

LAND USE AND RESOURCE LAW UPDATE

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I. Nuisance

McKiver v. Murphy-Brown, LLC, 2018 WL 6606061 (U.S.D.C. E.D. N.C. 2018).

Rulings on post-trial motions after entry of jury verdict granting compensatory and punitive damages to ten of twenty plaintiffs. Among the motions was a motion to vacate filed by defendant based upon post-trial amendments to North Carolina's Right to Farm Act (RFA). Defendant argues that the amendments clarify existing law and therefore apply to pending cases. Plaintiffs contend that amendments work a change in the law and apply only prospectively.

“To determine whether the amendment clarifies the prior law or alters it requires a careful comparison of the original and amended statutes. If the statute initially fails expressly to address a particular point but addresses it after the amendment, the amendment is more likely to be clarifying than altering.” (citations omitted). “Where, however, the legislature alters an unambiguous statute, it is presumed that the legislature intended to change the law.” (citations omitted)

Comparing the pre-amendment and post-amendment versions of the law, the court found that the amendments did not clarify, but changed the substance of the RFA. Therefore, the amendments apply only prospectively and the motion to vacate is denied.

Artis v. Murphy-Brown, LLC, 2019 WL 1103406 (U.S.D.C. E.D. N.C. 2019).

Similar post-trial motions as in *McKiver*, with identical rulings. Appeal from entering judgment on jury verdict granting six plaintiffs compensatory and punitive damages.

Gills v. Murphy-Brown, LLC, 2018 WL 5928010 (U.S.D.C. E.D. N.C. 2018).

Ruling on several motions including, *inter alia*, denial of defendant's motion for reconsideration of ruling on plaintiff's motion for partial summary judgment with regard to defendant's Right to Farm Act defense.

***McGowan v. Murphy-Brown, LLC*, 2018 WL 6795276 (U.S.D.C. E.D. N.C. 2018).**

Court's ruling on post-trial motions after official of final judgment on the jury verdict awarding two of the nineteen plaintiffs in this case punitive and compensatory damages. Defendant's motion to vacate judgment, motion for judgment as a matter of law, and motion for a new trial are all denied. Plaintiff's motion to amend the judgment is also denied. Defendant had asked the court to set aside the reduction of jury's punitive damages awards on the grounds that North Carolina's statutory punitive damages cap is unconstitutional as applied.

***McGowan v. Murphy-Brown, LLC*, 2018 WL 6729786 (U.S.D.C. E.D. N.C. 2018).**

Rulings on pretrial motions. Rulings include the granting of defendant's motion to "preclude argument, editorializing, or testimony by plaintiffs' counsel while questioning witnesses before the jury".

***Zerafa v. Hesse*, 2018 WL 4927104 (Ct. App. Mich. 2019).**

Defendants, Peter and Mary Hesse, own the property on which plaintiffs, Richard and Deborah Zerafa, hold two easements. The properties share a border and lie within Acme Township's Agricultural Zoning District. The easement at issue is a roadway along the property boundary and is plaintiffs' only means of ingress and egress to their property. In a 2014 lawsuit, plaintiffs sued defendants for interference with their easement rights, resulting in an April 2015 consent judgment that allowed plaintiffs to make certain improvements to the easement.

In April 2016, plaintiffs began making improvements to the easement to facilitate ingress and egress and the sale of their home. These improvements required plaintiffs to rent a bulldozer and hire an operator, Douglas Brinkman, to run it at considerable expense. Shortly after the improvements began, defendants sued plaintiffs, alleging that plaintiffs were injuring or threatening to injure their property. The trial court initially granted defendants' request for a temporary restraining order (TRO), but subsequently vacated it.

Plaintiffs filed their complaint in this action alleging that shortly after the trial court vacated the TRO, defendants installed a large pig-farm sign on the side of one of the buildings adjoining the easement, which prevented plaintiffs from selling their home for full market value. Additionally, plaintiffs alleged that, after the trial court vacated the TRO, Brinkman attempted to resume work on the easement, but Peter used his car to prevent Brinkman from operating the bulldozer, leading to a verbal altercation between Richard and Peter, which ended when Peter attempted to attack Richard and Brinkman stepped between the two men. Accordingly, plaintiffs alleged trespass, interference with easement use, contempt, nuisance, tortious interference with a business relationship or expectancy, and assault.

Defendants filed a counterclaim alleging trespass and contempt. Specifically, defendants alleged that plaintiffs pushed boulders that were on the easement onto defendants' property and that, throughout the summer of 2016, plaintiffs improperly trimmed several trees along the north side of the easement and moved a fence off the easement and onto defendants' property. According to defendants, plaintiffs performed operations on the easement without obtaining a survey to guide the work and installed the fence "in a poor and shoddy manner" that did not "maintain the integrity of the field," contrary to the terms of the consent judgment.

Following a bench trial, the trial court entered an order awarding plaintiffs \$7,400 in damages resulting from defendants' trespass and assault. Additionally, the trial court granted equitable relief to defendants regarding the two easements on defendants' property and plaintiffs' trespass on defendants' land. The Court of Appeals of Michigan affirmed. The court found, inter alia, that the pig farm sign, in an agricultural area, did not amount to a nuisance or tortious interference.

II. Right to Farm

Himsel v. Himsel, 122 N.E.3d 935 (In. Ct. App. 2019).

Neighbors brought declaratory judgment action against farmers and concentrated animal feeding operation (CAFO) alleging nuisance, negligence, and trespass and challenging constitutionality of Indiana's Right to Farm Act (RTFA) and Agricultural Canon. Farmers and CAFO filed motion for summary judgment on all claims. The Plaintiffs' complaint alleges that their use and enjoyment of their homes, as well as their homes' values, were ruined by noxious odors and airborne emissions coming from the CAFO. Neighbors filed motion for partial summary judgment on constitutional claims.

The Plaintiffs concede that the agricultural operation here has been in operation continuously for more than one year. Indeed, the record establishes that the farmland in question has been actively farmed for decades. The Plaintiffs also acknowledge that no significant change has occurred in the type of the agricultural operation at the Farm, as strictly defined under subsection (d)(1) of the RTFA. *See Parker v. Obert's Legacy Dairy, LLC*, 988 N.E.2d 319, 324 (Ind. Ct. App. 2013) (holding that cropland-to-CAFO conversion is not a significant change under the RTFA).

The Plaintiffs contend that the RTFA is not a bar to their nuisance action, however, because the CAFO would have been a nuisance when farming originally began on the Farm. In other words, the Plaintiffs rely upon subsection (d)(2) of the RTFA, which requires that "[t]he operation would not have been a nuisance at the time the agricultural ... operation began on that locality."

The Superior Court, Hendricks County, granted summary judgment in favor of farmers, but denied all other motions for summary judgment. On farmers' and CAFO's motion to correct error, the Superior Court granted summary judgment in favor of farmers and CAFO on all claims. Neighbors appealed.

The Court of Appeals held that the nuisance claim against CAFO was barred by RTFA. The evidence provided no indication that CAFO was negligently operated or violated environmental regulations. The court held that the trespass claim brought by neighbors against was also barred by RTFA;

On the constitutional claims, the court found that the RTFA did not violate Open Courts Clause of Indiana Constitution, emissions from the CAFO did not effect a taking of neighbors' property, the RTFA did not violate equal privileges or immunities section of Indiana Constitution, and application of Agricultural Canon was not required in dispute. The decision of the trail court was affirmed.

This is not a case where the Plaintiffs moved to the nuisance as that expression is typically understood. Indeed, the Farm did not change from crop farming to pig farming until well after the Lannons built their home and the Himsel Plaintiffs moved into theirs. Prior to the 2005 amendment to the RTFA, this would have constituted a significant change in the agricultural operation making the RTFA inapplicable.

One plaintiff knowingly built his residential home in the middle of farm country, and another lived and farmed on their property for a number of years before selling off much of their land and changing the use of their home to purely residential. None of the Plaintiffs can now be heard to complain that their residential use of their property is being negatively impacted because the use of the Farm changed from crops to hogs, a use that would not have been a nuisance in or around 1941 when the agricultural operation began on the locality.

The court rejected Plaintiffs' argument that applying the RTFA in this manner would allow a CAFO of any size to be built anywhere that agricultural activity ever existed. This argument fails to acknowledge the significant local zoning requirements for CAFOs.

***State v. Hammond*, 569 S.W.3d 21 (Mo. Ct. App. 2018).**

After a jury trial, Hammond was convicted of misdemeanor animal abuse, arising from an incident where Hammond drug a horse behind his truck. Hammond appealed, arguing that the circuit court erred in refusing to allow his attorney to read the Missouri Constitution's "right-to-farm" amendment (Art. I, § 35) to the jury, and in refusing his alternative request that the jury be advised of the amendment in an instruction. Hammond claimed that his treatment of the horse was a "farming or ranching practice". Finding no error, the Court of Appeals affirmed.

***Green 'n Grow Composting, LLC v. Martic Township*, 2019 WL 2400455 (Commwlth. Ct. Pa. 2019).**

Green 'N Grow Composting, LLC, through its sole owner, Stephen R. Lehman, owns property at in Lancaster County, Pennsylvania (the Property), which is located in the Township's Agricultural District. On a part of Property that is approximately five acres in size, Appellants have three structures, characterized by the Board as "Greenhouse Structures," that were used to compost materials. (Board's Findings of Fact (F.F.) Nos. 1-4, 19-21.)

On December 22, 2014, the Township's Zoning Officer issued Appellants an updated/corrected Zoning Certificate and Use and Compliance Permit (Use Permit). The Use Permit authorized the three Greenhouse Structures to be used "solely for agricultural use in accordance with the definition of 'normal agricultural operation' in [s]ection 2 of the Act of June 10, 1982 (P.L. 454, No. 133), commonly referred to as the Right to Farm Act.

The Zoning Officer alleged that Appellants had used the Property and Greenhouse Structures in a manner beyond that which was permitted in the Use Permit by bringing "discarded packaged food and beverages, including plastic, cardboard, Styrofoam and aluminum packaging, dissolved air flotation (DAF) sludge from processing operations," and "other items classified as residual waste" by the Department, and processing these materials through, *inter alia*, a composting operation.

The trial court concluded that Appellants' composting operation was not a "normal agricultural operation" under the Ordinance and the Right to Farm Act. The trial court determined that "the fact that compost [was] used in agriculture does not make the manufacture of compost a normal agricultural operation" and noted that, "[w]hile undisputedly fertilizer can be used and applied in an agricultural setting to enhance crop yields or growth, this does not transform what is otherwise clearly a manufacturing process into an agricultural one." (Trial court op. at 30-31.)

On appeal, Appellants advance new arguments not presented at trial. In the argument section of their brief, Appellants "have not provided one single citation or reference to either the Ordinance, a statute, an administrative regulation or a judicial opinion." (at page 4). Therefore, the trial court ruling was affirmed.

***Antle v. Martin*, 2018 WL 6266489 (Ct. App. Kentucky 2018) (unpublished).**

Hudson family filed suit against Antle, claiming that Antle denied them access to a family cemetery plot in the middle of a farm, that had been excepted from the deed to Antle. Court ruled in favor of Antle, holding that Antle held the entire property in fee simple.

Antle then filed claim for attorneys' fees under the local Right to Farm ordinance, which is modeled on the state statute. Court dismissed claim for attorneys' fees. Although Hudson family included claim for nuisance, gravamen of complaint centered on denial of access, not farming practices that the Right to Farm ordinance seeks to protect.

***Lima Township v. Bateson*, 2018 WL 4957020 (Mich. Ct. App. 2018).**

Township filed action to abate a nuisance. The trial court's final order enjoined Bateson and Gough from using the property in violation of Lima Township's zoning ordinances. In response to Lima Township's complaints, Bateson and Gough claimed that they were conducting a tree farm and nursery on the property and that all the equipment and vehicles were being used to prepare the land for the tree farm and to conduct tree farming operations. They further claimed that, to the extent that their storage and use of the equipment and vehicles were prohibited by Lima Township's zoning ordinances, those ordinances were preempted by the Right to Farm Act.

On appeal, Bateson maintains that the trial court erred when it determined that their use of the property was not protected under the Right to Farm Act, MCL 286.471 *et seq.* The Court of Appeals found that the trial court did not err when it determined that Bateson and Gough failed to establish that the Right to Farm Act protected their storage and use of the vehicles and equipment on the property at issue. The machinery and equipment must be *used* in the commercial production of farm products. It is not enough to show that the property is being used as a farm or farm operation and that the equipment or machinery is on the farm; the landowner must show that the machinery and equipment are used to further the farm operations. Affirmed.

III. Right to Shoot

***Goldstein v. Peacemaker Properties, LLC*, 828 S.E.2d 276 (W. Va. 2019).**

Property owners brought action alleging that neighboring shooting range substantially and unreasonably interfered with their use and enjoyment of their rural property. Range operators' clients intervened. The Circuit Court denied plaintiffs' fee petition and motion for additional sanctions for litigation misconduct, and granted defendants' motion for summary judgment. Plaintiffs appealed.

The Supreme Court of Appeals of West Virginia held that statute prohibiting nuisance claims against shooting range if shooting range was in compliance with local noise ordinances barred plaintiffs' claim for injunctive relief. The statute did not, however, bar plaintiffs' claim for money damages. Finally, the circuit court did not abuse its discretion in denying plaintiffs' motion for sanctions. Affirmed in part, reversed in part, and remanded.

***3 Rivers Logistics, Inc. v. Brown-Wright Post No. 158*, 2018 Ark. 91**

Neighbors brought nuisance action against landowner, alleging that landowner had built a shooting range that included areas designated for the use of pistols, rifles, and shotguns and that noise from range activities interfered with neighbors' use and enjoyment of their land, and seeking preliminary injunction preventing landowner from using range, and additionally, or alternatively, damages for the decrease in the value of neighbors' land. The Circuit Court granted landowner's motion to dismiss. Neighbors appealed.

The Supreme Court of Arkansas held that the language of the statute exempting sport shooting ranges from nuisance and noise pollution actions clearly expresses the Arkansas state legislature's intent to give a range immunity from noise-based lawsuits if it was not in violation of local noise ordinances at the time it was constructed and began operation. If there are no ordinances regulating noise, then the range is in compliance and the immunity statute applies. Landowner was entitled to statutory immunity from neighbors' nuisance action. The dissenting opinion asserted that if no noise ordinance existed at the time the shooting range commenced (as in this case), the statute does not apply. Immunity statute did not constitute taking of neighbors' properties under Arkansas Constitution. The Circuit Court judgment is affirmed.

IV. Urban Chickens

***Perez v. County of Monterey*, 32 Cal. App. 5th 257 (2019).**

Residents brought action for declaratory relief, challenging as unconstitutional a county ordinance prohibiting more than four roosters on a single property without a rooster keeping operation permit. The Superior Court, Monterey County, entered judgment for county, and residents appealed.

The Court of Appeal held that the residents could not maintain claim that ordinance was a regulatory taking in light of agreement to limit the scope of the issues tried to solely whether the ordinance was valid on its face. Residents failed to establish that burden which ordinance imposed on interstate commerce outweighed the benefit of the regulation. The exceptions to ordinance applicable only to minors (educational purposes and FFA/4-H projects) did not violate equal protection on basis of age discrimination. The ordinance was not an unconstitutional bill of attainder. Residents failed to establish that ordinance violated right to privacy and ordinance was a valid exercise of the county's police power.

***State v. Thesing*, 2019 WL 418624 (Minn. App. Unpublished opinion).**

Thesing keeps ten chickens on her residential property within a legally platted subdivision. She appeals a jury verdict convicting her of keeping chickens on her property in violation of the county development code. Given that the complaint against Thesing relied on a code provision that did not describe a crime and expressly did not apply to Thesing's legally platted property, the court found the complaint fatally defective. The conviction was reversed and remanded with instructions to vacate the conviction.

V. Marijuana

***Underwood v. 1450 SE Orient, LLC*, 2019 WL 11245805 (U.S.D.C. D. Or. 2019).**

Plaintiff Laura Underwood brought this action against 226 defendants alleging violation of the Racketeer Influenced and Corrupt Organizations ACT (RICO), 18 U.S.C. § 1962. Numerous defendants move to sever and dismiss for improper joinder. Plaintiff is an Oregon property owner who lives immediately adjacent to the former Oregon Candy Farm, on which marijuana is now cultivated. The marijuana is processed and converted into marijuana products. Plaintiff alleges these activities constitute a criminal enterprise (the Marijuana Operation). Several plaintiffs market and retail marijuana products. Plaintiff alleges all defendants engaged in the production and sale of a controlled substance, through the Marijuana Operation, in violation of the Controlled Substances Act. 21 U.S.C. §§ 812, 823, 841, 844. Plaintiff further alleges violation of the Controlled Substances Act and other criminal statutes, via the

Plaintiff alleges defendants' violation of RICO caused her injury by interfering with Plaintiff's use and enjoyment of Plaintiff's Property, burdening it with noxious odors, diminishing its market value and making it more difficult to sell. As a direct result of Plaintiff's Property's diminished market value, the amount of credit Plaintiff was able to obtain based upon the value of Plaintiff's Property was materially decreased.

Motions to sever granted in part. All retailers were severed.

***Shoultz v. Derrick*, 369 F.3d 1120 (U.S.D.C. D. Or. 2019).**

Plaintiffs, retired senior citizens, bought property in Colton, Oregon, in 1980. They built a home, raised a family, and continue to live on the property. In 2014, Defendant Lucke purchased property (the “Elwood Property”) in the immediate vicinity of Plaintiffs’ home.

Lucke, along with Defendants Derrick, Kinslow, and Stocks-Ladd, invested capital and developed a marijuana production facility (the “marijuana operation”) on the Elwood Property. Defendants have produced marijuana on the Elwood Property, trafficked marijuana produced on the Elwood Property, and “knowingly received proceeds from such trafficking.”

Defendants’ marijuana operation has negatively impacted Plaintiffs by interfering with their use and enjoyment of their property. The production includes the use of two large greenhouses, equipped with loud, large, commercial exhaust fans which operate 24 hours a day, seven days a week. When they are running at high speeds, the intense noise from the fans can be unbearably loud, making it difficult for Plaintiffs to sleep and scaring Plaintiffs’ dog. In addition, the marijuana production creates a strong and pervasive stench on Plaintiffs’ property, particularly on warm or humid days. As a result of the noise and the odors from the marijuana production, Plaintiffs no longer enjoy gardening or being outside on their property. Plaintiffs are also afraid of the prospect of violence after participants in the marijuana operation repeatedly fired automatic weapons into the field immediately adjacent to Plaintiffs’ property on October 15, 2017. Plaintiffs allege that Defendants have diminished the market value of Plaintiffs’ property by “making it more difficult to sell.”

Plaintiffs filed suit, alleging that defendants have conspired and engaged in a pattern of racketeering activity, in violation of the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c), (d). According to Plaintiffs, Defendants violated RICO by forming an enterprise, on a property adjacent to where Plaintiffs live, for the purpose of producing and distributing marijuana.

Defendants move to dismiss Plaintiffs’ Complaint for two reasons: (1) Plaintiffs fail to establish two of the elements of a RICO claim—that Defendants conduct or participate in the conduct of an association-in-fact enterprise, and that the alleged marijuana operation in this case is an association-in-fact, as defined by RICO; and (2) Plaintiffs fail to establish RICO standing because they do not allege injuries compensable under RICO. The Court granted Defendants’ motion to dismiss because Plaintiffs fail to allege injuries compensable under RICO, but granted leave to amend.

In order to plausibly allege a concrete financial loss in this case, Plaintiffs “must make good faith allegations that they attempted or currently desire to convert those [property] interests into a pecuniary form.” The Complaint, as written, fails to make such allegations.

***Statecraft PLLC v. Town of Snowflake*, 2018 WL 5729344 (Ct. App. Ariz. 2018).**

Statecraft PLLC attorneys Kory Langhofer and Thomas Basile (together, “Statecraft”) appeal the superior court’s judgment ordering them to pay the attorney fees of the Town of Snowflake (the “Town”) and Copperstate Farms, LLC (“Copperstate”) (collectively, “Appellees”) under Arizona Revised Statutes (“A.R.S.”) section 12-349. Statecraft represented several Snowflake residents (the “Residents”) in a suit to prevent the Town from issuing a special use permit (“SUP”) to Copperstate for the cultivation of marijuana. The Court of Appeals of Arizona affirmed the findings of the trial court, which found that claims filed by Statecraft were groundless and lacked a rational basis. Further, Statecraft arguments lacked good faith. The Court of Appeals affirmed the judgment awarding attorney fees, but modified the amount awarded to the Town based on the parties’ stipulation to an arithmetic error.

City of Warren v. Bezy, 2019 WL 2146275 (MI App. Unpublished opinion).

Defendant Bezy was cited for failing to register his marijuana business with the city for safety inspections and for emitting a noxious marijuana odor, all in violation of the city's zoning ordinance, and operation. No dispute exists that Bezy's operation complies with the Michigan Marijuana Act (MMMA).

Bezy argued, and the district court agreed, that the zoning ordinance was preempted by the MMMA as the provisions directly conflicted by imposing penalties on an operation fully in compliance with the MMMA. The circuit court agreed, noting that the detailed definition of "enclosed, locked facility" in the MMMA failed to include particular electrical, heating, or plumbing requirements, or requirements for air or odor filtration, as the zoning ordinance contained.

On appeal, the city argued no direct conflict as the additional safety considerations added by the city could coexist with the MMMA. Analyzing Michigan Supreme Court precedent, characterized as producing the rule that local governments may not restrict or penalized MMMA-compliant behavior, the court held that ordinances directly conflicted with the MMMA and affirmed the lower court's decision.

Charter Township of Ypsilanti v. Pontius, 2018 WL5629643 (Ct. App. Mich.).

Township's zoning ordinance prohibited medical marijuana dispensaries and medical marijuana nurseries as home occupations in the single-family residential district, but allowed such uses in light industrial districts.

Township initiated this action for declaratory and injunctive relief against defendant, a registered medical marijuana primary caregiver and qualified patient, to abate a public nuisance at her residential property located within the township, alleging that she grew medical marijuana in her basement for her registered qualified patients. According to township, its zoning code permitted caregivers who were also patients to cultivate medical marijuana in their homes for their personal use, but they could not do so as a "home occupation" for any of their patients.

The issue was whether the zoning ordinance directly conflicted with, and was therefore preempted by, the Michigan Medical Marijuana Act (MMMA). Both parties moved for summary disposition.

Township argued that no conflict existed because the zoning ordinance did not prohibit the activity, but merely designated the locations at which the activity occurred. The court rejected this argument, finding that the MMMA allows the activity at all locations. The ordinance was, therefore, preempted.

City of Riverside v. Golden Valley Collective, 2018 WL 6303903 (Ct. App. Cal.).

This case involves a nuisance abatement action brought by the City against Golden Valley Collective (the Collective), which operates a marijuana dispensary. The city ordinance prohibits any activity that violates state or federal law. The Collective opposed the issuance of the preliminary injunction by relying on the recently enacted Proposition 64, the Adult Use of Marijuana Act, which allows such activity. The trial court issued the preliminary injunction based on the Collective's violation of the City's zoning law prohibiting any property use that violates state or federal law, and the Collective's lack of proper license required to operate a marijuana business under state law. The Collective appealed.

On appeal, the Collective argues that the City's medical marijuana restrictions were preempted by and violate Proposition 64. The Court of Appeals disagreed, distinguishes state legalization of activity from local designation of a nuisance. According to the court, even if the Collective held a state permit, the local government could declare the activity a nuisance. The Court of Appeals affirmed the trial court opinion.

***Gamut Group v. City of Lansing*, 2019 WL 1265161 (Mich. App.).**

Gamut Group has owned a building housing an unlicensed medical marijuana dispensary in the city of Lansing since 2011. Its property is zoned E-2, permitting “local convenient type shopping,” and J, permitting parking. In October 2017, the city passed a revised zoning ordinance that limited medical marijuana dispensaries to zoning districts F, F1, G2, H, and I, and required that they be licensed. A broader variety of commercial purposes are permitted in zone F. Aware that the ordinance amendment was imminent, Gamut Group sought rezoning of its property to F to accommodate its existing dispensary. Despite that the city’s zoning administrator and planning board recommended approval of the rezoning request, despite any public objection, and despite the fact that the other three corner lots at the intersection had been rezoned to F, the city council denied Gamut Group’s request.

Gamut Group filed this declaratory judgment action, alleging that the denial of the rezoning application violated its right to substantive due process. The circuit court granted summary disposition in Gamut Group’s favor. The court agreed that the city treated Gamut Group’s property differently than “everyone else on this intersection” and that no reasonable governmental interest was advanced by the denial of the rezoning application. The court rejected the city’s defense that Gamut Group could not establish damages because it had not yet applied for a license to operate its dispensary, noting that it was reasonable for the landowner to wait for rezoning before expending the nonrefundable license application fee.

The Court of Appeals affirmed, finding that the appellate court reviewed substantive due process challenge to denial of zoning request under same standard as challenge to existing zoning ordinance. The dispensary was not required to plead or prove that all reasonable uses for its land were precluded. The city’s denial was arbitrary and capricious and did not advance reasonable government interest.

***Waltz Healing Center, Inc. v. Arizona Dept. of Health Services*, 2018 WL 6318865 (AZ App.).**

The Arizona Department of Health Services denied an application for a medical marijuana dispensary registration certificate because the applicant failed to comply with a legal requirement to show that the dispensary’s proposed location “is in compliance with” local zoning restrictions. The applicant appealed to the superior court, arguing it satisfied the requirement by submitting a four-year-old letter from the City of Tempe. The letter had expired by its own terms and, in any case, was dated. Tempe had also amended its zoning ordinance between 2012 (the date of the letter) and 2016 (the date of the application). The superior court affirmed the denial of the application, and the Court of Appeals affirmed the superior court’s judgment.

***Beauchamp v. Beauchamp*, 2018 WL 5276562 (Ct. App. Mich. 2018).**

Trial court included profits from medical marijuana business in spousal support calculation and net value of medical marijuana business in marital property division. Defendant argues that Michigan Medical Marijuana Act (MMMA) prohibits caregiver from profiting from sale of medical marijuana to patients. Therefore, including profits in spousal support calculation forces defendant to engage in illegal activity. For a similar reason, value of business should not be included as marital property. The Michigan Court of Appeals rejected these arguments, finding that income from medical marijuana business was properly included in spousal support calculation and value of business was properly included as marital property.

***State v. Owen*, ___ N.W.2d ___, 2019 WL 2167730 (Ct. App. Minn. 2019).**

Following its ruling on defendants' motions to dismiss, the district court certified the question: are sister wholly owned subsidiaries of the same parent company one "person," such that a transfer of cannabis oil from one subsidiary to the other cannot violate state cannabis law. The Court of Appeals of Minnesota answered this certified question in the negative.

Defendants were charged with intentionally transferring medical cannabis to a person other than allowed by law. The District Court denied defendants' motion to dismiss, and certified the question. In an issue of first impression, statute prohibiting intentional transfer of medical cannabis to a "person" other than allowed by law applied to a transfer between wholly owned subsidiaries of same parent corporation.

***Valley Green Grow, Inc. v. Town of Charlton*, 2019 WL 1087930 (Mass. Land Court 2019).**

On November 4, 2016, the voters of the Commonwealth voted YES to Question 4, authorizing the legalization, regulation and taxation of recreational cannabis in the Commonwealth of Massachusetts. Among those voting YES were a majority of the voters of the Town of Charlton (Town). After the ensuing enactment of G.L. c. 94G, regulating recreational marijuana in Massachusetts, the plaintiff Valley Green Grow, Inc. (VGG) entered an agreement with plaintiffs Charlton Orchard Groups, LLC (COG) and Nathan R. Benjamin, Jr. and Catherine Benjamin to purchase their farm in Charlton. VGG wants to build a 1,000,000 square foot indoor marijuana growing and processing facility on the property, consisting of 860,000 square feet of greenhouses, a 130,000 square foot post-harvest processing facility, and 10,000 square foot cogeneration facility. VGG approached the Town in the spring of 2018, filed a preliminary subdivision plan, and began negotiations for a development agreement and a host community agreement. At its May 2018 annual town meeting, the Town adopted by a two-thirds vote Warrant Article 27, amending the Charlton Zoning Bylaw (zoning bylaw) to allow certain recreational marijuana uses in the agricultural, community business, industrial and business enterprise park use districts by special permit. A group of citizens including intervenor Gerard F. Russell and other neighbors of the property, unhappy with the zoning amendment, brought two warrant articles to a special town meeting in August 2018. Warrant Article 1 sought to rescind the previously adopted amendment to the zoning bylaw that allowed marijuana uses. Warrant Article 2 sought to adopt a general bylaw to ban all non-medical cannabis uses within the Town. While a majority voted for Warrant Article 1, it failed to obtain the two-thirds majority necessary for an amendment to the zoning bylaw. Warrant Article 2 passed by a majority vote.

The plaintiffs sought a declaration that Warrant Article 2 is invalid, brought a motion for summary judgment. Because Warrant Article 2 was an improper attempt by the Town to exercise its zoning power through a general bylaw by regulating a use already regulated in its zoning bylaw, it is invalid and of no force and effect.

***County of Riverside v. Freedom Won LLC*, 2019 WL 358953 (Ct. App. Fourth Dist. 2019).**

In this appeal, defendants and appellants Freedom Won LLC, Desert Cann Wellness Center, and David Saccullo challenge the trial court's order granting plaintiff and respondent County of Riverside's request for a preliminary injunction prohibiting them from operating their cannabis dispensary within the county. Appellants argue it was error to issue the injunction because (1) Riverside's ordinance banning cannabis businesses is invalid for failure to obtain voter approval (based on the prefatory language in the voter referendum for the state law) and (2) Riverside could not demonstrate a likelihood of succeeding on the merits of its underlying public nuisance lawsuit against appellants because it had recently voted to repeal its countywide ban. The Court of Appeals concluded appellants were wrong on both points and the trial court properly issued the injunction. The decision was affirmed.

***Dreem Green Inc. v. City of Phoenix*, 2019 WL 1959618 (Ct. App. Ariz. 2019).**

Dreem Green, Inc. (“Dreem”) appeals from a judgment of the superior court affirming a variance approved by a zoning adjustment board that allowed Nick and Lindsay Couturier (the “Couturiers”) to open and operate a medical marijuana dispensary in north Phoenix. The Court of Appeals affirmed. Credible evidence supported the board’s conclusion that special circumstances affect the property and were not self-imposed.

***Headspace International LLC v. Podworks Corp.*, 5 Wash. App.2d 883, 428 P.3d 1260 (2018).**

California-based marijuana business brought action against Washington-based marijuana business, alleging infringing use of its mark “THE CLEAR,” unfair competition, unfair business practices, and violation of the Washington Consumer Protection Act. The Superior Court, King County, granted defendant business’s motion to dismiss, and plaintiff business appealed.

The Court of Appeals held that California-based marijuana business sufficiently alleged that it used its mark “THE CLEAR” in the ordinary course of business in Washington, as required to state a claim for trademark infringement. California-based marijuana business did not violate the Controlled Substances Act’s (CSA) prohibition against an out-of-state company from producing, processing, or selling marijuana products in Washington. The amendment to the CSA, that stated trademark and proprietary information licensing agreements were lawful, did not operate to make licensing agreement entered into before the amendment unlawful. Finally, California-based business was not required to be listed as a “true party of interest” on Washington-based licensee’s marijuana business license, and thus, its failure to do so was not unlawful, and did not deprive California-based business of its trademark protection. Decision reversed and remanded.

***In the Matter of the Petition of: Kittitas County for a Declaratory Order; Kittitas County v. Washington State Liquor and Cannabis Board*, 438 P.3d 1199 (Wash. Ct. App. 2019).**

County petitioned for review of decision of Washington State Liquor and Cannabis Board, seeking declaration that Board could only approve licenses for the sale of marijuana that were in compliance with local zoning laws. The Superior Court, Kittitas County, reversed. Board appealed. The Court of Appeals held that the issuance of a marijuana license was not a “siting activity” under Growth Management Act (GMA) and the Uniform Controlled Substances Act did not require Board to comply with local zoning laws when issuing applications or renewals. Reversed.

VI. Solar

***Perkins v. Town of Dryden Planning Board*, 172 A.D.3d 1695, 102 N.Y.S.3d 300, 2019 N.Y. Slip Op. 03874 (NYAD 3 Dept.)-**

Respondents SUN8 PDC LLC and Distributed Sun LLC (hereinafter collectively referred to as SUN8) leased farmland owned by respondent Scott Pinney in the Town of Dryden, Tompkins County in order to construct five separate community solar projects. A community solar project uses a group of solar arrays in a central location and provides utility-bill credits to subscribers in the community. The solar arrays are similar to rooftop solar panels but, instead, are located at the ground level. In connection with the construction of the projects, SUN8 sought to divide the farmland into five separate lots and place one project per lot. In 2017, the Dryden Town Board granted SUN8 a special use permit and site plan approval and respondent Town of Dryden Planning Board approved the preliminary subdivision plat. Petitioners Willow Glen Cemetery Association and Sarah Osmeloski, who both own land adjacent to the farmland, commenced two separate proceedings seeking, among other things, to enjoin the issuance of building permits and challenging the Planning Board's approval of the preliminary plat. In a December 2014 judgment, Supreme Court dismissed both petitions.

In February 2018, the Planning Board approved two resolutions – one allowing for a common driveway to provide access to all five subdivision lots from Route 13 and one approving the final subdivision plat for the solar project. In March 2018, petitioners commenced this CPLR article 78 proceeding seeking to annul the Planning Board's resolutions. Petitioners alleged that the Planning Board “lacked jurisdiction to consider any site plan application exceeding the four-lot limitation of [Town of Dryden Zoning Law § 602]” and that the resolutions were ultra vires and void because they authorized a common driveway for five flag lots on the final subdivision. Petitioners subsequently discovered that the notice of petition – but not the petition – erroneously described the resolutions being challenged as having been issued by the “Dryden Town Board,” as opposed to the Planning Board. Petitioners moved to amend the notice of petition, which Supreme Court granted. SUN8 and the Planning Board separately joined issue. The Planning Board also submitted an affidavit from Ray Burger, the director of the Town of Dryden Planning Department, who averred that only three of the five lots on the farmland were flag lots. Petitioners thereafter moved via order to show cause to amend their petition by, as relevant here, deleting the claims alleging that the number of flag lots to be served by a common driveway on the subdivision exceeded the limit provided by Town Law § 280–a and Town of Dryden Zoning Law § 602 and adding claims alleging that the subdivision violated the frontage and access requirements of those same statutes. Supreme Court found that respondents were not prejudiced by the proposed amendments, but nonetheless concluded that they were without merit. Accordingly, Supreme Court denied the motion and dismissed the petition, Petitioners appeal. The Appellate Division affirmed, finding that solar arrays are “structures”, not “buildings”.

***Board of County Commissioners of Washington County v. Perennial Solar*, 2018 WL 5993859 (Md. Ct. Spec. App.), 196 A.3d 933, 239 Md. App. 380 (2018).**

Board of county commissioners and aggrieved residents appealed from decision of board of zoning appeals approving application for special exception and variance to construct a solar panel farm. The Circuit Court dismissed with instruction that the board of zoning appeals vacate its decision. Board of county commissioners and aggrieved residents appealed. The Court of Special Appeals held that state law impliedly preempted local zoning regulation of solar energy generating systems (SEGS) that required certificates of public convenience and necessity (CPCN), and that Perennial Solar was subject to the jurisdiction of the Public Services Commission (PSC). Judgment of the Circuit Court affirmed.

VII. Wind

Mathis v. Palo Alto County Board of Supervisors, 927 N.W.2d 191 (Iowa 2019).

Landowners filed petition for declaratory and injunctive relief and for a writ of certiorari against county board of supervisors, seeking declaration that county's wind-energy ordinance was arbitrary, capricious, unreasonable, void, and unenforceable, and seeking a writ determining that board's approval of renewable energy companies' application for approval of wind-energy project should be set aside as illegal, arbitrary, capricious, unreasonable, and void. Renewable energy companies were granted leave to intervene as defendants. The District Court granted summary judgment in favor of board and companies. Landowners appealed.

The Supreme Court of Iowa held that wind-energy ordinance was not rendered illegal by the fact that renewable energy companies had provided input on the ordinance. The company that was current owner of the project at time of application substantially complied with ordinance requirement that any request for site plan and approval be submitted by the "Owner/Developer" of project, although company intended to transfer ownership of the project. The record failed to establish that board acted arbitrarily or capriciously in not following recommendations of Department of Natural Resources (DNR) and state archaeologist. The board did not act illegally, arbitrarily, or capriciously in approving the project despite acoustical expert's opinion that the project would at times exceed the maximum permissible 50-decibel noise level. Finally, the board did not act illegally, arbitrarily, or capriciously in relying on estimate provided by licensed professional engineer regarding cost of decommissioning each wind turbine. The District Court decision was affirmed.

VIII. Zoning

Pulte Home Corp. v. Montgomery County, 909 F.3d 685 (4th Cir. 2018).

Property developers brought action in state court against county and county planning commission, alleging that amendment of master plan, which governed zoning requirements for developers' property, delayed or denied water and sewer service to developers' property and amounted to a taking and violation of equal protection and substantive and procedural due process. Following removal, the United States District Court for the District of Maryland granted county and commission's motion for judgment on the pleadings. Developers appealed.

Pulte is a residential real estate developer. Between November 2004 and January 2006, Pulte purchased or contracted to purchase 540 acres of real property in Montgomery County, Maryland. At the time Pulte purchased the land, development of it was governed by the 1994 Clarksburg Master Plan & Hyattstown Special Study Area ("1994 Master Plan"). The 1994 Master Plan divided development of Clarksburg into four stages. In the fourth stage, the part of Clarksburg containing Pulte's land was to be developed into residential communities at specified densities.

Pulte's land was designated as a receiving property for Transferable Development Rights ("TDR"). The land was zoned to allow for one dwelling unit per acre, but Pulte could increase the allowable density to two units per acre by purchasing TDRs from agricultural properties in a different area of Montgomery County. The purchase of the TDRs would place a covenant on the agricultural property that would restrict its ability to be developed in the future. In essence, the TDR process was adopted by the County in order to encourage residential development in some areas while discouraging it in others.

Pulte invested more than twelve million dollars to purchase several hundred TDRs. It recorded its ownership of the TDRs. Its intention was to use the TDRs to build between 954 and 1,007 detached homes and townhomes on the land it had purchased in the TDR receiving area.

Under the 1994 Master Plan, there were several prerequisites for the commencement of Stage 4 development. These included a baseline biological assessment of the Little Seneca Creek and Ten Mile Creek watersheds; the issuance of at least 2,000 building permits in the areas that were to be developed in Stages 2 and 3; and the release of a report analyzing water quality management practices in analogous developments in similar watersheds and recommending best practices for water quality management and mitigation of potential environmental damage. All necessary triggers had occurred by 2009.

The 1994 Master Plan stated that “[i]ndividual developments within [Stage 4] can proceed once public agencies and the developer have complied with all of the implementing mechanisms.” J.A. 311 n.2. One of the listed implementing mechanisms was that once all of the prerequisite conditions had been met, “the County Council will consider Water and Sewer Plan amendments that would permit the extension of public facilities to the Ten Mile Creek area.” *Id.* at 311. Another listed implementing mechanism was that “[p]roperties in this stage are subject to ... approval by the Planning Board.” *Id.*

Pulte submitted its Water and Sewer Category Change Request application for review by the County and the Maryland-National Capital Park and Planning Commission (“Commission”) in May 2009, along with a required ten thousand dollar filing fee. The County, however, never acted on Pulte’s application. In September 2010, the County returned the filing fee and told Pulte that it would review the application in the spring of 2011. But 2011 came and went, and the County did not consider the application. Pulte resubmitted its application and filing fee in 2012, along with a water quality management plan, but the County still took no action on it.

In December 2012, Pulte submitted a Pre-Application Concept Plan to the Commission as required by the County Subdivision Ordinance. Pulte contends that the plan fully conformed with the governing Zoning Ordinance, yet the Commission rejected the plan as not ripe for review. The County and Commission refused to meet with Pulte to discuss the plan and stopped responding to Pulte’s detailed letters and other communications.

Rather than proceeding with Stage 4 development, the County and Commission reopened the 1994 Master Plan to study the Ten Mile Creek watershed, in which Pulte’s land is located. The 1994 Master Plan stated: “Master plans ... are intended to be updated and revised about every 10 years. It is recognized that circumstances will change following adoption of a plan and that the specifics of a master plan may become less relevant over time.” *Id.* at 527. Regarding water and sewer change applications, the Master Plan provided that the County Council may undertake several alternative actions after completing assessments, including to “[d]efer action on a Water and Sewer Plan category change, pending further study or consideration as deemed necessary and appropriate by the Council” or to “[c]onsider such other land use actions as are deemed necessary.” *Id.* at 312.

In October 2013, the Commission’s Montgomery County Planning Board (“Planning Board”) submitted to the County a draft amendment to the 1994 Master Plan, which the County extensively revised and approved (“Amendment”). Pulte asserts that the Amendment was aimed specifically at Pulte’s land and was based on pretextual and faulty science regarding the proposed development’s impact on water quality. The Amendment implemented a variety of regulatory changes that severely reduced the number of dwellings Pulte could build on its land and placed additional costly burdens on Pulte, such as a requirement to dedicate parkland.

The Fourth Circuit Court of Appeals declined to “wade into the waters of local government decisions and zoning regulations... This court has stated repeatedly in similar cases, and as recently as last year, that federal courts are not the appropriate forum to challenge local land use determinations. We again conclude that the landowner has failed to state viable constitutional claims against local entities based on zoning actions. Because Pulte had no constitutional property interest in developing its land as it had contemplated, and the local authorities had a plausible, rational basis for their actions, we affirm the district court’s entry of judgment on the pleadings.”

The Fourth Circuit Court of Appeals held that county and commission did not violate developers’ due process rights or equal protection rights. Regulatory actions by county and commission did not amount to a regulatory taking. County and commission did not violate provision of Maryland Constitution guaranteeing the right to a remedy by the course of the law of the land. The District Court decision is affirmed.

IX. Takings

Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162 (2019).

Property owner brought § 1983 action against township, alleging that ordinance authorizing officials to enter upon any property within the township to determine existence and location of cemetery violated her Fifth Amendment rights. The United States District Court for the Middle District of Pennsylvania dismissed without prejudice, and, following property owner’s filing of second amended complaint dismissed claims alleging that ordinance took the owner’s property without just compensation, in violation of the Fifth Amendment, and claims for declaratory and injunctive relief, without prejudice pending exhaustion of state law remedies. Owner appealed. The United States Court of Appeals for the Third Circuit affirmed. Certiorari was granted.

The United States Supreme Court held that property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it, and therefore may bring his claim in federal court under § 1983 at that time; overruling *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126. Vacated and remanded.

X. Conservation Easements

Pine Mountain Preserve, LLLP v. Commissioner of Internal Revenue, 151 T.C. 14 (2018).

(From Haynsworth Sinkler Boyd Blog) In *Pine Mountain Preserve* the Tax Court determined in a full-court opinion that the section 170 “perpetuity” requirement *was not satisfied* where an easement permits landowners to move the location of future structures within the conservation area. Conservation easements often reserve to landowners future rights to construct, within the conserved area, structures (like single-family residences) and facilities appurtenant to those structures (like barns, gazebos, fences and roads). Easements generally do not specify the exact location of these future build zones within the conserved areas. Last week, in *Pine Mountain Preserve*, the Tax Court held that this common practice (reserving the right to build anywhere within a conserved area) will invalidate an otherwise legitimate conservation easement.

Writing for the majority, Judge Lauber instructed, “[w]hat matters is whether there is a perpetual use restriction on ‘the real property’ covered by the easement at the time the easement is granted.” The Court determined that where “[building] lots could literally be placed anywhere within [the conserved area],” the statutory “perpetual use restriction did not attach at the outset to a defined parcel of real property or to a single, immutable parcel of land.” The Court reasoned that “[b]y permitting the [building envelopes] to be relocated to other sections of the conservation area, the deed allows the developer to subject to . . . development land that was supposed to be protected in perpetuity from any form of development.”

Put differently, the Court decided that to grant a perpetual use restriction on the “real property” subject to the easement, the *precise* real property to be protected within the conserved area must be defined at the time the easement is granted. In the Court’s opinion, because a right to build anywhere within a conserved area means that any portion of the area might later be developed, none of the area is in fact protected in perpetuity.

Practitioners, on the other hand, commonly interpret the “real property” clause in section 170(h)(2)(C) to refer only to the conserved area, generally—not particularized portions of property within the conserved area. Their thought is that so long as the same amount of land is preserved within the boundaries of the conserved area, it should not matter which portion of the land within the conserved area is developed.

***Institute of Range and the American Mustang v. The Nature Conservancy*, 922 N.W.2d 1 (S.D. 2018).**

In 1988, Dayton Hyde moved to the Black Hills to create a wild horse sanctuary. He formed IRAM as a South Dakota non-profit corporation to acquire land and preserve a habitat for horses. In 1998, The Nature Conservancy contacted IRAM about obtaining a conservation easement on IRAM's property. Paulson, acting on behalf of The Nature Conservancy, first discussed the terms of the easement with Hyde "over the back of a pickup truck." Paulson claimed he also met with IRAM's board regarding the easement. More specifically, he testified that in the fall of 1998, he met with Hyde and board members Blue and Watt in Washington to discuss the easement. Blue confirmed he had reviewed a draft of the easement in 1998 when visiting IRAM's property in South Dakota.

To facilitate the transaction, Hyde and Paulson executed an option to purchase the conservation easement. Pursuant to the option, IRAM granted The Nature Conservancy the right and option to acquire a conservation easement over IRAM's real property. The option indicated "[t]he total purchase price for the Conservation Easement, including the Option Consideration, (the 'Purchase Price'), shall be Two Hundred Thirty Thousand Dollars (\$230,000)." The option required the deed of conservation easement to be substantially similar to the one that was attached as Exhibit B. It also required the easement include provisions "in Section 5 below." Section 5 required that within twenty days after the parties approved an easement documentation report, The Nature Conservancy and IRAM would approve "a final form of a Deed of Conservation Easement," which again was to be substantially similar to Exhibit B.

Exhibit B contained a section titled, "Subsequent Sale, Exchange or Involuntary Conversion," which provided in relevant part that IRAM and The Nature Conservancy "agree that granting of this Easement immediately vests" The Nature Conservancy "with a property right[.]" The "full market value of this property right" was described in part as "50% of the full market value of the Property." The final deed similarly gave The Nature Conservancy an interest in IRAM's property and described the fair market value of the property right in part as: "50% of the fair market value of the Property." Hyde signed the option on behalf of IRAM; and Paulson signed on behalf of The Nature Conservancy. The option recited that both parties were authorized to enter into the transaction.

The parties subsequently amended the option two times. The first amendment changed a provision relating to the easement documentation report and the date upon which The Nature Conservancy and IRAM would approve the final deed. The second amendment again changed the date the parties were to approve the final deed. Like the prior documents, the second amendment required that the deed "be substantially in the form attached" as Exhibit B.

On October 18, 1998, Hyde signed a document acknowledging and accepting the easement documentation report. Bruce Pierce, as vice president of The Nature Conservancy, signed the same document on November 18, 1998. Closing on the deed of conservation easement occurred on December 3, 1998 at Fall River Title Company.

Approximately eighteen years later, in May 2016, IRAM commenced this action to have the deed declared null and void. It first argued The Nature Conservancy fraudulently procured the easement. Second, it argued Hyde acted *ultra vires* in granting the easement. IRAM claimed Paulson never presented the deed to the board for approval, and the board was unaware the easement gave The Nature Conservancy a property interest in IRAM's property. Finally, IRAM argued there was a failure of consideration and no meeting of the minds on the property interest provision.

Both sides moved for summary judgment based on statements of undisputed facts. The Nature Conservancy argued the statute of limitations had expired on IRAM's fraud claim. It further argued the undisputed facts established a meeting of the minds and consideration to support the deed. IRAM argued the deed was void on its face based on two discrepancies. It pointed out that the deed indicated Hyde had signed it on December 2, 1998, but the notary signature was dated December 3. It further pointed out its seal was not affixed to the deed, but the notary page represented that "the seal affixed is the corporate seal of said corporation."

The circuit court granted The Nature Conservancy summary judgment on each of IRAM's claims and denied IRAM summary judgment. First, it concluded the six-year statute of limitations had expired on IRAM's fraud claim. The court also found no issue of material fact in dispute on IRAM's claims of no meeting of the minds and failure of consideration. It did so because there was no dispute IRAM received \$230,000 for the easement. The court concluded the undisputed material facts established Hyde acted with corporate authority because IRAM subsequently ratified all of Hyde's acts by corporate resolution. IRAM appeals.

The South Dakota Supreme Court affirmed the lower court decision.

Ferman v. Bogaard & Associates, LLC, 2018 WL 6683943 (Super. Ct. N.J. 2018).

In November 2010, plaintiffs Randall Ferman and Debra Ferman purchased a newly constructed home in Chester, New Jersey for \$850,000 (the Property). The Property is subject to a conservation easement affecting nearly four acres of the approximately five and one-half acre parcel. Plaintiffs allege their closing attorney committed legal malpractice, and their realtors were negligent and committed consumer fraud, by failing to explain the scope of, and limitations imposed by, the conservation easement. Plaintiffs claim they would not have purchased the Property had they been properly advised about the easement. After owning the Property for four years, plaintiffs decided to list it for sale because it was too large for their needs. On September 23, 2016, plaintiffs sold the Property for \$812,500.

Plaintiffs filed this action against defendants Laurie Bogaard and Bogaard & Associates, LLC, their attorneys in the purchase of the Property, alleging legal malpractice, and defendants Janis Domiter and Weichert Realtors, the realtors who represented plaintiffs in the purchase of the Property, alleging negligence and consumer fraud. Plaintiffs do not claim the Property was worth less than the \$850,000 purchase price. Plaintiffs sought damages comprised of: (1) their down payment and the closing costs incurred when purchasing the Property; (2) the carrying costs for the Property during the period they owned it, comprised of mortgage payments, real estate tax payments, homeowner's insurance premiums, and maintenance costs; and (3) the real estate commissions, closing costs, and moving expenses incurred when they sold the Property.

Defendants moved for summary judgment, contending their respective alleged negligence did not proximately cause the damages claimed by plaintiffs. The trial court granted partial summary judgment dismissing the majority of plaintiffs' damage claims with prejudice. Plaintiffs voluntarily dismissed their remaining claims and appealed. The Superior Court affirmed.

The trial court judge found that if the plaintiffs would not have bought this particular home, they would have purchased another and incurred “carrying costs”, so the plaintiffs were not entitled to those damages. The judge also found plaintiffs’ claim that defendants’ conduct was a substantial factor in causing them to incur a down payment, closing costs, monthly payments, and all other expenses relating to the property was not supported by any evidence. The judge concluded plaintiffs presented no evidence they would not have purchased the property had they fully understood the nature and extent of the conservation easement, noting Debra Ferman testified that she enjoyed living in the house. The judge also concluded plaintiffs’ expert also failed to demonstrate plaintiffs’ alleged damages were proximately caused by defendants’ conduct,

Relying on the “net opinion rule”, the Superior Court affirmed the grant of partial summary judgment and the disregarding of a portion of the expert witness in the case. The net opinion rule requires that an expert “ ‘give the why and wherefore’ that supports the opinion, ‘rather than a mere conclusion.’ ” [citations omitted] The rule “mandates that experts ‘be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are [...] reliable.’ ”

City of Wilmore v. Snowden, 2018 WL 4264921 (Ct. App. Ky. 2018).

In 1997, Snowden attempted to get a rezoning on a property known as Roseglade Farm. The rezoning was approved after significant public objections, particularly to development within a particular 100 acre buffer. The new zoning district provides that “[a]s a condition to development in this zone, “an undeveloped portion of the parent tract ... will remain in permanent green space.””. Pursuant to that provision, and to appease the objectors, in December 1998, Snowden decided to dedicate 100 acres of Roseglade Farm to the City of Wilmore through a conservation easement. The deed of the conservation easement contains the following property description:

[T]he Property includes a designated area of permanent greenspace, as shown on Exhibit “B” and described in Exhibit “C” attached hereto and incorporated herein by this reference, and such area shall be maintained perpetually subject to the terms and restrictions of this Conservation Easement (hereinafter referred to as the “Protected Property”);

In 2016, Snowden submitted a proposal for development of the property. The proposal showed development on the 100 acre parcel subject to the conservation easement, but indicated that Snowden would donate a conservation easement on a different portion of the property. The City denied the proposal, citing the fact that development was shown on the conservation easement portion of the property. The City furthered denied a request to release the easement.

On March 9, 2017, Snowden filed a complaint for declaratory relief in the Jessamine Circuit Court. Snowden contended that he had a continuing right to modify and amend his preliminary development plan for Roseglade Farm subject only to the rules, regulations, and processes of the planning commission and without regard for the conservation easement recorded in 1999. Snowden argued that the portion of the farm that the parties intended to subject to the conservation easement “would and could only be identified with specificity at a future date when the [planning commission] approved ‘final construction plans.’ ” He contended that as a consequence, the easement “obviously fails to sufficiently identify the dimensions and boundaries of the property” and that the physical location of the property that it purported to encumber could not be located with reasonable certainty. In essence, Snowden sought to void any binding effect or continuity of his original conservation easement. The City of Wilmore and members of the town council denied that Snowden was entitled to the relief he sought.

Following a hearing conducted on July 13, 2017, the circuit court concluded that the conservation easement was facially void and unenforceable for want of an adequate description of the encumbered property. Summary judgment was entered in Snowden’s favor. The City appealed.

The Court of Appeals of Kentucky found that, despite the absence of exhibits B and C identified in the written easement at the center of this dispute, the dimensions and boundaries of the conservation easement can be physically located with reasonable certainty. The court reversed the summary judgment.

XI. Water

***Chambers-Liberty Counties Navigation District v. State*, 62 Tex. Sup. Ct. J. 969, ___ S.W.3d ___ (2019).**

This appeal pits two government entities asserting influence over oyster production in and around Galveston Bay. The Chambers–Liberty Counties Navigation District (“District”) leased submerged land to Sustainable Texas Oyster Resource Management, L.L.C., (“STORM”) for oyster production. The State of Texas sued the District and STORM, seeking to invalidate the lease under the theory that Texas law affords the Texas Parks and Wildlife Department (“Department”), not the District, the sole power to decide who may and may not cultivate oysters in the disputed area. The State also sought monetary relief against both defendants under sections 12.301 and 12.303 of the Parks and Wildlife Code.

This is an interlocutory appeal arising from the District’s plea to the jurisdiction, and the Texas Supreme Court had to “once again navigate the turbulent waters of governmental immunity”. The court of appeals allowed the State’s money-damages claims and its *ultra vires* claims to proceed. The Texas Supreme Court concluded that immunity bars the State’s claim for monetary relief against the District but does not bar its *ultra vires* claim that the District’s officers exceeded their authority by entering into the oyster lease. The court therefore reversed the judgment of the court of appeals in part and affirmed in part. The court also denied a related mandamus petition.

***Aqua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 2019 WL 2610965 (U.S.D.C. C.D. Calif. 2019).**

In May 2013, the Tribe filed this action for declaratory and injunctive relief against Defendants. (Complaint.) In June 2014, the court granted the United States’ motion to intervene as a plaintiff in its capacity as trustee for the Tribe’s reservation.

In December 2013, the parties stipulated to trifurcate this action. Phase I addressed “whether the Tribe has a reserved right and an aboriginal right to groundwater.” *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, et al.*, 849 F.3d 1262, 1267 (9th Cir. 2017). Phase II seeks to resolve (1) whether the Tribe owns the pore space underlying its reservation; (2) whether there is a water quality component to the Tribe’s federal reserved water right; and (3) the appropriate legal standard to quantify the Tribe’s reserved water right. If necessary, in Phase III, the Court will undertake the fact-intensive tasks of quantifying the Tribe’s rights to groundwater and pore space, and crafting appropriate injunctive relief. The Court also determined that should it find the right to groundwater includes a water quality component, Phase III will address the identification of the water quality standard.

All parties separately filed motions for summary judgment as to Phase I. The court granted partial summary judgment to the Tribe and United States on the claim that the government impliedly reserved appurtenant water sources—including underlying groundwater—when it created the Tribe’s reservation, and granted partial summary judgment to Defendants regarding the Tribe’s aboriginal title claims. Defendants brought an interlocutory appeal of the court’s grant of partial summary judgment in favor of the Tribe and the United States. The Ninth Circuit affirmed the court’s judgment. *Agua Caliente*, 849 F.3d at 1265. The United States Supreme Court then denied certiorari. *Coachella Valley Water Dist. v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 468 (2017); *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 469 (2017).

As in Phase I, all four parties separately filed motions for summary judgment as to Phase II. The parties moved for summary judgment on (1) whether the Tribe beneficially owns pore space underlying the Reservation; (2) whether the Tribe’s groundwater rights include a water quality component; and (3) the legal standard for quantifying the Tribe’s reserved water rights. The United States, however, only moved for summary judgment on the issues of (1) the legal standard for quantification; and (2) whether the reserved right to groundwater includes a quality component.

First, the court ruled that the Tribe lacks standing to seek quantification of its federally reserved water right. The Tribe does not lose its reserved water right by nonuse. However, for standing purposes, the Tribe must show an invasion to its legally protected interest.

The Tribe must show evidence that Defendants’ actions actually or imminently harm the Tribe’s ability to use sufficient water to fulfill the purposes of the reservation, and the Tribe failed to do so. Overdraft conditions, even if cumulatively over a number of years, is not enough to satisfy the burden of proof. The Tribe failed to present evidence that it is presently unable to use sufficient water to fulfill the purposes of the reservation nor does the evidence show that its need for water will increase in the future to conflict with Defendants’ use.

The court employed a similar analysis to conclude that the Tribe lacks standing on the water quality claim. The Tribe failed to produce evidence of harm, actual or imminent, to its ability to use water of a sufficient quality to fulfill the purposes of the reservation.

As to pore space, a similar analysis finds that the Tribe has standing to seek a declaration that it has an ownership interest in sufficient pore space to store its federally reserved water. However, the Tribe presented no evidence of actual or imminent threat to its ability to store water of any quantity, so lacks standing to seek injunctive relief. The Tribe similarly lacks standing to pursue the claim of pore space ownership.

The United States similarly lacks standing. Although the United States has the power to protect and enforce federal rights, it too failed to provide evidence of harm to the federal reserved water right. Summary judgment granted in part to Defendants.

XII. Oil and Gas (and Uranium)

***Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894 (2019).**

Mining companies and owners of land containing uranium deposit brought action against various Virginia state officials for declaratory and injunctive relief, alleging that a Virginia law preventing state agencies from accepting uranium mining permit applications was preempted by the federal Atomic Energy Act (AEA). The United States District Court for the Western District of Virginia, 147 F.Supp.3d 462, granted defendants' motion for summary judgment. Plaintiffs appealed. The Court of Appeals for the Fourth Circuit, 848 F.3d 590, affirmed. Certiorari was granted.

In a 3-3-3 decision, the United States Supreme Court held that the federal Atomic Energy Act (AEA) does not preempt Virginia law banning uranium mining. Justice Gorsuch, joined by Justice Thomas and Justice Kavanaugh, concluded that the AEA does not preempt Virginia's law banning uranium mining. Justice Ginsburg, joined by Justice Sotomayor and Justice Kagan, concurred, agreeing that the mining ban is not preempted by the AEA. However, the concurring opinion concluded that Justice Gorsuch's discussion of the perils of inquiring into legislative motive "sweeps well beyond the confines of this case". In addition, Virginia Uranium's obstacle preemption arguments (that the mining ban creates an "unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " fail under existing doctrine, so there is little reason to question whether that doctrine should be retained.

Chief Justice Roberts, joined by Justices Breyer and Alito, dissented, stating that "[a]lthough one party will be happy with the result of today's decision, both will be puzzled by its reasoning. That's because the lead opinion sets out an argument that no one made, reaching a conclusion with which no one disagrees." No party disputes the plurality's holding, as characterized by the dissent, that the AEA does not preempt the field of uranium mining safety. However, the question presented, says the Chief Justice, is whether a state can "purport to regulate a field that is *not* preempted (uranium mining safety) as an indirect means of regulating other fields that are preempted (safety concerns about uranium milling and tailings)." The dissent finds that the AEA clearly prohibits state laws that have the purpose and effect of regulating preempted fields. Since Virginia banned uranium mining to ban the more hazardous steps that come after mining- milling and storage of radioactive milling- the Virginia ban is preempted. Virginia disagreed with the Nuclear Regulatory Commission over how to safely regulate those activities, so used this tactic to indirectly regulate what the state is preempted from directly regulating.

Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board, 2019 WL 2605850 (Cmwlth. Ct. Pa.).

This is an appeal by Objectors from the order of the Butler County Court of Common Pleas (trial court) denying their appeal of the Middlesex Township (Township) Zoning Hearing Board's (Board) decision that denied their substantive challenge to the Township's Ordinance 127 and denied their appeal of the zoning permit that the Township issued to R.E. Gas Development, LLC (Rex). Initially, the Commonwealth Court affirmed the Board's decision. *See Delaware Riverkeeper Network v. R.E. Gas Development, LLC* (Pa. Cmwlth. Nos. 1229 C.D. 2015, 1323 C.D. 2015, 2609 C.D. 2015, filed June 7, 2017) (*Delaware Riverkeeper I*).

The matter returns to the Commonwealth Court on remand from the Pennsylvania Supreme Court pursuant to the following order:

AND NOW, this 3rd day of August, 2018, the Petition for Allowance of Appeal is **GRANTED**. The Order of the Commonwealth Court is **VACATED** and this matter is **REMANDED** to Commonwealth Court for reconsideration of its decision in light of *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) [(*PEDF II*)]. In addition, in light of the amendments contained in Middlesex Township Ordinance 127, which expressly include gas well development as a permitted use in the subject R-AG zone, and our decision in *Gorsline v. Bd. of Sup. of Fairfield Twp.*, [186 A.3d 375 (Pa. 2018) (*Gorsline II*)] wherein we noted "this decision should not be misconstrued as an indication that oil and gas development is never permitted in residential/agricultural districts, or that it is fundamentally incompatible with residential or agricultural uses," we direct Commonwealth Court to reconsider the relevance of *Gorsline* to its analysis of the issues on appeal in this case.

Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board, 190 A.3d 1126-27 (Pa. 2018) (*Delaware Riverkeeper II*) (emphasis in original). Upon reconsideration, the Commonwealth Court again affirm the Board's order.

This case is related to *Robinson Township v. Commonwealth*, 52 A.3d 463 (Pa. Cmwlth. 2012) (*Robinson I*), *aff'd in part and rev'd in part*, 83 A.3d 901 (Pa. 2013) (*Robinson II*).

Geyer owns farm property along the south side of the east-west Route 228 corridor in the Township near its boundary with Adams Township, which is near the Weatherburn Heights (Weatherburn) Planned Residential Development (PRD). In November 2012, the Township's Board of Supervisors enacted Ordinance 125 creating an R-AG Residential Agriculture Zoning District, a mixed-use district, to limit suburban growth and the location of PRD developments from a majority of the zoning districts in the Township. The Geyer farm is located in the R-AG Residential Agriculture District and Rex has leased the oil and gas underlying Geyer's property.

In August 2014, the Township's Board of Supervisors enacted Ordinance 127, over the objection of the Township's Planning Commission. Ordinance 127 states that the "Township Zoning Ordinance as currently written does not expressly provide for the use or regulation of oil and gas operations," and the "Township Board of Supervisors desires to expressly provide for the use and regulation of oil and gas operations within the Township." Reproduced Record (R.R.) at 34a. Ordinance 127 allows for "oil and gas well site development" as a permitted principal and accessory use in the AG-A Rural Residential District; AG-B Agricultural District; I-1 Restricted Industrial District; and the R-AG Residential Agriculture District; and as a conditional use in the C-2 Highway Commercial District; TC Town Center District; and C-3 Regional Commerce District. Ordinance 127 provides natural gas compressor stations as a permitted use in the I-1 Restricted Industrial District and as a conditional use in the AG-A Rural Residential District; AG-B Agricultural District; C-2 Highway Commercial District; TC Town Center District; and C-3 Regional Commerce District. The ordinance also provides natural gas processing plants as a conditional use in the I-1 Restricted Industrial and C-3 Regional Commerce Districts. *See* R.R. at 48a.

In September 2014, the Pennsylvania Department of Environmental Protection (DEP) issued well permits for drilling on the Geyer farm (Geyer site). The Township also granted Rex's application for a zoning permit for the drilling.

In October 2014, Objectors filed a substantive validity challenge to Ordinance 127 and an appeal of the zoning permit, which the Board consolidated for disposition. In the substantive validity challenge, Objectors claimed that Ordinance 127: (1) violates Article 1, Section 1 of the Pennsylvania Constitution⁸ because it was not designed to protect the health, safety, morals, and public welfare of its citizens and, therefore, is not a valid exercise of the Township's police power; (2) violates Article 1, Section 1 by injecting incompatible industrial uses into a non-industrial zoning district in violation of the Township's Comprehensive Plan thereby making the ordinance irrational; and (3) unreasonably infringes on their rights under Article 1, Section 27 of the Pennsylvania Constitution (Environmental Rights Amendment) to clean air, pure water, and a healthy local environment in which to live, work, recreate, and raise their children.

The expert witness for the Objectors testified that Ordinance 127 is not valid because it is not consistent with the comprehensive plan. According to this witness, oil and gas operations are a heavy industrial use associated with noise, odor, dust, pollution, fires and evacuations, which is inconsistent with the residential and agricultural uses in the R-AG Zoning District. The witness claimed that 90% of the land in the township is eligible for oil and gas development under the ordinance.

The Township's and Rex's land use expert, on the other hand, stated that oil and gas operations include industrial components but cannot be characterized as heavy industrial. This witness opined that the Objectors focused only on a temporary period of industrial development and did not consider the entire lifespan of the well pad. This witness calculated that 30% of the land in the township is open for oil and gas development. The Township Zoning and Hearing Board rejected the Objectors' claims, citing "woefully inadequate scientific expert testimony" and the consequent failure of the Objectors to meet their burden of proof.

The Commonwealth Court affirmed the Board’s decision, finding that:

- (1) The Township Supervisors’ view that the totality of oil and gas production, both during drilling and after reclamation, is compatible with the agricultural district is rational.
- (2) The totality of oil and gas drilling on a site is not an industrial use, but is instead a use traditionally exercised in agricultural areas, containing components of an industrial use.
- (3) Ordinance 127 specifically excludes oil and gas activities from areas zoned exclusively residential.
- (4) In mixed agricultural and residential districts, like R-AG, it is rational to preserve agricultural districts to provide a check on residential growth. “Oil and gas drilling provides a financial mechanism by which the free market can preserve agriculture”. Therefore, Ordinance 127 bears a substantial relationship to public health, safety, and welfare and provides a balancing of interests.
- (5) Objectors have failed to meet their burden that the oil and gas pads will injure their neighbors.
- (6) The Township Supervisors have acted in their role as trustee for future generations as required by the *Pennsylvania Constitution*, by helping to preserve agricultural resources for future generations.

XIII. Pipeline Cases

EPA Proposed Rule

On August 9, 2019, the EPA proposed a rule that would reduce state and tribal authority to block projects like pipelines, export terminals and dams over water concerns, and would give federal agencies new authority to expedite such projects. The proposed rule narrows the ability of states and tribes to deny permits to projects under Section 401 of the Clean Water Act. New York, Washington and Oregon have used Section 401 to block energy projects over environmental concerns recently. Guidance issued by the EPA in June, 2019 hinted at the changes.

***Defenders of Wildlife v. United States Department of Interior*, ___ F.3d ___, 2019 WL 3366598 (4th Cir. 2019).**

Environmental organizations filed petition for review of biological opinion (BiOp) and incidental take statement (ITS) issued by United States Fish and Wildlife Service pursuant to Endangered Species Act (ESA) in connection with proposed natural gas pipeline construction project.

The Fourth Circuit Court of Appeals held that:

- (1) BiOp’s conclusion that project would not jeopardize endangered rusty patched bumble bee’s (RPBB) survival and recovery was arbitrary and capricious;
- (2) BiOp’s conclusion that project would not jeopardize endangered clubshell’s survival and recovery was arbitrary and capricious;
- (3) take limit for endangered Indiana bat in ITS failed to satisfy criteria for proper surrogate habitat; and
- (4) take limit for threatened Madison Cave isopod (MCI) in ITS was arbitrary.

The BiOp and ITS are vacated and remanded.

***Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197 (4th Cir. 2019).**

Natural-gas company brought eminent domain actions against landowners to obtain easements for natural-gas pipeline route that had been approved by Federal Energy Regulatory Commission (FERC). The United States District Court for the Western District of Virginia, 2018 WL 648376, the United States District Court for the Northern District of West Virginia, 307 F.Supp.3d 506, and the United States District Court for the Southern District of West Virginia, 2018 WL 1004745, granted partial summary judgment to company and issued preliminary injunctions granting it immediate possession of the easements. Landowners appealed.

The Fourth Court of Appeal held that the district courts had authority to issue preliminary injunctions granting company immediate possession of easements. The company had demonstrated more than likelihood of success on merits. The company demonstrated irreparable injury absent preliminary injunctions. Balance of equities favored company over landowners. Public interest favored issuance of preliminary injunctions. Affirmed.

***Appalachian Voices v. State Water Control Board*, 912 F.3d 746 (4th Cir. 2019).**

Environmental groups and their individual members filed petitions to review certification of Virginia Department of Environmental Quality (DEQ) and State Water Control Board that it had reasonable assurance that activities related to construction of natural gas pipeline would not degrade the state's water resources. Pipeline company intervened.

The Fourth Circuit Court of Appeals held that DEQ and Board did not act arbitrarily and capriciously by purportedly reopening comment period as to its certification, specifically with regard to "upland" activities relating to pipeline's construction. In addition, DEQ and Board's decision not to conduct combined effect analysis did not render their issuance of certification arbitrary and capricious so as to violate Administrative Procedure Act (APA). The DEQ and Board did not act arbitrarily and capriciously by purportedly failing to conduct a separate and adequate antidegradation review before issuing certification. Finally, the DEQ and Board did not act arbitrarily and capriciously by purportedly failing to ensure that water quality in karst geology regions would be protected before issuing certification. Petition denied.

***Cowpasture River Preservation Association v. Forest Service*, 911 F.3d 150 (4th Cir. 2018).**

Petitioners brought action for review of decision of Forest Service, alleging it violated National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), and Mineral Leasing Act (MLA) by issuing special use permit (SUP) and record of decision (ROD) authorizing developer to construct natural gas pipeline through parts of national forests and granting right of way across Appalachian National Scenic Trail (ANST).

The Fourth Circuit Court of Appeals held that the Forest Service acted arbitrarily and capriciously in violation of NFMA by concluding that forest planning rule's substantive requirements were unrelated to purpose of, and thus inapplicable, to national forest plan amendments it made to allow developer to construct pipeline. The Forest Service acted arbitrarily and capriciously in violation of NFMA in determining that there was no substantial adverse impact on national forests as result of national forest plan amendments, such that forest planning rule's substantive requirements did not apply to amendments. The Forest Service did not act arbitrarily and capriciously in violation of NFMA by failing to provide opportunity for public comment for amended national forest plan standards. The Forest Service violated NFMA and its own national forest plans by failing to consider alternatives for construction of pipeline that would avoid national forest land. The Forest Service's adoption of alternative routes analysis in lead agency's final environmental impact statement (FEIS) was arbitrary and capricious in violation of NEPA. The Forest Service violated NEPA by adopting lead agency's final environmental impact statement (FEIS) without taking requisite hard look at environmental consequences of pipeline. The Forest Service lacked statutory authority to grant developer pipeline rights of way across ANST pursuant to MLA.

***Sierra Club v. United States Army Corps of Engineers*, 905 F.3d 285 (4th Cir. 2018).**

Petitioners asked the court to set aside Respondent U.S. Army Corps of Engineers' (the "Corps") December 22, 2017, verification and July 3, 2018, reinstated verification that construction of the Mountain Valley Pipeline (the "Pipeline") can proceed under the terms and conditions of Clean Water Act Nationwide Permit 12 ("NWP 12"), rather than an individual permit. Among other arguments, Petitioners asserted that, in issuing its verification, the Corps improperly imposed one condition—requiring use of a "dry cut" method for constructing four river crossings—"in lieu of" a special condition imposed by the State of West Virginia, J.A. 232—that "[i]ndividual stream crossings must be completed in a continuous, progressive manner within 72 hours," J.A. 43—as part of its certification of NWP 12. Construction of each of the four river crossings using the "dry cut" method is expected to take four-to-six weeks to complete.

Exercising jurisdiction pursuant to 15 U.S.C. § 717r(d)(1), the court concluded that the Corps lacked authority to substitute the "dry cut" requirement "in lieu of" West Virginia's 72-hour temporal restriction. Accordingly, the court vacated, in its entirety, the Corps' verification of the Pipeline's compliance with NWP 12. *See* 5 U.S.C. § 706(2); 33 C.F.R. § 330.6(d) (explaining that if any part of a project requires an individual permit, then "the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process."). The court reserved judgment on the parties' remaining arguments until a forthcoming opinion.

***Sierra Club v. United States Army Corps of Engineers*, 909 F.3d 635 (4th Cir. 2018).**

Environmental groups petitioned for review of actions by the United States Army Corps of Engineers, LRH-2015-592-GBR, which decided that construction of natural gas pipeline could proceed under terms and conditions of an existing general permit, rather than an individual permit.

The United States Court of Appeals held that Corps' determination, that it had authority under Clean Water Act (CWA) to substitute on a case-specific basis its own conditions for those conditions imposed by states as part of their certification of a nationwide permit, was not entitled to *Chevron* deference nor was determination entitled to *Skidmore* deference. Corps exceeded its authority under CWA by substituting its own special condition in lieu of condition certified by state of West Virginia. Corps' determination that a state could waive a condition it imposed in certifying a nationwide permit was not entitled to *Chevron* deference. West Virginia could not waive condition without providing public notice and opportunity for public comments. Petition granted.

***Sierra Club v. United States Department of Interior*, 899 F.3d 260 (4th Cir. 2018).**

Environmental organizations filed petitions for review of incidental take statement (ITS) issued by United States Fish and Wildlife Service (FWS) authorizing natural gas pipeline to take listed species and right of way issued by National Park Service (NPS) allowing pipeline to drill and pass underneath parkway surface. Petitions were consolidated.

The Fourth Circuit Court of Appeals held that the petitions were timely. The take limits in ITS were arbitrary and capricious. Organizations had associational standing to file petition seeking review of right of way issued by NPS. NPS's interpretation of statute regarding licenses or permits for rights-of-way over parkway lands was not entitled to *Chevron* deference or *Skidmore* respect. Mineral Leasing Act (MLA) did not diminish NPS's authority to manage National Park. NPS acted arbitrarily and capriciously in granting right of way. Natural Gas Act (NGA) did not preclude Court of Appeals from granting petitions. Petitions granted.

***Sierra Club v. United States Department of Interior*, 722 Fed. Appx. 321 (Mem.) (4th Cir. 2018).**

Petitioners seek review of the U.S. Fish and Wildlife Service's Incidental Take Statement, which authorized the Atlantic Coast Pipeline project to take certain threatened or endangered species. As to five of the affected species, Petitioners argue that the agency failed to set clear limits on take as required by the Endangered Species Act.

Exercising jurisdiction pursuant to 15 U.S.C. § 717r(d)(1), the court concluded, for reasons to be more fully explained in a forthcoming opinion, that the limits set by the agency are so indeterminate that they undermine the Incidental Take Statement's enforcement and monitoring function under the Endangered Species Act. Accordingly, the court vacated the Fish and Wildlife Service's Incidental Take Statement. *See* 5 U.S.C. § 706(2). We reserve judgment on the parties' remaining disputes until our forthcoming opinion.

Sierra Club v. State Water Control Board, 898 F.3d 393 (4th Cir. 2018).

Environmental groups, individuals, and other entities filed petitions for review of decision of Virginia Department of Environmental Quality (DEQ) certifying under Clean Water Act (CWA) that it had reasonable assurance that certain activities regarding construction of natural gas pipeline would not degrade state's water. Petitions were consolidated, and pipeline company intervened.

The Fourth Circuit Court of Appeals held that petitioners had standing. State had sufficient basis to find reasonable assurance that construction activities would not degrade state's water. State did not act arbitrarily and capriciously in deciding to analyze impacts from activities covered by nationwide permit (NWP) separately from impacts from upland activities related to pipeline's construction. Petitions denied.

Sierra Club v. United States Forest Service, 897 F.3d 582 (4th Cir. 2018).

Conservation organizations sought judicial review of Bureau of Land Management's (BLM) decision granting a right of way through federal land for construction and operation of natural gas pipeline and of United States Forest Service's decision to amend the Jefferson National Forest Land Resource Management Plan to accommodate the right of way and pipeline construction, alleging that BLM and Forest Service violated the National Environmental Policy Act (NEPA), the Mineral Leasing Act (MLA), and the National Forest Management Act (NFMA).

The Fourth Circuit Court of Appeals held that the Forest Service acted arbitrarily and capriciously in adopting Federal Energy Regulatory Commission's (FERC) sedimentation analysis in its environmental impact statement (EIS). BLM and Forest Service reasonably evaluated the impacts on National Forest from granting right of way for pipeline. Draft EIS's statement of project purpose was reasonable under NEPA. The Forest Service's record of decision (ROD) adopting FERC's EIS adequately considered alternatives. The Forest Service acted arbitrarily and capriciously in concluding that its amendment to national forest plan to permit pipeline to be built through forest was not directly related to any substantive requirement of NFMA's 2012 Planning Rule. BLM violated its obligations under MLA to minimize adverse environmental impacts and proliferation of separate rights-of-way across federal lands in issuing ROD adopting FERC's EIS. Petitions for review granted, vacated and remanded.

Berkley v. Mountain Valley Pipeline, LLC, 896 F.3d 624 (4th Cir. 2018).

Landowners along path of proposed natural gas pipeline brought action against various defendants, including joint venture project to construct pipeline and Federal Energy Regulatory Commission (FERC), challenging constitutionality of provisions of the Natural Gas Act (NGA), including that NGA's eminent domain provision violated the Fifth Amendment. The United States District Court for the Western District of Virginia granted defendants' motion to dismiss. Landowners appealed.

The Fourth Circuit Court of Appeals held that Congress's intent to preclude district-court jurisdiction was fairly discernible in NGA. Factors for determining whether district court was divested of subject matter jurisdiction weighed in favor of finding Congress did not intend district court to have jurisdiction. Affirmed.