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In Brief
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Whistleblower and First Amendment Protection

***Berlyavsky v. N.Y.C. Department of Environmental Protection*, No. 16-1096-CV, 2016 WL 7402667 (2d Cir. Dec. 20, 2016) (unpublished).**
The Second Circuit upheld a trial court's dismissal of a suit by a former agency employee alleging employment discrimination and retaliation. The former New York City Department of Environmental Protection employee was fired after he reported concerns about the collection and handling of wastewater samples. The court of appeals held that the employee did not properly plead a claim for First Amendment retaliation. The employees' job was to collect water samples and thus he was speaking in his role as a public employee and not as a public citizen. When public employees make statements pursuant to their official duties, the court held, the Constitution does not protect their statements from employer discipline.

***Competitive Enterprise Institute v. Michael E. Mann*, Nos. 14-CV-101 and 14-CV-126, 2016 WL 7404870 (D.C. Ct. App. Dec. 22, 2016).**
The Court of Appeals for the District of Columbia held that Penn State University climate scientist Michael Mann may bring a suit claiming defamation and intentional infliction of emotional distress based on articles that appeared on the websites of the Competitive Enterprise Institute and the National Review. Mann's complaint claimed that the articles, which criticized Mann's conclusions about global warming and accused him of deception and academic misconduct, and compared his alleged deception to deceptions by Penn State's disgraced assistant football coach, Jerry Sandusky, contained false statements that injured his reputation. The trial court ruled that Mann's claims were likely to succeed on the merits and thus were sufficient to defeat a motion to dismiss based on the District of Columbia's Anti-Strategic Lawsuits Against Public Participation Act. The Court of Appeals affirmed, concluding that Mann presented sufficient evidence for a jury to find, by a preponderance of the evidence, that the statements were false, defamatory and, by clear and convincing evidence, that appellants did so with actual malice. The case was remanded to the district court to determine whether the allegations are either verified or discredited. "If they are proven to be false, the statements breach the zone of protected speech."

CERCLA

***Alcoa Inc. v. APC Investment Co.*, No. 2:14-cv-06456, C.D.Cal. Sept. 12, 2016).**
A district court denied a motion to dismiss CERCLA contribution suits against Exxon Mobil Corp. and Continental Heat Treating Inc. for groundwater remedial costs at operable unit No. 2 of the Omega Superfund site in California. Exxon and Continental argued that a 2005 Administrative Order on Consent between them and EPA provided them with contribution protection. The issue was whether a clause in the AOC providing contribution protection for "matters addressed in the

AOC" encompasses the contribution for the OU2 costs in question. The federal government filed an *amicus* brief arguing that the 2005 settlement addressed liability for response costs at the Omega Chemical site near Whittier, not hazardous substances releases from separate properties like that in Santa Fe Springs. The district court agreed, stating that courts analyzing "matters addressed" language in consent orders "have refused to include any matter not expressly contemplated in the agreement."

***Asarco, LLC v. Noranda Mining, Inc.*, 844 F.3d 1201 (10th Cir. 2017).**
The Tenth Circuit reversed a trial court's decision that ASARCO was estopped from pursuing its CERCLA contribution claims against Noranda Mining because of prior representations it made to a bankruptcy court in 2005 concerning its settlement with EPA for the site. In the bankruptcy settlement, ASARCO agreed to pay $1.79 billion to claims at 52 sites, including $7.4 million for the site at issue. Noranda argued that ASARCO represented that the $7.4 million settlement was fair and represented ASARCO's proportionate liability and thus should not now be allowed to argue for contribution on the grounds that it had paid more than its fair share. The Tenth Circuit held that ASARCO's positions are not clearly inconsistent given the overall context of the settlement approved by the bankruptcy court, and that ASARCO "would not necessarily gain an unfair advantage by being allowed to pursue its claim now."

AIR QUALITY

***USA v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).**
A divided Sixth Circuit reversed, for the second time, the district court's grant of summary judgment in favor of a power company, DTE Energy, that was sued by EPA for failure to obtain a permit prior to construction pursuant to the New Source Review program. Prior to construction, DTE informed the Michigan DEQ that the overhaul of one of its units was not a major modification because it was routine maintenance, repair and replacement and, in addition, that the emissions were exempt based on demand growth. EPA's enforcement action was dismissed by the district court, but on appeal the 6th Circuit reversed, holding that EPA could bring an enforcement action based on projected increases in emissions without first showing that emissions had increased after the project was constructed. *U.S. v. DTE Energy Co. (DTW I)*, 711 F.3d 643 (6th Cir. 2013). On remand, the district court again entered summary judgment for DTE, focusing on language in the 6th Circuit's first opinion that the NSR regulations allowed operators to undertake projects "without having EPA second-guess their projections." The 6th Circuit reversed again, and the panel rendered three opinions. Judge Daughtrey's opinion states that EPA is not prevented by the court's prior opinion in DTE I from challenging DTE's preconstruction projections, and that there are genuine issues of material fact that preclude a grant of summary judgment for DTE. His opinion also states that actual post-construction emissions have no bearing on the question whether DTE's preconstruction projections complied with the NSR regulations. Judge Batchelder concurred in the judgment, noting her continuing disagreement with *DTE I*, but conceding that it is the law of the Sixth Circuit. She emphasizes, however, that the rules contain no requirement that the operator obtain EPA review or approval of the pre-construction predictions, but EPA "deems both the operator's prediction and reality meaningless if EPA disagrees." Judge Rogers' dissent concludes that DTE complied with the basic requirements of the regulations for making projections and thus the district court properly

granted summary judgment. "[R]equiring DTE to establish that its application of the exclusion was more reasonable than EPA's application of the exclusion would turn New Source Review into a *de facto* prior approval scheme by requiring a district court to hold a trial to resolve this issue before the operator could proceed to construction."

Bahr v. U.S. Environmental Protection Agency, 836 F.3d 1218 (9th Cir. 2016).
The Ninth Circuit rejected in part EPA's approval of the Arizona plan for airborne particulates in Maricopa County. Arizona submitted a plan revision pursuant to 42 U.S.C. 7513a(d), which requires a five percent annual reduction in PM-10. The court agreed with petitioners that EPA's approval was contrary to the statute because the contingency measures included in the plan had already been implemented. The court of appeals declined to defer to EPA's interpretation of the contingency measures requirement because under the plain language of Section 7513(c)(9) contingency measures are measures that will be taken in the future, not measures already implemented.. However, the court rejected the environmental petitioners arguments that the plan did not include best available control measures and most stringent control measures as of 2012, holding that under the statute such demonstrations do not apply to a five percent reduction plan.

***Murray Energy Corp. v. McCarthy,* No 5:14-ccv-00039, 2017 WL 150511 (N.D.W.Va., Jan. 12, 2017), appeal filed, No. 17-1170 (4th Cir. Feb. 6, 2017).**
A federal district court ordered EPA by July 1, 2017 to submit an evaluation of plant closures and job losses in the coal industry and other entities affected by rules affecting coal mining and power generation. On October 17, 2016, the court had granted summary judgment for plaintiffs and ordered EPA to provide, within two weeks, a plan and schedule for compliance with Section 321(a) of the Clean Air Act, which requires the Administrator to conduct continuing evaluations of potential loss or shifts of employment which may result from administration or enforcement of the Clean Air Act and applicable implementation plans. In response, EPA disagreed with the court's interpretation of Section 321(a) and that it would take EPA two years to develop a methodology to use in an effort to comply with this provision. The district court was not pleased. In its final order dated January 11, 2017, the court called EPA's response "wholly insufficient, unacceptable, and unnecessary. It evidences the continued hostility on the part of EPA to acceptance of the mission established by Congress." Reviewing EPA's responses to questions raised by members of Congress, the court's opinion states that through it all EPA Administrator "McCarthy consistently articulated the agency's statutory interpretation that the precise question addressed by Section 321(a) is whether specific lay-offs result from EPA's actions, but she just as consistently admitted explicitly and implicitly that her agency is not conducting any efforts to answer it and claimed answering the question has 'limited utility.'" The court's order emphasized that in Section 321(a) "Congress unmistakably intended to track and monitor the effects of the Clean Air Act and its implementing regulations on employment in order to improve the legislative and regulatory processes." In addition to its order requiring EPA to evaluate the coal industry and related industries by July 1, 2017, the court also ordered EPA by December 31, 2017 to submit evidence to the court demonstrating that EPA "has adopted measures to continuously evaluate the loss and shifts of employment which may result from its administration and enforcement of the Clean Air Act." Given the pending appeal to the Fourth Circuit, it is unclear which of these mandated deadlines will be met.

WATER QUALITY

***Fairweather Fish Inc. v. Pritzker,* No. 3:14-cv-05685, 2016 WL 6778781 (W.D.Wash., Nov. 16, 2016), appeal filed, No. 17-35037 (9th Cir. Jan. 17, 2017).**

A federal district court partially vacated and remanded a rule promulgated by the National Oceanic and Atmospheric Administration (NOAA) regulation for fixed gear halibut and sablefish fisheries in the North Pacific Ocean. The rule prevented fishermen from using hired masters to harvest any quota shares obtained after February 12, 2010. The court held that the final rule was impermissibly retroactive with respect to the regulation of halibut quota shares because it "goes well beyond frustrating Plaintiffs' business expectations." The court accordingly vacated the regulation of halibut quota shares before July 28, 2014, the date the final rule was published. The court also remanded the regulations for compliance with the national standards for fishery conservation and management, 16 U.S.C. 1851(a).

***Ohio Valley Environmental Coalition v. Fola Coal Co. LLC,* No. 16-1024, 2017 U.S. App. LEXIS 108 (4th Cir. Jan. 4, 2017).**

The Fourth Circuit affirmed a district court decision holding that a coal company, Fola Coal Co., violated the Clean Water Act and ordering it to take corrective measures. The environmental groups had alleged that Fola violated a narrative permit condition that required compliance with water quality standards. In particular, the plaintiffs alleged that Fola discharged ions and sulfates causing increased conductivity in the receiving stream. The company argued that the state knew of the ions in its discharge and set no specific limits on conductivity, that Fola was in compliance with the effluent limits in its permit, and therefore the NPDES permit shields it from liability. The Fourth Circuit rejected Fola's argument that the permit language was ambiguous and should be read as imposing obligations on the state, not the permit holder. The Fourth Circuit also rejected Fola's argument that a permit shields its holder from liability as long as it complies with effluent limits in its permit, explaining that numerical limits on specific pollutants are not the only proper subject of regulation under the Clean Water Act. "The terms of Fola's permit required it to comply with water quality standards. If Fola did not do so, it may not invoke the permit shield."

***Conservation Law Foundation v. U.S. Environmental Protection Agency,* No. 15-165, 2016 U.S. Dist. LEXIS 172117 (D. R.I. Dec. 13, 2016).**

A district court dismissed a suit by an environmental group alleging that EPA determined that certain industrial dischargers contribute to water quality violations, but failed to notify the dischargers that they must obtain NPDES permits under the Clean Water Act. In particular, plaintiffs alleged that EPA's approval of Total Maximum Daily Loads (TMDLs) for certain Rhode Island water bodies constitutes a determination that stormwater controls are needed for discharges from industrial facilities. The court found that nothing in the TMDL documents indicate that EPA has made a determination that stormwater discharges from point sources contribute to a violation of water quality standards or that additional NPDES permits should be required. Because EPA's election not to require permitting does not constitute a failure to perform a nondiscretionary duty, the court found that it has no jurisdiction over the matter.

***Gulf Restoration Network v. Lisa P. Jackson,* No. 2:12-cv-00677,2016 U.S. Dist. LEXIS 173459 (E.D.La. Dec. 16, 2016).**

A district court rejected a claim by environmental groups that EPA improperly denied a petition urging EPA to impose federal numeric water quality standards for the portion of the ocean protected by the Clean Water Act but outside the jurisdiction of any state. In particular, plaintiffs urged EPA to establish standards to control nitrogen and phosphorus pollution in the Mississippi River and the Northern Gulf of Mexico. EPA declined to make a "necessity determination," which the court viewed as "essentially deciding not to decide." In particular, EPA concluded that the most effective approach would be to build on its efforts to work cooperatively with states and tribes to strengthen nutrient management programs. The court concluded that EPA's assessment of the best approach to address nitrogen and phosphorus pollution is entitled to deference, and the reasons given in EPA's denial were not arbitrary, capricious or contrary to law.

NEPA

***Great Basin Resource Watch v. Bureau of Land Management,* No. 14-16812, 2016 WL 7448094 (9th Cir., Dec. 28, 2016).**

The Ninth Circuit affirmed in part and vacated in part a district court judgment in a suit challenging the Bureau of Land Management's approval of a molybdenum mining operation in Nevada. The court in particular held that BLM's analysis of the project under NEPA was deficient because the selection of baseline levels of zero for several air pollutants was unsupported, and the analysis of cumulative air impacts was deficient because the BLM made no attempt to quantify the cumulative air impacts of the project or the effects of other activities. The court of appeals declined to address plaintiffs' claim that BLM violated its duty to protect lands withdrawn under Executive Order Public Water Reserve 107, stating that BLM should first address the deficiencies in its NEPA analysis. The court also asked BLM, on remand, to clarify its position whether four springs in the area of the project were covered by the Executive Order.