FEATURE ARTICLE

NEW STRATEGIES FOR INJECTING CLIMATE CHANGE ANALYSIS INTO AGENCY DECISION-MAKING LIKELY A WASHOUT

By Richard S. Davis and Graham St. Michel

For some time now, advocates have been seizing on the growing public awareness of global climate change in hopes of injecting climate change considerations into federal agency decision-making under a host of environmental statutes. With mixed success, these efforts have continued in a trial-and-error fashion under different environmental laws. Recently, environmental groups have turned their attention to the Clean Water Act (CWA) and other water resource protection laws as potential vehicles to address climate change.

In the last six months alone, these groups have filed novel lawsuits seeking to introduce climate considerations into agency decision-making under the CWA § 404 permitting program and the CWA § 303 total maximum daily load (TMDL) approval process. Recently, the Natural Resources Defense Council and Sierra Club (plaintiffs) filed a lawsuit against the U.S. Army Corps of Engineers (Corps), challenging a § 404 permit tied to the construction of a $5.5 billion coal-to-liquids (CTL) fuel plant in Ohio. *See, Natural Resources Defense Council v. U.S. Army Corps of Engineers*, Case No. 09-00588 (N.D. Ohio filed Jan. 14, 2009). *See,* related article at 1 *Climate Change L. & Pol'y Rptr* 354 (April 2009).

Others are pressing to alter a wetlands restoration project to account for anticipated climate change-related impacts, such as rising sea levels. If successful, these lawsuits could establish precedent requiring greater consideration of climate change implications in water-related decisions and buoy efforts to force climate considerations into new areas of agency decision-making. On the other hand, despite the growing public concern and the novelty of such arguments, the use of water resource protection laws as a ladder to reach climate change issues stands on shaky ground.

Background

Efforts to address climate change through agency decision-making are nothing new in the environmental law arena. As early as 1990, advocates succeeded in using the National Environmental Policy Act (NEPA), which requires federal agencies to evaluate the environmental impacts of a proposed action, to force federal agencies to consider climate impacts of proposals. *See, City of Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990) (holding that the NHTSA failed to assess the climate change impacts of its decision to reduce fuel economy standards); 42 U.S.C. § 4332(2)(C). More recently, advocates used NEPA to sue the Export-Import Bank of the United States and the Overseas Private Investment Corporation, claiming that these agencies failed to consider the climate implications of financing overseas fossil fuel projects. *See, Friends of the Earth, Inc. v. Watson*, ___F.Supp.2d___, Case No. C 02-4106 JSW (N.D. Cal. 2005).

Advocates have also used climate change arguments to influence agency decision-making under the Endangered Species Act (ESA). In 2005, they petitioned the Department of the Interior to list the polar bear as an endangered species, citing loss of habitat associated with rising sea levels as a primary justification. In 2008, the agency listed the polar bear as a threatened species, marking the first time a species has been designated specifically because its habitat is threatened by climate change and sparking a firestorm of litigation over the designation and the propriety of considering climate concerns in ESA

decisions. Lawsuits filed under the Clean Air Act also have succeeded in forcing agencies to address greenhouse gas (GHG) emissions. *See, Friends of the Chattahoochee v. Longleaf Energy*, Case No. 08-146398 (Ga.Super 2008) (invalidating an air permit and halting the construction of a coal-fired power plant due to the permit's failure to address CO_2 emissions), *appeal docketed*, (Ga.App. July 20, 2008). It comes as little surprise then that this strategy is now being applied under the CWA.

Analysis

Natural Resources Defense Council v. U.S. Army Corps of Engineers

Over the past six months, environmental advocates have ramped up efforts to address climate change concerns with the CWA and other water resource protection laws. *See, eg., Natural Resources Defense Council v. Army Corps of Engineers*, Case No.09-00588 (N.D. Ohio filed Jan. 14, 2009). The proposed project, which is the first of its kind in the United States, will impact 0.17 acres of jurisdictional wetlands. Shortly after the U.S. Army Corps of Engineers (Corps) issued a § 404 permit for the project, plaintiffs challenged it, alleging that the agency had not sufficiently analyzed the project's impacts.

The lawsuit hinges on the scope of the public interest review, which the Corps conducts when deciding whether to issue a § 404 permit for the discharge of dredged or fill material into jurisdictional waters. This review consists of "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). Ultimately, the Corps must balance the: "benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments." *Id.*

Plaintiffs allege that the § 404 permit for the proposed Ohio CTL plant is invalid because the Corps' public interest review ignored the climate change-related detriments arising from the project. Coal liquification is used to produce vehicle and jet fuel, a process that releases CO_2 to the atmosphere. According to plaintiffs, the CTL plant will have an annual carbon footprint of about 26 million tons of CO_2, with the plant itself emitting 12 million tons of CO_2 annually and the fuel produced at the facility emitting 14 million tons annually, but the Corps' review did not account for the detrimental impacts of these emissions. Instead, plaintiffs argue, the agency focused only on the overall benefits of the project—namely increased energy supply, job creation, and decreased emissions from liquid coal fuels compared to conventional transportation fuels. Thus, they charge, the Corps' decision-making process was arbitrary and capricious and the resulting § 404 permit violates the CWA.

In the end, environmental groups' position on "clean coal" may best be viewed via NRDC's own policy statement:

> The coal industry is touting a plan to transform millions of tons of coal into diesel and other liquid fuels using an expensive, inefficient process that releases large quantities of heat-trapping carbon dioxide into our air. The economic, social, and environmental drawbacks of liquid coal are significant: Relying on liquid coal as an alternative fuel could nearly double global warming pollution per gallon of transportation fuel and increase the harmful effects of coal mining on communities and ecosystems from Appalachia to the Rocky Mountains. Liquid coal is not the clean transportation fuel of the future but a dirty and costly industry of the past. America has better options.

See, "Liquid Coal: A 'Clean Fuel' Mirage; Choosing the Right Path for Fueling North America's Transportation Future," Chapter 4 of A Joint Report By the Natural Resources Defense Council, Western Resource Advocates and Pembina Institute (June 2007).

Conservation Law Foundation v. U.S. Environmental Protection Agency

Another effort to inject climate change considerations into agency decision-making under the CWA has arisen in the context of TMDL approvals. In October 2008, the Conservation Law Foundation (CLF) sued the U.S. Environmental Protection Agency (EPA), seeking to force the agency to consider climate change when evaluating TMDLs for waters that violate water quality standards under CWA § 303. *See, Conservation Law Foundation v. U.S. Environmental Protection Agency*, Case No. 08-238

(D. Vt. filed Oct. 28, 2008); 33 U.S.C. § 1303. The lawsuit claims that EPA's approval of a phosphorous TMDL for Vermont's Lake Champlain was arbitrary, capricious, and otherwise not in accordance with the CWA because the agency did not analyze climate change impacts to water resources when reviewing waste load allocations, overall loading capacity, seasonal variations, critical conditions, and the margin of safety. According to CLF, this failure deprived EPA of a legal basis for concluding that the phosphorus TMDL could attain and maintain applicable state water quality standards. While these claims raise novel issues, it appears unlikely they will be adjudicated on their merits. The lawsuit is currently on hold while the parties negotiate a settlement.

Draft Damage Assessment and Restoration Plan

A third effort to use Clean Water Act authority to address climate change issues has arisen in the context of an $18 million wetlands restoration project undertaken pursuant to the Oil Pollution Act of 1990 (OPA). 33 U.S.C. §§ 2701-2762. In 2004, a tanker spilled nearly 265,000 gallons of crude oil into the Delaware River and adjacent wetlands. The states of New Jersey, Pennsylvania, and Delaware, along with the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service, were appointed as trustees under the OPA, responsible for restoring the damaged wetlands and addressing other impacts. This January, after several years of studying the spill, the trustees released a draft damage assessment and restoration plan. The plan identifies nine proposed projects including restoration of nearly 198 acres of salt marsh and grasslands. Although these areas were directly impacted by the spill, some individuals and experts are pressuring the trustees to revise the plan to account for climate change-related sea level rise that may occur in the future. They are urging the trustees to use the available restoration funds to acquire land easements to provide wetlands a route of upland migration to avoid rising sea levels in lieu of restoring the existing coastal wetlands. While the trustees have not responded to these comments yet, this effort reflects another attempt to elevate climate change interests to the forefront of agency decision-making in the name of water resource protection.

Conclusion and Implications

Attempts to inject climate change concerns into agency decision-making is a recent development, particularly in the context of the CWA and water resource protection. Many of the questions surrounding these strategies remain unanswered, and while courts are unlikely to anoint the CWA as the next mechanism for regulating GHG emissions, the coupling of growing public concern with creative legal arguments, might offer sufficient persuasion to a reviewing court. If and when such strategies succeed, the result will be a material expansion of the law as it exists today.

The plaintiffs' arguments in the lawsuits discussed above blur the boundaries between the CWA and the other environmental law statutes that have already been used to force agency climate analysis. While there is a rationale connection between GHG emissions and the Clean Air Act, use of the CWA to regulate GHGs or address impacts stemming from their release into the atmosphere is to treat the CWA as a surrogate for the Clean Air Act. Likewise, requiring public interest reviews conducted by the Army Corps in the § 404 permitting process to consider every possible impact the project may have on not only the wetlands but the environment as a whole, is to replace NEPA's own call for broad environmental reviews. Finally, restoration projects required under the Oil Protection Act were more likely intended to address actual resource damages than they were intended to provide prospective mitigation for unrelated future harms.

If successful, efforts to inject climate change concerns into water resource protection laws would stretch these laws beyond their current bounds. If courts choose to open this door, additional questions will arise, especially with regard to the rationale's outer-limits. For example, in deciding whether a proposed hospital passes the CWA § 404 public interest review, must the Corps consider CO_2 emissions from vehicles transporting patients to and from the hospital? What about the CO_2 attributable to the hospital's substantial electricity usage or laundry facilities? What about the manufacturing of equipment, linens, papers, and electronics necessary to operate the hospital—must the CO_2 impacts of these activities be considered within the scope of reviewing a wetlands permit? How many other permits needed by

the hospital may be infiltrated by new climate change analysis?

The legal and factual issues surrounding the causes and effects of climate change are wide, uncertain, and can be highly malleable. And as public concern grows, novel arguments to fit climate change within both familiar environmental authorities and more obscure regulatory provisions will almost certainly emerge. This strategy could delay development and industrial projects and increase their cost in addition to forcing discrete climate considerations into previously unrelated agency decision-making processes. While agencies and courts faced with these arguments may ultimately dismiss them as specious, stakeholders should be mindful of the greater uncertainty and vulnerability of their proposed projects and permits to this new line of attack.

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