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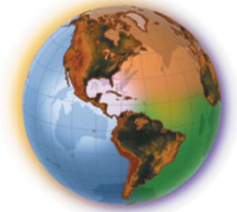

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The Volkswagen air pollution emissions scam

Professor Arnold W. Reitze, Jr.

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On September 18, 2015, the U.S. Environmental Protection Agency (EPA) announced that Volkswagen sold 482,000 diesel engine vehicles in the United States that were programmed to pass the government's emissions tests, but under normal driving conditions would emit air pollutants significantly above legal limits. Interestingly, EPA only recently discovered the cheating through the results of an independent study, even though it had been going on for many years. The International Council on Clean Transportation (ICCT), a European environmental group, wanted to have the U.S. technology adopted for European motor vehicles because Volkswagen was meeting emission standards in the United States that were more stringent than those imposed in the European Union. The ICCT provided a grant to West Virginia's Center for Alternative Fuels, Engines and Emissions (CAFEE) to study emissions during real-world driving. After extensive testing of various Volkswagen diesel models in California, and driving test diesel vehicles to Seattle, the CAFEE researchers concluded the vehicle's emissions were exceeding the Clean Air Act (CAA) standards by 5 to 35 times. On March 31, 2014, the results of this study were presented at an industry conference in San Diego, which led to Volkswagen, on September 3, 2015, admitting to U.S. and California regulators that it deliberately outfitted its cars with "defeat devices."

The vehicles involved include model year (MY) 2009 through 2015 Volkswagen Beetle and Jetta models and the MY 2014 and 2015 Passat models. Subsequently, Volkswagen announced that about 11 million vehicles of various models with 1.6- and 2.0-liter diesel engines sold worldwide have affected diesel engines. According to EPA, Volkswagen programmed the computer that controls the engine performance to activate the emissions controls when driving patterns are detected that are consistent with a testing protocol. When the vehicle is operated on the road, the computer is programmed to maximize fuel economy, but air pollution emissions increase dramatically. On November 2, 2015, EPA and the California Air Resources Board (CARB) announced that Volkswagen, Audi, and Porsche vehicles with 3-liter diesel engines also have defeat devices, which adds about 10,000 vehicles plus an unknown number of MY 2016 vehicles to the list of vehicles alleged to violate the CAA. On November 19, 2015, Volkswagen admitted 85,000 3.0-liter diesel engine vehicles had technology that was not disclosed to EPA during the certification process. This could result in an additional maximum penalty of $412 million. Moreover, Volkswagen has admitted that carbon dioxide emissions and related fuel consumption levels were misrepresented for up to 800,000 vehicles. However, the carbon dioxide issue may not be as serious as initially thought. Volkswagen has estimated the financial impact of these transgressions at over $9.24 billion.

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The decision by Volkswagen to cheat on the emissions requirement may have its root in the 2007 decision to not use the Daimler Blue Tec device that sprays urea into the exhaust stream to neutralize nitrogen oxide (NO_x) formation. The company wanted to avoid the use of urea tanks, which are expensive, take up space, and are an inconvenience to consumers. Moreover, Volkswagen would have had to meet EPA regulations on the use of selective catalytic reductions (SCR) systems that, at that time, made it almost impossible for light-duty vehicles to comply. They chose to use a "Lean NO_x" system that injects extra fuel into the engine and into the exhaust system. This involves a trade-off between NO_x formation and fuel economy that requires complex calibration of the onboard engine control computer. Unfortunately, it appears that the system could not meet the stringent U.S. emission standards while still preserving the fuel economy benefits of the diesel technology.

Under the CAA § 203(a)(3)(b), the use of components intended to defeat or bypass pollution controls is prohibited; § 203(a)(1) prohibits the sale of vehicles that do not conform to the specifications under an approved certificate of conformity issued by EPA. Volkswagen now faces a maximum civil penalty of $37,500, with the adjustments for inflation, for each of the over half million diesel vehicles involved in the testing violations. This could result in a civil penalty as high as $20 billion. On January 4, 2016, the U.S. Department of Justice filed a civil complaint against Volkswagen, Audi, and Porsche for violations involving almost 600,000 diesel engine vehicles.

The U.S. Department of Justice is also conducting a criminal investigation. Under the CAA, violations of the mobile source provisions are not subject to criminal prosecution for knowing violations, although CAA § 113(c)(2) provides for criminal fines and imprisonment for up to two years for false statements and certifications. In situations such as Volkswagen's, the violation the government is likely to allege is giving false statements pursuant to 18 U.S.C. § 1001, which provides for criminal fines and a prison sentence of up to five years.

Moreover, at least 28 states, led by California, are looking into state enforcement actions against Volkswagen. In late September 2015, Texas became the first state to sue Volkswagen Group of America, Inc. The state is seeking $100 million in damages for worsening air quality in Harris County, which is already an ozone nonattainment area. The Texas Attorney General is also suing Volkswagen for violating the Texas Deceptive Trade Practices Consumer Protection Act. In October 2015, the West Virginia Attorney General's Office filed a lawsuit against Volkswagen of America, Inc., for at least $43 million for alleged violations of the state's consumer protection law. In addition, many individual consumer lawsuits have been filed. This led the U.S. Judicial Panel on Multidistrict Litigation to transfer 63 pending consumer lawsuits to the U.S. District Court for the Northern District of California with the potential to add 451 actions against Volkswagen.

The most costly part of any settlement, however, could be requirements to mitigate the harm,

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which could include both supplemental environmental projects *and* repair of the defective emission technology. Repairing the defective vehicles could involve many European countries because the governments of Germany, Spain, Sweden, Switzerland, Italy, and Belgium are recalling the vehicles. Because diesel vehicles account for half the European car market, the mandatory recall imposed by Germany will require the repair of 8.5 million vehicles. The fix will take time because the affected cars involve three generations of diesel technology. Generation three vehicles include MY 2015 and 2016. They will be the easiest to repair and are to be addressed in 2016. Generation two vehicles will begin to be repaired in mid-2016. However, generation one vehicles, which make up most of the affected fleet, will require a more substantial engineering effort. The time for these repairs to be initiated and completed is unknown.

Volkswagen, on November 3, 2015, told its dealers to halt the sale of some Volkswagen and Audi new and used models. Porsche has halted sales of its Cayenne sports utility vehicle. On November 4, 2015, Moody's Investors Service Inc., downgraded Volkswagen's credit rating to A3 from A2 with the potential of additional downgrades. In November, Fitch lowered the long-term credit rating to BBB+ and in December so did Moody. The ramifications of Volkswagen's alleged violations can be expected to continue to unfold for years.

Judicial challenges to the Clean Water Rule: A brief and relatively painless guide for the procrastinator

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If you have ignored the litigation contesting the Obama administration's efforts to define "waters of the United States" for purposes of the Clean Water Act, you are in luck: mostly what you have missed is a fight about where to have the fight.

More than two dozen cases have been filed challenging the Clean Water Rule, issued by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers on June 29, 2015. 80 Fed. Reg. 37,054. For the moment, you only need to pay close attention, at most, to three of them. Bonus!

The rule is a shameless appeal to Justice Kennedy, widely expected to be the deciding vote when a rule challenge inevitably reaches the Supreme Court. Justice Kennedy wrote the concurring opinion in the last Supreme Court case to address Clean Water Act jurisdiction, *Rapanos v. United States*, 547 U.S. 715 (2006). *See* C. Thomas, *Defining "Waters of the United States": A*

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Mean-Spirited Guide, Natural Res. & Env't, Summer 2015, at 32, *available at* http://www.squirepattonboggs.com/~/media/files/insights/publications/2015/08/defining-waters-of-the-united-states/nre_v30n01_feat07_thomas.pdf. His opinion broadly concluded that the Clean Water Act regulates anything with a "significant nexus" to waters that "are or were navigable in fact or that could reasonably be so made." Given the breadth and ambiguity of the term "significant nexus," EPA and the Corps squeeze it in 438 times in the rule and its supporting material.

The "significant nexus" test, alas, is not uniformly loved. Because of ambiguity about the proper forum for challenges to the rule, opponents have sought review in numerous courts. At the appellate level, 16 petitions for review were filed in eight courts of appeal. The matters were consolidated pursuant to 28 U.S.C. § 2112 in a single action within the United States Court of Appeals for the Sixth Circuit. Those consolidated cases are commonly referred to as either *In Re EPA and Department of Defense Final Rule* or *State of Ohio v. U.S. Army Corps of Engineers.* Nos. 15-3751 (MCP No. 135).

The petitioners include industry and environmental groups and 18 states. Petitioners would prefer to have the merits of their arguments heard first at the district court level. Accordingly, they moved to dismiss their own petitions, arguing that the final rule is not subject to immediate review by the courts of appeal.

Since dismissal of the Sixth Circuit proceeding would leave the United States to litigate at least 16 cases in 13 district courts, respondents would obviously prefer to stay put. The jurisdictional issue was argued before the Sixth Circuit on December 8, 2015. Those desperate for entertainment can find docket numbers for all of the appellate and district court proceedings in footnotes 3 and 4 of the government's brief, Docket No. 58.

In a burst of counter-intuitive efficiency, prior to even determining itself whether it has jurisdiction over the case, on October 9, 2015, the Sixth Circuit panel granted a motion to enjoin implementation of the rule, nationwide. That is, although the panel was not sure it had the power to decide the case, it nevertheless decided it had the authority to enjoin EPA and the Corps from implementing the rule. You are not alone if that reminds you of Alice's Red Queen insisting on proclaiming "sentence first, verdict afterward." L. Carroll, Alice's Adventures in Wonderland & Through the Looking-Glass (Penguin 2000).

On February 22, 2016, the panel decided that it does have jurisdiction. But it did so via a 2–1 ruling, with the two judges concluding that the court does have jurisdiction coming up with completely different grounds for so doing. Needless to say, a petition for rehearing *en banc*—which remains pending—immediately followed. *In Re: Environmental Protection Agency and Department of Defense Final Rule*, Nos. 15-3751 (6th Cir.) (Nos. 85, 86).

One other case at the appellate level bears mention, *State of Georgia v. McCarthy,* No. 15-

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14035 (11th Cir.). This is an appeal by 11 states of a district court ruling denying their request to enjoin implementation of the rule. The district court found that the courts of appeal have exclusive jurisdiction over the states' challenges, on the grounds that the Clean Water Rule is, indeed, the sort of "effluent or other limitation" that must be challenged via petition for review. Oral argument took place on the jurisdictional issue on February 23, 2016.

That brings us to the district courts. The United States had asked the U.S. Judicial Panel on Multidistrict Litigation to consolidate all of the district court cases—back when there were only a measly nine of them. The Judicial Panel declined, properly, ruling that 28 U.S.C. § 1407 supports consolidation of cases that involve common issues of fact, but not merely common issues of law. In re: Clean Water Rule: Definition of "Waters of the United States," MDL No. 2663, Doc. #163 (J.P.M.L. Oct. 13, 2015).

Of the 16 district court cases, the most notable one has been *North Dakota v. EPA,* No. 3:15-cv-00059 (D.N.D.). The District of North Dakota has already analyzed the constitutional merits of the rule and found them wanting. On August 27, 2015, the court granted a preliminary injunction against implementation of the rule. The court found the rule likely exceeds the agencies' congressional mandate to regulate "waters of the U.S." and also likely violates the Administrative Procedure Act. The judge later clarified that the injunction applied only in the 13 states party to the case (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico (through state agencies), North Dakota, South Dakota, and Wyoming).

So where does this leave us, other than dazed and confused? The Sixth Circuit's nationwide injunction against enforcing the new rule will remain in place for now. That could change, however, if the Sixth Circuit accepts the petition for rehearing *en banc* and decides it does not have jurisdiction after all. In that event, the Eleventh Circuit conceivably could step in. If not, the consolidated actions will again be fragmented and you will need to start paying attention to the other district court cases, desperate for entertainment or not. And of course, subject to further developments in lower court cases, enforcing the rule would be permissible except in the 13 states litigating the North Dakota action.

Ultimately, whether the new Rule exceeds either Congress' grant of statutory authority in the Clean Water Act or Congress' constitutional power to regulate under the Commerce Clause is likely to be decided by the U.S. Supreme Court. More particularly, the issue is likely to be decided–or not decided, in light of the death of Justice Scalia–by the single vote of Justice Kennedy. There is a reason why the rule and its supporting material used Kennedy's phrase "significant nexus" 438 times.

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Supreme Court walks energy policy tightrope as it addresses federalism and states' rights

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A rare trio of near-simultaneous Supreme Court energy cases is providing considerable drama as the Court weighs competing claims of federal and state power to control energy policy. In resolving them, the Court is likely to shape the future of energy project development, renewable energy, and possibly even the Court's eventual review of the Obama administration's Clean Power Plan.

With Congress in stalemate over energy policy, particularly on issues relating to climate change, clean energy, energy efficiency, and demand reduction, the states have stepped forward to fill the void. States are legislating and regulating to support renewables and new clean (natural gas-fired) power generation as replacements for old and dirty coal plants, and are examining the limits of natural gas pipeline pricing power. At the same time, the Federal Energy Regulatory Commission (FERC) is also trying to innovate—for instance, by supporting demand response programs that pay customers to avoid using electricity during periods of peak demand.

Who should lead this effort—the states or FERC? The Supreme Court is walking a tightrope as it considers these issues. With two of the three energy cases now decided, the Court appears to be supporting a new spirit of cooperative federalism, under which the federal government can regulate in matters directly affecting wholesale power and gas markets, while states retain authority over retail energy sales and matters that indirectly affect wholesale markets.

Negawatts equal megawatts

The Court's most recent decision, *Federal Energy Regulatory Commission v. Electric Power Supply Ass'n*, ___ S. Ct.___, No. 14-840, (U.S. Jan. 25, 2016), responds to a rule FERC issued in 2010 under the Federal Power Act (FPA), known as Order No. 745, that requires wholesale power market operators to pay electric consumers for their commitments *not* to use power at certain key times (such as when demand is particularly high). Order No. 745 required that these payments for not using electricity be equal to the rates wholesale power generators are paid for *generating* electricity. FERC thus sought to establish the principle that "negawatts" equal megawatts.

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Wholesale generators, seeing FERC's position as a threat to their market, challenged Order No. 745. First, they argued, FERC has no jurisdiction under the FPA over the electric consumption of end-use customers at their homes or places of business; such retail use is the province of the states. Second, they argued that FERC acted arbitrarily and capriciously by determining that negawatts equal megawatts. After all, why should customers that make the inexpensive decision to *stay out* of the market be paid the same amount as companies that invest millions to erect the massive machinery that actually generates electricity?

In a 6–2 decision (Justice Alito recused himself), the Court sided with FERC, reasoning that Order No. 745 only *indirectly* impacted retail market prices; the order's direct effect was on wholesale markets, thus putting it within FERC's jurisdiction. Justice Kagan, writing for the majority, said that FERC had "amply explained how wholesale demand response" helps to achieve the FPA's dual core objectives—to protect "against excessive prices" and ensure "effective transmission of electric power." The Court, she wrote, would not "read the FPA, against its clear terms" and overhaul demand response when it so clearly permits FERC "to fulfill its statutory duties of holding down prices and enhancing reliability in the wholesale energy market." Given the FPA's purposes (which no one disputed), the Court was unpersuaded by arguments that FERC had overstepped its jurisdiction and was impinging on states' rights to regulate retail power prices. As Justice Kagan wrote, "although (inevitably) influencing the retail market too, [Order No. 745] does not intrude on the States' power to regulate retail sales." She added that, "in choosing a compensation formula, the Commission met its duty of reasoned judgment. FERC took full account of the alternative policies proposed, and adequately supported and explained its decision."

Natural Gas Act and states' antitrust authority

The second case, *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015), involved states' efforts under state antitrust laws to investigate wholesale natural gas sellers' direct sales to large industrial customers. In *Oneok*, the Court held that the Natural Gas Act (NGA)—a statute similar to the FPA in many respects—does not preempt a state antitrust investigation of sales of natural gas. The Court nonetheless observed that "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce."

The key difference for preemption purposes was the distinction between "measures aimed directly at interstate purchasers and wholesale for resale, and those aimed at" subjects left to the states. Where a state law can be applied to nonjurisdictional (i.e., state's realm) as well as jurisdictional (i.e., FERC's realm) sales, the Court will only find preemption where the matter falls within the preempted field. Antitrust laws, the Court said, like blue sky laws, are not aimed at natural gas companies in particular, but rather at all businesses in the marketplace. This broad applicability, not aimed at wholesale natural gas sellers, convinced the Court to find no preemption.

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Can states support wholesale power plant development?

The final cases, yet to be resolved, are in ways the mirror image of *FERC v. Electric Power Supply Ass'n*, this time testing whether *states* ventured too far into FERC's exclusive realm under the FPA. These cases, which were scheduled to be argued on February 24, 2016, deal with states offering selected power plant developers guaranteed wholesale capacity payments no matter what they actually produce. *Hughes v. Talen Energy Mktg.*, No. 14-614, and *CPV Md. v. Talen Energy Mktg.*, No. 14-623. The key issue is whether the FPA preempts states from offering guaranteed contract prices to build wholesale power plants in organized competitive wholesale power markets. Both the Third and Fourth Circuits determined that similar procurement programs in two states were preempted by the FPA.

Given the lack of a circuit split, lawyers involved in the *Talen Energy* cases were surprised when the Supreme Court granted certiorari only five days after oral argument in *Electric Power Supply Ass'n*. Some have speculated that Justice Alito's recusal in that case may have been behind the surprise grant, reasoning that because a 4–4 split was possible in *Electric Power Supply Ass'n*, the Court wanted to assure itself of another crack at the FPA this term to define the boundaries of cooperative federalism in electricity policy. Time will tell.

Is the Endangered Species Act an endangered statute? Drought stressors on species protection

Sandi Snodgrass and Tom Jensen

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The U.S. Supreme Court has remarked that the "the language, history, and structure" of the Endangered Species Act (ESA) "indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). The prolonged western drought is calling into question whether federal legislators will continue to grant imperiled species the highest priority. A recent California-focused bill passed by the U.S. House of Representatives shows that some in Congress believe that at-risk species conservation is a lower priority than agriculture and other economic interests. A California-focused bill introduced in the Senate directs agencies to maximize water supplies, but only to the extent consistent with the ESA. The Senate bill also funds water storage and other structural changes to augment water supplies for human needs and to benefit ESA-listed

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fish. Both bills appear to be framed to require agencies to avoid extinction of endangered species. However, neither bill appears written to foster recovery of endangered fish species, including those that are already near extinction.

H.R. 2898 – Western Water and American Food Security Act of 2015

Introduced by Representative David Valadao (R-CA) on June 25, 2015, H.R. 2898, the Western Water and American Food Security Act of 2015, was passed by the House of Representatives on July 16, 2015. It includes a wide variety of measures to address the continuing drought and has a highly prescriptive approach to ESA-listed species.

In particular, it requires the Director of the U.S. Fish and Wildlife Service to review and modify every five years the method used to calculate the incidental take levels for the Delta smelt fish species in the 2008 biological opinion for the federal Central Valley Project (CVP) based on updated information and modeling. It also directs how the modified incidental take level should be determined, including using population levels from a time period when smelt abundance was much higher than current levels. The bill directs the Secretary of the Interior to conduct additional annual surveys for Delta smelt and requires the Director to continuously evaluate, and amend as appropriate, the reasonable and prudent alternative in the Delta smelt biological opinion. It sets forth similar provisions with respect to adjustment of reasonable and prudent alternatives in the 2009 salmonid biological opinion for the CVP.

H.R. 2898 also requires the federal and state water projects to maximize water deliveries, so long as such deliveries do not directly result in a negative impact on the long-term survival of the Delta smelt and listed salmonid species, taking into account any efforts to offset impacts of adjusted operations such as habitat improvements, predator control, and fish salvage. The bill defines “negative impact on the long-term survival” as “to reduce appreciably the likelihood of the survival of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” Notably, this differs from the “jeopardy” standard of the ESA, which refers to both survival and recovery, and to direct and indirect effects, not just survival and not solely direct effects on survival. 50 C.F.R. § 402.02. It also requires that all hatchery-spawned fish be treated the same as natural-spawned fish for purposes of any determinations under the ESA, contrary to current agency practice that aims to protect and recover wild fish stocks.

S. 1894 – California Emergency Drought Relief Act of 2015

On July 29, 2015, Senator Dianne Feinstein (D-CA) introduced S. 1894, the California Emergency Drought Relief Act of 2015. The bill contains a variety of funding and water project operational strategies. It includes major funding provisions for desalination research and development, water storage, water-efficiency programs, assistance to drought-stricken

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communities, loans or loan guarantees for water resources infrastructure projects, and grants for water recycling and reuse.

The bill, like the House-passed measure, includes provisions requiring agencies to maximize water supplies available through operation of California water projects, including the CVP and the State Water Project (SWP). But it expressly states that nothing in the bill authorizes any federal official to take any action that is likely to jeopardize any ESA-listed species or result in the destruction or adverse modification of critical habitat or cause any additional adverse effects beyond those anticipated under the 2008 and 2009 biological opinions applicable to the CVP and SWP. The ESA savings provision begs the question whether adherence to existing law is in fact adequate to preserve or recover the listed species, some of which are in steep decline. The Senate bill includes numerous provisions related to habitat, hatchery operations, predation, and other measures that, while not providing flows, may benefit fish populations. S. 1894 would terminate when the Governor of California declares an end to the state drought emergency or on September 30, 2017, whichever is later.

Prospects and implications

Although both bills include some provisions that would address water resources outside California, Congress has yet to consider a national or "west-wide" drought bill. Senators Murkowski and Cantwell, the Republican and Democratic leaders of the Senate Committee on Energy and Natural Resources, have expressed interest in passing a west-wide bill. A representative of Idaho water users recently criticized the Senate bill, saying it "would do little for other Western states and would actually expand California's environmental mandates to other states," foreshadowing the difficulty of passing broader legislation. Legislative maneuvering to attach California drought legislation to a year-end appropriations bill appears to have collapsed. This winter's El Niño may reduce immediate pressure for legislation, though persistent drought conditions forecasted for western states will undoubtedly continue to impact species-protection policy and actions. Policymakers will grapple for strategies capable of addressing the "new normal" of water shortages without abandoning species protection. Perhaps the recent Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, which encourages landscape-scale mitigation and private investment in conservation, will improve the resiliency of at-risk species to drought and other environmental stressors so that, when water is scarce, neither species nor society needs to make the ultimate sacrifice.

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Pipe dreams: A Canadian perspective on the Keystone XL pipeline rejection

Dufferin Harper

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The project

Keystone XL (KXL) is a proposed pipeline project by TransCanada Pipelines Limited (TCPL) involving the transport of up to 830,000 barrels per day of Alberta oil to the United States. KXL would not have been the first pipeline to ship oil across the Canada-U.S. border (there are currently approximately 30 other cross-border oil pipelines), nor would it have been the first pipeline to ship Alberta oil to the United States. Indeed, prior to KXL, cross-border pipelines were considered so routine that former Prime Minister Harper once called the U.S. decision to approve KXL a "no-brainer" and "inevitable."

The decision

So much for prognostications. On November 6, 2015, after seven years of regulatory review and just weeks before the UN Climate Change Summit in Paris, President Obama's administration rejected the KXL pipeline application. As justification for the rejection, Secretary of State John Kerry referred to a variety of factors, including that Alberta oil was a "particularly dirty source of crude."

The label

The "dirty crude" label stems from the manner in which much of Alberta's oil (or more accurately stated, bitumen) is recovered. Approximately 99 percent of Alberta's proven oil reserves are in the form of bitumen, a sticky molasses-like substance that does not flow at room temperature. Alberta has extensive areas where certain sands and clays are saturated with bitumen, thus the name "oil sands."

If bitumen is located close to the surface it is removed by surface mining. Alternatively, if it is located deeper underground, it is removed by a variety of techniques involving the drilling of wells and the use of pressurized steam and solvents. Both mining and well techniques generate more greenhouse gas (GHG) emissions than conventional oil recovery methods, hence the label "dirty."

Reaction to the decision

In typical Canadian fashion, the initial political reaction to the KXL rejection has been

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subdued, with Prime Minister Trudeau stating that he was "disappointed" and Premier Notley of Alberta indicating she was "not surprised." The subdued reaction may in part be because it appears to many Canadians that the rejection was based more on political motives beyond the control of Canadians rather than environmental concerns. For example, Saskatchewan's premier stated: "The US administration chose to put political interests ahead of the economic and environmental benefits that Keystone XL would provide." Similarly, Russ Girling, president and CEO of TCPL, stated: "Today misplaced symbolism was chosen over merit and science—rhetoric won over reason."

Reaction to the label

What has not been subdued has been Canada's, and particularly Alberta's, response to the "dirty crude" label. Although Alberta has had a GHG emissions regime since 2007 (it was the first North American jurisdiction to do so), Alberta has been diligently working towards revising that regime. In November 2015, immediately prior to the UN Summit, Alberta unveiled its new Climate Leadership Plan (Plan). The timing of the Plan's release coincidentally followed the rejection of KXL.

Two aspects of the Plan involve the oil sands. First, oil sands facilities will be required to meet an oil sands specific emissions performance standard in which they will be compared to the best-performing facilities, i.e., those with the lowest GHG emissions per unit of production. Second, in direct response to criticisms that the continued development of the oil sands will lead to unrestricted GHG emissions, a legislated limit or cap on oil sands emissions will be imposed. Current annual oil sands emissions are 70 megatonnes of carbon dioxide (CO_2). The new cap will limit annual emissions to 100 megatonnes of CO_2. The initial reaction to Alberta's Plan has been positive. Even Al Gore has come out in praise of the Plan, calling it an example of "forward thinking action" by Alberta.

The new reality

What has become obscured in the KXL rejection is the lost opportunity that it represents to the United States. The United States currently imports oil from a variety of countries, although Canada is by far its largest source (approximately 37 percent). In contrast, approximately 97 percent of Canada's oil exports (the vast majority of which come from Alberta) go to the United States. In essence, the United States benefits from receiving nearly all of the oil exports from its democratically stable Canadian neighbor, which has the third-largest proven oil reserves in the world. Assuming Alberta's new Plan is considered credible on the world stage and it overcomes its "dirty crude" label, the KXL rejection may provide incentive for Canada to look beyond the United States to export Alberta oil. In response to the KXL rejection, Canada's Foreign Affairs minister stated: "We need to be sure that . . . nobody will question the fact that Canada has a strong environmental assessment, strong science, strong clean energy deployment, strong clean infrastructure, and then our products and goods *will be welcome everywhere*." Similarly,

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Premier Notley stated: "The decision today underlines the need to improve our environmental record and enhance our reputation so that we can achieve our goal of building Canada's energy infrastructure, *including pipelines to new markets*."

The KXL pipeline decision may become one that the United States ultimately regrets. Once Canada has expanded its export base to include other countries, the United States may lose the opportunity to import the "no longer dirty" crude oil from its stable neighbor to the north.

Responding to the drought: A dispatch from California

David Aladjem

David Aladjem is a partner with Downey Brand LLP in the firm's Sacramento, California office.

As of this writing, California has endured four years of severe drought, or as the chair of the California State Water Resources Control Board, Felicia Marcus, described it, "the drought of our lifetimes." The snowpack in the Sierra Nevada Mountains, which provides a very large proportion of California's water supply, is above normal for this time of year, even though California's major reservoirs only have about half of their normal storage capacity. Scientists are predicting a strong El Niño event in 2016, but even such a strong weather pattern is unlikely to enable California to shake off the enduring effects of this extended drought. Therefore, this is a good time as any to evaluate California's overall response to the drought and what it might mean for Western water law in the future.

Limits on agricultural water use

California's water system operates according to the principle of priority, under which the first user is "senior" and has the most secure right to water, while later users are deemed "junior." During drought periods, junior users must cut back (or "curtail") their water use before those with more senior rights. The agricultural sector has felt the impact of the drought most keenly where agricultural users have junior water rights, such as those associated with the two largest in-state water projects: the federal Central Valley Project (CVP) and the California State Water Project. Working with the CVP and the State Water Project, the California State Water Resources Control Board (SWRCB) has enforced the priority system via "curtailments" (i.e., SWRCB orders that require certain classes of junior users to reduce or halt their water use entirely). As a result of drought and SWRCB curtailments, CVP agricultural water users have not received any allocations of water during the past two years; during that same span, SWP users received a 5 percent allocation in 2014 and a 20 percent allocation in 2015, mostly due to the availability of stored water. All nonproject water users with priority dates after 1914 were curtailed in 2014 and nonproject water users with priority dates after 1903 were curtailed in

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2015.

Limits on urban water use

In the urban sector, Governor Edmond G. "Jerry" Brown, Jr. requested that urban water users voluntarily cut back their use in 2014 by 25 percent. Water users in Northern California largely complied, but there were limited reductions in water use in Southern California. Many agencies, particularly those in Southern California, objected to the 25 percent target on the grounds that they had been engaged in water conservation efforts for many years so they effectively were being penalized for past efforts. Further, they contended that as they had invested strategically in local supplies, the newly proposed reductions would not really provide an overall water supply benefit. In 2015, by contrast, Governor Brown mandated a 25 percent reduction statewide but directed the SWRCB to allocate these reductions to reflect, among other things, past conservation efforts, resulting in "tiered" conservation requirements wherein some suppliers must conserve more than 25 percent and others less. Final results are not yet in at the time of this writing (the reporting period ended in February), but it appears that California will indeed meet Governor Brown's ambitious conservation target.

Limits on environmental water use

Recognizing early in 2015 that it would be impossible to meet the established water quality standards in the San Francisco Bay-San Joaquin River Delta Estuary (the "Bay-Delta Estuary"), the CVP and the State Water Project petitioned the SWRCB to modify those standards to reflect the severity of the drought. The SWRCB did modify the water quality standards through a series of orders, after engaging in informal consultations throughout the process with the U.S. Bureau of Reclamation (the operator of the CVP), the California Department of Water Resources (the operator of the SWP), the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the California Department of Fish and Wildlife. Many stakeholders were not impressed by the results: water users claimed that the resulting instream supplies were too great, while advocates for leaving water instream claimed that consumptive uses were still too great. Yet the outcome represented the SWRCB's best effort to try to balance the protection of fish and wildlife, provide water to senior water rights holders, and meet the needs of urban California for water from the Bay-Delta Estuary.

The evolution of drought management

California's experience with the current drought suggests that the SWRCB is moving to a more sophisticated understanding of the intersection of the priority system, the public trust doctrine, and article X, section 2 of the California Constitution, which requires all uses of water in California (including the environment) to be "reasonable and beneficial." Where there is a well-established priority system (i.e., in the use of water for agriculture), the SWRCB has rightly relied on the priority system. In the urban or environmental sectors, though, where it is more

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difficult to apply the priority system simplistically, the SWRCB has opted to try to evaluate what "reasonable and beneficial" water uses might be. The SWRCB's mandatory urban water conservation tiers, which are based on gallons per/capita per/day, reflect the concept that there is a reasonable quantity of water per person for urban uses and that uses beyond that level can and should be curtailed significantly during droughts. The SWRCB's efforts to allocate a greater quantity of the vastly reduced drought supply in the Bay-Delta Estuary to urban and agricultural users rather than leave it instream, similarly, reflect the concept that water allocated to the environment must be curtailed during droughts to the amount deemed reasonable—not necessarily optimal—for fish and wildlife.

The SWRCB is attempting to carefully navigate its way in the management of California's complex water allocation system during this drought. As one might expect, the SWRCB has made its share of missteps. But, if the SWRCB is actually engaged in bringing together the priority system, the public trust doctrine, and the reasonable and beneficial use doctrine together as suggested above, this drought may turn out to be a very important milestone for California water law.

In Brief

Theodore L. Garrett

Theodore L. Garrett is a partner of the law firm Covington & Burling LLP in Washington, D.C. He is a past chair of the Section and is a contributing editor of Trends.

CERCLA

***United States v. NCR Co.*, No. 10-C-910, 2015 WL 6142993 (E.D. Wis. Oct. 19, 2015).**
A federal district court in the Fox River litigation held that defendant NCR failed to meet its burden to demonstrate both that the harm at issue was theoretically capable of divisibility and there was a reasonable basis for apportionment. In 2014, the Seventh Circuit had ruled that the risk of harm increases with polychlorinated biphenyl (PCB) concentrations and thus is continuous. On remand, the district court issued an order on May 15, 2015 finding that NCR had established a divisibility defense and apportioning costs. Upon reconsideration, the court found that the estimates of PCB contribution by Mr. John Wolf, cited by NCR, contradicted facts previously found by the court, and that two key sources of PCB contribution were missing from Mr. Wolf's data. NCR's expert had relied on Mr. Wolf's data. The court also rejected the NCR expert's "binary approach" to apportionment, under which ascribing large mass estimates to NCR did not substantially alter NCR's share, in contradiction to the Seventh Circuit's view in this case "that both the harm and the cleanup costs are relatively linear." On the other hand, the district court rejected the argument by other parties that since NCR caused the entirety of

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the harm by producing carbonless copy paper in the first place, the harm must not be divisible, stating that CERCLA's framework is based on "actual pollution" rather than a "product liability framework."

Further background is available at http://www.americanbar.org/groups/environment_energy_resources/committees/snrdl_regional_updates/20151202_third_time_is_a_strike_out.html.

***Florida Power Corp. v. FirstEnergy Corp*., 2015 WL 6743513 (6th Cir. Nov. 5, 2015).**
A divided Sixth Circuit panel held that two EPA Administrative Orders on Consent (AOCs) for sites in Florida did not resolve Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability and thus did not trigger CERCLA's statute of limitations. The AOC's in 1998 and 2003 required Florida Power to perform a remedial investigation and feasibility study for two coal gasification plants in Florida. In 2011, the United States filed a lawsuit seeking cost recovery, contribution, and a declaratory judgment of liability for both sites. The district court granted Florida Power's motion for judgment on the pleadings, concluding that the claims were barred because the AOCs triggered CERCLA's three-year statute of limitations. The Sixth Circuit reversed. The court held that the AOCs do not resolve plaintiff's liability because "resolution of liability is conditioned on plaintiff's [satisfactory] performance and does not take immediate effect," citing the court's decision in *ITT Industries v. BorgWarner*, 506 F.3d 452 (6th Cir. 2007). Unlike other cases cited by defendant, the AOC did not contain language reciting that it was an administrative settlement for purposes of CERCLA section 113(f)(3)B) resolving as of the effective date plaintiff's liability to the United States. The majority noted that this language was included in 2005 revisions to EPA's model AOC, which explains a departure from prior Sixth Circuit cases based on pre-2005 AOCs. The dissent disagreed, stating that a reservation of rights should not impact resolution of a potentially responsible party's liability when the AOC provides that the AOC resolves liability to EPA. The dissent also contended that the Sixth Circuit case law contains "a contradiction" on the relevance of key terms of AOCs for purposes of defining an administrative settlement that triggers the statute of limitations.

***The Peoples Gas Light and Coke Co. v. Beazer East, Inc*., 802 F.3d 876 (7th Cir. 2015).**
The Seventh Circuit Court of Appeals affirmed a district court decision dismissing CERCLA contribution claims by Peoples Gas Light, which spent $70 million to clean up a coke plant site in Illinois. The Seventh Circuit held that that indemnity language in a 1920 contract between Peoples and a predecessor of defendant Beazer East relieved Beazer of any liability resulting from its operation of the coke plant. The 1920 agreement stated that the obligations of Beazer's predecessor "shall be limited to operating or supervising the operation" of the plant and "without liability of any character . . . . except as expressly assumed under the terms of this contract." The court found this to be "precisely the kind of broad and general release language that has been construed by courts to encompass CERCLA liability."

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More information can be found at http://www.americanbar.org/groups/environment_energy_resources/committees/snrdl_regional_updates/20150925_case_summary.html.

Air quality

***Murray Energy Corp. v. Gina McCarthy*, 2015 WL 7017009 (N.D. W.Va. Nov. 12, 2015).**
***In Re: McCarthy*, No. 15-2390, 2015 WL 8286143 (4th Cir. Dec. 9, 2015).**
The Fourth Circuit issued a writ of mandamus on November 24, 2015, with a further corrected order on December 9, 2015, directing the district court to issue a protective order preventing Murray Energy from deposing EPA Administrator McCarthy in a lawsuit claiming that EPA has engaged in a "war on coal." A federal district court had previously denied a motion by the United States for a protective order precluding the deposition in the suit by Murray Energy seeking relief for EPA's failure to evaluate potential loss of employment resulting from implementation of section 321 of the Clean Air Act. In denying the motion, the district court noted that the Administrator has personally been involved in the implementation of section 321 and statements the Administrator made to Congress indicate that EPA has not made any evaluations of job losses under section 321, contrary to the position of EPA in this case. The Fourth Circuit reversed. EPA produced documents showing that the agency had made job-loss evaluations, but the Fourth Circuit found no inconsistency with congressional statements, and thus no "extraordinary circumstances," because the evaluations were not prepared for the purpose of complying with the law.

***Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015).**
The Clean Air Act does not preempt common law claims alleging negligence, nuisance, and trespass against a whiskey distiller, the Sixth Circuit held. Nearby property owners complained that ethanol vapor from the distillation facility creates an unreasonable annoyance and interference with the use and enjoyment of their property. The facility had a federally-enforceable Clean Air Act permit that did not set permit limits for fugitive emissions of ethanol, but the distiller was ordered by the Louisville air pollution district to abate the emissions contributing to the nuisance. The property owners brought a class action in federal district court seeking compensatory damages and an injunction. The district court rejected the distiller's argument, in its motion to dismiss, that plaintiffs' claims were preempted by the Clean Air Act, and the Sixth Circuit affirmed. The Sixth Circuit's opinion concludes that the states' rights savings clause, 42 U.S.C. § 7416, preserves to states the right to impose "any requirement" respecting air pollution control, which "clearly encompasses common law standards." The opinion cites Supreme Court decisions, including *International Paper Co. v. Ouelette*, 479 U.S. 481, 497–98 (1987), holding that the Clean Water Act, which contains provisions modeled on the Clean Air Act, preserves state common law claims, although it preempts state common law claims as applied to out-of-state sources.

***Ahmad Mourad v. Marathon Petroleum Co. LP*, No. 14–cv–14217, 2015 WL 5439738 (E.D.**

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Mich. Sept. 15, 2015), ***appeal pending*****, No. 15-2213 (6th Cir.).**
A federal district court dismissed a lawsuit alleging claims for tortious interference with business relationships and nuisance. Plaintiffs alleged that defendant Marathon Petroleum acquired 94 percent of the residential properties in a subdivision in order to expand its refinery operations, resulting in financial loss to plaintiffs that rely on the residents for revenue. The court agreed with defendant that plaintiffs' complaint must be dismissed because it fails to allege any specific, affirmative acts by defendant that would "support the conclusion that Defendant acted with malice or for the purpose of interfering with Plaintiffs' business." The opinion states that there is "nothing inherently wrongful or improper" about defendant's desire to expand the refinery "and to purchase surrounding property to facilitate this expansion." The court also dismissed plaintiffs' nuisance claim, which alleged that the refinery's operations increased ambient air pollution to the neighborhood. The court concluded that plaintiffs failed to "explain how the emissions interfered with their use and enjoyment of their properties, let alone how the interference was unreasonable" in light of the utility of the refinery.

Water quality

United States v. STABL, Inc.**, 800 F.3d 476 (8th Cir. 2015).**
A district court's penalty of $2.2 million for violations of the Clean Water Act was upheld on appeal to the Eighth Circuit. The district court granted the government's motion for summary judgment as to liability, which relied on defendant's discharge monitoring reports (DMRs) showing that discharges from defendant's rendering plant consistently exceeded its National Pollutant Discharge Elimination System permit limits. The court of appeals rejected defendant's argument that the DMRs are hearsay and lack foundation, holding that they are non-hearsay adoptive admissions. The court of appeals also rejected defendant's argument that the data upon which the DMRs were based were so unreliable as to create a genuine issue of fact. A defendant who wishes to assert laboratory error has "a heavy burden," otherwise permit holders would have "an incentive to employ lax laboratory techniques." The opinion states that the intent of Congress would be subverted if a permittee could impeach its own DMRs "without specific evidence demonstrating that the laboratory error likely resulted in overreporting of pollutant levels that were in fact within permit limitations."

Energy

Sierra Club v. U.S. Army Corps of Engineers**, 803 F.3d 31 (D.C. Cir. 2015).**
The D.C. Circuit affirmed the dismissal of a lawsuit by the Sierra Club challenging the approval by several agencies of a 593-mile crude oil pipeline built by Enbridge Inc. across Illinois, Missouri, Kansas, and Oklahoma. Almost all of the land over which it passes is privately owned, and the court of appeals held that although the agencies were required to conduct National Environmental Policy Act (NEPA) analyses of the various federal approvals, the agencies were not obligated also to analyze the impact of the construction and operation of the entire pipeline.

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The court rejected the Sierra Club's reliance on the "connected actions" doctrine, stating that the doctrine does not draw into NEPA review the balance of the project on private land, which is not otherwise subject to agency action. The brief concurring opinion stated that "Little more ink needs to be spilled to conclude that—given federal control over less than 20 miles of the 600-mile pipeline—NEPA cannot compel federal review of the entire, essentially private, pipeline.

Views from the Chair

Pamela E. Barker

Pamela E. Barker is a member of the firm Lewis Rice LLC. She is chair of the ABA Section of Environment, Energy, and Resources.

At the midpoint of the ABA year, I am proud to report on our outreach efforts—both in terms of increasing member participation in Section activities and in establishing deeper and new collaborations with other organizations.

Our 23rd Fall Conference in Chicago was one of our most successful in years, especially in terms of member involvement. Of note, of the 377 registrants, almost one-third were first-time attendees and 95 were young lawyers! In addition to a wide range of CLE sessions with distinguished speakers and a series of social and networking events, the conference offered committee roundtables and committee chair and vice chair sessions to encourage member participation.

This year's membership outreach programming includes "Meet ABA SEER" events being held throughout the country. Eight have taken place to date. These events introduce young lawyers and law students to the Section and the areas of environmental, energy, and resources law. A typical event features a panel discussion or speakers and networking opportunities.

Some very exciting collaborations are underway with groups outside the ABA. Beginning with the 24th Fall Conference, we will be cooperating with Dividing the Waters, a project of the National Judicial College that serves as a resource for judges who resolve water conflicts. There will be sessions at our Fall Conference that touch on water issues and we are inviting judges to attend.

Our Outreach Committee, chaired by Michelle Diffenderfer, and our State and Local Bar Coordination and Engagement Committee, chaired by Ignacia Moreno, have established many new cooperative ventures. This year, we will have cosponsored programs with the State Bar of Texas, the D.C. Bar, and the New York State Bar Association. An additional ten bar associations

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have expressed interest in collaborating with us. We have also scheduled cosponsored programs with a number of other ABA sections, as well as with the American Council on Renewable Energy, Pace University Law School, the University of Montana School of Law, and the Rocky Mountain Mineral Law Foundation.

Finally, we are collaborating on international projects and by the time you read this we will have cosponsored a special institute on Human Rights Law and the Extractive Industries in Panama City, Panama. Our cosponsors for this program are the Rocky Mountain Mineral Law Foundation, the ABA's Section of International Law, the International Bar Association, and the Mexican Bar Association.

As you can see, we have been busy with our outreach efforts but this is only a start—we want to do much more. If you would like to become more involved in Section activities, just let me know.

And if you are connected with a group with interests in our areas of law, see if they would be interested in working with the Section on a program or event. If you are active in your state or local bar association, ask your section or committee of environmental, energy, or natural resources law if they would like to team up with the Section. If the answer is yes, let me know and we will make every effort to make it happen. Through collaboration with other organizations in our subject areas, we will make each other stronger and better.

People on the Move

James R. Arnold

Jim Arnold is the principal in The Arnold Law Practice in San Francisco and is a contributing editor of Trends. Information about Section members' moves and activities can be sent to Jim's attention in care of ellen.rothstein@americanbar.org.

Adam Baas has been elected the 2016 chair of the Environmental Law Section of the Bar Association of San Francisco. Baas is with Edgcomb Law Group, LLP, in San Francisco. Baas concentrates his practice in the areas of environmental litigation, regulatory compliance, land use, and the redevelopment of environmentally impacted properties. He has experience in a wide range of environmental matters and has been lead counsel in representing corporate clients in complex environmental litigation matters, including cost recovery actions, natural resource damage claims, toxic torts, storm water flows, and cases involving leaking underground storage tanks. Baas also has experience in advising clients on regulatory compliance with state and federal environmental laws and regulations.

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Ladd Cahoon has been promoted to partner at Edgcomb Law Group, LLP, in the firm's San Francisco office. Cahoon represents clients in a range of matters involving environmental due diligence and impaired property transactions, brownfields property redevelopment, environmental insurance procurement, administrative agency proceedings, and hazardous waste site remediation. He also represents and advises clients in connection with USTs, storm water, wetlands, land use, CEQA, and mining issues. Cahoon serves on the Executive Committee of the Environmental Law Section of the Bar Association of San Francisco.

Gretchen Frizzell has joined the U.S. Environmental Protection Agency's Region 4 Office of Regional Counsel as an associate regional counsel in Atlanta, Georgia. Frizzell's work focuses on issues related to the Clean Air Act. She was formerly an associate at Balch & Bingham in Birmingham, Alabama. She is on the *Trends* Editorial Board and is a member of the Section's 2015–2016 Leadership Development Program.

Larry Liebesman has joined the Annapolis, Maryland firm of Roy L. Mason P.A. as counsel. Liebesman will continue his environmental law practice with an emphasis on Clean Water Act, ESA, and NEPA issues. He was previously with Holland & Knight in Washington, D.C. Liebesman is also a senior policy advisor at the Washington, D.C. environmental government relations firm of Dawson and Associates, which is headed by Bob Dawson, former Assistant Secretary of the Army for Civil Works and Associate Director of the Office of Management and Budget for Natural Resources. He is a former chair of the Section's Water Quality and Wetlands Committee.

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