration can be time-consuming and costly, and at times trade-offs ensuring project sustainability have

---

[18] The Commission has taken bold and sometimes controversial positions in defense of coastal resources resulting in several significant state and U.S. Supreme Court cases. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (holding that the Commission could not condition coastal development permit on property owners' transfer to public of easement across beachfront property); Sec. of the Interior v. Cal., 464 U.S. 312, 334 (1984) (finding that consistency determination under Coastal Zone Management Act was not required when the federal government sold gas leases); Reauthorization Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 1388-299 to -319 (codified at 16 U.S.C. §§ 1451-64 (2012)); Ann E. Carlson & Andrew Mayer, *Reverse Preemption*, 40 Ecology L.Q. 583, 621 (2013). For a highly partisan account of the Commission's role, *see* J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. Envtl. L. & Pol'y 247, 271 (2004). The Conservancy has also been both lauded and criticized for its role in land conservation within the state. *Compare* Joan Hartman, *The Southern California Wetlands Recovery Project: the unfolding story*, 30 Golden Gate U. L. Rev. 885 (2000) (discussing the Coastal Conservancy's critical role in protecting wetlands in Southern California), and *California's Land Conservation Efforts: The Role Of State Conservancies*, Cal. Leg. Analyst's Office (2001), http://www.lao.ca.gov/2001/conservancies/010501_conservancies.html (last visited Apr. 27, 2017) ("[s]tate conservancies can be less cost-effective than alternative approaches in achieving land conservation goals.").

[19] A former executive officer of the Conservancy summed up this approach in a review of the first ten years of the agency:

> The Conservancy was created as a project-implementing agency, not as a planning agency. Therefore, it was obliged to seek ways to make the most of its limited resources in a direct and visible manner. It not only succeeded in solving some tough problems, it invented some new methods for doing so, and in the process it created a model that others are now, ten years later, seriously considering adopting elsewhere.

Peter Grenell, *The Coastal Conservancy: The First Decade*, 2 Cal. Waterfront Age 5 (Fall 1986), http://scc.ca.gov/webmaster/coast_ocean_archives/0204.pdf.

[20] *See, e.g.*, Bolsa Chica Land Tr. v. Super. Ct. of San Diego Cty., 71 Cal.App.4th 493 (1999) (holding that the Coastal Act did not authorize the development of environmentally sensitive areas and blocking the development of 5,700 residential units, a seventy-five-acre marina, and a 600-foot-wide navigable ocean channel and breakwater).

been imperfect.[21] Nonetheless, collaboration remains a central tenet of the Conservancy's efforts to build long-lasting support for coastal projects.

II. Legal Origins of The Conservancy

Though many consider the Conservancy to be a product of California's Coastal Zone Management Act, it was actually created by separate legislation. The California Coastal Act and California Coastal Conservancy Acts of 1976 originated in an initiative measure, the Coastal Zone Conservation Act (also known as Proposition 20), passed by voters in the November 1972 general election.[22] As California Supreme Court Chief Justice Mosk observed at the time:

> [t]he People of California have become painfully aware of the deterioration in the quality and availability of recreational opportunities along the California coastline due to the combined factors of an increasing demand for its use and the simultaneous decreasing supply of accessible land in the coastal zone. Growing public consciousness of the finite quantity and fragile nature of the coastal environment led to the 1972 passage of Proposition 20. . .[23]

Proposition 20 created state and regional commissions charged with preparing plans to increase public awareness of the coast and to manage land use and development within the coastal zone.[24] The goal was "to prepare, based upon such study and in full consultation with all affected governmental agencies, private interests, and the general public, a comprehensive, coordinated, enforceable plan for the orderly, long-range conservation and management of the natural resources of the coastal zone, to be known as the California Coastal Zone Conservation Plan."[25]

---

[21] For example, wetland conservation efforts sometimes result in the loss of prime agricultural land, and public access to sensitive wildlife areas can disrupt wildlife recovery. S*ee* Cal. Farm Bureau Fed'n v. Cal. Wildlife Conservation Bd., 143 Cal.App.4th 173 (2006) (requiring CEQA analysis of agricultural impacts from proposed restoration project).

[22] Cal. Stats.1976, c. 1441, § 1. The Conservancy Act came out of recommendations of the interim commissions designed to undertake studies to determine the ecological planning principles and assumptions needed to ensure conservation and protection of coastal zone resources and, based upon such studies and in full consultation with all affected public and private interests, to develop and adopt a California Coastal Zone Conservation Plan (Coastal Zone Plan). (§§ 27001, subd. (b), 27300—27304.) For a history of Proposition 20, *see* CEEED v. Cal. Coastal Zone Conservation Comm'n, 43 Cal.App.3d 306, 311 (1974).

[23] Pac. Legal Found. v. Cal. Coastal Comm'n, 33 Cal. 3d 158, 162 (1982) (footnote omitted).

[24] *See* Former §§ 27300–27320, enacted by Prop. 20, Nov. 7, 1972 Gen. Elec. and repealed by Stats.1974, ch. 897, § 2, p.1900, eff. Jan. 1, 1977.

[25] Former § 27001 et seq. This statute was repealed with the passage of the California Coastal Act which implemented the federal Coastal Zone Management Act. *See* Stats.1974, c. 897, § 2.

This plan guided the subsequent framing of the Coastal Act, establishing the Commission, and of the Coastal Conservancy Act, which created the California State Coastal Conservancy.[26] Consistent with the principle that regulatory and proprietary governmental powers should be separated,[27] the California legislature divided authority between the two new agencies.

With these acts, California joined other states in solidifying twenty years of efforts to exert more control over their coastlines. Together with the State Water Resources Control Board, and the San Francisco Bay Conservation and Development Commission, established in 1965 as the first coastal-zone management agency in the country,[28] the Conservancy and Commission became integral parts of a comprehensive vision through which the coast would be carefully stewarded, protected, and developed.[29]

III. Change Over the Decades

Over time, the size, scope, and complexity of Conservancy projects has increased dramatically. Early projects revolved around acquiring small properties to solve big land use problems. El Nido was one of the first, a maze of 182 tiny lots waiting for development in a large subdivision above Malibu Beach in Southern California.[30] This subdivision was

[26] Hagopian v. State of Cal., 223 Cal. App. 4th 349, 360–61 (2014), (as modified), *review denied* (as modified), *review denied (*Apr. 30, 2014)*;* Marine Forests Soc. v. Cal. Coastal Comm'n, 36 Cal. 4th 1, 19 (2005).

[27] The doctrine of separation of governmental and proprietary state actions was popular in the 1970s around the time the Conservancy Act was being fashioned. *See generally* Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 Ariz. St. L.J. 559, 571 (1990) (discussing the relative popularity of the doctrine with *Nat'l League of Cities v. Usery,* 426 U.S. 833 (1976)).

> [S]tate action is proprietary if it "essentially reflect[s] the [governmental] entity's own interest in its efficient procurement of needed goods and services, . . .Second, state action is proprietary if "the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." . . .Thus, the doctrine also "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation.

Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1041 (9th Cir. 2007) (citations omitted). The rapid development of the California coast in the 1960s and '70s suggested the lack of social regulation and the need to address the problem not just through zoning and other regulations, but through the state purchasing ecological services for the public at large.

[28] *See About Us*, S.F. Bay Conservation and Dev. Comm'n, http://www.bcdc.ca.gov/aboutus (last visited Sept. 13, 2016).

[29] Telephone Interview with Meg Caldwell, *supra* note 10.

[30] The El Nido subdivision was created in 1928 before the advent of modern zoning regulations and without regard for the environmental constraints of the area. The subdivision established several hundred very small lots, most of which were on steep canyon slopes. Cal. Coastal Comm'n

situated on steep and highly erosive soils. The Conservancy acquired the lots and placed open-space easements over all but 15 of them.[31] It also transferred open-space easements to the Mountains Recreation and Conservation Authority.[32] Today, fifteen lots remain with sufficient land area to develop two residences, which will offset the costs of the project.[33]

In Northern California, in another early project, the Conservancy stepped in when the Commission needed help with mitigation for several small development proposals impacting pocketsize marshes.[34] Though the resulting Bracut Marsh Bank, built on an old lumberyard, did not turn out as planned, it represents one of the state's first wetland mitigation banks and an early example of the Conservancy thinking beyond individual property deals.[35]

In the 1980s, the Conservancy began to work on larger-scale acquisition and restoration projects with proportional environmental benefits. These included estuarine restoration along the Tijuana River, whose health, and that of the disadvantaged communities along it, was suffering from cross-border pollution.[36]

During this decade, the Conservancy's territory significantly expanded as well. In 1982, it gained jurisdiction over the shores and wetlands of the San Francisco Bay, broadening the definition of "coastal

---

Staff Report on (CDP) Application No.4-95-102, 4 (Feb. 29, 1996), http://documents.coastal.ca.gov/reports/1996/3/W23-3-1996.pdf.

[31] A 1979 report addressing the cumulative impacts of development in the small lot subdivisions of the Santa Monica Mountains found that the El Nido subdivision "contains erosive soils, which due to grading for homesites, would create erosion and sedimentation problems in Solstice Creek." *Id.* at 5.

[32] *See* El Nido Subdivision project file, Conservancy Project No. 79-008 (on file with the State Coastal Conservancy).

[33] *Id*.

[34] *See* Bracut Marsh Enhancement Plan, State Coastal Conservancy Staff Recommendation, Project No. 89-017, Mar. 16, 1989 (on file with the State Coastal Conservancy).

[35] *See, e.g.*, U.S Army Corps of Engineers, National Wetland Banking Study 5, 32 n. 58 (1994). Prior to 1980, the thirteen-acre site represented a filled, diked former tideland that had been used for twenty years as a lumber mill yard. The Conservancy initiated restoration of the site in 1981 by re-contouring the land and breaching the western levee to introduce tidal inundation to the site. Exotic vegetation was also removed and fencing was erected to minimize human disturbance. In 1992, six of the thirteen acres that make up the reserve were restored to tidal salt marsh. The remaining portion of the reserve include a small freshwater pond and seep, upland annual grassland, and a forested, freshwater wetland that was created in 1992 by planting native trees and shrubs. Mad River Biologists, Bracut Marsh Ecological Reserve, Final Monitoring Report 1-1 (2004) (on file with the State Coastal Conservancy).

[36] For a discussion of the evolution of the Tijuana Estuary restoration, *see History of SWIA & The Tijuana Estuary*, S.W. Wetland Interpretive Ass'n, http://www.swia4earth.org/History%20of%20SWIA.html (last visited July 10, 2017). For historical maps and other geographical information, *see Tijuana River Valley Historical Ecology Investigation*, S.F. Estuary Inst. & Aquatic Science Ctr., http://www.sfei.org/projects/tijuana#sthash.QTjQyJ62.dpbs (last visited July 10, 2017).

zone" set forth in the 1976 acts.[37] Soon afterwards, it gained access to interior watersheds well outside the established coastal zone. This expansion, achieved through negotiations with the California Department of Fish and Game (now Department of Fish and Wildlife), enabled the agency to take on an even greater variety of projects.[38]

Also of importance in shaping the Conservancy's direction was an early commitment to building local stewardship. With help from The Trust for Public Land, the Conservancy provided free training manuals and workshops to communities interested in permanently protecting the land they loved by forming land trusts. The Conservancy also provided granting funds to new land trusts for qualifying land acquisitions or other conservation projects while helping them learn management and negotiation skills.[39] Before these Conservancy and Trust for Public Land initiatives, few land trusts existed in California.[40]

One particular development in the 1980s illustrates this aspect of early Conservancy priorities. In 1983, the Conservancy provided the funds necessary for the Marin Agricultural Land Trust (MALT) to acquire its first easement.[41] MALT was established to purchase easements in coastal West Marin County and provide an economic boost for farms so they could be protected forever from development. Since then, the Conservancy has granted nearly twelve million dollars to help MALT acquire twenty-two easements protecting nearly 14,000 acres.[42]

In the 1990s, the scale of the Conservancy's projects expanded again. The Conservancy launched a region-specific Bay Area conservancy, and began shepherding more complex multi-benefit, multi-parcel, multi-agency projects through approvals and construction. Many of these projects are highlighted in section four of this article, "A Closer Look at the Conservancy in Action."[43] During the 1990s, Conservancy projects covered a broad range, including: facilitating plans and permits to restore tidal action at a retired army airfield in Novato; breaking the deadlock

[37] Cal. Stats. 1997, chap. 896 (S.B.1048) (1997) (codified at Pub. Res. Code Div. 21, chap. 4.5 (§§ 31160, et seq.)).

[38] Telephone Interview with Neal Fishman, Former Deputy Director, State Coastal Conservancy (Aug. 15, 2016).

[39] California State Coastal Conservancy, Government Grants for Land Trusts developed by Janet Diehl, former Project Manager at the California State Coastal Conservancy (1990) (on file with the State Coastal Conservancy).

[40] Telephone Interview with Janet Diehl, former Project Manager, State Coastal Conservancy (Aug. 20, 2016).

[41] Marin Agricultural Land Trust File, Conservancy Project No. 82-010 (on file with the State Coastal Conservancy).

[42] *The Conservancy at 40 Years: Marin County*, CAL. STATE COASTAL CONSERVANCY, http://scc.ca.gov/2016/06/07/the-conservancy-at-40-years-marin-county (last visited Sept. 13, 2016).

[43] *See infra*, section IV.

over flood-control plans for the Napa River;[44] and nurturing boundary-crossing regional trail projects along and around California's shores.

Throughout the 2000s, substantial funding provided by park and water bonds allowed the Conservancy to partner with businesses and local municipalities on more-expensive projects such as the removal of San Clemente Dam on the Carmel River,[45] the restoration of beleaguered steelhead streams,[46] and the transformation of an industrial waterfront to a new public shore for Fort Bragg.[47]

In this most recent decade, climate change, sea-level rise, and coastal erosion due to higher-intensity wave action have become more pressing issues for the Conservancy. The needs of vulnerable urban communities, and the potential for the creation of more natural infrastructure (such as wetlands, living shorelines, and oyster beds) than concrete sea walls to protect them, have become new priorities.

In many ways, this relatively rapid expansion of authority over time cannot be uncoupled from the concurrent growth in the agency's budget. Initial funding in 1976 was a lump sum of $10 million dollars. Budgets expanded and contracted over decades, but were significantly augmented by state bonds in the 2000s of $100, $250, and $400 million.[48] While a project in the 1980s might have involved fifty acres, a few regulators and resource managers, and $100,000, today's projects range to thousands of acres and hundreds of millions of dollars, and involve myriad partners.[49]

---

[44] *See infra*, text accompanying notes 95 through 104.

[45] *See infra*, text accompanying notes 105 through 116.

[46] Projects were developed in many of the major estuaries along the coast including Humboldt Bay, Tamales Bay, San Francisco Bay, Morro Bay, Monterey Bay and along the central coast of California.

A list of these projects is available at the office of the State Coastal Conservancy and specific areas can be accessed through the Conservancy's website.

[47] *See infra* text accompanying notes 120 through 121.

[48] Telephone Interview with Neal Fishman, *supra*, note 38. Details may include: Nejedly-Hart State, Urban, and Coastal Park Bond Act of 1976, $10 million; California Parklands Act of 1980, ~ $40 million; Propositions 18 and 19 of 1984, ~ $80 million; Prop 70 of 1988, $58 million; surplus state general fund money around '98, '99, ~ $50-$100 million; Coastal Protection Bond Act of 2000, ~$50-55 million.

[49] Telephone Interview, Jeffrey Haltiner, Principal with Philip Williams Associates (and later ESA Associates) (July 20, 2016). *Also compare* the Bracut Marsh project, discussed *supra* in text accompanying note 35, and the Hamilton Wetland Restoration project, *infra* text accompanying notes 68 through 70. Bracut Marsh involved acquisition of 13 acres, the restoration of 9 acres and cost $296,000 in 1980. Hamilton Wetlands Restoration involved 2600 acres and cost $114,387,242 (approximately $22 million state share) with the acquisition beginning in 2001 and completed in 2014).

From a restoration point of view, this kind of scale is necessary for ecosystem health and landscape resilience.[50]

IV. A Closer Look At The Conservancy In Action: On The Ground And In The Water

Now forty years old, the Conservancy has completed more than 2,400 projects in both coastal and inland counties, and in both Northern and Southern California.[51] Hundreds more projects remain underway. In this time, the Conservancy has also helped conserve more than 500 properties containing more than 400,000 acres of wetlands, dunes, wildlife habitat, recreational lands, farmland, working forestlands, and scenic open space (see Map/Figure 1 for all major acquisitions).[52] It has also facilitated access to, or construction of, hundreds of miles of trails, and retired hundreds of lots in inappropriately planned subdivisions along the coast.

In four decades, the Conservancy has invested more than $2 billion dollars in public funds, and leveraged another $3.5 billion dollars in investments.[53] The amounts spent are considerable and testify to the trust placed in the Conservancy over the years by other agencies, organizations, and the public to look after a beloved coast.

The following sections highlight how the Conservancy has fulfilled Coastal Act public access and protection directives in more detail. Sections are organized around the following Conservancy activities: restoring wetlands and coastal habitats; linking coasts, shores, and public open space via regional trail systems; conserving landscapes on larger scales; protecting watersheds; and increasing access to the coast for all Californians. These highlights represent a sampling of the myriad Conservancy projects and priorities[54] possible for an institution equipped with a Swiss

---

[50] Telephone Interview Jeffrey Haltiner, *supra* note 49. *See also Landscape Resilience Framework*, S.F. Estuary Inst. (2015), http://resilientsv.sfei.org/sites/default/files/general_content/SFEI_2015_Landscape%20Resilience%20Framework.pdf.

[51] Telephone Interview with Richard Wayman, Former Real Estate Manager, Coastal Conservancy (August 2016).

[52] Data sources for Map 1 and Map 2 of this article include: Conservancy Projects – California State Coastal Conservancy, 2017; Regional Trails – California State Coastal Conservancy, 2017; Urban Areas – U.S. Census – Tiger 2015; Protected Areas – GreenInfo Network; CPAD 2016b, http://www.greeninfo.org/ (last visited Mar. 8, 2018).

[53] "In its first 20 years, the Conservancy authorized approximately $200 million for restoration, acquisition, and access projects. In the decade that followed, the Conservancy authorized projects using nearly $1 billion in bond funds provided by California's voters through Propositions 12, 13, 40, 50 and 84." Cal. State Coastal Conservancy Strategic Plan 2013-2018 5, http://scc.ca.gov/files/2013/03/SCC-Strategic-Plan-2013-18.pdf (last visited May 21, 2017).

[54] California State Coastal Conservancy, Project Viewer, http://www.mapcollaborator.org/sccpv/prod/ (last visited Sept. 13, 2016).

army knife full of tools and strategies for achieving coastal protection and public access goals.[55]

These sections also explore how the legal, financial, and institutional context outlined above plays out on the ground and in the water and highlight the role played by the Conservancy in completing these projects, whether as planner, funder, mediator, or advisor (see Map/Figure 2 showing major projects mentioned in this article).

A. The Restoration and Enhancement of Wetlands

Wetlands at the physical border between coast and ocean, or shore and bay, have long been a frontier of Conservancy action. In a sense, all the Conservancy's opportunities and challenges come together in the coastal wetland: wildlife protection, public access, climate adaptation, pollution abatement, and development.

Three of the Conservancy's largest and most significant wetlands projects from the last forty years reveal various aspects of this big picture, beginning with the restoration of the Elkhorn and Moro Cojo sloughs near Moss Landing in Monterey County. Together these two sloughs represent one of the state's three largest tracts of tidal salt marsh outside San Francisco Bay.[56]

By the early 1980s, Elkhorn Slough had become significantly impacted by erosion, sedimentation, and runoff carrying high levels of heavy metals, agricultural nitrates, and coliform.[57] A $50,000 grant from the Conservancy to Monterey County in 1985 funded the preparation of a comprehensive, science-based management plan to restore and protect this critical waterway.[58]

Thirty-one years later, this project is still active and, additionally, encompasses Moro Cojo slough, located about a mile to the south. Ongoing efforts address restoration of the surrounding farmland, construction of recreational facilities and trails, and protection of the habitats of a

---

[55] Telephone Interview with Samuel Schuchat, Executive Officer of the State Coastal Conservancy (Sept. 2016).

[56] For a comparison of marsh extent throughout California, *see* EcoAtlas, http://www.ecoatlas.org/ (last visited Mar. 8, 2018) (using California Aquatic Resources Inventory www.sfei.org/cari). This data source suggests the other two largest tracts may be Mugu and Humboldt Bay.

[57] For a history of the conservation and preservation of Elkhorn Slough, *see* Laurel Marcus, *Elkhorn Slough*, Cal. Coast & Ocean 8, 11 (Fall 1991), http://scc.ca.gov/webmaster/coast_ocean_archives/0704.pdf.

[58] Elkhorn Slough Wetland Enhancement Program, State Coastal Conservancy Staff Recommendation, File No. 85-005 (1985) (on file with the State Coastal Conservancy).

variety of birds, fish, marine mammals, and invertebrate species that rely on the slough.[59]

While the long-term protection and restoration of the sloughs has been achieved through multiple partners, the Conservancy has been central to this project since that first grant in 1985, providing critical resources at key moments.[60] Financially speaking, those resources now amount to $8.7 million spent on acquisition (about twenty percent of the project total), $2.7 million on restoration, and another $8 million dollars passed along to other agencies.[61] With this help, the effort at large has protected more than 3,000 acres.[62]

The second significant complex of wetland projects launched by the Conservancy in the mid-1980s occurred in Marin and Sonoma counties. These projects tackled several uncertainties about wetland restoration techniques of concern to the local conservation community. These concerns revolved around whether material dredged from shipping channels could safely be placed in subsided former wetlands to raise elevations and spur plant growth. Concerns also included what the appropriate planning and permitting processes should be for such "beneficial reuse" projects. The Conservancy started with a test project in Sonoma County and followed through with additional projects in adjacent Marin County.

The Sonoma Baylands project—designed by hydrologist Philip Williams who worked on dozens of Conservancy restorations over decades—was an experiment on 348 acres.[63] The land was owned by the Conservancy, and included a perimeter levee built by the US Army Corps of Engineers.[64] Restoration crews filled the site with clean dredged sediment from the nearby Petaluma River channel and Port of Oakland, restoring elevations on the former hay farm to just below mean

[59] The Coastal Conservancy and other conservation organizations continue to fund acquisitions around the slough area. For example, the Coastal Conservancy recently funded acquisition of a nearby farm that was causing sediment problems for wildlife in the slough. *See* Sand Hill Farms Acquisition, State Coastal Conservancy Staff Recommendation, Project No. 16-003-01, Mar. 24, 2016, http://scc.ca.gov/webmaster/ftp/pdf/sccbb/2016/1603/20160324Board07_Sand_Hills_Farm_Acquisition (last visited Mar. 5, 2018). For additional information about conservation, recreation, and restoration efforts, *see* ELKHORN SLOUGH, http://www.elkhornslough.org/watershed/index.htm (last visited Mar. 6, 2018).

[60] Telephone Interview with Mark Silberstein, Director Elkhorn Slough Foundation (Aug. 29, 2016).

[61] Telephone Interview with Janet Diehl, *supra* note 40.

[62] *Id.*

[63] Telephone Interview with Philip Williams, *supra* note 15.

[64] For additional information, *see* Sonoma Baylands Acquisition and Enhancement, State Coastal Conservancy Staff Recommendation, Project No. 88-024 (on file with the State Coastal Conservancy).

sea level.[65] The levee was subsequently breached, tidal flows and habitat values restored, and ownership transferred to the U.S. Fish and Wildlife Service.[66] Once all these goals were accomplished, the Conservancy funded monitoring of restoration progress and sharing of the results.[67]

Based on these experiences in Sonoma County, the Conservancy was well prepared to help restore a nearby, larger Marin County site in a similar fashion. Here, efforts to restore the former Hamilton Army Airfield were faltering after years of decontamination work and permitting problems when the Conservancy stepped in to keep the project moving.[68] Between 2008 and 2011, crews succeeded in placing approximately 6 million cubic yards of dredged material, primarily from the Port of Oakland, on the site. The material had to be barged, slurried, piped, and then sprayed on site to raise the land elevation to levels suitable for creating

---

[65] *See generally* Sonoma Baylands Public Access, State Coastal Conservancy Staff Recommendation, Project No. 88-024, Dec. 11, 2003, http://scc.ca.gov/webmaster/ftp/pdf/sccbb/2003/0312/0312Board06_Sonoma_Baylands.pdf.

[66] For a full discussion of the Sonoma Baylands Project, *see* Laurel Marcus & Marcia Grimm, *The Sonoma Baylands Project: Creating an Environmental Benefit Out of the San Francisco Bay Dredging Crisis*, 2 Hastings W.N.W. J. Envtl. L. & Pol'y 121 (1995). The article discusses the long-fought bureaucratic hurdles that were overcome to transform the area into a productive wetland:

> The final victory occurred in a particularly grand fashion. In December of 1993, President Bill Clinton endorsed the Project as a part of the Port's dredging effort. In the wake of large-scale military base closures, the Port was seen as especially vital to the local economy. The dedication and hard work of Congressional Representatives, most particularly Ron Dellums (and Lee Halterman of his staff), gave the Baylands the boost it needed. A White House task force was created to move forward the dredging and the Project. Local Corps staff, many of whom had long supported the Project despite the reluctance at their headquarters, formed a partnership with the Conservancy that has since brought the Project to construction.

Id. at 125. Researchers consider the project "a turning point in Bay restoration efforts" in that it resolved conflicts between federal, state and local regulatory agencies and the region's shipping ports. *See Bay Restoration*, Aquarium of the Bay Pier 39, https://bayecotarium.org/about/the-bay-institute/bay-restoration/ (last visited Oct. 20, 2017).

[67] For a discussion of the monitoring agreement, *see* Sonoma Baylands Wetlands Restoration Demonstration Project Monitoring, State Coastal Conservancy Staff Recommendation, Project No. 88-024-01 (Oct. 21, 2010), http://scc.ca.gov/webmaster/ftp/pdf/sccbb/2010/1010/20101021Board17_Sonoma_Baylands_Monitoring.pdf (last visited Jan. 27, 2018).

[68] The Conservancy had prepared the groundwork for this project through the beneficial use of dredge spoils for projects in Sonoma. This process took years of coordination with regulators, the environmental community and Congress to allow the beneficial use of dredge spoils. Generally, these kinds of activities would fall to regulatory agencies responsible for water quality or land use permitting, but what was needed was an organization that could connect regulated entities with environmentally beneficial projects. In this way, non-regulatory approach to land use and environmental regulation is needed to save precious public resources and allow for a public discussion of how public benefit is achieved. For a discussion of this background, *see* Christopher B. Busch, et al., *Taming Adversarial Legalism: The Port of Los Oakland's Dredging Saga Revisited*, 2 N.Y.U. J. Legis. & Pub. Pol'y 179 (1999).

tidal marsh. All these preparations enabled them to breach the perimeter levee and allow tidal waters back onto the property in 2014.

The project represents one of the largest beneficial reuse of dredged sediment ever at a wetland restoration site in California.[69] On both this project and its predecessor, partners viewed the Conservancy's efforts as essential in terms of addressing missing pieces.[70] Today, a new site at nearby Bel Marin Keys continues this tradition of experimentation with delivering dredged sediment from the Bay to restoration sites.[71]

The third major example of Conservancy action on wetlands occurred in Southern California, where less than ten percent of historic wetlands remain.[72] Here, the Conservancy provided the kind of regional-level planning to address significant wetland or habitat losses that regulators and private foundations often cannot or will not fund.

The resulting Southern California Wetlands Recovery Project[73] is an eighteen-agency coalition staffed by the Conservancy. The project began by developing a regional plan that included where wetlands should be fostered, how they should be restored, how to maximize available

---

[69] Ariel Rubissow Okamoto & Kathleen M. Wong, *Natural History of San Francisco Bay*, CAL. NAT. HIST. GUIDES 246-255 (2011).

[70] Telephone Interview with Phillip Williams, *supra* note 15.

[71] Telephone Interview with Matt Gerhart, Program Manager, State Coastal Conservancy (Aug. 25, 2016). For a discussion of the sediment issue, *see* Ariel Rubissow Okamoto, *Hamilton Done, But More to Do*, 23 ESTUARY MAG. (June 2014), http://www.sfestuary.org/hamilton-done-but-more-to-do/.

[72] Telephone Interview with Joan Cardellino, South Coast Project Manager, State Coastal Conservancy (Sept. 12, 2016).

[73] For a discussion of the genesis of the project *see* Hartmann, *supra,* note 18. The project was first conceived as a mitigation clearinghouse, but this idea was unpopular. *See* Southern California Wetland Clearing House Conservancy Project, File No 96-008-01 (on file with the State Coastal Conservancy). The final project design was a compromise between environmentalists and other agencies which did not want to create a mitigation bank to subsidize additional wetland infill, and the Conservancy's need for funding and mitigation sites for development projects in Southern California.

> The agencies refused to embrace mitigation banking as a joint goal and the very proposal made the environmental community livid. The environmentalists believed that the creation of mitigation banks might offer an excuse for even greater enforcement latitude and laxness. If banks were in existence, then regulators might be more readily coaxed into allowing mitigation instead of holding the line by refusing to permit non-water dependent activities and insisting on avoidance and minimization in cases of water-dependent activities.
>
> The Coastal Conservancy found itself squarely in the middle of a squall. Although it has an independent board, its annual budget is proposed by the Resources Agency and the Conservancy's Executive Officer reports to the Resources Secretary. While cautious about mitigation banks and how they would appear to the Conservancy's local constituents, the Conservancy's Executive Officer, Michael Fisher, saw the potential of Wheeler's proposal as a magnet for funds.

Hartman, *supra*, note 18, at 945-46.

funding, and how to cooperate with existing stakeholder planning efforts.[74]

Since its launch in 1997, the Conservancy has sustained the Southern California project with $110 million in grants (out of a total $631 million spent by the effort at-large). In all, the project has completed 206 wetlands projects between Point Conception in Santa Barbara County and the Mexican border, restored nearly 5,000 acres, and acquired and protected 8,246 acres.[75] These acreages bring the Southern California project close to the scale of the San Francisco Bay projects described later in this article,[76] and demonstrate the Conservancy's ability to stay involved[77] and plan across large landscapes.

Today, the project and the Conservancy are in the midst of a three-year planning process to provide a 100-year integrated vision for all of the coastal wetlands (more than 100 individual sites) between Point Conception and Mexico, accounting for potential levels of accelerated sea-level rise, land use and ownership, and species needs.[78]

B. Connecting the Coast's Parks and Habitats with Trails

While some coastal landscapes, such as wetlands, are highly sensitive to human disturbance, other landscapes, such as beaches and bluffs, are well-suited to trails and coastal access points. Providing the state's populace with coastal access has remained at the core of the Conservancy's mission. This public access has also helped build awareness of the benefits of coastal protection, conservation, and restoration.

During the Conservancy's frugal early years, improving coastal access often meant little more than building a stairway down a bluff to a secluded beach. Today the Conservancy regards these sorts of short spur trails as part of a much broader vision. As the Conservancy has expanded in both jurisdiction and budget over the decades, its approach toward public access and trail building has increasingly hinged on connectivity and a holistic, rather than piecemeal approach.

The notion of creating a continuous coastal trail from Oregon to Mexico was included in the original legislation that created the California Coastal Commission (the Commission) in 1976, and even before that in Proposition 20 in 1972. But it was not until 1999 that the California

---

[74] *Id*.

[75] Southern California Wetlands Recovery Project: Celebrating 15 Years (2014), http://scwrp.org/wp-content/uploads/2014/12/FINAL-120414-wetlands_report_12-3_sprds.pdf.

[76] *See infra* text accompanying note 85.

[77] Telephone Interview with Greg Gauthier, Program Manager, State Coastal Conservancy (Aug. 16, 2016).

[78] *See* S. Cal. Wetlands Recovery, http://scwrp.org/strategy/ (last visited Mar. 8, 2018).

Coastal Trail received official recognition, earning it state support, a mandate for completion, and assigning the Conservancy the task.[79]

Seventeen years later the trail is well on its way, with 700 of a total 1,230 miles now completed.[80] Its current state is a network of beaches, trails, and highway corridors. A typical segment is found in Sonoma County: from the northernmost point above Sea Ranch to the Marin County border at Bodega Bay, the Coastal Trail follows beaches and bluffs for sixty percent of its run, and the shoulder of Highway 1 for the remaining forty percent.[81]

According to a 2003 report, additional acquisition, construction, and improvements statewide are likely to cost more than $300 million, and much of that will flow through the Coastal Conservancy.[82] Other long-term partners in the effort include the Commission, State Parks, and the Sebastopol-based nonprofit Coastwalk (now known as California Coastal Trail Association), which have been instrumental in securing legislative and financial backing for the trail.[83]

Today, the Coastal Trail provides a literal and figurative focal point on the coast with its influence extending well beyond the confines of a sandy beach or bluff-top path to surrounding lands and the halls of Sacramento. Its name alone serves as an organizing principle for achieving conservation dollars, and its unified nature helps promote buy-in and partnership among myriad partners.[84]

Several other long trails reflect the Conservancy's public access mandate and ability to bridge local jurisdictions and property lines with publicly accessible trails and the establishment of regional conservancies (see next section). In Northern California, these include a 500-mile-long San Francisco Bay Trail (begun in 1989 and seventy percent complete) and a 550-mile Bay Area Ridge Trail (also begun in 1989 and now sixty seven percent complete). In the Bay Area, the Conservancy has even worked to promote access to the water itself through a network of launch

[79] In 1999, the Governor designated the California Coastal Trail as California's Millennium Legacy Trail. *See* Historical and Statutory Notes to Gov. Code, § 65080.6 (West 2017). Authorization to develop the California Coastal Trail was placed into the Coastal Conservancy's enabling legislation in 200. Pub. Res. Code § 312408. The Coastal Act also provides protection for development of the trail. Pub. Res. Code, § 30609.5 (2017) (prohibiting the sale or transfer of State lands between the first public road and the sea).

[80] Telephone Interview with Tim Duff, Program Coordinator for Coastal Trail (Aug. 16, 2016).

[81] California Coastal Trail, http://www.californiacoastaltrail.info/cms/pages/main/index.html (last visited Sept. 14, 2016).

[82] Cal. State Coastal Conservancy Completing the California Coastal Trail, 24-25 (2003), https://scc.ca.gov/webmaster/ftp/pdf/pub/coastal_trail_report.pdf.

[83] Telephone Interview with Tim Duff, *supra* note 80.

[84] Telephone Interview with Neal Fishman, *supra* note 38.

and landing sites for human-powered craft known as the San Francisco Water Trail (begun in 2005 over thirty launch sites have since been created).[85] Similar large-scale trails are underway in Southern California. All these region- and state-linking trails are enabled in large part by the Conservancy's financial, logistical, and scientific support, and embody the agency's ongoing commitment to continuously improving public access to the California coast.

C. Ramping Up Regional and Landscape-Scale Conservation

Two areas of California's coast have called for special attention in the last forty years, in the form of new region-specific conservancies under the Conservancy. The San Francisco Bay Area Conservancy Program and the Santa Ana River Conservancy Program were established due to increasing need for natural resource restoration and protection in both of those areas.[86] Both expanded and enhanced the Conservancy's legal jurisdiction inland and upland from coast.

---

[85] *See* S.F. Water Trail, http://sfbaywatertrail.org/map/ (last visited Oct. 20, 2017); S.F. Estuary P'ship State of the Estuary Report, (2015), http://www.sfestuary.org/wp-content/uploads/2015/10/SOTER_2.pdf.

[86] Telephone Interview with Amy Hutzel, Deputy Executive Officer, State Coastal Conservancy (Aug. 15, 2016). The San Francisco Bay Conservancy was established within the Coastal Conservancy because "the Bay Area is already acknowledged in the Coastal Conservancy's enabling statute as a region of special needs." California Bill Analysis, Senate Committee, 1997-1998 Regular Session, Senate Bill 1048, CA B. An., S.B. 1048 Sen. (The legislation recognized the need for a "coherent regional approach" to conservation planning within the bay area as scientists became increasingly aware of the interconnected nature of the Bay Area watersheds). A coalition of Bay Area environmental groups such as the Bay Area Open Space Council pushed the legislation forward to create habitat linkages around the bay. *See* San Francisco Bay Area Conservancy Program, State Coastal Conservancy Staff Recommendation, Project No. 06-039 (Oct. 9, 2006), http://scc.ca.gov/webmaster/ftp/pdf/sccbb/2006/0610/1006Board07_SF_Bay_Area_Conservancy_Prog.pdf. For information about the Open Space Council, *see* Bay Area Open Space Council, http://openspacecouncil.org/about/ (last visited Mar. 8, 2018).
With respect to the Santa Ana River, *see* Pub. Res. Code § 31171:

> (b) The Santa Ana River region is home to one of the fastest growing populations in the nation, which is expected to grow from its current five million residents to ten million residents by 2050.
> ***
> (d) Despite vast areas of parkland in the region, many communities in San Bernardino and Riverside Counties are park poor, with less than three acres of green space per 1,000 residents. This is particularly true in the communities that were built out before the development boom of the past few decades. As more working-class families moved to the area in search of jobs, the population in these older neighborhoods swelled but public resources for parks and recreation were not invested proportionally to the growth.
> ****
> (f) The establishment of the Santa Ana River Conservancy Program will provide the state with the necessary structure to plan and implement restoration and preservation

The idea of a stand-alone Bay Area Conservancy came from John Woodbury of the Bay Area Open Space Council.[87] The council needed a regional entity with the authority and funds to connect open space and parklands planning and acquisitions in a fast-growing metropolitan region. Former Conservancy deputy director Neal Fishman suggested setting it up within the State Coastal Conservancy, both to avoid having to create an all new agency and to get it up and running more quickly.

In 1997, Senator Byron Sher carried a bill at the request of the Bay Area Open Space Council to create the San Francisco Bay Area Conservancy Program.[88] After it was signed into law by Governor Pete Wilson later that year, the Conservancy had new jurisdiction over ridgetops, upper watersheds, and natural lands in all nine Bay Area counties, instead of just the margins of the Bay and immediate watersheds.

Farther south, the Santa Ana River Trail had been under development for several decades, spanning three counties and connecting seventeen cities. In 2006, Californians passed Proposition 84,[89] allocating $45 million dollars to the Conservancy for Santa Ana River trail projects and $10 million dollars to each of the three counties the trail traverses with the remaining $15 million dollars split among them.[90]

This investment reflected early recognition of the importance of the Santa Ana River, the largest watershed in Southern California, to the state. The watershed drains a 2,650-square-mile area and flows from the San Gorgonio Wilderness Area through San Bernardino, Riverside, and Orange counties, and into the ocean at Huntington Beach.[91] Seven million people live in the watershed, including many underserved communities that lack access to parks.[92]

---

projects and recreation opportunities, and enhance the overall condition of the Santa Ana River.

[87] John Woodbury, *San Francisco Groups Driver Toward an Ambitious 25-Year Goal*, 19 CAL. COAST AND OCEAN 12, http://scc.ca.gov/webmaster/coast_ocean_archives/1904.pdf.

[88] Cal. Stat. Chap. 896 (S.B. 1048) (1997) (codified at Pub. Res. Code §§ 31160, et seq).

[89] "Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006", Initiative Measure (Prop. 84, § 1, approved Nov. 7, 2006, eff. Nov. 8, 2006) (codified at Pub. Res. Code § 75001, et. seq. (2017)).

[90] Pub. Res. Code, § 75050(i) (projects developed in consultation with local government agencies participating in the development of the Santa Ana River Parkway).

[91] *See* PATRICK MITCHELL, SANTA ANA RIVER GUIDE*:* From Crest to Coast - 110 miles along Southern California's Largest River System (2006).

[92] *See, e.g.*, Santa Ana River Parkway, State Coastal Conservancy Staff Recommendation, Project No. 07-097 (Oct. 13, 2007) (recommending the development of a coastal access ways along the river) http://scc.ca.gov/webmaster/ftp/pdf/sccbb/2013/1306/20130620Board3B_Santa_Ana_River_Pkwy_Trail_Ex3.pdf. The lack of adequate recreational opportunities was one of the main reasons for creation of the conservancy as repeated in the house and senate bill analyses. *See, e.g.*, Pub. Res. Code § 31171(d); Senate Floor Analysis of Senate Bill 1390 (2013-14 Reg. Sess.) at 5 (May 25, 2014) ("many communities in that watershed have poor access to park space and the Santa Ana

Building on the Proposition 84 investments and recognizing the important conservation work that needed to be done along the river, the Santa Ana River Conservancy Program was created in 2014 by legislation shaped in the Senate Natural Resources Committee.[93] In conjunction with completing the trail, Santa Ana River Conservancy projects include preserving open space, protecting wildlife habitat, agricultural lands, and water quality, as well as providing educational opportunities and public access.[94] The trail and the adjacent restoration and preservation efforts are now referred to as the Santa Ana River Trail and Parkway.

These two regional conservancies, and their associated trail and conservation projects, represent Conservancy efforts. In addition, they connect key California population centers to the natural world.[95]

D. Reaching Inland into the Watersheds

Coastal areas are not isolated from their watersheds; what happens upstream affects coastal beaches, lagoons, estuaries and marshes, and the ocean. Recognizing this important connection, the Conservancy has supported communities throughout the state in efforts to improve entire watersheds. Resulting projects have restored river floodplains, daylighted buried streams in urban communities, and removed entire dams to return migrating fish to headwaters streams.

In Northern California, the Napa River is a good example of this approach. The river meanders for fifty miles through wine country, downtown Napa, ranch and agricultural lands, and Napa-Sonoma marshes before entering San Francisco Bay.[96] The city was built on the river's floodplain. After twenty major floods and millions of dollars of property damage, the Napa County Flood Control District asked the United States Army Corps of Engineers (Army Corps) to widen, deepen, and wall off the river through downtown Napa.[97] Residents and environ-

River faces a number of water management issues); Assembly Floor Analysis, Senate Bill 1390 (2013-14 Reg. Sess.) at 7 (Aug 18, 2014).

[93] 214 Stats. Ch. 562 (codified at Pub. Res. Code §§ 31170, et seq.).

[94] Telephone Interview with Julia Elkin, Project Manager, State Coastal Conservancy (August 11, 2016).

[95] *The Conservancy at 40: Santa Ana River Trail and Santa River Conservancy Program*, Cal. State Coastal Conservancy, http://scc.ca.gov/2016/08/02/the-conservancy-at-40-santa-ana-river-trail-and-santa-ana-river-conservancy-program (last visited Aug. 18, 2016).

[96] For an illustrated overview of the Napa Valley, *see* Robin M. Grossinger, et al., Napa Valley Historical Ecology Atlas: Exploring a Hidden Landscape of Transformation and Resilience (2012).

[97] For a history of flood control initiatives on the river dating back to the infamous 1862 California floods, *see The History of Floods*, Napa County, https://www.countyofnapa.org/1094/The-History-of-Floods (last visited Mar. 8, 2017).

mentalists had a different idea. A 400-member coalition (of citizens, regulatory agencies, and others) opposed to a traditional channelization project came up with their own plan for a "Living River"—one that would help reduce flood damage but also provide habitat and not ruin the river.[98] The alternative design needed hydraulic modeling, which the Conservancy covered with a $50,000 grant.

The new design was adopted by the Army Corps, and the Conservancy continued to support the "Living River" project, which stretches for seven miles from Highway 29 at the south end of town to just upstream of downtown. With another $50,000 Conservancy grant in 1997, the city returned 600 acres of leveed-off grazing lands to floodplain. This transition allowed the river's flows to dissipate, helping lower water surface elevations downtown by several feet during flood events.[99]

Three years later, with a grant of close to $1.7 million, the Conservancy helped the Napa flood control district acquire another 193 acres of ranchland, giving back more floodplain to the river.[100] And in 2004, it granted the state Wildlife Conservation Board $160,000 to acquire yet another 242 acres of ranchland contiguous with the 600 acres restored in 2001.[101] Today, the Living River project is a national model for using an environmental restoration approach to achieve flood risk reduction.[102]

More recently, the Conservancy expanded its efforts in the Napa River watershed, both upstream and downstream of the Living River project area. It provided $1 million dollars to help the state acquire 9,460 acres of the Napa-Sonoma marsh complex and close to $3 million dollars for restoration.[103] Upstream, the Conservancy has spent nearly $2 million dollars to replace fish barriers and river-constricting culverts, and to revegetate and restore more reaches of the river.[104] In the Rutherford reach, landowners gave up vineyard land for widening and restoration.[105]

---

[98] For a discussion of the "living river" approach, *see* Ebb and Flow, *Living River" Flood Control for Napa,* CAL. COAST & OCEAN 33, 34 (Spring 1997), http://scc.ca.gov/webmaster/coast_ocean_archives/1301.pdf.

[99] Napa River Flood Reduction and Wetland Restoration Project Coastal Conservancy Project Summary, File No. 97-012 (2000) (on file with the State Coastal Conservancy). *See also*, Robin Meadows, *Napa Survives Wet Winter with Dry Feet*, ESTUARY NEWS MAG. 15 (June 2017), http://www.sfestuary.org/wp-content/uploads/2017/04/EstuaryNewsJun2017-v10pages.pdf.

[100] *Id*.

[101] Stanley Ranch Wetland Acquisition, Coastal Conservancy Staff Recommendation, File No. 03-161, (2004) (on file with the State Coastal Conservancy).

[102] Telephone Interview with Ann Riley, former Watershed and Stream Restoration Advisor, San Francisco Bay Regional Water Quality Control Board (Aug. 13, 2016).

[103] Telephone Interview with Richard Wayman, *supra* note 51.

[104] *Id.*

[105] Rutherford Reach Restoration Project, Coastal Conservancy Staff Recommendation, File No. 04-068 (2004) (on file with the State Coastal Conservancy). The project required significant trust for both private landowners and state funders. Landowners were required to sign agreements

A second project in Monterey County underscores another aspect of Conservancy efforts to support upper watershed protection, create living rivers, and address complex infrastructure challenges to fish health such as dams. The Carmel River flows for thirty-six miles to the Pacific Ocean, through evergreen forest, chaparral, coastal prairie, and sand dunes. Once one of the state's best steelhead streams, it is also the principal water supply for the Monterey Peninsula. But, by the early 1990s, its steelhead population had declined from an estimated 12,000 to 20,000 fish to just a few hundred.[106]

In 1997, the National Marine Fisheries Service (NMFS) listed the Central Coast steelhead as a threatened species, citing water diversions, dams, poor habitat, and overfishing as causes of the decline.[107] One of the biggest problems for fish on the river was the San Clemente Dam, built eighteen and a half miles from the coast in 1921. By the 1990s, the old dam had almost completely silted in, and the steelhead that managed to navigate the fish ladder over the dam then had to swim through the sludge-filled reservoir behind it to reach their spawning habitat upstream.[108]

After the Department of Water Resources Dam Safety Division declared the dam unsafe, the owner and local water utility, California American Water (CAW), proposed reinforcing it with a new "cast-in-place" concrete wall.[109] But NMFS objected to that proposal due to its potential impacts on steelhead.[110] If the dam collapsed and released all its sediment downstream, it would destroy critical fish habitat.

The Conservancy helped resolve this impasse. Between 1998 and 2003, the Conservancy funded the design of a comprehensive restoration

---

cooperating with the evaluation and design of the restoration and eventually with preservation of the improvements made with public funds. Public funders required faith in the assurance provided by landowners in the early phases of the project that they wanted to follow the project through restoration. Staging of the negotiated landowner agreements took continued persistence and demonstration that a restored river would provide benefits to adjacent vineyards and communities.

[106] Peter Fimrite, *Lessons for California as a Dam Falls and a River Moves*, S.F. CHRONICLE (Mar. 4, 2016), http://www.sfchronicle.com/science/article/Lessons-for-California-as-a-dam-falls-and-a-river-6871888.php (last visited July 9, 2017).

[107] Carmel River Restoration Program, Coastal Conservancy Staff Recommendation, File No. 02-090 (2003) (on file with the State Coastal Conservancy).

[108] A history of the dam's impact on Southern California Steelhead is contained in the National Marine Fisheries Services' biological opinion and incidental take permit authorizing demolition of the dam. For the biological opinion, *see Biological Opinion*, U.S. DEPT. OF COMM., June 3, 2013 http://www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/south_central_southern_california/nmfs_bo_carmel_river_reroute_and_dam_removal_6-3-13.pdf.

[109] State Coast Conservancy San Clemente Dam Technical Assistance Staff Recommendation, File No. 07-004 (2007) (on file with the State Coastal Conservancy).

[110] Carmel River Restoration Program, Coastal Conservancy Staff Recommendation, *supra,* note 107.

Golden Gate University Environmental Law Journal, Vol. 10, Iss. 1 [2018], Art. 2

plan for the ninety-acre lagoon at the river mouth. The Conservancy also secured $4 million dollars in funding from the California Department of Transportation to construct a project that would recreate historic sloughs and wetlands to support migrating steelhead.

Conservancy efforts to tackle the dam itself began in 2003. At that time, it granted the Planning and Conservation League Foundation (PCLF) $300,000 to develop a conceptual design for restoring habitat to help the steelhead and the California red-legged frog (a federally listed threatened species under the Endangered Species Act)[111] recover, in conjunction with modifying or removing the dam.[112] The Conservancy worked with NMFS and the PCLF to develop an alternative project that would reroute a half-mile section of the river into San Clemente Creek, and use the abandoned reach for sediment storage.[113] Allowing the sediment to erode downstream was not an option because of the potential impacts on steelhead and the increased risk of flooding; hauling the sediment offsite would have been prohibitively expensive.

In this example, the Conservancy did not balk at the costs or complexities. Along with several partners, the Conservancy helped fund the difference between CAW's dam bolstering plan and the rerouted river project. The Carmel River project is an example of the scale and scope of a project that cannot be done by regulation.[114] In general, dam deconstructions are incredibly slow and costly, and there is little incentive for dam owners to update dams that no longer generate revenue, even if impacts on fish and other public resources continue.[115]

The San Clemente Dam was removed in the summer of 2015. The total bill came to $83 million dollars, with CAW contributing $49 million dollars; the Conservancy $9.2 million; other state and some federal agencies $21 million dollars; and the balance from nonprofit and mitigation funds.[116] The largest dam removal project in the state to date, San Clemente may become a model for other dams that have filled in and create momentum for similar projects along the coast. The steelhead now have

---

[111] 16 U.S.C. § 1531 et seq. (2017).

[112] Carmel River Restoration Program, *supra* note 107.

[113] *Id.*

[114] Telephone Interview with Richard Wayman, *supra* note 51.

[115] Joe Geever & Julia Chunn-Heer, *Moving Beyond the Dam Era*, SURFRIDER FOUND., http://www.surfrider.org/coastal-blog/entry/moving-beyond-the-dam-era (last visited Sept. 15, 2016). *See* Michael Pyle, *Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers*, 14 STAN. ENVTL. L.J. 97 (1995).

[116] San Clemente Dam Removal Project, Project File No. 07-004 (on file with the State Coastal Conservancy). Slightly different figures were reported in the media. Bettina Boxall, *$84-Million Removal of a Dam on Carmel River Set to Begin*, L.A. TIMES (June 23, 2013), http://articles.latimes.com/2013/jun/23/local/la-me-dam-removal-20130624 (last visited Mar. 8, 2018).

unimpaired access to more than twenty-five miles of spawning and rearing habitat on the Carmel River.[117]

E. Weaving Space for Nature and Shore Visits into the Urban Fabric

Few ideas are more central to California's Coastal Act and to every action taken by the Conservancy than opening the coast to the people. Along the Pacific, the challenges have often included gaining access through private property or building and maintaining trails across eroding cliffs. In California's urban centers, the challenge has been defending and creating spaces between high-rises and office parks and reclaiming urban shores for parks, habitats, and trails. If people can get to the coast, people will continue to cherish it. Almost ninety-five percent of California's thirty-seven million people live in urban environments, and seventy-five percent live near the coast.[118] More may need to move toward the coast as climate change and drought increase air temperatures in interior valleys.[119]

Conservancy work in urban areas has included: cleaning urban rivers and streams; keeping pollution away from public beaches; building trails and bikeways that link homes to schools, businesses, parks, and natural areas. In addition, the work includes restoring natural areas with projects that offer jobs to local residents and provide career training for youth; developing parks in densely populated neighborhoods; assuring that low-income residents have access to natural areas; and reviving more than 100 declining or degraded urban waterfronts.

In Fort Bragg, located on California's North Coast, the Conservancy funded the town's purchase of part of the former Georgia-Pacific lumber mill, opening views and trails along more than three miles of the city's waterfront.[120] This purchase has smoothed the city's adjustment to a new

---

[117] Telephone Interview Richard Wayman, *supra* note 51; San Clemente Dam Removal Project Description, Coastal Conservancy (on file with the State Coastal Conservancy).

[118] *See* Press Release, Cal. Nat. Res. Agency, California Announces Commitments to Address Ocean Acidification and Other Threats to Coastal Communities and Ecosystems at United Nations Oceans Conference (June 6, 2017), http://resources.ca.gov/wp-content/uploads/2017/06/Press-Release-California-Announces-Commitments-to-Address-Ocean-Acidification.pdf.

[119] Cal. Dept. of Water Res., Perspectives and Guidance for Climate Change Analysis (Aug. 2015), http://www.water.ca.gov/climatechange/docs/2015/Perspectives_Guidance_Climate_Change_Analysis.pdf.

[120] Fort Bragg Waterfront Acquisition, Coastal Conservancy Staff Recommendation, File No. 07-004 (2007) (on file with the State Coastal Conservancy); Fort Bragg Waterfront Acquisition (Phase I), Coastal Conservancy Staff Recommendation, File No. 05-005 (May 18, 2005), http://scc.ca.gov/webmaster/ftp/pdf/sccbb/2005/0505/0505Board04_Fort_Bragg_Waterfront.pdf.

economy based more on visitor services than resource extraction.[121] In Southern California, urban waterfront-restoration projects once centered on public piers and commercial-fishing facilities are now shifting to urban greening projects.[122]

On a statewide scale, in 2013 the Conservancy launched its "Explore the Coast Program" to encourage California residents to visit the shore. Through three grant rounds, the Conservancy has awarded more than $4 million dollars to support more than 150 projects. These grants include funding transportation for school groups and families from inland areas to the ocean and San Francisco Bay, as well as opportunities for people from underserved communities and those with disabilities to visit the coast.

In the San Francisco Bay Area metropolitan area, one of the Conservancy's largest, longest, and most complex multi-partner urban projects involved the acquisition and restoration of 15,000 acres of former salt production ponds owned by Cargill Inc. (formerly Leslie Salt. Company). This patchwork of green, blue, and orange shoreline ponds had been off-limits to the public and more familiar to locals as an airplane vista than a public park. With the help of myriad partners, the Conservancy is now overseeing the restoration of this industrial landscape as well as the development of miles of levee-top trails open to the public, all within a few miles of eight million people.[123]

Coming up with a restoration plan to convert this former salt-making landscape into wetland habitat serving not only endangered species and shorebirds, but also people, may have been the Conservancy's most challenging task. The resulting plan, broken into multiple phases over fifty years and developed by experts with enormous stakeholder input, is engaging the Conservancy in what is widely regarded as one of the largest landscape-scale, science-based experiments in "adaptive manage-

---

[121] After redevelopment of the site, the public will enjoy the 4.5-mile trail that is already well used. Nearby cable steps allow access to a previously inaccessible pocket beach. The acquisition opened a historic Fishermen's Cemetery, Johnson Rock and a scenic overlook of the ocean. Local artisans have installed benches at the site. *See* http://scc.ca.gov/2016/05/26/the-conservancy-at-40-years-fort-bragg/ (last visited July 10, 2017).

[122] These projects take a variety of approaches to urban greening: from pocket parks to allow recreation in dense neighborhoods to low impact development projects to capture storm water and provide vegetation along urban streets. For an example of these kinds of projects, *see* Willowbrook Parkway Project, Coastal Conservancy Staff Recommendation, File No. 15-023 (Feb. 2, 2017), http://scc.ca.gov/webmaster/ftp/pdf/sccbb/2017/1702/20170202Board08_Willowbrook_Parkway.pdf.

[123] Ariel Rubissow Okamoto and Kathleen M. Wong, NATURAL HISTORY OF SAN FRANCISCO BAY, *supra* note 69, at 262-68; Ariel Rubisssow Okamoto, *Into the Breach*, *Baylands Reborn*, BAY NATURE MAGAZINE 35-38 (July-Sept. 2013). For current information concerning the South Bay Salt Pond, *see* SOUTH BAY SALT POND RESTORATION PROJECT, http://www.southbayrestoration.org/Project_Description.html (last visited Mar. 8, 2018).

ment" on the planet.[124] Without the relationships, credibility, and trust among myriad federal, state and local partners developed by the Conservancy over the years in the region, such an ambitious landscape conversion project would never have been possible.

In June 2016, the Conservancy gained a powerful new tool for completing many of the projects it is engaged in around San Francisco Bay when the passage of Measure AA[125] funded a new regional San Francisco Bay Restoration Authority through a $12 regional parcel tax.[126] Conservancy staff are now helping to administer the Restoration Authority and define its grant making criteria.

V. Coastal Protection Forty Years Back and Forty Years Ahead

Looking back, one can only imagine what California's coast might have looked like today without the Coastal Act of 1976 and the Conservancy. Instead of the vast extent of bluffs, beaches, forests, campgrounds, and trails open to visitors in 2017, the coast would very likely have hosted more casinos, golf courses, hotels, spas, businesses, freeways, and private homes.

Of course, not all impacts have been halted by California's constellation of coastal and water-quality management institutions. Not every law and every statute launched that day back in 1976 has been perfectly realized.

For every accomplishment described in this story, there were as many projects that fell short in some way of the original grand vision for California's coast. Over time, the State has seen incremental losses in places neither the Commission nor the Conservancy could influence.

More recently, the socio-political context of government efforts to protect environmental quality and conservation has changed too. Between 1980 and 2000, restoration work had almost unilateral support by government and the public. Today, the path to the realization of a project often includes controversy and lawsuits. The big-government, big-picture, landscape-scale planning that the Conservancy was so successful at

---

[124] For a fuller description of the negotiation process and goal development for the project, *see* South Bay Salt Pond Restoration Project, http://www.southbayrestoration.org/Project_Description_archive.html (last visited Mar. 8, 2018).

[125] The San Francisco Bay Restoration Authority approved this tax measure to place on the ballot January 13, 2016, before voters at the election on June 7, 2016, *see* Parcel Tax, Measure AA, Ballotpedia (June 2016), https://ballotpedia.org/San_Francisco_Bay_Restoration_Authority_%E2%80%9CClean_and_Healthy_Bay%E2%80%9D_Parcel_Tax,_Measure_vAA_(June_2016)#Path_to_the_ballot (last visited Mar. 8, 2018).

[126] *See* Gov't Code, Title 7.5, created by AB 2954 (2008), Cal. Sess. L. Ch. 690 (2008).

in the 1990s did not last due to the balkanization of the environmental community and special interests in nearly every project.[127] Two examples include the Conservancy's Malibu Beach restoration,[128] stalled by environmental lawsuits but then completed, and the Ballona wetlands restoration in Los Angeles, opposed by local environmental groups with a different restoration agenda, resulting in enormous additional project costs.[129]

It is common that disagreements cannot be overcome and projects stall or fall apart due to fear of and resistance to proposed changes in land use. One Conservancy project at the mouth of the Salinas River was stopped by local farmers who perceived the project as "anti-agriculture."[130] Another project, an effort to reduce the effects of intense urban development in the Temecula-Murrieta watershed of the Santa Margarita River, was stopped by local building interests. The Conservancy learned from both "failures" and now does much more advance work around potential conflicts.[131]

Beyond the social and political challenges, there have also been technical failures in projects, where local wetland, stream, or habitat conditions simply did not improve after Conservancy projects were carried out on the ground. These challenges have led the Conservancy to include more measurable and quantifiable objectives in its projects to allow better tracking of outcomes.[132]

There is also marketing "failures," not unusual in public agency work. With respect to the Bracut Marsh, for example, the anticipated demand for a mitigation bank at Humboldt Bay did not work out eco-

[127] Telephone Interview with Philip Williams, *supra* note 15.

[128] *See, e.g.*, La Costa Beach Homeowner' Ass'n v. Cal. Coastal Comm'n, 101 Cal.App.4th 804 (2002) (upholding Coastal Commission acceptance of an off-site mitigation of property owners' view that corridor conditions would maximize public access to the coast) and La Costa Beach Homeowners' Ass'n v. Cal. State Coastal Conservancy, CA Sup. Ct. case no. BS063275 (filed May 12, 2000).

[129] For an outline of the history of the Ballona wetland restoration, *see* BALLONA WETLANDS RESTORATION PROJECT EVNT'L IMPACT STATEMENT ES1-ES4, https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=149710&inline (last visited Mar. 8, 2018).

[130] Telephone Interview with Jeff Haltiner, *supra*, note 49. Similar challenges to restoration were raised by the California Farm Bureau in connection with the restoration of the Salt River in Humboldt County.

[131] Telephone Interview with Jeff Haltiner, s*upra* note 49.

[132] The Conservancy calls for measurable and quantifiable objectives in its strategic plan: http://scc.ca.gov/about/strategic-plan/. The Conservancy also requires grantees to include post-project monitoring of restoration projects using the California Rapid [Wetland] Assessment Method visit http://www.cramwetlands.org/ (last visited Mar. 8, 2018). For older projects it has instituted its own project monitoring of all capital projects (restoration and public access) to ensure that projects are delivering their intended purposes for the duration of the 20-year grant agreement and requires entities that own lands acquired with Conservancy help to submit regular monitoring reports.

nomically.[133] In terms of providing a return for investment, the State is better at providing a public good such as a predictable and stable mitigation mechanism than it is at marketing and selling mitigation properties.

Finally, from a larger species-restoration perspective, many listed and protected species continue to decline today, despite all the work done to save them.[134] However, these species declines may not be for lack of trying on an individual project level but more for a lack of political will and restoration at the scale necessary to truly recover species health.[135]

Looking ahead, implementation of the Coastal Act over the next forty years presents new and unparalleled challenges: climate change and rising sea levels. No political or economic shift from the status quo could have exerted as ubiquitous an effect on Conservancy activities and priorities. Impacts are projected to be so considerable that the state legislature gave the Conservancy new authorities to tackle them.[136]

A coast is constantly eroding and changing and requires ongoing management and restoration.[137] But the zone of wetlands, creek mouths, sloughs, and floodplains protected and enhanced by California's coastal agencies and partners remains an invaluable first line of defense against a rapidly rising sea level, increasingly severe storms and stronger waves. If it were not for all this work, those responsible for protecting coastal California would be awaiting a western version of Hurricane's "Sandy" and

[133] The failure of the project is an illustration of the difficulty with publicly-owned land banks. From a practical perspective, the public receives the ecological services of the bank regardless of its use as mitigation for other development. There is little incentive for a conservation organization to actively market the mitigation opportunities where such market may encourage the destruction of other valuable ecosystem services; community development organizations and other governmental entities that have a different public mission may be a better vehicle for reclaiming abandoned properties.

[134] Jeffrey J. Rachlinski, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act Noah's Choice: The Future of Endangered Species*, 82 Cornell L. Rev. 356 (1997). The classic example is the continued effort to save Delta Smelt in the Sacramento delta despite continued demand for water and other uses. For a history of the litigation over delta smelt, *see* Kristina Alexander, *Biological Opinions for the Sacramento-San Joaquin Delta: A Case Law Summary*, Cong. Research Serv. (Mar, 13, 2014), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R41876.pdf; San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 596 (9th Cir. 2014) ("over the past decade, the delta smelt population has been decimated even relative to these depleted levels, with a measured decline since 2000 of up to three orders of magnitude below historic low.").

[135] For the description of a local example, *see* Joe Eaton, *No Scapefish from the Drought Wars*, Estuary News, (Dec. 2016), http://www.sfestuary.org/estuary-news/no-scapefish/ (last visited Oct. 20, 2017). For a broader discussion, *see* John A. Wiens, Ecological Challenges and Conservation Conundrums (2016).

[136] *See* 2012 Stats. 611 (codified at Pub. Res. Code § 31113) (authorizing the Conservancy to address impacts of climate on resources within the coastal region).

[137] Telephone Interview Philip Williams, *supra* note 15.

"Katrina" with greater approbation. More people and property would be in the path of disaster.

Still, the Conservancy, the Commission, and their local partners have built so many widely used public trails and coastal access points it is hard to conceive of such extreme changes in the future. Will the Bay Trail ringing San Francisco really continue to flood like many low spots now do during a king tide? Will thousands of acres of newly restored tidal habitats drown as the U. S. Geological Survey projects?[138] Must cities and shoreline communities make room for habitats to migrate upland or otherwise migrate within the narrow band between developed waterfronts and upper watersheds?[139] It is a lot to do very fast.

Adapting to this brave new world requires a new approach to environmental conservation. Historically, species protection and habitat acquisition targeted resources of current ecological value. Priorities were based on a future similar to the past. This is no longer the case for the planet, let alone California.

Addressing this challenge demands a new land-acquisition strategy. The Conservancy needs large, contiguous blocks of land that allow species to move to or up the coast. These blocks must contain a range of microclimates so species can move around in them. If all else fails, the public and its institutions must decide whether to help relocate or save species that cannot survive or help themselves.[140]

Saving San Francisco Bay's wetlands—while integrating this more natural infrastructure into necessary upgrades to transportation, water delivery, wastewater treatment, and other infrastructure–will be a huge challenge. The urgency of acting soon is widely recognized by the community of shoreline landowners and managers. The long lead times required for large capital projects is up against an anticipated rapid increase in the rate of sea-level rise around the year 2050.[141]

---

[138] U.S. Geological Surv., http://www.werc.usgs.gov/project.aspx?projectid=238 (last visited Mar. 8, 2018).

[139] "In general, over the next century we expect climate change and other drivers to create a more dynamic landscape, with the location and nature of baylands habitats shifting more frequently than in the recent past." *See*, *The Baylands and Climate Change: What Can We Do*, S.F. Estuary Inst. & Aquatic Science Ctr. 41 (2015), http://www.sfei.org/sites/default/files/biblio_files/Baylands_Complete_Report.pdf.

[140] Telephone Interview with Sam Schuchat, *supra* note 55. *See also* Healey et al., *Perspectives on Bay-Delta Science and Policy, State of Bay-Delta Science*, 14 S.F. Estuary & Watershed Sci. (Dec. 2016), http://escholarship.org/uc/item/7jz6v535; Kathleen M. Wong, *Options for Orphan Species*, Estuary News (Dec. 2016), http://www.sfestuary.org/estuary-news/orphans/.

[141] *Living with a Rising Bay*, S.F. Bay Conservation and Dev. Comm'n, (2011), http://bcdc.ca.gov/BPA/LivingWithRisingBay.pdf; Cal. Ocean Protection Council, Rising Seas in California, An Update on Sea-Level Rise Science (Apr. 2017), http://www.opc.ca.gov/webmaster/ftp/pdf/docs/rising-seas-in-california-an-update-on-sea-level-rise-science.pdf.

To help local municipalities address this looming threat, the Conservancy launched a "Climate-Ready" grant program in 2013. The program provides money, staff, expertise, and networking to help small cities and towns think more proactively about climate-change effects on their coasts and communities. Grant rounds to date have been hugely oversubscribed—a good thing because the Conservancy sees local government as at the forefront of local adaptation.[142]

In early 2017, threatened changes in federal participation in climate change planning and environmental protection have increased the level of uncertainty about the nation's quality of life and the planet's health in the future.[143] Faced with this unsettled and ever-shifting landscape, California and the Conservancy are uniquely positioned to lead the way forward.

Looking back in conclusion to this story of the Conservancy's growth and evolution over forty years, some key elements of its success stand out. Most obvious, perhaps, may be the Conservancy's proactive approach to coastal planning and problem solving, its commitment to building local stewardship, and its flexibility as the scope of environmental and restoration activities evolved with new science and new challenges. Behind the scenes, however, other elements of the Conservancy's success likely include its willingness to take risks to get bigger, better, or more sustainable projects, and to think big, across large landscapes, organizational silos, and jurisdictional boundaries. Finally, the Conservancy also rarely chooses the easiest or most direct path to a goal—pursuing partnerships and collaborations instead. As many acquisition and restoration projects take decades to produce healthy species, robust ecosystems, and ongoing public stewardship, sticking to projects despite long time-

---

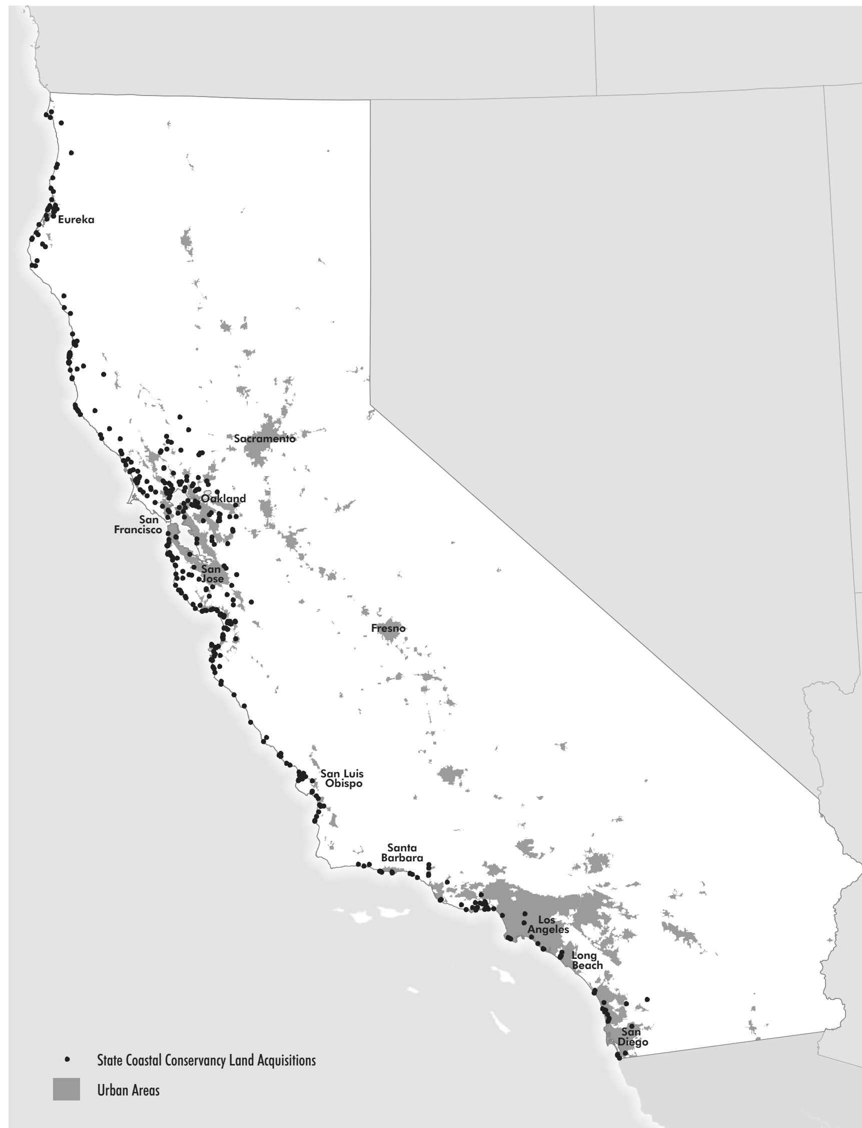
[142] *Marin Bay Waterfront Adaptation and Vulnerability Evaluation*, Marin County, https://www.marincounty.org/main/baywave/vulnerability-assessment (last visited Oct. 20, 2017).

[143] Perhaps the most significant recent indication of this is the President's decision to withdraw from the Paris Climate Accords. *See* Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. Times (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html (last visited Feb. 15, 2017). For a discussion of the potential effects of climate change on our future, *see Climate Issue*, N.Y. Times Mag. (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/magazine/our-climate-future-is-actually-our-climate-present.html?rref=collection%2Fissuecollection%2Fmagazine-index-20170423&action=click&contentCollection=magazine®ion=rank&module=package&version=highlights&contentPlacement=1&pgtype=collection (last visited Mar. 8, 2018). Projected effects were documented in the Climate Change Center, *Our Changing Climate 2012 Vulnerability & Adaptation to the Increasing Risks from Climate Change in California* (2012) and a new study is currently underway. A Summary Report on the Third Assessment from the California Climate Change Center, http://www.energy.ca.gov/2012publications/CEC-500-2012-007/CEC-500-2012-007.pdf. For a discussion on the fourth California Climate Assessment, *see Research and Tool Development*, Cal. Nat. Res. Agency, http://resources.ca.gov/climate/safeguarding/research/ (last visited July 10, 2017).

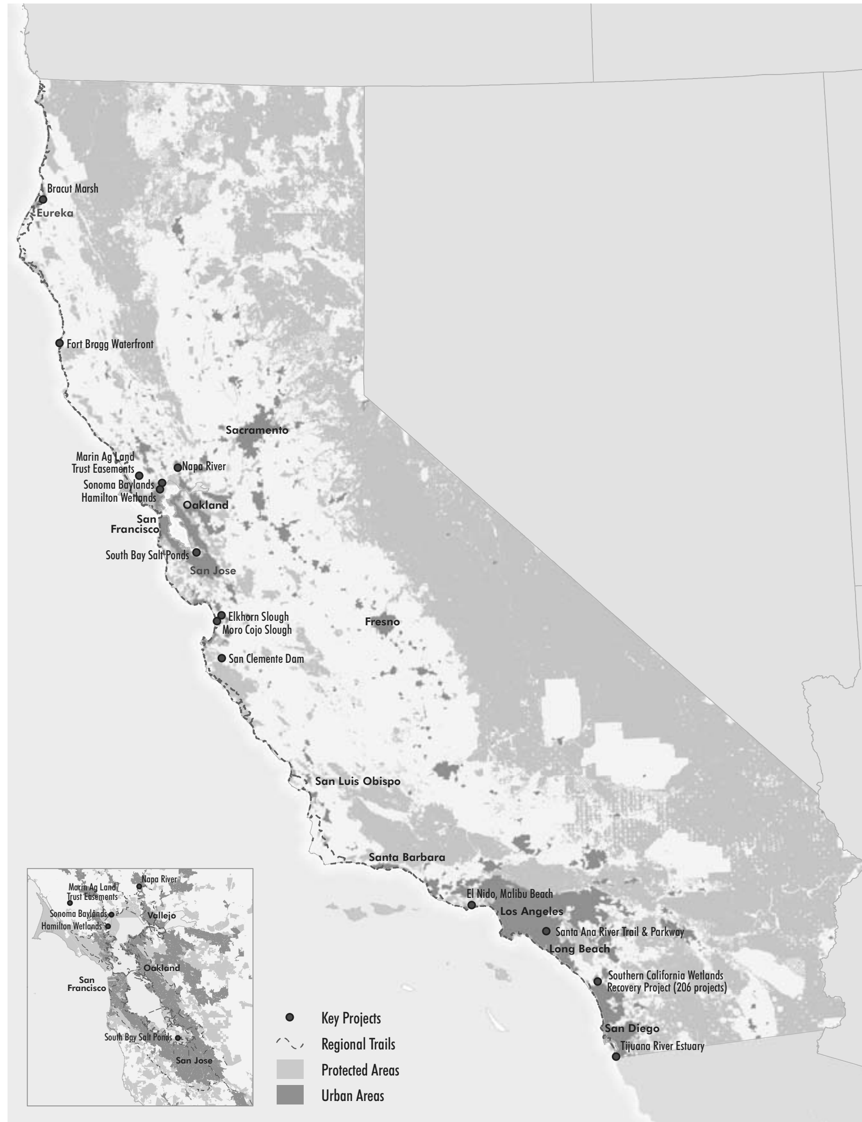
lines and repeated challenges may have been the most consistent secret of the Conservancy's success.

In the years ahead, anyone hiking, driving, or sailing along the coast of California will continue to be astounded by its untouched extent. It is this treasure—this natural, wildlife-filled yet publicly accessible zone where the continent and its western watersheds meet the Pacific—that is the invaluable gift of the Coastal Zone Management Act, the Conservancy and its partners, to the public.

All Projects



KEY PROJECTS



Golden Gate University Environmental Law Journal

Volume 10 | Issue 1 Article 3

May 2018

A Battle Over Oysters: Drakes Bay Oyster Co. v. Jewell and Its Aftermath

Elena Idell
Golden Gate University School of Law

Follow this and additional works at: https://digitalcommons.law.ggu.edu/gguelj

Part of the Environmental Law Commons

Recommended Citation
Elena Idell, *A Battle Over Oysters: Drakes Bay Oyster Co. v. Jewell and Its Aftermath*, 10 Golden Gate U. Envtl. L.J. 33 (2018).
https://digitalcommons.law.ggu.edu/gguelj/vol10/iss1/3

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Environmental Law Journal by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

A BATTLE OVER OYSTERS: *DRAKES BAY OYSTER CO. V. JEWELL* AND ITS AFTERMATH

Elena Idell [1]

"Wilderness is a relative condition. As a form of land use it cannot be a rigid entity of unchanging content, exclusive of all other forms."[2]

— Aldo Leopold

I. Introduction

This comment summarizes the saga of Drakes Bay Oyster Company (DBOC), located in Point Reyes National Seashore (Seashore) in Marin County, California, just north of San Francisco. Owned and operated by the Lunny family, DBOC battled the National Park Service (NPS) in an attempt to compel the NPS to renew its special use permit (SUP). The SUP allowed DBOC to operate within Point Reyes National Seashore. This conflict pitted environmentalists against each other. Supporters of local, sustainable agriculture were on one side of the environmental debate. Traditional environmentalists, representing the other side, advocated for returning uninhabited areas to an untouched state.

The dispute over the oyster farm's presence resulted in litigation and an appeal to the Ninth Circuit to resolve the legal questions presented by the issue of renewal, specifically, whether the NPS could be compelled to renew DBOC's SUP. The result was the Ninth Circuit's decision, *Drakes Bay Oyster Co. v. Jewell*, which set forth unfortunate precedent for the future of agriculture in Point Reyes National Seashore

[1] Elena Idell is a third-year law student at Golden Gate University, School of Law, and will graduate in May 2018. Elena's interest in environmental law started as an undergraduate student at the University of California, Davis, where she earned a Bachelor of Science in Environmental Science and Management.

[2] Aldo Leopold, Wilderness as a Form of Land Use (1925), in The River of the Mother of God, and Other Essays by Aldo Leopold 135-36 (Susan L. Flader & J. Baird Callicott eds., 1992).

Published by GGU Law Digital Commons, 2018

by not allowing the oyster farm operations to continue within the Seashore.[3] Arguing that the case involved important issues of administrative law with broad national implications, the Lunnys filed a petition for certiorari with the United States Supreme Court. However, this petition was denied by the Court in 2014.[4]

DBOC's operation was "supported by modern environmentalists who believe[d] that people can, through sustainable agriculture, develop a close and symbiotic relationship with the environment."[5] When it was in existence, the oyster farm helped control nutrient levels and played a key role in the ranching cultural landscape.[6] Converting the land on which DBOC resided into full wilderness designation was an effort to "erase human past" in the Seashore.[7] This comment presents the opinion that the Ninth Circuit should have allowed the review of the Secretary's decision to not renew DBOC's permit to operate within the Seashore. The support for this argument rests on three legal positions, as discussed in the dissenting opinion of *Drakes Bay Oyster Co. v. Jewell*.[8]

First, the majority in *Drakes Bay Oyster Co.* relied on a misinterpretation of the Point Reyes Wilderness Act. Second, many recognized the oyster farm as a pre-existing use in the Seashore. And third, the public policy underlying the issue strongly favored keeping DBOC in operation.

Based on the majority's decision in *Drakes Bay Oyster Co. v. Jewell*, the Ninth Circuit created dangerous legal precedent for the future of agriculture in the Seashore. The Ninth Circuit decided that it did not have the authority to review the Secretary of Interior's (Secretary) decision to deny renewal of the oyster farm's permit.[9] The precedent established by this decision is detrimental for ranchers who live and operate within the Seashore, as these ranchers are also part of the working landscape of the park. Given the result of the *Drakes Bay Oyster Co.*, the future of ranching in the park stands on dangerous grounds.

[3] Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073 (9th Cir. 2013).

[4] Drakes Bay Oyster Co. v. Jewell, 134 S. Ct. 2877 (2014), *cert. denied*.

[5] Petition for Writ of Certiorari at 2, Drakes Bay Oyster Co. v. Jewell, 134 S. Ct. 2877 (2014) (No. 13-1244).

[6] LAURA WATT, THE PARADOX OF PRESERVATION 196 (2017).

[7] Telephone Interview with Dr. Laura Watt, Professor, Sonoma State University (Oct. 17, 2016).

[8] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1093-99.

[9] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1082.

II. Point Reyes National Seashore

A. A Brief History of Point Reyes

The Seashore, established in 1962 and administered by NPS, is located approximately 30 miles north of San Francisco.[10] Humans have inhabited lands that became the Seashore for millennia.[11] Congress established the Seashore as a working landscape of diverse uses[12] to "save and preserve, for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped."[13] The Seashore received its designation by Congress in 1962, making it the third of fourteen national seashores and lakeshores in the park system,[14] covering more than 71,000 acres.[15] It includes areas of historical importance, with designated cultural landscapes scattered throughout the rugged coastline.[16] Additionally, the Seashore is home to a diversity of wildlife, including marine mammals, birds, fish, and one of the largest populations of tule elk.[17] The Seashore also includes a marine area, Drakes Estero, an estuary located within the Seashore that harbors a complex marine environment.[18]

Some of the first humans to populate the Seashore and leave remnants of their inhabitance were the Coast Miwok, who used the Seashore as a source of food and shelter.[19] After the disappearance of the Coast Miwok, Mexican land grantees and Franciscan missionaries inhabited the Point Reyes region and introduced cattle ranching to the area.[20]

The early California settlers in Point Reyes in the 1850s were lured by the cool, moist climate of Point Reyes, an ideal environment in which

---

[10] *Point Reyes Timeline*, Point Reyes Nat'l Seashore Ass'n, http://www.ptreyes.org/learn-about-seashore/point-reyes-timeline (last visited Jan. 8, 2018).

[11] Paul Sadin, Managing A Land In Motion: An Admin. History of Pt. Reyes Nat'l Seashore 11 (2007).

[12] Peter Prows, *Ninth Circuit Grants Emergency Injunction To Protect Drakes Bay Oyster Company From "Artificial Wilderness" Designation* (Mar. 11, 2013), http://briscoelaw.net/3-11-13/.

[13] Drakes Bay Oyster Co. v. Jewell, 747 F. 3d at 1078.

[14] *See* Sadin, *supra* note 11, at 3.

[15] *Id.*

[16] *Historic Landscapes of Point Reyes*, Nat'l Park Service, https://www.nps.gov/pore/learn/historyculture/places_historiclandscapes.htm (last visited Nov. 14, 2016).

[17] *Wildlife Viewing*, Nat'l Park Service, https://www.nps.gov/pore/planyourvisit/wildlife_viewing.htm (last visited Jan. 8, 2018).

[18] *Drakes Estero Restoration*, Nat'l Park Service, https://www.nps.gov/pore/learn/management/planning_drakesestero_restoration.htm (last visited Oct. 12, 2016).

[19] *Ranching History at Point Reyes*, Nat'l Park Service, https://www.nps.gov/pore/learn/historyculture/people_ranching.htm (last visited Jan. 8, 2018).

[20] *See* Sadin, *supra* note 11, at 17.

to raise dairy cows.[21] Point Reyes attracted ranchers due to its broad coastal prairie, an abundance of grass, long growing season, and available fresh water supply. The early ranchers created small individual ranches, later acquired by the Shafter family (Shafters).[22] The Shafters eventually acquired 50,000 acres of land with the goal of marketing large quantities of butter (later known as the Shafter/Howard dairy enterprise).[23] In 1866, as part of the Shafter family re-organization, the area was partitioned into 33 ranches, known as the "alphabet" ranches, as each ranch was named a letter A-Z.[24]

The establishment of these ranches led to the notorious "Butter Rancho" period, in which "record yields" of butter and cheese were produced from Point Reyes dairies.[25] In 1867, Marin County produced 932,428 pounds of butter.[26] The Butter Rancho period ceased after the 1906 earthquake and subsequently the Great Depression, but new owners came in, bought the ranches, and improved them in 1935.[27] The new owners established a robust dairy industry. As Marin County developed through the 1950s, the ranchers became concerned about rising property taxes[28] and dropping dairy prices.[29]

Dairy and cattle ranchers "secure[d] their place in Point Reyes," by forming an alliance with the Sierra Club[30] to preserve the ranchland in the Seashore upon its establishment in 1962.[31] In establishing the Seashore, the NPS became the area's landlord when the NPS bought all parcels of land that are now the Seashore by negotiating a purchase with the ranchers to allow the ranchland to remain.[32] The establishment of the

[21] NAT'L PARK SERVICE, *supra* note 19.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] In 1965, the California legislature enacted the Williamson Act. This act allows local governments to enter into contracts with private landowners to preserve agricultural uses in return for property tax savings. THE LAND CONSERVATION ACT, http://www.conservation.ca.gov/dlrp/lca (last visited Feb. 20, 2017). In the case of the ranchers in the Seashore, not all ranchers enrolled because they feared that, while enrollment would save property taxes, there were disadvantages related to estate tax obligations that arise in the event of a death of a rancher patriarch or matriarch. WATT, *supra* note 6, at 83-84.

[29] NAT'L PARK SERVICE, *supra* note 19.

[30] John Muir founded the Sierra Club in 1892. It is one of the largest grassroots environmental organizations in the U.S. Today, there are over two million supporters who advocate, promote, and educate about environmental awareness. The organization has been successful in protecting wilderness, passing the Clean Air Act, Clean Water Act, and Endangered Species Act. SIERRA CLUB, http://www.sierraclub.org/about (last visited Feb. 20, 2017).

[31] NAT'L PARK SERVICE, *supra* note 19.

[32] WATT, *supra* note 6, at 129.

Seashore created concern among the ranchers because they viewed the Seashore's goals as conflicting with the long-time family ranching operations of the area. So, the ranchers and the NPS compromised to allow for the "retention of the ranches in a designated pastoral zone, with ranchers signing 25 to 30-year reservations of use and occupancy leases, and special use permits for cattle grazing" within the Seashore.[33] Most of the ranchers entered into 20-year reservations of use and occupancy (RUO) to remain in operation within the Seashore.[34] One ranch opted for a longer RUO of 30 years, and Johnson Oyster Company entered into a 40-year RUO.[35] Most of the ranches that remain today operate under leases between the ranch and the NPS, most of which are for five-year terms with the option of renewal. The language in these leases is "almost identical" to the language in special use permits (SUPs), granted to some ranchers, as well as to DBOC.[36]

1. The Establishment of Point Reyes National Seashore

In 1960, California Senator Clair Engel and Representative Clem Miller introduced legislation to create the Seashore "with a design that would retain existing agricultural uses."[37] A key concern in establishing the Seashore was "the possible effects of establishing a park on the local agricultural economy."[38] Thomas Kuchel, a California Senator, described the concept:

> [T]he bill before your subcommittee is perhaps a precedent setting proposal in that it would authorize the Federal establishment in the State of California of a novel type of reservation designed to protect the public interest in and maintain the character of rare scenic, recreational, inspirational, and historic features of a section of our lengthy Pacific seacoast.[39]

The NPS Director, Conrad Wirth, supported this idea, including maintaining the oyster farm that already existed in the Seashore.[40] The NPS Planning Chief, George Collins, stated the oyster beds are ". . . a very

---

[33] NAT'L PARK SERVICE *supra* note 19.

[34] WATT, *supra* note 6, at 130.

[35] *Id.*

[36] *Id.*

[37] Brief of Dr. Laura A. Watt et al. as Amici Curiae Supporting Plaintiff-Appellants at 2, Drakes Oyster Bay Co. v. Jewell, 747 F. 3d 1073 (2014), http://cdn.ca9.uscourts.gov/datastore/general/2013/10/25/13-15227_Amicus_brief_by_Dr_Laura_Watt.pdf.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 3.

important activity" and the oyster cannery in Drakes Estero should remain in operation "under national seashore status because of [its] public values."[41] These values were included in proposals that made their way to Congress in 1961.[42] Mr. Wirth endorsed this language in a statement that the NPS would permit the oyster farm to remain in operation because many people were not aware of its operation and because the commercial oyster beds in operation were "a natural way of development."[43]

The NPS included language in the Seashore's planning documents that "the land uses in a national *seashore* should be 'less restrictive' than a national *park*."[44] These documents set forth the notion that the oyster farm should remain in operation due to its "exceptional public values."[45] These values included exposing the public to a "unique industry" and providing "educational opportunities."[46]

These proposals culminated in the passage of the Point Reyes National Seashore Act in 1962.[47] The Senate Report on the Point Reyes National Seashore Act reiterated the importance of these "public values," and the idea that the oyster farm would continue in operation with the passing of the act.[48]

2. *The Federal Wilderness Act of 1964*

To understand the immense conflict that exists between legislation administering the Seashore, it is important to understand wilderness regulation on a federal level. Congress passed the Wilderness Act of 1964 two years after the establishment of the Seashore. Wilderness designation differs from other public lands in that it is the highest level of conservation protection for federal lands.[49] The act diverged from the NPS's purpose of encouraging nature tourism.[50] Instead, it was put in place to protect wilderness areas from tourists and the impacts associated with vehicles brought by tourists.[51] The drafters of the Wilderness Act in-

[41] *Id.* (citing Excerpts from House Hearing on S.2428, Apr. 14, 1960).

[42] *Id.* at 4.

[43] *Id.* at 4-5. See *An Act To Establish The Point Reyes National Seashore in the State of California: Hearing on S. 476 Before the Subcomm. on Public Lands of the H. Comm. on Interior and Insular Affairs*, 87th Cong. (1961) (statement of Conrad Wirth, NPS Director).

[44] NAT'L PARK SERVICE, PROPOSED PT. REYES NAT'L SEASHORE: LAND USE SURVEY & ECONOMIC FEASIBILITY REPORT 1 (1961).

[45] Brief of Dr. Laura A. Watt, et al., *supra* note 37, at 4.

[46] *See supra* note 44, at 16.

[47] Brief of Dr. Laura A. Watt, et al., *supra* note 37, at 5.

[48] *Id.*

[49] *The Wilderness Act*, NAT'L PARK SERVICE, https://www.nps.gov/pore/learn/management/wildernessact.htm (last visited Dec. 6, 2016).

[50] WATT, *supra* note 6, at 104.

[51] *Id.*

cluded language that was meant to accommodate "many existing commercial land uses, particularly for subsistence or small-scale local economies."[52] The language of the Wilderness Act stated that wilderness areas are to be "administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, and so to provide for the protection of these areas [and] the preservation of their wilderness character."[53]

The Wilderness Act "creates congressionally designated wilderness zones that act primarily as a restraint on the actions of federal agencies, not private entities."[54] The language of the Wilderness Act makes clear that a "wilderness designation is *supplemental*" to other land use designations.[55]

3. The Point Reyes Wilderness Act

In 1976, Congress passed Public Law 94-544, the Point Reyes Wilderness Act, which created the Point Reyes Wilderness.[56] This act designated 25,375 acres as "wilderness" in accordance with the federal Wilderness Act of 1964, including 8,003 acres designated as "potential wilderness."[57] Public Law 94-567, enacted almost simultaneously, designated wilderness areas within 13 units[58] of the National Park System, including the Seashore.[59] This federal act vaguely defined potential wilderness as "all lands . . . upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated as wilderness."[60] This new category of wilderness was "intended to limit NPS's ability to develop recreational services while allowing some existing land uses to continue."[61]

---

52 WATT, *supra* note 6, at 105.

53 Drakes Bay Oyster Co. v. Jewell, 747 F. 3d at 1078.

54 WATT, *supra* note 6, at 107.

55 *Id.*

56 Drakes Bay Oyster Co. v. Jewell, 747 F. 3d at 1078.

57 Point Reyes Wilderness Act of 1976, Pub. L. No. 94-544, 90 Stat. 2515 (1976).

58 'A "unit" in the NPS is one of the following: national park, national monument, national preserve, national reserve, national seashore, national lakeshore, national historic park, national battlefield park, national military park, national battlefield, national battlefield site, national historic site, national memorial, national wild, scenic, and/or recreational river, national parkway, national scenic and historic trail, national memorial, national recreation area, national scientific reserve, national capital parks, or "other."' Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 DENV. U. L. REV. 575, 576 (1997).

59 WATT, *supra* note 6, at 117.

60 *Id.*

61 WATT, *supra* note 6, at 101.

Before the designation of "wilderness" areas within Point Reyes, Congress began appropriating funds to acquire the lands within the Seashore's boundaries.[62] Part of this process involved the State of California conveying its ownership of submerged lands and coastal tidelands within the Seashore's boundaries to the federal government, including Drakes Estero.[63] This conveyance "reserved certain mineral and fishing rights, which allowed the State to 'prospect for, mine, and remove [mineral] deposits from the lands,' and 'reserved to the people of the state the right to fish in the waters underlying the lands.'"[64]

The House Report on the Point Reyes Wilderness Act included a statement that NPS will "steadily continue to remove all obstacles" to convert the land from potential wilderness to full wilderness status.[65] However, the legislative intent of the creation of the Seashore supports the main argument of this comment, in that the wilderness designation provided for "explicit protection of existing agricultural uses, including dairying, beef, cattle ranching, and oyster production."[66]

4. *Agriculture in the Seashore and DBOC*

The legislative intent behind the steady removal of obstacles did not justify immediate removal upon the expiration of the permit for DBOC due to the Ninth Circuit's decision. Furthermore, DBOC's oyster farm was not an obstacle prohibiting either a potential or full wilderness designation.[67]

In establishing Drakes Estero as potential wilderness, Congress recognized the existence of the oyster operations within the wilderness area, but decided not to designate that particular area as pure wilderness; instead, it designated the area as "potential wilderness."[68] The NPS "argued vigorously" that, due to California's reserved mineral and fishing rights, Drakes Estero had an "incomplete title precluded any wilderness designation."[69]

Originally, Drakes Estero was planned to be designated as wilderness.[70] However, the presence of the oyster farm, combined with the lease of the bottomlands from the State, made Drakes Estero "unsuitable

[62] Drakes Bay Oyster Co. v. Jewell, 747 F. 3d at 1093 (Watford, J., dissenting).
[63] *Id.*
[64] *Id.*
[65] *Id.* at 1087 (majority opinion).
[66] WATT, *supra* note 6, at 107.
[67] Brief of Dr. Laura A. Watt, et al., *supra* note 37, at 7.
[68] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1094 (Watford, J., dissenting).
[69] WATT, *supra* note 6, at 111.
[70] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1094 (Watford, J., dissenting).

for wilderness designation."[71] The decision to designate Drakes Estero as potential wilderness occurred because it included "lands which [were] . . . essentially of wilderness character, but retain[ed] sufficient nonconforming structures, activities, uses or private rights so as to preclude immediate wilderness classification."[72] During the hearings on the creation of the Point Reyes Wilderness Act in 1976, "[n]o one advocating Drakes Estero's designation as wilderness suggested that the oyster farm needed to be removed before the area could become wilderness."[73]

The designation of Drakes Estero as potential wilderness made it one of eleven marine potential wilderness areas in the United States.[74] Due to its unique nature as a marine protected area, Drakes Estero is governed by a number of public agencies, including the NPS, the California Fish and Game Commission, the California Coastal Commission, the National Marine Fisheries Service, and the U.S. Fish and Wildlife Service.[75] The NPS is the primary manager of Drakes Estero, and the California Department of Fish and Game regulates the use of the state water bottom in Drakes Estero, which included a lease to DBOC to grow oysters (called a mariculture lease).[76]

B. Section 124

In 2009, the NPS argued, using a National Academy of Sciences Study, that DBOC's oyster farming negatively impacted the harbor seal population in Drakes Estero.[77] Following this allegation, the NPS conducted internal research on DBOC and Drakes Estero to establish the potential impact that the oyster farm had on the harbor seal population.[78] DBOC disputed the study, arguing that it was biased and withheld material and relevant research.[79] Later, Senator Diane Feinstein's involvement urged the Superintendent of the Seashore, Don Neubacher (Neubacher), to renew Drakes Bay's SUP upon expiration.[80] Neubacher claimed he did not have authority to do so.[81] As a result, Senator Fein-

[71] Watt, *supra* note 6, at 111.

[72] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1095 (Watford, J., dissenting).

[73] *Id.* at 1094.

[74] Comm. on Best Practices for Shellfish Mariculture and the Effects of Com. Activities in Drakes Estero, Pt. Reyes Nat'l Seashore, Cal., Nat'l Res. Council, Shellfish Mariculture in Drakes Estero, Pt. Reyes Nat'l Seashore, California 9 (2009).

[75] *Id.*

[76] *Id.*

[77] Watt, *supra* note 6, at 190.

[78] *Id.* at 191.

[79] *Id.*

[80] *Id.*

[81] *Id.*

stein sponsored a legislative rider in Congress, Section 124 (Section 124) of the National Environmental Policy Act (NEPA).[82] In writing Section 124, Congress "sought to override" NPS's 2005 legal analysis in a memorandum sent to Lunny that stated that the Point Reyes Wilderness Act mandated elimination of DBOC.[83]

Section 124's controversial "notwithstanding clause" "precluded" the Secretary from basing his decision on a misinterpretation of the Point Reyes Wilderness Act.[84] Section 124 stated: "*Notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization*."[85] The Secretary "recognized" that Section 124 gave him the authority to issue a new special use permit to DBOC.[86] However, the Secretary asserted that he would not grant the SUP because renewal was not compatible with the 1976 Point Reyes Wilderness Act.[87]

C. Drakes Bay Oyster Company

Before the European settlers wiped them out, oysters had grown in Drakes Estero for millennia.[88] Oyster farming then returned to Drakes Estero starting in the 1930's.[89] The California Fish and Game Department began leasing the waters of Drakes Estero to oyster farms as early as 1934.[90] In 1954, the Johnson Oyster Company, owned by Charles Johnson (Johnson), began cultivating oysters in Drakes Estero on the beach and in onshore areas adjacent to Drakes Estero.[91] Johnson subsequently sold the land (not the submerged oyster beds) on which the oyster farm was located to the United States in 1972.[92]

On that same parcel, DBOC cultivated oysters until its RUO expired.[93] Upon selling his land to the United States, Johnson agreed to retain a 40-year RUO.[94] The RUO allowed the land to function as an

---

[82] *Id.*

[83] Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1093 (Watford, J., dissenting); *id.* at 1096-97.

[84] *Id.* at 1098.

[85] Drakes Bay Oyster Co. v. Salazar, 921 F. Supp. 2d 972, 977 (N.D. Cal. 2013).

[86] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1081.

[87] *Id.*

[88] Peter Prows, *Ninth Circuit Grants Emergency Injunction To Protect Drakes Bay Oyster Company From "Artificial Wilderness" Designation*, Briscoe Ivester and Bazel LLP Newsletters (Mar. 11, 2013), http://briscoelaw.net/3-11-13/.

[89] Drakes Bay Oyster Co. v. Salazar, 921 F. Supp. 2d at 978.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

oyster farm within the Seashore until November 30, 2012.[95] The RUO stated, "[u]pon expiration of the reserved term a special use permit *may* be issued for the continued occupancy of the property for the herein described purposes."[96] In addition, "[a]ny permit for continued use will be issued in accordance with the NPS regulations in effect at the time the reservation expires."[97] In 2008, DBOC and the NPS executed the SUP that authorized DBOC to conduct operations on an adjacent area to the RUO area to process shellfish, allow for visitors, and operate a pump and sewage pipeline.[98] The SUP also expired on November 30, 2012.[99]

Kevin Lunny (Mr. Lunny) and his wife, Nancy Lunny, founded DBOC after purchasing Johnson Oyster Company in 2004.[100] Mr. Lunny grew up on a cattle ranch adjacent to the oyster farm where he still resides, and became the first organic rancher in Point Reyes.[101] Upon purchase, Mr. Lunny knew that the RUO for DBOC would expire on November 30, 2012.[102] DBOC operated within the Seashore from 2004 until the Secretary mandated that it vacate the Seashore in 2014, upon the denial of the extension of its SUP.[103]

Although Mr. Lunny was aware, at the time of purchasing Johnson Oyster Company, that the RUO would expire, the NPS gave him no notice that it would not renew the RUO or the SUP.[104] In 2005, the NPS issued Mr. Lunny a memorandum from the Solicitor of the Department Interior stating that the 1976 Point Reyes Wilderness Act "mandated elimination of the oyster farm," without specifying any statutory language to support that mandate.[105] A subsequent memo stated that the NPS could not issue a permit for the oyster farm when its lease "came up for renewal in November of 2012."[106] As the dissent points out, this statement in the memorandum was a misinterpretation of the history and intent of the Point Reyes Wilderness Act because the NPS "erroneously

[95] *Id.*

[96] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1079.

[97] *Id.*

[98] Drakes Bay Oyster Co. v. Salazar, 921 F. Supp. 2d at 980.

[99] *Id.*

[100] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1079.

[101] Petition for Writ of Certiorari, *supra* note 5, at 6.

[102] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1079.

[103] Guy Kovner, *Facing closure deadline, Drakes Bay harvests final crop*, PRESS DEMOCRAT (Dec. 6, 2014), http://www.pressdemocrat.com/news/3204619-181/oyster-operation-winding-down?gallery=4454733&artslide=0.

[104] Petition for Writ of Certiorari, *supra* note 5, at 6.

[105] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1097.

[106] *Id.*

deemed the oyster farm" as an obstacle, and relied on that assumption in making its decision.[107]

Finally, after an environmental review under NEPA, in the form of an environmental impact statement (EIS), the Secretary issued a Memorandum of Decision (MOD) on November 29, 2012.[108] The MOD "directed the [NPS] to let the permit expire according to its terms."[109]

III. DBOC v. The NPS in the Ninth Circuit: The Dissent Was Right

The closing of DBOC was an attempt to create "an artificial wilderness in the middle of an important and historic farming area."[110] The end of the oyster farm's era in a historic and agriculturally productive area, unfortunately, has negative implications on the future of agriculture in the Seashore. The issues adjudicated in *Drakes Bay Oyster Co. v. Salazar*, at the district court level, and upon appeal in the Ninth Circuit's decision in *Drakes Bay Oyster Co. v. Jewell*, set a legal precedent that will likely, and unfortunately, guide future agriculture and land use decisions in the Seashore.

Familiarity with the procedural history of *Drakes Bay Oyster Co. v. Jewell* is fundamental to understanding the context of the case. In 2010, Mr. Lunny sent letters asking the Secretary to exercise his authority under Section 124 to extend the SUP past its set expiration date.[111] The NPS conducted an environmental review under NEPA to analyze the potential environmental impacts of Mr. Lunny's request to extend the permit.[112] Section 124 of NEPA gave authority to the Secretary to authorize another SUP for operations within the park.[113]

Section 124 also included that "the Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture" in the Seashore.[114] This report concluded there was a "lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero at the current levels of production and under current operational practices."[115]

[107] *Id.*

[108] *Id.* at 1081.

[109] *Id.*

[110] Petition for Writ of Certiorari, *supra* note 5, at 2.

[111] Drakes Bay Oyster Co. v. Salazar, 921 F. Supp. 2d at 980.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 977-8.

[115] Nat'l Research council, *supra* note 74, at 6.

DBOC brought an action in U.S. District Court, Northern District on December 21, 2012, against Kenneth Salazar, the Secretary of the Department of the Interior at the time, seeking to have the November 29, 2012, MOD "voided" and declared "unlawful" by the court.[116] The MOD stated Salazar would allow DBOC's permit to expire as of November 30, 2012, and that he would not issue a new permit.[117] DBOC brought action in the district court seeking a preliminary injunction against the Secretary.[118] The court denied the motion for preliminary injunction.[119] In bringing the action, DBOC argued that the Secretary's decision violated regulations that gave the Secretary discretion to renew the permit.[120]

After a denial of the preliminary injunction at the district court, DBOC sought review in the Ninth Circuit. On appeal, DBOC hoped to have the Secretary's decision to not renew its permit overturned.[121] DBOC filed its appeal on September 3, 2013.[122]

A. Misinterpretation of the Point Reyes Wilderness Act and Section 124

The district court concluded that it did not have jurisdiction to review the Secretary's decision because Section 124 did not provide a "meaningful standard" on which to base a decision to renew the SUP.[123] Furthermore, the district court found that, to establish a likelihood of success on the merits, DBOC would have to show that NPS's decision was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" under Section 706(2) of the Administrative Procedures Act (APA).[124] The district court held that DBOC could not "show a likelihood of success" under this APA standard.[125] The Ninth Circuit also held that it "lack[ed] jurisdiction to review the Secretary's . . . decision whether to issue a new permit."[126]

Because Congress left it up to the Secretary's discretion to decide whether to review the SUP, the Ninth Circuit's majority held that it could not consider "the making of an informed judgment by the agency," re-

---

[116] Drakes Bay Oyster Co. v. Salazar, 921 F. Supp. 2d at 975.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 976.
[120] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1077.
[121] *Id.* at 1073.
[122] *Id.*
[123] *Id.* at 1082.
[124] 5 U.S.C. § 706(2)(a) (1966).
[125] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1082.
[126] *Id.*

garding the Secretary's actions under Section 124.[127] The court reasoned that Section 124 authorized, but did not require, the Secretary to extend the SUP because it was the Secretary's discretionary decision as the voice of an agency.[128] The court also held that Congress gave complete authority to the Secretary to grant or deny a SUP extension and provided no "mandatory considerations."[129]

The Ninth Circuit also found no violation under Section 124 because it determined the Secretary was "authorized" to issue a new permit, but was not "required" to do so.[130] Federal courts have "jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves a violation by the agency of constitutional, statutory, regulatory, or other legal mandates or restrictions."[131]

According to the majority, "notwithstanding clauses nullify conflicting provisions of law."[132] The majority opinion held that the "notwithstanding" clause of Section 124 was in place to "convey that prior legislation should not have been deemed a legal barrier."[133] However, this interpretation was not consistent with the legislative intent of the Point Reyes Wilderness Act—which supported the existence of the oyster farm within the wilderness area, as supported by the dissenting opinion.[134]

The Honorable Paul J. Watford's dissenting opinion stated the reasons the majority was in error. According to the dissent, notwithstanding clauses, as the United States Supreme Court has held, are intended to "override conflicting provisions of any other section."[135] Therefore, the dissent writes, the clause in Section 124 "was intended to override the Department's [2005] misinterpretation of the Point Reyes Wilderness Act," which stated that the Point Reyes Wilderness Act mandated the elimination of the oyster farm.[136] Thus, the dissent's interpretation of the "notwithstanding" clause of Section 124 is supported by the legislative intent of the previously analyzed Point Reyes Wilderness Act.

The majority believed it was not authorized to decide whether the Secretary made the wrong decision because the Secretary did not violate

---

[127] *Id.* at 1078.
[128] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1082 (citing 5 U.S.C. § 701(a)(2) (2012)).
[129] *Id.* at 1078.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 1083.
[133] *Id.* at 1084.
[134] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1095.
[135] *Id.* at 1096.
[136] *Id.*

any law in making his decision.[137] The dissent states, even in the absence of a notwithstanding clause, "it would make no sense to assume that Congress authorized the Secretary to base his decision on a misinterpretation of the Point Reyes Wilderness Act."[138] Therefore, the dissent concludes that the intention of the notwithstanding clause of Section 124 was to override the previous misinterpretation of the Point Reyes Wilderness Act.[139] In basing its decision on factors which "Congress intended to override," the ruling of the Secretary was "arbitrary and capricious" under the APA in deciding not to renew the SUP.[140] The dissent emphasizes that the Secretary misinterpreted the Point Reyes Wilderness Act; therefore, DBOC was "likely to prevail on the merits of its APA claim."[141] The dissent more accurately analyzes and reviews the agency decision in coming to the conclusion that the preliminary injunction should have been issued.

B. The Oyster Farm Was a Pre-Existing, Non-Conforming Use

Prior to passage of the Point Reyes Wilderness Act, DBOC's oyster farm was considered a pre-existing non-conforming use.[142] The Federal Wilderness Act of 1964 provides "there shall be no commercial enterprise . . . within any wilderness area."[143] This act is "best read as a restriction on *new* uses in designated wilderness areas, but as allowing many uses to continue."[144] The legislative history of the Federal Wilderness Act sheds light on Congress's belief that the "new wilderness-preservation system would not affect the economic arrangements of business enterprises 'because existing private rights and established uses are permitted to continue.'"[145] The Act broadly prohibits commercial enterprises in wilderness areas.[146] However, it also contains a list of exceptions and pre-existing uses that may remain within a wilderness area.[147] The list of prohibitions in the Federal Wilderness Act is "subject

---

[137] *Id.* at 1085.

[138] *Id.* at 1097.

[139] *Id.*

[140] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1098.

[141] *Id.*

[142] *Id.* at 1095.

[143] 16 U.S.C. § 1133(c) (1964).

[144] Brief of Dr. Laura A. Watt et al., *supra* note 37, at 6.

[145] Drakes Bay Oyster Co. v. Jewell, 747 F. 3d 1095 (quoting S. Rep. No. 88-109 at 2 (1963)).

[146] Brief of Dr. Laura A. Watt et al., *supra* note 37, at 6.

[147] *Id.*

to existing rights," and allows for the "use of aircraft or motorboats, where these uses have already become established."[148]

As the dissent points out, Johnson Oyster Company had existing private rights issued by California that "pre-dated both the passage of the [federal] Wilderness Act and creation of the Point Reyes National Seashore."[149] Those opposing the extension of DBOC's SUP argued that Drakes Estero's designation as "potential wilderness meant that Congress intended the oyster farm to cease operations once its federal lease to operate on the land expired in 2012.[150] However, that position is not supported by the legislative intent of the Point Reyes Wilderness Act. The only suggestion of such an intent is a "single sentence in the House Report" to "steadily remove obstacles" to allow for full wilderness status of Drakes Estero.[151] Reliance on this single sentence, however, is a flawed interpretation of the Point Reyes Wilderness Act, since the legislative history does not view the oyster farm as an "obstacle."[152]

The Sierra Club, in the years before passage of the Point Reyes Wilderness Act, also supported the idea of the oyster farm as a pre-existing, non-conforming use.[153] "The water area can be put under the Wilderness Act even while the oyster culture is continued—it will be a prior existing, non-conforming use."[154] Many statements in the Senate Hearings on the Point Reyes Wilderness Act, including those from the cosponsors of the legislation, also support this interpretation.[155] Testimony at House Hearings also "echoed this sentiment and endorsed continued oyster farming."[156] For example, the Wilderness Society's representative, Raye-Page, expressed his agreement with this concept by testifying,[157] "the oyster culture activity, which is under lease, has a minimal environmental and visual intrusion . . . [the oyster farm's] continuation is permissible as a pre-existing non-conforming use and is not a deterrent for inclusion of the federally owned submerged lands of Drakes Estero in wilderness."[158]

---

[148] *Id.* (citing 16 U.S.C. § 1133(c), § 1133(d)(1)).

[149] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1097.

[150] Brief of Dr. Laura A. Watt et al., *supra* note 37, at 7.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* (citing Sierra Club comment letter to National Park Service (May 30, 1973), appended to Department of Interior, Propose Wilderness Point Reyes National Seashore California: Final Environmental Impact Statement ("1974 FEIS"), at A41, A51 (April 1974)).

[155] *Id.* at 8.

[156] *Id.* at 9.

[157] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1094.

[158] *Statement of (Ms.) Raye-Page for The Wilderness Society before the National Parks and Recreation Subcommittee of the House Interior and Insular Affairs Committee on H.R. 8002 and*

Therefore, the legislative intent of the Point Reyes Wilderness Act supports the existence of DBOC as a pre-existing, non-conforming use. The dissent holds that the oyster farm was allowed to remain under the potential wilderness designation because DBOC's operations were not "incompatible with the area's wilderness status."[159] The dissent also notes that the comments on the legislation to designate wilderness status included the comment: "the oyster farm was a beneficial pre-existing use that should be allowed to continue notwithstanding the area's designation as wilderness."[160] The dissent correctly found the intent of the Point Reyes Wilderness Act was to consider the oyster farm to be, in fact, a pre-existing, non-conforming use at the time of the designation of Drakes Estero as potential wilderness.

C. The Strong Public Policy In Support of DBOC

DBOC's oyster cultivation provided significant environmental benefits.[161] Oysters are filter feeders, which means that they consume phytoplankton (microscopic marine organisms) and thereby improve water quality by filtering the water.[162] As the oysters grow, they form structured reefs on which other marine creatures can thrive.[163] To put in perspective the importance of oysters for water quality, consider that in the Chesapeake Bay, the oyster population is now one percent of what it once was, resulting in degraded water quality.[164] As a result, the National Oceanic and Atmospheric Administration implemented oyster restoration activities to help restore the water quality in the Chesapeake Bay.[165]

DBOC played a significant role in shellfish production in the Bay Area and California, providing about 40 percent of California's oysters.[166] When DBOC was in operation, oyster production was approximately 500,000 pounds of oyster meat per year,[167] valued at one and a

---

H.R. 7198 to establish Point Reyes Wilderness in California, 94th Cong. at 6 (1976) (statement of Raye-Page, The Wilderness Society, Representative).

[159] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1094.

[160] *Id.*

[161] Petition for Writ of Certiorari, *supra* note 5, at 2.

[162] Nat'l Oceanic and Atmospheric Administration, Chesapeake Bay Office, *Oyster Reefs*, Nat'l Oceanic and Atmospheric Admin., https://chesapeakebay.noaa.gov/index.php?option=com_content&view=article&id=97&Itemid=124 (last visited Feb. 4, 2018).

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *What Drakes Bay Oyster Means to Our Community*, Drakes Bay Oyster Co., http://www.drakesbayoyster.com/community/ (last visited Feb. 20, 2017).

[167] Michael Ames, *The Oyster Shell Game*, Newsweek (Jan. 18, 2015), http://www.newsweek.com/2015/01/30/oyster-shell-game-300225.html.

half million dollars.[168] DBOC produced oysters on less than 150 acres of water bottom.[169] From an agricultural and nutritional perspective, oysters provide an excellent protein alternative without the use of feed, fertilizers, or pesticides.[170] As a comparison, it would take approximately 30,000 acres of pasture to produce an equivalent amount of protein from a grass-fed beef operation.[171] Now that DBOC is no longer in production, the demand for oysters requires California to produce an additional 38,000 pounds of oysters per week.[172]

Alice Waters[173] and Michael Pollan,[174] both food pioneers and advocates of local, sustainable agriculture, supported DBOC's operations as embodying the local, sustainable agriculture movement. An amici curiae brief in support of an appeal for the denial of the preliminary injunction expressed the viewpoints of these supporters and more.[175] The closing of the oyster farm had a "broad, negative impact" on the future of sustainable agriculture" and "on the local economy . . . [the] food industry in the San Francisco Bay Area . . . and, in the longer term, food security and the U.S. balance of trade."[176]

Supporters of DBOC argued that, if the oyster farm's lease was not renewed, the effects would be detrimental on other shellfish production businesses. Other shellfish producers in the area, such as Tomales Bay Oyster Company,[177] expressed concerns about its capacity to meet the

---

[168] Matt Brown, *Drakes Bay Oyster Co. agrees to shut down*, PressDemocrat (Oct. 6, 2014), http://www.pressdemocrat.com/news/2927908-181/drakes-bay-oyster-co-agrees?artslide=2.

[169] *What Drakes Bay Oyster Means to Our Community*, *supra* note 166.

[170] Petition for Writ of Certiorari, *supra* note 5, at 2.

[171] *See supra* note 169.

[172] *Id.*

[173] Alice Waters is a chef and author, and an "American pioneer" of the culinary philosophy of using seasonal, sustainable, and local ingredients. She is the proprietor of the historic Chez Panisse restaurant and is Vice President of Slow Food International. Chez Panisse, http://www.chezpanisse.com/about/alice-waters/ (last visited Feb. 20, 2017).

[174] Michael Pollan is an award-winning author who writes about the intersection of culture and nature within food, farms, gardens, and the human environment. He has written books such as *The Omnivore's Dilemma: A Natural History of Four Meals* (2006) and *Food Rules: An Eater's Manual* (2010). Michael Pollan, http://michaelpollan.com/press-kit/ (last visited Feb. 20, 2017).

[175] Alice Waters, Hayes Street Grill, Tomales Bay Oyster Company, Marin County Agricultural Commissioner Stacy Carlsen, California Farm Bureau Federation, Marin County Farm Bureau, Sonoma County Farm Bureau, Food Democracy Now, Marin Organic, and Alliance for Local Sustainable Agriculture filed an amici curiae brief on March 13, 2013, in support of an appeal for the denial of the preliminary injunction in the district court. Motion for Leave to File Amici Curiae Brief in Support of Appellant DBOC Preliminary Injunction Appeal at 1, *Salazar*, 921 F. Supp. 2d 972 (2013) (No. 13-15227).

[176] *Id.*

[177] Tomales Bay Oyster Company is one of two oyster companies located on Tomales Bay, located east and inland of the Seashore. Motion for Leave to File Amici Curiae Brief at 8, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227). While part of Tomales Bay borders the Seashore, these two

higher demand resulting from DBOC's closing.[178] Because of limited local capacity to produce oysters, oysters now must be imported from other states or countries.[179]

IV. Future Implications for Agriculture in Point Reyes

The DBOC dispute was not the end of the fight to keep agriculture in existence in the Seashore. A coalition of environmental groups recently filed a parallel lawsuit[180] to the DBOC dispute in U.S. District Court in San Francisco in February 2016.[181] A group of environmentalists filed *Resource Renewal Institute, Center for Biological Diversity, and Western Watersheds Project v. National Park Service* to challenge the continuation of ranching leases in the Seashore, claiming that ranching in the Seashore causes environmental harm.[182] The plaintiffs allege a violation by NPS of federal law in determining to "move forward with a ranch plan without conducting sufficient environmental studies on how ranching affects the Seashore's natural resources.[183] Unfortunately, the decision in the DBOC case is not favorable for the ranchers in this new lawsuit.

The environmental groups bringing the suit allege that the NPS records "show that ranching operations [have] adverse effects, including impairing resources like water quality, wildlife, and recreational uses."[184] In bringing this action, the plaintiffs (the environmental groups) hope to receive "a full and fair scientific review of the impacts of ranching on the many protected species in the park, as compared to other public uses of the seashore."[185]

---

oyster companies can remain in operation because they do not operate under SUPs within the Seashore.

[178] Motion for Leave to File Amici Curiae Brief at 2, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227).

[179] *Id.* at 7.

[180] After the U.S. District Court denied NPS's motion to dismiss the lawsuit in July 2016, this lawsuit continued was settled in July 2017. Twilight Greenaway, "Ranching in Point Reyes Seashore Called into Question," Civil Eats (Sept. 16, 2016), http://civileats.com/2016/09/16/ranching-in-point-reyes-national-seashore-called-into-question/.

[181] Complaint at 1, Resource Renewal Institute, Center for Biological Diversity, and Western Watersheds Project v. National Park Service (N.D. Cal. filed Feb. 10, 2016) (No. 3:16-cv-00688).

[182] *Id.*

[183] Mark Prado, *Court says lawsuit targeting Point Reyes cattle operations can move forward*, Marin Independent J. (July 19, 2016), http://www.marinij.com/article/NO/20160719/NEWS/160719800.

[184] Devin Katayama, *Lawsuit Challenges Cattle Ranches at Point Reyes National Seashore*, KQED News (Feb. 12, 2016), https://ww2.kqed.org/news/2016/02/12/lawsuit-challenges-cattle-ranches-at-point-reyes-national-seashore/.

[185] Prado, *supra* note 183.

The ranchers argue that they have been an important part of the history and culture of Point Reyes and its landscape, as some of the families and farms have resided in the Seashore since the 1860s.[186] Specifically, the plaintiffs allege that the NPS must prepare a new or revised General Management Plan (GMP) before continuing its current planning process, to "fully analyze the impacts of livestock ranching on the natural and recreational resources of the Seashore."[187] GMPs are required to be revised each year, and must include "measures for the preservation of the area's resources."[188] There are currently fifteen families with ranching operations in the Seashore, covering 18,000 acres.[189] Most of the ranchers now operate under "one year lease extensions," as the NPS has said it cannot renew new leases until the GMP process is complete.[190]

A settlement agreement in this suit was filed on July 12, 2017.[191] The outcome of this agreement is that the Seashore will "update its general management plan and prepare an associated environmental impact statement that evaluates alternatives that include eliminating historic ranching and dairying operations."[192] This outcome may have been influenced by the dangerous precedent set by the DBOC case, in that the Seashore now will evaluate the option of elimiating ranching from its land. As a result of the settlement of the *Center for Biological Diversity* suit, the unfortunate potential remains that ranching may eventually be completely eliminated from the Seashore.

The most unfortunate consequence of the DBOC suit results from the fact that the Ninth Circuit held that it did not have jurisdiction to overrule the Secretary's decision.[193] The DBOC case set the precedent that agency decisions of the nature of the Secretary's cannot be overturned by judicial review. If this is the precedent by which the Ninth Circuit—and other courts—will consider any future actions by the NPS, regardless of whether the NPS decides to renew the ranchers' leases, the court may again deny it has the discretion to overturn any decision by the Secretary.

---

[186] Katayama, *supra* note 184.

[187] Compl. At 3, *Resource Renewal Institute, Center for Biological Diversity, and Western Watersheds Project v. National Park Service* (2016) (No. 3:16-cv-00688).

[188] 54 U.S.C. § 100502(a).

[189] Prado, *supra* note 183.

[190] WATT, *supra* note 6, at 224.

[191] Stipulated Settlement Agreement, Resource Renewal Institute, Center for Biological Diversity, and Western Watersheds Project v. National Park Service, No. 4:16-cv-00688, (N.D. Cal. July 12, 2017).

[192] *Settlement reached in ranching suit*, PT. REYES LIGHT (July 12, 2017), https://www.ptreyeslight.com/article/settlement-reached-ranching-suit.

[193] Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1082.

Idell: A Battle Over Oysters

V. Conclusion

The debate among environmentalists that this comment presents has substantial implications for the future of agriculture in Point Reyes National Seashore and the United States. As humans continue to have an impact on natural landscapes, there exists a need for altering the meaning of preservation. Societal trends "increasingly value sustainable agriculture and a more intimate connection with the natural world through cultural use and engagement."[194]

The Seashore, with its "working landscape,"[195] is a perfect example that showcases how agriculture and wilderness can coexist "side by side," further demonstrating that "humans can coexist with the natural world."[196] It is extremely unfortunate that the loss of DBOC has reduced the potential for this coexistence. Departures from the working landscape in the Seashore are "a tragic loss to this vibrant area's sustainable agriculture and distinctive character."[197]

The NPS mandate terminating DBOC's operations is highly negative precedent for the future of the relationship between humans and nature. The judicial process of reviewing DBOC's operations required a closer look at the legislative intent, agricultural impact and cultural importance of the Seashore.

Overall, the precedent from the Ninth Circuit, which suggests that courts do not have the authority to overturn the decisions of an agency such as the NPS, is a flawed and highly detrimental standard for the future of agriculture within the NPS. The modern definition of "wilderness" has changed from the stringent standards of its historical use. It is now necessary to acknowledge the need for and importance of working landscapes that allow both wilderness and agriculture to coexist.

---

[194] Watt, *supra* note 6, at 215.

[195] Motion for Leave to File Amici Curiae Brief at 11, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227).

[196] Watt, *supra* note 6, at 226.

[197] *Id.*

Golden Gate University Environmental Law Journal, Vol. 10, Iss. 1 [2018], Art. 3

https://digitalcommons.law.ggu.edu/gguelj/vol10/iss1/3

Golden Gate University Environmental Law Journal

Volume 10 | Issue 1 Article 4

May 2018

Powering Mary Jane: Marijuana and Electric Public Utilities

Ryan Dadgari

Follow this and additional works at: https://digitalcommons.law.ggu.edu/gguelj

Part of the Environmental Law Commons

Recommended Citation

Ryan Dadgari, *Powering Mary Jane: Marijuana and Electric Public Utilities*, 10 Golden Gate U. Envtl. L.J. 55 (2018).
https://digitalcommons.law.ggu.edu/gguelj/vol10/iss1/4

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Environmental Law Journal by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

POWERING MARY JANE: MARIJUANA AND ELECTRIC PUBLIC UTILITIES

RYAN DADGARI[1]

The discourse surrounding legalizing marijuana use and cultivation is full of political, legal, and economic voices. While some discussions address the high electricity consumption of marijuana grow operations and their effects on the energy grid, few—if any—discuss whether or not public utilities could be held federally liable for supplying power to marijuana grows and incentivizing growers to use more energy efficient methods. Just as banks, doctors and lawyers could be at risk for providing their services to this emerging industry, so too could public utilities. In some cases, utilities that refuse to provide service to state-legal marijuana grow operations experience theft of electricity. This occurs in states where marijuana cultivation is both legal and prohibited. Until Congress intervenes, public utilities must continue to operate in legal limbo if they supply power and incentives to marijuana grows. Legitimate state-legal marijuana businesses face a persistent dearth of resources that other legitimate businesses receive, and high energy consumption will increasingly strain our overburdened power grids. These issues could be addressed through a Federal Energy Regulatory Commission order, Congressional action, or Supreme Court rule.

I. INTRODUCTION

Over the last two decades, marijuana use has gone from illicit and underground to mostly decriminalized. In some cases, it has become a legalized substance vying for both recreational and medicinal recognition. Increasingly widespread marijuana use over the last two decades

[1] Ryan Dadgari is a graduate of Texas A&M School of Law, Class of 2016. He has a passion for the legal and business aspects of Marijuana Law. As a law student, he was one of the first students in the nation to participate in a class exclusively relating to Marijuana Law. He has acquired Bachelors in Business Administration in both Finance and International Business from California State University Sacramento and was employed in various finance related positions prior to attending law school.

spawned a robust industry now experiencing exponential growth without the promise of basic services, like electric energy. As medicinal and recreational use of marijuana is decriminalized at the state level, many public utility companies are caught in a legal and ethical dilemma. Public utilities have expressed concern that providing services to businesses like marijuana grow operations (grows) could expose them to federal prosecution. However, selectively withholding services violates state mandates to provide electric energy to customers in their territory. Understandably, these public utilities are torn between fulfilling their statutory mandates and arousing the ire of federal prosecutors.

This article analyzes whether public utilities can be held liable for racketeering under federal Racketeer Influenced and Criminal Organization (RICO) statutes or aiding and abetting laws for providing or incentivizing electric service to marijuana growers and concludes that it is unlikely, absent specific circumstances. Part II of this article discusses the legalities of the marijuana industry, including federal prohibition of marijuana under the Controlled Substances Act (CSA), legalization of marijuana within the borders of individual states, and the evolution of the Department of Justice's (DOJ) selective enforcement of the federal prohibition on marijuana. Part III analyzes the struggle between federalism and states' rights, addressing the regulation of local electric energy distribution and the effects that the Interstate Commerce Clause, federal legislation such as the RICO statutes, and aiding and abetting statutes may have on public utilities. Part IV considers whether public utilities can legally provide service and incentives to marijuana growers under the current federal prohibition. Part V examines the high-energy consumption of marijuana grows, and the effects of consumption on the energy industry; this section also proposes interim solutions to the problems public utilities face until the legalization of marijuana is achieved at the federal level. Part VI of this paper provides recommendations to solve problems that public utilities and marijuana grows face under current law.

II. Marijuana Industry "Legalization"

To understand the complicated circumstances facing public utilities, it is important to first understand the changing landscape as it relates to marijuana laws. This section discusses the illegality of marijuana at the federal level under the CSA and marijuana's status in states that have voted to legalize it. The section concludes with a discussion depicting the DOJ's evolving stance on enforcing the federal prohibition of marijuana.

A. Why Growing is Federally Illegal

It was legal to grow and consume marijuana for most of American history.[2] In fact, U.S. physicians began to recognize marijuana's therapeutic potential as early as the 1840s. Between 1850 and 1941, the medical community recognized cannabis as a medicinal treatment in the *United States Pharmacopoeia*, a listing of federally approved drugs used in the United States.[3] However, in the 1910s, several states criminalized the drug.[4]

Throughout the 1920s and 30s, the American public began to associate marijuana with African Americans, Latino migrant workers, and crime.[5] In 1932, Congress passed the Uniform Narcotic Drug Act, which regulated narcotic drugs, in hopes of controlling interstate crime thought to be caused by the increasing use of marijuana.[6] After criminalization, aspirin, morphine, and other opium-derived drugs replaced marijuana as more potent treatments for pain and other medical conditions.[7] Congress approved the Marihuana Tax Act of 1937, which placed a tax on the sale of cannabis.[8] By 1941, growing opposition from the American Medical Association culminated in the removal of marijuana from the *United States Pharmacopoeia,* after being listed as a medicine for almost a century.[9] Marijuana's legal status continued to vary from state to state until Congress passed the Controlled Substances Act (CSA).

1. CSA – Schedule I Drug Classification of Marijuana

Due to pervasive and popular drug use among Americans in the 1960s, Congress passed the CSA in 1970.[10] Lawmakers intended for the CSA to prohibit the importation and distribution of drugs that had an acute potential for abuse and virtually no medicinal significance.[11] The

---

[2] Mark Eddy, *Medical Marijuana: Review and Analysis of Federal and State Policies*, Cong. Res. Service 1 (Apr. 2, 2010), http://fas.org/sgp/crs/misc/RL33211.pdf.

[3] *Id.*

[4] Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 81 (2015).

[5] *Id.*

[6] Tyler T. Flynn, The Grass is not Always Greener: A Hazed and Confused Federal Approach to Legal Marijuana and the Resulting Impact on Mother Earth, 4 (May 12, 2015) (unpublished J.D. thesis, Texas A&M University School of Law) (on file with author) (citing Melanie Reid, *The Quagmire That Nobody in the Federal Government Wants to Talk About: Marijuana*, 44 N.M. L. Rev. 169, 170 (2014)).

[7] Eddy, *supra* note 2, at 1.

[8] *Id.* at 2.

[9] *Id.* at 2-3.

[10] *Id.* at 3; Flynn, *supra* note 6, at 4.

[11] Flynn, *supra* note 6, at 4-5.

CSA categorized drugs into five schedules according to their probability of abuse, their medicinal usefulness, and the physical and psychological effect on the abuser.[12] The CSA classified marijuana as a Schedule I drug along with heroin, LSD, and cocaine.[13] Schedule I drugs, according to the drafters, are drugs that: "1) have a high potential for abuse, 2) have no currently accepted medicinal use, and 3) are not safe to use under medical supervision."[14] Under the CSA it is illegal to manufacture, distribute, or possess with the intent to manufacture, distribute, or possess a controlled substance.[15] Violating the prohibitions under the act can prompt unforgiving civil and criminal sanctions, and up to life in prison for large volume trafficking offenses by manufacturers and dealers.[16]

Despite its illegality and the prospect of severe punishment, close to 30 million Americans admitted using some form of marijuana in 2010.[17] Marijuana is now the most widely consumed illegal drug on the planet; between 124 million and 300 million people—or 3 to 4 percent of the global population—report using marijuana annually.[18]

B. States In Which Marijuana is Legal

The battle between the states and the federal government over the decriminalization or legalization of marijuana began immediately after the passage of the CSA in 1970. In March of 1972, the National Commission on Marijuana and Drug Abuse, also known as the Shafer Commission, recommended that small amounts of marijuana should be legalized.[19] Although President Nixon created the commission, he rejected its recommendation and, in July of 1973, formed the Drug Enforcement Administration (DEA).[20] In October of that year, Oregon became the first of several states to decriminalize marijuana, contrary to federal classification under the CSA .[21] Unlike the Nixon administration, President Jimmy Carter endorsed the Shafer Commission's recommendation. In 1977, he sent a letter to Congress asking that they decriminalize

[12] *Id.* at 5.

[13] 21 U.S.C. § 812 (2012).

[14] *Id.* at § 812(b)(1).

[15] 21 U.S.C. § 841(a)(1) (2010).

[16] Chemerinsky, *supra* note 4, at 83; *see also* Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 Stan. L. & Pol'y Rev. 633, 635 (2011).

[17] Flynn, *supra* note 6, at 5.

[18] *Id.*

[19] *Milestones in U.S. Marijuana Laws*, N.Y. Times, Oct. 26, 2013, http://www.nytimes.com/interactive/2013/10/27/us/marijuana-legalization-timeline.html?_r=0#/#time283_8117.

[20] *Id.*

[21] *Id.*

marijuana for adults.[22] Just four years later, President Reagan reversed the course towards decriminalizing marijuana with his "war on drugs" campaign.[23] Those states that had once adopted decriminalization began to tighten restrictions and recriminalize.[24] With the Antidrug Abuse Act of 1986 and 1988, Congress and the Reagan administration created strict federal prison sentences for drug dealing convictions, designed the three-strikes law which made it possible for offenders with two or more prior convictions to be sentenced to life without parole, and established the first national director of drug policy or "drug czar."[25]

As different views than those of the federal government emerged, marijuana policy would not change until 1996, when California voters passed California's Compassionate Use Act, Proposition 215 (Prop 215). Prop 215 legalized the cultivation, possession, and use of marijuana for medical purposes, laying the groundwork for future laws across the country.[26] Sixteen years later, two States, Colorado and Washington, took it a step further by legalizing marijuana for recreational use.[27]

1. Colorado

Colorado was the first state to enact legislation permitting the recreational use of marijuana, and it did so by way of another first—an amendment to the state's constitution.[28] Colorado's state legislature wrote the recreational marijuana law to allow regulation of marijuana in the same way that alcohol is currently regulated in the state.[29] Anyone over 21 years of age is authorized to possess and consume marijuana in quantities of one ounce or less, without the fear of criminal prosecution.[30] Individuals who "possess more than one ounce of marijuana are required to show proof of a debilitating medical condition or physician's prescription."[31] Those consuming marijuana must not do so in public or in a way that jeopardizes others.[32] Those who wish to cultivate marijuana

---

[22] *Marijuana Law Reform Timeline*, NORML, http://norml.org/shop/item/marijuana-law-reform-timeline (last visited Nov. 1, 2015); *see also A Brief History of the Drug War*, DRUG POL'Y ALL., http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war (last visited Nov. 1, 2015).

[23] *Id.*

[24] *Id.*

[25] *Milestones in U.S. Marijuana Laws*, *supra* note 19.

[26] *Id.*

[27] *Id.*

[28] Gina S. Warren, *Regulating Pot to Save the Polar Bear: Energy and Climate Impacts of the Marijuana Industry*, 40 No. 3 COLUM. J. ENVTL. L. 385, 394 (2015).

[29] *Id.* at 394-95.

[30] *Id.* at 395.

[31] *Id.*

[32] *Id.*

for personal use can cultivate up to six cannabis plants (three of which can be mature at any time), and must do so indoors.[33] Commercial growing operations are also legal with the proper license from the Department of Revenue.[34]

2. *Washington*

Along with Colorado in 2012, voters in Washington passed Initiative 502 allowing anyone over twenty one years of age to cultivate, possess, and consume designated amounts of marijuana privately.[35] The initiative, incorporated into the state's Uniform Controlled Substances Act, was intended to: 1) shift the focus of law enforcement resources toward violent and property crimes instead of marijuana-related crimes; 2) better fund "education, health care, research, and substance abuse prevention" by generating state and local tax revenue from marijuana; and 3) remove marijuana from the illegal drug organizations at play in the black market and place it into a state-licensed and highly regulated system.[36] Washington's regulation and licensing program controls commercial marijuana at three levels: production, processing, and retail sales.

3. *Other States Allowing the Recreational Use of Marijuana*

In 2014, Alaska, Oregon, and Washington D.C. voters legalized recreational marijuana.[37] Alaska's Ballot 2 legalized recreational marijuana use for adults and permits the possession of one ounce and up to six cannabis plants.[38] Commercial cultivators are required to pay registration and licensing fees, and register with the Alcoholic Beverage Control Board.[39]

Oregon legalized the cultivation, possession, and use of marijuana for adults 21 and over through Oregon Measure 91.[40] This measure allows adults to possess one ounce or less in public and up to eight ounces in private, and the authority to grow up to four plants for household use.[41] Oregon placed the burden of regulation on its Liquor Control Commission, which will also be responsible for qualifying commercial

---

[33] *Id.*

[34] Warren, *supra* note 28, at 395.

[35] *Id.* at 396.

[36] *Id.* (referencing Uniform Controlled Substances Act, WASH REV. CODE ANN. §§ 69.50.101-609 (2015)).

[37] *Id.*

[38] *Id.* at 397.

[39] *Id.*

[40] Warren, *supra* note 28, at 396.

[41] *Id.* at 397.

cultivators by requiring them to go through a state licensing process and pay licensing fees.[42]

Lastly, Washington D.C. legalized the possession of marijuana through Initiative 71, the Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act, in 2014.[43] Seventy percent of voters chose to allow adults to possess up to two ounces of marijuana and six plants, only three of which could be mature at any given time, for personal use, but there are no commercial cultivation or licensing schemes for possession included in the Act.[44] Today, a total of twenty three states and Washington D.C. have deviated from the federal government's prohibition and claims of marijuana being a harmful drug with no medicinal significance.[45] These states have either decriminalized or legalized the use and cultivation of marijuana within their boundaries.[46] This progression forced the federal government and the Department of Justice to evaluate its views towards marijuana.

C. DOJ's Evolution on Marijuana

The Department of Justice's (DOJ) views on marijuana evolved in recent years due to state legalization, budget reductions, and the Obama administration's stance of non-enforcement, which allows states to experiment with marijuana legalization. Not long after California passed Proposition 215, the federal government worked tirelessly to block its implementation by targeting physicians who recommended medical marijuana, patients, and dispensaries.[47] Drug-czar Barry McCaffrey announced that the government's aim was to rescind physicians' registrations with the DEA if they recommended marijuana use, leaving physicians unable to prescribe any controlled substance.[48] In *Conant v. Walters*, the Ninth Circuit Court of Appeals found that the DEA's course of action was an unconstitutional infringement on the First Amendment rights of physicians, because it limited the physician's capacity to speak "frankly and openly" with patients.[49] The ruling forced the DEA to take

---

[42] *Id.*

[43] *Id.* at 397-398.

[44] *Id.* at 398.

[45] *Id.* at 391.

[46] *Id.*

[47] Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 Chap. L. Rev. 555, 566-67 (2010).

[48] *Id.* at 567.

[49] *Id.* (citing Conant v. Walters, 309 F.3d 629, 639-40 (9th Cir. 2002) (Kozinski, J., concurring) (noting that the DEA's planned revocation policy would mean that physicians who spoke "candidly to their patients about the potential benefits of medical marijuana [would] risk losing their license to write prescriptions, which would prevent them from functioning as doctors")).

the only other viable option to disrupt the sale of medicinal marijuana: the more expensive and time consuming route of enforcement against the actors involved in the medical marijuana market.[50]

This new course of action proved to be more fruitful for the agency's war on drugs according to the outcomes of court rulings.[51] In 1997, the federal government sought an injunction against six medical marijuana cooperatives under the CSA in *United States v. Oakland Cannabis Buyers' Cooperative*.[52] The Defendants successfully argued that the medical necessity defense applied to their activities.[53] The Supreme Court reversed and allowed the injunction, holding that the medical necessity defense was not valid against charges of manufacturing and distributing marijuana since "the balance had already been struck against a medical necessity exception" under the CSA.[54]

Four years later, *Gonzales v. Raich* raised a Commerce Clause challenge against California's medical marijuana law.[55] In this case, DEA agents raided the home of Dianne Monson (Monson), a California medical marijuana patient. The DEA agents seized six marijuana plants from Monson's residence.[56] The government ultimately did not file charges against Monson after the raid.

However, the incident prompted Monson to join fellow medical marijuana patient Angel Raich and two caregivers in filing suit for an injunction against the DEA to prevent the agency from enforcing the CSA against them for cultivating medicinal marijuana.[57] The plaintiffs supported their position with two recent Supreme Court decisions that restricted the federal government's authority under the Commerce Clause: *United States v. Lopez* and *United States v. Morrison*.[58] These two cases held that "noncommercial" activity was beyond the reach of federal law and the commerce power of the government.[59] Monson and Raich argued that marijuana cultivation for personal medicinal use was similar to other noncommercial activity, like possessing a gun in a gun free school zone.[60] In the prior decision, the *Lopez* court held that possession of a gun in a school zone was noncommercial activity that fell outside the

[50] *Id.*
[51] *Id.*
[52] *Id.* at 568. (citing U.S. v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001)).
[53] U.S. v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 483-84 (2001).
[54] Kreit, *supra* note 47, at 568.
[55] *Id.*
[56] *Id*. (citing Gonzales v. Raich, 545 U.S. 1 (2005)).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Kreit, *supra* note 47, at 568-69.

Dadgari: Powering Mary Jane

federal government's authority under the Commerce Clause, and struck down a provision making that activity a federal crime under the Gun Free School Zone Act of 1990.[61]

As with other such cases, the Ninth Circuit ruled for the plaintiffs in *Raich*.[62] However, the Supreme Court reversed in a 6-3 decision, holding that regulating "the possession and noncommercial cultivation of marijuana was a necessary part of Congress' efforts to criminalize the interstate market for the drug under the Controlled Substances Act."[63] The majority distinguished the *Raich* case and the prior *Lopez* and *Morrison* cases on the ground that regulating the possession and cultivation of marijuana for personal use was an indispensable component of regulating larger economic activity, "in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[64]

With both the *Oakland Cannabis Buyers' Coop.* and *Raich* cases, the Supreme Court clarified that federal officials could prosecute medical marijuana cultivators, providers, and patients constitutionally—a power that the federal government has exercised numerous times over the last decade and a half.[65] Despite the Supreme Court's decisions, California had over 700 medical marijuana collectives openly operating with the acceptance or support of city and county governments, serving approximately 300,000 to 400,000 qualified patients by 2009.[66]

Despite its best efforts, the federal government failed to stop the spread of marijuana laws.[67] In 2009, U.S. Deputy Attorney General David W. Ogden issued the DOJ's first memorandum for prosecutorial guidance on medicinal marijuana enforcement, signaling the first step in the government's shift away from full enforcement.[68] Ogden suggested that prosecuting seriously ill people using marijuana as a physician-recommended treatment consistent with applicable state law, or caregivers operating in "clear and unambiguous compliance with existing state law" to provide marijuana to individuals, is "unlikely to be an efficient use of limited federal resources."[69]

---

[61] *Id.* at 569.

[62] *Id.* at 569; Gonzales v. Raich, 545 U.S. 1 (2005).

[63] Kreit, *supra* note 47, at 569.

[64] *Id.* (citing U.S. v. Lopez, 514 U.S. 549, 561 (1995)).

[65] *Id.*

[66] *Id.* at 570 (citing Roger Parloff, *How Medical Marijuana Became Legal*, FORTUNE 141, 144 (Sept. 18, 2009)).

[67] Kreit, *supra* note 47, at 570-71.

[68] *Id.* at 571; *see also* William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 515 (2015).

[69] Memorandum from David W. Ogden, U.S. Deputy Att'y Gen. on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 2 (Oct. 19, 2009), http://www.justice.gov/opa/documents/medical-marijuana.pdf.

Published by GGU Law Digital Commons, 2018

To ensure that this recommendation did not undermine the government's ability to enforce federal laws, U.S. Deputy Attorney General James M. Cole (Cole) issued another memorandum to prosecutors in 2011.[70] In the 2011 memo, Cole clarified that the DOJ remained committed to enforcing the CSA in all states and that the Ogden memo was never intended to shield "large-scale, privately operated industrial marijuana cultivation centers" from "federal enforcement action and prosecution," even if they complied with state law.[71] This memo seemed to illustrate the DOJ's willingness to prosecute any large grow operation. Two years later, Cole issued another memorandum in response to Colorado and Washington legalizing recreational marijuana, signaling another step towards an even more selective attitude in federal enforcement. Cole suggested that the DOJ would not interfere with states that legalized marijuana-related conduct, implemented a robust and effective system of regulation, and showed a willingness to enforce their laws and regulations if they did not undermine the eight chief priorities of federal enforcement.[72] The central federal enforcement priorities are:

> (1) Preventing distribution of marijuana to minors; (2) Preventing marijuana revenue from funding criminal enterprises, gangs or cartels; (3) Preventing marijuana from moving out of states where it is legal; (4) Preventing use of state-legal marijuana sales as a cover for illegal activity; (5) Preventing violence and use of firearms in growing or distributing marijuana; (6) Preventing drugged driving or exacerbation of other adverse public health consequences associated with marijuana use; (7) Preventing growing marijuana on public lands; and (8) Preventing marijuana possession or use on federal property.[73]

In evaluating an alleged violation, Cole advised prosecutors that they should assess conduct on a case-by-case basis and consider not only the size or commercial nature of the operation, but also whether the state has a strong and effective regulatory system in place, the operation's compliance with the state's regulatory system, and whether the operation's conduct implicates one or more of the federal enforcement priorities.[74] The

---

[70] William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 515-16 (2015).

[71] Memorandum from James M. Cole, U.S. Deputy Att'y Gen. on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 1-2 (June 9, 2011), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

[72] Memorandum from James M. Cole, U.S. Deputy Att'y Gen. on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[73] *Id.* at 1-2.

[74] *Id.*

DOJ also stated that it would not sue to block laws legalizing marijuana in the states and the District of Columbia, which some proponents hailed as a step toward ending the drug's prohibition.[75]

This trend has since reversed with the new presidential administration. In a memorandum issued January 4, 2018, current U.S. Attorney Jeff Sessions (Sessions) rescinded guidance allowing states to implement their own marijuana laws.[76] With this return to federal marijuana enforcement, federal prosecutors are free to enforce federal laws against marijuana, putting all actors involved in the marijuana industry—including utilities—in jeopardy.[77]

III. Federalism Versus States' Rights

Since the DOJ decided to follow a policy of selective enforcement, the states found that they have some leeway in legalizing marijuana and managing the use of the drug.[78] State laws that allow for either medicinal or recreational marijuana are in direct conflict with the federal ban under the CSA.[79] However, as the DOJ noted, so long as the industry is regulated by a strong and effective state regulatory system—and the entities involved do not impede upon the federal enforcement priorities—the industry will be left to state regulation and enforcement.[80]

In spite of the federal government's policy, the reality of the federal ban's existence still threatens the services that regulated commercial businesses need to thrive.[81] For example, marijuana-related entities have difficulty accessing banking services in states where marijuana is legal.[82] The American Bar Association has not clarified whether lawyers can counsel in-state entities without being held liable for criminal conspiracy or found guilty under accomplice liability.[83] And at a time when Western states are facing water shortages due to drought, the Federal Bureau of Reclamation recently stated that "Reclamation will not approve use of

[75] *Milestones in U.S. Marijuana Laws*, *supra* note 19.

[76] Memorandum from Jefferson B. Sessions, III, U.S. Att'y Gen. on Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

[77] *Id.*

[78] Baude, *supra* note 70, at 516.

[79] Julie Andersen Hill, *Marijuana, Federal Power, and the States: Banks, Marijuana, and Federalism*, 65 Case W. Res. L. Rev. 597, 599 (2015).

[80] Cole Memo, *supra* note 72.

[81] Baude, *supra* note 70, at 516.

[82] Hill, *supra* note 79, at 600.

[83] Baude, *supra* note 70, at 517.

Reclamation facilities of water in the cultivation of marijuana."[84] While the industry continues to grow exponentially, many marijuana-related companies face multiple challenges that companies in other industries do not. The primary challenge is federalism.

Public utilities are caught in the same quagmire. By servicing and incentivizing marijuana grows, these utilities risk federal prosecution; however, withholding services and incentives from grows within their territory violates state mandates requiring utilities to service and protect all customers within their territory. To analyze this issue in more detail, it is important to know how electric energy is regulated, and how federal laws would apply to public utilities that provide electricity to marijuana grows.

A. Who Regulates Electric Energy?

The energy delivery industry is a billion-dollar business.[85] In fact, it is larger than any other industry in the United States today.[86] Weighing in at "roughly twice the size of telecommunications and almost thirty percent larger than the U.S-based manufacturers of automobiles and trucks," electric utilities necessitate "far more investment than the average manufacturing industry and even ten to 100 times more per unit of delivered energy than gas and oil systems."[87] Regulation of the electric industry was once the sole jurisdiction of the states, but over the last 100 years, federal laws and regulations have slowly eroded the bright lines that once separated federal and state jurisdiction.[88] Today, "the network of interconnected electric facilities is national in scope," and presents problems that call for national solutions in some cases and local solutions in others.[89]

The Federal Energy Commission (FERC), an independent federal agency, oversees the regulation of the electric industry. The Federal Water Power Act of 1920, the first major piece of legislation to address the electricity industry, established what would eventually become

[84] *Reclamation Manuel PEC TRMR-63, Use of Reclamation Water or Facilities for Activities Prohibited by the Controlled Substances Act of 1970*, Bureau of Reclamation 1, 2 (Mar. 20, 2015), http://www.usbr.gov/recman/temporary_releases/pectrmr-63.pdf.

[85] Gina S. Warren, *Vanishing Power Lines and Emerging Distributed Generation*, 4 Wake Forest J. L. & Pol'y 347, 354-55 (2014).

[86] *Id.*

[87] *Id.* at 354-355.

[88] Everest Schmidt, *A Call for Federalism: The Role of State Government in Federally Controlled Energy Markets*, 65 Rutgers L. Rev. 574, 577-78 (2013).

[89] Joel B. Eisen, *Regulatory Linearity, Commerce Clause Brinksmanship, and Retrenchment in Electric Utility Deregulation*, 40 Wake Forest L. Rev. 545, 588 (2005).

Dadgari: Powering Mary Jane

FERC.[90] This Act purported to carve out a portion of states' jurisdiction to be regulated by the federal government and created FERC's predecessor, the Federal Power Commission (FPC), to oversee the industry's regulatory obligations.[91]

In 1935, Congress passed the Public Utilities Act, which created Title I, the Public Utilities Holding Company Act (giving the Securities and Exchange Commission authority to regulate utility holding companies) and expanded and renamed the Federal Water Power Act to the Federal Power Act (FPA), Title II.[92] The FPA expanded FPC jurisdiction to include "transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce" and "all facilities for such transmission or sale of electric energy."[93] The FPC's jurisdiction expanded yet again with the passage of the Natural Gas Act (NGA) of 1938, which placed the "transportation of natural gas in interstate commerce" under its authority.[94] However, the NGA did not grant the commission jurisdiction over "any other transportation or sale, local distribution," or "production or gathering" of natural gas.[95]

Another major piece of legislative authority for the agency was the Department of Energy Organization Act of 1977, which expanded the agency's jurisdiction to include the regulation of oil pipelines and reorganized the FPC as FERC.[96] The last piece of authoritative legislation, the Public Utility Regulatory Policies Act of 1978, amended the FPA to encourage the development of renewable energy resources and promote energy conservation, and gave FERC oversight of these objectives.[97] With the nation moving increasingly toward interconnectedness, where infrastructure or borders are no longer the clear demarcation of jurisdiction, Congress continues to increase the federal government's regulatory authority over the industry. As the history of FERC demonstrates, Congress progressively whittled away at states' rights to regulate electric energy by implementing laws that place more control in the hands of the federal government.

---

[90] Schmidt*, supra* note 88, at 580.

[91] *Id.*

[92] *Id.* at 580-81.

[93] *Id.* at 582 (citing 16 U.S.C. § 824(b)(1) (2006)) ("A wholesale transaction is 'a sale of electric energy to any person for resale.' " § 824(d). A "retail sale" is a sale directly to an end-user. See Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517 n. 12 (1947)).

[94] Kyle Chadwick, *Crossed Wires: Federal Preemption of States' Authority over Retail Wheeling or Electricity*, 48 ADMIN. L. REV. 191, 204-05 (1996).

[95] *Id.* at 205.

[96] *History of FERC*, FED. ENERGY REG. COMM'N, http://www.ferc.gov/students/ferc/history.asp (last visited Nov. 24, 2015).

[97] *What is a Qualifying Facility?*, FED. ENERGY REG. COMM'N (Feb. 3, 2012), http://www.ferc.gov/industries/electric/gen-info/qual-fac/what-is.asp.

The United States' Constitution created a federalist system in which both the federal government—via FERC—and the states—via state public utility commissions—oversee the regulation of today's electric industry.[98] Section 201(b) of the FPA (now codified as 16 U.S.C. § 824) declares that federal regulation applies to those parts of business that consist of the transmission and sale at wholesale of electric energy in interstate commerce, but does not apply to those matters that are subject to regulation by the states.[99] Under this bright line, Congress intended the FPA to occupy the field of transmission and wholesale sales in interstate commerce.[100] States cannot have jurisdiction over subject matter that is regulated by FERC or any other federal entity.[101]

FERC states that its statutory authority grants it regulatory power over electric energy transmissions in interstate commerce. FERC also regulates the wholesale sales of electric energy by public utilities in interstate commerce and all facilities for such transmission. FERC's jurisdiction includes corporate activities and transactions of public utilities such as accounting, mergers, and securities issuances. FERC also maintains siting authority over hydroelectric and nuclear generation.[102]

Under the FPA, the Commission has authority over public utilities defined as "any person who owns or operates" a facility used for "the transmission of electric energy at wholesale in interstate commerce."[103] FERC asserts that the FPA does not give it authority over local electric energy distribution, the retail sale of electricity to end users, and the siting of generation facilities that are not nuclear or hydroelectric in nature.[104] Therefore, these responsibilities fall to the States. Since the passage of the FPA, utility companies, states, and the federal government have continuously called upon the Supreme Court to assist in determining where the jurisdiction of the federal government ends and where state regulation begins. Through a series of decisions, the court interpreted the intent of Congress regarding federal jurisdiction in cases involving the movement of electricity under the FPA.

---

[98] Jeffery S. Dennis, *Federalism, Electric Industry Restructuring, and the Dormant Commerce Clause: Tampa Electric Co. v. Garcia and State Restrictions on the Development of Merchant Power Plants*, 43 NAT. RES. J. 615, 658 (2003).

[99] 16 U.S.C. § 824 (2015).

[100] Chadwick, *supra* note 94, at 208.

[101] *Id.*

[102] Lawrence R. Greenfield, *An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities in the United States* 1, 10 (Dec. 2010), http://www.ferc.gov/about/ferc-does/ferc101.pdf.

[103] *Id.* at 11 (quoting 16 U.S.C. § 824(e)).

[104] *Id.* at 12.

Dadgari: Powering Mary Jane

1. Intent and Jurisdiction of the FPA

The Supreme Court has considered the congressional intent behind the FPA and how it affects FERC's jurisdiction multiple times since the law's enactment.[105] In the 1943 case *Jersey Central Power & Light Co. v. FPC*, the Court determined that the FPA's principal function was to allow a federal agency the authority to regulate electric energy sales across state lines.[106] Two years later, in *Connecticut Light and Power Co. v. Federal Power Commission*, the Court quoted an FPC Commissioner as saying that the Act "is designed to . . . fill the gap in the present State regulation of electric utilities" and that it was "conceived entirely as a supplement to, and not a substitution for State Regulation."[107]

Specifically, a House Report cited by the Court noted that the Act was "drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions."[108] Another House Report regarding a revision of the Act confirmed "the policy of Congress [was] to extend . . . regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State Commission."[109] Thus, the Court held that while Congress intended the Act's jurisdiction to follow the surge of electricity into interstate commerce, the Act's language allows it to "extend only to those matters which are not subject to regulation by the States."[110] In doing so, the Court was sure to note the complexity of regulating an industry such as electricity, where any part of the supply that comes from outside a state may be present in every distribution facility that is connected to the network.[111] The Court stated that, had the Act not placed an artificial limitation on regulation, federal jurisdiction would reach "a toaster on the breakfast table."[112]

In *Federal Power Commission v. Southern California Edison Co.*, the Court determined that Congress intended to draw a bright line to distinguish between state and federal jurisdiction.[113] Finding that it was

---

[105] Dennis, *supra* note 98, at 625-26.

[106] Schmidt, *supra* note 88, at 582 (citing 319 U.S. 61, 67-68 (1943)).

[107] *Id.* (citing 324 U.S. 515, 525 (1945)).

[108] *Id.*

[109] *Id.*

[110] Dennis, *supra* note 98, at 625-26 (citing 16 U.S.C. § 824(a) (2000)).

[111] *Id.* at 626.

[112] *Id.*

[113] Schmidt, *supra* note 88, at 583 (citing Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964)).

Published by GGU Law Digital Commons, 2018

the intent of Congress to codify a strict distinction between local and national jurisdiction, the Court held that Congress, through the FPA, ultimately authorized federal jurisdiction over wholesale sales and state regulation over retail sales.[114] The Court explained that Congress enacted the FPA due to previous court decisions establishing the pervasive notion that a state cannot regulate wholesale transactions but can regulate retail sales.[115] In *New York v. FERC*, the Court upheld that the FPA extended federal jurisdiction to those electric energy matters previously under state control, which indirectly related to interstate commerce.[116] The Court also stated that the Act preserved state jurisdiction and was replete with statements describing Congress' intent to do so.[117] Thus, the Court drew the line making it easier to identify regulators of the electric industry.

B. Interstate Commerce

While states regulate the retail sale and local distribution of electricity, almost all electricity delivered to consumers in the U.S. ultimately passes through FERC's jurisdiction.[118] Due to the interconnected nature of the grid[119] and untraceable nature of electricity,[120] Congress and the courts consider electric energy as interstate commerce.[121] As a result, the Commerce Clause is one of the federal government's enforcement tools. In *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, the Supreme Court cited several previous cases regarding electricity and natural gas. The Court explained that Congress intended for the FPA to adopt the bright line in *Attleboro*, where federal jurisdiction was limited to the wholesale of electricity and retail sale to the end user was wholly under state jurisdiction.[122] However, the Court rejected this distinction, and instead looked to its general trend in Commerce Clause jurisprudence that calls for each case to be evaluated on "the nature of the state regulation involved, the objective of the state, and

---

[114] Chadwick, *supra* note 94, at 199.

[115] Steven Ferrey, *State Wars-the Empire Strikes Back: The Federal/state Constitutional Power Confrontation*, 65 Baylor L. Rev. 1, 36-37 (2013) (citing Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 214).

[116] Julia E. Sullivan, *The Intersection of Federally Regulated Power Markets and State Energy and Environmental Goals*, 26 Fordham Envtl. L. Rev. 474, 481-82 (2015).

[117] Schmidt, *supra* note 88, at 611-12.

[118] Andrew H. Meyer, *Federal Regulatory Barriers to Grid-Deployed Energy Storage*, 39 Colum. J. Envtl. L. 479, 484 (2014).

[119] *Id.* at 505.

[120] Ferrey, *supra* note 115, at 55.

[121] Dennis, *supra* note 98, at 625-26.

[122] Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 380 (1983).

the effect of the regulation upon the national interest in the commerce."[123]

In the more recent *General Motors Corporation v. Tracy*, the Court found that retail sales to domestic consumers regulated by the state were not immune from ordinary Commerce Clause jurisprudence.[124] However, this ruling diverged from the precedent the Court set in cases involving both the FPA and the NGA that upheld the exemption of state regulation of in-state retail sales from dormant Commerce Clause attacks.[125] The Supreme Court denied hearing two cases expected to clarify this ruling.[126] For that reason, this article makes arguments consistent with the traditional view that state regulation of in-state retail sales is exempt from attack under the dormant Commerce Clause. Therefore, states and public utilities are not under threat of federal action under the Commerce Clause for encouraging public utilities to provide electric service and efficiency incentives to state-legal marijuana grows; however, the cultivation of marijuana is not exempt from Congressional regulation.

In *Gonzales v. Raich*, the Court held that there was a rational basis for Congress to regulate in-state marijuana cultivation, because it affects price and market conditions whether it is grown for personal use or for the express purpose of being sold in the interstate market.[127] The court noted that marijuana cultivated for both purposes is a fungible commodity, with well-established interstate markets that are susceptible to fluctuations in supply and demand based on the introduction of personal consumption into the national market.[128] When the effects of individual producers are combined, Congress can rationally expect its actions to have substantial effects on interstate commerce.[129]

With this decision, the Court acknowledged that the broad-regulatory scheme principle was a constitutional and effective means of regu-

---

[123] *Id.* at 379.

[124] Gen. Motors Corp. v. Tracy, 519 U.S. 278, 291 (1997).

[125] *Id.* at 291-92.

[126] *See* Fiordaliso v. PPL EnergyPlus, LLC, 135 S. Ct. 1583 (3rd Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3742 (U.S. Mar. 23, 2015) (No. 14-694), *and cert. denied,* 83 U.S.L.W. 3742 (U.S.Apr. 25, 2016) (No. 14-694) (on file at http://www.scotusblog.com/case-files/cases/fiordaliso-v-ppl-energyplus-llc/); CPV Power Development v. PPL EnergyPlus, LLC, 135 S. Ct. 1583 (3rd Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3742 (U.S. Mar. 23, 2015) (No. 14-634), *and cert. denied,* 83 U.S.L.W. 3742 (U.S. Apr. 25, 2016) (No. 14-634), http://www.scotusblog.com/case-files/cases/cpv-power-development-inc-v-ppl-energyplus-llc/.

[127] Kenneth R. Thomas, *The Power to Regulate Commerce: Limits on Congressional Power*, Congressional Research Service 1, 14 (May 16, 2014) (citing Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *rev'd, sub nom;* Gonzales v. Raich, 545 U.S. 1 (2005)), https://www.fas.org/sgp/crs/misc/RL32844.pdf.

[128] *Id.*

[129] *Id.*

lating a presumably in-state activity, in lieu of a jurisdictional element.[130] The Court demonstrated that, through the Commerce Clause, local cultivation of marijuana can be regulated without a case-by-case analysis or requiring a jurisdictional addition to the CSA.[131] Therefore, even if a jurisdictional element existed in the CSA, case-by-case analysis would be bypassed; federal statutes regulate the cultivation of marijuana and offer a rational basis for Congress to believe that failure to regulate marijuana cultivation would undercut the overall economic scheme.[132] As a result, Congress can regulate activities by devising broad regulatory schemes such as the CSA, even if the activities would fail a case-by-case analysis in statutes that incorporated a jurisdictional element.[133]

Accordingly, marijuana grows are subject to Congressional regulation under the CSA and the Commerce Clause, even though the cultivation of marijuana is legal at the state level. This could lead to federal prosecution under the CSA and under the Commerce Clause. Growers could be found liable under the CSA because their actions are in direct violation of the statute. They could also be liable under the Commerce Clause for interfering with interstate commerce. As stated previously, public utilities are exempt from prosecution under the Commerce Clause, but may be held liable under the CSA should the court find that they specifically intended to violate the statutory prohibitions as "racketeering influenced criminal organizations" or if they are determined to be aiding and abetting growers in the furtherance of prohibited activities under the CSA.

1. Racketeer Influenced and Criminal Organizations

To prove a substantive RICO violation under 18 U.S.C. § 96, the government must prove beyond a reasonable doubt that: "(1) an enterprise existed; (2) the enterprise participated in or its activities affected interstate commerce; (3) the defendant was employed by or was associated with the enterprise; (4) the defendant conducted or participated in the conduct of the enterprise; (5) through a pattern of racketeering activity."[134] According to Congress, the term "racketeering activity" refers to many things, including "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter,

[130] Noelle Formosa, *Ganging Up on Rico: Narrowing Gonzales v. Raich to Preserve the Significance of the Jurisdictional Element As A Constitutional Limitation in the Racketeer Influenced and Corrupt Organizations Act*, 82 S. Cal. L. Rev. 135, 153 (2008).

[131] *Id.*

[132] *Id.* at 153-54.

[133] *Id.* at 154.

[134] *Id.* at 155 (quoting U.S. v. Marino, 277 F.3d 11, 33 (1st Cir. 2002)).

or dealing in a controlled substance."[135] To convict under the statute, federal prosecutors must prove the existence of a "pattern of racketeering activity," which is defined as at least two acts of racketeering activity.[136] Even if the activity has a *de minimis* effect on interstate commerce, courts can exercise jurisdiction by "proof of a probable or potential impact."[137] The jurisdictional element of this statute, found under § 1962(c), applies to "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" that "conduct[s] or participate[s], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[138] Given the Supreme Court's opinion in *Raich*, the jurisdictional element is not needed because the CSA is a broader scheme statute, and the activity of cultivating marijuana for personal and commercial use affects interstate commerce. Accordingly, the federal government must only prove the elements of RICO beyond a reasonable doubt.

If the federal government pursues prosecuting public utilities under RICO statutes, cases would likely include several elements. First, an enterprise that affects interstate commerce exists, no matter how it is construed.[139] State-legal marijuana businesses are illegal federally, and the *Raich* decision established that cultivation of marijuana, even for personal medicinal use, affects interstate commerce. Commercial cultivation of marijuana clearly affects commerce, even if the product is only sold to in-state businesses or individuals. Likewise, public utilities are enterprises that affect interstate commerce, because the amount of energy they withdraw from the grid has a direct effect on other entities—often in different states—sharing energy from the same sources.

Under the second element, utilities participate in or affect interstate commerce by providing electric energy services to marijuana grows.[140] If utilities deny indoor marijuana grows access to electric energy, marijuana production decreases substantially, which directly affects supply and demand in interstate markets. This element is met since the output of the grow is higher than it could be without the electric service provided from a public utility. In addition, the public utility would utilize power

[135] 18 U.S.C. § 1961(1).

[136] § 1961(5).

[137] Eleanor T. Phillips et al., *Racketeer Influenced and Corrupt Organizations*, 52 Am. Crim. L. Rev. 1507, 1527-28 (2015) (quoting United States v. Juvenile Male, 118 F.3d 1344, 1349 (9th Cir. 1997)).

[138] Formosa, *supra* note 130, at 155 (quoting 18 U.S.C. § 1962(c)).

[139] 18 U.S.C. § 1961(4) ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity").

[140] 18 U.S.C. § 1962(c) ("It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce.").

Golden Gate University Environmental Law Journal, Vol. 10, Iss. 1 [2018], Art. 4

from the grid to supply the energy these grows need, affecting interstate commerce for a racketeering activity.

The third element is employment, or association. When a public utility has no common purpose with the grower—in other words, no intent to grow marijuana—the element can only be met in a few ways.[141] First, if a marijuana business or one of its decision-making officers purchases public utility stocks with the proceeds from the sale of marijuana and has enough of a controlling interest in the utility to affect its decisions, association implicates the utility.[142] Second, if a public utility purchases a controlling interest in a marijuana enterprise, it implicates the utility through association.[143]

Under the fourth element of participating in the conduct of the enterprise, incentivizing energy efficient methods could be construed as public utilities conducting or participating in the racketeering enterprise.[144] Unless the utility is involved in the actual management and operation of the grow, this is likely not sufficient to implicate the utility for conducting or participating in the conduct of the racketeering enterprise.[145]

Under the fifth and final element, other than acts involving controlled substances, it is unlikely that more than one racketeering activity is in play where public utilities are servicing marijuana grows.[146] If the provision and maintenance of service are the only acts involved, this element is likely not met. However, if any other racketeering activity is present, this element is easily met.

Through the above analysis, a public utility could be found culpable under RICO without much perversion by simply striving to comply with state mandates to provide electric energy service to all legal entities in its territory. Where elements three, four, and five fail here, it would not be farfetched to see that, although highly unlikely, an imaginative prosecu-

---

[141] Phillips, *supra* note 137, at 1519 (citing U.S. v. Olson, 450 F. 3d 655, 688 (7th Cir. 2006) ("noting that the Latin Kings operated as a "well-equipped organization with a defined hierarchical command structure," "allegiance to a national organization," and maintained "structure throughout the period described")).

[142] 18 U.S.C. § 1962(a) (prohibiting direct and indirect use or investment of any income resulting from racketeering activity).

[143] 18 U.S.C. § 1962(c).

[144] Phillips, *supra* note 137, at 1530-31 (Must make decisions in operation or management of the enterprise to conduct or participate, but decision-making of a low degree may not constitute participation in the enterprise's affairs).

[145] *Id.* at 1530.

[146] 18 U.S.C. § 1961(5) ("'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.").

tor could arrange the facts so that a judge or jury would believe that the elements are met. Barring an imaginative prosecutor, or a far-reaching court, a public utility would likely not be found guilty under RICO. In such cases, the government could turn to the aiding and abetting statute as applied under the CSA.

2. *Aiding and Abetting*

Behind almost every criminal statute is a hidden feature that allows for perpetrators of a crime and those that assist them to face the same punishment.[147] Section 2(a) of 18 U.S.C. states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[148] This section defines aiding and abetting as "assisting in the commission of someone else's crime."[149] Mere knowledge of an offense without assistance is not enough to be found culpable; likewise, assistance without intent is not enough.[150]

Yet someone culpable under this statute need not assist in every aspect of the criminal offense.[151] Aiding and abetting is not a stand-alone offense; it must take place either before or at the time of the substantive offense.[152] While the substantive offense must be completed for a conviction, the hands-on offender does not need to be named or convicted.[153] Section 2(b) states "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."[154] Under this language, actors and the intermediaries—innocent or not—are liable for their conduct if, when taken together, it amounts to an offense.[155] The *mens rea* requirement under section 2(b) is "willfully" which, although not entirely clear, seems to mean "intentionally."[156] The courts "believe that an individual 'willfully' causes an offense when he intends the commission of conduct that constitutes a crime and then intentionally uses someone else to commit it."[157] Even if someone is unaware that his un-

[147] Charles Doyle, *Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2*, CONG. RES. SERVICE 1 (Oct. 24, 2014), https://www.fas.org/sgp/crs/misc/R43769.pdf.
[148] 18 U.S.C. § 2(a) (2015).
[149] Doyle, *supra* note 147, at 3.
[150] *Id.*
[151] *Id.* at 4.
[152] *Id.*
[153] *Id.*
[154] 18 U.S.C. § 2(b).
[155] Doyle, *supra* note 147, at 8.
[156] *Id.*
[157] *Id.* (citing U.S. v. Gumbs, 283 F.3d 128, 135 (3d Cir. 2002)).

derlying conduct is criminal, an individual may still incur liability under Section 2(b) if he intends to assist in the facilitation of the substantive criminal action.[158]

Since "assistance" and "facilitation" are malleable terms, public utilities rightfully have concerns when servicing marijuana grows and offering incentives to curb high consumption.[159] If the court interprets aiding and abetting to implicate individuals who "specifically intended to facilitate" or truly "assisted" in the commission of an act that violated the CSA, public utilities could have some potential for liability.[160] However, because public utilities specifically intend to remain in compliance with state mandates, an analysis of the elements of aiding and abetting demonstrates where lines of intent can be drawn. To convict an individual for aiding and abetting, the prosecution must prove beyond a reasonable doubt: "(1) That the accused had specific intent to facilitate the commission of a crime by another; (2) That the accused had the requisite intent of the underlying substantive offense; (3) That the accused assisted or participated in the commission of the underlying substantive offense; and (4) That someone committed the underlying offense."[161]

In proving the first element, a public utility's intent would be to fulfill its duty and obligation under state mandates. Utilities act because they are obligated to serve and protect their customers, including all state-legal entities, by statutes enacted long before any state legalized marijuana for medicinal or recreational purposes. Utilities do not act because they specifically intend to facilitate the commission of the federal crime of marijuana cultivation, even if they know that the entity they are providing electric energy to intends to violate the CSA. Rather, they specifically intend to protect the other customers within their service area, by reducing energy consumption and theft from these marijuana grows. Utilities accomplish this by providing service and offering incentives for more efficient use of energy.

It is hard to conceive that a public utility would intend to cultivate marijuana in violation of the CSA under the second element. Public utilities do not set out to cultivate marijuana, but they do intend to serve and protect their customer base per statutory mandates. Simply providing electricity to a grower does not inherently demonstrate intent to further the crime. In this instance, public utilities would be equally liable in aiding and abetting the cultivation of marijuana. Utilities provide electricity

---

[158] *Id.* at 8-9.

[159] David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 Cardozo L. Rev. 567, 591 (2013).

[160] *Id.*

[161] Conant v. Walters, 309 F.3d 629, 635 (9th Cir. 2002).

and incentives to those growers. That action facilitates the substantive crime of the states and the growers. Since the federal government usually leaves the states to experiment and serve as laboratories for future policy making ideas, this is not likely an effective way to prove these two elements.

The third element of assistance or participation presents the same dual interpretation problem. Federal prosecutors would likely consider utilities to be assisting or participating in the commission of the underlying substantive crime, should they provide service and incentives to marijuana grows. Once again, the same argument works in reverse; for utilities to comply with state laws and statutory mandates, they must service state-legal businesses and protect the other customers in their territory. Utilities accomplish this in part by offering incentives to grows to encourage the use of energy-efficient methods of operating.

The fourth element is likely to be uncontested. Marijuana growers intend to cultivate, distribute, and possess marijuana, committing the underlying substantive crime. Like the previous RICO analysis, this analysis demonstrates that by simply fulfilling their duties and obligations under state mandates, there is a possibility that utilities could be found culpable for aiding and abetting in the cultivation, distribution, and possession of marijuana without much slanting. Where the argument in this analysis fails under elements one, two, and possibly three, a little imagination on the part of a prosecutor could be used to prove otherwise. Therefore, Congressional action is needed to decriminalize or legalize marijuana, allowing public utilities to operate within their state mandates to service and protect all the customers within their territory without the threat of federal prosecution.

IV. Where Does This Leave Public Utilities?

While unlikely, public utilities could face criminal prosecution for providing service to marijuana grows. If the utilities are merely operating within the normal framework of duties and obligations under state mandates, their actions likely do not meet the elements required for federal prosecution. Public utilities can therefore provide electric service and efficiency incentives to marijuana grows. Additionally, policy concerns may necessitate that utilities provide service to marijuana grows to address high-energy consumption, power theft, and other issues.

A. Servicing Marijuana Grows

The language of 16 U.S.C. § 824(b) specifies that FERC does not have jurisdiction over facilities that generate electricity, distribute electricity locally, transmit electricity only for intrastate use, or transmit electricity which is "consumed wholly by the transmitter."[162] As the Court in *FERC v. Mississippi* found, Congress could have preempted the field of electric regulation entirely, if it chose to do so.[163] However, Congress decided on a less intrusive course of action by establishing a "cooperative federalism" approach, which showed deference to state authority.[164] Justice O'Connor opined that this approach facilitates the frequently recognized idea that "the 50 States serve as laboratories for the development of new social, economic, and political ideas."[165] It allows the States to enact and administer their own regulations to meet their own particular needs within the limits of established minimum standards set by the federal government.[166]

Today, nearly all states have established a regulatory structure that expects each utility in an identifiable area to provide retail electric service.[167] State laws impose an obligation on each utility to plan for and acquire the facilities needed to provide adequate and reliable service to all the customers located in its service territory.[168] This obligation applies universally whether it is stated explicitly in statutes or fleshed out in case precedent.[169] Therefore, public utilities have a responsibility under state law to provide electric service to customers. As Puget Sound Energy said in a statement, it "has a duty and obligation to serve customers under Washington state law. If there's a legal business in our service territory that needs our services, we welcome them as a customer."[170]

Accordingly, because the states regulate local distribution of electricity, public utilities can provide service to state-legal marijuana busi-

---

[162] 16 U.S.C. § 824.

[163] Schmidt, *supra* note 88, at 587.

[164] *Id.*

[165] James W. Moeller, *Of Credits and Quotas: Federal Tax Incentives for Renewable Portfolio Standards, and the Evolution of Proposals for a Federal Renewable Portfolio Standard*, 15 Fordham Envtl. L. Rev. 69, 97 n.144 (2004) (citing FERC v. Mississippi, 456 U.S. 742, 788 (1982) (O'Connor, J. concurring in part and dissenting in part)).

[166] *Id.*

[167] J. A. Bouknight, Jr., *Planning for Wholesale Customer Loads in A Competitive Environment: The Obligation to Provide Wholesale Service Under the Federal Power Act*, 8 Energy L. J. 237, 264 n.7 (1987).

[168] *Id.*

[169] *Id.*

[170] Robert Walton, *'Don't ask, don't tell': How utilities are powering the marijuana industry*, Indus. Dive (Oct. 23, 2014), http://www.utilitydive.com/news/dont-ask-dont-tell-how-utilities-are-powering-the-marijuana-industry/322565/.

Dadgari: Powering Mary Jane

nesses, as they are the type of state-legal entities that state mandates obligate them to serve. Failing to do so would violate state regulatory commission mandates, which could lead to penalties imposed by the state utility commission. It is important to note that while public utilities involved in local distribution are not regulated under the FERC, they could still provoke federal criminal prosecution. However, utilities are obligated to protect their customers and should do so even in the face of conflict between state and federal governments.

B. Offering Incentives to Marijuana Grows

Utilities can protect customers by taking the necessary steps to reduce instances of power theft, and promote efficiency in the marijuana industry to curb high energy consumption. With the decriminalization or legalization of marijuana cultivation in more states, growers will increasingly divest themselves from theft and off-grid power sources; instead, growers will simply plug into the grid for electricity.[171] In turn, this burgeoning industry's energy consumption will grow exponentially.[172]

Some utilities, like Snohomish County Public Utilities District, fear that providing incentives like cash rebates to marijuana grows would cause them to clash with the Bonneville Power Administration (BPA). A conflict with BPA could jeopardize millions of dollars in federal grants for other projects unrelated to marijuana, such as tidal and geothermal energy or smart-grid and energy-efficiency programs.[173] BPA, the largest power marketer in the Pacific Northwest and the supplier of one-half of the funding for the Northwest Energy Efficiency Alliance, stated that it will not reimburse the 140 public utilities that are its customers due to the federal ban on marijuana.[174]

Even though federal law prohibits marijuana cultivation, state populations continue to decriminalize or legalize marijuana. Individual states continue to act as laboratories for marijuana policy development, prompting local governments, utilities, and others to take their own measures. For instance, Colorado's Boulder County enacted a cannabis car-

[171] Warren, *supra* note 28, at 405.

[172] *Id.* at 403.

[173] David Ferris, *Utilities struggle to control appetites in energy-hungry marijuana industry,* E&E Publishing LLC (Aug. 8, 2014), http://www.eenews.net/stories/1060004230.

[174] Ted Sickinger, *Powering pot: Growers will gobble electricity*, The Oregonian, Sept. 5, 2015, http://www.oregonlive.com/business/index.ssf/2015/09/powering_pot_growers_will_gobb.html.

bon tax.[175] Investor-owned Xcel Energy Inc., the major electricity provider in Colorado, admitted to giving rebates to marijuana growers, though it refused to disclose the amounts.[176] Both Puget Sound Energy and Avista, investor-owned utilities in Washington State, provided growers with significant rebates funded by fees on their own customers instead of the government.[177] Energy Trust of Oregon, a non-profit organization, coordinates efficiency programs for customers of Portland General Electric and PacifiCorp, conducting technical studies and providing rebates for lighting upgrades to medical marijuana growers.[178]

In providing for the economic welfare and safety of their residents, states have traditionally had the authority to regulate public utilities and determine state energy policies.[179] Because electric energy is an essential service that is "affected with the public interest," states and utilities must take steps to ensure reliable electric energy service at a reasonable price to all consumers.[180] Therefore, states and public utilities can incentivize marijuana grows in the effort to promote energy efficiency and reduce the average energy consumption of marijuana cultivation. When federal agencies such as BPA are not willing to reimburse public utilities for energy efficiency incentives, states should levy a tax like the cannabis carbon tax enacted by Boulder County. States could also allow public utilities to tax all electric energy customers to fund a rebate program until Congress can be swayed to change the law. Without a change allowing for the decriminalization or legalization of marijuana, grows will continue to negatively impact the energy industry, placing other customers at risk and consuming energy at a rate that will inevitably strain the power grid.

V. Negative Effects of Marijuana Grows on the Energy Industry

Without legislation for the legalization or decriminalization of marijuana that allows public utilities to serve and incentivize growers free and clear of federal enforcement, marijuana grows will increasingly have a negative impact on the energy industry due to high energy consumption with little or no incentive to become more efficient. The high-energy

[175] Hillary Borrud, *Power needs of pot industry raise issues with Energy Dept., utilities*, East Oregonian, Apr. 26, 2015, http://www.eastoregonian.com/eo/capital-bureau/20150426/power-needs-of-pot-industry-raise-issues-with-energy-dept-utilities.

[176] Ferris, *supra* note 173.

[177] *Id.*

[178] Sickinger, *supra* note 174.

[179] Schmidt, *supra* note 88, at 618.

[180] *Id.* at 575.

consumption of marijuana grows inevitably causes cultivators to evade steep power bills and avoid detection from enforcement agencies. These problems will continue to plague both industries in all states, whether marijuana is decriminalized or not.

A. High-Energy Consumption of Grows

According to the preeminent researcher, Evan Mills, an expert on the energy use of marijuana grows, the budding industry of indoor marijuana cultivation is a highly energy intensive process in which cultivators attempt to control environmental conditions throughout the life-cycle of the plants.[181] The criminalization of marijuana pushes cultivators to grow indoors in an effort to conceal their actions.[182] Criminalization is also responsible for energy inefficiencies of the marijuana cultivation process. Transporting small volumes of product over long distances and taking measures that undercut ventilation efficiencies to suppress noise and odor leads to the use of diesel generators for off-grid power production.[183] These generators produce more greenhouse-gas emissions and are far less efficient than many electric grids.[184] It currently takes approximately 4,600 kg of carbon dioxide emissions to produce about one kilogram of processed marijuana buds; when cumulated across all national production, this equals the emissions of 3 million average cars in the U.S.[185] Mills explains that energy is used in many aspects of the indoor growing process and cites high-intensity lighting, dehumidification to rid grow rooms of water vapor and to prevent mold formation, heating or cooling grow rooms and drying rooms, pre-heating water used for irrigation, and air-conditioning and ventilation for removing waste heat.[186]

With lighting levels equivalent to those in hospital operating rooms and hourly air changes greater than 60 times the rate of the modern home, Mills estimates that the power densities of indoor marijuana grows are equal to modern data centers.[187] His research approximates that indoor marijuana grows use about 20 terawatt hours of energy annually,

---

[181] Evan Mills, *The Carbon Footprint of Indoor Cannabis Production*, 46 Energy Pol'y 58 (2012), http://evanmills.lbl.gov/pubs/pdf/cannabis-carbon-footprint.pdf.

[182] Evan Mills, *Energy up in Smoke: The Carbon Footprint of Indoor Cannabis Production - Frequently Asked Questions*, http://evan-mills.com/energy-associates/Indoor.html (last visited Nov. 10, 2015).

[183] *Id.*

[184] *Id.*

[185] Mills, *supra* note 181, at 58.

[186] *Id.* at 59.

[187] *Id.*

including off-grid production.[188] This consumption matches the output of seven large electric power plants, or the consumption of 2 million average American homes.[189] He estimates that indoor marijuana grows account for more than $6 billion or more than one percent of annual electricity consumption nationally.[190] Indoor cultivation is responsible for approximately three percent of all electricity used in California, the top-producing state of marijuana grown indoors.[191] This is the equivalent of the energy used in 1 million average Californian homes and expenditures on energy equating to $3 billion per year.[192] In the U.S., indoor marijuana cultivation uses six times as much energy as the pharmaceutical sector, approximately eight times more energy per foot than the standard commercial building, four times more than the average hospital, and eighteen times more than the average home.[193]

1. Illegal Grows Stealing Electricity

The darker side of the narrative is the increased instances of power theft due to the high-energy consumption of marijuana grows. Canadian based BC Hydro declared that between 2006 and 2010, there were more than 2,600 thefts of electricity, the majority allegedly from marijuana growers. BC Hydro reported that electricity losses increased from around 500 gigawatt-hours to at least 850 gigawatt-hours, costing the company approximately $100 million a year.[194] This is not an isolated event. Ontario, Canada also estimates that power theft for all purposes, including a good portion of theft for the cultivation of marijuana, results in $500 million in losses.[195] While U.S. estimates are hard to obtain, theft is thought to account for up to $6 billion in losses nationally.[196]

Like other electric utilities, BC Hydro cites several problems with marijuana grow operations, including: electricity theft by cultivators that wish to avoid detection from officials; safety risks created for utility employees, first responders, and the public; damage to the grid, such as power surges and electrical failure that can damage a utility's equipment and cause power outages; and the waste of electricity, which the com-

---

[188] *Id.*
[189] *Id.*
[190] *Id.* at 60.
[191] *Id.* at 59.
[192] *Id.* at 59-60.
[193] *Id.* at 62.
[194] Peter Kelly-Detwiler, *Electricity Theft: A Bigger Issue Than You Think*, FORBES, Apr. 23, 2013, http://www.forbes.com/sites/peterdetwiler/2013/04/23/electricity-theft-a-bigger-issue-than-you-think/ (last visited Nov. 10, 2015).
[195] *Id.*
[196] *Id.*

Dadgari: Powering Mary Jane

pany says is an "affront to the conservation efforts of legitimate customers."[197] Theft of electricity is a concern for utility customers as well, because it increases electricity prices for legitimate consumers.[198] While theft of electricity is a significant and persistent concern, BC Hydro and other utilities reduce losses with a number of different strategies, such as setting up anonymous tip lines, implementing new technology such as theft-detecting system meters and smart meters, and creating revenue protection units that visit suspect locations and inspect them for electrical theft.[199]

B. Curbing the High-Energy Consumption of Grows

In addition to minimizing waste through power theft, utilities frequently grapple with the high-energy consumption of marijuana grows.[200] According to the Mills study, lighting is responsible for thirty-three percent of the energy used for indoor marijuana grows.[201] While lighting is not the only culprit to blame for high-energy use, it is the most prominent piece of equipment and the grower's largest expense.[202] Each bulb of an indoor grow light, whether it is high-pressure sodium, high-intensity discharge, or metal halide, consumes 1,000 watts or more of electricity.[203] Besides using large amounts of electricity, the lights produce a large amount of heat that must be vacated from grow rooms with fans and air conditioners, which consume energy as well.[204] With no current national standards in place for horticultural lighting, utilities and other energy organizations must take on the risky task of promoting and incentivizing efficient energy use in the marijuana industry.[205]

Investor-owned utilities currently offer cash incentives in the form of rebates for energy efficient equipment in state-legal marijuana industries in Colorado, Washington, and Oregon.[206] While some investor-owned utilities are pressing forward and offering cash rebates, public

[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] Ferris, *supra* note 173.
[201] Mills, *supra* note 181, at 60.
[202] Ferris, *supra* note 173.
[203] *Id.*
[204] *Id.*
[205] *Id.*; *see also* Lisa Cohn, *Addressing the Energy-Intensive Marijuana Industry in Oregon*, Energy Efficiency Markets (Jul. 28, 2015), http://energyefficiencymarkets.com/addressing-energy-intensive-marijuana-industry/ (Energy Trust of Oregon already offers legal medical marijuana facilities that seek to save energy and reduce costs incentives through their Production Efficiency program).
[206] *Id.*

Published by GGU Law Digital Commons, 2018

utilities generally refrain from doing so, citing concerns of federal criminal prosecution and the loss of federal grant money to the state.[207] In today's society, although often overlooked, electricity is a unique and essential element that touches every aspect of modern life.[208] When a shortfall jeopardizes the safety and welfare of a state, that state's government must act to protect its public interest.[209]

VI. Conclusion

While it is unlikely that a utility that simply supplies electricity to a marijuana business would be implicated for racketeering or aiding and abetting, the federal government could take explicit steps to protect utilities that are acting strictly within their state mandates. For instance, FERC could issue an order stating that utilities are protected from prosecution if acting strictly within their state regulatory directives to provide electricity to all state-legal entities within their service territory. Congress could pass legislation authorizing public utilities and other recognized businesses to engage in commerce with marijuana businesses in states that have legalized marijuana, so long as their actions amount to hands-off involvement in providing the types of services that any recognized legal business would require. A third and possibly more promising approach would be for the Supreme Court to create a bright-line rule offering public utilities and other service providers protection from federal prosecution, so long as their involvement amounts to the same type of hands-off service they provide other legally recognized businesses. For utilities, this would essentially amount to an affirmation that electric energy service for grows is to be treated the same as other customers.[210]

Further, full federal decriminalization or legalization would create new possibilities for protecting citizens, because it would allow the marijuana industry to address energy issues through legitimate regulatory measures such as codes, standards, and incentives. These measures would help reduce energy use and its by-products. In addition, decriminalizing or legalizing marijuana would allow state legal marijuana businesses to operate by the same rules as other federally recognized legal businesses, and eliminate the conflict between marijuana businesses and those currently recognized businesses like public utilities. Instead of making federally recognized legal businesses choose between

[207] *Id.*

[208] Schmidt, *supra* note 88, at 573; *see also Energy Primer: A Handbook of Energy Market Basics*, Fed. Energy Reg. Comm'n, 2 (July 2015), https://www.ferc.gov/market-oversight/guide/energy-primer.pdf (stating that consumers cannot eliminate consumption and have few substitutes).

[209] *Id.*

[210] Mills, *supra* note 181.

Dadgari: Powering Mary Jane

abiding by federal or state law, Congress should observe the voice of the national population and decriminalize or legalize marijuana. Without Congressional action, law-abiding public utilities that are merely fulfilling their state statutory obligations will likely still face uncertainty in business operations and the lingering threat of federal litigation.

Published by GGU Law Digital Commons, 2018

Golden Gate University Environmental Law Journal

Volume 10 | Issue 1 Article 5

May 2018

Taking a Breath: Lessons For the Port of Oakland From the Clean Trucks Program At the Ports of Los Angeles and Long Beach

Julia Chernova
Golden Gate University School of Law

Follow this and additional works at: https://digitalcommons.law.ggu.edu/gguelj

Part of the Environmental Law Commons

Recommended Citation
Julia Chernova, *Taking a Breath: Lessons For the Port of Oakland From the Clean Trucks Program At the Ports of Los Angeles and Long Beach*, 10 Golden Gate U. Envtl. L.J. 87 (2018).
https://digitalcommons.law.ggu.edu/gguelj/vol10/iss1/5

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Environmental Law Journal by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

TAKING A BREATH: LESSONS FOR THE PORT OF OAKLAND FROM THE CLEAN TRUCKS PROGRAM AT THE PORTS OF LOS ANGELES AND LONG BEACH

JULIA CHERNOVA [1]

I. INTRODUCTION

"The American dream has become a nightmare for me," said Porfirio Diaz, an independent contractor from Mexico who pays for his insurance and fuel yet he does not get paid for the hours spent waiting in line to pick up cargo from the port.[2] "My son Pablo seems to have asthma, but I can't take him to the doctor to find out."[3] "I've got six kids, and I'm just hoping to be able to live through this," said LaDonna Williams, a resident of Vallejo—a city in California's San Francisco Bay Area. "I'm afraid to go to the doctor because I may get a death sentence."[4] Meanwhile, the U.S. Environmental Protection Agency (EPA) recognizes that "[d]iesel particulate kills anyone with compromised lung function: it's no different than having a gun in the hand."[5]

---

[1] J.D. Candidate, Golden Gate University, School of Law, 2018. The author's interest in emissions from the heavy-duty diesel trucks started when she lived in Southern California and observed the effects of air pollution on community health. The author would like to thank her family and friends for constant support, as well as the Golden Gate University School of Law Environmental Law Journal Editorial Board for their leadership and excellent editing.

[2] It would cost him more than $80,000 to retrofit his truck, but he cannot even afford to cover the tax on the work. Debra Kahn, *Environmental Justice: EPA hits the road to hear residents' concerns*, GREENWIRE (Oct. 25, 2010), https://advance.lexis.com/api/permalink/b5a49e22-4b28-406f-8d5c-4eea4b25c4f7/?context=1000516 (last visited Mar. 14, 2018).

[3] *Id.*

[4] *Id.*

[5] *Id.*

Published by GGU Law Digital Commons, 2018

Currently, the poor pollution standards that are being implemented in the Port of Oakland[6] have detrimental health effects on the local communities. In many cases, West Oakland's workers and residents are being exposed to much higher levels of pollution and health risks compared to other parts of Oakland and surrounding cities.[7] Diesel particulate matter (DPM) is the term used for the solid or liquid particles the exhaust carries into the air.[8] DPM also contains diesel soot and aerosols, including: ash particulates, metallic abrasion particles, silicates and sulfates.[9] Since DPM is so small and heavy it does not rise into the air; instead, it tends to fall back down close to where it was emitted. As a result, the majority of DPM is easily inhaled into the lungs where it is quickly transported into the bloodstream.[10] Inhaling this particulate matter may relate not only to cancer, but also aggravate asthma, a variety of lung diseases, heart disease, as well as brain and immune system issues.[11]

Thus, congestion at the Port of Oakland hurts air quality predominantly in African American neighborhoods in West Oakland.[12] For West Oakland residents, living with high levels of air pollution from the Port of Oakland is more than a health issue. For this largely African-American low-income community, it presents an environmental justice issue. The potential adverse impacts of port growth need to be assessed and mitigated, especially since many preexisting health conditions make port communities vulnerable to the cumulative impacts of port growth.[13]

This article first discusses and explains the laws that govern air quality at the major California ports. Then, it explores the Clean Truck Program (CTP) implemented by the ports of Los Angeles and Long Beach to improve port-related air quality and address public health issues

---

[6] The Port of Oakland occupies 19 miles of waterfront on the eastern shore of San Francisco Bay, with about 900 acres devoted to maritime activities and another 2,600 acres dedicated to aviation activities. The Port of Oakland owns, manages and markets seaport facilities on the San Francisco Bay and the Oakland Estuary. *California Ports,* http://www.seecalifornia.com/california/california-ports.html (last visited Mar. 14, 2018).

[7] *Pollution and Health Concern in West Oakland*, ENVTL. DEF. FUND, https://www.edf.org/airqualitymaps/pollution-and-health-concerns-west-oakland (last visited Mar. 19, 2018).

[8] Karen Bowen, *Breathing Dangerous Diesel Fumes*, TRUCK NEWS.COM (Feb. 23, 2016), https://www.trucknews.com/features/breathing-dangerous-diesel-fumes/ (last visited Mar. 14, 2018).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *East and West Oakland Health Data: Existing Cumulative Health Impacts*, ALAMEDA CITY. PUB. HEALTH DEP'T 3 (2015), http://www.acphd.org/media/401560/cumulative-health-impacts-east-west-oakland.pdf (stating that West Oakland is 49.4% African American).

[13] Edmund Seto, et al., *Health Impact Assessment of the Port of Oakland*, UNIV. OF CAL. BERKELEY HEALTH IMPACT GROUP ES-1 (2010), http://www.pewtrusts.org/en/~/media/assets/external-sites/health-impact-project/portofoakland.pdf.

in low-income areas caused by drayage trucks emissions.[14] Next, it discusses a comparison of truck air pollution regulations at the ports of Los Angeles, Long Beach, and Oakland. Finally, this article argues that it is necessary for the port of Oakland to adopt measures used by the ports of Los Angeles and Long Beach to improve air quality in the neighborhood.

II. Background

The United States began regulating pollution in the 1960s with the passage of the Clean Air Act (CAA).[15] Since then, the CAA has undergone many modifications as people have sought to reduce exposure to environmental hazards that are known to compromise human health. The CAA requires the EPA "to establish national ambient air quality standards" for certain common and widespread pollutants "based on the latest science" to protect public health and welfare nationwide.[16] The EPA has set air quality standards for six common "criteria pollutants": (1) particulate matter (PM) also known as particle pollution; (2) ozone; (3) sulfur dioxide; (4) nitrogen dioxide; (5) carbon monoxide; and (6) lead.[17] Section 166 of the CAA declares that states or localities can set standards that are no less stringent than federally mandated minimums.[18] However, the CAA expressly provides an exception to the state of California if the EPA administrator grants California a waiver from preemption by federal standards.[19] Because of certain localized air pollution problems caused by its unique geography and topography, California is the only state per-

[14] Known for the comprehensive clean air programs, the Ports of Los Angeles and Long Beach have eliminated 87% of diesel particulate matter, cut nitrogen oxides by 56%, reduced sulfur oxides by 97% and decreased greenhouse gases more than 18% since 2005. As a result, the Port of Oakland should adopt the strategies developed and put into effect by the ports of Los Angeles and Long Beach because low-income residents of West Oakland experience the effect of diesel exhaust, resulting in high levels diseases caused by air pollution. Port of L.A., *Ports to Consider Approving the San Pedro Bay Ports Clean Air Action Plan 2017* (Oct. 16, 2107), https://www.portoflosangeles.org/environment/progress/news/ports-consider-update-clean-air-action-plan-thursday-nov-2/ (last visited Mar. 14, 2018).

[15] John Bachmann, *Will the Circle Be Unbroken: A History of the U.S. National Ambient Air Quality Standards*, 57 J. of the Air & Waste Mgmt. Assoc. 652, 662 (2007), https://www.epaalumni.org/userdata/pdf/History%20of%20NAAQS.pdf.

[16] *The Clean Air Act in a Nutshell: How It Works*, U.S. Envtl. Prot. Agency 3 (2013), https://www.epa.gov/sites/production/files/2015-05/documents/caa_nutshell.pdf.

[17] *Criteria Air Pollutants*, U.S. Envtl. Prot. Agency, https://www.epa.gov/criteria-air-pollutants (last visited Apr. 28, 2017).

[18] Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 266 (2004) (Souter, J., dissenting); *cf.* Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986) (describing section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act as "not a model of legislative draftsmanship" whose wording is "at best inartful and at worst redundant.").

[19] EPA Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66, 496 (Dec. 15, 2009) (codified at 40 C.F.R ch. I), https://www.gpo.gov/fdsys/pkg/FR-2009-12-15/pdf/E9-29537.pdf (announcing the finding of EPA

mitted by the CAA to initially deviate from the federal standards, but only if California proves to EPA that it has "compelling and extraordinary conditions" requiring emissions restrictions that differ from the federal ones.[20] Thus, state and local governments have taken an increasingly active role in enacting programs aimed at addressing environmental concerns such as climate change and clean air.[21]

A. Air Quality Standards Under State Law

While the EPA has set emissions standards for new engines, in recent years the California Air Resources Board (CARB) has sought to accelerate emissions reductions with aggressive new regulations.[22] CARB is the State agency in charge of developing statewide programs and strategies to reduce the emission of smog-forming pollutants and toxics by diesel-fueled mobile sources.[23] It also actively promotes and disperses grant and incentive programs to assist trucking and freight operators to comply with clean air regulations.[24] In response to the growing number of heavy-duty diesel trucks in California, CARB uses two control technologies: a diesel particle filter, which removes most particulate matter, and selective catalytic reduction, which targets emissions of nitrogen oxides (NOx).[25]

States can also regulate fuel and fuel additives in its state implementation plan if the EPA finds that the state requirement is necessary to achieve the relevant national ambient air quality standard and other requirements are met that limit the number of different states fuel requirements.[26] CARB sets state standards and oversees local Air Quality

---

Administrator Jackson that greenhouse gas emissions constituted an "endangerment" as a preliminary step to formal regulation of such emissions).

[20] Ted Hadzi-Anthich & Ryan Walters, *Ninth Circuit Court to California: You Can't Always Get What You Want*, Forbes (Jun 22, 2017), https://www.forbes.com/sites/realspin/2017/06/22/ninth-circuit-court-to-california-you-cant-always-get-what-you-want/#1982dcd86d4e (last visited Mar. 14, 2018).

[21] Charles H. Haake, & Justin A. Torres, *Drawing the Line: Preemption of State Enviro Regulation*, Law360 1 (July 15, 2013), http://www.gibsondunn.com/publications/Documents/HaakeTorres-DrawingtheLine.pdf.

[22] *Truck and Bus Regulation, On-Road Heavy-Duty Diesel Vehicles (In-Use) Regulation*, Cal. Air Res. Bd., https://www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm (last visited Mar. 14, 2018).

[23] *Environmental Considerations*, Cal. Dep't of Transp., http://www.dot.ca.gov/hq/tpp/offices/ogm/environment.html (last visited Mar. 14, 2018).

[24] *Id.*

[25] Julie Chao, *Air Pollution Down Thanks to California's Regulation of Diesel Trucks*, Berkeley Lab (Dec. 11, 2014), http://newscenter.lbl.gov/2014/12/11/air-pollution-down-thanks-to-californias-regulation-of-diesel-trucks/ (last visited Mar. 14, 2018).

[26] *Id.*

Management Districts (AQMDs) in California.[27] AQMDs have authority to set and implement state plans in compliance with state and federal law, subject to approval by the CARB.[28] CARB is charged with submitting the state plans to the EPA.[29] CARB is also responsible for regulating mobile sources of air pollution and sets specific motor vehicle emission standards.[30] AQMDs regulate fixed sources of air pollution, which require AQMD permits to operate.[31] Although state and federal agencies play a role in harbor governance, state law takes precedence in all California ports. Additionally, the Port of Los Angeles' CTP is a central element of the San Pedro Bay Ports Clean Air Action Plan (CAAP)—a landmark air quality plan that established the most comprehensive, far-reaching approach to improve air quality in the Ports region and to reduce health risks from maritime goods-movement-related-activities.[32] Together, these federal and state environmental laws give government officials and local communities tools to challenge port development and implement tougher environmental standards.

B. Drayage Trucks: Purpose and Dray-Off Problem

Drayage is the transportation of goods over a short distance and can include the trucking of containerized cargo from port to port or to a rail yard.[33] Usually, drayage means movement of goods between short distances as part of the supply chain process. Today, port drayage includes short-hauls from ocean ports to a rail ramp, warehouse, or other destination.[34] Drayage trucks tend to be older vehicles with little or no emission controls.[35] These vehicles tend to congregate near ports and rail yards and emit significant amounts of smog-forming NOx and toxic soot PM.[36]

---

[27] *Environmental Impact Report, Executive Summary*, S. Coast Air Quality Mgmt. Dist. ES-2 (2003), http://www.aqmd.gov/docs/default-source/ceqa/documents/aqmd-projects/2003/2003-aqmp/4_ex_sum04063DF944BF.pdf.

[28] *Id.*

[29] *Authority*, S. Coast Air Quality Mgmt. Dist., http://aqmd.gov/home/about/authority.

[30] Cal. Health & Safety Code §§ 40000, 43018 (West 2006). CARB exercises this authority under a Clean Air Act waiver permitting it to set its on-road vehicle emission standards. 42 U.S.C. § 7543(b) (2012).

[31] Cal. Health & Safety Code § 40000 (West 2006).

[32] *San Pedro Bay Ports: Clean Air Action Plan 2017*, Port of L.A. 16 (July 2017), https://www.portoflosangeles.org/pdf/CAAP_2017_Draft_Document-Final.pdf.

[33] *What is Drayage?*, ContainerPort Group, Inc., (May 16, 2017), https://www.containerport.com/what-is-drayage/ (last visited Mar. 14, 2018).

[34] Alisha, *What is Drayage*?, Dedola Global Logistics (Jan 25, 2012), https://dedola.com/2012/01/what-is-drayage/ (last visited Mar. 14, 2018).

[35] *Overview of The Statewide Drayage Truck Regulation*, Cal. Air Res. Bd. 1 (July 3, 2013), https://www.arb.ca.gov/msprog/onroad/porttruck/regfactsheet.pdf.

[36] *Id.*

Reducing emissions from these trucks is necessary to meet federally imposed clean air standards and to reduce adverse health effects, especially on nearby communities.[37]

One of the main issues is truck drivers trying to outsmart the law by purchasing new trucks, yet still using their old ones, by a practice known as "dray-off." A "dray-off" is the transfer of cargo from a clean drayage truck to an older/dirtier truck (or vice versa).[38] Licensed Motor Carriers (LMC) are violating the CTP when they use a CTP compliant truck to pick up or drop off a container to and from a port's terminal, but switch the container from the compliant "clean" truck to a non-CTP compliant "dirty" truck outside of the terminal.[39] Ultimately, truck drivers that engage in dray-offs are circumventing regulatory requirements, adversely impacting the air quality of the surrounding communities, and fostering an uncompetitive business environment.[40] Even though the truck companies can save money by avoiding the CTP requirements, these illegal activities cause air pollution to the local communities and need to be stopped.

III. Clean Truck Programs In California Ports

In December 2007, CARB approved a new regulation to reduce emissions from drayage trucks transporting cargo to and from California's ports and intermodal rail yards.[41] LMC and Independent Owner Operators that transported cargo to and from California's ports or intermodal rail facilities had to register their 1994 and newer Class 8 diesel-fueled trucks in the CARB Drayage Truck Registry by September 30, 2009.[42] To reduce truck emissions, the Ports of Los Angeles and Long Beach adopted Clean Truck Programs in 2007 and 2008, requiring the

---

[37] *Id.*

[38] Dray-offs occur for two reasons: to avoid CARB requirements and to save money. It happens because some companies try to either save money on buying new trucks that are in compliance with the CTP or due to a lack of governmental funding to make an old truck replacement. Strict air requirements for trucks may influence some truck owners to participate in the illegal practice of transferring goods from "clean" trucks to "dirty" trucks off port grounds. John Haveman, *Driver-LMC Relationships in Port Drayage: Effects on Efficiency, Innovation, and Rates*, Marin Econ. Consulting 3 (Aug. 14, 2014), http://www.marineconomicconsulting.com/whitepapers/MEC_DrayageDrivers_081414.pdf.

[39] *Standard Operating Procedure For Reporting and Handling of Potential Container Switch (Dray–Off) Incidents*, Port of L.A. 1, https://www.portoflosangeles.org/ctp/CTP_Dray_Off_Reporting_Procedures.pdf (last visited Mar. 19, 2018).

[40] *Id.*

[41] *Overview of The Statewide Drayage Truck Regulation*, Cal. Air Res. Bd. 1, https://www.arb.ca.gov/msprog/onroad/porttruck/regfactsheet.pdf (last visited Mar. 19, 2018).

[42] *California Air Resources Board*, Port of L.A., https://www.portoflosangeles.org/ctp/ctp_carb.asp (last visited Mar. 14, 2018).

use of cleaner trucks and a host of other essential requirements.[43] Because thousands of diesel trucks serve the Ports of Los Angeles and Long Beach every day, emissions from moving all those products and goods worsen smog and afflict residents in harbor-area communities with higher asthma rates and cancer risk in what has been labeled the "diesel death zone."[44]

A. Clean Truck Programs In Long Beach and Los Angeles

Coexisting with refineries, freeways, and the congested behemoth twin port complex, the South Bay and Harbor Area are home to a relatively high number of people with asthma.[45] One of the reasons the Ports of Los Angeles and Long Beach adopted an aggressive, comprehensive strategy in late 2006 was to reduce port-related emissions by at least 45% over five years and to spur the technology advancements needed to clean the air and improve resident's health.[46] One of the first major proposed initiatives was the CTP, which was developed to mitigate the adverse health impacts of goods movement on the surrounding communities.[47] The CTP places restrictions on the type of trucks that are allowed to enter the port, applying standards that gradually increased through the four-year implementation period of the program.[48] Under the CTP, ports initially adopted various measures designed to phase out the use of older trucks and admit to the port only newer modeled cleaner trucks.[49] The articulated goal of the CTP was to cut air pollution from port trucks by

---

[43] Morgan Wyenn, *Court Orders Long Beach to Analyze the Environmental Impacts of the Modified Clean Trucks Program*, Nat. Res. Def. Council, https://www.nrdc.org/experts/morgan-wyenn/court-orders-long-beach-analyze-environmental-impacts-modified-clean-trucks (last visited Mar. 14, 2018).

[44] The area stretching from Long Beach to East Los Angeles is what environmental activists call the "diesel death zone." Emissions from trucks, ships, trains and other diesel-powered sources envelop the region. Appendix B shows how different vehicles contribute to smog in greater Los Angeles. A program campaign ensued to raise work and environmental standards at the Ports of Los Angeles and Long Beach by converting port trucks to clean vehicles. Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. Irvine L. Rev. 939 (2014), http://scholarship.law.uci.edu/ucilr/vol4/iss3/3 (last visited Mar. 14, 2018).

[45] Donna Littlejohn, *Port Pollution Cleanup Partially Credited With Fewer Child Asthma-Related Hospital Visits in Harbor Area*, Daily Breeze (Jun. 7, 2015), http://www.dailybreeze.com/health/20150607/port-pollution-cleanup-partially-credited-with-fewer-child-asthma-related-hospital-visits-in-harbor-area (last visited Mar. 14, 2018).

[46] *Background, San Pedro Bay Ports Clean Air Action Plan*, Port of L.A., https://www.portoflosangeles.org/environment/caap.asp (last visited Mar. 14, 2018).

[47] Tayler Durchslag-Richardson, et al., *Benefit-Cost Analysis of the Ports of Los Angeles and Long Beach Clean Truck Program,* Univ. of S. Cal. Sch. of Pol'y, Planning, and Dev. Rev. 2 (2011), https://priceschool.usc.edu/files/documents/masters/research/MPP_11.pdf.

[48] *Id.*

[49] Sean M. Sherlock, *Ninth Circuit Court of Appeals Strikes Down Port of LA's Clean Trucks Provision*, Snell & Wilmer Developing News (Sept. 27, 2011), https://www.swlaw.com/search/

more than 80% within five years.[50] Under the CTP proposal, with the assistance of a port-sponsored grant subsidy, drayage truck owners would scrap and replace the oldest of approximately 16,000 trucks and retrofit others.[51]

In 2008, the Ports of Los Angeles and Long Beach used their tariff authority to allow only concessionaires operating "clean" trucks to enter port terminals without having to pay a new truck impact fee at the gate.[52] According to the CTP, concession companies would be required to use only trucks that meet the CAAP standard.[53] However, this standard does not prevent the dray-off practice that takes place outside the ports because truck companies do not have enough funds to buy new trucks and there is not a market for their old "dirty" trucks due to the CAAP standard.[54]

Under the CTP, there are several stages to establish a progressive ban on polluting trucks: (1) October 1, 2008: All pre-1989 trucks were prohibited from entering the Port; (2) January 1, 2010: 1989-1993 trucks were banned, in addition to 1994-2003 trucks that had not been retrofitted; (3) January 1, 2012: All trucks that did not meet the 2007 Federal Clean Truck Emissions Standards were banned from the Port.[55] To promote a quick replacement of older, high-polluting trucks with newer, lower-emission trucks, funding for truck retrofits and new vehicles came from a number of sources,[56] as well as the Port of Los Angeles' imple-

all/?keywords=Ninth%20Circuit%20Court%20of%20Appeals%20Strikes%20Down%20Port%20of%20LA%E2%80%99s%20Clean%20Trucks%20Provision (last visit Mar. 21, 2018).

[50] Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. Irvine L. Rev. 939, 1111 (2014), http://scholarship.law.uci.edu/ucilr/vol4/iss3/3 (last visited Mar. 14, 2018).

[51] Assembly Comm. on Lab. and Emp., AB 950 A, Q (May 4, 2011), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0901-0950/ab_950_cfa_20110502_153319_asm_comm.html (last visited Mar. 14, 2018).

[52] *San Pedro Bay Ports Clean Air Action Plan*, Port of L.A. 1 (2007), https://www.portoflosangeles.org/newsroom/2007_releases/news_041207ctp_qa.pdf.

[53] The standard was defined in 2007 by the EPA as newer or retrofitted trucks manufactured no earlier than 1994 or trucks that have been replaced through the Gateway Cities Truck Modernization Program. Each year, the oldest trucks are barred from the ports until finally only those that meet the CAAP standard are permitted to work in the ports. Roger Hernandez, Assembly Comm. on Lab. and Emp., AB 621 A, T (Apr. 8, 2015), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0601-0650/ab_621_cfa_20150406_134656_asm_comm.html (last visited Mar. 14, 2018).

[54] LMC would be required to pay a license fee to obtain a concession to operate in the ports and after a transition period would be necessary to directly, own, operate, and maintain their truck fleet and employ the drivers directly. *Id.* at T-U.

[55] *About the Port of Los Angeles Clean Truck Program*, Port of L.A., https://www.portoflosangeles.org/ctp/idx_ctp.asp (last visited Mar. 14, 2018).

[56] Proposition 1B provided $98 million towards $50,000 grants for the purchase of 2007 trucks. Proposition 1B, also known as the Highway Safety, Traffic Reduction, Air Quality and Port Security Bond Act of 2006 was passed by voters in 2006. It authorized $1 Billion dollars in bond funding for incentives to reduce goods movement related diesel emissions. In addition to grants for

mentation of an Incentive Program in 2008.[57] The Port of Long Beach provided $44 million in incentives to concessionaires that already have committed to deploying new privately funded clean trucks into drayage service in advance of CTP schedule requirements and $20,000 to paid program participants for each EPA 2007-compliant truck used at the port.[58] To qualify for the incentive program, trucks had to be funded privately and be committed to make an average of six trips per week for five years.[59] Incentive program participants also could apply to receive a cash "Efficient Use" incentive payment of $10 per port dray with their '07-compliant truck if they achieved a target of 600 qualified drays in and out of the ports of Los Angeles and Long Beach and 300 of those drays were for Port of Los Angeles cargo during the first year of the CTP.[60] The per-truck payout limit for this additional incentive would be $10,000.[61] The Port of Long Beach provided $37.5 million in lease to own financing as well as $1 million for the retrofit of 1994-2003 trucks.[62] However, the funding was still limited, and not all applicants were able to receive awards.

The Port of Long Beach and the Port of Los Angeles have undertaken the most aggressive actions to reduce emissions from this sector, ultimately mandating the use of drayage trucks that meet the new 2007 emission standard. The CTP changes the way the trucking business is regulated. It has proven successful in combating air pollution caused by port-related ships, trucks, trains, cargo-handling, and harbor craft by the attributed 80% reduction in truck emission in 2013.[63] As a result, most ports in the United States have developed programs that regulate emissions from diesel fuel engines and thereby have improved air quality and public health.[64]

Clean Trucks, Prop 1B provided money for many goods movement related projects including grade separations, highway improvements, and other port related projects. *Regulation and Response at the San Pedro Bay Ports*, METRANS TRANSP. CTR. 1, 64 (May 2013), https://www.metrans.org/sites/default/files/research-project/08-06_Giuliano_final_0_0.pdf.

[57] *Grants and Funding Opportunities*, PORT OF L.A., https://www.portoflosangeles.org/ctp/ctp_grants.asp (last visited Mar. 14, 2018).

[58] *Id*.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Regulation and Response at the San Pedro Bay Ports*, METRANS TRANSP. CTR. 1, 64 (May 2013), https://www.metrans.org/sites/default/files/research-project/08-06_Giuliano_final_0_0.pdf.

[63] Melissa Lin Perrella, *Five Year Anniversary of the Port of LA's Clean Truck Program*, NAT. RES. DEF. COUNCIL (Sept. 24, 2013), https://www.nrdc.org/experts/melissa-lin-perrella/five-year-anniversary-port-las-clean-truck-program (last visited Mar. 14, 2018).

[64] Calendar year 2016 marked the Port of Los Angeles' highest reduction of all key pollutants: diesel particulate matter (DPM) emissions have fallen by 87%; sulfur oxides (SOx) emissions

B. Roadblocks to Implementation

Even though the CTP achieves its purpose of cutting air pollution from port trucks, truck companies deal with the reality of changing their old trucks. Officials from the Port of Los Angeles, the Port of Long Beach, and the South Coast Air Quality Management District (SCAQMD)[65] provided subsidies: from $20,000 for a new clean diesel to $142,000 for a liquefied natural gas (LNG).[66] Truck drivers were encouraged to buy LNG,[67] and they did so because they wanted to drive cleaner and newer trucks. However, LNG trucks started to break down right away, leading not only to a disruption in business but also to an inability to sell LNG trucks. As a result, trucks cannot be resold because they are expensive to repair. Additionally, LNG trucks were not powerful enough to haul loaded containers from the ports: the truck slowed to 25 miles per hour (mph) at the slightest grade even when other trucks were going 55 mph.[68] Truck companies use these trucks only to haul empty containers over short distances.[69]

C. Oakland's Comprehensive Truck Management Program

In October 2009, the Oakland Board of Port Commissioners approved a truck ban that is consistent with the January 2010 CARB deadline for drayage trucks.[70] Effective January 1, 2010, the ban required that Seaport facility operators deny entry to drayage trucks that could not demonstrate compliance with CARB's January 2010 emissions requirements listed in Appendix D. In response to the Maritime Air Quality

---

have plummeted by 98%; and nitrogen oxide (NOx) emissions have dropped by 57%. *Emissions at Historic Lows While Cargo at Historic High at the Port of Los Angeles*, Port of L.A. (Aug. 18, 2017), https://www.portoflosangeles.org/environment/progress/news/historic-low-emissions-port-los-angeles/ (last visited Mar. 14, 2018).

[65] To facilitate compliance with the federal CAA and to apply the state air quality program, the California state legislature created the South Coast Air Quality Management District (SCAQMD) together with other regional AQMDs. SCAQMD develops regulations designed to achieve public health standards by reducing emissions from business and industry for the Ports of Los Angeles and Long Beach. Regulations, S. Coast Air Quality Mgmt. Dist., http://www.aqmd.gov/home/regulations (last visited Mar. 14, 2018).

[66] Emily Guerin, *How local ports reduced pollution, but lost trust among truck drivers among the way*, 89.3 KPCC (March 13, 2017), http://www.scpr.org/news/2017/03/13/69667/how-local-ports-reduced-pollution-but-lost-trust-a/ (last visited Mar. 14, 2018).

[67] LNG is natural gas that has been converted to liquid form for ease and safety of non-pressurized storage or transport.

[68] *See* Guerin, *supra* note 66, at 11.

[69] *Id*. at Appendix C (showing the percentage of port cargo moved by LNG trucks, 2009-2016).

[70] *Clean Trucks*, Port of Oakland, http://www.oaklandseaport.com/seaport-resources/trucker-resources/comprehensive-truck-management-program/ (last visited Mar. 14, 2018).

Chernova: Taking a Breath

Improvement Plan's (MAQIP) regulations and other stakeholder interests, the Port of Oakland developed the CTMP to set forth plans and actions to comprehensively address air quality, safety and security, business and operations, and community issues associated with drayage operations.[71]

As a step toward compliance with the statewide Emission Reduction Plan, including the Drayage Truck Rule, and in response to public pressure and to address the needs of the neighboring community to improve its quality of life, the Port of Oakland has developed an air quality improvement program: the CTMP. The first phase of CTMP required the LMC to execute a Secure Truck Enrollment Program (STEP) agreement with the Port of Oakland.[72] The second phase, initiated in January 2010, required the Licensed Motor Carriers to enter truck information into the Port Registry database by April 2010.[73] The activities at the port were regulated or terminated for those who did not comply and for those who did not meet the modern emissions standards through a truck retrofit or replacement program.[74] The two-phase implementation (Phases 1 and 2) helped satisfy the core goals of the Port of Oakland including increased port security and decreased emissions from the heavy-duty diesel vehicles.[75]

The Clean Trucks component of the CTMP was developed to help ensure that drayage truck-related air emissions are reduced as quickly as possible.[76] It also addresses the relationship between the CTMP, CARB regulations, and the Port's drayage truck ban, and provides information on the Port's role in helping truck owners comply with these requirements.[77]

[71] *Port of Oakland Maritime Air Quality Improvement Plan Progress Report Meeting*, PORT OF OAKLAND 1, 4 (Jan. 10, 2013), http://www.portofoakland.com/files/PDF/environment/maqip_outcomes_memo.pdf.

[72] *Comprehensive Truck Management Program*, PORT OF OAKLAND, http://www.portofoakland.com/port/seaport/comprehensive-truck-management-program/ (last visited Mar. 14, 2018).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Comprehensive Truck Management Program*, PORT OF OAKLAND, http://www.oaklandseaport.com/seaport-resources/trucker-resources/comprehensive-truck-management-program/ (last visited Mar. 14, 2018).

[77] *Id.*

Published by GGU Law Digital Commons, 2018

IV. Argument

A. The Port of Oakland's CTMP Falls Short of the Efficacy of Los Angeles's and Long Beach's CTP

The ports of Los Angeles and Long Beach are known locally as a "diesel death zone" because together, they constitute the largest single source of diesel emissions in the greater Los Angeles area.[78] Moreover, the Port of Los Angeles now has a direct relationship with the Licensed Motor Carriers for the first time because of a Licensed Motor Carriers concession program.[79] The program allows for greater accountability and monitoring of the public health, safety, and environmental impact of the trucks entering the port.[80]

Vehicle microscopic simulation and emission models, combined with an air pollutant dispersion model and a health assessment tool measure the progress of the CTP.[81] As a result, traffic on two busy freeways, the I-710 and the I-110, as well as some heavily trafficked arterial roads were analyzed to estimate the health impacts caused by drayage truck emissions of PM for four different years that correspond to deadlines for the CTP: 2005, 2008, 2010, and 2012.[82] Appendix E shows that the main health income is mortality from PM: it results in approximately six cases per year with a corresponding cost in excess of $40 million; elderly people (65 years old and over) are primarily affected with 3.20 cases per year.[83] However, these costs decreased by 36%, 90%, and 96% after accounting for the requirements of the 2008, 2010, and 2012 CTP deadlines, respectively.[84] These results quantify the magnitude of the social costs generated by drayage trucks in the Alameda corridor,[85] suggesting

[78] Genevieve Giuliano, et al., *Evaluation of the Terminal Gate Appointment System at the Los Angeles/Long Beach Ports*, Ctr. for Int'l Trade and Transp. 13 (February 2008), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.410.508&rep=rep1&type=pdf.

[79] *Port of Los Angeles Marks One-Year Anniversary, Successes of Clean Truck Program*, The Port of L.A. News 2, https://www.portoflosangeles.org/ctp/CTP_One_Year_Successes.pdf (last visited Mar. 14, 2018).

[80] *Id.*

[81] Gunwoo Lee, et al., *Assessing Air Quality and Health Benefits of the Clean Truck Program in the Alameda Corridor, CA*, 46 Transp. Res. Part A: Pol'y and Prac. 1177 (2012), http://www.sciencedirect.com/science/article/pii/S0965856412000808?np=y (last visited Mar. 14, 2018).

[82] *Id.*

[83] Mana Sangkapichai, et al., *An Analysis of the Health Impacts from PM and NOx emissions resulting from train operations in the Alameda Corridor,* CA, Univ. of Cal. Transp. Ctr. 1, 15 (Jan. 2010), https://escholarship.org/uc/item/4n34t20t (last visited Mar. 14, 2018).

[84] *See* Gunwoo, *supra* note 81, at 14.

[85] A 20-mile railroad express line that connects the port of Long Beach and Los Angeles to the transcontinental rail network east of downtown Los Angeles.

Chernova: Taking a Breath

that these costs justified replacing drayage trucks operating there, and indicating that the CTP likely exceeded its target.[86]

In contrast, the Port of Oakland appears to have fulfilled the 2010 goals for heavy-duty diesel vehicle measures under the Emission Reduction Plan, which puts them on track to meet an estimated 32% reduction in mortality caused by primary diesel PM associated with goods movement in California by the year 2020 (CARB 2006a).[87] An additional 48% reduction in emissions from 2010 levels will be needed to reach the 2020 goal of reduced mortality.[88] Future proposed measures include the adoption of trucks with newer and cleaner engines, continued use of CARB-verified level 3 DPFs, and expansion of the enforcement zone for clean drayage trucks to include the majority of the South Coast Air Basin.[89] Much of the mortality reduction is projected to occur near the ports or along major truck routes leading to and from the ports.

Today, the 11,000 drayage trucks servicing the Ports of Los Angeles and Long Beach terminals are all 2007 or newer models.[90] The Port of Oakland's CTMP shares many aspects of the CTP, but on a smaller scale. In comparison, in 2009, at the behest of former Oakland Mayor Ron Dellums, CARB agreed not to enforce phase one regulations of the CTMP for six months.[91] While the Ports of Los Angeles and Long Beach made the companies comply with the CTP and replace the trucks, the Port of Oakland allowed the trucks to be retrofitted.[92]

---

[86] With annual health costs from drayage truck emissions in excess of $440 million (the estimated health impacts from PM2.5 exposure in 2005), the payback period for replacing all of the 11,000 drayage trucks serving the SPBP complex is no more than 4 years, assuming that a new truck costs $150,000. Even this admittedly simplistic calculation suggests that the social benefits of implementing the Clean Truck Program far exceed the costs of this program and clearly justify its implementation. *See* Gunwoo, *supra* note 81, at 14.

[87] Toshihiro Kuwayama, et al., *Particulate Matter Emissions Reductions Due to Adoption of Clean Diesel Technology at A Major Shipping Port*, AERSOL SCI. & TECH. 35-36 (2012), http://www.tandfonline.com/doi/pdf/10.1080/02786826.2012.720049?needAccess=true (last visited Mar. 14, 2018).

[88] *Id*. at 36.

[89] *Id*.

[90] *Air Quality*, PORT OF LONG BEACH, http://www.polb.com/news/displaynews.asp?NewsID=941 (last visited Mar. 14, 2018).

[91] Brittany Schell, *New Emissions Rules Expected to Improve West Oakland Air Quality*, OAKLAND NORTH (2012), https://oaklandnorth.net/2012/07/18/new-emission-rules-expected-toimprove-west-oakland-air-quality/ (last visited Mar. 14, 2018).

[92] Press Release, Oakland Board of Port Commissioners Bans Dirty Trucks, Port of Oakland (Oct. 9, 2009), http://www.portofoakland.com/press-releases/press-release-184/ (last visited Mar. 14, 2018). According to research conducted by Berkeley scientist Robert Harley and based on data collected from thousands of trucks near the Port of Oakland, emissions of black carbon, a key component of diesel PM and a pollutant linked to global warming, was slashed 76% from 2009 to 2013. Also, emissions of oxides of nitrogen, which leads to smog, declined 53%. During this period, the median age of truck engines declined from eleven to six years, and the percentage of trucks equipped with diesel particulate filters increased from 2% to 99%. Comparable emission reductions

Another impact of the Port of Oakland's program measured emission factor distributions for diesel trucks operating at the port before and following the implementation of the emissions control rule.[93] A comparison of emissions measured before and after the implementation of the truck retrofit/replacement rule shows a 54 plus-minus (±) 11% reduction in the fleet-average BC emission factor, accompanied by a shift to a more highly skewed emission factor distribution.[94] Although only particulate matter mass reductions were required in the first year of the program, a significant decrease in the fleet-average NOx emission factor (41 ± 5%) was observed, most likely due to the replacement of older trucks with new ones.[95] However, part of the problem in communities with heavy truck traffic is that diesel engines last a very long time and older trucks operating on the road still emit the black smoke that used to be the signature of all diesel-powered eighteen-wheelers.[96]

The Ports of Los Angeles and Long Beach have stricter requirements for drayage trucks entering their facilities than the Port of Oakland. So, the Port of Oakland should consider implementing the concession agreement and including stricter parts from CTP to CTMP to improve air quality. The Ports of Los Angeles and Long Beach measured decreased emissions levels in the area by 2012 due to the trucks being retrofitted with new technology as required to come into compliance with the 2007 CARB standards.[97] Consequently, air pollution dropped quickly and dramatically in both ports. Similarly, air pollution can be decreased at Oakland because West Oakland can be compared to the "diesel death zone" of the Ports of Los Angeles and Long Beach. Emissions from the Port of Oakland envelop West Oakland and impact the community's health; it is an environmental nightmare with health effects. Therefore, the Los Angeles CTP now serves as a model for sustainable operations in all West Coast ports, and the Port of Oakland should adopt the Port of

---

could normally take up to a decade through the gradual replacement of old trucks or natural fleet turnover. In this case, the improvements are attributed to the ARB's DTR and to the CTMP at the Port of Oakland, which require vehicle owners serving the port to clean up their trucks by either replacing them with newer models or installing diesel particulate filters. Study Finds Truck Fleet Clean-Up Dramatically Decreases Engine Emissions Near Port of Oakland, CAL. AIR RES. BD. 15-31 (July 25, 2017), https://ww2.arb.ca.gov/news/study-finds-truck-fleet-clean-dramatically-decreases-engine-emissions-near-port-oakland (last visited Mar. 21, 2018).

[93] Concentrations of these species along with carbon dioxide were measured in the exhaust plumes of individual diesel trucks as they drove by en route to the Port.

[94] Timothy R. Dallmann, et al., *Effects of Diesel Particle Filter Retrofits and Accelerated Fleet Turnover on Drayage Truck Emissions at the Port of Oakland*, ENVTL. SCI. & TECH. (2011), http://pubs.acs.org/doi/abs/10.1021/es202609q (last visited Mar. 14, 2018).

[95] *Id.*

[96] *See* Schell, *supra* note 92, at 15.

[97] *Air Quality*, PORT OF LONG BEACH, http://www.polb.com/environment/air/default.asp (last visited Mar. 14, 2018).

Los Angeles' CTP to reduce air emissions and support the statewide vision for more sustainable freight movement.

B. The Port of Oakland Should Adopt Strategies Implemented By the CTP

The Port of Oakland should consider adopting the CTP strategies because of the success of the first phase CTP, the demand for more efficient trucks, and the great diversity of efficiency technologies that are already available to consumers. Implementing this CTP will bring comprehensive environmental, community, and labor standards.

The CTP and CTMP were not intended to focus on the inefficiencies in the system, but rather on air pollution, an externality associated with trucking services, primarily drayage, provided at the port. These programs were designed to reduce the environmental impact of truck emissions related to drayage services and to improve the air quality for people who work or live near the port. Therefore, the Bay Area Air Quality Management District (BAAQMD) should continue to work with the community and the Port to implement its studies of trucking operations in the West Oakland community to reduce the trucks' impact on the air.

The most compelling reason to follow the steps taken by the Ports of Los Angeles and Long Beach CTPs is to improve the health conditions of the West Oakland neighborhood. Trucks that travel to and from the Port of Oakland and within the community are associated with several interrelated health issues.[98] The health effects of these air pollutants to residents of local communities include asthma, other respiratory diseases, cardiovascular disease, lung cancer, and premature mortality, impacting residents as well as the drivers of the trucks.[99] In addition, children exposed to truck-generated smog are absent more often from school and emergency room visits increase dramatically.[100] Trucks also emit noise—much more so than conventional automobiles—which can cause stress and annoyance, disrupt sleep, impact the school performance of children, and cause myocardial infarctions (a blockage of blood flow to the heart muscle).[101] Furthermore, increased numbers of trucks in the community can translate to increased risk of truck collisions with other vehicles, bicyclists, and pedestrians, as well as broader transportation is-

[98] *See* Seto, *supra* note 13, at 2.

[99] *Id.*

[100] *Id.*

[101] *Id.*

sues, such as blight, road wear, parking issues, social cohesion, and physical activity.[102]

Due to these health conditions, the Port of Oakland should adopt the CTP's strategies, such as replacing and mandating to phase out the oldest, dirtiest diesel trucks, because they have showed improvements in health rates in the ports of Los Angeles and Long Beach. There is no longer black smoke seen coming from truck smokestacks as they travel through Wilmington (a neighborhood in the Los Angeles Harbor Region area of Los Angeles, California) and trucks can no longer endlessly idle as they wait for containers to be loaded.[103] Furthermore, respiratory illnesses dramatically decreased after the Port of Long Beach installed portable air filter systems at The Willow Tree Child Care Infant and preschool program.[104]

The Port of Oakland's trucks are not the only source of air emissions in the community because trucks from the post office and other businesses in the area contribute to emissions. Moreover, there are many vehicles on surrounding freeways that contribute to community air pollution and noise. There are also other sources of noise, such as the Bay Area Rapid Transit (BART) and other passenger and freight trains. Ultimately, all these sources affect public health in West Oakland. West Oakland residents bear the increasing burden of all these transportation pathways. Due to the close position of the residential area with industrial land, residents are exposed to an onslaught of environmental hazards.[105] Poor health from one pathway (for instance, exposure to noise) may make residents more susceptible to the impacts of another aspect (for example, air pollution). However, collaborative fights against the air pollution in the neighborhood can lead to improvements similar to the positive changes in Los Angeles and Long Beach.

C. Possible Consequences in The Port of Oakland Arising From the Failure to Adopt a Better Standard

The consequences of the inaction can be dramatic for the Port of Oakland and its neighborhood because they depend on each other: both breathe the same air though, and they both need it clean. Diesel pollution has been known to have a significant health impact because it can cross

[102] *Id.*

[103] Barbara Ostrov, *Pollution and Health at the Ports of Los Angeles and Long Beach*, Univ. of S. Cal. Ctr. For Health Journalism Fellowship Blog (July 15, 2010), https://www.centerforhealthjournalism.org/blogs/pollution-and-health-port-los-angeles (last visited Mar. 14, 2018).

[104] *See* Littlejohn, *supra* note 45, at 8.

[105] *See* Seto, *supra* note 13, at 2.

over the blood-brainer barrier causing asthma, chronic lung disease, and lung and brain cancer.[106] If the trucks are not fixed, West Oakland's children will continue to have respiratory problems, adults will continue to have a high asthma rate because of the diesel emissions, and the port's truck traffic will be not regulated in the community.

Moreover, poor air quality will raise disputes between the Port of Oakland and the West Oakland community. For example, the West Oakland Environmental Indicators Project has filed a federal complaint alleging that by forging ahead with a planned port expansion, the city and Port of Oakland are ignoring the disproportionate health impacts on West Oakland residents.[107] The tension between the two may escalate in the future because of the new administration in Washington that could change the priorities at the EPA. Although much uncertainty exists as to the future decisions of the current administration, the CTP strategies should be implemented to protect the high percentage of low-income and minority populations bearing the burden of higher exposure to diesel emissions. Currently, many small truck companies have had to close their businesses because of the high prices for the new compliant trucks, and the registration. The port drayage industry is not against clean technologies, but technologies must be affordable and commercially viable.

D. Transformation of the Trucking Industry and Its Consequences

Even though the CTP brings fundamental changes in the port drayage industry, any significant reorganization of the industry can lead to pitfalls. The transition from a regime of low and loosely monitored safety and emissions standards to one with tight controls on each is a complicated matter. The difficulties associated with such a transition include significant supply disruptions and the dislocation of substantial numbers of industry workers.

Consistent with CARB's notoriety as the most aggressive regulatory agency in the nation, California's diesel requirements tighten emissions controls to such an extent that it is nearly impossible for all but the largest and most highly capitalized companies to comply.[108] Small and medium-sized trucking companies have trouble adapting to new regulations

[106] Ngoc Nguyen, *Tracking Air Quality Block by Block*, Kaiser Health News (Apr. 11, 2017), https://khn.org/news/tracking-air-quality-block-by-block/ (last visited Mar. 14, 2018).

[107] Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, EarthJustice, 1, 2, (Apr. 4, 2017), http://earthjustice.org/sites/default/files/files/2017-04-04-TitleVI_Complaint.pdf (last visited Mar. 21, 2018).

[108] *See* Hadzi-Anthich, *supra* note 20, at 4.

because many do not have the cash reserves that larger firms do to buy new trucks or retrofit old ones. Based on the research "Best and Worst States for Trucking Industry in 2016" conducted by Merchant Cash USA, "without small trucking companies, the cost of shipping could [rise] throughout the U.S."[109] The cost of a truck that meets the emissions requirements set by CARB makes it difficult for individuals to own their truck. Therefore, although regulatory agencies helped with initial grants, the smaller carriers had to either leave the state or give up their trucks.[110] The cost of buying a new truck is a major concern for many drivers and it can lead to significant loss of local business and jobs. The costly effort forced trucking companies to change the way they do business, sometimes opting to upgrade or sell an entire fleet and lease trucks instead.

BAAQMD and Alameda County are committed to provide financial support to upgrade or replace on-road diesel trucks with newer, lower-emission equipment to help drivers reduce diesel particulate emissions at the Port of Oakland.[111] However, BAAQMD and Alameda County's grants are limited and complicated to obtain.[112] For example, it can cost between $15,000 and $25,000 to retrofit a truck with a filter, and a 2007 engine model truck can cost as much as $65,000.[113] In 2010, many truckers went out of business because of the expense.[114] Truckers must apply for grants at least a year before they need the grant money.[115] Thus, the smaller trucking companies and independent owner-operators go out of business because they may not be as proactive in addressing the needs they will have ten or twelve months down the line.

The primary obstacle in this plan is the fear of change. First, it is difficult to implement the CTP without leading to short-run but potentially significant disruptions in service. The Port of Oakland's truckers face issues with the new trucks similar to complaints in Los Angeles: maintenance and repairs are expensive and the trucks are not efficient enough to conduct business. In addition, the diesel particulate filter may cause problems—constant repairs that result in delays and safety issues

---

[109] *Best and Worst States for Trucking Industry in 2016*, AJOT (Jan. 19, 2016), https://www.ajot.com/news/best-and-worst-states-for-trucking-industry-in-2016 (last visited Mar. 14, 2018).

[110] Megan Headley, *Are CARB's Emission Requirements Forcing California Truckers Out of Business?*, TRUCKS.COM (Mar. 5, 2015), https://www.trucks.com/2015/03/05/are-carbs-emission-requirements-forcing-california-truckers-out-of-business/ (last visited Mar. 14, 2018).

[111] *Trucks*, BAY AREA AIR QUALITY MGMT. DIST., http://www.baaqmd.gov/grant-funding/businesses-and-fleets/trucks (last visited Mar. 14, 2018).

[112] *Id.*

[113] *See* Schell, *supra* note 92, at 15.

[114] *Id.*

[115] *Id.*

that cause risk of fires and other truck related accidents.[116] Even though the diesel particulate filter is designed to reduce diesel PM, it leaves a giant carbon footprint on the state when it malfunctions or damages trucks.[117] Consequently, small businesses absorb the financial implications by raising prices or reducing services.

Therefore, the Port of Oakland should adopt the Ports of Los Angeles and Long Beach's Infrastructure Cargo Fee program or similar mechanism to ensure sufficient funding is available to meet air quality goals. If it were to do so, grants would be made available for the truck upgrades to smooth the economic expense of transition.

E. Additional Recommendations

The best way to get old port trucks off the road would be for the U.S. Congress to change diesel emission policy. Currently, the EPA regulates emissions from newly manufactured heavy-duty diesel engines and has left regulation of emissions from existing engines to the states and local government authorities.[118] To improve air quality and reduce public health hazards, the Port of Oakland should (1) ban old trucks from port facilities on a schedule that will eliminate all trucks manufactured before 2007; (2) conduct a port truck survey that investigates where port truck trips begin, how port trucks travel through the local community, and where port trucks ultimately deliver their cargo; (3) regulate and license trucking companies to encourage them to meet environmental goals; (4) finance retrofitting and replacement of old trucks, scrapping the oldest vehicles so they cannot be used elsewhere; and (5) look at the source of pollution and regulate it by monitoring the needed neighborhoods. However, the Port of Oakland should watch out for the old trucks that will be left out on the road for more than two decades. Also, leaving the regulations to the Port spurs the port to compete for business by reducing emissions standards.

V. Conclusion

Traffic conditions along California's major roads into the ports are often congested, and the fleet of older, or high-polluting trucks, result in elevated levels of exposure to diesel PM in adjacent communities. Emis-

[116] *Lawsuit claims filters cause fires and excessive repairs*, Com. Carriers Ins. Agency (March 5, 2015), http://www.insure-ccia.com/articles/?p=239 (last visited Mar. 14, 2018).

[117] *Id.*

[118] David Bensman, *Port Trucking Down the Road: A Sad Story of Deregulation,* Demos 12 (July 21, 2009), http://www.demos.org/sites/default/files/publications/Port%20Trucking%20Down%20the%20Low%20Road.pdf.

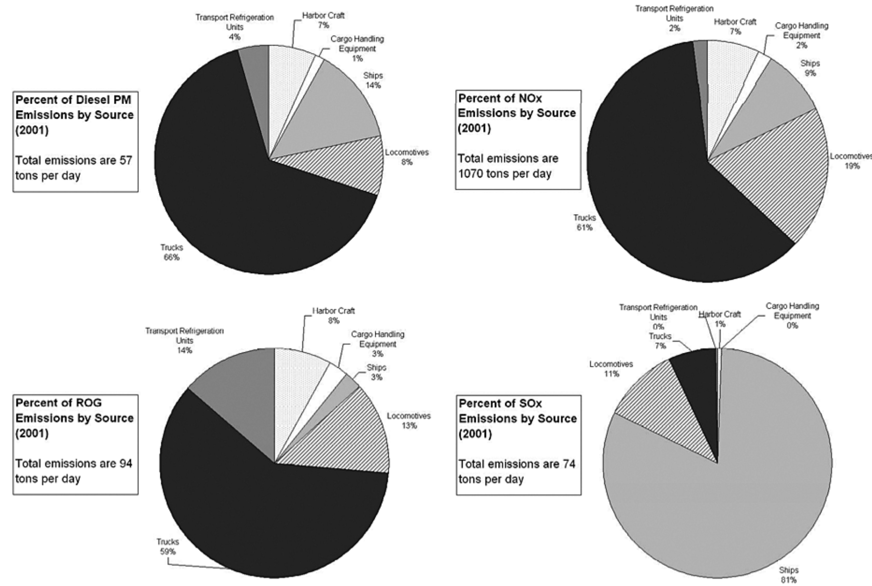
sions and resulting risks are expected to increase with future trade expansion unless substantial control measures are implemented to reduce port-related emissions. Implementing strategies from the CTP would have emission reduction benefits that the Port of Oakland should consider adopting. However, any strategy to reduce emissions from port trucks must account for a variety of issues. Chief among these problems is the ability and willingness of port truck owners to participate in desired retrofit and modernization efforts. Profit margins for port truck drivers are slim, and they lack the capacity to raise rates to generate the money to pay for the costs associated with modernization. Any attempt to use regulatory mechanisms alone to induce truck owners into paying for modernization or retrofit of their trucks could well create a shortage of trucks willing to move goods at ports.

Most of the funding programs with funding provided by CARB that are now in existence are voluntary and have had mixed participation from truck owners. Because profit margins are so low for port truck drivers, many are unwilling to assume additional expenses when they can continue to function with their currently owned trucks. One option is to establish a period during which funding for retrofits and replacements will be available. Once the period has ended, the truck owner would have to assume all expenses and would not be allowed to operate without severely restricting their ability to continue working in port service.

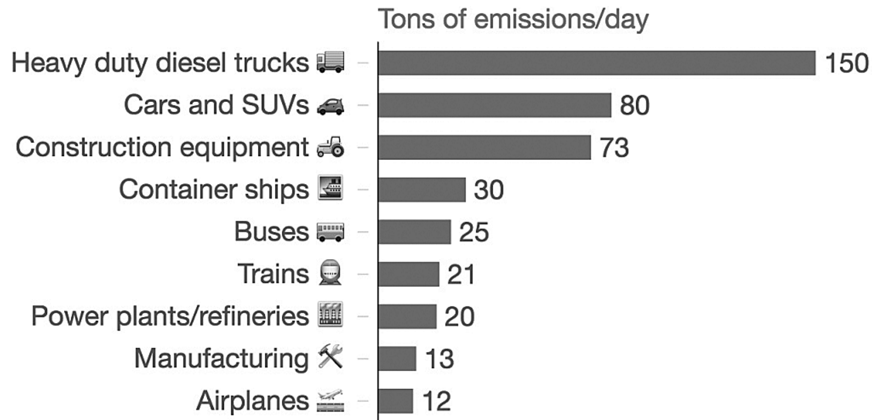
Additionally, owners and operators who do not have access to capital to pay for the needed improvements drive most of the existing port trucks. One possible solution is to have the cost of truck upgrades and retrofits financed through guaranteed loans. Drivers would receive credits that retire these loans each time a container is picked up or dropped at the port. Retrofit control technologies along with additional strategies, such as engine replacement or repower, have the potential to significantly reduce emissions from port trucks and are integral to any port truck modernization strategy.

Finally, cleaner fuels, exhaust emission reduction technologies, and alternative power systems exist for reducing harmful impacts of maritime shipping on workers and local neighborhoods alike. The Ports of Los Angeles and Long Beach have proactively addressed air quality; the Port of Oakland can do the same.

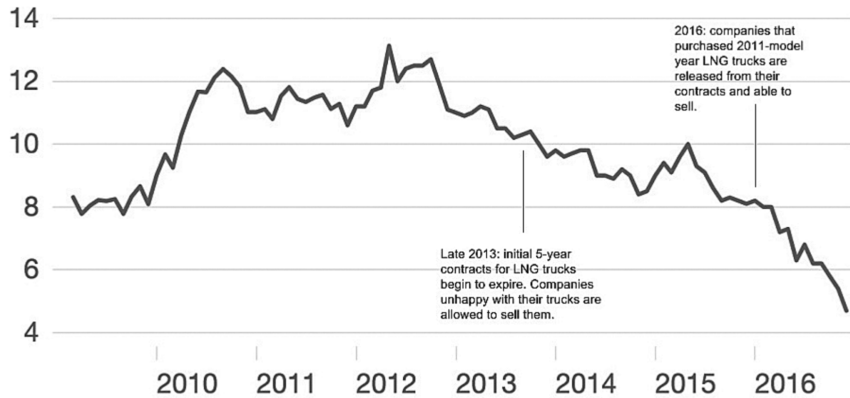
Appendix A. 2001 Statewide Goods Movement Emissions



Appendix B. How Much Each Source Contributes to Smog in Greater LA



Appendix C. Percentage of Port Cargo Moved by LNG Trucks, 2009-2016



Appendix D. CARB's 2010 Emission Requirements

TRUCK ENGINE MODEL YEAR	CARB EMISSION REQUIREMENT SCHEDULE	PORT OF OAKLAND EMISSION REQUIREMENT SCHEDULE
1993 & older	Prohibited starting January 1, 2010	Prohibited starting January 1, 2010
1994 1995 1996 1997 1998 1999 2000 2001 2002 2003	Starting January 1, 2010, Reduce PM emissions by 85% (e.g. install a CARB-verified level 3 Diesel Particulate Filter) And Starting January 1, 2014, meet 2007 engine emission standards	Starting January 1, 2010, Reduce PM emissions by 85% (e.g. install a CARB-verified level 3 Diesel Particulate Filter) And Starting January 1, 2014, meet 2007 engine emission standards
2004	Starting January 1, 2012, Reduce PM emissions by 85% (e.g. install a CARB-verified level 3 Diesel Particulate Filter) And Starting January 1, 2014, meet 2007 engine emission standards	Starting January 1, 2012, Reduce PM emissions by 85% (e.g. install a CARB-verified level 3 Diesel Particulate Filter) And Starting January 1, 2014, meet 2007 engine emission standards
2005 & 2006	Starting January 1, 2013, Reduce PM emissions by 85% (e.g. install a CARB-verified level 3 Diesel Particulate Filter) And Starting January 1, 2014, meet 2007 engine emission standards	Starting January 1, 2013, Reduce PM emissions by 85% (e.g. install a CARB-verified level 3 Diesel Particulate Filter) And Starting January 1, 2014, meet 2007 engine emission standards
2007* & newer	Fully Compliant	Fully Compliant

*Additional requirements may apply in 2021 for all drayage trucks pursuant to CARB Regulations.

Appendix E. Some Seasonal Health Impacts of PM2.5 from PM Exposure

Period	Scenario	$PM_{2.5}$ Mortality Age: 30-65	$PM_{2.5}$ Mortality Age: 65 and over	Chronic Bronchitis	Total Value ($2005)
Winter	Baseline	$4.47 (0.66)	$5.15 (0.76)	$0.22 (0.68)	**$9.84**
	Scenario2	$2.19 (0.32)	$2.51 (0.37)	$0.11 (0.34)	**$4.81**
	Scenario3	$1.98 (0.29)	$2.25 (0.33)	$0.10 (0.30)	**$4.34**
Spring	Baseline	$3.45 (0.51)	$4.07 (0.60)	$0.17 (0.53)	**$7.69**
	Scenario2	$1.67 (0.24)	$1.93 (0.28)	$0.08 (0.26)	**$3.68**
	Scenario3	$1.50 (0.22)	$1.73 (0.25)	$0.08 (0.23)	**$3.31**
Summer	Baseline	$4.21 (0.62)	$5.16 (0.76)	$0.21 (0.64)	**$9.59**
	Scenario2	$2.10 (0.31)	$2.51 (0.37)	$0.11 (0.32)	**$4.72**
	Scenario3	$1.88 (0.28)	$2.25 (0.33)	$0.09 (0.29)	**$4.22**
Fall	Baseline	$6.40 (0.94)	$7.43 (1.09)	$0.32 (0.97)	**$14.14**
	Scenario2	$3.17 (0.47)	$3.65 (0.54)	$0.16 (0.48)	**$6.98**
	Scenario3	$2.82 (0.41)	$3.22 (0.47)	$0.14 (0.43)	**$6.18**
Year 2005	Baseline	$18.52 (2.72)	$21.80 (3.20)	$0.93 (2.83)	**$41.25**
	Scenario2	$9.12 (1.34)	$10.60 (1.56)	$0.46 (1.39)	**$20.18**
	Scenario3	$8.18 (1.20)	$9.46 (1.39)	$0.41 (1.25)	**$18.05**

Golden Gate University Environmental Law Journal, Vol. 10, Iss. 1 [2018], Art. 5

Golden Gate University Environmental Law Journal

Volume 10 | Issue 1 Article 6

May 2018

The Right to Flourish, Regenerate, and Evolve: Towards Juridical Personhood for an Ecosystem

Nicholas Bilof
Golden Gate University School of Law

Follow this and additional works at: https://digitalcommons.law.ggu.edu/gguelj

Part of the Environmental Law Commons, and the Water Law Commons

Recommended Citation

Nicholas Bilof, *The Right to Flourish, Regenerate, and Evolve: Towards Juridical Personhood for an Ecosystem*, 10 Golden Gate U. Envtl. L.J. 111 (2018).
https://digitalcommons.law.ggu.edu/gguelj/vol10/iss1/6

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Environmental Law Journal by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

THE RIGHT TO FLOURISH, REGENERATE, AND EVOLVE: TOWARDS JURIDICAL PERSONHOOD FOR AN ECOSYSTEM

NICHOLAS BILOF[1]

I. INTRODUCTION: THE RIVER THAT OOZED RATHER THAN FLOWED

On June 22, 1969, the Cuyahoga River in Cleveland ignited into flames as a passing train spattered sparks into its water. When TIME magazine published photos of the Cuyahoga burning alongside a story that described the river as "so saturated with sewage and industrial waste that it 'oozes rather than flows,'" concern erupted across the country.[2] In retrospect a half-century later, TIME noted that "the flaming Cuyahoga became a figurehead for America's mounting environmental issues and sparked wide-ranging reforms, including the passage of the Clean Water Act and the creation of federal and state environmental protection agencies."[3]

Because of its public role as the symbol of a movement of environmental reform, the Cuyahoga received rehabilitating treatment and resources, and was ultimately declared "fireproof" on the twentieth anniversary of the blaze.[4] Once no longer flammable, even if it still was not sparkling clean, biologists found several species of insects, fish, and other organisms that had disappeared from the Cuyahoga had now returned and were "flourishing."[5]

[1] Nicholas Bilof is a 2L at Golden Gate University School of Law. He is expected to graduate in May 2019.

[2] Jennifer Latson, *The Burning River that Sparked a Revolution,* TIME MAG. (June 22, 2015) http://time.com/3921976/cuyahoga-fire/.

[3] *Id.*

[4] Doron P. Levin, *River Not Yet Clean, but It's Fireproof,* N.Y. TIMES (June 25, 1989) http://www.nytimes.com/1989/06/25/us/river-not-yet-clean-but-it-s-fireproof.html.

[5] *Id.*

Published by GGU Law Digital Commons, 2018

But the Cuyahoga is exceptional: approximately forty percent of the rivers and lakes in the United States, as surveyed by the U.S. Environmental Protection Agency (EPA), are too polluted for swimming and fishing.[6] Water pollution has many causes, but most often results from fertilizer run-off and industrial wastewater discharges.[7] Meanwhile, in many places across America water supplies are straining to meet ever-increasing demands; diversions of water to support cities, agriculture, and industrial uses have significantly altered the natural character of many waterways and their surrounding habitats, jeopardizing the sustainability of rivers, lakes, and other crucial, interconnected ecosystems.[8]

Inevitably, the use of water for almost all human activities results in the deterioration of its quality and generally limits its further potential use.[9] For that reason, it is necessary to protect the nation's waterways from exploitative and destructive human practices. But half a century after the river that oozed and burned sparked a national movement giving rise to a host of environmental protection agencies and regulations, most rivers and lakes in the U.S. are still more polluted and over-tapped than ever. Because governments and the legal system have failed to safeguard America's waterways, a crucial evolution in legal consciousness is needed.

With that end in mind, this article will examine two at-risk American rivers through a comparison of the different legal approaches brought by the citizens and conservation groups fighting to protect them. Through analysis of the two lawsuits, this article will highlight the flaws of the traditional approach, and introduce a novel proposal for a shift in the lens under which nature is considered in American jurisprudence.

Part I will survey the Suwannee River and a citizen suit against a poultry-packing plant accused of illegally fouling its waters through repeated violations of an EPA-issued permit governing wastewater discharges. This suit represents the congressionally-created traditional avenue to protecting a natural object when government agencies are unable or unwilling to enforce environmental regulations.

---

[6] *Why is Our Water in Trouble?*, THE NATURE CONSERVANCY, https://www.nature.org/ourinitiatives/habitats/riverslakes/threatsimpacts/ (last visited Jan. 14, 2018).

[7] *Id*; *see also* Environment America Research & Policy Center, *Corporate Agribusiness and the Fouling of America's Waterways,* ENV'T AMERICA, http://www.environmentamerica.org/reports/ame/corporate-agribusiness-and-fouling-americas-waterways?_ga=2.70661520.1050170889.1506310806-342562671.1506310806 (last visited Jan. 14, 2018).

[8] *Protect Ecosystems and Fisheries,* NAT. RESOURCES DEF. COUNS., https://www.nrdc.org/issues/protect-ecosystems-and-fisheries (last visited Jan. 14, 2018).

[9] *Water Quality Monitoring: Chapter 2 - Water Quality*, WORLD HEALTH ORG. 18 (Jamie Bartram and Richard Balance, eds.) http://www.who.int/water_sanitation_health/resourcesquality/wqmchap2.pdf.

Bilof: The Right to Flourish, Regenerate, and Evolve

Part II will present the Colorado River and a unique suit, which builds upon dusty law review pages and an old Supreme Court Justice's dissent in an attempt to establish juridical personhood for a river ecosystem. This case of first impression aims to establish a new legal doctrine that would significantly loosen the standing requirements for citizens seeking to sue for the protection of inanimate, natural objects—by allowing the suit to be brought in the name of the aggrieved ecosystem itself. The court's declaration of the ecosystem as a legal person is the necessary first step towards the recognition of the ecosystem's fundamental rights, and an ultimate remedy against the state and governor for the violation of those rights.

Part III will consummate the comparison of approaches brought by the two suits through argument positing why an evolution in the consciousness of American jurisprudence is necessary and desirable. Because the governments and laws of the United States have failed to protect the ecosystems within its jurisdiction, Nature needs a voice to litigate for its own preservation.

II. The Suwannee

The headwaters of the Suwannee River descend from an elevation of approximately 120 feet above sea level.[10] In total, the Suwannee's course runs about 250 miles, all but thirty-five of which are within the State of Florida.[11] Although its flow churns at an average speed of four miles per hour, transitions in geography create noticeable differences, dividing the Suwannee into its Upper, Middle, and Lower sections.[12] The Upper Suwannee is lined with steep limestone banks that hasten its flow and create rare Florida "whitewater."[13] The Middle section's "sloping sand banks retain the footprints of turkey, deer and other animals that drink from the river."[14] About fifty miles downstream, near the city of Fanning Springs, the Lower Suwannee serves as a fish habitat and a home to other species, like bluegill, redear sunfish, channel catfish, and

[10] *The Suwannee River*, Save Our Suwannee, http://www.saveoursuwannee.org/suwannee-region/ (last visited Jan. 14, 2018).

[11] *Suwannee River*, Encyclopedia Britannica, https://www.britannica.com/place/Suwannee-River (last visited Jan. 14, 2018).

[12] Save Our Suwannee, *supra* note 10.

[13] *Id*.

[14] *Suwannee River*, Georgia River Network, https://garivers.org/other-georgia-rivers/suwannee-river.html (last visited Jan. 14, 2018).

Published by GGU Law Digital Commons, 2018

both redbreast and spotted sunfish.[15] Many consider the Suwannee River to be one of Florida's most important waterways.[16]

Beyond the Suwannee River itself is its watershed, or basin, which covers almost ten thousand square miles.[17] The Suwannee Basin is a diverse ecosystem, and this diversity contributes to the importance of its ecology: the watershed is made up of three separate but interconnected hydrologic landscape units, each supporting an abundance of animal, plant, and human life.[18] The Suwannee River Basin is the largest free-flowing source of freshwater to the Gulf of Mexico.[19]

But the Basin faces supply-anxieties as more people, more wells, larger wells, and increasingly-intensive agriculture practices have resulted in persistently increasing withdrawals.[20] Additionally, the relative abundance of water resources in the Suwannee Basin makes it a target for nearby localities; particularly of concern is "the envious look northward from the water-exhausted Tampa Bay area."[21]

A. The Waters' Quality

Compared to most of the major rivers in the United States, the Suwannee's flow is "relatively unimpaired [in terms of] water quality."[22] It has been called "the only major waterway in the southeastern United States that is still unspoiled."[23] It is designated as one of twelve National Showcase Watersheds.[24] Significant portions of its basin are permanently protected under the ownership of federal and state governments.[25] In the

[15] Save Our Suwannee, *supra* note 10.

[16] Plaintiff's Complaint at 3, Env't Am. v. Pilgrim's Pride Corp., (2017) (No. 3:17-cv-00272-TJC-JRK).

[17] *Suwannee River Watershed: Preserving the Georgia/Florida Connection*, U.S. Fish and Wildlife Service https://www.fws.gov/northflorida/Documents/NFL_Suwanee_factsheet.pdf (last visited Jan. 14, 2018).

[18] *The Suwannee River: A Coastal Plain Watershed in Transition* 3 (last visited Jan. 14, 2018), http://users.clas.ufl.edu/jbmartin/Prospectus.pdf; *see also The Suwannee River Basin Pilot Study: Issues for Watershed Management in Florida* https://pubs.usgs.gov/fs/FS-080-96/ (last visited Jan. 14, 2018).

[19] *Mary M. Davis and David W. Hicks* Water Resources of the Upper Suwannee River Watershed *70,* http://gwri.gatech.edu/sites/default/files/files/docs/2001/DavisM-01.pdf *(last visited Jan. 14, 2018).*

[20] Save Our Suwannee, *supra* note 10.

[21] Save Our Suwannee, *supra* note 10.

[22] *The Suwannee River: A Coastal Plain Watershed in Transition, supra* note 18, at 1.

[23] *The Suwannee River*, Exploring Florida, https://fcit.usf.edu/florida/lessons/suwannee/suwannee.htm (last visited Jan. 14, 2018).

[24] *The Suwannee River: A Coastal Plain Watershed in Transition, supra* note 18, at 1.

[25] *Suwannee River Watershed: Preserving the Georgia/Florida Connection* U.S. Fish and Wildlife Serv., https://www.fws.gov/northflorida/Documents/NFL_Suwanee_factsheet.pdf (last visited Jan. 14, 2018).

Bilof: The Right to Flourish, Regenerate, and Evolve

mid-1970's, the U.S. Department of the Interior recommended that the Suwannee be added to the National Wild and Scenic River System to protect the river from depletion and contamination.[26] Although there are several industrial plants that release effluent into the Suwannee's watershed, the United States Environmental Protection Agency (EPA) regulates industrial discharges by issuing permits through the National Pollutant Discharge Elimination System (NPDES).[27]

B. NPDES Protection

The Clean Water Act (CWA) prohibits the discharge of any pollutant by any person—except those discharges "in compliance with law."[28] To discharge a pollutant, or any combination of pollutants "lawfully," the EPA Administrator must issue an NPDES permit.[29] The Administrator may issue a permit "after opportunity" for public hearing,[30] and therein prescribe conditions on what can be discharged, as well as monitoring and reporting requirements, and other provisions "to ensure that the discharge does not hurt water quality or people's health."[31] According to the EPA, "[a]s long as the wastewater being discharged is covered by and in compliance with an NPDES permit, there are enough controls in place to make sure the discharge is safe and that humans and aquatic life are being protected."[32] There are several NPDES permit-holders along the Suwannee's route; one of which is a plant owned by a large corporation called Pilgrim's Pride.

C. Pilgrim's Pride

As part of JBS USA Holdings, Inc.,[33] Pilgrim's Pride Corporation is the second-largest chicken producer in the world.[34] Pilgrim's operates a processing plant in Live Oak, Florida, where chickens are born, raised,

---

[26] Georgia River Network, *supra* note 14.

[27] NPDES Permit Basics, *National Pollutant Discharge Elimination System (NPDES)* United States Envtl. Protection Agency, https://www.epa.gov/npdes/npdes-permit-basics (last visited Jan. 14, 2018).

[28] 33 U.S.C. § 1311.

[29] *See generally* 33 U.S.C § 1342.

[30] 33 U.S.C § 1342(1).

[31] What is an NPDES permit?, U. S. Envtl. Protection Agency *supra* note 27; *see* 33 U.S.C. § 1342(2).

[32] *Is it legal to have. . .*, U.S. Envtl. Protection Agency, *supra* note 27.

[33] JBS USA is a wholly owned subsidiary of JBS S.A., a Brazilian company that is the world's largest processor of fresh beef and pork, with more than US $40 billion in annual sales as of 2012. *About JBS* JBS SA, https://jbssa.com/about/ (last visited Feb. 18, 2018).

[34] *About Us* Pilgrim's Pride, http://www.pilgrims.com/our-company/about-us.aspx (last visited Jan. 14, 2018).

Published by GGU Law Digital Commons, 2018

"slaughtered, bled, scalded, de-feathered, eviscerated, cut up, deboned, and packed at the plant."[35] The Live Oak plant is less than one mile from Suwannee River State Park.[36] For more than five years, Pilgrim's has held an NPDES permit allowing it to discharge a limited amount of wastewater into the Suwannee.[37] That permit was issued by the Florida Department of Environmental Protection (FDEP), which was delegated authority to issue NPDES permits by the EPA.[38]

The FDEP has also designated the Suwannee River as "Special Waters" of the Outstanding Florida Waters.[39] Under Rule 62-302.700(1) of the Florida Administrative Code, the department's policy is "to afford the highest protection to Outstanding Florida Waters."[40] A state water will be given this designation after a finding that "the waters are of exceptional recreational or ecological significance and a finding that the environmental, social, and economic benefits of the designation outweigh the environmental, social, and economic costs."[41]

In April 2015, the FDEP found that the Pilgrim's plant in Live Oak had been violating the limits for toxicity set out in its NPDES permit from February 2013 to December 2014.[42] The FDEP released an order requiring Pilgrim's to take "corrective actions" in response to its "chronic toxicity violations."[43] Yet, in a memo dated February 3, 2017, an FDEP Wastewater Inspector wrote that there were "significant noncompliance issues" at the plant, and that Pilgrim's "is still having issues with meeting the permit limits."[44] Since its NPDES permit was issued, the Pilgrim's plant at Live Oak has discharged millions of gallons of wastewater into the Suwannee river.[45] Neither the federal government nor the State of Florida have effectively prevented Pilgrim's from violating the Clean Water Act (CWA or the Act).[46]

---

[35] Andrew Caplan, *Pilgrim's Pride sued over wastewater in river*, GAINESVILLE SUN (Mar 9, 2017 6:42 PM) http://www.gainesville.com/news/20170309/pilgrims-pride-sued-over-wastewater-in-river; Pilgrim's Complaint, *supra* note 16, at 1.

[36] Caplan, *supra* note 35.

[37] Pilgrim's Complaint, *supra* note 16, at 2.

[38] *Id.*

[39] *Id.* at 40.

[40] Special Protection, Outstanding Florida Waters, Outstanding National Resource Waters, Fla. Admin. Code Ann. r. 62-302.700.

[41] FLA. ADMIN. CODE ANN. R. 62-302.700(5).

[42] Pilgrim's Complaint, *supra* note 16, at 20.

[43] *Id.* (quoting FDEP *2015 Consent Order* w/ Pilgrims, April 2015*)*

[44] *Id.* at 3.

[45] Caplan, *supra* note 35.

[46] Pilgrim's Complaint, *supra* note 16, at 3; 33 U.S.C. §1251 et seq. (1972).

D. Who Will Protect the River When the Government Has Failed To?

A citizen suit provision in the CWA allows citizens to sue any person who is alleged to have violated (a) an effluent standard or limitation, like those of an NPDES permit; or (b) an order issued by the Administrator or a state relating to such a standard or limitation.[47] This provision is designed to include citizens in the enforcement of environmental protection and to serve as a check on the government. The provision also permits any citizen to sue the agency alleging that the Administrator has failed to fulfill any duty under the Act "which is not discretionary."[48]

Consequently, a group of citizens and environmental groups filed suit against Pilgrim's in U.S. District Court for the Middle District of Florida.[49] The suit alleges that Pilgrim's has violated the CWA for 1,377 consecutive days (almost four years).[50] The plaintiffs claim to have noticed algal blooms—toxic to humans, animals and plant life—in the Suwannee downstream from the Pilgrim's plant.[51]

Algal blooms occur when nitrogen and phosphorous, most often coming from agricultural fertilizer runoff and wastewater, enter an aquatic environment.[52] Such deleterious effects are not unknown to the EPA: by its own report, "agriculture is the leading cause of pollution in more than 145,000 miles of rivers and streams; one million acres of lakes, reservoirs and ponds; and 3,000 square miles of bays and estuaries in the United States."[53] According to the EPA's Toxic Release Inventory, which tracks the management of certain toxic chemicals through industry self-reporting, "JBS facilities (including Pilgrim's) dumped more than 37.6 million pounds of toxic pollutants into American waterways from 2010 to 2014."[54] Although some of these reported discharges may have been self-reported "exceedances" of NPDES permit limits, most of these

---

[47] 33 U.S.C. §§ 1365(a)(1), (f).

[48] 33 U.S.C. § 1365(a)(2).

[49] *See generally* Pilgrim's Complaint, *supra* note 16.

[50] Caplan, *supra* note 35.

[51] Pilgrim's Complaint, *supra* note 16, at 41; *see generally* Jane J. Lee, Pea Soup*,* Pictures: Extreme Algae Blooms Expanding Worldwide, National Geographic (April 24, 2013) https://news.nationalgeographic.com/news/2013/04/pictures/130423-extreme-algae-bloom-fertilizer-lake-erie-science/.

[52] Lee, *Plant Food*, *supra* note 51.

[53] Environment America Research & Policy Center, *Corporate Agribusiness and the Fouling of America's Waterways,* Env't America 7 (June 29, 2016), http://www.environmentamerica.org/reports/ame/corporate-agribusiness-and-fouling-americas-waterways?_ga=2.70661520.1050170889.1506310806-342562671.1506310806.

[54] Toxics Release Inventory (TRI) Program, U.S. Envtl. Protection Agency, https://www.epa.gov/toxics-release-inventory-tri-program/learn-about-toxics-release-inventory#What%20is%20the%20Toxics%20Release%20Inventory; Env't America, *supra* note 53, at 21.

pollutants, which were purposely released into natural waterways, are lawfully permitted by both federal and state governments.[55]

E. Remedies

In the suit against Pilgrim's for its Live Oak plant's alleged NPDES violations, the plaintiffs seek: (a) a declaration of Pilgrim's violations of the CWA and NPDES permit; (b) a determination of the number of days Pilgrim's has violated; (c) an order to comply with the CWA and NPDES permit, and to refrain from further violations; (d) an order to implement remedial, mitigation, or offset measures; (e) an assessment of civil penalties against Pilgrim for each day of violations; (f) an award for the costs of litigation; and (g) any other relief the Court deems necessary.[56] Much of the relief sought is declaratory and injunctive. The declaratory findings of parts (a) and (b) are prerequisite to any injunctive or civil relief that can be granted.

Under the CWA, if the Administrator finds that a violation has occurred, notice must be given to the violator in addition to the local state government. If neither violator nor state government respond sufficiently, the Administrator should issue a compliance order.[57] The Administrator *may* bring civil action against a violator "for appropriate relief, including a permanent or temporary injunction."[58]

The CWA also authorizes criminal penalties for negligent and reckless violations, in addition to false statements in reporting and tampering with monitoring equipment.[59] Civil penalties are also available, up to $25,000 per day for each violation.[60] When determining the amount of a civil penalty, a court will consider a variety of factors, including: (i) the seriousness of the violation; (ii) any economic benefit that resulted from the violation; (iii) any history of other violations; (iv) any good faith efforts to comply; (v) the economic impact of the penalty on the violator; and (vi) "such other matters as justice may require."[61]

As the statutory provisions demonstrate, the federal government has a variety of options to address violations of the CWA. However, the "vast majority" of the EPA's enforcement is executed through adminis-

---

[55] 33 U.S.C. § 1311.
[56] Pilgrim's Complaint, *supra* note 16, at 42.
[57] 33 U.S.C. § 1319(a).
[58] 33. U.S.C. § 1319(b).
[59] 33. U.S.C. § 1319(c).
[60] 33 U.S.C. § 1319(d).
[61] *Id.*

trative action.[62] In practice, when the government does bring civil action to enforce environmental protections, the strength of the penalties authorized by the CWA are often not employed effusively.

For example, in a 1999 case from the Fourth Circuit, defendant Smithfield Foods, Inc. owned and operated two slaughterhouses that discharged wastewater into Virginia's Pagan River.[63] Smithfield had been granted NPDES permits, but was accused of violating the wastewater limits imposed by the permits for a period of over five consecutive years.[64] Although the Virginia Department of Environmental Quality had evidence of "Smithfield's numerous CWA violations," the EPA eventually realized that the State of Virginia "did not intend to initiate legal action against Smithfield."[65]

When the EPA finally sued in the Eastern District of Virginia, "the district court found Smithfield liable for 6,982 days (19 years) of violations."[66] Under the civil penalties provision of the CWA, Smithfield's liability for the violations set a maximum penalty of $174.55 million.[67] Applying the § 1319(d) factors, the district court found that "the violations were serious, the company had a history of noncompliance, its financial status was healthy, and good-faith efforts to comply with the law were minimal."[68] The district court evaluated the economic benefit to Smithfield from its violations at $4.2 million, and imposed penalty of $12.6 million, only about seven percent of the statutory maximum.[69] The Court of Appeals reviewed "the highly discretionary calculations" of the district court under an abuse of discretion standard and remanded for a recalculation of the penalties.[70] Ultimately, the penalty was reduced to $12.4 million.[71] Despite further charges that the chief operator of Smithfield's wastewater treatment plant had falsified reports and destroyed records, no criminal penalties were ordered.[72]

While this case serves as an example of federal government enforcement of environmental protections through civil penalties, the EPA

---

[62] Jennifer Cornejo and Jordan Rodriguez, *Clean Water Act Section 404 Enforcement* 2, https://www.velaw.com/UploadedFiles/VEsite/Presentations/CWASection404Enforcement.pdf (last visited Mar. 19, 2018).

[63] U.S. v. Smithfield Foods, Inc., 191 F.3d 516 (4th Cir. 1999).

[64] *Id*.

[65] *Id*. at 522.

[66] *Id*. at 523.

[67] *Id*. at 529.

[68] Cornejo et al., *supra* note 62, at 7.

[69] *Id.*

[70] *Smithfield,* 191 F.3d at 532.

[71] Cornejo et al., *supra* note 62, at 7.

[72] *Smithfield,* 191 F.3d at 523.

notably favors administrative rather than civil or criminal action.[73] The prerogative tends to be focused on bringing the violator into compliance rather than on punition, or restoration of the contaminated ecosystem. In the case of citizen suits, all civil penalties awarded by a court are paid to the government; citizen plaintiffs have no right to monetary damages under the CWA.[74]

F. Standing

Achieving an adequate civil remedy in an environmental protection suit can be difficult, as can collecting on a judgment. However, many environmental suits are never tried on their merits: such cases can run into problems of justiciability, particularly in terms of standing. Prior to the 1990s, environmental cases enjoyed a broader view of standing. But with the evolution of the injury-in-fact standard, particularly in terms of its application to environmental litigation, standing has become a significant hurdle for lawyers bringing legal action to protect the environment.[75]

Historically, *Lujan v. Defenders of Wildlife (Lujan II)*[76] marked a dramatic shift in standing jurisprudence. As an issue of first impression, the Court considered standing under a citizen suit provision.[77] Although many believed that citizen suits overrode the necessity of showing an injury-in-fact,[78] the Court in *Lujan II* affirmed otherwise on the basis that standing's constitutional grounding necessitated an injury-in-fact.[79] The majority opinion set in place a stricter standard than it had ever before applied to environmental plaintiffs; as a result of *Lujan II* "an individual standing witness must [now] demonstrate that the behavior of a defendant directly affects a tangible, personal interest. It is not enough to allege an attenuated interest more diffusely defined . . ."[80]

---

[73] Nicholas J. Nastasi and Jennifer A. DeRose, *Federal Environmental Law: Criminal Enforcement,* Ass'n of Corp. Couns. (Feb. 1, 2012) http://m.acc.com/legalresources/quickcounsel/felce.cfm.

[74] Ohio Envtl. Council, Guide to Clean Water Acts Citizen Suits 10 (last visited Mar. 19, 2018), https://www.waterboards.ca.gov/water_issues/programs/swamp/docs/cwt/guidance/112a1.pdf.

[75] Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. Rev. 931, 938 (1998).

[76] 504 U.S. 555 (1992).

[77] *Cf.* Lujan v. Nat'l Wildlife Fed'n (Lujan I), 497 U.S. 871 (1990); *See* 45 UCLA L. Rev. 931, n.90.

[78] Injury-in-fact is defined as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Kerchner v. Obama, 669 F. Supp. 2d 477, 481 (D.N.J. 2009) (quoting *Lujan II,* 504 U.S. at 560).

[79] 504 U.S. 555.

[80] 45 UCLA L. Rev., at 950.

For the Pilgrim's case, the standing standard for citizen suits under the CWA is no different. A "citizen," for the purposes of a citizen suit under § 505(a) of the Act, is defined as "a person or persons having an interest which is or may be adversely affected."[81] This language can be read as codifying the injury-in-fact standard into the Act. The Court has held that "environmental plaintiffs adequately allege injury-in-fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."[82]

Thus, the complaint in the Pilgrim's suit takes pains to qualify the "members" of the plaintiffs' group. The named plaintiffs, Environment America, Inc. and the Sierra Club, are both national non-profit environmental conservation organizations. However, a plaintiff, as a national non-profit environmental organization, may not have standing alone. The Sierra Club certainly knows this fact, as it once attempted to establish that, as an organization, it had standing to sue as itself.[83] In *Sierra Club v. Morton,* the Sierra Club argued that its "longstanding concern with and expertise in [environmental] matters were sufficient to give it standing as a 'representative of the public,'" and "specifically declined to rely on its individualized interest as a basis for standing."[84] But that argument was unsuccessful.

Here, Environment America, Inc. a Colorado corporation, operates under the name "Environment Florida"; Sierra Club, a California organization, with an office in Fort White, Florida, in addition to the number of its Florida Chapter's members—some of which are from the Suwannee area.[85] To bolster the legitimacy of their standing, the plaintiffs assert that some of their members "live, own homes, or spend time near the [Live Oak] plant and/or the Suwannee River, and . . . participate in recreational activities in, on, or near the Suwannee River downstream of the plant."[86] The complaint further elaborates: "[plaintiffs' members] swim, canoe, kayak, dive, fish, view wildlife, take walks, conduct research, bicycle, boat, and engage in other activities on, in, and by the Suwannee

[81] 33 U.S.C. §§ 1365(a), (g).

[82] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,120 S. Ct. 693, 705 (2000); Nat. Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 994 (9th Cir. 2000) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972).).

[83] Sierra Club v. Morton, 405 U.S. 727 (1972) (affirming the dismissal of the Sierra Club's suit to stop the Disney corporation from developing a secluded natural valley into a major ski resort.).

[84] *Id.* at 735 n.8.

[85] Plaintiff's Complaint at 4, Env't Am. v. Pilgrim's Pride Corp., (2017) (No. 3:17-cv-00272-TJC-JRK).

[86] *Id.* at 5.

Golden Gate University Environmental Law Journal, Vol. 10, Iss. 1 [2018], Art. 6

River and its springs downstream of the plant."[87] This section of the complaint concludes by listing nine paragraphs of harm suffered by plaintiffs' members, from the lessening of enjoyment of recreation activities, to fears about eating fish caught in the River.[88] This description is necessary to establish standing under the CWA—not just any concerned citizen can enact a citizen suit.

G. Other Problems With Standing

Another obstacle for citizen suits is that plaintiffs must give sixty-days' notice to the EPA, the state, and the alleged violator before suing.[89] The Court's purpose in notifying the alleged violator "is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit."[90] Certainly, this notification requirement is not unreasonable; it is intended to minimize the burden on a crowded court system. But it often allows violators to strategically sweep the rug out from under citizens, so to speak. In general, regulated industries want to avoid CWA citizen suits, which can cost significantly more than enforcement actions by regulatory agencies.[91] If a violator suddenly ceases its "exceedances," or reports that it has, concerned citizens can be left powerless to address the damage of the past violations; they must rely on the government and trust in its "discretion."[92]

Thus, even when the government has created protections for the environment and built provisions to empower citizens to participate in their enforcement, pollution occurs and the environment degrades. Irrespective of designations like "Special Waters," and hyperbole about "ecological value" and "highest protections," the federal and state governments have repeatedly failed to adequately abate the problem of the industrial defiling of America's waters. Regulations like the CWA and NPDES permits fail to deter violator-industrialists from environmentally-destructive practices. Violations are met with notices and administrative orders that drag on, and citizen attempts to pick up the government's slack are met by many obstacles. As the current federal government seeks to re-

---

[87] *Id.* at 40.

[88] *Id.* at 41.

[89] 33 U.S.C. § 1365(b)(1)(A).

[90] Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60 (1987).

[91] Ohio Envtl. Council, Guide to Clean Water Acts Citizen Suits 6 (last visited Mar. 19, 2018), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwj2_PeRnIXXAhVIzGMKHXH5B34QFggtMAI&url=https%3A%2F%2Fwww.waterboards.ca.gov%2Fwater_issues%2Fprograms%2Fswamp%2Fdocs%2Fcwt%2Fguidance%2F112a1.pdf&usg=AOvVaw0r4RzHbsRy8q9Xv9dT0abt.

[92] 33 U.S.C. § 1365(a)(2).

peal environmental protections and deflate the EPA in favor of deregulation and big business, who will protect America's weary waterways?

III. The Colorado

From mountainous heights stream the source-waters of the Colorado River.[93] Delivered downward on the American southwest from the Continental Divide in Colorado's Rocky Mountains, the Colorado River cuts its way through seven American states toward the Gulf of California.[94] Its course carves 1,450 miles through canyons, buttes, mesas, and gorges, providing for the Colorado's epic, photogenic backcloths.[95] Before the construction of the many dams that modernly sap its course, the Colorado fed one of the largest desert estuaries on the planet.[96] Even now, the watershed spans eight percent of the continental United States.[97] Consequently, the traditional power and abundance of the Colorado's life-giving presence in the arid expanses of the southwest have made it the lifeline of the region.[98]

But the Colorado's moniker, "the hardest-working river in the west," understates the strain it endures: it bears the burden of "over-allocation, over-use, and more than a century of manipulation."[99] It is the most-litigated and most-regulated river in America, maybe even the world; while there are others more sizable, "no other river is more divided and overused."[100]

A. The Triumph of Politicians and Engineers

More water is diverted from the Colorado River Basin than from any other watershed in America—Los Angeles, San Diego, Phoenix, Tucson, Denver, Tijuana, Mexicali, and Las Vegas are all dependent on its waters.[101] To invoke the words of scholar Philip L. Fradkin: "The

[93] *Colorado River Basin,* Desert USA, https://www.desertusa.com/colorado/coloriv/du_coloriv.html (last visited Mar. 14, 2018).

[94] April R. Summitt, Contested Waters: An Envtl. History of the Colo. River X, Boulder: University Press of Colorado (2013); *Colorado River* American Rivers, https://www.americanrivers.org/river/colorado-river/ (last visited Jan. 15, 2018).

[95] *Colorado River*, American Rivers, https://www.americanrivers.org/river/colorado-river/ (last visited Jan. 15, 2018).

[96] *Colorado River*, New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Colorado_River (last visited Jan. 15, 2018).

[97] American Rivers, *supra* note 95.

[98] Summitt, *supra* note 94, at 4.

[99] New World Encyclopedia, *supra* note 96.

[100] Summitt, *supra* note 94, at X.

[101] Philip L. Fradkin, A River No More: The Colo. River and the West 42 (1996); Summitt, *supra* note 94, at X.

complex of dams, reservoirs, tunnels, and canals spreading from the Colorado River system to embrace much of the West has become the most complicated plumbing system in the world."[102]

While seven major dams straddle its main channel, in addition to dozens more scattered astride the Colorado's tributaries, it is the Hoover Dam that stands most prominently and with the most renown.[103] It symbolizes both "the successful joining of federal power and individual ingenuity," and "the human ability to control nature, to harness a river."[104] At the time of its completion in 1936, the Hoover Dam was the largest concrete structure ever built, as well as the tallest and biggest dam on the planet.[105] Today, the Hoover Dam's gigantic turbines churn over four billion kilowatt-hours of electricity from the Colorado's waters each year to keep large sections of California, Nevada, and Arizona alight.[106]

The Morelos Dam, located about three hundred miles below the Hoover Dam, diverts flow to irrigate farms across the Mexican border.[107] This lower section of the Colorado, officially designated as the "Lower Colorado River" (Lower Colorado), begins upstream in Arizona; it is where the River is most "bottled up and sucked dry by agriculture and municipal demand."[108] The Colorado River is one of the world's few rivers that regularly dries up before reaching the salty seawaters of its natural destination.[109] The Lower Colorado currently holds the number one position on the America's Most-Endangered River Report for 2017.[110] This fact is greatly disconcerting considering that the "Lower Colorado River provides drinking water for one in ten Americans . . . and grows approximately 90 percent of the nation's winter vegetables."[111]

Part of the problem is that the Lower Colorado Basin consumes a yearly deficit, on average, of approximately 1.2 million more acre-feet of water than it receives from the Upper Basin, which is sucked unsustainably from water supplies accumulated when demand was lower.[112] Al-

---

[102] FRADKIN, *supra* note 101, at 42.

[103] SUMMITT, *supra* note 94, at IX.

[104] *Id.*

[105] *Id.* at IX, 3.

[106] *Id.* at IX.

[107] *Id.*

[108] AMERICAN RIVERS, *supra* note 95.

[109] AMERICAN RIVERS, *supra* note 95; *but see* Sandra Postel, *A Sacred Reunion: The Colorado River Returns to the Sea*, NAT'L GEOGRAPHIC: WILDLIFE AND WILDPLACES (May 9, 2014), https://voices.nationalgeographic.org/2014/05/19/a-sacred-reunion-the-colorado-river-returns-to-the-sea/.

[110] America's Most Endangered River Report 2017, https://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2017/04/11121018/MER2017_FinalFullReport_04062017.pdf.

[111] *Id*. at 3.

[112] *Id.* at 3-4.

though recent attempts to address this issue have seen some success, the Most-Endangered Report has warned that the looming menace of drought endures and may intensify.[113]

B. The Law of the River

The close of 2017 brings the ninety-fifth anniversary of the signing of the Colorado River Compact.[114] This agreement, signed November 24, 1922, has become known as the "keystone" of the swollen body of law governing the Colorado River.[115] The Compact allocates waters for the River's seven basin states: Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California.[116]

By dividing these states into different groups, the Compact allocates a collective consumptive use of 7.5 million acre feet (MAF) of water per year to each group, which is then apportioned among its states.[117] The figures used to tabulate this allocation were based on hydrologic data from the federal Reclamation Bureau that indicated an annual average flow of 16.4 MAF. But the data varies over time because the Colorado's flow has never been consistent, ranging from 4.4 MAF to over 22 MAF per year; the average flow has actually been millions of acre feet less than the Compact's commissioners presumed.[118] Despite suggestions that it should be renegotiated after fifty years, the Compact's allocation was made in perpetuity; its figures continue to be the basis for consumption of the Colorado River's waters.[119]

But the negotiation of the Compact was only the beginning: battles over the Colorado have been fought within and without the houses of Congress, internationally, and all the way up to the Supreme Court. Notable developments include the "largest water settlement in U.S. history," when in 2004, the Gila River Indian Community finally gained confirmed water rights after a struggle lasting more than a century.[120] Also,

---

[113] *See id.*

[114] Joe Gelt, *Sharing Colorado River Water: History, Public Policy, and the Colorado River Compact*, Water Resources Res. Ctr. (Aug. 1997), https://wrrc.arizona.edu/publications/arroyo-newsletter/sharing-colorado-river-water-history-public-policy-and-colorado-river.

[115] *Id.*

[116] Greg Hobbs, Jr. History of Colorado River Law, Development and Use: A Primer and a Look Forward *3 (2005)* http://scholar.law.colorado.edu/hard-times-on-colorado-river/?utm_source=scholar.law.colorado.edu%2Fhard-times-on-colorado-river%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages; Law of the River Colo. River Water Users Ass'n, https://www.crwua.org/colorado-river/uses/law-of-the-river *(last visited Jan. 15, 2018).*

[117] Colo. River Water Users Ass'n, *supra* note 116.

[118] Gelt, *supra* note 114.

[119] Hobbs, *supra* note 116, at 4; Col. River Compact Article III(a). https://www.usbr.gov/lc/region/pao/pdfiles/crcompct.pdf.

[120] Summitt, *supra* note 94, at 161.

in one of the longest U.S. Supreme Court cases in history, Arizona battled California over whether water from the Gila River (one of the Colorado's tributaries) would count as part of Arizona's annual allotment.[121]

This extensive legislative and litigative history demonstrates the centrality of the Colorado River to human livelihood—yet its epic legal chronicle also displays a consistent ignorance to the livelihood of the River itself. Generations of battling communities and governments have always posited the River as the *object* of the litigation. The Colorado itself—as a system, as an entity—has eternally stood outside the courtroom doors while its fate has been mulled and wrought without any consideration for its own wellbeing or survival. Now, with increasing concerns about the failure of the traditional legal system to address issues of environmental degradation, a new movement is swelling, pushing for a shift in legal consciousness to recognize the River itself as *plaintiff* of the litigation.

C. Colorado River Ecosystem Versus State and Governor

On September 25, 2017, a lawsuit was filed in federal district court in the name of the Colorado River Ecosystem.[122] The suit seeks declaratory and injunctive relief against the State and Governor of Colorado for: (1) the recognition of the Colorado River Ecosystem's constitutional personhood; (2) recognition of the Ecosystem's fundamental rights; (3) equal protection of those rights; and (4) the enjoining of the State from failing in its duty to recognize those rights, and thereby violating those rights.[123] In addition to the Ecosystem, the plaintiff party includes "next friends": an environmental group and local citizens with a strong connection to the ecosystem, whom the suit proposes to serve as the Ecosystem's legal voice.

The plaintiffs' group of this suit resembles that of the *Pilgrim's* citizen suit. Both suits have been brought by environmental groups, composed of citizen-members at both the national and local level, to protect the rivers from ruin. However, *River Ecosystem* posits a new legal perspective that it argues is necessary "to avert collapse" because "[t]he dominance of a culture that defines Nature as property enables its destruction."[124]

---

[121] *Id.* at 156; *see* Arizona v. California, 373 U.S. 546 (1963).

[122] Col. River Ecosystem v. State, No. 1:17-cv-02316-NYW (D. Col. filed Sept. 25, 2017).

[123] *See* Plaintiff's Amended Complaint, Col. River Ecosystem v. State (filed Nov. 3, 2017) (No. 1:17-cv-02316-NYW), *throughout the discussion reference will be to the Amended Complaint rather than the Original Complaint.

[124] *Id.* at 19.

D. Plaintiff Colorado River Ecosystem

The idea of suing in the name of a natural system is foreign to the American Legal System. So, to meet the demands of legal exactitude and functionality, the complaint does not refer to "the River," but instead to "the Ecosystem." Because a river is only an artery of a greater watershed drainage system, this broader nomenclature is more appropriate and workable. The Ecosystem is the approximate 246,000 square mile area "bound by the high points and ridge lines where drop-by-drop and grain-by-grain, water, sediment, and dissolved materials ebb their way towards the Gulf of California."[125]

Although the idea of a lawsuit by a natural entity presumes fanciful hypotheticals wherein blades of grass sue gardeners, etc., the definition of the Ecosystem offered in the complaint is more legally-feasible than even its rational critics may imagine. An ecosystem may be indefinably expansive in its reaches, but that does not make it invisible. The major avenues and arteries of its passage are clear enough, and fundamental to the lives—animal, plant, and human—that exist within its province.

E. Next Friends and the Riverkeeper

The complaint proffers the human parties of the plaintiffs' group as "next friends," or guardians, of the Ecosystem. They represent "the human part . . . capable of speaking through words on behalf of the natural communities that comprise the Colorado River Ecosystem."[126] The term "next friend" is traditionally used in the legal context to refer to the person through whom an infant or juvenile maintains or defends a suit in the absence of a guardian. It has also been employed creatively in the contexts of elder law, habeas corpus, and military/terrorism prisoner cases as well.[127] The complaint describes the next friends, who were chosen "to facilitate the Ecosystem's appearance in court," in a manner akin to the description given of the plaintiffs' group in *Pilgrim's*.[128]

Like the plaintiffs in *Pilgrim's,* the members of Deep Green Resistance, the next friends, reside at various locations along the River or have some articulable connection to the Ecosystem. However, the next friends are not qualified in terms of their relationship to the Ecosystem in quite

---

[125] *Id.* at 3.

[126] *Id.* at 10.

[127] *See* Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 Yale J. Health Pol'y L. & Ethics 147 (2016); Tracy Bateman Farrell, *Next-Friend Standing for Purposes of Bringing Federal Habeas Corpus Petition*, 5 A.L.R. Fed. 2d 427; Caroline Nasrallah Belk, *Note: Next Friend Standing and the War on Terror*, 53 Duke L.J. 1747 (2004).

[128] River Ecosystem Complaint, *supra* note 123, at 10.

the same detail as the plaintiffs in *Pilgrim's*; not as much effort is dedicated to establishing a direct harm (i.e. an injury-in-fact) to individual humans because the next friends concept proposes an evolution of the standing standard for environmental cases. Instead, the next friends are offered as guardians "bound to act in [the Ecosystem's] best interests and to advocate for [its] inherent and constitutionally-secured rights."[129] This role is held up as an application of the *guardian ad litem,* who serves as a legally-appointed protector of a child or a person who has a disability.

In *River Ecosystem*, the next friends concept offers a loosening of the standing standard to (a) give prominence to the injury of the environmental system itself, and (b) free plaintiffs' groups from the potentially-fatal burden of having to articulate a direct human harm. Rather than seeking plaintiffs with very specific facts to fit into the narrow field of what qualifies as proper to establish standing, the next friends guardianship allows for the election of agents who may have less of a qualifiable "injury," but who may nonetheless have a more qualified relationship with the environmental system to be represented. For example, in addition to the members of Deep Green Resistance, the next friends also include Owen Lammers and John Weisheit. Mr. Lammers is described as the Executive Director of Living Rivers, an advocacy group working "to realize social-ecological balance with the Colorado River Watershed."[130] The complaint states that Mr. Lammers has held this position for almost twenty years.[131]

D. John Weisheit is the 63-year-old "Riverkeeper" who "has enjoyed the Colorado and its tributaries since childhood . . . Mr. Weisheit began his training as a professional river guide in 1980 and continues to lead river trips that support scientific research and public education."[132] Mr. Weisheit has also published a long-researched book about canyonland rivers.[133]

The traditional injury-in-fact standard creates significant obstacles for plaintiffs in environmental suits. It also serves to reinforce the dangerous idea that Nature is property by blurring the judicial lens from the recognition that the interests and wellbeing of ecosystems are justiciable. Even the citizen suit provisions built in to environmental statutes like the CWA are hampered by this human-centered standing approach. But the next friend designation allows qualified individuals with specialized

---

[129] *Id.* at 11.
[130] River Ecosystem Complaint, *supra* note 123, at 16.
[131] *Id.*
[132] *Id.* at 16, 19.
[133] *Id.* at 16.

knowledge and skills tailored to the interests of the natural system to stand for its rights without having to allege a particularized injury.

This idea of overcoming the standing standard by placing Nature itself as a plaintiff in a lawsuit is not a new one. Despite the decision of the unconvinced majority, *Sierra Club v. Morton* did yield one notable upshot for environmentalists: in his dissent, Justice Douglas gave credence to the revolutionary notion that the resource itself should be granted standing.[134]

F. The Lone Justice Standing With the Trees

The notion rooted in Douglas' dissent had been presented in an article published just a few months before titled *Should Trees Have Standing?*[135] In that article, law professor Christopher Stone proposed that, as human evolution has gradually given to an expansion of those with rights under the law, a further expansion of the law is possible to convey rights to natural systems, like a river, or, as it was in *Sierra Club v. Morton,* a valley.[136]

In fact, the law already conveys rights to other inanimate entities, such as trusts, corporations, and municipalities.[137] Stone ventured that while the idea may sound absurd, at one time so did the idea of giving rights to women; the current legal notion of property looks to the natural world as "objects for man to conquer and use—in such the same way as the law once looked upon 'man's' relationship to African Negroes."[138] Stone's article proffered a glimpse into how such a system would function, claiming that in some ways the legal system has already begun to develop the necessary mechanisms (such as guardianship, and class actions for injuries diffused over a large group).[139] He declared that conceptually, such a legal sea-change is necessary to re-adjust awareness about humanity's relationship to the environment. This idea is at the foundation of "resource-centered" standing, and can be contrasted with the current and traditional human-centered approach.

Although Stone's article and Douglas' dissent were written almost a half-century ago, there has been little development of the "standing for nature" idea since then. Except for a few sporadic articles reviving the

[134] *Sierra Club,* 405 U.S. 727 (1972), *see supra* note 83, at 741.

[135] Christopher D. Stone, Should Trees Have Standing?: and Other Essays on Law, Morals, and the Env't, (25th Anniversary Ed. 1996).

[136] *Id.*

[137] *Id.* at 3.

[138] *Id.* at 12.

[139] *Id.* at 7.

notion for the purpose of academic debate, the idea has remained outside American halls of justice—until now.

G. Standing, As It Stands Today

Modernly, scholars speak of globalist standing, as exemplified by the cases before the era of *Lujan II*, and localist standing, the current standard, which places an intensively individualistic focus on the plaintiff's injury-in-fact. In her article *Standing for the Environment,*[140] Ann Carlson makes an interesting argument that, while many enviro-litigators lament the change in *Lujan II*, the heightened standard can influence litigation strategies to focus more on the human implications of environmental degradation. Carlson describes it as "a chance to establish a stronger connection between humans and the natural environment and thus do more for long-lasting environmental protection than can be accomplished through any single legal victory."[141]

Scholars and lawyers like Stone, however, would argue that this human-centered perspective blinds the law to some of Nature's injuries that those human persons who do have standing cannot or will not adequately represent. In *Should Trees Have Standing*, Stone provides a number of examples: "even if a plaintiff riparian wins a water pollution suit for damages, no money goes to the stream itself to repair its damages . . . even if the jurisdiction issues an injunction . . . there is nothing to stop the plaintiffs from selling out the stream, i.e. agreeing to dissolve or not enforce the injunction at some price," as Judge Learned Hand might encourage them to do.[142] Stone argued that "a serious reconsideration of our consciousness towards the environment" is necessary, and it is through the Supreme Court and the legal system as a way to inculcate society.[143] Those are words of decades ago, and the legal system is only now at the outset of an opportunity to consider the Standing for Nature doctrine's merits.

H. The Legal Basis

River Ecosystem centers on a group of human representatives suing on behalf of the ecosystem composing the Colorado River. The suit alleges the state government has failed to recognize the Ecosystem's rights, and that it continues to create and pursue policy that contributes to

[140] Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. Rev. 931 (1998).
[141] *Id.* at 1004.
[142] Stone, *supra* note 135, at 11.
[143] Stone, *supra* note 135, at 36.

Bilof: The Right to Flourish, Regenerate, and Evolve

the Ecosystem's demise. First, the suit asks the federal district court to declare the Ecosystem a legal person. Upon a determination of the Ecosystem's personhood, the suit seeks the recognition of the Ecosystem's rights, so that the court may then acknowledge the State's violation of those rights. Finally, the suit begs the court's protection from further governmental violation by compelling the State to recognize the Ecosystem's rights.

The plaintiff contends the court has the authority to grant this remedy through the function of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, which states that

> any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.[144]

This statute does not confer jurisdiction, so the lawsuit also invokes diversity of citizenship under 28 U.S.C. § 1332 (the Colorado's waters cannot be said to reside in only one state;), as well as federal question subject matter under § 1331, and original jurisdiction under § 1343, subsection (a)(3) of which is specifically used

> [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all *persons* within the jurisdiction of the United States.[145]

The use of this subsection is important because (1) of course, the State and Governor are the defendants, and (2) the very purpose of the suit is to establish the personhood and rights of the Colorado River Ecosystem under the U.S. Constitution. This statute establishes the jurisdiction of U.S. district courts over "any civil action authorized by law to be commenced by any person," to recover for the deprivation of any right, and this subsection is designed for instances where a government actor is the cause of that deprivation.[146]

[144] 28 U.S.C. § 2201(a). Also notable is the statutory language qualifying that a party's rights may be declared "whether or not further relief is or could be sought." This feature reveals the design of the statute to operate commonly as a summary proceeding in cases of undisputed facts or solely questions of law. *See* Advisory Notes.

[145] 28 U.S.C. § 1343(a)(3) (emphasis added).

[146] 28 U.S.C. § 1343(a)(1).

Published by GGU Law Digital Commons, 2018

For the court to be able to give declaratory relief under § 2201, there must be "a case of actual controversy."[147] The statute takes this language directly from the U.S. Constitution.[148] Courts, in the context of this statute, have interpreted those words to mean that the controversy must be "of a justiciable nature."[149] If the court finds that an actual controversy exists, "[t]he existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared."[150]

The complaint asserts that there is an actual case and controversy, and legal uncertainty, as to whether the Colorado River Ecosystem is a legal person and thereby has inherent rights protected by the Due Process Clause of the Fourteenth Amendment.[151] The complaint defines the Ecosystem's inherent rights as the "right to exist, the right to flourish, the right to regenerate, the right to be restored, and the right to naturally evolve."[152] In this way, the litigation strategy to protect the Colorado is radically different from the traditional citizen-suit model, like that being used in the attempted protection of the Suwannee.

Here, the Ecosystem becomes more than an object—it becomes an *actual party* to the suit and a legal actor speaking directly to the court for the recognition of its own standing and rights. In *River Ecosystem*, a win means the Ecosystem's entitlement to legal status, so that it may litigate for its own protection, whereas in *Pilgrim's*, a win means the government-set limits on toxic discharges will be enforced. The difference between both the legal posture and potential results of the two different suits is staggering, and reflects the gap in modern jurisprudence and social consciousness about the value of Nature—and its role in sustaining the human economy.

The complaint frames the issue as the need for the Ecosystem to protect itself, because "[t]hreats to the Colorado River Ecosystem are threats to life."[153] This stance is in stark contrast with the traditional legal notion that the Earth is property, or at best, that the environment is passive and must be protected from human encroachment by paternalistic legislation. The major problem with this latter approach has always been where to draw the line: the fine balance between limiting environmental degradation without hindering industry.

---

[147] 28 U.S.C. § 2201.

[148] U.S. CONST. art. III.

[149] Ashwander v. TVA, 297 U.S. 288, 325 (1936).

[150] USCS Fed Rules Civ Proc R 57 Notes of Advisory Committee. *FRCP 57 governs the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201.

[151] River Ecosystem Complaint, *supra* note 123, at 27.

[152] *Id.*

[153] *Id.* at 25.

History has shown that governments and the law have failed to safeguard the environment upon which civilization depends. In a system that has so much hope, trust, and reliance on the mechanical wrenching of the adversarial push-and-pull to extract justice, perhaps it is only logical that Nature be given the power to advocate for itself—especially when its foremost historical enemies, governments and corporations, yield so much legal force.

I. The Amendments and Juridical Personhood

The Petition Clause of the First Amendment protects the right to petition a court for the redress of grievances. The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee that the government shall not deprive any person of "life, liberty, or property." Because a lack of legal recognition violates its due process and petition rights, the plaintiff contends that the Colorado River Ecosystem should be recognized as a "person" as the word is used in the Constitution.[154] This effort towards establishing juridical personhood for the Ecosystem is the first step towards having its rights legally acknowledged and enforced. This point is where the crux of the litigation lies: if the plaintiff is unable to persuade the court that the Ecosystem should be considered a legal person, the claims for the recognition of its rights will fail.

But while the idea of a non-human entity as a "person" may seem strange to the average American, lawyers and jurists (and boardroom executives) have long been familiar with the idea. In fact, modern law holds many examples of the attribution of constitutional rights to "non-natural" entities, just as it holds examples of the historical denial of the rights of some groups of natural persons (e.g. women, slaves, etc.). The most prominent example of a non-natural legal person is that ubiquitous actor, the hero and villain of modern times: the Corporation.

J. Corporations Are People Too

Corporate personhood stems from a rationale of economic efficiency, but has since germinated into a broader philosophy legitimizing the continued expansion of corporate rights under a theory of aggregation.[155] Under this modern theory, corporations derive their own separate

---

[154] *Id.*

[155] *See* James G. Wright III, *A Step Too Far: Recent Trends in Corporate Personhood and the Overexpansion of Corporate Rights*, 49 J. Marshall L. Rev. 889, 890 (2016); Brendan F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go From Here?*, 58 S.D. L. Rev. 119, 140 (2013).

rights from the aggregation of the human individuals of which they are comprised.[156] Although the idea of corporations existing as legal entities with the ability to contract, to sue, and to own property is relatively ancient, our modern conception of the "corporate person" is distinct in that now corporations are afforded constitutional rights extending beyond the mere practicality of economic function.[157] Indeed, it has been observed that the modern "Court takes the notion of [corporate] 'personhood' quite literally, attempting to expand the rights of corporations to equal that of natural persons."[158]

K. The Grounds Upon Which the Corporate Person Stands

Corporate personhood is the notion that the U.S. Constitution "provides for equal identity between corporations and persons."[159] The evolution of corporate personhood in modern American jurisprudence has manifested expansions in unanticipated ways, leading scholars to observe that, "corporate personhood is quicksilver; it seems an endlessly adaptable concept."[160]

The increase in the legal clout of corporations has had the parallel effect of contributing to environmental degradation. Because the greatest polluters are industrial, the continuing expansion of the rights of corporate persons empowers these super-human aggregates, whose destructive activities are exponential in force. Lawsuits to protect natural areas are often against corporate defendants, brought by environmental groups and concerned citizens. But because the legal system has developed alongside economic expansion, business interests often trump those of concerned environmentalists, especially when it comes to standing requirements.

And so, behemoth industrialists like JBS not only have increased resources and capital, but they also enjoy a legal status that affords them

---

[156] Wright III, *supra* note 155, at 890-91.

[157] Gwendolyn Gordon, *Environmental Personhood,* 15-16, SSRN (March 7, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935007.

[158] Wright III, *supra* note 155, at 908. The contemporary Court's view seems in close concurrence with Mitt Romney's famous quip to hecklers during the 2011 presidential campaign: *see* Ashley Parker, *'Corporations Are People,' Romney Tells Iowa Hecklers Angry Over His Tax Policy* N.Y. Times (Aug. 11, 2011) http://www.nytimes.com/2011/08/12/us/politics/12romney.html.

[159] Nick J. Sciullo, *Reassessing Corporate Personhood in the Wake of Occupy Wall Street*, 22 Widener L.J. 611, 642-643 (2013).

[160] Gordon, *supra* note 157, at 2. And yet it the Court was never doubtful that a corporation could be considered a legal person: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." Santa Clara Cnty. v. S. P. R. Co., 118 U.S. 394, 397 (1886).

a variety of legal tools with which to lobby and litigate against environmental protections, and to wage their defense against suits to expose and prosecute their pollutive malfeasance. Governments, like that of the State of Colorado, often defer to the interests of big business on environmental matters, cooperating under the seduction of economic, infrastructure, and employment gains. American history has seen governments with varying degrees of alignment and deference to the corporate infringement of Nature's rights, some with less, some with more, but consistently and regardless of administrative policy, the laws and courts of the United States have failed to safeguard the natural ecosystems of America.

IV. The Necessary Evolution

The waters of the Suwannee are, by government acknowledgement, exceptionally pure and vital. The flow of the Colorado is undeniably epic and crucial: with it, millions of thirsts are quenched, crops irrigated, and the electricity of several metropolises fueled. The Suwannee is a target of neighboring water-scarce municipalities. The Colorado has been dammed and diverted so many times now that its waters rarely reach their oceanic destination. It is common to think of these victims as isolated bodies of a landscape, or azure veins on a map. But these units of water are actually pieces of elaborate ecosystems upon which the lives and the ultimate livelihood of American civilization depend.

The purpose of law is to promote and safeguard the health, welfare, and safety of a society. The role of government is to uphold and execute the law. But the government and the law have miscarried the value of natural ecosystems. Even with the legislated protection of agencies like the EPA, the degrative effect of regulated human activity on natural systems has been visibly profound. The EPA has shown itself to be insufficient, yet courts defer to its jurisdiction, presuming it will manage things appropriately. But the EPA tolerates exceedances and neglects to use the full strength of its power for punition and deterrence. As a federal agency, the EPA is subject to the ebbing policy whims of changing executives; the application of its powers and discretion have never been consistent.

The Colorado is a foremost example of the failure of law and government to sustain a natural system. The extensive century of law-making around the Colorado has focused almost exclusively on damming and divvying up its flow. The legal battles that have been waged, including the longest running U.S. Supreme Court case in history,[161] have been

[161] Arizona v. California, 373 U.S. 546 (1963).

singularly-centered; apportionment between competing human groups and needs is the unwavering, all-else-overshadowing concern.

But the short-sighted human needs of the past and present have neglected to appreciate the living quality of the resources that have been subjugated, sapped, and sullied in their service. Rivers are pieces of intricate ecosystems; ecosystems are living entities, and therefore can be killed and eradicated. Modern American civilization, through its laws and governments, has endorsed, supported, and upheld the despoilment of the natural ecosystems under its jurisdiction—without adequate consideration of their finite mortality. Therefore, those elements of American society endowed with the power and position to protect the environment, have been and continue to be complicit in its destruction.

A. When the Government Has Failed to Protect a River, The Ecosystem Must Be Able to Protect Itself

À la base, *Pilgrim's* and *River Ecosystem* are the same: they both seek judicial remedy to the problem of a river's ruin. Substantively, however, their legal approaches are vastly different. *Pilgrim's* follows the traditional model, as designed by Congress and enacted, for this context, as the citizen suit provision of the CWA.

At best, the *Pilgrim's* plaintiffs may win a court order forcing Pilgrim's to comply with the toxic discharge limits in its NPDES permit, and "to refrain from further violations."[162] A court could also issue an order obligating Pilgrim's to "remedy, mitigate, or offset the harm caused by [its] violations," and issue a civil penalty against the corporation for each day of its violations. Superficially, existing law does empower a court to address the threefold objectives of punishment, deterrence, and restoration. Nonetheless, past examples of (a) the EPA's regulation; (b) the historical pattern of court enforcement; in addition to (c) the alarmingly continuous increase in ecological degradation nationwide since the EPA's creation, have shown this avenue to be ineffectual.

Conversely, *River Ecosystem* proffers the opportunity for a legal paradigm shift. Even as the potency of the EPA deflates, and the current executive and lawmakers veer government policies far from environmental protection, a declaration of the Ecosystem's rights by the judicial branch could serve as a necessary check towards a balance of the type intended by the Constitution's framers. Such a declaration would not only force businesses and governments to reconsider their treatment of

[162] Plaintiff's Complaint at 42, Env't Am. v. Pilgrim's Pride Corp., (2017) (No. 3:17-cv-00272-TJC-JRK).

(and attitudes toward) ecological resources—and the effects thereupon of human (mainly economic) activities—but it would also set an important precedent with which to evolve America's legal consciousness. In a country where less than a fifth of the rivers are officially considered "good" and "healthy biological communities," while the rest "can't support healthy aquatic life," that such an evolution is necessary seems self-evident.[163]

Another difference between the *Pilgrim's* model and that of *River Ecosystem,* is the form of the human representatives standing for the respective rivers. In *Pilgrim's*, the conservationist groups leading the suit sought out select individuals with whom some articulable relationship to the river can be proved. This practice is widespread, and necessary, in environmental litigation because of the particularized injury-in-fact requirement of standing. As applied to citizen suits, a stringent injury-in-fact standard creates a needless procedural obstacle. Congress explicitly wrote citizen suit provisions into environmental regulations with the intention of loosening standing obstacles in the environmental context; it was the Court which tightened up the standard. Accordingly, the current standing requirements in front of environmental suits could be overcome by the Court's expansion of juridical personhood to include natural ecosystems.

A next friends-type designation would allow for more specialized and motivated representatives, such as John Weisheit, *River Ecosystem*'s designated "riverkeeper," and Owen Lammers, another named next friend in the suit. Respectively, these two represent (1) a hands-on, lifetime local inhabitant, with decades of experience navigating the waters, and over twelve years of dedication to scientific research in the area; and (2) an experienced organizer and activist focused on developing sustainable management policies within the region.

In contrast to the unique representatives conservation groups are often forced to seek out to overcome the hurdle of standing, the next friends concept opens courtroom doors to those holding great dedication and experience with the ecosystem who may otherwise have trouble showing a particularized injury. But this is not to say that just anyone could file a lawsuit on behalf of an ecosystem because that could lead

[163] Dashiell Bennett, *Half of All U.S. Rivers Are Too Polluted for Our Health,* THE ATLANTIC (Mar. 27, 2013) https://www.theatlantic.com/national/archive/2013/03/half-all-us-rivers-are-too-polluted-our-health/316027/; *see* U.S. Environmental Protection Agency, *EPA Survey Finds More Than Half of the Nation's River and Stream Miles in Poor Condition*, WATER ONLINE (Mar. 26, 2013), https://www.wateronline.com/doc/epa-survey-finds-half-nations-river-stream-miles-poor-condition-0001.

parties who exploit or over-use natural resources to also file like-named lawsuits, with the furtive purpose of reducing protections.

The purpose of the next friends concept is not to eliminate the standing requirement for environmental suits. Rather its objective is to refine its adequacy: just as a *guardian ad litem,* in the family law context, is appointed to serve "the best interest of the child," so too would the next friend be evaluated in terms of an ability to represent the "best interests" of the Ecosystem, as adjudged by the court—through a lens wider than that of the particularized injury-in-fact standard. That way, more environmental cases could be heard and decided on their merits.

Moreover, because corporations are legal persons with expanded constitutional rights, and because the greatest polluters are industrial, the development of the legal system alongside economic expansion has granted those superhuman aggregates of resource, capital, and political influence a voice in the courts. When it comes to environmental laws, that voice is most often heard either pushing for less limitations or defending against allegations of causing harm.

V. Conclusion

On November 17, 2017, Pilgrim's settled the lawsuit against it by agreeing to pay $1.43 million in penalty fees. Some of that amount will go to the federal and Florida state governments, but the greater part will be paid to Stetson University to create a Sustainable Farming Fund, which will be administered by the Institute for Water and Environmental Resilience at the school.[164] On November 7, ten days before the announcement of that settlement, the net income attributable to Pilgrim's Pride for the third-quarter of 2017 had increased from $98.66 million to $232.68 million—a 230% increase.[165]

So, while the settlement contains provisions that appear to favor the river, along with steps toward evolving the future environmental impacts of agricultural practices, the result poses concerns about the prospect of the Suwannee's enduring purity. First, the allowance levels of the Pilgrim's plant's NPDES permit still remain legal limits: about 1.5 million

[164] Jamie Wachter, *Pilgrim's Pride Settles Water Pollution Lawsuit* The Suwannee Democrat (Nov. 16, 2017) http://www.suwanneedemocrat.com/news/pilgrim-s-pride-settles-water-pollution-lawsuit/article_9c18e536-ca49-11e7-b4e0-37646c7f0746.html.

[165] *Pilgrim's Pride Q3 Profit Rises,* NASDAQ (Nov. 7, 2017) www.nasdaq.com/article/pilgrims-pride-q3-profit-rises-20171107-02068.

gallons of wastewater from the processing plant are pumped into the Suwannee River daily.[166]

Second, Pilgrim's is exempted from its obligation to limit its plant's toxic discharges by purchasing new equipment and installations if the discharge of wastewater into the Suwannee has been *scheduled* to be eliminated through an alternative plan approved by the Florida Department of Environmental Protection, prior to the deadlines set for compliance.[167] The same exemption applies to the obligation to pay penalties from any future violation to the Farming Fund. Given the track record of the Florida EPA's leniency towards agri-business, this provision is not encouraging.

Third, the penalty fees, described as "historic for the state [of Florida]," represent a mere 0.6 percent of the company's net income for the year's 3rd quarter.[168] That number speaks volumes about the state government's attitude toward enforcement; in this case the state "had not taken any meaningful action in well over 1,000 days of violations over five years."[169] And so, while this settlement represents a victory for the citizens who stepped in because their "state officials were not doing enough to protect one of Florida's most important rivers,"[170] it also poses an echoing query about what would have happened had the particular facts of the case not so-easily supported the citizen-plaintiffs' standing.

Meanwhile, less than a month later, on December 4, 2017, Magistrate Judge Nina Y. Wang of the U.S. District Court for the District of Colorado issued an order dismissing plaintiff Colorado River Ecosystem's complaint with prejudice.[171] The court order thereby granted the plaintiff's motion to dismiss its amended complaint; denied as moot the defendant's motion to dismiss the amended complaint; and directed the Clerk of the Court to terminate the case.[172] Approximately three weeks earlier, on November 16, the Colorado Attorney General's office had sent a letter threatening that if the plaintiffs did not withdraw the case it would file sanctions against Jason Flores-Williams, the attorney repre-

[166] Eileen Kelley, *Settlement proposed against Chicken-Processing Plant that Dumps into Suwannee*, NAT'L ENVTL. LAW CTR. (Nov. 15, 2017), https://www.nelconline.org/settlement-proposed-lawsuit-against-chicken-processing-plant-dumps-suwannee-river.

[167] Wachter, *supra* note 164 (emphasis added).

[168] Kelley, *supra* note 166.

[169] *Id.*

[170] *Id.*

[171] *See* Order 12/4/17, Col. River Ecosystem v. State (2017) (No. 1:17-cv-02316-NYW).

[172] *Id.*

senting the Colorado River Ecosystem and its next friends.[173] In the plaintiff's motion to dismiss its own complaint, Flores-Williams wrote:

> The Complaint represented a good faith attempt to introduce the Rights of Nature doctrine to our jurisprudence . . . The undersigned [counsel for plaintiff] continues to believe that the doctrine provides American courts with a pragmatic and workable tool for addressing environmental degradation and the current issues facing the Colorado River. That said, the expansion of rights is a difficult and legally complex matter. When engaged in an effort of first impression, the undersigned has a heightened ethical duty to continuously ensure that conditions are appropriate for our judicial institution to best consider the merits of a new canon. After respectful conferral with opposing counsel per D.C.COLO.LCivR 7.1(A), Plaintiff respectfully moves this Honorable Court to dismiss the Amended Complaint with prejudice.[174]

Following the court's order, Colorado Attorney General Cynthia Coffman issued a statement saying the "Colorado River Ecosystem asked for the dismissal after [her] office filed a motion to dismiss the amended complaint."[175] But Attorney General Coffman's statement did not mention the threatened sanctions. Instead, it declared that the case "unacceptably impugned the State's sovereign authority to administer natural resources for public use."[176] This argument, grounded in the Tenth Amendment, is a common response against uses of the federal courts for environmental protection.

However, the geographic and economic expanses of a single ecosystem interweave the interests and fates of different communities and cannot be said to fall, even in part, under the exclusive jurisdiction of one: the Colorado's watershed is domiciled in six different states, plus Mexico. By the very nature of ecological interconnectivity, the health of America's ecosystems should be understood and addressed as a national (i.e. federal) question. Nevertheless, because of the State's threatened sanctions against Flores-Williams, Attorney General Coffman's claim

---

[173] Lindsay Fendt, *State Files Again to Dismiss Colorado River "Personhood" Suit, Threatens to Sanction Lawyer*, COYOTE GULCH (Dec. 4, 2017), https://coyotegulch.blog/2017/12/04/state-files-again-to-dismiss-colorado-river-personhood-lawsuit-threatens-to-sanction-lawyer/.

[174] Plaintiff's Motion to Dismiss, Col. River Ecosystem v. State (2017) (No. 1:17-cv-02316-NYW).

[175] Chris Walker, *Attorney to Withdraw Colorado River Lawsuit Under Threat of Sanctions*, WESTWORD (Dec. 4, 2017), http://www.westword.com/news/colorado-river-lawsuit-to-be-with drawn-due-to-potential-sanctions-9746311.

[176] *Id.*

that the "case unacceptably impugned the State's sovereign authority" cannot be tested on its merits.

In her announcement, Attorney General Coffman observed that "[u]nder the terms of dismissal, the case cannot be brought again in federal court."[177] Though it may be true that the terms of the dismissal preclude the case from being brought again in federal court, this prejudice only applies to the case's plaintiffs; the dismissal does not prevent a different plaintiff from bringing a different suit to establish the same doctrine.

So, while the Colorado River Ecosystem may be left unrecognized, the merits of Ecosystem Personhood and the Rights for Nature doctrine remain untried by an American court. Flores-Williams wrote of the need for appropriate "conditions" when bringing a case of first impression. But environmental issues, particularly those related to water quality and scarcity in the U.S., show no signs of abatement.

In response, a shift in consciousness is needed; juridical personhood for the nation's environmental systems could be the way to open such a door. The administrative, economic, and legal systems of America are structured with an inherent, fatal blindness to the wellbeing of the natural systems that support them. Notions of property and apportionment, measured solely in terms of human benefits and injuries-in-fact, are not conducive to the health and protection of the ecosystems that underpin our civilization.

The legal recognition of ecosystem personhood not only widens the scope of the types of injuries a court can determine, as concerns environmental harm, but it also holds the potential to progress cultural attitudes and begin inculcating a new social consciousness of the human relationship with the environment. In the same way that the Court thrust a change upon the American social landscape with its decision in *Brown v. Board of Education*,[178] so can it overcome staunched, destructive notions again by recognizing the constitutional personhood, and inherent rights, of the ecosystems within its jurisdiction: "a society in which it is stated, however vaguely, that 'rivers have legal rights' would evolve a different legal system than one which did not employ that expression, even if the two of them had, at the start, the very same 'legal rules' in other respects."[179] Yesterday, today, and tomorrow America, and the world, stand at a turning point upon which the fate of the planet's life-blood—

[177] *Id.*

[178] Brown v. Bd. of Ed*uc.*, 347 U.S. 483 (1954) (holding that racial segregation in public schools is unconstitutional).

[179] STONE, *supra* note 135, at 33.

and thereby the lives of its inhabitants and their economies—is dependent.

Despite great resistance and apathy against the expansiveness of the current environmental crises, the Court's recognition of the rights of Nature could re-orient the American legal system, and thereby American society, setting forth the evolution of the nation in a new direction. Just as *Brown v. Board* was followed by defiance, experimentation, success and failure, ultimately the first step undertaken by the Warren Court in recognizing the unconstitutionality of race-based school segregation led to a fundamental change in the way subsequent generations of Americans thought and behaved. Such a step is crucially needed now, because the right to flourish, regenerate, and evolve—although framed for an ecosystem—is really the right to flourish, regenerate, and evolve American civilization.