Highlights
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Highlights for November, 2025 ***Federal Environmental Regulation of Real Estate***

D.C. Circuit affirmed downlisting American burying beetle from endangered to threatened status. In Center for Biological Diversity v. United States Fish and Wildlife Service, --- F.4th ----, 2025 WL 2181489 (D.C. Cir. 2025), an environmental organization brought an Endangered Species Act (ESA) action against the Fish and Wildlife Service pursuant to the Administrative Procedure Act (APA). The environmental organization sought vacatur of the Service's rules downlisting the American burying beetle from endangered to threatened status and establishing protections for the conservation of the beetle based on the downlisting. The United States District Court for the District of Columbia denied the environmental organization's motion for summary judgment and granted the Service's motion for summary judgment. The environmental organization appealed and the United States Court of Appeals for the District of Columbia Circuit affirmed, holding that the organization had associational standing for the challenge to the downlisting rule, but lacked associational standing for the challenge to the protective-measures rule. The downlisting rule did not run afoul of the ESA's definitions of "endangered" and "threatened." The Service's determination that the beetle was only threatened was grounded in the record and reasonably explained. The downlisting was not arbitrary and capricious due to the Service's alleged failure to define "near term" as part of analysis. Finally, the Service adequately explained its findings, evidence, and predictions about the resiliency of the beetle.

Alaska Supreme Court held hunting permit allocation regulation constitutional. In Cassell v. State, 567 P.3d 1273 (Alaska 2025), an Alaskan hunter brought an action against the Board of Game, challenging the regulation allocating permits to hunt Kodiak brown bears, which allocated at least 60% of permits to Alaska residents and no more than 40% to nonresidents. The hunter asserted that the permit allocation violated the Alaska Constitution's principle of equal access to fish and game and the constitutional duty to manage Alaska's resources for the maximum benefit of Alaskans. The hunter also sought declaratory and injunctive relief. On cross-motions for summary judgment, the

District Court granted the State's motion and the hunter appealed. The Alaska Supreme Court affirmed, holding that the regulation did not grant nonresidents a special privilege in violation of the equal access clauses. Even if the regulation could be viewed as an allocation of game resources to professional hunting guides, such an allocation would not contravene the equal access clauses. Finally, the regulation did not violate the Board's constitutional duty to manage resources for the maximum benefit of Alaskans.

California Court of Appeal determined that the state water quality control policy was inconsistent with the Clean Water Act. In Camarillo Sanitary District v. State Water Resources Control Board, --- Cal.Rptr.3d ----, 2025 WL 2218155 (California 2025), wastewater dischargers petitioned for a writ of mandate challenging the State Water Resources Control Board's adoption of a state policy for water quality control requiring an analysis of the whole effluent toxicity tests using unadopted statistical method developed by Environmental Protection Agency (EPA) as guidance for testing for whole effluent toxicity, known as the test of significant toxicity. They alleged violations of the Clean Water Act (CWA), state water laws, the state Administrative Procedure Act (APA), and the California Environmental Quality Act (CEQA). The Superior Court denied the writ request and the dischargers appealed. The Court of Appeal held that the EPA's method could not be used to comply with CWA permitting requirements. Judicial deference was not warranted for any EPA or Board determination that the EPA's method satisfied the CWA. The state water quality control policy was inconsistent with the CWA. The Board properly adopted the policy under the state water laws, and complied with state APA standards in adopting the policy. Moreover, the Board could use a substitute environmental document under the CEQA-certified regulatory program, and it adequately considered potentially significant impacts under the CEQA.

California Court of Appeal held that Wiyot Tribe was necessary party in action based on petition for writ of mandate and complaint for declaratory and injunctive relief. In Citizens for a Better Eureka v. City of Eureka, 111 Cal. App. 5th 1114, 333 Cal. Rptr. 3d 218 (California 2025), a community advocacy group filed a petition for writ of mandate and complaint for declaratory and injunctive relief. The group challenged an action by the city and the city council that authorized the reduction or removal of a city-owned parking lot for redevelopment into affordable housing based on a California Environmental Quality Act (CEQA) exemption. The project developer, Wiyot

Tribe, which was not named in the petition, moved to dismiss on the basis that it was a necessary and indispensable party to the proceeding. The Superior Court granted the Tribe's motion and the group appealed. The Court of Appeal affirmed, holding that the redevelopment of the parking lot into affordable housing, rather than the city's approval of removing parking spaces, was a "project" that the group sought to challenge. The group had an obligation to add the Tribe as a necessary party. The statute of limitations prevented the group from joining the Tribe as a necessary party. On balance, equity was served by dismissing the group's petition for failure to add the Tribe as a necessary party. Affirmed.

Connecticut Appellate Court found that owner of gas stations did not have clear legal right to approved application payment under category priorities and reverse auction system. In Aldin Associates Limited Partnership v. State, 230 Conn. App. 223, 330 A.3d 613 (Connecticut 2025), the owner of gas stations brought an action for damages and sought a writ of mandamus directing the State's Commissioner of Energy and Environmental Protection to adjudicate the owner's unapproved mid-size station remediation reimbursement applications submitted for later-cancelled underground storage tank petroleum clean-up program. He also sought the writ of mandamus to direct the Commissioner to request that the State Comptroller pay the owner's approved applications. The Superior Court granted the defendants' motion to dismiss for lack of subject matter jurisdiction. The owner appealed and the Appellate Court reversed in part and remanded as to the writ request. After the Commissioner's approval of the unapproved applications, the owner filed an amended complaint seeking a writ of mandamus directing payment of the approved applications. After trial to the court, the Superior Court denied the writ and the owner appealed. The Appellate Court affirmed, holding that the trial court did not exceed the scope of remand by requiring the owner to establish that the conditions for mandatory duty to pay the approved applications were met. Claims for higher-priority payment categories than mid-size stations were pending, precluding the reallocation of funds to mid-size category. The owner did not have clear legal right to payment under the category priorities and reverse auction system.

Hawaii Intermediate Court of Appeals held that objectors entitled to contested case hearing on the BLNR's approval of applicant's archeological permits. In Mālama Kakanilua v. Board of Land and Natural Resources, 155 Hawai'i 512 (Hawaii 2025), objectors appealed the Board of Land and Natural Re-

sources' (BLNR) approval of archeological permits to the applicant. The Circuit Court and the Environmental Court affirmed. The objectors appealed. The Intermediate Court of Appeals vacated and remanded, holding that the court's prior order requiring a contested case hearing on the applicant's prior permit application was not the law of the case or res judicata. The prior court did not collaterally estop the BLNR from deciding the contested case on the applicant's subsequent permit application. The BLNR breached its affirmative duty to preserve and protect traditional and customary native Hawaiian rights to protect iwi kupuna, or native Hawaiian burials. The objectors were entitled to a contested case hearing on the BLNR's approval of the applicant's archeological permits.

Maine Supreme Judicial Court approved Board of Environmental Protection's reliance on previously issued discharge permit. In Eastern Maine Conservation Initiative v. Board of Environmental Protection, 334 A.3d 706 (Maine 2025), environmental organizations brought an action challenging the Board of Environmental Protection's affirmance of the Natural Resources Protection Act (NRPA) permits issued by the Department of Environmental Protection authorizing an aquaculture company to construct a land-based fish farm and install intake and outfall pipes in a coastal bay. The Superior Court affirmed, and the organizations appealed. The Supreme Judicial Court affirmed, and held that the NRPA did not require the Board or the Department to analyze the specific effects of the effluent discharge into the bay when granting the NRPA permit to install intake and outfall pipes. Also, the Board reasonably relied on the previously issued discharge permit when determining whether the installation of pipes would not unreasonably harm any significant wildlife habitat or other aquatic life.

Missouri Court of Appeals ruled that consumer's failure to warn claims not preempted. In Durnell v. Monsanto Company, 707 S.W.3d 828 (Missouri 2025), a consumer brought a strict liability defective design, strict liability failure to warn, and negligence against manufacturer of herbicide, alleging exposure to its primary ingredient, glyphosate, caused him to develop non-Hodgkin's lymphoma. After the jury awarded the consumer $1.25 million in compensatory damages on the failure to warn claim, the Circuit Court entered judgment and denied the manufacturer's motion for judgment notwithstanding the verdict or new trial. The manufacturer appealed and the Court of Appeals affirmed. It was held that the express preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not apply to preempt the consumer's strict liability failure to

warn claim. Moreover, the manufacturer failed to establish that conflict preemption impliedly preempted the consumer's failure to warn claim.

Montana Supreme Court determined that trial court failed to make specific findings required by MEPA for equitable relief. In Montana Environmental Information Center v. Montana Department of Environmental Quality, 420 Mont. 150, 561 P.3d 1033 (Montana 2025), an objector, which was an environmental advocacy group, filed a complaint challenging the air-quality permit issued for a proposed generating station. The District Court entered an order granting summary judgment to the Department of Environmental Quality (DEQ) and applicant as to certain issues, granting summary judgment to objector on other issues, vacating the permit, and remanding the environmental assessment (EA) to DEQ for further analysis. On the applicant's motion, the court then stayed the vacatur pending appeal. The applicant and the DEQ appealed, and the advocacy organization cross-appealed. The Montana Supreme Court held that the EA took a "hard look" at the noise impacts, as required under the Montana Environmental Policy Act (MEPA). The EA failed to take the requisite "hard look" at the facility's lighting impacts. Post-EA amendments to the MEPA to prohibit an environmental review from including an evaluation of greenhouse-gas emissions within the state borders or beyond the state borders did not apply retroactively. Under the then-applicable version of the MEPA, the DEQ's decision not to analyze greenhouse-gas emissions as part of the EA was arbitrary and capricious. The completion of the building of the generating station did not render moot the issue of whether the DEQ acted arbitrarily and capriciously when, under the then-applicable version of the MEPA, it decided not to analyze greenhouse-gas emissions as part of the EA. However, because the trial court made none of the specific findings that the MEPA required for equitable relief, vacatur of the permit would be reversed.

Nebraska Supreme Court found that violation of farmers' due process rights at prior NRD hearing did not taint subsequent NRD hearings on new complaint. In Hauxwell v. Middle Republican Natural Resources District, 319 Neb. 1, 21 N.W.3d 34 (Nebraska 2025), farmers petitioned for review of the natural resources district's (NRD) order imposing penalties, including restrictions on use of ground water for irrigation, due to the farmers' violation of the NRD's rules and regulations and the Nebraska Ground Water Management and Protection Act (NGWMPA). The District Court reversed and vacated, and the NRD appealed. The Supreme Court held that the NRD's failure

to file findings and conclusions with the district court following a prior remand did not deprive the court of jurisdiction. The NRD's findings and conclusions as to violations by the farmers, with the penalty to be determined later, did not constitute a "final, appealable order." The farmers lacked the requisite aggrievement for an NGWMPA appeal of the NRD's findings and conclusions as to the violations. The farmers' corporation was the farmers' alter ego that did not need to file a petition for review. Violation of the farmers' due process rights at the prior NRD hearing did not taint subsequent NRD hearings on a new complaint.

New York Appellate Division held that Board failed to take hard look at potential adverse impacts. In Clean Air Action Network of Glens Falls, Inc. v. Town of Moreau Planning Board, 235 A.D.3d 1124, 228 N.Y.S.3d 334 (New York 2025), the petitioner commenced an article 78 proceeding to annul a negative declaration under the State Environmental Quality Review Act (SEQRA) and site plan approval issued by the town planning board to the applicant for construction of proposed biosolids remediation and fertilizer processing facility. The Supreme Court dismissed the petition. The petitioner appealed and the Appellate Division reversed and remitted, holding that the Board failed to take a hard look at the potential adverse impacts on the air quality of the proposed facility, as required by the SEQRA. Furthermore, the Board's unexplained deference to the Department of Environmental Conservation's (DEC) permitting standards and periodic monitoring did not satisfy its SEQRA obligations.

Ohio Court of Appeals concluded that trial court did not abuse its discretion in finding that council failed to comply with procedural requirements of ordinance. In Minerva Dairy, Inc. v. Minerva, --- N.E.3d ----, 2025 WL 842473 (Ohio 2025), the dairy plant sought judicial review of an order by the village council to revoke the plant's industrial waste permit and assess fines based on alleged violations of the ordinance governing discharge from plant. The Court of Common Pleas granted the plant's motion for a de novo hearing, and subsequently vacated the order. The Court of Appeals affirmed and held that the trial court did not abuse its discretion in finding that the council failed to comply with the procedural requirements of the ordinance, thus rendering its order arbitrary and capricious. The trial court afforded the council's order the required presumption of validity on administrative review. The trial court did not abuse its discretion in finding that there was not a preponderance of reliable, probative, and substantial evidence to support the council's order. The plant had a protectable property interest in its industrial waste permit and thus, it had constitutional rights

to due process beyond the procedural rights afforded to it by the ordinance. The trial court did not abuse its discretion in granting the plant's motion for a de novo hearing on the administrative review of the council's order. The village invited any error by the trial court in vacating the order rather than holding a de novo hearing to correct due process deficiencies. The trial court would not remand the matter to the council to cure procedural deficiencies and to issue a new show cause order.

Pennsylvania Supreme Court held that EHB's decision upon review of DEP's approval was reviewable in federal court under NGA. In Cole v. Pennsylvania Department of Environmental Protection, 329 A.3d 1228 (Pennsylvania 2025), challengers to a proposed natural gas compressor station sought judicial review of the decisions of the Environmental Hearing Board (EHB) which dismissed their appeals of the Department of Environmental Protection's (DEP) approvals of the station under the Clean Air Act (CAA) and Pennsylvania's Air Pollution Control Act (APCA). The Commonwealth Court reversed and remanded. Appeal was allowed and the Supreme Court affirmed, holding that the Department of Environmental Protection's (DEP) approval of the natural gas compressor station did not constitute a final agency action that would vest the United States Courts of Appeals with original and exclusive jurisdiction to review the order under the Natural Gas Act (NGA). Review of the DEP's order by the Environmental Hearing Board (EHB) did not constitute a "civil action" that was precluded by the NGA's jurisdictional limit. The EHB's decision upon review of the DEP's approval was reviewable in federal court under the NGA.

Texas Court of Appeals lacked jurisdiction to review whether TCEQ erred in issuing permit. In Texas Commission on Environmental Quality v. San Antonio Bay Estuarine Waterkeeper, 714 S.W.3d 270 (Texas 2025), environmental advocacy groups and their members filed suit for judicial review of a decision by the Texas Commission on Environmental Quality (TCEQ) to deny their requests for a contested case hearing regarding the TCEQ's approval of crude condensate terminal operator's application for minor source air permit to expand terminal. The District Court reversed most of the TCEQ's decision and remanded the case to the agency to hold a contested case hearing. The operator and the TCEQ appealed. The Court of Appeals held that substantial evidence supported the TCEQ's decision that group members were not affected persons entitled to a contested case hearing on the basis of health and safety concerns. Substantial evidence supported the decision that group members were not affected persons on the basis of use and enjoyment of

property. Substantial evidence supported the decision that group members who had asserted recreational and aesthetic claims were not affected persons on basis of use of natural resource. Substantial evidence supported decision that group members who had alleged potential impact on their livelihoods were not affected persons on basis of use of economic interests. Evidence did not establish that affected person status had been denied based on arbitrary one-mile standard of distance from site. The TCEQ's application of state law "personal justiciable interest standard" was not arbitrary and capricious and was not an abuse of discretion. The Court of Appeals lacked jurisdiction to review whether the TCEQ erred in issuing permit.

Texas Court of Appeals determined that county did not comply with testing requirements. In Hyde v. Harrison County, 710 S.W.3d 403 (Texas 2025), the Texas Commission on Environmental Quality (TCEQ) initiated an administrative enforcement action against the county, alleging that it had failed to comply with statutory requirement that it conduct annual line-leak detector test and piping-tightness test for pressurized piping associated with underground storage tanks that county owned and operated. After an administrative hearing, the TCEQ issued its decision assessing an administrative penalty of $5,626. On the county's petition for judicial review, the District Court vacated the TCEQ's decision on grounds of governmental immunity. The TCEQ appealed, and the Court of Appeals reversed. On remand, the District Court reversed the TCEQ's order without specifying grounds. The TCEQ appealed and the Court of Appeals reversed and remanded. It held that substantial evidence supported the TCEQ's findings that the county had not conducted the required tests in the preceding 12 months. Also, the county's testing in the consecutive calendar years did not comply with the requirement that it test at least once per year.